Supreme Court of the United States

October Term, 1968

In the Matter of:

ZENITH RADIO CORPORATION a corporation Petitioner vs HAZELTINE RESEARCH, INC., a corporation, and HAZELTINE CORPORATION, a corporation, Respondents	**Docket No.** 49

Place Washington, D. C.

Date January 22, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

ZENITH RADIO CORPORATION, a corporation, Petitioner;	:	
vs.	:	No. 49
HAZELTINE RESEARCH, INC., a corporation, and HAZELTINE CORPORATION, a corporation, Respondents.	:	

Washington, D. C.
January 22, 1969

The above-entitled matter came on for argument at 11:00 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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APPEARANCES (Continued):

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: Case No. 49, Zenith Radio Corporation, petitioner, versus Hazeltine Research, Inc., et al.

Mr. McConnell.

ARGUMENT OF THOMAS C. McCONNELL, ESQ.

ON BEHALF OF PETITIONER

MR. McCONNELL: Mr. Chief Justice and Members of the Court:

I represent the Zenith Radio Corporation, which is the petitioner in this case.

Respondents are the Hazeltine Research, Inc., a corporation, which is a wholly owned subsidiary of the Hazeltine Corporation, and it was stipulated by the parties in this case in the pretrial stipulation that for all purposes in this lawsuit, and all purposes in the instant case, that the two corporations should be considered one and the same.

The instant suit was brought for the alleged infringement of a patent, a monochrome patent, alleged to have been infringed by the Zenith Corporation and both the District Court and the Court below, the Court of Appeals, held that that patent was invalid and not infringed.

Q Mr. McConnell, I am sorry, but there is an issue that is submitted to us, isn't there, as to whether both Hazeltine corporations are bound here or whether it is just the subsidiary and not the parent?

A That is right.

Q Is there a difference there?

A I am going to reach that in the course of my argument.

Q I didn't understand why you made your opening statement, because there is that issue.

A There is that issue, Your Honor. I simply made the statement as part of the facts in the case, that there was that pretrial stipulation and I am treating for this portion of the argument the two corporations as the same.

In that suit, Zenith answered by setting out that that patent and other patents of Hazeltine had been misused by putting them in foreign patent pools, which foreign patent pools had refused to license imports and had restricted commerce between the United States and foreign countries, namely, Canada, England, and Australia, contrary to the provisions of the antitrust laws, the Federal antitrust laws, that any restriction or any combination, conspiracy or arrangement between competitors which restrain commerce not only between the States of the United States, but between the country of the United States and foreign countries violated section 4 of the Clayton Act, sections 1 and 2 of the Sherman Act, and under those two sections, also section 16 of the Clayton Act.

Alleging the same facts as we had set up in the misuse answer, we filed a counterclaim and in that counterclaim asked

for treble damages and asked for an injunction against the activities of these foreign patent pools.

After a trial and findings of fact in detail made by the District Court, a judgment was entered on April 5, 1965 pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The damages which had been occasioned by the plaintiff, or by the counterclaimant in the amount of $19,042,173 for the loss of sales and profits in the Canadian market in the sale of home receiving sets in television and radio.

At the time the findings came down, Hazeltine obtained new counsel and came in and made various motions which are discussed in the briefs, the purport of which was to reopen the case on evidence which was available at the time of the trial and for further proceedings on the claim that there were embargoes imposed by the Government as opposed to private patent pools and conspiracies in England and Australia.

For that limited purpose, the case was reopened, and after further hearing, on December 13, 1965 the trial court awarded petitioner treble damages in the amount of $15,919,458 for loss of sales and profits in England and Australia during the damage period.

In the first judgment, an injunction was entered against the continuance by the respondent companies and the pools for putting their patents in these pools or in any way furthering the activities of these pools -- and this is important --

no supersedeas was filed to that judgment, even though there was an appeal, and since that first judgment was entered on April 5, 1965, Zenith has been operating under the protection of the injunction of the United States District Court in their activities in Canada.

On appeal, or in entering the last judgment after the trial court had heard all the evidence that was produced on the original trial, plus all the different matters which were urged and argued in a three- or four-day hearing on the motions to reopen the case, and after hearing everything that was submitted in the case, trial court made this comment, and I quote:

> "There could be no question in my mind that Zenith suffered damages during the damage period by virtue of the pools which I have found, and reiterate, existed at the time of the damage period."

The Court of Appeals reversed both judgments on the ground that there is no substantial evidence in this record that Zenith was injured by the activities of these pools in its business or property, and held, as a matter of law, that on this record Zenith was not even threatened with injury by the activities of these pools.

Now, the proof of injury to Zenith's business in Canada was in large part documentary and I am going to go into it in some detail in the course of this argument, and was not denied by any single witness or document in this case.

So it is my submission to this Court that what is presented is whether, on admitted facts, which we claim and the District Court found was unequivocal in its proof of actual, substantial damage to the Zenith Corporation, whether on those admitted facts, as a matter of law, the Federal antitrust laws, namely, 1 and 2 of the Sherman Act, and 4 and 16 of the Clayton Act, do not reach and have no sanction which will stop that conduct.

Now, before going to the individual markets, I want to, if the Court will bear with me, take just a few minutes to give some of the background of this conspiracy.

In this Court in 1962, and in subsequent cases, has held, namely, in the Continental Ore case, that conspiracies which are designed to control a complete market and which are put together by competitors to exclude competition permanently, should not be juged by taking particular parts of the proofs and examining them and passing on to something else, but that the proofs should be looked at as a whole, and in the Continental Ore case that it was highly relevant to go back and look at the proofs at the inception of the conspiracy and the proofs out of which the conspiracy was created to show its intent, its purpose, its effect, and its result.

Now, I have been in this litigation with these pools on behalf of Zenith since 1953 and I am not going to refer to any of my own personal knowledge. Everything I am going to

tell this Court with reference to the beginnings is in this record. May I say at the threshold of this case, the documentary evidence in this case came in by pretrial stipulation without any objection, the documents as to their verity all admitted, no objection to them whatever, no contravening evidence of any kind, and some of it, and most of it, and the part I am now going to talk about, put in by my opponents in the trial court.

From 1919 until 1935, through some 50 cross-licensing agreements, the leading electronic companies of the world divided up the markets of the world. I am leaving out the Iron Curtain countries. I am talking now about the free world countries where competition is possible.

Among those companies was the telephone company, the Westinghouse Company, R.C.A., General Electric Company, English Electric Company, the Telefunken Company, The General Electric Company of Germany, GTSF, the French company, Standard Cables and Wireless, the Austallian company, and the Phillips Company of Holland, which is the largest electronics company and probably the largest aggregation of capital and business in the entire world.

Now, all of these companies, shoulder to shoulder and by cross-licensing agreements divided the free world up into markets and part of that was the North American Continent, which was assigned to the so-called "radio group." The radio group was composed of the telephone company -- that's American

Telephone and Telegraph Company -- General Electric, R.C.A., the Westinghouse Company, and the Phillips Company.

Zenith came into conflict and confrontation with this worldwide conspiracy when in 1933 R.C.A., with 10,000 patents in a pool which was composed of patents contributed by all the companies that I have mentioned, some 10,000 of them, asserted them against Zenith and demanded that we take a license.

We took the position, and said so in our pleadings which are in this case, that the whole industry in the United States had paid tribute to this pool for years, $1,300,000 or so had been paid in tribute to the pool, that the pools were illegal, and we filed a suit in the United States District Court down in Delaware asking for a determination that the pools were illegal, a case before Judge Lahey, now dead.

Immediately the pool countered with 63 patent suits against us in that proceeding. Parenthetically, we got to trial in one of them, it took us 18 months to try it. If we tried them all, there wouldn't be a lawyer left alive who had ever had any connection with the case.

They countered out of that suit by suing Zenith in the United States District Court in Chicago on two patents, the telephone company, R.C.A. and General Electric, and in that suit, Zenith counterclaimed and set up a suit for treble damages claiming that they had been excluded from the market in Canada and couldn't sell their goods there because of the pool which

was part of the overall conspiracy, the pool known as Canadian Radio Patents, Limited.

That suit got down to trial. It was to go to trial on September 9, 1957. The Sunday before it went to trial the parties settled the case by paying Zenith $10 million, giving Zenith patent rights in then existing black and white monochrome patents in all markets, and the suit down in Delaware was dismissed upon their, in effect, dedicating the patents, 10,000 of them, to the trade.

I brought that in for a purpose, because Zenith is represented here as in some way taking advantage of the antitrust laws, when I submit on the entire record they have done very constructive service under the antitrust laws, and they freed the entire American market, so that from that time on -- and the relevance of this is on the damage proof -- we had a free market in the United States.

With a free market, Zenith came from a little, small company, hardly known, to the leading company in television, and I think the second or third producer in the United States in radio.

Q Is there any issue as to the effect of the release that Zenith executed in this litigation that was settled that has a bearing on the present problem, or are you agreed that the release operated to benefit Hazeltine?

Let me put it to you this way: Hazeltine was not a

party to the litigation that you have just described which was settled, was it?

A No.

Q But various companies that were members of the Canadian Radio Patent Pool were parties; is that right?

A Well, maybe I haven't been frank with Your Honor entirely. I believe that Hazeltine was named, if not in the pleadings, certainly in the proofs, as a co-conspirator.

Q All right. But however it may be, as part of the settlement of that litigation, as I understand the papers before us, Zenith executed a release, and that release, in substance, exonerated or relieved the defendants with whom Zenith settled of liability for any past acts or any further liability to Zenith for past acts; is that right?

A No. There is no such evidence in this record. There is no release in this record. There are some settlement papers in this record, put in by my opponents -- not by me.

Q One important issue here, if it is an issue, is whether you do or do not, whether there is or is not agreement that that settlement operated to benefit Hazeltine as a joint tortfeasor, or whether it did not. Are you agreed on that, or is that an issue in dispute before this Court? That is my question.

A There is an issue in dispute on that. First, as to the facts, I don't agree any release ever released Hazeltine.

I definitely do not.

Secondly, no release was ever pleaded in this case and no release was ever mentioned in this case until one year after the case had been tried, at which time they came in with an offer of proof of a release.

Now, we cite cases in our brief that under Rules 8, I believe, and 15, affirmative defenese have to be pleaded in a case so the party opposed can meet them, and no such plea was made. The case wasn't tried on any release theory.

Q You have done a very elaborate job here, and I don't want to interfere with you. This is an elaborate case, but all I want to know is whether we do or do not have to worry about the effect of the release. From what you tell me, I gather that we do.

A You do.

Q Your adversary says that that release does release Hazeltine, and you say that it does not.

A Exactly. And I say further than that, not only does it not release Hazeltine, but it isn't even an issue in the case, except brought in later by offers of proof.

Under the rules, Your Honor, under the Federal rules, unless an affirmative defense is pleaded during the trial, so you can meet it.

Q During the trial, or during the time?

A During the trial, or so close to it that the

parties are there trying their lawsuit. It is waived, and the Court of Appeals in the Seventh Circuit has handed down three cases that say that even a court can't relieve them of a waiver. There is nothing that can be done. They have waived it.

The reason for it is that we try a lawsuit on the pleadings and they go in there -- they put this settlement in to show that the two cases were different. That is what they said. They told the court, "Why, it's a different case." That is the funniest plea of release I ever heard.

There was never any plea of release and there was never any evidence offered on it and no court ever opened it up, either in the District Court or the court below to permit such a defense to be made.

I say the issue is not before this Court.

Q Are you saying this on the basis that the Court might disagree with you?

A Oh, if this Court disagrees with me, what I say has absolutely no bearing on the subject. There is no question about that. This is the last resort.

Q I thought the rules were exceedingly liberal.

A Not in this respect, and for a reason. I mean, you can't try cases on offers of proof after the case has been submitted and you are in the upper courts with no chance to show what the release was or where it was admitted or what the objections to it are, and what it included, and all the factual

matters that were involved.

Q Are you saying now that this offer was only made after the case was appealed and in the Court of Appeals?

A I am saying that this offer was made after findings of fact had been made and the case had been tried.

Q Was it still in the trial court?

A Yes, it was still in the trial court, but the release was available at the trial and not offered, a new theory.

Q The Court of Appeals didn't place any reliance on the release?

A No, the Court of Appeals said nothing about the release.

