

BOYCOTT AND PRICE WAR: VIOLATION OF THE ANTITRUST LAWS OR UNFAIR COMPETITION?

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I.

The Supreme Court's recent decisions in *Klor's Inc. v. Broadway-Hale Stores, Inc.*¹ and in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*,² pose the question contained in the title of this article. In the *Klor's* case, plaintiff, a neighborhood retail store brought action against the defendant, a chain department store, which had induced certain national manufacturers and their distributors to discontinue selling to plaintiff. The *Radiant Burners* case involved an association which awarded its seal of approval to gas burners passing its tests. At the behest of some of its members, the association withheld its approval of plaintiff's burners, and two of the gas-distributing defendants refused to service plaintiff's burners, thus effectively excluding them from the market. In both cases, the district court³ and the court of appeals⁴ held that the complaints involved "purely private quarrels" and did not establish a "public wrong proscribed by the Sherman Act." On this conceptual premise, both plaintiffs were denied protection against an obviously illegal act. The Supreme Court granted certiorari "to consider this important question in the administration of the Sherman Act." Reversing the lower courts, the Supreme Court reaffirmed the doctrine that "group boycotts or concerted refusals to deal with other traders have long been held to be in the forbidden category" and that they are not "saved by allegations that they were reasonable in the specific circumstances,"⁵ because they have "by their 'nature' and 'character' a 'monopolistic tendency.'"⁶ Although one may not quarrel with the result, the theory on which it depends is questionable. Every boycott does not have such a "monopolistic tendency." Analytically, boycott does not even belong in either of the categories which are, *per se* or under special circumstances, considered violations of the antitrust laws.

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¹ *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), reversing 255 F.2d 214 (9th Cir., 1958).

² *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), reversing 273 F.2d 196 (7th Cir. 1959).

³ Not reported.

⁴ 255 F.2d 214 (9th Cir. 1958); 273 F.2d 196 (7th Cir. 1959).

⁵ *Klor's Inc. v. Broadway-Hale Stores, Inc.*, *supra* note 1, at 212.

⁶ *Id.* at 213.

Per se violations are those which by their nature or character have under all circumstances a "monopolistic tendency." Illustrative are loose combinations or agreements for price fixing, production control or division of markets. These necessarily involve restraints of competition and are what international trade labels a cartel or cartel-like agreement. We may call them peaceful agreements between competitors with respect to their competitive relations.⁷

They may also be close combinations, such as consolidations and mergers, which though illegal in principle, may nonetheless be permissible if they do not affect the competitive structure of an industry. There may even be combinations with noncompetitors either by way of vertical integration or horizontal combination.

Then there are activities which are part of the fabric of economic life, such as exclusive dealing agreements, patent license agreements, etc., which, though otherwise reasonable, may be tainted when "accompanied with a specific intent to accomplish a forbidden restraint."⁸

Boycott does not fit into the *per se* classification. True, there are boycotts which warrant the invocation of the antitrust laws. Thus, injunctions have been directed against wholesalers who combined to prevent manufacturers from selling directly to consumers or retailers,⁹ co-operative retail associations,¹⁰ wholesalers who also sold at retail,¹¹ chain stores,¹² and a wholesaling company operating as purchasing exchange.¹³ Combinations between laundry companies and

⁷ Callmann, "Patent License Agreements Between Competitors and the Monopoly Issue," 28 Geo. L.J. 871 (1940).

⁸ United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948).

⁹ Arkansas Wholesale Grocers' Ass'n v. Federal Trade Commission, 18 F.2d 866 (8th Cir. 1927), *cert. den.*, 275 U.S. 533 (1927); See also, United States v. Southern Wholesale Grocers' Ass'n, 207 Fed. 434 (N.D. Ala. 1913); Wholesale Dry Goods Institute v. Federal Trade Commission, 139 F.2d 230 (2d Cir. 1943), *cert. den.*, 321 U.S. 770 (1944); Pacific States Paper Trade Ass'n v. Federal Trade Commission, 4 F.2d 457 (9th Cir. 1925), *aff'd*, 273 U.S. 52 (1927); *In re* Grocery Distributors Ass'n of Northern California, Federal Trade Commission (Dkt. No. 5177, 1948); Note, 97 U. Pa. L. Rev. 133 (1948).

¹⁰ Arkansas Wholesale Grocers' Ass'n v. Federal Trade Commission, 18 F.2d 866 (8th Cir. 1927), *cert. den.*, 275 U.S. 533 (1927); Southern Hardware Jobbers' Ass'n v. Federal Trade Commission, 290 Fed. 773 (5th Cir. 1923).

