Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 80

In the Matter of:

ZENITH RADIO CORPORATION,

Petitioner;

vs.

HAZELTINE RESEARCH, INC.,

Respondent

Place Washington, D. C.

Date November 10, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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HAZELTINE RESEARCH, INC.,

REspondent.

Washington, D. C.
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The above-entitled matter came on for argument at 10:05 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

THOMAS C. McCONNELL, Esq.
134 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

VICTOR P. KAYSER, Esq.
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Chicago, Illinois 60603
Counsel for Respondent

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 80, Zenith Radio Corporation against Hazeltine Research.

Mr. McConnell, you may proceed whenever you are ready.

ARGUMENT OF THOMAS C. McCONNELL, ESQ.

ON BEHALF OF PETITIONER

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

I appear here on behalf of the Zenith Radio Corporation, the petitioner in this case.

The case comes here by way of certiorari to review and all of the Court below, Seventh Circuit Court of Appeals, which vacated an award of damages in favor of Zenith Radio against Hazeltine Research, Inc., the respondent. The single damages were $6,297,391, which covered and resulted in a damage award and judgment of $19,077,173.

This is the second time this case has been before this Court in certiorari and under the present case. I believe that it is necessary for me to briefly review the prior proceedings.

On November of 1957 the respondent sued the petitioner in the United States District Court in Chicago for the infringement of an electronics patent. The petitioner filed an answer, setting out the patent was invalid and that it was misused because its counterpart was placed in a patent pool in Canada known as Canadian Radio Patents Ltd.

On May 22nd of 1963 the petitioner filed a counterclaim under the antitrust laws setting out that they had been interfered with in its business in attempting to export radio and television sets in the United States and the Canadian markets. Its business had been serious damaged and they asked for treble damages.

On a trial, the trial court found that Zenith had been damaged and in the Canadian market had been damaged to the extent of over $6 million, and on April 5th, 1965 entered a judgment in favor of the petitioner and against the respondent in that amount of money.

After findings had been made and after the court -- a year after the case had been tried, the Court entered its findings and conclusions against the contentions of the respondent. The respondent appearing with new counsel attempted to bring into the case two new defenses, affirmative defenses so called, namely, an attempt to plead the statute of limitations and an attempt to bring in a release which had been executed in a prior proceeding against RCA and General Electric and Western Electric, a proceeding to which the respondent was not a party.

Q Have those issues not been raised in any way in the trial itself?

A No, these issues have not been raised in the trial itself, because no pleadings of the affirmative were ever made at the time of the trial. And the first time they appeared

was a year after the case had been tried and the proof had been closed.

The current court refused to reopen its findings and conclusion so far as the Canadian damage case was concerned, and affirmed its judgment. On appeal the Court below reversed the Canadian damage award on the ground that it said that there was no fact of damage shown by the proof in the case.

The case then came here by certiorari and this Court reversed the Court below on the Canadian damage issue and held that there was abundant proof of the fact of damage and held that the case should be sent back and remanded for further proceedings in accord with the opinion of this Court.

Now I want to quote one paragraph from this Court's prior opinion, because it seems to me it really summarizes the whole case as it existed at that time. This Court said in its prior opinion:

"We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. * * * HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time Zenith was deprived of what always had been refused it -- a license on pool patents permitting it to sell American-made merchandise in Canada. * * *

"Here, Zenith was denied a valuable license and

submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it had enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed."

Now the claimed damage was a measure of damages which has been approved by every court that has dealt with it here in this case, including the Court below, was a comparison between what Zenith made in the way of profit in the American market against comparable competition to which it had in Canada. And during the same period of time, in the period that is that we were comparing, what Zenith could do in an open market as compared with compared with what it could do in an absolutely closed and restricted market.

That computation showed that the best that Zenith could do in the damage period, which is a definite four-year period from May 22, 1959 to June 1, 1963 -- the best that Zenith could

do was 3 percent. Well, there was one year that it went up, I think, to 5 percent. But it started at 3 and it ended at 3, faced with the opposition of the pool.

In the United States, on the other hand, it had 16 percent of the radio and television market, so transposing the profits on that volume of business, we reach the computation of the amount of the damages.