So much for the background in this case. I do want to say, however, that there is an anomaly from what I have said already in that some of the leading lawyers in this country -- Whitney Seymour, who was later President of the Bar Association; John Cahill, a leading lawyer in New York -- advised their clients to pay $10 million for damages suffered by Zenith up until 1957 and this lower court now holds, as a matter of law, that sort of conspiracy couldn't cause any damage whatever.

Q That isn't your main issue, is it?

A No.

Q As to the sufficiency of the evidence to support the showing of damage?

A Right. That is all the court dealt with

apparently, and I assume tacitly, I believe, in order to reach this point.

The Government has filed a brief here. There really isn't any question about the illegality of these pools under the decisions of this Court.

I first want to address myself to the Canadian market. Were we damaged? Was there substantial evidence of damage in the Canadian market?

In 1926 there was put together up in Canada CRPL, Canadian Radio Patents, Limited, and it was composed of our competitors, people who sold radio and television sets in competition with us here and in Canada, if we ever got into the market.

I have never seen a case, and I am sure this Court hasn't either, where the evidence of the conspiracy is written down, sponsored, and put in evidence by the respondents. Usually the conspiracy case we have to try is a case where you infer conspiracy from a number of different acts.

This Court held a long time ago, in the Interstate Circuit case, that the old days of proving conspiracy by having people gathered around a table had gone to a darker age; that now we prove conspiracies, particularly business conspiracies, by showing a plan which is designed to destroy or interfere with competition, and a joinder in it, with knowledge of its intent and purport. That is what you have to prove.

But we have nothing in the way of inference in that sort of a proof. But to understand the impact on the damage issue, this Court has to see what this conspiracy was designed to do, namely, to control a complete market, pursuant to an overall conspiracy to control the markets of the world.

Plaintiff's Exhibit 50-A, which was put into evidence by my opponents -- I didn't put it in; they put it in -- was a report by the Royal Canadian Commission on a submission made by Canadian Radio Patents, Limited where somebody up there, a distributor, had complained that they were keeping him from importing sets into Canada.

They heard all the evidence and they issued a report. I want to read some of it, if the Court will bear with me. This is the whole conspiracy, as far as Canada is concerned.

Q What was the report? Who made it?

A A Royal Canadian Commission, and it was issued and dated December 31, 1959, within this damage period in this case.

Q What are you reading from, Mr. McConnell?

A I am reading from Plaintiff's Exhibit 50-A, which is found in the record at Appendix 2811 and 2829-30.

"Canadian Radio Patents, Limited, hereinafter called CRPL, was incorporated in 1926 for the purpose of acting as a patent licensing agency. At the time of the presentation of its brief to this Commission, it acted as a central

patent licensing agency in the administration of patent rights in the radio, television and general electronics fields in respect to patents owned by its then five shareholders, Canadian General Electric Company, Canadian Westinghouse Company, Northern Electric Company" --

And if I may interpolate, Northern Electric Company is a wholly owned subsidiary of the American Telephone and Telegraph Company.

--"Canadian Marconi Company" -- which is a wholly owned subsidiary of the English Marconi Company -- "and Canadian Radio Manufacturing Company" -- which is a wholly owned subsidiary of the Phillips Company of Holland.

"It acted as licensing agent in Canada for RCA Victor Company and Hazeltine Electronics Corporation, the respondent in this case.

"The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents and in the absence of a license from CRPL, it is doubtful if anyone could sell in Canada a radio or television receiver. CRPL indicated that it does not grant a license to any importer of radio or television receivers except in the limited situation where the type or kind of radio or television receiver sought to be imported is not manufactured by any radio or television receiver manufacturer in Canada.

"It is particularly in respect to this policy of CRPL

in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.

"It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio."

Now, how did they enforce it? The record is clear on it. There isn't any denial. They had patent agents and investigators, and they went around and they checked to see if there were any imported radio sets. If there were, they turned them in to the pool and the pool then started suit, and most of the suits, according to the documentary evidence coming from the files of the pool, ended in an agreement by the distributor never to handle a set again that was imported into Canada.

Our distributors had to enter into such an agreement. We had a man by the name of McCuspey. The documents are in the case. He had to agree that he wouldn't handle any unless it was licensed, and the only way it could be licensed -- and our evidence is replete with demands by Zenith to get licenses and they couldn't get licenses, and while it said that we didn't formally ask for license after 1953, we had a lawsuit that ran clear through 1957 which was designed to break up this illegal restriction on licensing, and we did get --

Q Who did you get the license from?

A The pool.

Q The pool.

A Yes.

Q You couldn't ship any --

A We couldn't ship any sets up there that were licensed because --

Q That were not licensed, you mean.

A Yes, because they said, Mr. Justice, "You cannot have a license from these 5,000 patents in this pool unless you build a factory in Canada and produce your product there. You can't produce it in Chicago and ship it into Canada and sell it in our market."

How could you stop commerce between countries any more effectively than that?

Q Was that justified by the law of Canada?

A No. It isn't justified by any law that I know of.

Q I mean, had they passed a law authorizing it?

A We had the issue made, Mr. Justice, in the District Court, that this was authorized by Canadian patent law, and we tried it out, and they lost that issue, and the District Court made a specific finding that there was nothing in the Canadian patent law which justified any such sort of a proceeding.

Even if they had been, and they could do it with their individual patents, it is elementary that when they join in a conspiracy with our competitors to use this to stop our

competition -- and I am going to get into that in a minute --

Q That is in Canada?

A In Canada, yes, but it is the flow of commerce from the United States into Canada that is being interfered with.

Q Well, suppose they wanted to put a prohibitive tariff on.

A Oh, that is a Government thing.

Q I am talking about the Government.

A Oh, the Government can do anything they want. I am not talking about the Government.

Q That is what I was trying to get at.

A No, this is not a Government organization.

Q Was it operating within authority?

A No, absolutely not. This is a private conspiracy.

Q Is it denied?

A Is it denied? There is no proof of any --

Q Is that an issue?

A Of course. There is no proof, no contention --

Q What position does the other side take on that?

A The view the other side took was that under Canadian patent law, they had to restrict licenses for imports; otherwise, they incurred certain sanctions on their patent rights. That was their contention and we tried it out on expert testimony. We had Canadian experts come down here and there was not one single thing to it. It was a complete sham

from top to bottom and the District Court so held. They didn't appeal it. There was no issue on it in the lower court, in the Appellate Court and they have abandoned it here in their briefs.

Q That is foreclosed, you think.

A Yes.

As I say, they sent out these investigators to scout out imports and then bring suits or write letters. The record shows -- from their records -- there isn't any denial to any of this. Nobody from the pool ever got on the stand in any issue in this case. Warning notices were widely published in newspapers.

The pool boasted. Newspapers from coast to coast carry the tremendous total of 4,343,084 advertising messages to help put a stop to importation of cheap, substandard, imported radios. They are our customers. They were our potential customers in Canada.

Then they sent out a warning notice. They sent one out just shortly before the suit started, and this was addressed to importers, vendors or users of radio and television receivers. That is all the people we could possibly sell to -- an importer, a vendor or a user. That is our entire market.

Now, here is an inducement to boycott our product in the entire country of Canada.

"We wish to bring to your attention that Canadian

Radio Patents, Limited is a central patent licensing agency administering various important Canadian patents of inventions relating to radio and television receivers."

And then they list the licensees. Of course, we were not licensed, so we weren't listed. And then they say:

"The above companies are working the patented inventions in Canada on a commercial scale and are prepared and willing to meet the public demand for the patented articles in Canada on reasonable terms."

Now here is the threat:

"Canadian Radio Patents desires to inform importers, vendors, purchasers, or users of radio or television receivers which infringe patent rights owned or administered by Canadian Radio Patents, Limited, and they are listed above, that they will be held liable to Canadian Radio Patents, Limited on account of said infringement."

Then they sent out notices:

"Only Canadian-made, Canadian-sold sets licensed under the basic patents of Canadian Radio Patents, Limited."

My opponents in the trial court in an attempt to sustain the issue that Mr. Justice Black referred to, that there was some law up there in Canada which would justify this sort of conduct, put a man on the stand by the name of Gordon Fripp Henderson, who was a member of a firm that had represented this pool for years and years and years.

But just a minute before I get into that.

Hazeltine put its patents in this pool in 1943 with extensions up until 1963, past the damage period -- I don't know what has happened since, because we have no proof. They say now they are not in it because they have been enjoined. They say they filed an affidavit that they have done something about it, but they are under injunction now, which has never been superseded, to get out of the pool, and they are pleading here that because they are now obeying a court injunction, that that some way absolves them from getting into this pool.

But anyway, they got into the pool. The injunction enjoined them from staying in these pools.

Q Where was the injunction?

A United States District Court in Chicago, entered by Judge Austin.

After he had made his little speech about the patent law, where he finally weakened and unwindlassed and admitted that there was nothing in the law that justified their position and retracted his whole position, we went into the cross-examination of this witness, who was the attorney for the pool and who had made the submission by the pool to the Royal Canadian Commission, thoroughly familiar with all of it, worked with them for years and years and years.

I cross-examined him, and I want to read some of his cross-examination because it shows the impact of this conspiracy

and what it was intended for, what it was intended to do, and what it actually did do within this damage period, and which the Court of Appeals says, as a matter of law, can't under our anti-trust law constitute damage.

He said, "My law firm presented the submissions on behalf of Canadian Radio Patents, Limited, and it certainly sought to say that Canadian Radio Patents, Limited, was not doing anything illegal."

He said the report was submitted on the 31st day of December 1959. That is within our damage period.

"Question: Now you told us this morning that you knew what the policy, the licensing policy, of Canadian Radio Patents, Limited, was and that as I understand you to state it, the policy was not to license imports where there was manufacturing in Canada.

"Answer: That is correct.

"Question: Now, imports that came in in the electronics field would represent competition to the owners of this pool, would it not?

"Answer: Certainly.

"Question: No question about it, is there?

"Answer: I would have thought not.

"Question: The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL, it is doubtful if

anyone could sell in Canada a radio or television receiver. Was that considered?

"Answer: Of course they considered it. They wrote it. They considered that aspect of the matter and they referred to it in the report."

They said, "Well, do you consider that a company like Zenith Radio, exporting into Canada, is competition for the members" -- that is the members of the pool.

Well, I didn't get an answer to that, so I asked him another.

"Question: And that would include Zenith Radio Corporation, wouldn't it?

"Answer: It would include anyone who at that time sought to sell in Canada radio receiving sets.

"Question: And you have told us that if Zenith is a competitor, and if it doesn't manufacture, if there are manufacturers in Canada, then this pool will not license Zenith to import anything into Canada; isn't that right?

"Answer: They will not license the importation into Canada in respect of the type and kind of television set or radio set that is being made in Canada. That is correct. And this includes home radio and television sets.

"Question: The report says it was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television

receiver which infringes any one or more of the patents in this portfolio, except in the limited area where permission has been granted to import the apparatus which CRPL agrees is not of a type or kind made in this country. Is that what they arrived at?

"Answer: It so states; the report so states.

"Question: And that was CRPL's statement, wasn't it?

"Answer: That is CRPL that made the submission.

"Question: That made the submission that that is what they are doing.

"Answer: That is correct.

"Question: Now, under that, Zenith couldn't get a license to import at all unless they manufactured up there, could they? I am talking about seeking to import something that is competitive with the members of the pool.

"Answer: On something that is being made in Canada?

"Question: Yes, by the pool.

"Answer: Then their stated policy is that they would not grant a license to import."

They are competitors. They are joined shoulder to shoulder with a great mass of patents. Whether they are valid or not, they could keep you in litigation forever and ever in enforcing those patents.

By the way, the District Court found that the instant suit, which was brought on the Hazeltine patent, which was in

the pool, was brought pursuant to the pool. Hazeltine came into this pool in 1943. The record shows that they volunteered their patents to be used in litigation against importers, documentary evidence. The record shows that they were in these pools by their own admission, knowing that the purpose of the pool was to exclude importation. No question about it; admitted by their general counsel on his cross-examination and upon his deposition.

They said they were in the pool, the Canadian pool, and they intended -- right in the trial they said they were in the pool and they intended to stay in that pool, flaunted their participation in the pool, and they said the reason for it was to get more bucks for Hazeltine.

Well, I suppose every illegal activity from the beginning of time down to date has had something about getting more bucks or more money out of the illegal activity, and that certainly is no justification, with all due deference.

There is some rather interesting --

Q Is there some finding of the District Court with relation to this and its applicability to the Canadian patent law?