¹¹ Wholesale Grocers' Ass'n v. Federal Trade Commission, 277 Fed. 657 (5th Cir., 1922); National Harness Manufacturers' Ass'n v. Federal Trade Commission, 268 Fed. 705 (6th Cir. 1920).

¹² United States v. Southern California Wholesale Grocers' Ass'n, 7 F.2d 944 (S.D. Cal. 1925).

¹³ Western Sugar Refinery Co. v. Federal Trade Commission, 275 Fed. 725 (9th Cir. 1921).

labor unions against the so-called "bobtails,"¹⁴ conspiracies between manufacturers and dealers to discriminate against catalogue houses, "upstairs houses," sub-jobbers, undesirable or "unlicensed" retailers, and the like,¹⁵ conspiracies between manufacturers, dealers and union workers to boycott manufacturers of nonunion-made articles who were paying lower wages and, consequently, could undersell them,¹⁶ conspiracies between local manufacturers, dealers and trade unions to restrain out-of-state manufacturers from shipping and selling within the local area,¹⁷ and combinations formed by retailers to prevent wholesalers,¹⁸ manufacturers, wholesale dealers, brokers or commission men from selling directly to consumers, have likewise been enjoined.¹⁹ In the Sugar Institute case²⁰ the boycott directed against one firm's merger of brokerage and warehousing functions was held unlawful not only because its real purpose was to preserve a uniformity of price but also because of the rigorous method of enforcement.²¹

However, there are equally as many types of boycott which do not fall within the proverbial categories of the antitrust laws; for instance, when a trade association or similar group institutes a boycott against those who allegedly commit unfair practices, such as "design piracy," how can it be said that such a boycott by its nature or character has a monopolistic tendency? It was not designed to restrain lawful competition or to achieve market control. Nor does it

¹⁴ *Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187*, 339 Pa. 353, 14 A.2d 438 (1940).

¹⁵ *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D.N.Y. 1942). Such a boycott was held "prima facie unlawful," referring to *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941). See also *United States v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D.N.Y. 1942), *aff'd*, 321 U.S. 707 (1944); *Phelps Dodge Refining Corp. v. Federal Trade Commission*, 139 F.2d 393 (2d Cir. 1943).

¹⁶ *United States v. Brims*, 272 U.S. 549 (1926) (indictment for violation of the antitrust laws).

¹⁷ *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395 (1947).

¹⁸ *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1915). See also, *Retail Lumber Dealers' Ass'n v. State*, 95 Miss. 337, 48 So. 1021, 1054 (1909), *aff'd*, 217 U.S. 433 (1910); saying that defendant's purpose was not confined to the prevention of unfair competition but extended to any and all competition; *State v. Adams Lumber Co.*, 81 Neb. 392, 116 N.W. 302 (1908).

¹⁹ *Granada Lumber Co. v. Mississippi*, 217 U.S. 433 (1910), *affirming*, 95 Miss. 337, 48 So. 1021 (1909); *United States v. Hollis*, 246 Fed. 611 (D.C.D. Minn. 1917); *United States v. National Retail Lumber Dealers Ass'n*, 40 F. Supp. 448 (Colo. 1941).

²⁰ *Sugar Institute v. United States*, 297 U.S. 553 (1936), affirming Judge Mack's famous opinion in 15 F. Supp. 817 (S.D.N.Y. 1934).

²¹ For instance, a rehearing after the Institute had made its finding could be had only upon the request of an Institute member, not the disqualified intermediary.

reflect any of the essential elements of restraints such as price fixing, production control, division of markets, etc.²² For the same reasons, the boycotts involved in the *Klor's* and *Oilburner* cases were probably not motivated by any desire for monopolistic control; it could hardly be said that the defendants in those cases were seeking to dominate the market. As the District Court held, only "private quarrels" were involved. But that conclusion does not resolve the issue.

If such a boycott is nevertheless illegal *per se*—and of course it is—the rationale must be found elsewhere. Why stretch the antitrust laws to reach a desired result, when other doctrines are not only available but more and more apposite? It seems unrealistic to require a plaintiff, who is basically involved in a private quarrel with a competitor, to allege public injury or facts from which such injury can be inferred, such as increase in prices to the consuming public, diminution in the volume, or deterioration in the quality, of the merchandise in the competitive market and the like. It is puzzling, indeed, why the courts were so entranced by the antitrust laws. Why did they ignore tortious or even malicious interference with business relations, or "trespass upon the property" of a "going concern"—in short, unfair competition?²³ Invoking the antitrust laws to decide a pure case of unfair competition is like shooting squirrels with elephant guns!