Now the only thing before this Court today is the amount of petitioner's damages. This Court has already held that the facts of damage have been proved and has concluded the issue as between these parties by a decision which is res adjudicata and cannot be in any way attacked.

So we have a very narrow issue here, and that is was the proof sufficient here to establish the amount of the petitioner's damages? On the remand the Court below construed this Court's mandate as permitting it to re-examine as it the statute of limitations defense and the release defense were already in the case, to re-examine what effect those two defenses might have on the amount of petitioner's damages.

And it paraphrased part of this Court's opinion. I think the Court -- I can't quote it exactly, but the substance of it was this Court said that since the damage amount was computed by assuming at the beginning of the four-year damage period Zenith had a mature market, which the evidence shows it would have had in the absence of the conspiracy. There is evidence

to that fact, not denied. Since it assumed that, then some part of the damage which was allowed must have arisen from acts, overt acts or causative acts, which occurred prior to the damage period. And taking that as a basis, the Court below then said that any damages caused by overt acts prior to the damage period which could be traced back to show that they caused the actual damage, that that couldn't be considered on a damage award in-- the face of the plea of the statute of limitations and also in the face of a plea of relief.

Now there is a question of labor here, but I am not going to argue that here this morning, because our case is so clear on the merits that it seems to me that it is diverting and it gives substance to defenses which it is our position are absolutely irrelevant and have no merit whatsoever on this consideration.

It is our position and it is our submission that only four years of damages were ever claimed, that only four years of damages were ever awarded, and that the only damages which were awarded were profits which had been lost by Zenith in that four-year damage period.

Now my opponent defined the issue in this way, and I think I had better take their word for it, because it is a pretty good definition of what this issue is. At page 62 of their brief, they say:

"Similarly, the decision of the Court of Appeals was

not that, as a matter of discretion, the trial court should have granted a new trial. On the contrary, the Court of Appeals held that the trial court had committed errors of law (namely, the failure to give the proper effect to the statute of limitations and the release defenses) and that to correct those errors of law, the taking of additional evidence on the issue of the amount of recoverable damages is necessary."

Now, it is apparent if there was no error of law in the District Court's refusal to entertain those defenses, there is no possible basis for the grant of a new trial by the Court below.

Now it is our contention that since none of the petitioner's damages accrued or came into being until the damage period, it is absolutely irrelevant whether the causative act originated at some previous time or whether it traced back by some sort of proof how much of the award was due to this or that, that happened prior to the damage award.

There is nothing in the statute of limitations which is applicable to this case which bars recovery on damages which accrued in the four-year period. Section 4(b) provides, and it is very specific -- there isn't any ambiguity about it at all: Any acts to enforce any cause of action under Sections 15 or 15(a) of this title shall be forever barred unless commence within four years after the cause of action accrues.

The Court below interpolated into that statute the following words. It said the law with respect to the statute

of limitations in Section 15(b) of the Clayton Act is that the period commences to run from the last overt act of the conspiracy.

It says nothing like that in this statute. It is a complete reading into the Act of something which isn't there and this Court said, in Radovich against National Football League, that it was the province of the court to construe the statute as it was and not read into it -- it should not add requirements preferring the private litigant beyond what is specifically set forth by the Congress in those laws. And there is no congressional authority whatever for reading into this very clear statute of limitations the words which the Court below did.

Now that bring us to when did this cause of action accrue? In a civil suit under the antitrust laws there is no cause of action until damage has ensued which is actionable. That is when your cause of damage accrues and that is admitted at pages 41 and 42 of the respondent's brief.

Here the cause of action could not accrue until Zenith lost profits. It hadn't lost profits until the four-year damage period and there is no way in which it could sue for a loss of profits before the profits had been lost. It had to await the time when it lost its profits, and all of its proof was based on the computation which, by the way, was never denied, no testimony against it, as to how much profit was lost during a particular four-year damage period.

The Court below and my opponent say that the statute

of limitations must run from the overt act which caused the loss of profits. Let's see where that leaves us.

That means that if any acts which cause these losses of profits occurred prior to this damage period, Zenith couldn't have sued for them then. It hadn't lost any profits. And when it got down to the time when it had lost profits, it couldn't sue for the overt act because they are barred by statute of limitations and the whole argument obviously just proves too much, and is contrary to the statute.