A Yes, right in the back of our brief, which we set out, and I will read it to Your Honor. It is on page -- let me read it to you from the record. It was made an appendix to our original brief. It is Finding 32.

Q Finding 32. In which one of your briefs is it?

A Original brief, not the petition. The original brief in this Court.

Q Page 17 of your brief.

A Yes, that is it.

The court held the proofs establish as a fact that in the circumstances of this case, the Canadian Patent Act does not require the pool to refuse to license importation, as contended by plaintiff, nor does the Act penalize in any way a patentee who licensed for importation; whereas, in this case there is being carried on extensive manufacturing in Canada under its patents. It rules squarely on it.

Q Where is that statement finding restricted to the Canadian Patent Act? Is there contention relating to any other provision of Canadian law?

A No. Not another thing, Your Honor.

Q Just the Canadian Patent Act.

A Not another thing.

There was a time -- this is a digression -- when Canada restricted imports under its Patent laws. Then they had a congress of the different countries, a Patent Congress, and they all recognized that they all had mutual interests in breaking down these patent restrictions which restrain trade between different countries.

So they changed it, and they said, under the congress -- what was that Congress? It was a congress; congress of '24 --

well anyway, there was a congress; it is in the record -- that under that congress, no country who wanted to stay in the congress could put any restrictions on patents or upon the import of goods which were patented, and that was written into the Canadian patent law, and the Canadian patent law says, "Nothing in this Act shall be construed to contravert any treaty" -- and this was a treaty.

So it was clear out of the patent.

Q I hesitate to anticipate your argument, but the situation is different during the damage period in Australia, isn't it?

A No, sir.

Q Isn't it contended that Australia had during the damage period some sort of governmental import provisions?

A Oh, yes; for a year and a half.

Q That by governmental provision precluded importation.

A Right. And that was excluded from the damages.

Q And that was excluded from the damages?

A That was excluded from the damages, and there are no damages in this judgment which cover any period where there was a government embargo.

But we are not talking about a government embargo here, I think Your Honor understands. We are talking about a private conspiracy designed by electronic competitors all over the world.

To go back to my lawsuit in Chicago, we thought we had settled the case and that we could now go to work in Canada and develop our markets. That is what we thought, and we were --

Q This is in 1957?

A In 1957. That was settled on September 9, 1957.

Q For $10 million.

A $10 million, and also the licensing by General Electric and by R.C.A. and by Westinghouse, of patents up to that date, not including color television.

Q But including radio and television, monochromatic television.

A Right. Exactly right.

So we start to go into Canada. Mr. Wright testified, and there is no denial of his testimony, no witness got on the witness stand, and they say we ought to have brought some distributors in.

But here is something I want to bring out before I get to this.

There was a conspiracy within a conspiracy. They had distributors' organizations up in Canada which were cooperating hand in glove with this pool and they comprised the people you have to deal with. When you sell sets, you have to go to distributors.

The court below criticizes us because we didn't bring in distributors. The distributors were all banded against us.

The record shows it by documentary evidence, by their minutes, where they are trying to cooperate with the pool and say, "Tell us what we can do. Tell us what we can do to help you in stopping the import of American products into Canada." They were all in it.

So when we go up there, Mr. Wright testified and there is no denial of his testimony, and they tried to impugn his testimony -- and I have seen some funny things in lawsuits, but never in my life have I seen witnesses attempted to be impugned by documents which are not in the evidence, which were never even presented until a year after the case had been tried, where no chance has ever been made to meet any of the documents which they claim impeach Mr. Wright's testimony.

In other words, ordinarily cases are tried on a record made in the trial court, and here they come in with pages of offers of proof, with new counsel, trying to take a new grasp on the case a year after it has been tried.

The trial court said to that, "These things all were available at the trial. Why weren't they produced?"

No excuse given.

Q Had findings been made yet?

A Yes, the findings had all been made. The case had been put to bed and a year had gone by. Then they come in with new counsel, with this new attempt to try the case all over again and the District Court wouldn't do it, and rightly so.

It is a matter of discretion with the District Court whether to reopen a case and the new evidence rule is conclusive on it. All of this evidence, whatever it was, was available at the time of the trial and never produced until a year after the trial, and then it is largely counsel's statements, and what they would do and what they wouldn't do.

Ordinary cases are tried on the records made at the trial. This is an exception, apparently.

Q Mr. McConnell, after the luncheon recess you are going to tell us about damages specifically, aren't you?

A Yes, I am. I certainly am. But I am getting to the question now of the fact of damages, and the fact of damage, the way the courts have been construing it -- and I say that with all due deference -- the fact of damage is the foundation and you start from there with the proof of the actual damages.

What was the fact of damage? The fact of damage, Number 1, we couldn't have any licenses on pool patents. Number 2, everybody in that trade, for years, since 1926 at least, had been conditioned to the fact that without a pool license, anybody who handled sets was subject to suit, was subject to harassment, was subject to letters being sent out to the potential customers not only of ours but of the distributors themselves, the users. They were published in the trade papers. They were published in the press.

It was inducement to boycott an entire market.

Q Were was the suit filed against you?

A Against us the suit in Chicago was filed pursuant to this.

Q I mean, for infringement?

A An infringement suit, yes, on a patent in the pool.

Q They made it on infringement.

A Yes.

Q That is in connection with your United States business, though, isn't it?

A No. The trial court held it was pursuant to this conspiracy, and it was admitted -- I am going to get to that after the luncheon recess.

Q I understand that, but I mean to say that you have some patents from Hazeltine, don't you? Does Zenith have and use patents from Hazeltine?

A Not now. We did.

Q You did.

A Years ago.

Q But as of the time that this litigation was started by Hazeltine?

A We had no patents from Hazeltine.

Q I see. And this action was instituted by Hazeltine, and it was instituted claiming infringements here and elsewhere, in this country and elsewhere?

A Claiming infringement on a patent which was in the Canadian pool.

Q I understand that, but did they claim that you were infringing it by the distribution and sale of sets in this country only, or also in Canada?

A In this country only.

Q In this country only. That is what I was trying to get at.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter recessed, to reconvene at 12:30 p.m. the same day.)

(The argument in the above-entitled matter resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: Mr. McConnell, you may continue with your argument.

FURTHER ARGUMENT OF THOMAS C. McCONNELL

ON BEHALF OF PETITIONER

MR. McCONNELL: Mr. Chief Justice and Members of the Court:

After the 1957 settlement, as I said this morning, the Zenith company undertook to go into the Canadian market with their radio and television sets.

Now, here are two contiguous markets -- Canada and the United States -- right alongside each other. As far as the border areas are concerned, Canadian listeners can pick up broadcasts from television and radio all along the border from American stations. There is no difference in the sets. They had the same lines. They had the same cycles.

The testimony was that of the two products, the American product was far superior to the Canadian product; that the contiguous markets had essentially the same competition, although there was more competition in the United States market than there was in Canada.

Mr. Wright testified that he went up there and tried to establish distribution in that market. There was a ready demand for a product; surveys had shown that. He couldn't find

distributors. Distributors, as I pointed out this morning, were in these associations. We have the minutes of some of their meetings, tied up with the pool. He couldn't get distributors for the reason that they had been conditioned, like Pavlo's dog, for years and years, to the sounding of the gong of the Canadian Radio Patents, the threat, the constant inherent threat against everybody in the trade, with the warning notices, with the investigations, with the lawsuits, and that was the market.

The pool was there, still in existence, run by General Electric, even though the Government had started a suit against them and had gotten a consent decree whereby three of the conspiring companies had agreed to license their sets without importation -- which, by the way, negative any thought that there was anything in Canadian law that would prevent them from licensing for importation -- but permitted General Electric to continue to run that pool, and General Electric continued to run the pool with a permanent organization, manager, investigators, and what have you.

So Mr. Wright testified that he couldn't get distribution, the kind of distribution to which a product of Zenith was entitled in a market, and the reason he couldn't get it was because of the threats of the pool against the potential distributors which he tried to get. He said he could get some distribution in the Western provinces -- there is a very sparse settlement out there -- and some in the Maritime Province.

But along the contiguous territories he couldn't get them, so he had to use the hearing-aid distributor. We had a hearing-aid distributor. That is another product of Zenith. We had a Canadian Zenith which distributed hearing aids and he used them to try and build up some distribution.

Q Well, in this next period of time, were you handicapped by the lack of licenses under any patents for importation in Canada?

A Yes.

Q Or did you have them by reason of your settlement?

A We didn't have them, and I am coming to that --

Q Now we are in the period 1957 and subsequent years; is that right?

A That is right, and I am going to get right to that. I will show Your Honor how, and why, in effect, not having them is --

Q What is the damage period? When did it begin -- 1959?

A 1959 to 1963; May of 1959 to May of 1963.

Q May of '59 to May of '63.

A So he couldn't get distributors, so he had to use his hearing-aid distributors, and even under that impediment he was able to sell some sets, about 5 percent of the market, the proof shows, against 20 percent which Zenith was selling in the United States.

We hadn't any more than gotten underway up there than a man by the name of Bryan McConnell, no relation of mine -- he ran the pool. He was an employee of General Electric. He ran the pool. He came to Mr. Keeley, our manager of our hearing-aid company, and he said, "What are you doing here? Are you going to manufacture in Canada? You can't import sets in here because we know that you got some licenses under your settlement in 1957, but we have other patents which are controlling. We have Marconi patents, we have Hazeltine patents, we have Phillips patents, and they can't be licensed for import. You have to manufacture in Canada."

No dispute to that conversation. McConnell doesn't deny it. Nobody denies it. It is admitted on this record that that is what he told us, and that "We want diagrams of your sets to examine," and we gave them to him and he took them home and then he came back and he said, "You are infringing these patents."

He sent us a notice within the damage period in which he -- regular notice, threatened a suit, "You are infringing the patent." That is the way you start an infringement suit. You name the patents. And then encloses a pool license which is limited to manufacture in Canada.

Q But you nevertheless went ahead into the Canadian market.

A Yes, we went in, but we only made 5 percent and the Court of Appeals below us seems to think that there must

be a total exclusion from a market. We are saying that the impedimenta of the pool and the effect that it has had to create boycotts of our product during the damage period, was an impedimenta which we faced continuously, cumulatively, as this Court said in the United Shoe Machinery case.

Sure, we would have sued back in 1957, as this Court said in the Shoe Machinery case, but we could still sue in 1959, if the effect of this illegal conspiracy, which hasn't been terminated, which is still existing, which is still continuing, which is still going forth, and the threat inherent to the whole trade, and known to the whole trade.

And the threat was serious. The testimony is that under Canadian patent law, any distributor could have all of the product confiscated by the owner of the patents. He couldn't sell them because he didn't have a license to sell them. We took that risk, and we took that risk, Mr. Justice, relying on enforcement of the antitrust laws of this Federal Government.

Q I gather you prove your damages by saying that without the impedimenta, you would have had a similar share of the Canadian market to that which you have in the United States.

A Exactly, and we have testimony --

Q That is the core of your damage proof.

A Right.

Q Without any embellishment to show any distributors who actually laid off your products because of the threat?

A That is right. Wright's testimony wasn't denied. Kaplan testified the same way. It wasn't denied. Nobody came in from the pool and said we could get distributors, nobody.

Q I suppose there is testimony to show that you had the product to sell. I mean, you had volume enough to --

A We are a competitor beautifully equipped to compete. That is the rule that has been laid down in the antitrust cases. Are we dealing with a competitor, equipped to compete? We were.

Q Were you equipped with a distribution system?

A No, we couldn't get the distribution system because of an illegal conspiracy, and that is what we are complaining about, one of the things.

Q Was there testimony suggesting that you put as much effort in the developing of a distribution system in Canada as you put in the United States?

A No, because we were threatened with infringement suits on every single set we sold, and we have sold -- I don't know how many sets --

Q But you went ahead. You went in. You sold a lot of television sets and radio sets in Canada.

A Yes. The potential liability still exists. We can be sued for the profit on every --

Q Is there testimony indicating that you laid off the Canadian market?

A Exactly; by Mr. Wright. He said he didn't dare develop it to the same extent.

Q You went ahead to some extent.

A Yes, to some extent, trying to preserve what market he had. And by the way, it has grown under the protection of the court decree in the District Court to $14 million a year, corroborating the testimony of Mr. Wright and Mr. Kaplan.

Now, I want to go back for a moment.