In light of the precedents, the courts were following tradition. In *Lewis v. Huie-Hodge Lumber Co.*,²⁴ the defendant, who operated a sawmill, had no competition until the plaintiff established a rival business. To drive the plaintiff out of business, defendant intimidated plaintiff's suppliers and customers. Defendant's acts were held justified on the theory that they were prompted by purely competitive purposes and were not particularly designed to injure the plaintiff personally. In *Katz v. Kapper*,²⁵ the defendants "called meetings of the customers of plaintiff, threatened them that they would be driven out of business and ruined if they continued to purchase fish from plaintiff, but promised that if they purchased fish from defendants, they would be given substantial reductions in price, so that they could successfully compete with plaintiff and drive him out of business; that if said customers continued to buy from plaintiff, the

²² Although we can agree with the Supreme Court that the boycott instituted by the Fashion Originators' Guild was unlawful, our reasoning in arriving at that conclusion differs. See note 55.

²³ There can be no doubt that, under the *Hurn v. Oursler* doctrine, the federal court had jurisdiction over the unfair competition charge, based upon the claim of antitrust law violation which was "not plainly wanting in substance." *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co. Inc.*, 12 F.R.D. 403 (S.D.N.Y. 1952).

²⁴ 121 La. 658, 46 So. 685 (1908).

²⁵ 7 Cal. App. 2d 1, 44 P.2d 1060 (1935); Note, 9 So. Calif L. Rev. 425 (1936).

defendants would open a retail store and would sell fish to the customers of plaintiff's customers at such low prices that plaintiff's customers would be driven out of business. . . . Defendants did open such a store, did widely advertise and sell fish at lower prices than either plaintiff or defendants could purchase the same, and at a loss to the defendants."²⁶ Although in *Dunshee v. Standard Oil Co.*,²⁷ the court conceded that an act, lawful in itself, may become unlawful by reason of a malicious or wrongful motive, the opportunity to prove wrongful motive in the *Katz* case was denied when defendants' demurrer was sustained.²⁸

The defendant's conduct in these cases amounted to ruthless warfare. Such attacks directed against competitors make a mockery of the law of unfair competition and liken it to the law of the jungle.

There are cases, however, where an opposite result was reached, although the competitive methods employed were no more odious or excessive than in *Katz v. Kapper*.²⁹ In *Standard Oil Co. v. Doyle*,³⁰ it was held "most assuredly unlawful to obstruct, harass, and annoy appellee's employees when engaged in the discharge of their duties in selling and distributing oils to appellee's customers; to threaten customers of appellee to shut them up in their business if they continued to deal in appellee's oils." In *Loyd Sabauo v. Cubicciotti*,³¹ the defendants were enjoined from threatening to withdraw their business from the plaintiff's booking agents if they continued to sell the latter's tickets. In *Schonwald v. Ragains*,³² the defendant threatened that he and all other persons engaged in the same business would refuse to sell to any person who purchased from plaintiff. The court, in holding for plaintiff, made an excellent distinction between competition by offering better quality or service and interference by boycott.³³ An interesting conflict of opinion is shown in *Roseneau v.*

²⁶ *Id.* at 5, 44 P.2d at 1061.

²⁷ 152 Iowa 618, 132 N.W. 371 (1911).

²⁸ *Id.*, "The fact that the methods used were ruthless, or unfair, in a moral sense, does not stamp them as illegal. It has never been regarded as the duty or province of the courts to regulate practices in the business world beyond the point of applying legal or equitable remedies in cases involving acts of oppression or deceit which are unlawful. Any extension of this jurisdiction must come through legislative action."

²⁹ *Supra* note 25.

³⁰ 118 Ky. 662, 671, 82 S.W. 271, 26 Ky. L. Rep. 544 (1904).

³¹ 159 Fed. 191 (E.D. Pa. 1908).

³² *Schonwald v. Ragains*, 32 Okla. 223, 122 P. 203 (1912).

