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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

TABLE OF CONTENTS

Page



## TABLE OF CASES CITED

Page

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

| | |
|---|---|
| In the Matter of<br><br>ACME ASBESTOS COVERING AND FLOORING COMPANY, ET AL. | DOCKET NO. 4613 |

## BRIEF OF COUNSEL FOR THE COMMISSION

A complaint was issued in the above matter on October 10, 1941. On December 27, 1941, an amended complaint was issued in which it is alleged that the respondent Acme Asbestos Covering and Flooring Company and nineteen other respondents entered into an agreement and conspiracy to eliminate and suppress competition in price and otherwise in the sale and distribution of asbestos paper and other low-pressure asbestos pipe covering. The amended complaint sets out numerous alleged acts and practices in which the respondents engaged to effectuate said agreement and conspiracy. After the respondents had filed answers to the amended complaint hearings were held at which testimony was heard in support of the allegations of the amended complaint and in opposition to said allegations and on the 15th day of March, 1943, the trial examiner filed his report on the evidence.

## AMENDED COMPLAINT

The amended complaint sets forth the necessary jurisdictional allegations and alleges that respondents manufacture and sell approximately from 80 percent to 90 percent of low-pressure asbestos pipe covering manufactured and sold in the United States with the respondents Johns-Manville Corporation and the Philip Carey Manufacturing Company and its wholly owned subsidiary The Philip Carey Company, manufacturing and selling approximately 50 percent. Some of the respondents manufacture the material and wind it or convert it into pipe covering while other respondents buy the materials from the manufacturers and wind it or convert it into finished pipe covering. The respondents, Tulloch, Johns-Manville Corporation, the Philip Carey, a wholly owned subsidiary of the Philip Carey Manufacturing Company, Norristown Magnesia and Asbestos Company, together with some of the other respondent corporations, prior to and during the year 1934 entered into and agreement, understanding, combination and conspiracy for the purpose, intent and with the effect of substantially restricting, suppressing and eliminating actual and potential competition in price and otherwise in the sale and distribution of said products and that the respondents who did not originally enter into said agreement did during the years 1935 and 1936 adopt, join in and become parties to said agreement and cooperated in the carrying out, enforcing and maintaining said agreement.

During the year 1934 the respondent Johns-Manville Corporation obtained what is known as a Toohey patent which contained claims embodying low-pressure pipe covering, asbestos paper and other material used primarily for low-pressure pipe covering. The main feature of the patent claims was that it would by the introduction of a wax sizer make the material water repellent and moisture-proof.

As a part of and incident to said agreement, understanding and conspiracy to the respondent Johns-Manville did on September 11, 1935, grant to the respondent Tulloch an exclusive license to make, use and sell and the exclusive right to issue nonexclusive license to others to make use and sell the materials and products covered by said letters patent. Pursuant to and to effectuate said agreeement and understanding with reference to the sale and distribution of said products respondents,

1. fixed and maintained prices;

2. required and adopted uniform methods of computing prices by the use of a so-called "manual of unit prices for pipe covering and insulating blocks" and by other means and methods;

3. classified customers;

4. fixed, established and maintained differentials in prices between different classes of customers;

5. adopted and maintained uniform contracts for sale of such products by respondents;

6. adopted and maintained a system of selling said products at delivered prices; said system being designed to prevent the difference in freight cost creating any difference in delivered cost prices;

7. adopted and maintained a system of zones for price fixing purposes;

8. simultaneously shifted a locality or area from one price zone to that of another;

9. established standard sizes and thicknesses in materials and fixed differentials in prices applicable to said sizes;

10. discussed and adopted before the granting of the Toohey patent a merchandising plan to be used by respondents in the sale and distribution of their products. Under said merchandising plan said respondents specifically agreed among other things upon -

(a) the classification of buyers to determine the discount said customers were to receive;

(b) zoning the various States of the United States in order to neutralize differences in freight rates on certain materials;

(c) terms and conditions of sale which respondent should, and did, follow;

(d) rigid control of prices under threat of imposition of penalties for any digression;

(e) arrangement for the appointment by each respondent of a limited number of distributional accounts which were to be given and were given special discounts;

(f) filing price lists of said material with respondent Tulloch containing delivered prices for and within the various zones.