Twenty-three years ago I appeared before this Court in the so-called Bigelow case. It involved the Jackson Park Theater in Chicago. We had a jury verdict and it went up on appeal to the same Court of Appeals in the Seventh Circuit and the Court of Appeals said that the only method of proving damages is to compare an open market with a closed one.

For a quarter of a century the motion picture industry had destroyed an open market in Chicago. There was no such comparison, and so, obviously, nobody could have made that kind of proof, so the court held that there was no fact of damage and reversed the case and it came up here by certiorari.

This Court, in that case, said that where wrongdoers, violators of the Act, have destroyed an open market comparison, estimates can be used, and in that case the only evidence we had was the estimate of our theater manager that absent the restrictions of the conspiracy we could have done as much business as a competing theater, and the Court held --

Q But you did have the competing theater figures.

A Yes, and we have an open market in the United States which is contiguous with the Canadian market which is comparable in all respects, as to competition, as to markets, as to broadcasts, and as to all the rest --

Q Do any of your American competitors have plants in Canada?

A Some of them have gone in and some of them have failed. But the point in this case, Mr. Justice, is whether or not we can be compelled to accede to stopping commerce.

Q I understand that. I am just thinking about the damages. Let us assume that an American competitor of yours who has 10 percent of the American market builds a plant in Canada just like his American plant, and he tries to get 10 percent of the Canadian market, just like he has in the United States, and doesn't do it. He can't, somehow, get more than 5 percent.

A There is no such evidence in this record. There is no such contention made in this record. Nobody got on the witness and said "If you had built a plant up there you couldn't have gotten more than 5 percent." No countervailing evidence to ours. The cases say, "Well, yes, on the estimate that is made" --

Q There must be some evidence around, however, as to how your American competitors have fared when they went into Canada and built a plant.

A Not on this record there isn't.

Q There is not in this record, but I just suggest that there may be some evidence available to that extent.

A The evidence that is available, and there is some inference from the evidence -- there is the testimony of Mr. Kaplan -- that he made a survey and found it was absolutely, utterly uneconomical to produce sets in Canada with Canadian labor, and all the rest of it, and there was other evidence that three companies who went in there and tried, failed.

Q Well, that may be. Which way do you run that -- for you or against you?

A I run it for me, because why should we be compelled to go into Canada in violation of the antitrust laws. We have the protection of these laws, if Your Honor please.

Q But if a company builds a plant and fails to command a decent share of the market, who builds a plant in Canada and fails to have a decent share of the market, that doesn't necessarily mean that that same company couldn't have done better if it hadn't built a plant.

A Well, maybe so, Your Honor. But the court below, the District Court -- and the Courts of Appeals have said this time and time again, and you said it in this Court in the Bigelow case -- the weight of testimony of this kind is for the District Court. It is not to be weighed on some supposititious case up above, with all due deference, now. I am not --

Q Or on some basis of reasonableness.

A That's a difference of opinion, too.

Well, I have one further contention to make. My time is running out.

We show, by the estimates, and transposing of this, and bear in mind, Mr. Justice, that there was no objection to the evidence, the computations came in without objection --

Q What was your recovery, or do you know, on Canada, in the District Court?

A $19 million, treble.

Q That is trebled.

A Trebled, yes. It would be a third of $19 million.

Q Mr. McConnell, the position, I take it, is this, and I would like to see whether you agree: Let us assume that the pool is in violation of the antitrust laws. Let us assume that Hazeltine's participation in it is a violation of the antitrust laws. Let us assume that you have established the facts of damage to Zenith.

The remaining problem is that the Court of Appeals held that the finding of the District Court as to the amount of damage was clearly erroneous in the case of the Canadian pool. Is that right?

A No. The Court of Appeals held that they don't get to that question because there is no fact of damage, and without a fact of damage, we don't get to Bigelow or any of the

other cases.

Q They held that there was no fact of damage as distinguished from --

A No injury, either actual or threatened.

Q As distinguished from no proof of the amount of damage.

A Right. No holding.

Q All right. In any event, if we get past that, let us assume just for purposes of this inquiry, that we believe you have established the fact of damage. Then on the question of the amount of damage, and whether the finding of the District Court on that was clearly erroneous or not, what you have submitted to us is that you are totally excluded from the market and that the proper measure of the damages in those circumstances is the percentage of the market that you have in the United States. Is that correct?

A Right. And that is the --

Q Are there in this record any facts that tend to show that if you were allowed to compete in Canada, you would or might be able to achieve the same percentage of market that you achieved in the United States, or does that rest totally on hypothesis.

A No. It rests on the testimony of Mr. Wright, Joseph Wright, who is President of the company; of Mr. Sam Kaplan, who at that time was Treasurer --

Q They testified that if they could compete in Canada, they would achieve the same percentage of market?

A Yes, knowing all the factors --

Q What I am trying to suggest that you get to is to tell us briefly, if you will, what their testimony says, if anything, with respect to the basis for that conclusiary judgment of theirs.

A The basis of their testimony was that the markets were essentially the same; that the advertising in the United States overlapped into Canada and created a market for our product; that the competition was comparable; that our sets were better; that the shipping problems and tariffs were not involved.

They took them all into consideration, and on the basis of that -- and Kaplan, with 40 years in the business, and Wright with 20-some -- they testified from their knowledge that they could have done it and could have gotten the same share and there was no cross-examination and there was no other witness who testified any differently, and the testimony stands uncontradicted on the record and the trial court adopted it.

Let me turn to Finding No. 36, which is found in the back of the brief. This is the finding:

"The foreign commerce of Zenith has been drastically curtailed by the patent pools in England, Canada and Australia. The damages Zenith has sustained were estimated by experienced officials of Zenith thoroughly familiar

with the business problems and sales potentials in the markets involved. They determined the approximate damages sustained by a thorough study of each of the markets involved, and all relevant factors, including tariffs, shipping costs, manufacturing problems. Zenith's foreign commerce has been damaged by the pools in the following amounts during the 4-year statutory damage period."

Now, that was based upon the same kind of testimony that this Court unequivocally said was proper in the Bigelow case and other cases since has said whatever its weight may be, it is competent. It came in without objection. Nobody objected to it. Nobody objected to the computation. Nobody put on any countervailing evidence.

Q If you don't mind, could you tell us briefly at this point, on the basis stated by the Court of Appeals for its conclusion that the District Court was clearly erroneous in finding the fact of damage?

The Court of Appeals held that you had not applied adequately for licenses, that there was no showing that you were excluded, in fact? What was it?

A Well, I can't answer Your Honor's question because I have no comprehension of how the court could hold, on this record, that there was no fact of damage, or even a threat of damage. I just don't understand it, to be perfectly candid and frank with the Court.

Q The Court of Appeals ordered some changes in the injunction, but it didn't reverse the judgment granting an injunction entirely, did it?

A It did in part.

Q But only in part.

A But on the pools, it completely reversed it.

Q On the pools it completely reversed it?

A Yes. It gave us no protection at all.

Now, here we built up, under the protection of this injunction, a business of $14 million, which approximates and corroborates what the estimates were that were made by our officials.

The consequence -- and I can't understate this -- the consequence of a sustaining of a taking away of our protection from this injunction is that we can be sued on every single set we have ever sold under the pool patents, and we are subject to a potential liability of any profit that we made on those sets and we can be forever barred from that market, and here sits three companies waiting to see what this Court -- we have taken $10 million from them back in 1957 and they wait to see who is going to get the business that Zenith has developed in Canada, and if that isn't a threat -- I mean, I should never have started to practice law. I should have given it up altogether.

Q Is that $14 million figure in this record, Mr. McConnell?

of those annual reports?

A Well, I don't think --

Q By authority of your reasoning that supported your answer to Justice Fortas just now?

A The reason that I have to take the position that I took with Justice Fortas is that this record was closed. There is no other way to show what happened since; no other way.

This situation Your Honor is talking about, they came in a year after the case was tried, with these reports, with no chance to answer the reports, or explain who wrote them, or anything else about them.

Q They were signed, I think.

A What?

Q They were signed. The report to the stockholders is signed, presumably, by the president of the company.

A Assuming they were, they are not conclusive on anything. They are one item of evidence which never got in the record.

I have a little time left that I am going to reserve, if I may.

MR. CHIEF JUSTICE WARREN: Mr. Chadwell?

ARGUMENT OF JOHN T. CHADWELL, ESQ.

ON BEHALF OF RESPONDENTS

MR. CHADWELL: Mr. Chief Justice, may it please the Court:

Before starting on the main part of my argument, I would like to get a few basic points before the Court.

The first is that this case was tried before a District Judge without a jury.

The second is that after the trial, Zenith prepared and submitted findings for the judge to sign, and the judge signed every single finding, and every single finding that he did sign was a finding prepared by Zenith and he didn't even change a comma. The judge did not --

Q Is that something new or unique in this case?

A In this case? Well, it is unique insofar as the courts in which I have been practicing are concerned.

The court reversed on the ground that the findings were clearly erroneous that showed an impact on Zenith's business. The court followed the rule announced by this Court in Gypsum to the effect that a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, and the court said that was the situation with the Court of Appeals in this case.

Now, Mr. McConnell said nothing about England, although the amount of damages awarded by the court on the English pool was approximately the same, in the neighborhood of $15 million. The reason I think that Mr. McConnell said nothing about England was that the testimony in connection with the English pool

demonstrated, I think, to the Court of Appeals, that the statements of Mr. Wright, President of Zenith, and of Mr. Kaplan, Executive Vice President of Zenith, were not believable.

In connection with the analysis of the Court of Appeals of the record with respect to England, that fact is demonstrated. These two men not only testified with respect to the English pool; they testified with respect to impact, as Mr. McConnell said, and with respect to the amount of damage they testified on both subjects with respect to the Canadian pool as well.

Now, the Zenith evidence submitted by Mr. Wright, through Mr. Wright and Mr. Kaplan, is unbelievable on crucial issues in this case. It was either repudiated or recanted by the witnesses themselves, it was shown to be incorrect by later evidence and undisputed findings, or it was directly contradicted by contemporaneous documents which are in evidence.

In connection with the English pool, we went in on a motion to reopen the case as to the English pool upon getting into the case and we made the motion on the ground that we would be able to show that embargoes, English governmental embargoes, prohibited and made impossible the importation of radio and televison sets for 20 years before 1959 and there were, as a result, two separate hearings as to England. The first was in 1964, after which the court entered Finding 36, read by Mr. McConnell, exactly as submitted by Zenith, awarding damages in the amount of $24 million.

Now, that finding and that award in England was based upon testimony of these two men as follows: I want to briefly summarize it and then show what they said when they came back on the second trial, which was awarded to us limitedly on embargoes as to England but which we were not permitted to have as to Canada.

Q When you say England, did you mean Canada?

A No, sir. I mean England. You see there were three pools alleged. One was the pool in England. One was the pool in Canada and one was the pool in Australia.

Q You are talking now about the ---

A I am talking now about the English pool about which Mr. McConnell said nothing, although his judgment includes about $15 million for England, and I am taking up England first because I think that the testimony of these witnesses at the first trial before findings were entered compared to the testimony at the second trial as to England, after the court reopened on the question of these embargoes, shows that they were not believable witnesses, that they were not credible witnesses, and the review of the Court of Appeals of the entire record, I submit, brought out that fact.

Q Did the Court of Appeals say anything about their credibility?

A The Court of Appeals did not expressly mention it except that they did refer to one particularly outrageous

instance of it saying that Zenith's cause was not helped by that testimony. They did not expressly refer to the credibility of the witnesses otherwise although they could not have made some of the findings that they made without having serious doubts, grave doubts, as to their credibility, and I would like to outline to the court what they said the first time and what they said the second time and the extent to which they were contradicted by contemporaneous documents.

Now, if the Court will bear with me, I would like to bring out those two points.

Q Assume the two were believed in the sense, is it critical that the testimony be impeached?

A Well, I think it is important that their testimony was impeached. I think, as Mr. McConnell said, that their main contention was based upon the testimony of these two men.

Q Was there any other testimony, did you offer any countervailing testimony to the subject?

A We made offers of proof. We offered everything that the court would let us offer. This is at the second trial. Now if the court will permit me ---

Q How about the first trial?

A Well, we were not at the first trial. We went in on a motion to set aside the findings on the ground that we could show, as to England now, we could show that they were kept out of the pool many years before 1959 by governmental embargo.