Now bear in mind that we are dealing here with a continuing conspiracy. This Court found that this conspiracy existed all during the damage period and found that specifically in its opinion, and that we are dealing with constant invasions of the rights during a time we are trying to compete in Canada during this four-year period.

Now could we have sued for those profits prior to the damage period? Well, all we have to do is look at the proof that was adduced here and see that is impossible. First, Zenith had to show -- and this Court on another branch of this case held -- that in order to show facts of damage, you have got to show that you are equipped to compete, that you are willing and able to compete in the foreign markets from which you claim to be excluded and that, absent the conspiracy, you would have been there competing.

On that it was said that we hadn't made that proof in

England and Australia. So how could you make proof of that kind prior to the damage period? You had to show that you were in business, but you wanted to compete, that you were equipped to compete, and that you were prevented from competing.

Secondly, we had to show that this pool was in operation during this whole four-year damage period. Now we couldn't show that prior to the damage period. They could have disbanded their pool. It would be entirely speculative as to whether they would have continued it.

And, thirdly, we had to show a comparable measure of damage in the United States, which meant that we had to be in business in the United States as well as in Canada during the damage period. So it was utterly impossible for Zenith to have proved up the loss of profits which it did prior to this damage period and the fact that an overt act entered into it -- I don't care where it originated. If they originated way back in 1926 when this pool originated, if they had a causative effect that dont' result in damages until the damage period, there was no cause of action until they did originate in damages. But when the did originate in damages, it was only during the four-year period and the statute does not bar, and the Act so says.

The Act says that it starts when the cause of action accrues, not when overt acts were performed, but when the cause of action accrues.

So much for the statute of limitations. We say it is

absolutely and utterly irrelevant even it had properly gotten into the case, which we do not agree.

So I want to turn now to the release point.

There was a release given in this record, but it didn't have anything to do with the respondent in this case. That release was in a prior proceeding between Zenith, RCA, Western Electric and General Electric. We had been excluded continuously by this pool since 1926. We sued them in a counterclaim in the United States District Court and we settled the case, and we settled it with the release given September 1957, a year and a half before this damage period started.

Now the Court below had a little difficulty with this, and understandably so. The following colloquy occurred between the Court in Tague:

"THE COURT: When was the RCA release signed?

"MR. KAYSER: It was signed, as I understand it, on September 27, 1957.

"THE COURT: As I understand it, they are only claiming according to your chart from May 22nd of 1959 to May 22 of 1963.

"MR. KAYSER: Yes, Your Honor, that is very true.

"THE COURT: I am not sufficiently astute today to understand your theory so that I can understand how this release in '57 had anything to do with what occurred in '59 to '63."

Now it is our position that if the Court below can

construe a release executed in 1957 to bar a cause of action which did not arise and did not exist until 1959, then this release is construed in a manner to relieve a future cause of action of the antitrust laws which would be illegal, invalid and against public policy, because the public hasn't entered in the enforcement of the treble damage provisions of the antitrust laws.

There are other reasons why this release is not valid and they are discussed in the brief. So it is our submission that there is no relevance in either of these defenses. Even if they had been in the case, there was nothing to them. And they never got into the case, and this Court referred to them as belatedly raised in its prior opinion.

Now I have one further point. Bear in mind this Court has already found the facts against them, the only question is the amount.

I am going back to the Eastman Kodak case. This Court has held that once the facts of damage are established, mere uncertainty as to amount will not vitiate an award of damages because the uncertainty which we are talking about, and we are talking about it here. The claim is that we did not have a mature market, to begin with, and it is speculative whether e would have had and, therefore, it is uncertain and therefore our whole damage computation is uncertain and the damages awarded are uncertain. But throughout the briefs and throughout the

arguments, the respondent has taken the position that they have been in this pool since, well, 20 years and they have contributed along with their co-conspirators to our inability to compete in any way in Canada. Of course we had no mature market. We couldn't get a mature market and the reason we didn't have a mature market was because they had prevented it. In other words, to apply that argument to this case means that the uncertainty, if there is an uncertainty and we do not believe there is in view of the evidence in the case, first, that we would have had it absent the conspiracy -- not denied; computation of damages -- not denied, not objected to, no objection on the ground that it was uncertain. It went without objection, no contrary proof, no opinion proof to the contrary within that situation.