11. discussed and agreed upon a proposed form of license agreement between respondent Tulloch and Johns-Manville Corporation regarding the sale and use of licensed materials and products covered by the Toohey patent and a form of license agreement between the respondent Tulloch and respondent corporations regarding the same subjects and the schedule of prices, terms and conditions of sale of said materials and products;

12. entered into and carried out said license agreement between respondent Johns-Manville Corporation and respondent Tulloch and also entered into and carried out nonexclusive license agreement by the respondent Tulloch and respondent corporations under the terms of which license agreements respondent corporations were required to sell the licensed material according to schedule, prices, terms and conditions of sale fixed by agreement among said respondents;

13. adopted by respondent corporation as a part of said sub-license agreements a merchandising plan substantially identical with the plan heretofore described in paragraph 10 with respondent Tulloch managing and supervising the operation and enforcement of said plan by the imposition of penalties and otherwise;

14. discussed and agreed in advance as to changes and amendments to be made in the sub-license agreements before respondent Tulloch actually announced said changes and agreements;

15. agreed to include nonlicensed materials to be covered by said merchandising plan and thereby fixed the prices, terms and conditions of sale of said materials.

The complaint concludes with an allegation as to the result of said agreements and the necessary injury to the purchasing public.

ANSWERS

The answers of all of the respondents were substantially the same and can be summarized as denying any agreement or collusion on the part of the respondents and by claim of rights to do the things alleged in the complaint since the respondents operated under the NRA Code from December, 1933, until the Schechter Decision and then as operating under the voluntary agreement invited by the President from May until September, 1935, and then operated as licensees under a license agreement to manufacture and sell a patented product. Respondents contend that their acts and practices while licensees were acts and practices required of them by the licensor and that these requirements did not exceed the lawful right of the owner of a patent.

DESCRIPTION OF PRODUCT

Asbestos is mined in rock form and then taken to the factory where the rocks are crushed and ground and the small particles are run over a screen where the fiber is screened from the small particles of rocks. After the fiber is taken from the ore it is placed in a vat with a starchy mixture where it is thoroughly mixed and then rolled into strips of paper.

The low pressure (coarse corrugated) air cell asbestos paper covering is material consisting of a flat sheet of asbestos paper rolled on a corrugated sheet, with corrugations approximately one-fourth inch in depth.

Silicate of soda is commonly used to adhere the flat sheet to the corrugated sheet. A layer of a flat sheet of paper and a layer of corrugated paper thus united is referred to as a ply. These plies are then rolled one upon the other in a spiral manner to make a two, three, four, or other ply pipe covering. These plies are formed into sections usually three feet long and sufficient in diameter to fit the pipe for which they are manufactured. These sections are not joined on one side and are partially open on the other so that the two halves work on a hinge to enable the covering to be fitted around the pipe.

The low-pressure fine corrugated air cell type asbestos pipe covering is principally the same as the coarse corrugated, the difference being in the depth of the corrugations.

The low-pressure laminated type asbestos pipe covering differs from the corrugated type in that the means of separation between the layers vary, such as indentations instead of corrugations.

Wool felt type pipe covering is a type of material that consists of layers of wool felt paper with inner liners of water repellent material - the outer layers of which are usually made of water repellent material.

Anti-sweat type pipe covering is a material consisting of alternating layers of water repellent material and wool felt material usually made in telescopic form so as to permit a breaking of the joint and secure inclusion of air from the pipe.

Frost-proof pipe covering is a type of covering designed specifically to protect pipes which are underground and exposed to the possibility of freezing.