And it was the governmental embargoes that kept them out. It was not the act of the pools and their entire contention with respect to England was that they had been kept out for many years prior to 1959, that if they had been permitted to buy the pools to sell during that period they would have built up a business from which they would have made profits during the damage period from 1959 to 1963.

Q The original hearing was on damages. These two men testified at the original hearing, right?

A They testified at the original hearing, not only about damages. They did testify about damages.

Q Well, did Hazeltine put on any evidence concerning damages at all?

A They put on these two men who testified concerning the amount of damages.

Q I thought that was Zenith.

A I beg pardon. Oh, I am sorry. I misunderstood you.

Q Well, did your side put on anything concerning damages that was contrary to what they put on?

A Not at the first trial.

Q So it stands uncontradicted?

A Well, at the first trial. But it stands contradicted by their own testimony that they gave at the second hearing.

Q Is that the only reason that there wasn't any countervailing testimony in the first trial?

A Well, I don't know ---

Q If you took the position ---

A Well, I personally was not at the first trial.

Q No.

A And, I can't say the reason for it. I assume, Mr. Chief Justice, I assume the reason was because they did not think that a case had been made up. I am sure that was the reason.

May I say that first it was said that for many years, as I said, Zenith had tried to import to England. On each occasion it was said the British pool threatened distributors until they ceased buying Zenith products. And it was claimed that Zenith, and that the English pool had prevented Zenith from building up its market.

They testified that during the four-year period, 1959 to 1963, Zenith had in fact attempted to market TV sets in England converted from the American standard, the 525 line standard in America, to a unique British 405 line system. They testified that Zenith had so converted its sets, had said sets converted to its English distributor with kits and parts to make conversions where necessary.

They testified further that conversion was so simple Ramsay, the English distributor, did it in his back room, that

he had made such conversions, had made an effort to sell these sets after the embargo was lifted in 1959, but was unable to do so because he was precluded by the pool.

Now that was the testimony of these men at the first hearing, precisely what I have said.

Now, they make two basic contentions, by their testimony. That these things had happened, that that is what had hurt them, that that is how they were damaged.

Now, turning to the first point, that for many years prior to '59 the pool had blocked Zenith's attempts to sell and that they had been unable to build up the market. Now the Government's brief, the Solicitor General said, that this contention of long exclusion of the pool with Zenith basic theory of recovery, which indeed it was.

Now, after the Court's findings were entered as I say, we filed this motion. We urged that we could prove that there was nothing to this contention with respect to the blocking by the pool in England before 1959, there was nothing to it. We could prove that Government embargoes is what did it and it was not the pools at all.

Now, on that motion, and in the course of that argument, Zenith counsel denied that there were any embargoes, he objected to reopening the case, on the ground that there were no embargoes and he said, and I quote, from page 3035 to 3039 of the record.

"There never was an embargo, never." We can prove just the opposite.

Zenith's counsel further stated to the trial court and I am quoting. "Contrary to representations made in open court by counsel for Hazeltine, there never has been an embargo. That is, there never has been a governmental prohibition aginst importation of radios and television receivers either in England or Australia."

Now that is what he argued to the court. That is what he said in opposing our motion to reopen. But the court did reopen, to enable us to put in proof of embargoes, limited to that question and we did put in proof of the embargoes, and we did show that the embargoes existed and that was the reason we were kept out of the English pool for 20 years, from 1939 to 1959. That was proved beyond a doubt and the court then held that the Iron Curtain of the governmental embargoes and nothing else kept Zenith out of England prior to June 1959, and out of Australia prior to April 1960, which was the date of lifting the embargoes in Australia.

The trial judge held that.

Now the testimony of Zenith's witnesses of exclusions by the pool part of '59 was thus shown to be untrue and the Government agrees that that was what was Zenith's basic theory. The Government agrees in their brief filed in this Court what was Zenith's basic theory was shown to be without merit, on the

basis of the governmental embargoes.

It was right and Kaplan, these two men to whom Mr. McConnell referred, it was right and Kaplan led the trial court to believe that the pool had kept Zenith out of England during those periods, and I would like to read from the record this question on the second trial.

"Q Now isn't it a fact, Mr. Kaplan" -- this is cross-examination by Mr. Kayser -- "that Zenith has taken the position from the beginning of this litigation that for many years it was excluded from the patent pools from importing radios and television sets into all three countries?"

The Court, while it has not only taken that position but they persuaded the Court to so find and Mr. Kaplan said, "That is correct."

When Mr. Wright was recalled he said, "Now you told this Court that you had been excluded from England, Canada and Australia for many years by the patent pools.

"A Yes, sir.

"Q You told this Court that based on that exclusion you were entitled to damages during the statutory period?

"A Yes, sir."

And the fact is that they were precluded and kept out of England by the embargoes and nothing but the embargoes.

Now at the second hearing, faced with proof of the embargoes they testified that they had known about the embargoes

all the time. Now they hadn't mentioned it, hadn't mentioned it. They said, "Why we knew about that all the time."

Zenith counsel, in opposing our motion to reopen, what did he say?

He said, as I read to the Court, "There were no embargoes. We can prove that there were no embargoes."

And what did Zenith officials say on recall? They said that the matter had been discussed with their attorneys before they testified at the first trial. They so testified that they had taken the embargoes into consideration in their first testimony. And it assumed that they were a complete barrier, although they said nothing about it and their counsel, no doubt at their instructions, had denied it.

Now, their second contention.

Q If it was so wrong, what they said, why wasn't that controverted at the first trial? Why was it that you would sit by and let that stand without saying anything against it and leave the court to a wrong finding?

A Well, I can't answer that, Mr. Chief Justice, I assume as I said a little while ago that the reason they didn't put in evidence on that was that the case had not been made out any way so they didn't do it.

It is a fact that there was no proof of embargoes at the first trial. There was irrefutable proof at the second trial after the court, exercising his discretion, after the

court had reopened and let us put in evidence as to this question and there was no question about it whatsoever.

Q But the trial court said, "Yes, there is some embargoes," but after the embargoes were lifted, he still thought that the pools kept Zenith out. That still gave a judgment with respect to England?

A That is right. He gave a judgment with respect to England although there were those embargoes clear up to 1959 and his actual saying, "Well, now, there was written contemporaneous records, correspondence between Mr. Ramsay ---

Q I was just thinking, what the trial court ultimately did was to award a judgment for England?

A Right.

Q After the date of the embargo?

A Yes, sir. Yes, sir, that is what they did.

Q Well, what are the facts. Now you have been attacking the credibility of these men and their counsel. I am not clear about what the facts are. Mr. McConnell said in his argument a little while ago that, as I understand it, that there was some sort of an embargo in Australia for a year and a half of the damaged period.

A That is completely wrong.

Q All right, tell me what the facts are ---

A Oh, yes. There was ---

Q First about Australia.

A Yes, sir.

Q Is that right or wrong?

A In Australia there was an embargo from 1939 until April 1960. The embargo there was lifted a year or so later.

Q All right. The damage period begins in May 1959?

A Yes, sir.

Q So that there was an embargo in Australia for that portion of the damage period?

A Correct.

Q Now turn to England.

A Yes, sir.

Q Was there or was there not an embargo in England during the damage period, namely May 1959, May 1963?

A There was no governmental embargo during that period of time. Here is what there was. I don't want to interrupt, your Honor.

Q No, that is the end of my question. You have been talking about embargo here and I want to know precisely what the facts are as this record shows.

A Well the precise facts are those that we have just stated. The embargo was until 1959 in England and it was in April, 1960, in Australia.

Now then, after that, after that, I would like to point out the second contention that Zenith had made ---

Q Is it so that when these men were testifying that

there was no embargo? I don't know what the ---

A They didn't testify.

Q I don't know what the testimony is. I am interested in the facts.

A Yes, sir.

Q And you attacked that testimony?

A Yes, sir.

Q You do not want us to get the impression that they falsely testified that there was no embargo in England during the damage period. You don't want to convey that?

A No. I am not saying there was an embargo during the damage period, sir. No. During the damage period the facts are: That there was correspondence between the distributor, Ramsay in England and Zenith which showed very clearly that the reason that Zenith didn't import to England during that period was because they didn't want to. They had no intention of doing it. They were waiting for the change in the television standards.

Q I am familiar with that point and I understand that point. I just didn't understand your previous argument.

Q What was the real purpose of your argument on the embargo in light of what you have just told us?

A Well, the purpose of it, your Honor, was that we tried to reopen the case and did reopen the case for the purpose of proving embargoes, though they were denied. We did that and the reason we did that was that we wanted to show that their

contention was incorrect, that the pool had been keeping them out as signing 36 said. The pool had been keeping them out all these years.

The pool didn't keep them out. It was the embargo that kept them out from 1939 until 1959. They had contended that had the pool not kept them out all those years they would have built up a market in England to a very high level which would have yielded them profits during the damage period that they were unable to earn.

That is the reason for it.

Now, I want to say this. This is a point specifically mentioned by the Court of Appeals in the Court of Appeals' opinion.

Their contention was that Zenith had intended to import TV sets to England beginning in '59 but were blocked by the pool and as I say the uncontradicted documents were the contrary but Zenith counsel characterized Kaplan's testimony as being that he was able to convert to the English standard, he was able to convert from the 525 line to the 409 line and it was so simple that Ramsey could do it in his back room with a screwdriver as Mr. McConnell characterized it, that they were converting these American-made sets to the English standard throughout the damage period and that they were trying to sell them but couldn't sell them because of the activities of the pool.

Now, on recall, they were forced to say contrary what they had said at the first hearing. No television sets had been converted by Zenith to the English 405 line standard. No conversion kits had been furnished to Ramsay as they had said. No sets had been adapted by the English distributor to the English 405 line standard, and no sets had been offered by Zenith in the English market at all.

Now, I think this testimony of Mr. Wright, when confronted with this testimony he had given at the first trial compared to what he said at the second trial, is revealing.

"Q When you told the court back in 1964 that Zenith had sent a few television sets to Mr. Ramsay which he had attempted to market, you did not know whether or not those sets were equipped to receive English television?

"A No, sir, I did not.

"Q When you told the court that Mr. Ramsay had attempted to market these sets, did you know whether or not he did in fact attempt to market them?

"A I did not know specifically what he had done."

Now the Government agrees that there were variations in the testimony of these men. I am talking about the Solicitor General's brief, that there were variations in their testimony, that they had modified their testimony by their 1965 assertions and the Solicitor General states that this change in their testimony could justify the conclusion by the trial court that

other aspects of their testimony were also unworthy of belief.

Now in Zenith's brief to this court, and I am referring to pages 86 to 88 they quote from some of this same discredited testimony about the distributor converting sets and asserts,

"There was no denial of this testimony, and there is no other evidence in this record on the issue" where the other evidence in the record on the issue is there, recanting that testimony when they got to trial the second time.

Q Mr. Chadwell, on the basis of some experience, may I ask you really, these people were not cross-examined in the first trial, were they?

A They were the second trial. Yes, sir.

Q Now, on the second, what you call the second trial which is the production of evidence ---

A Yes, sir.

Q After the findings were made, pursuant to permission of the Court, I take it your point must be that on cross-examination which is really what it was, wasn't it, there was no cross-examination in the first trial.

A No cross-examination.

Q And then substantially on cross-examination these men testified as you have here narrated and perhaps at most what you are trying to say to us is that things that were brought out on cross-examination were more deviational, more deviant from what they said on direct testimony than as a

common ordinary experience of lawyers and witnesses in the trial of cases. Isn't that right?

A It certainly is, your Honor.

Q Because every time you examine a witness particularly, on an expert subject of this sort, you bring out lots of facts that they don't adduce on their direct examination.

A True.

But I submit to your Honor that when they make statements that are as flat as these were both times it is something more than you would normally expect to get by some modification of their testimony.

Q What is the reason for exercising the Canadian ---

A I think the reason is that when I started out I wanted to show how they had buried their testimony with respect to the English part and where we had a second hearing, or an additional hearing, and did not have one on the Canadian part, I wanted to show that because I think that had a bearing on the decision of the Court of Appeals to reverse after reviewing the entire record.

Because I think the Court had serious question as to the credibility of the witnesses after noting the differences in their testimony at the two hearings.

Q Did the Court say so?

A As I said, Mr. Chief Justice, they did not say so except with respect to the second point and on that they said

that Zenith didn't gain anything by putting in this testimony concerning convertibility of the sets.