This Court said in the Bigelow case and it said in other cases that a jury may make a just and reasonable estimate of the damage based on relevant data and render the verdict accordingly. In such circumstances juries are allowed to act upon probably and inferential as well as direct and positive proof.

Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victims. And this Court said it in another way by saying, in the absence of more precise proof, the best evidence that can be produced is all wrong because "the most elementary conception of justice and public policy require that the wrongdoer shall bear the width

of the uncertainty which all wrong has created.

And here throughout the brief these gentlemen say they have created the uncertainty because they kept us out of the market during all the prior periods and the damage period.

Now, as I say, this Court has held the fact of damages. What did the Court below say? The Court below said, "There is testimony for Zenith relied on by the District Court that in the four-year damage period had Zenith been free from the lawful activity of the Canadian pool, which virtually excluded it from the Canadian market, it would have enjoyed the same proportion of that market as it did in the United States. In Canada the competitors were the same as in the United States. Its promotion and advertising flowed back and forth between the two countries. The distributors in Canada were available, but were frightened off by the pool's activities and threats."

It is our view that this is competent evidence, prima facie, upon which the amount of damages could reasonably be approximated by virtue of the Supreme Court's decision in Bigelow and there is not one iota of countervailing evidence. And I submit that the judgment entered April 5, 1965, should be reinstated.

MR. CHIEF JUSTICE BURGER: Very well, Mr. McConnell, thank you.

Mr. Kayser?

ARGUMENT OF VICTOR P. KAYSER, ESQ.

ON BEHALF OF RESPONDENT

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

I propose to spend my half-hour primarily answering the assertions made by Zenith counsel, but I would like, first, to give a brief background against which this discussion may be conducted.

As Zenith counsel stated correctly, the issue here involves the amount of damages recoverable by Zenith and Zenith's right to recover some damages is not in dispute. This Court on the prior appeal in the Court of Appeals to recognize on remand that Zenith is entitled to recover those damages caused by the Canadian Patent Pool taking place during the four-year period of May 22, 1959 to May 22, 1963.

But the question which remains is whether Zenith is entitled to recover those damages suffered during the four-year period that as a result of acts of the Canadian pool taking place prior to the four-year period. The prior period during which the Canadian pool is supposed to have interfered with Zenith's operations began in 1926.

Q Now Mr. McConnell told us that this was not raised in the trial court in the first go-round. Will you clarify that at some point?

A I might as well go over that directly now.

Q Whenever you wish.

A I will, Mr. Chief Justice. The fact is that the defenses of statute of limitations and the defenses of the September 27, 1957 releases were raised after trial and after findings, but before entry of judgment. At that time we entered the litigation and moved for a reopening to prove these defenses. That leave was granted, and we have outlined the circumstances, the events and statements of the trial court at pages 51 to 55 of our opening brief.

The leave was granted to prove those defenses. They were pleaded. We set the motion to dismiss, reciting that those defenses had been pleaded. The motion was overruled obviously for the reason that the trial court felt that the defenses had no merit. As this Court said, "Apparently the trial court felt it was immaterial as to whether the damage-causing acts had taken place during the period or prior to the period."

And as we pointed out in our brief, Zenith itself has admitted both in its reply and its original in the first appeal and in this appeal that we were granted leave to file the defenses, that the defenses were overruled and held to have no merits, and for that reason the final judgment was entered as to Canada.

Q Do you think the record also lends itself to the view that the ground for its statute that you go ahead and file your defense, but I am not going to entertain them individually?

A Mr. Justice, I think not. As a matter of fact, I would think, for example, to grant the case cited in our brief where a similar suggestion was made, I believe the Second Circuit said, the record speaks, and it says that leave was granted. This was on the record. Leave was granted to file these defenses. And I suggest that the record speaks from the fact that that is the record before this Court.

In that connection it should be pointed out that the Court also, based on the same motion, did grant us partial relief in the case of England and Australia and permitted the limiting to the mainland U. S. The result of that, of course, was that the claim there was completely disposed of.