High-pressure laminated asbestos pipe covering is similar to the other materials above mentioned with the difference that there are more plies and a higher grade of insulating material is used.

Corrugated asbestos paper is a flat piece of paper on which is glued or cemented a corrugated sheet of paper.

Asbestos paper and roll boards are just flat materials with no corrugations involved.

Wool felt paper is material used to manufacture the wool felt types of covering or other products.

Sponge felt paper is a type of paper in which sponges or other light materials are incorporated having the effect of making a rather spongy type of material with large numbers of very small confined air spaces.

Brass, zinc and lacquer bands are bands used to hold the sections of the pipe together.

Flexible range boiler jackets are plies of paper as above described rolled into a cylinder form of sufficient diameter to cover the boiler for which they are manufactured.

In making the regular corrugated types of pipe covering the flat sheets are fastened to the apex of each corrugation of the corrugated sheet but in making the flexible range boiler jackets the flat sheets of paper are not fastened to any corrugation except those within an inch or two of the outer edge, thus leaving the jacket in a condition where it can be easily folded.

RESPONDENTS

In the industry under consideration there are what are known as manufacturers, that is concerns, that make the pipe, corrugate it and wind it into completed sections of pipe covering. There are other concerns known as winders or converters who buy the manufactured asbestos from the manufacturer and corrugate the paper and wind it into finished pipe covering. Some winders buy the material and corrugate it and some buy the material and have others to corrugate it. Some of the manufacturers sell both the flat and corrugated type of asbestos paper and also sell the finished type of covering.

Respondent Acme Asbestos Covering & Flooring Company is an Illinois corporation located in Chicago, Ill., and is what is known in industry as a winder or converter and will be referred to hereinafter as respondent Acme.

The respondent Asbestos Asphalt Insulation & Covering Company is an Illinois corporation located in the city of Chicago, and is the successor to the Illinois Philip Carey Company, and is what is known as a converter or winder and will be referred to hereinafter as respondent Asbestos Asphalt.

The respondent Atlantic Asbestos Corporation is a New York corporation, located in New York, and is successor to J. Ozurovitch and is known in the trade as a manufacturer and will be referred to hereinafter as respondent Atlantic.

The respondent, A. H. Bennett Company, is a Minnesota corporation located at Minneapolis and is known in the trade as a winder or converter and will be referred to hereinafter as respondent Bennett.

The respondent, Philip Carey, is an Ohio corporation located at Lockland and is known in the trade as a manufacturer and will be referred to hereinafter as respondent Carey.

The respondent Clark Asbestos Company is an Ohio corporation located in Cleveland and is known in the trade as a converter or winder and will be referred to hereinafter as respondent Clark.

The respondent, Empire Asbestos Products Company, Inc., is a New York corporation located in Long Island, and is what is known in the trade as a manufacturer and will be referred to hereinafter as respondent Empire.

The respondent, Gillen-Cole Company is an Oregon Corporation located at Portland, and is what is known in the trade as a winder or converter and will be referred to hereinafter as respondent Gillen-Cole.

The respondent, Johns-Manville Corporation is a corporation located in New York and is what is known in the trade as a manufacturer and will be referred to hereinafter as respondent, Johns-Manville.

The respondent, Keasbey & Mattison, is a Pennsylvania corporation, located at Ambler and is known in the trade as a manufacturer and will be referred to hereinafter as respondent Keasbey and Mattison.

The respondent, Plant Rubber and Asbestos Works is a California corporation located at San Francisco and is known in the trade as a winder or converter and will be referred to as respondent Plant Rubber.

Respondent, L. A. Rubber & Asbestos Works is a California corporation and is located in Los Angles and is known in the trade as a manufacturer and will be referred to hereinafter as respondent L. A. Rubber.

The respondent, G. A. MacArthur Company is a Minnesota corporation located in St. Paul and is known in the trade as winders or converters and will be referred to hereinafter as respondent MacArthur.