Q And plus the fact that the District Court saying this again that after it was all through with the second phase of the case, nevertheless thought these two witnesses were believable enough in some respects to award a judgment with respect to England.

A They did.

Q In addition to Canada.

A They did.

Q Yes.

A But that judgment with respect to England -- Mr. Kayser is going to cover Canada is the reason I am not doing that ---

Q I see.

A But that testimony with respect to England was all important to them.

Q Are you going to argue that given their testimony even as changed the second time but given the truth of it that nevertheless they are not entitled that the proof was insufficient to show the impact, the fact of damage?

A Yes, sir. And the reason is that ---

Q Which course did the Court of Appeals take do you suppose? Assuming that their testimony was correct, and nevertheless they didn't prove damage or ---

A No. No, they did not assume their testimony was correct. As a matter of fact they held that the real reason that Zenith did not export to England was that they were waiting for a change by the British Government in the television standards from the 405 to the 625 line which was an exceedingly important change which made obsolete all television sets unless they were converted at considerable expense and the fact of the matter is that during the damage period -- in fact in 1961 in the middle of the damage period -- Ramsey wrote to Zenith and reported on the continued testing and examination of the 625 line standard ---

Q Is the Court of Appeals bound to view the testimony in a case like this in the light most favorable to the ---

A No, sir. And that is a fact I would like to discuss which is brief although Mr. McConnell did not refer to it, I think that the Court was right in relying upon the decision of the Gypsum case and that a finding is clearly erroneous when -- although there is evidence to support it -- the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed.

Now that is the rule that has been followed in a question of the power of the Court of Appeals to reverse a decision of the trial court since the DuPont decision which I believe was some 25 years ago.

Now the contention is raised here that the jury rule

should apply in this case despite the fact that this was a case tried by the court and without a jury.

Mr. McConnell also has made that contention and that I assume I think also the suggestion of the Solicitor General. But there is no doubt at all that Rule 52a makes the provision that I have referred to. There is no doubt at all that under the decision in the Gypsum case the rule is that the Court of Appeals has the right to reverse even though there is some evidence to support the findings when they are left with this definite and firm conviction that a mistake has been committed, and the Court stated that it was left with a definite and firm conviction that a mistake had been committed.

And I must say that the Government as much as admits that applying the standard, the established standard, under 52a as stated in the Gypsum case that the Court of Appeals was right in reversing on that ground if you assume that that ground is the correct one.

Q Did they testify before the judge?

A Yes, sir, they did.

Q He heard their evidence?

A He heard their evidence.

Q Is all that it means. A Court of Appeals, your relying is on an old volume. I understand that you are relying on and that the Court of Appeals had a right to set that aside and it did so on the basis that you are arguing now.

A Yes, sir.

Q Largely because of their belief that these two witnesses were not critical?

A Well, I don't think it was only that, Mr. Justice Black.

Q Well, I said largely. That is all right.

A Well, I think another very important point to the Court of Appeals and in fact they said so is that there was the delay or complete failure to do anything about shipping sets to England because they were awaiting the change to the 625 line broadcast system.

And the correspondence shows that. The contemporaneous correspondence shows it without any question of a doubt. That is what they wrote back and forth about it. Finally there was a firm statement by Mr. Ramsay that they could not import and sell until the change was made.

Nothing could be clearer that there was a contemporaneous document, contemporaneous correspondence directly contradicting and directly contrary to the theory that Zenith was interested in and wanted to import to or export to England during the damage period.

Q But there is a difference, is there not, between the lull in England and the lull in Canada on the subject?

A On the subject of ---

Q Well, on the subject of the importation, what

could have bothered them, what could have kept them out of Canada? And what could have kept them out of England?

A The only thing that could have kept them out of England that I know of was their desire not to go there until there was a shift in the broadcast standard. That is what the correspondence shows. The plaintiff claims it was the pool that kept them out.

Q The difference was with reference to Canada.

A Well, the plaintiff claims that the pool kept them out. But the pool had nothing to do with it.

Q In Canada or in England?

A In England I am talking about.

Q In England, all right. But you are using all this as a basis also to answer them on Canadian shipments.

A Well, no, Mr. Kayser is going to talk about Canada.

I merely said that the two witnesses who had testified with respect to England also testified with respect to Canada. The reason that they stayedout of England is clear, it is undenied. It was denied by Mr. Wright. He said he wasn't holding up until the 625 line standard came in but the contemporaneous correspondence denies that.

Q I am a little mixed up on these things. How many millions in England is the judgment and how many millions in Canada?

A Well, there is approximately $15 million in England in TV's, plus about $2 million in radios. No, I think it is $13 million and $2 million.

Q And in Canada? What is the judgment?

A $19 million in Canada.

Q Mr. Chadwell, do you know of any case where the Court of Appeals has been approved in really reassessing the credibility of the witnesses? Where you assume that certain evidence that has been testified to by one person, the trial court was right but the Court of Appeals, absent any contrary evidence, says we disbelieve that witness and will not accept his testimony?

A Your Honor, ---

Q Gypsum isn't such a case?

A Well, in the Jackson case which was just decided by the Court of Appeals by the District in 1965, and it discussed at pages 82 to 83 of our main brief, says that a question of credibility doesn't depend necessarily, entirely on demeanor. It depends on whether the testimony is inconsistent with known facts as well.

It depends on whether it is inconsistent with contemporaneous documents, it depends on whether it is inherently believable.

And if the Court of Appeals reaches the conclusion against it on those theories without respect or regard ---

Q But the Court of Appeals hasn't said any one of those things here, any reason whatsoever for disregarding the testimony of these people ---

A The statement that I just made was the only one.

Q But I would agree that even with that you still certainly might win by saying that even if their testimony is believed ---

A I think that is right.

Q That the Court of Appeals, I take your argument to mean that the Court of Appeals not only rejected this testimony but was wholly justified in doing so.

A I think they were wholly justified in doing so.

Q Tell me, what standard do we apply here?

A I think you apply the standard of the DuPont case that I stated.

Q I don't quite follow you.

Q You mean the Gypsum case?

A The Gypsum case, yes.

Q You mean then we redo what the Court of Appeals did?

A No, sir, I don't think you have to redo what the Court of Appeals did.

Q Well, if you don't redo it, then there must be something less we do. What is the something less?

A Well, I think that in order to sustain the Court

of Appeals, what they did, you either accept their review of the record and their conclusions with respect to the record or you have got to review it.

Q That is what I am trying to get to.

A Yes, sir.

Q We look at their review and say whether in some respect it erred, is that it? That is one way of doing it. Is that right?

A Yes.

Q Well, we look at it and test what they did against what standard? That is what I am trying to get to. Against what standard we test whether or not what they did was right?

A I think the same standard that they tested against.

Q That sounds to me, Mr. Chadwell, like doing over again what they did. Taking this record and applying the Gypsum test and independently concluding whether the Gypsum test required the reversal.

A Well, I think the question is whether the Court of Appeals followed the test that it laid down by this Court in Gypsum. That is what they did, I think. That is what they said they did.

They said they did.

Q This is a non-jury test?

A Yes, sir.

Q And in a jury case it would be different?

A Oh, yes. A jury case is different. This is a non-jury case. And I say that Rule 52a plus the decision in the Gypsum case is what controls and I think this Court can consider whether the Court of Appeals did that. They said they did it.

And they have outlined in their opinion exactly what they find as to each one of the three pools, all of which is amply supported by the record and I don't see how the record could point to anything else.

Q Well, now, how much of the record -- it is about this high (indicating) -- do you think we have got to look at?

A Well, I would think that you would have to do the job that the Court of Appeals has done in order to decide whether they were right or wrong in what they did.

Q Well, that sounds to me like doing over again what they did.

A Well, we point out in our briefs I think what the record shows on these things.

Q Mr. Chadwell, as a result of your argument on the embargo in England, do you want us to hold that they are entitled to no damages or do you want us to hold that the damages should be diminished? I raise the fact that they had not planned to build up any business while the embargo was in effect.

A I think that there should be no damages because

the evidence does not show through findings or through evidence what the damage should be on this other theory. It does not show it and that is pointed out in the Government's brief, where they are recommending remanding for further testimony on these points.

Q Is that agreeable to you?

A Well, we think that it is not necessary to do that. We think that on the decision of the Court of Appeals based upon these contemporaneous records as to England, based upon the facts as to Canada, which Mr. Kayser will discuss, and based upon the fact that in Australia there was never any effort to get down there at all that amounted to anything.

Since 1951 anyone could have had an import license into Australia. There has been no problem about it whatsoever.

Q Is that conclusion based upon the fact that we ought to wipe out of our consideration the testimony of these two men?

A I think you have got to consider it against the other testimony in the record and the other facts. I don't see as to England how in the world the general statements of these men can be credited against or over contemporaneous documents exactly to the contrary. That is what exists here.

Q But there was no embargo during the statutory period.

A That is right.

Q Well now, they do contend, do they not, that the pool prevented them from doing business in England during the statutory period?

A During the damage period.

Q Yes, damage period. Why should we wipe out the testimony so far as that is concerned?

A Because that testimony is contradicted by their contemporaneous documents to the contrary, as I have just said. This correspondence in 1961 ---

Q When do those contemporaneous documents come in?

A They came in from ---

Q No, when did they come into this record?

A Oh, into this record. They were offered by Zenith counsel in a bulk package at the first hearing.

Q Were they admitted then?

A They were admitted then. And there are a great number of these letters and we cite them in our brief. There are some that we have made an offer of proof with respect to because they had not been introduced. They are in the record as an offer of proof.

The document that I just referred to, written in 1961, in which it was said that we can't start selling in England until they change the broadcast standard, the 625 line. That is in evidence and was put in evidence by Zenith counsel.

Q Mr. Chadwell, since it is true in this case that

the case was closed, findings of fact were issued and you had it reopened for the purpose of taking additional proof.

Would it, on the basis of that, be just as fair for us to adopt the Government's position and remand this case?

A Well, I think this Court can certainly do that. It seems to me that on the record as I have stated it, speaking now about England, that you have got to weigh the contemporaneous documents against what they said. When you weigh the two I don't see how the Court can come to any conclusion except that which the Court of Appeals did come to.

Q You think we must do that in reference to the Canadian judgment, in reference to the English judgment?

A Yes, sir.

Q Because you think an argument is better in one than the other or why could we not decide in favor of one and not in the other?

A Well, of course, you could.

Q Well, why wouldn't it be justified? Isn't there a difference?

A Well, they are entirely different. They are entirely different. They are not the same pool. The Court could certainly do that. But I don't think the Court should do that and Mr. Kayser will finish our argument dealing with Canada.

MR. CHIEF JUSTICE WARREN: Mr. Kayser.

ARGUMENT OF VICTOR P. KAYSER, ESQ.

ON BEHALF OF RESPONDENTS

MR. KAYSER: Mr. Chief Justice, and may it please the Court.

Before getting to the subject of Canada, I would like to devote just another minute on the subject of England, and I think possibly clarify what may be somewhat of a misunderstanding.

The fact is that as to England the testimony of Wright and Kaplan which had formed the basis of the findings was two-fold.

First the testimony about having been kept out of England by the pools for many years which was disproved by the later proof of the embargo, this was one part of their factual damage theory as to England that the pools kept them from developing a market by June '59 from which developed market they could then profit.

And then the second part of that assertion was that in fact during the four years they were interested and intent in going in England and the testimony that Mr. Chadwell has referred to, having to do with the contention they built a few sets or converted a few sets and that the English distributor had tried to sell them, that evidence had been put in to indicate interest in the English market.

And that was the evidence that they relied on to show

interest and readiness to go into the English market during that four-year period.

Now, when they got back on the stand and were forced to admit that that testimony was not true, they were forced to admit it because we had taken the distributor's deposition and he admitted that there was nothing to it.

When they were forced to admit that there was nothing to their original testimony, that did two things. No. 1, it seriously impaired, we admit, their credibility on all aspects but secondly it knocked out the second of the two aspects upon which their English claim was based.

So at that point in fact they have no evidence in this record on which to base any claim as to England other than they had this question of Exhibit 220. The inferences to be drawn from that, which I will come to later.

Secondly, before going into Canada, I would like to answer the questions or respond to the inquiries this morning as concerns the matter of a release. Now, if I ---

Q Excuse me, Mr. Kayser, before you get to that, may I interrupt you. I take it that what you are really saying is that with respect to England on your Point 2 as you have just stated it, it says if Zenith were a stranger that this is the only evidence in the record that goes to their desire to do business in England, their readiness and ability to do business in England, when absent the alleged restraints?