³³ *Id.* at 240. "They [defendants] did not sell their ice cheaper. They did not claim to have a better grade or quality of ice. They did not offer better delivery facilities. They did not offer any inducement by way of credits, or time, in payment of ac-

*Empire Circuit Co.*³⁴ Plaintiff operated a burlesque theatre in Buffalo and the defendant controlled the principal burlesque theatres in many of the larger cities throughout the country. Defendant gave notice that it would not book the production of any producer whose troupes performed in theatres other than those owned or controlled by it. As a result, about twenty producers cancelled their contracts with the plaintiff, and the latter was unable to obtain presentable attractions for its theatre. In reversing the lower court, the majority held that defendant's method of doing business resulted in greater efficiency and that its acts were not inspired by malice. The dissenting judge, however, referred to the fact that defendants "repeatedly stated that they intended to destroy the Court Street Theatre Co.;" that "they went at this scheme in a systematic manner"; that defendant company's managers "did maliciously single out the Court Street Theatre Co. as the point of attack in order to destroy it," and that "no such warfare was carried on against other companies."³⁵ In *Binderup v. Pathé Exchange*,³⁶ a theatre owner refused to purchase films from certain distributors, whereupon the distributors induced his suppliers to cease dealing with him. Plaintiff alleged that all had combined and conspired to prevent him from carrying on his business by refusing to furnish him with film service and by unlawfully cancelling unexpired contracts which he had with several suppliers. The destruction of the plaintiff's business by force and attack would have been unlawful had each distributor acted individually or separately. The combination of the distributors, however, and their conspiracy to prevent the plaintiff from dealing with any only served to accentuate the severity of the unlawfulness. The court, in finding for plaintiff, stressed that fact.³⁷ In another case, however, the plaintiff was denied relief, because he failed to show the existence of a conspiracy, "a requisite of any boycott."³⁸

counts. . . . Their sole and only excuse was that they enjoyed a monopoly of the ice business . . . and that, unless the customers who had contracts with Ragains would forthwith break and violate those contracts, they could not have or purchase any ice from said defendants."

³⁴ 131 App. Div. 429, 115 N.Y.S. 511 (1909), motion to amend decision denied, 132 App. Div. 947, 117 N.Y.S. 1146 (1909).

³⁵ Pages 438, 442. See also *Peekskill Theatre v. Advance Theatrical Co.*, 206 App. Div. 138, 200 N.Y.S. 726 (1923), where officers of Loew's, who were interested in a rival theatre, made efforts to ruin the Peekskill Theatre Company by inducing distributors to break their contracts and refuse to deal with it. Injunction granted.

³⁶ 263 U.S. 291 (1923).

³⁷ See also, *Sultan v. Star Co.*, 106 Misc. 43, 174 N.Y.S. 52 (1919).

³⁸ *McNeil v. Hall*, 220 N.C. 73, 16 S.E. 456 (1941); adversely criticized in Note, 40 Mich. L. Rev. 1273 (1942); See also, Note, 30 Geo. L.J. 319 (1942).

II.

The present state of the law is characterized by confusion; it may be said to be in the "chrysalis stage" and anything but uniform. The general statement that the courts, in boycott cases, usually consider the object sought and the means used is not entirely correct.³⁹ There are at least three rules which influence the courts: (1) The ordinary tort rule, under which the boycott is *prima facie* a tort and the defendant is liable unless he can justify his act. "The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there were just cause for inflicting the damage."⁴⁰ Malice, *i.e.*, the instigation of an injurious act out of sheer ill-will, tips the scales against the defendant and relieves the courts of the delicate task of weighing the equities of the parties. Concerted action, however, is permissible where the court finds that the purposes and objectives of the combine are unobjectionable. (2) The conspiracy rule, under which the secondary boycott is unlawful solely because of the element of combination.⁴¹ "An act harmless when

³⁹ "A boycott is commonly understood by the people and is generally spoken of in the law as an unlawful thing, and this, because the ordinary trade boycott of large bodies of men, is usually accompanied by acts of violence, threats, or intimidation; but I think it clear that under this definition, which seems to cover all the elements of a boycott, there may be a lawful as well as an unlawful boycott, depending on the *purpose and intention* with which the boycott is inaugurated, the *means and methods* employed, and the *ends intended to be accomplished* by its existence" (Emphasis added). Booker & Kinnaird v. Louisville Board of Fire Underwriters, 188 Ky. 771, 784, 224 S.W. 451 (1920).

⁴⁰ Ames, How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor, Lectures on Legal History 399 (1913).

⁴¹ It has been said that "no branch of the law seems less clear than that of conspiracy. At common law there was a writ of conspiracy now obsolete, dealing with treason and felonies. A later development resulted in an action on the case in the nature of conspiracy for the damage caused to plaintiff." Keviczky v. Lorber, 290 N.Y. 297, 305, 49 N.E.2d 146 (1943). The essentials of a conspiracy are commonly described as follows: It is "A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means." Pettibone v. United States, 148 U.S. 197 (1893). It has also been called a "partnership in criminal purposes brought about by an agreement." United States v. Kissel, 218 U.S. 601, 608 (1910), *reversing*, 173 Fed. 823 (1909); Patterson v. United States, 222 Fed. 599, 631 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 (1915). In fact, the term conspiracy, by itself, means nothing. Its essence is the tort which motivates it. Therefore, it has been properly held that "where conduct is tortious in itself allegations that it was committed pursuant to a conspiracy add nothing to the complaint, although conduct otherwise innocent may sometimes become actionable if done in concert." Original Ballet Russe v. Ballet