The respondent, Norristown Magnesia & Asbestos Company is a Pennsylvania corporation, located at Norristown, and is known in the trade as a manufacturer and will be referred to hereinafter as respondent, Norristown.

The respondent, W. S. Nott, is a Minnesota corporation, located at Minneapolis, and is known in the trade as a converter or winder and will be referred to hereinafter as respondent, Nott.

The respondent, Pacific Asbestos & Supply Company, is an Oregon corporation, located at Portland, and is known in the trade as winders or converters and will be hereinafter referred to as Pacific Asbestos.

The respondent, Sall Mountain Company, is a Delaware corporation located in New York and is known in the trade as a manufacturer and will be hereinafter referred to as respondent, Sall Mountain.

The respondent, Standard Asbestos Manufacturing Company is an Illinois corporation located in Chicago, Ill., and is known in the trade as a winder or converter and will be referred to hereinafter as respondent Standard Asbestos.

The respondent Donald Tulloch, Jr., is an individual, located in Philadelphia, Pa., and will be hereinafter referred to as respondent Tulloch.

## PATENTS AND LICENSE AGREEMENTS

There are two patents and license agreements involved in this proceeding.

On the 26th day of September, 1931, Mr. Earl R. Williams and Mr. Edward Toohey, who were then employed by the respondent Johns-Manville, applied for a patent involving the process of manufacturing asbestos paper so as to render it water repellent and shrinkproof. A patent was issued to Messrs. Williams and Toohey on the 4th day of September, 1934, which patent is in evidence as Respondents Exhibit 12 and is referred to throughout the record as the Toohey patent.

There are eleven claims in the Toohey patent but according to the testimony of numeous witnesses the same method is used to manufacture asbestos paper and pipe covering as has been used in the industry for years and years before the letters patent was issued with the exception that in making asbestos paper and pipe covering according to the claims in the letters patent a wax sizer, designed to make the paper or pipe covering water repellent and moisture proof is beaten into the asbestos fiber and then heat treated to fuse the wax and fiber before it is rolled into paper. In other words, in making paper and pipe covering as was made for years and years before 1931, and is being made today, and making pipe covering according to the claims in the letters patent the mining is the same; the method used in obtaining the asbestos fiber is the same; the sizer is different; the mixing of the sizer and the fiber is the same; corrugating the paper is the same; indenting the paper is the same; the process of making the plies is the same; rolling the plies into finished sections of pipe covering is the same and the application of the finished product is the same.

The Toohey patent was assigned to respondent, Johns-Manville, and on September 11, 1935, the respondent Johns-Manville issued a license to the respondent Donald Tulloch, Jr., to manufacture, use and sell, and an exclusive license to license others to manufacture, use and sell the product covered by the letters patent. All of the other respondents were at one time or another since 1935 a sub-licensee of respondent Tulloch. The dates the different respondents entered into license agreements with the respondent Tulloch and that some of them cancelled these agreements are set forth in Commission's Exhibit 3 with such exceptions as will be pointed out hereinafter.

Before letters patent were issued to Messrs. Williams and Toohey with reference to the shrinkproof paper letters patent were issued to Grant Williams covering flexible range boiler jacket (hereinafter described). This patent was later assigned to respondent Norristown and this assignment was made before the Toohey patent was granted.

In August, 1933, respondent Norristown issued a license to respondent Carey, to manufacture and sell flexible range boiler jackets and in February of 1934, respondent, Norristown, issued a license to the respondent, Johns-Manville to manufacture flexible range boiler jackets and some time during the year 1934 respondent, Norristown issued a license to respondent Sall Mountain to manufacture flexible range boiler jackets. There was no price schedule with the license issued to respondent Carey but there was a price schedule in connection with the license issued to respondent, Johns-Manville and respondent, Sall Mountain.