A Yes.

Q And that this evidence with respect to the set conversion, convertibility of the sets, being refuted ---

A Repudiated, repudiated by the witnesses themselves.

Q Well, it goes to the question of fact, what has been called the fact of damage?

A Yes.

Q Well, now suppose we should disagree with you on that, without getting into the subtleties of that statement, if we should disagree with you on that, I take it neither you nor Mr. Chadwell is submitting to us, that the patent pool, you are not trying to defend the legality under the antitrust laws of the patent pool in Hazeltine's participation in it?

A I would like to answer that in two parts if I may. No. 1, I should say that on the point of intent to enter there is in addition to the fact that they repudiated, they recanted their testimony, there is also as Mr. Chadwell has said, there is the documentation in the record from Zenith's own bulk exhibit which clearly showed that during this entire period they were waiting for the perspective change of the broadcast standard.

Q I understand that. You have made that clear.

A On the second question, the fact is that we, as shown in our brief, entirely aside from any other aspect, we

believe that the record shows that from January 1958 on, if they in fact had had an interest in entering the English market thatfrom then after the embargo and through the damage period they could have obtained a license.

They never inquired for a license. They could have had a license.

Q I want to be very clear on one thing. Are you, or are you not arguing that the English pool -- let us take that A, and B the Canadian pool -- are lawful, are not unlawful with respect to the participation of Hazeltine therein?

A We, frankly, your Honor, as we have seen this case, we have not seen fit to go into that question, and we consider that the issue of the fact of damage which was found in favor of the Hazeltine Corporation by the Court of Appeals is a threshold question.

Q That is adequate. I understand your language. I am not asking you to concede the illegality.

A We do not. But we are not arguing it. We most certainly do not concede it.

Q What is your argument to the Court of Appeals on that subject?

A On the Court of Appeals, we frankly, your Honor, we made a very brief argument. We did defend the legality of the pools. We believe that they are lawful but there again our thrust was on the question, "Was Zenith in fact hurt?" And

also on the issue of the amount of damage as well as several other issues.

Q Could we take your briefs in the Court of Appeals on the question of legality as the total of your argument here if we come to that?

A No, your Honor, as I said we did not brief it exhaustive there and we have not briefed it exhaustively here.

Q Well, I would have thought in the Court of Appeals you would have to reach it exhaustively because you have the findings against you and I would think that you would want to prove to the best of your ability that these were legal if they were legal.

A Your Honor, we faced with the situation under which we had been thrust there. Frankly, we had to form a judgment as to what emphasis to place. We had a client who had the judgment of $34 million against him. We felt he was clear that irrespective of the question of legality which certainly I need not say in an area like this is a very complicated area, it was a matter of judgment to put our thrust where we thought it was most clear that the judgments below were wrong.

And that is what we did.

Now, on the issue of release I think -- and I will spend just a moment on that -- but it should be clear that the releases were in fact pleaded in the District Court by leave of Court and before entry of judgment.

And we have covered that point in our reply to the Solicitor General's brief where the point was made.

Also, I think it should be pointed out that on Zenith's reply brief filed in this court on page 16 Zenith admitted that the trial court permitted the filing of the pleas, as of a date a year after the trial, and then promptly overruled a motion to dismiss the counter claims on these grounds.

The releases were in fact pleaded admittedly after the original trial but before judgment by leave of the trial court.

Q What was the reason they were not pleaded at the first trial?

A Your Honor, we were not counsel, but I think the reason they were not pleaded at the first trial was because under the theory of action which was set forth in the original counter claim, there would have been no conceivable basis to plead them, because as set forth in that counter claim and in the affidavit of Mr. Crotty, one of counsel for Zenith, it was recited that the acts complained of, which formed the basis of this counter claim which was not filed until 1963, three years after the answer, had taken place after the filing of the answer.

That was a span of three years before filing of the answer and I would submit that it would be quite obvious under those circumstances the release would have no possible applicability and it was only after, as we pointed out in our brief,

Zenith switched its action to claim not that the acts within the past three years had caused damage but that by reason of the acts going back to 1926, Zenith had been damaged by the effect of those. It wasn't until that point that the release became applicable and at that time we got into the case, we pleaded it and were permitted to plead it.

Now as to the question of Canada, I think we must remember that the issue that we have here is whether or not there was a damaging impact by the Canadian pool upon Zenith's Canadian business during the four-year period. And by reason of the testimony given by the Zenith witnesses, the final ultimate issue of question there is, we believe, as the Solicitor General correctly stated it.

Namely, whether Zenith was unable to obtain a full-fledged Canadian distribution system during the period from June 1959 through May 1963, and if not whether such inability was attributable to the actions of the Canadian pool.

That is the issue as to Canada as to fact of damage. Now we have heard a great deal this morning about this alleged gigantic international world-wide conspiracy, and incidentally the proofs and the findings do not support that, but in any event we have heard that language about these alleged conspiracies or giant conspiracy.

Well, there are several observations to be made there.

First, Mr. McConnell has said, as to Canada, that its

evidence is almost entirely documentary and yes, it is. And it is all before 1957.

Secondly, I think we should remember that Zenith is not entitled to any recovery here by reason of any alleged illegality of the Canadian pool or any other pool or by reason of any overt act which may have been done is entitled to recovery, it is asking that it be paid money, it is entitled to that only if it can show that there was an impact, a damaging impact by those pools upon Zenith's business during the four years.

Now what does the record show incidentally as to Canada after the 1957 releases? It shows, yes, as Mr. McConnell says, it shows that there was a trade builder ad in August 1958 warning about infringement, but it also shows, that Mr. Wright sent a telegram and a letter, a strong letter, to the Canadian pool and said, "We are fully licensed under all Canadian patents which the pool controls, that we consider this advertisement detrimental, that if you ever send another one or issue another one, we will see you in court." And there never was.

Q Did the pool directly communicate with Zenith?

A No, Zenith communicated with the pool.

Q Was Zenith ever warned that it required a license from the pool to operate in Canada directly?

A Well, directly, there were meetings.

Q I thought we were told there was a communication

to Zenith in which there was a license for domestic production?

A Yes. But those communications, Mr. Justice White, were between Zenith and the pool, not made known to the distributing public, but, yes, there were a couple of meetings and there was, as Mr. McConnell has said,

Q But the pool said stay out unless you are going to build a factory up there?

A No, the pool sent Zenith a license form ---

Q For what?

A Which called for manufacture in Canada.

Q Wasn't Zenith informed that the pool held controlling licenses, controlling patents for --

A No.

Q -- which Zenith required a license?

A No, that letter as I recall referred to three patents, which it was believed -- the letter said it was believed -- that Zenith would infringe.

Q And in order to operate they needed those licenses?

A Zenith said they didn't need those licenses, your Honor. Zenith took the position that it was fully licensed and the fact of the matter is that Zenith entered the Canadian market when they sold ---

Q The pool's view was that you need something with us before you can operate in Canada?

A That was suggested.

Q Not only suggested, but said.

A It was said, yes. And no action was ever taken. Zenith continued to grow in Canada.

Q Well, how did this suit get started?

A This suit has absolutely nothing whatsoever to do with the foreign business of Zenith or with the Canadian pool, the English pool or the Australian pool, and I think possibly I would like to turn to that point since the question was raised right now.

Because Mr. McConnell when he was asked on that question said, yes, there was a finding to the effect that there was a connection between the Instant Patent Suit and the Canadian ---

Q He finally said it was on domestic production?

A Yes, there was a connection. However, the number of the finding he gave you, which I believe was 32, had absolutely nothing to do with the domestic litigation.

Further the finding which Zenith itself submitted and was entered in this case, Finding No. 13, after reciting the domestic activities of Hazeltine Corporation, including a reference to the Instant Suit, said that the injury to Zenith's business and property from the domestic suit and these other activities was $50,065, namely the cost of defending the litigation and there wasn't a word in any of those findings which

in any way proported to connect the domestic situation or the domestic suit with the Canadian situation.

And, in fact, not only is there nothing in the record but when in the colloquy which I had with the trial court in March on the reopening -- that is referred to at page 126 to 127 of our brief -- he made it quite apparent that in his opinion he did not understand that there was any connection between the domestic activities of Hazeltine Research and the foreign activities of the Canadian pool.

And the Court of Appeals accordingly said quite correctly, we submit that there is no evidence in this record to indicate any connection and that, in fact, the Appellate Court never took that suggestion seriously.

Q Well, that doesn't matter one way or the other, does it? Does it matter one way or the other with respect to the outcome of this suit?

Whether this suit grew out of a domestic controversy or a controversy that had its origins related to the foreign countries.

A We don't think it does, your Honor, but Zenith has argued that point in his briefs. We think it is totally irrelevant. There is no connection.

To get back to the Canadian situation, the question of this correspondence, the question of this Trade Builder ad, it is apparent that Zenith never considered it offered a threat

to it because when it filed its answer in this case in April, 1960, some years to months later if it had felt that these acts constituted a threat and damage to it, it would have been a compulsory counter claim required at that time.

And there never was any such compulsory claim until May, 1963, when they ascribed their damage solely to acts occurring after April, 1960.

Now Wright was asked by his counsel as to exactly what were the clouds or difficulties or effects which the alleged activities of the pool had on Zenith's business in Canada.

Q What about the distributors, anything to dispute the fact that the distributors were contaminated by the alleged conspiracy or whatever the word is?

A Mr. Justice Marshall, this is part of my next point.

Q Good.

A Mr. Wright testified as to two alleged effects of the Canadian pool and its activities during the period and he said they had to do with the holding back on advertising and promotion, and they had an effect on the ability to get distributors. At least that is the way Zenith has characterized that testimony.

Now on the first point of holding back on advertising and promotion, I submit that that point is no longer in the case because when we got Mr. Kaplan on the stand in November, 1965,

we asked him about Zenith's advertising in Canada, and he said that it was typical to what you would expect in a new market, in fact implied it was a bit larger and further Zenith's own Exhibit 218 in this case shows that there were in fact substantial expenditures in advertising, radio, television, newspapers, magazines, billboards; you name it, they used it.

The Government feels that it is indicated that they recognize that this is out of the case and we most certainly agree. But I think it should be pointed out and the Court of Appeals took note of this fact that this was evidence given by a witness, later shown to be untrue, by his own fellow executive.

We turn then to the second question, that of whether or not Zenith was in fact unable to obtain a full fledged Canadian distribution during the four-year period, and I submit that is the crux of Zenith's entire claim as to Canada.

Now, Zenith asserts that Mr. Wright testified that he tried to get distributors but he had problems. He could get some in Western Canada, but he couldn't get them in the other portions of Canada because of the Canadian pool.

But actually if you read Mr. Wright's testimony very closely you will see that even though someone might get that impression he didn't say that. He made some comments to the effect that the August, 1958, Trade Builder ad, things of that fact, would cause a serious problem in getting distributors.

But he never testified that in fact that there was

a single instance where he had failed to get a distributor or where a distributor had left Zenith.

Q Is there any finding on that testimony in the trial court?

A No, your Honor, that is one of the things that the Solicitor General pointed out, that you couldn't tell what the trial court's supposed theory was. And it may very well have been the theory that they could be awarded damages because the pool for many years prior to that had prevented them from building up a matured market.

The course, as we pointed out, that any damage based on that theory is gone, is not relevant because of the 1957 releases.

Secondly, it is said that Wright testified that he could get distributors in Western Canada but had trouble elsewhere. But the fact is that if his testimony is examined all he said was that they could get distributors in Western Canada, they had less success in the Central and Eastern Provinces but didn't say why.

And as a matter of fact, as we shall show in a minute, he didn't have trouble getting distributors anywhere in Canada.

Q I didn't get that last statement.

A We shall show in a minute the fact is that Zenith did not have difficulty getting distributors. By 1959 they were boasting they had a nation-wide network of distributors

effective and vigorous at all levels. So Wright's testimony, as I shall show in a moment, was not true.

Q What did the courts find on that question as to whether that testimony was true?

A Not as I recall, no, the findings had to do with this pre-1957 period. But there was, of course, as Zenith relies on, this very broad conclusory finding about drastic curtailment.

Q Mr. Kayser, may I ask you this. I wonder if the question before us on this branch of the case could be phrased this way.