done by one may become a public wrong when done by many, acting in concert, for it then takes on the form of conspiracy, and may be prohibited or punished, if the result be hurtful to the public, or to the individual against whom the concerted action is directed."⁴² The rigidity of this rule precludes consideration of economic interests or the equities involved.⁴³ (3) The antitrust law rule, under which a boycott is illegal if it violates the spirit or the letter of federal or state antitrust legislation. Here confusion reigns, for the conspiracy rule has been further confounded by the monopoly aspect. The existence of a combination has so fascinated the courts that they have given little or no attention to the nature of the combination unless compelled to do so by the "rule of reason." The antitrust law approach, which is rooted in the common-law principle that "no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil,"⁴⁴ may well apply to a boycott used as a device for preventing others from becoming competitors; the antitrust law rule is a salutary supplement to the competitive aspect, for it prevents the courts from ignoring the disparity of economic power. Where the object of the combination is unlawful under the antitrust laws, the unlawfulness of the boycott need not be further considered.

Criticism has been justifiably levelled at the fact⁴⁵ that the courts have, by and large, failed to give proper consideration to the relationship between the parties. This relationship is as important a consideration and as deserving of attention as the means used and objects sought. The fact that the courts and textwriters have continuously failed to analyze them has caused the confusion in the cases. On the other hand, it is an oversimplification of the problem to consider secondary boycott, unlawful in the bargaining struggle and lawful in the competitive struggle.⁴⁶ A guiding rule might be found, however, in the rules of the competitive order of struggle.

Theater, 113 F.2d 187 (2d Cir. 1943); Restatement, Torts, §§ 765, 775; or that "the allegation and proof of a conspiracy in an action of this character [fraud] is only important to connect a defendant with the transaction and to charge him with the acts and declarations of his conspirators, where otherwise he could not have been implicated." *Brackett v. Griswold*, 112 N.Y. 454, 20 N.E. 376 (1889); *Green v. Davies*, 182 N.Y. 499, 75 N.E. 536 (1905).

⁴² *Granada Lumber Co. v. Mississippi*, 217 U.S. 433, 440 (1910), *affirming* 95 Miss. 337, 48 So. 1021, 35 R.L.A. (N.S.) 1054 (1909). For conspiracy within the same enterprise, see *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

⁴³ For other objections to this theory, see *Annot.* 6 A.L.R. 909, 911 (1920).

⁴⁴ *Case of the Tailors of Ipswich*, 11 Coke 53a, 77 Eng. Rep. 1218 (K.B. 1614).

⁴⁵ Note, 33 Col. L. Rev. 478 (1923).

⁴⁶ *Ibid.* See also *Handler*, "Unfair Competition," 21 Iowa L. Rev. 175, 208 (1936); warning against the application of any rigid and inflexible rule in this connection.

III.

The nature of the competitive order was suggested by this author some 20 years ago.⁴⁷ Basically there are two divisions of the order of life: ordinary life, which imports an order of peace, and business life, for which the field of competition is the arena for conflict, which imports an order of struggle. In ordinary life conflict arises from real or apparent injury; in the competitive life it is the very essence of the competitive relationship. In ordinary life restoring peace means restoring order; in competitive life peace necessarily suggests a violation of the antitrust laws! Struggle is in the nature of things incidental to competitive activity. There is no other motive than the obtention of the prize, and there is no chance of obtaining peaceful conditions so long as competition continues. In the field of competition struggle is natural and essential, and rules of law should be designed to regulate the contest. It is typical of the order of struggle that a competitor is permitted to injure his rivals in trade; the wrong stems out of a violation of the rules prescribed for the fair contest. Which tort the wrongful act commits depends upon which rules of struggle are recognized.

What are the rules in the law of unfair competition? Competition has been defined as "the act or proceeding for something that is sought by another at the same time; or contention of two or more for the same object or for superiority, rivalry, as between aspirants for honors, or for advantage in business."⁴⁸ This concept of competition is too broad. This is apparent when examined in a field entirely divorced from business life—in the field of sports. To understand it properly, "Competition resembles a race rather than a fight, for in a fight it is quite proper to 'knock out' your opponent; but tripping your rival in a race is regarded as bad sportsmanship."⁴⁹

Again, starting with the fundamental concept of competition and then attempting to transfer its general terms into the language of business life, it must be realized that there is a definite distinction between the principles motivating the struggle of rivals in sports and those in commerce. A game is but a single occurrence; what happens to its participants after the event has no bearing upon the contest. The winner may celebrate his success or he may collapse; he has accomplished what he set out to do. Competition in business, however,

⁴⁷ "What is Unfair Competition?" 28 *Geo. L.J.* 585 (1940); see also, Callmann, *The Law of Unfair Competition and Trademarks*, § 6 (2d ed. 1950 with Supp. 1961).