The respondent, Norristown, issued a license to respondent Ruberoid to manufacture flexible range boiler jackets in April of 1938, and to respondent Keasbey & Mattison in April of 1938 and to respondent Empire in November of 1939. (Tr. 700)

## STATEMENT OF THE FACTS

The respondent Tulloch, referred to by Mr. Callopy of respondent Acme as the "Guiding Light" of the asbestos industry, had been connected with the asbestos industry in one way or another several years prior to the NRA Code in 1933. He was for a period of two years before 1933, the date the NRA Code relative to the asbestos industry became effective, manager of an association in the asbestos paper field; the association of which the principal respondents in this proceeding were members. From December 1933 to May 1935, he was secretary-manager of the Asbestos Paper and Allied Products Division of the NRA Code (Tr. 47). From September 11, 1935, to the present time he has been administering a license under the Toohey patent. For some time before and during the time of the NRA the respondent Tulloch was in close association with the other respondents in this proceeding.

In 1933, some five or six months before application for the approval of the NRA Code as applicable to the Asbestos Paper and Allied Products Division of the asbestos industry was made and more than a year and a half before the said Toohey patent was issued, the respondent Tulloch went to Detroit, Mich., and tried to interest Mr. C. Stanley Morgan, a member of the industry, in a license agreement relative to preshrunk paper, the proposed license agreement being designed to stabilize the industry, stabilize prices and methods of selling and distributing asbestos paper, pipe covering and allied products (Tr. 1247-1258).

On June 16, 1933, the National Industrial Recovery Act was approved and thereafter under date of June 26, 1933, the members of the asbestos industry, including all the respondents formulated a Code and Merchandising Plan applicable to manufacturing and selling of asbestos paper and asbestos pipe covering and allied products. This Code and Merchandising Plan was submitted to the NRA authorities and by the NRA authorities recommended to the President for his approval and the President approved the Code as of November 1, 1933. The respondent, Tulloch was made secretary-manager. There were some 55 members of the industry in the group known as the Asbestos Paper and Allied Products Division of asbestos industry, and all of the respondents in this proceeding were included in this group.

The respondents, together with the other members of the industry within this group, operated their business under and in accordance with the provisions of this Code and Merchandising Plan before the Code was approved by the President in November, 1933, and thereafter until May 27, 1935, the date of the demise of NRA (Tr. 277). During this period drafts of changes and revisions of the original Merchandising Plan were made and submitted to the NRA Code authorities but none of these was ever approved.

Immediately following the demise of the NRA several of the respondents entered into a voluntary agreement whereby they agreed to be governed by and to carry out sections 3, 4, 5, 7, 8 and 10 of the NRA Code as applicable to the asbestos industry. This agreement provided for a merchandising plan but no plan was formed. This agreement continued in effect for several months (Com. Ex. 18, 152 A & B).

September 11, 1935, the respondent Tulloch entered into a license agreement with respondent Johns-Manville wherein the respondent Johns-Manville licensed respondent Tulloch to manufacture, use and sell and the exclusive right to license others to manufacture, use and sell the products covered by the Toohey patent. Simultaneously with this license agreement respondent Tulloch issued a sub-license agreement to respondent Johns-Manville to manufacture, use and sell said products. From time to time after September 11, 1935, respondent Tulloch sub-licensed other members of the industry. These sub-license agreements will be collectively referred to as the Tulloch License Agreement. All of the other respondents were at some time between 1935 and 1940 sub-licensees of respondent Tulloch. The dates of their entry and the dates of their withdrawal from the license agreement will be referred to more fully hereinafter. A price schedule and a Merchandising Plan to be used in connection with the license agreements were formulated and put in use. The price schedule at first covered all the items hereinbefore described except range boiler jackets and this item was included in the price schedule at a later date. The Merchandising Plan covered every conceivable phase of manufacturing and marketing of the products involved in this proceeding. Specific things dealt with in this Merchandising Plan will be set out later. Minor changes and revisions were from time to time made but its principal features remained in force and effect throughout the terms of the Tulloch License Agreement.