Was there a basis for the trial court concluding that on account of threats by the pool to prevent the importation into Canada of products, Zenith products, manufactured in the United States, Zenith was deterred, prohibited, prevented from shipping its products into Canada and selling those products there? No. 1.

No. 2. Because of the activities of the pool in Canada, that distributor that Zenith was unable to obtain a full-fledged distribution system that you have put it, and that Zenith inferred that was there an adequate basis for the court conclusion that Zenith wanted to and but for, but for the activities of the pool, either with respect to prohibiting forbidding importation or with respect to threats against distributors, Zenith would have distributed and sold its

product in Canada.

Isn't that about what it comes down to in this branch of the case?

You have got two points, one the pool Finding 29 with respect to the pool activities in prohibiting importation of product made in the United States and, two, the distribution system, and either of those at this remote distance I suggest to you it arguably might support a finding that the pool has damaged Zenith in violation of antitrust laws.

And then the question is, has it demonstrated what the amount of damage is and if so, what is that?

A Well, your Honor, I don't believe I can agree that there was a record which would justify any conclusion of the fact of damage.

Because, granted a pool policy, we nevertheless have the fact that Zenith considered itself fully licensed, took that position and was never in any way interfered.

Q Well, as I think my brother, was developed in the colloquy with my brother, White, the pool nevertheless took the position that it would not permit the importation of Zenith products in Canada. Zenith could go up there and start a factory, but however it may be I am not asking you to agree to the conclusion right now, Mr. Kayser, but is this a correct analysis of issues before us?

That is to say, that whether there is an adequate

basis for the District Court's findings on pool prohibition of importation, whether there is an adequate basis for what is arguably implicit in the District Court's findings, namely that the pool threatened distributors and, third, whether there is an adequate basis for the finding that but for these restraints Zenith would have sold its product in Canada.

Are those the issues before us?

A I would think so, Mr. Justice, depending on what you mean by adequate basis. I think certainly there is the issue as to the effect of Rule 52a, but striking aside from that, yes.

Now, I would like then to come back to this matter of alleged inability to get distributors. Now the Solicitor General in his brief recognized that the proof on this issue, I believe he recognized that it was lacking or certainly of very low standard, and he made the comment "No person can be certain whether Zenith would have been able to obtain a Canadian-wide group of distributors notwithstanding the pool."

He made that as a comment and as a justification and as an argument for possibly supporting the decision of the District Court.

But may it please the Court, this brings us to the subject of Zenith's annual reports which yet arenot in evidence but they were in existence, they were in an offer of proof, made before entry of judgment, they are in the transcript before

this Court, we believe and Mr. McConnell recognizes the Court may take judicial notice of them, and we believe, respectfully, that they are inescapable unless the truth is to be ignored.

I think, respectfully, that there is a very basic question presented here. Granted, that these annual reports were not put in evidence during the trial. That is undeniable.

But the fact is that these are contemporaneous documents out of the Zenith files, they are the highest record of its stewardship to its shareholders, and they directly contradict the testimony of the Zenith witnesses if they be construed as Zenith says they should be.

And under the decision of this Court in U.S. versus DuPont, that when contemporaneous documents, admissions of this type, conflict with the later oral testimony of the witness, then it was said the contemporaneous documents must control.

Now on this question was Zenith able to obtain a full-fledged Canadian distribution system during the damage period, what do the annual reports say? 1959 report answers it unequivocally unless we are told that the annual reports are not honest.

That annual report says and I quote, "Zenith now has a strong distribution network at both the wholesale and the retail level throughout Canada." That covers the first seven months of the four-year period. Already they had a fully developed, strong distribution system at all levels, not in the

Western Provinces ---

Q I suppose the 5 percent share of the market could justify calling your system strong?

A Yes. Yes. Mr. Justice White, I would like to come to that 5 percent question.

Q Good.

A I believe it was your Honor who suggested that possibly this was the evidence ultimately on which Zenith must rely or seeks to rely as to Canada. Namely, Exhibit 220 which is reproduced in our brief opposite page 20.

Now that Exhibit 220, and I will explain the background testimony, shows that Zenith asserted that it was entitled to claim as its share of the market beginning from the first day of the damage period, June 1, 1959, the benefits of a share of the Canadian market equal to the share which it had realized through its many years of activity here in the United States.

Here, Zenith has been in radio since the 20's I believe and has been in television since the late 40's. So this Exhibit 220 was premised on the theory that Zenith should claim the entire claim, roughly 20 percent share of the market based on the notion its market should equal its U.S. market.

But what was that theory based on? It was based on the theory that the Canadian pool going back for many, many years, back to 1926, had been in there keeping Zenith products

out. And kept them from building up the market share and that therefore, because of those acts, they were entitled to claim the benefits of a fully-developed market.

But, of course, the fact of the matter is that the 1957 release released not only past damages but also future damages resulting from any of those acts going back from 1926 to 1957.

Q The Court of Appeals really wasn't -- didn't reverse on the amount of damages or on the validity of 20 percent as against 15 percent. What it said was that, I gather, that it wouldn't have had any more of the market absent the pool?

A Yes. Any more.

Q There just wasn't any impact.

A There was no indication that the pool, that beginning after the release ---

Q Bothered it at all, bothered Zenith ---

A That is right. And incidentally, the Court of Appeals did make reference to the release in its opinion.

Q You say the annual report indicates that Zenith itself was saying that we wouldn't have any more than this strong distribution system absent the pool? I don't read it that way.

A Your Honor, given the proposition that Zenith in making its claim in having a market starts from scratch. Would have to start, we say, from scratch in 1957, because of

these releases. I submit that these annual reports in this offer absolutely destroy any notion that with that starting point Zenith did not do as well as it could have.

In fact these reports, to the shareholders, to the public, are an extended story of success after success after success.

Q It referred to an annual report showing a $14 million annual business I gather. Was that in the same status as the reports to which you are referring?

A The report that he refers to I believe is a report which I think they made to the Commerce Department or something like that. It is not in the annual report.

Q Oh, I see.

A It is not the document that they attached to their brief.

Q I see. And, do you think that we can or cannot properly take judicial notice of the report to which he refers?

A Oh, I think, your Honor, you can take judicial notice of it but I don't think it means anything.

Q I said properly.

A Yes, but I don't think it means anything.

But these annual reports, which I say are the highest report of the corporation of its stewardship to its shareholders, what do they say?

I have pointed out that they say they had the

distribution network complete by 1959. In 1960 they report that Zenith successfully countered the downward industry sales trend and made important gains.

1961. They talk about gratifying progress, consistent national advertising and the enthusiasm of distributors and dealers as resulting in a doubling of their sales.

Q That refers specifically to Canada?

A Yes, your Honor, it does. Yes, it does.

Q Do the excerpts on this in your main brief on pages -- where are they?

A They are reproduced in full in the Appendix A to our brief. The reports other than the statistics for those years. Yes, the excerpts also appear beginning at page 55 of our brief.

Now Zenith counsel has tried to dismiss these annual reports by saying well the corporation doesn't have to cry on its shareholders' shoulder, but, of course, what he overlooks is that these reports, beginning in 1957 are really a very, very revealing year-by-year history of Zenith's operations. They are in direct conflict either with the testimony of the witnesses or any inferences which anyone might seek to draw from them.

And on this matter of crying on the shareholders' shoulder, the fact is that Zenith did exactly that.

Q Among other things, the Japanese competition ---

A Japanese competition. They also talked about the problem of the tariff in Canada, exchange control, ratio. '57 as they said the cartel is now at an end and never mentioned it again, or the problems in the cartel.

So it really is a very, very revealing history. Well, now I would like to spend my remaining 4-1/2 minutes on behalf of the Hazeltine Corporation raising the jurisdiction of the question which is also before this court. I must do so very briefly and will make only the points as quickly as I can.

First, that Hazeltine Corporation a parent was never named a party to the litigation, was never served with process, never filed an appearance and the litigation was solely between Hazeltine Research and Zenith Radio.

The only proported basis for holding the parent liable was the stipulation entered into May 7, 1963, and as Mr. McConnell himself said this morning, that stipulation was between the parties, namely Hazeltine Research and Zenith, and Hazeltine Corporation was never a party to it.

And it should be noticed also that in the counter claim filed in this case which was some three weeks after the stipulation, although Zenith referred to Hazeltine Corporation as the parent, it never named it as a party and in fact in the claim for judgment for treble damages, a judgment was asked only, a judgment against counter-defendant Hazeltine Research, never Hazeltine Corporation.

Now, the fact is also that both Zenith and the trial courtknew that Hazeltine Corporation was not before the court. Zenith, in its brief, constantly distinguished between the parent and the subsidiary, said that Mr. Dodds represented the subsidiary, not the plaintiff.

The trial judge himself in a colloquy when I raised the question that Hazeltine Corporation was not a party, what did Judge Austin say?

"Well, of course, Hazeltine Corporation wasn't a party to the lawsuit."

That is the trial judge speaking.

Now, finally, and I think this is really very significant in this picture, the first time Hazeltine Corporation even knew that there was any thought that it was to be bounded by the judgments was the day after the original findings calling for the enormous award of $49 million were entered, and that Hazeltine Corporation heard about it over a Dow-Jones tape to the effect that Zenith's counsel has advised that he intends to ask that Hazeltine Corporation be bound by the judgment.

The reason for this, I suggest, is obvious. These findings for $49 million were 15-16 times the net worth of Hazeltine Research. In fact, substantially greater than the total assets of Hazeltine Corporation and its subsidiaries.

But at least Hazeltine Corporation had more assets than Hazeltine Research and, therefore, Zenith decided at that

point that the judgment should be disserted against the parent. They succeeded in getting the trial court to do that, even though the trial court himself had admitted that Hazeltine Corporation wasn't a party to the lawsuit.

Your Honor, I still have a moment more of time, but I would ask if anyone has any questions. I have hurried to finish within my time and unless someone has any I shall sit down.

MR. CHIEF JUSTICE WARREN: Mr. McConnell, you have a few moments.

REBUTTAL ARGUMENT OF THOMAS C. McCONNELL, ESQ.

ON BEHALF OF PETITIONER

MR. McCONNELL: I was taken to task by Mr. Chadwell for not mentioning England but I ran out of time. I had to choose something ---

Q Before you run out of time, are you going to get on this point made ---

A I will, your Honor.

After this case had been submitted and we have heard about the findings being entered -- Hazeltine entered findings. They presented complete findings on every aspect in this case. And in those findings time after time after time they asked the trial court to approve Hazeltine Corporation's entry into the pools, the use of their patents in the pools, that there was no illegal use of Hazeltine Corporation's patents, foreign

patents, and Hazeltine Research, Inc. had no foreign patents. They were the patents of Hazeltine Corporation. If they had entered those findings, I couldn't have said one single word about their not being readjudicated.

I was there, they presented them, we stipulated that the companies were the same and they were there asking for relief from that court.

And it was only -- you talk about the findings being written but they wrote findings. The court asked both sides to present findings. They wrote them. We wrote them. And the court entered our findings. And it is done and approved by the Court of Appeals out in the Seventh Circuit.

Further than that, all of their officials were there during the whole course of the trial and knew that the two companies were stipulated to be one and the same and that Hazeltine was there, their counsel for the parent company tried to justify their participation in these pools.

Trying to get a complete bill of health from the District Court on their violation of the antitrust laws and there isn't the slightest question in the world about that and the rule is that a party that comes in and asks relief from a court submits itself to the jurisdiction of the court.

Not only that, this isn't a case where a judgment was entered against somebody who wasn't there -- off in left field somewhere. They came to the court before our judgment was

entered and they raised the contention that they were not bound by what is going on in this court and they raised the question of whether or not the submission of these findings brought them into the case.

And they lost on that issue. And the District Court said they were in the case. That is true, he referred to the stipulation, but here we were dealing with a situation and a stipulation and why was the stipulation entered. We don't have to speculate about it.

They presented a stipulation in which they said for the purposes of this suit these two companies are to be considered the same. Why? They spell it out. To avoid the necessity of looking through the court for bail from the subsidiary to the parent. That was why. So they wouldn't have to go into the ---

I could have made the proof that one was the agent of the other. One was the alter ego of the other. No problem of proof. They were there. This isn't a case where you are trying to hold somebody who wasn't there.

Thank you.

(Whereupon, at 2:35 p.m. the argument in the above-entitled matter was concluded, the Court recessing until 10 a.m. Thursday, January 23, 1969.)