⁴⁸ Bouvier, *Law Dictionary* (Baldwin's Ed. 1934).

⁴⁹ Ross, *Principle of Sociology* (1930), 166. Also McLaughlin, "Legal Control of Competitive Methods," 21 *Iowa L. Rev.* 274, 280: "It is possible to distinguish between a competitive race and a competitive fight."

has a continuing appeal. Because competition has the function of economic organization it is not realistic to consider it in the sense of isolated transactions. Every separate commercial transaction has an effect upon the enterprise as a whole, and this will be manifest in the success of an enterprise. It may be said that this net effect is the prize of competition; the customer seems to be only a means to the end, more exposed to view than all, but ultimately the seller, buyer, banker, newspaper and advertising agency are also of great importance. Actually, an important distinction exists. It is the main function of a business enterprise to sell its product. Financing, advertising, and similar transactions, although necessary, are merely auxiliary. Thus, the decision of the customer is the most important event. Each bargain is a contest with the conquest of the customer the goal; he is the umpire of the game, his comparison decides the issue, and his favor is sought by all who seek to sell him their wares.

This line of reasoning leads to a distinction which should be the pole-star in the law of "unfair competition," *i.e.*, the distinction between competition characterized by constructive effort and that characterized by nonconstructive effort. The former will always be allowed, for *constructive competition* is not unlawful. The latter, however, should fundamentally be taboo.

"Constructive effort" is the effort of one who seeks a commercial advantage through the honestly exercised means of his own strength, ingenuity, skill and capital.⁵⁰ Constructive effort is a subjective concept; the business man's effort is constructive, not because his act is beneficial to the general economy from an objective point of view, especially not because *he* considers his competitive effort beneficial to the whole, but because in his business activity he makes use of those powers which are reasonably necessary to do the best possible job within his ability.

The maxims of competitive equity can be drawn only from the peculiar character of the particular "game competition."⁵¹ In the competitive contest, constructive effort is the basic and permissible weapon. It is not a struggle of one competitor *against* the other but of all *with* the others for a common prize. The customer is in the role of umpire, and competitors should invite his patronage by affording him the opportunity to *judge freely the quality, price and service*

⁵⁰ The classical expression of constructive effort may be found in the Homeric Words: "Be ever best and o'ertop other men." This is the advice given by two fathers to their sons who were leaving for war; it is the unsurpassable exposition of the ideal in an age of sportsmanlike fighting.

⁵¹ See Callmann, *op. cit. supra* note 47, at p. 136.

each offers, as the product of his own effort and skill without any violation of non-competitive legal obligations.

IV.

Why is the boycott in the *Klor's* case (usually called a secondary boycott because it entails an attempt to induce others to avoid dealing with the victim), and the defamation in the *Oilburner* case unlawful? Why are they "unfair competition?" Because they both involve direct attacks upon a competitor. A direct attack is a fight "against" and not a struggle "with" a competitor and this markedly differs from constructive effort. It is "unfair" because in "fair" competition the loser is only beaten in such a manner as is necessary to permit the customer to give the winner his patronage.⁵² The direct attack, however, is executed by act or word and may mention the competitor by name or innuendo. The dangerous implications of this type of attack are not yet generally recognized.⁵³ In many cases it merely serves as a welcome substitute for such concepts as "malice," "purpose of injuring a competitor" or "intent to drive a competitor out of business."⁵⁴

The Fashion Guild case⁵⁵ highlights the error of condemning all boycotts as antitrust law violations. True, the Court there properly chastized the association for a number of organizational measures used to discipline its members; there was, moreover, an obvious restraint of trade within the meaning of the antitrust laws. The boycott, however, was something quite different; it was a kind of self-defense against a practice, design-piracy, which was, and still is, considered unfair competition by the majority of those who do not indulge in it. The members of the trade who instituted the boycott acted in good faith and were the proponents of the purer ethic. It

⁵² "Competition consists in trying to do things better than someone else; that is, making or selling a better article at a lesser cost, or otherwise giving better service. It is not competition to resort to methods of the prize ring, and simply 'knock the other man out.' That is killing the competitor." Mr. Justice Brandeis, *Competition*, *American Legal News*, Vol. 44, January 1913, quoted in Mason, *A Case Study in the Working of Democracy*, Princeton University Press, esp. Chap. III, p. 72 (1938).