We had a single motion directed to all of these matters which we submitted to the trial court should be permitted by the fact that, among others, the proposed judgment of $39 million was so devastating and would have been so fatal, that in the interest of justice the trial court in its discretion should permit these things to be done.

Now this Court in its first opinion pointed out specifically that the damages in Canada had been based on the assumption not only that there had been wrongful conduct during the period, but on the assumption that there had been wrongful conduct in the prior years, 1926 to 1959, and that Zenith had been damaged by those prior acts.

In fact, the opinion here specifically pointed out that

Zenith asserted that it should have had 16 percent of the Canadian television market at the beginning of the period, of the four-year period, that is; that Zenith claimed it should have had a 13 percent share of the radio market but for pool activities, instead of which it had 3 percent of television and 4 percent of radio. And accordingly, as this Court point out, the portion of the damage, I submit, is a large portion, was necessarily based on the pre-damage period conduct accrued during the period 1926 to 1959.

And on remand -- pursuant to remand of this Court, the Court of Appeals did hold that the defenses of release and limitations were in the case, and did hold that they barred the recovery of damages suffered during the damage period by reason of these pre-damage period and pre-release period acts and that, accordingly, that the case should go back to the trial court so that there might be excluded that portion of the original award which was based on the proved damage period conduct and so that the award might be limited to damages resulting from conduct occurring during the damage period.

Q May I ask you if there is somewhere -- this is not the only problem dealing with damages in this case? There are some indications that there might be some further limitations on what caused the damages during the damage period.

Let's assume that Zenith proved that without the conspiracy that there had been a free market, and if it were

starting afresh during the damage period, it could have had 5 percent the first year, 10 percent the second, 15 the third, and 16 by the end of the fourth year. Would it be entitled under the opinion below to recover the difference between those percentages and what it actually had in those years?

A Assuming that it started with its actual market there at the beginning?

Q Yes.

A I think the answer is "yes."

Q You mean it would be enough -- for example, it could recover the difference between 15 percent that it would have had in the third year and the 3 percent that it had in the third year, on the facts of this case?

A If that factor is established on remand, yes.

Q But all that is is a matter of evidence to show what it could have done in the market, in a free market?

A Yes.

Q Practically established already. I mean, given enough time to get the situation clear.

A Well, it was not established, I submit, Mr. Justice, because the figures that we have now start with 16 percent of the television ---

Q I understand, but is it established in the case that they could have reached 16 percent, given a free market?

A In the ultimate ---

Q Yes.

A --- in some other year. Well, the record shows ---

Q You are not challenging that really here, are you?

A Well, we had taken the position below that the two markets are not truly comparable.

Q Isn't that question really disposed of by the litigation up to now?

A Well, as I see the litigation up to now, the thing that is established is that Zenith did have a 3 percent market at the beginning of the period and 4 percent as to television, and prima facie the Court below has said, in effect, that assuming that Zenith began back in 1926 on radio and in 1948 on television, which was when they began in the U. S. market, that the evidence indicates that prima facie in that span of years under those conditions there could have been the same in Canada as in the United States. The record does indicate that.

Q There really is quite a bit left over from your standpoint in this case. You are challenging not only this pre-damage period matter, but also Zenith's ability to have received 16 percent within this damage period?

A You mean within a span of 3 percent, we most firmly say, Mr. Justice, that that would be seriously in contention, because Zenith's own proof -- let's take television. Zenith's own proof is that starting in the United States when they started as a new competitor, that by 1959 -- after ten years

-- they had gotten 16 percent in the Canadian market, their own proof is that starting in the United States in the '20s in radio, over a span of 30 years, it took them that long to get up to 13 percent of the radio market, and in Canada the conditions are different, and I most firmly submit that to think that Zenith could have started in 1959 with its 3 percent share of the television market and 4 percent ---

Q Well, I'll ask you one more question. Let's assume that it could prove to the satisfaction of the Court that within the four years it could have had 10 percent. Let's just assume that.

A Yes, starting at 3 percent ---

Q The free market figure. And it only had 3 percent in the fourth year. Now do you think that on the facts already established in this record it could recover its damages between the 10 percent and the 7 percent in the fourth year?