⁵³ In *American Steel Co. v. American Steel & Wire Co.*, 244 Fed. 300 (Mass. 1916), the varied attacks by which the defendant sought to drive competitors with whom he was unable to come to terms out of business were considered under the antitrust laws.

⁵⁴ Direct attacks against a competitor can also be based upon disparagement of one's rival and/or his goods ("business libel") or abuse of litigation for the purpose of harrassing a competitor and/or his customers.

⁵⁵ *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 463 (1941).

seems highly improbable that anyone even thought that the boycott would lead to a monopoly. But self-defense or self-help is a privilege premised upon the concept that one who is the target of attack is entitled to take reasonable defensive action to avert immediate injury when there is no time to resort to law. This principle must be adopted by, and adapted to, the law of unfair competition. That means: "The proper forum for the trial of legal controversies is the court."⁵⁶ Self-help should only be sanctioned when belated judicial aid would be academic or otherwise prove ineffectual. So long as the courts remain unwilling to declare a practice unfair competition, private groups cannot resort to such drastic means as a boycott because of an act which the victim of the boycott would be entitled to consider lawful. If the courts would condemn certain acts as unlawful, a preliminary injunction would, of course, be preferable to self-help.

V.

The parallel between boycott and price war is illuminating. The most popular weapons in a price war are sales below cost and price discrimination. Under the statutes, a sale below cost is unlawful only if effected for the purpose of "injuring a competitor or destroying competition." "Selling below cost" usually begins in selling below the prices of a competitor and if the latter is adamant it goes on until the price is below cost. Do phrases such as "intent to destroy competition" or "create a monopoly" add anything of value to the phrase "to injure a competitor?" An affirmative answer is indicated. Driving a competitor out of business can be one means of realizing monopolistic ambitions, and if the aggressor who declares and wages the price war is powerful enough to dominate the field there can be no doubt that we can properly label his activity "selling below cost with the intent to lessen competition or create a monopoly." In principle, a price war is possible without this illegal intent, for the war may be between two competitors who, themselves, are in competition with many others. In such a case, selling below cost would be unlawful only as unfair competition or only because it is intended "to injure a specific competitor," *i.e.*, to drive him out of business; here there is no violation of the antitrust laws nor is there any evidence of an "intent to lessen competition" or "create a monopoly." The gravamen of the complaint is the unfair attack upon a competitor.

⁵⁶ *Johnson Laboratories v. Meissner Mfg. Co.*, 98 F.2d 937 (7th Cir. 1938); *A. B. Farquhar Co. v. National Harrow Co.*, 102 Fed. 714, 49 L.R.A. 755 (3d Cir. 1900); *Sun-Maid Raisin Growers of California v. Avis*, 25 F.2d 303 (D. N. Ill. 1928); *Maytag Co. v. Meadows Mfg. Co.*, 35 F.2d 403 (1929), *cert. den.*, 281 U.S. 737 (7th Cir. 1930).

The same distinction can be found in the Robinson-Patman Act.⁵⁷ This act defines three kinds of price discrimination: (1) general price discrimination in price, service and facilities the effect of which may be "substantially to lessen competition or tend to create a monopoly" or "to injure, destroy, or prevent competition"; (2) geographical price discrimination; and (3) selling "at unreasonably low prices for the purposes of destroying *competition* or eliminating a *competitor*." The first category is declared unlawful in section 1 of the Act, which amended section 2 of the Clayton Antitrust Act. The other categories are declared unlawful in section 3 of the Act and this section prescribes penal sanctions only. The Supreme Court⁵⁸ held that section 3 does not create a private cause of action, because it is an independent criminal provision while section 1, like section 2 of the Clayton Act, is an antitrust law and therefore gives rise to the remedies provided by the Act.⁵⁹ To the extent that the Court denied that a criminal law may give rise to a civil cause of action, its decision is questionable.⁶⁰ Nor is it clear why the types of price discrimination outlawed by section 3 differ in character from those proscribed by the amended section 2 of the Clayton Act; there is, no doubt, "a partial overlap"⁶¹ between both sections. Price discrimination of the section 3 variety, maintained "for the purpose of destroying competition," has the same result as the discrimination forbidden by the antitrust laws. In determining whether a particular provision is an "antitrust law" the test is not whether it is physically incorporated in another law which is an antitrust law but whether it is directed against the same offenses, *i.e.*, against acts which "restrain trade," "substantially lessen competition," "create a monopoly," or "injure, destroy or prevent competition." To the extent that section 3 of the Robinson-Patman Act (or, for that matter, any other law) is designed to prevent the "elimination of a competitor," it is also a law against unfair competition. Like a boycott, a price war imports aggression. It constitutes a direct attack upon a competitor and is avowedly designed to drive him out of business by concentrating the power of superior economic strength against him. Price-cutting is a common incident of marketing; price discrimination, however, is selling at unreasonably low prices or

⁵⁷ 49 Stat. 1526; 15 U.S.C. 13 (1936); an act to amend section 2 of the Clayton Antitrust Act, 38 Stat. 730, 15 U.S.C. 12 (1914).

⁵⁸ *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1948); *Safeway Stores, Inc. v. Vance, Trustee in Bankruptcy*, 355 U.S. 389 (1958).

⁵⁹ Clayton Act §§ 14 and 16.

⁶⁰ See Callmann treatise, *op. cit. supra* note 47, Supp. 1961 to p. 553, n. 29.

⁶¹ See 355 U.S. at 378.

below cost, and characterizes the cutthroat competition that follows the declaration of a price war.⁶²

Lawyers and judges can never do full justice to the facts of a case unless they have a clear notion about the law which should govern it. It is important, therefore, that a distinction be recognized between a law directed at regulation of business, a law intended to prevent monopolistic developments, and a law which merely proscribes unfair competition. This distinction determines what kind of tort a boycott or price war would be in a special situation. Labelling all boycotts as monopolistic, even though it presents a convenient peg on which to hang the rationale of a particular holding, can distort the development of the law. A boycott can, of course, involve a conspiracy for monopolistic purposes and then again it can also be a combination arising out of a "private quarrel." Price discrimination intended to favor the large purchaser to the prejudice of his smaller rivals is a typical example of an antitrust violation. The seller's competitors are only incidentally prejudiced. Price discrimination directed at driving a competitor out of business is primarily unfair competition and may incidentally result in monopoly.

A recent Court of Appeals⁶³ opinion indicates that a certain trend has already taken hold. In that case, the facts clearly established that defendants intended to destroy the plaintiff-competitor by proselyting its key employees, appropriating of its trade secrets, using false financial statements with respect to its condition, interfering with its source of raw materials, disturbing its employees, and inducing its employees to breach their fiduciary relationships. Although all of the practices could have properly been condemned as unfair competition, the Court referred to the *Klor's* case and in "viewing the conspiracy alleged in the instant case" held that "the purpose of de-

⁶² For a price war case, where the court was divested by artificial and irrelevant antitrust considerations, see *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). There, defendant, in the course of a bitter price war directed against plaintiff's local business, maintained prices in its interstate transactions but cut prices in its intrastate transactions in plaintiff's locality, expressly for the purpose of driving plaintiff out of business. See also *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 153 F. Supp. 648 (N.D. Ill. 1957); *Bowman Dairy Co. v. Hedlin Dairy Co.*, 126 F. Supp. 749 (N.D. Ill. 1954); *Babcock v. Crafts 20 Big Shows, Inc.*, 342 P.2d 974 (Cal. App. 1959); *Cf.*, also *Noerr Motor Freight v. Eastern Railroad Presidents' Conference*, 155 F. Supp. 768 (E.D. Pa. 1957), *rev'd* in other respects in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), in which the acts of unfair competition were so patent that the distinction between the antitrust laws should have been highlighted.

⁶³ *Atlantic Heel Co., Inc. v. Allied Heel Co., Inc.*, 284 F.2d 879 (1st Cir. 1960). See also, *Parmelee Transportation Co. v. Keeshin*, 186 F. Supp. 533 (N.D. Ill. 1960), *aff'd*, 292 F.2d 794 (7th Cir. 1961).

stroying a competitor by means that are not within the area of fair and honest competition is a purpose that clearly subverts the goal of the Sherman Act. It constitutes an interference with the natural flow of interstate commerce which would exist under conditions of fair and honest rivalry for the buyer's trade."

The *Klor's* case may indicate that a kind of federal law of unfair competition is in gestation; however, the confusion in legal concepts suggests that paternity is not the common law of unfair competition but of the antitrust laws. Desirable as a federal law of unfair competition may be,⁶⁴ it would be more dignified to create it by act of Congress or even an "overt act" of the courts than by misinterpretation of existing statutes.

⁶⁴ See H. R. 7833, 86th Cong., 1st Sess. (1959) (Lindsay Bill).