A Mr. Justice, your question, I think that begs some additional questions that must be asked. You say you think that on the facts of this record -- there are no facts in this record on which you could assume based on 3 percent at the beginning ---

Q Yes, but I said let's assume that we could prove that they would have had 10 percent in the fourth year.

A Yes.

Q And they only had 3. Then do you have any legal

basis for saying that they could not recover the 7 percent?

A Assuming it is down to 3?

Q Yes.

A No, I don't see any basis for saying that they could recover their 7 percent.

Q You would say that the contingent -- what would have caused that damage, that 7 percent, Mr. Kayser?

A Well, the Court has already ruled in its first opinion that the continuation of the pool during the four-year period with a continued policy against licensing of imports had an impact.

Q You wouldn't say that the over -- the Court below indicated that perhaps it could recover damages placeable to some specific overt act.

A Mr. Justice, I don't read the Court of Appeals opinion that way.

Q If you did, you wouldn't agree with it?

A No, sir, because we are bound by the opinion of this Court, and this Court has ruled, as I understand it, that ---

Q Oh, I'm sorry to have used your time.

A Well now, I would now like to go briefly to the point of the release which Zenith's counsel suggests, No. 1, can have no application; and, No. 2, if so, would involve a violation of law.

First off, how can this release executed in 1957 have

any conceivable bearing on damages which were suffered after 1957? The answer is, of course, as we have pointed out in our briefs, that this release by its terms relased all past, present and future claims, causes of action, et cetera, which might have resulted or might bear results from acts and conducts prior to the release, namely, up to the day of these presents -- the usual language.

Now Zenith argued that if this release has such an effect, it is against public policy and in its brief cited the Fox Midwest Theatres case, which came out of the Eighth Circuit. Now that case held that it would be against public policy and the violation of the Sherman Act to permit a release which covered future damages based on future violations of the Sherman Act.

So that obviously would be an encouragement to and, in fact, to some extent a license for future violations of the Sherman Act.

But in this case all we have here and what we do have here is a release which covers damages suffered in the future by reason of past acts. It covers that and it covers nothing more, it purports to cover nothing more.

And it must be quite obvious that when Zenith asserts that it was the conduct of the pool over the period from 1926 to May 22, 1959 that prevented Zenith from building up to this 16 and 14 percent share of the market, which it would have enjoyed

during this period, it must be quite obvious, I submit, that the major portion of that conduct between 1926 and 1959, which interfered with the proved buildup, had occurred prior to September 27, 1957.

In fact, Zenith's evidence in this case was largely testimony and documents as concerning earlier affairs.

I will say, finally, on the subject of the releases, that Zenith itself has admitted to the trial court that HRI, Hazeltine Research, has the benefit of the release, because when we brought up the question at the reopening hearing, the court asked, "What is your reply to his contention that the 1957 release also released Hazeltine from anything prior to the date of the release?"

"ANSWER: Well, any damages which had accrued prior to 1957, if they were joint tort nature, which we allege they were, would be released. But we are not asking for damages prior to 19 ---

"THE COURT: Then you have answered my question."

And then Zenith counsel went on to argue this contention about future damages that would be contrary to public policy and so forth. But the application of the release to HRI as an alleged joint tort seeker is clear.

Q Is HRI less than a 49 percent owned subsidiary?

A If that less than 49 percent subsidiary was an alleged co-conspirator, it would apply.

Q Even though the release applied to the subsidiary and define "subsidiaries" as being only subsidiaries which are owned 49 percent or more?

A Well, Mr. Justice, as we pointed out in our brief, this release more than the subject matter of the suit, but it was a general release.

Q Yes.

A And it was for that reason apparently to file a general release to the parents and subsidiaries.

Q Yes, for what purpose could they possibly have wanted to define subsidiaries if they meant to include all subsidiaries?

A In order to define them to include them under the general release, but absent, as he mentioned, if they were, in fact, co-conspiractors, they would have the benefit.

Now as to the subject of the statute of limitations and the contention that it does not apply on the ground Zenith asserts that no cause of action accrued until after the actual damages were suffered, I submit that Zenith's argument flies directly in the face of long-established legal principles, not only in the application in the antitrust cases, but generally in the law.

Those principles are that a cause of action accrues when it can first be brought, and in the case of Sherman Act violations, as well as in other law, the action can be brought --

and in the case of the Sherman Act violations -- where the wrongful conduct has an impact on the business of the plaintiffs or on his property. That is, when there has been an invasion of his rights.

And at that time he had a cause of action, not only for the damages he has already suffered, but for the damages he is likely to suffer and is reasonably likely to suffer in the future as the result of that impact.

Now Zenith's counsel has referred to the act of constant invasions, namely, that there are rather admittedly impact of wrongful conduct during the period. But all that amounts to is that Zenith would therefore have additional causes of action for the damages caused during the damage period conduct, and in fact that is what the Court of Appeals ruled and this Court recognized, that Zenith does have a cause of action for damages caused during the period. But as to the damages resulting from the previous acts, it has its cause of action for past and future damages more than four years ago, it did not sue and, therefore, its claim based on its prior conduct is barred.

Now I have said that this is a well-settled principle. We have cited a number of antitrust cases in our briefs in this in Figures 40 and 41 of our opening brief, on pages 10 to 13 of our reply. I would like to add a case that Zenith cited in its reply brief, the Dairy Foods case, which also enunciated the principle that you can recover future damages without waiting for

the time to pass during which those damages would be suffered.

This is like saying to a personal injury plaintiff, who has lost a leg and can no longer pursue his livelihood, "Oh, no, you may not sue for future loss of income. You must wait year after year as you lose the income and you must file suit year after year."

That, I submit to this Court, is not the law, and what Zenith is really doing here is attempting to subvert the effect of Section 4 of the Clayton Act, which says the cause of action must be brought within four years from the time it accrues or it is barred.

By attempting a redefinition of "cause of action" which, in fact, would fly right in the face of the statute itself, because the law has long been settled and was so at the time of the passage of Section 4(v) that when there is an impact, you can sue both for damages already suffered and for those which are reasonably anticipated to be suffered in the future.

Now I think that possibly the best way to summarize this point is to read two sentences from the Momand case, which is an antitrust case. This is a quotation from the District Court. The case was affirmed by the First Circuit and certiorari denied in 1949; and I read:

"Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages

not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial."

This is quoting Lawlor v. Loewe, an opinion by Mr. Justice Holmes in 235 U.S.

Now, finally, I would like to go to this contention that has been made as to uncertainty as to damages and somehow it is suggested that our position is contrary to the Bigelow case.

Now the Bigelow case has said that if it is established that some damages have been suffered by reason of unlawful acts and if there is an uncertainty as to whether those damages result from unlawful conduct or perhaps other conduct, but that uncertainty will be resolved against the defendant who may have created the uncertainty.

But we submit that in this case there is no uncertainty, that the amount of damages resulting from the damage period conduct is ascertainable. This Court itself has said that a portion of the award must necessarily result from pre-damage period conduct. It is pointed out that the award was based on the assumption of a 16 percent of the television when, in fact, the share at the beginning of the period was 3 percent; that it is obviously that 13 percent out of that initial 16 percent claim resulted from pre-damage period conduct. The same is true on

radio, where the assumed share was 13 and the actual share was 4. It is obvious that 9/15ths of the original share traces to pre-damage period conduct. It could be traced to nothing else.

The way this thing would be resolved would be to start on the remand with a 3 percent share of the television and a 4 percent share of radio, putting the relevant estimates, make a determination to marketing experts, and other experts, whoever is qualified to determine what Zenith could have achieved during the four years in a free market setting of its actual 3 and 4 percent share. Then apply those percentages to volume, by profits and subtract the share and the profits that Zenith actually achieved, and the difference would be clearly and ascertainably with reasonable certainty, the difference would be Zenith's damages.

And we submit that under this state of facts when so great a portion of this $19 million, this devastating $19 million, is obviously based on pre-damage period conduct -- we submit that the clear road to be followed here is to hand the case back to the Court below so that there may be a determination, so that there may be a fixing of the amount that Zenith actually suffered based on conduct during the four-year period, and then bring the litigation to an end.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kayser. Thank you, Mr. McConnell. The case is submitted.

(Whereupon, at 11:05 a.m. the argument in the above-entitled matter was concluded.)