During the time the respondent Tulloch was negotiating with respondent Norristown relative to the Tulloch License Agreement the respondent Tulloch either at the request or with the consent of respondent Norristown tried to obtain licensees for respondent Norristown relative to flexible range boiler jackets but there were no other licensees obtained until in April of 1938 and no evidence of any effort being made to obtain licensees after January of 1937, the date the respondent Tulloch included flexible range boiler jackets in the said price schedules.

MERCHANDISING PLANS, THEIR CONTENTS AND COMPARISONS

The first Merchandising Plan in evidence is Respondents Exhibit 3 dated June 26, 1933, and the heading is "This Merchandising Plan is Adopted Pursuant to Article VI, Section 4(b) of the Asbestos Code."

This Merchandising Plan covers the products designated (1) corrugated air cell type asbestos pipe covering sheets and blocks, (2) wool felt pipe covering with asbestos and/or waterproof linings, and (3) anti-sweat types of covering.

Section 2 provides for the classification of buyers and describes the necessary qualifications of the buyers in the different classes. Section 2 further provides that the names of all customers classified for various trade outlets shall be compiled by the manufacturers and submitted to the merchandising committee of the division (NRA code) and be open to inspection of the manufacturer and to the class of trade affected, and that additions may be made by any manufacturer only after application in writing on a prescribed form, this application to be made to the manager of the division.

Section 3 details the manner of making shipments of the different products and defines carload lots and less than carload lots, and further provides that "manufacturers shall not hire trucks from their customers nor rent their own trucks to their customers for the purpose of transporting asbestos heating insulating materials. There shall be no allowance of trucking charges where material is picked up at factory or warehouse by customer trucks."

Section 4 designates different classes of shipping delivery points, such as factory points, metropolitan area, and manufacturer's warehouse.

Section 5 is with reference to prices and methods of handling orders.

Subsection (a) of section 5 provides that no manufacturer can sell to any buyer for resale more than one small introductory order unless the buyer has agreed in writing to make no improper use of the member's merchandising plans, prices, terms and/or conditions of sale or otherwise misrepresent the policies or products of the member, to sell from a list no higher than that from which the products were purchased and to observe all the provisions of the NRA Code insofar as applicable.

Section (b) provides for pricing of standard sizes of pipes and blocks and designates the differentials in prices between the different sizes and thicknesses of the product and the method of figuring prices to be charged.

Subsections (c), (d), (e), and (j) provide for a standard pipe covering price list and clock price list; differentials in price between the different sizes and thicknesses of the product; the method of figuring prices to be charged; the differentials in prices on different types of bands and canvas jackets used; protection to the buyer and manufacturer in case of price advances or decreases after the sale of the merchandise; the terms of payment by the different classes of buyers and for the contents of sales contracts to the different classes of buyers.

Section 9 provides for freight allowances on shipments of merchandise and zones the United States into different zones for pricing purposes and for freight allowance purposes and describes in minute detail the boundaries of the different zones.

Section 2, subsection IV, provides for the appointment by manufacturers with the approval of the manager of a limited number of special distributional accounts.

Section 5(a) provides for a standard pipe covering price list and block price list.

Article VIII of the Code under which respondents claim they were operating provides for the filing of future prices by the different manufacturers with the manager of the Code Division. This Plan contains every provision necessary to enable the different manufacturers and the different dealers in the products to arrive at definite, uniform prices without the necessity of consulting one another.

The next Merchandising Plan in evidence, Commission's Exhibit 151-A through 151-W, is dated June 27, 1934, and according to the testimony of the witnesses Mr. High and Mr. Tulloch, was prepared and submitted to the NRA authorities but was never approved. It is fundamentally the same as Respondent's Exhibit 3, above described (2329-2370-2156-7, 2254-5, 3159-3163).

Immediately after the NRA Decision declaring certain portions of the NRA law unconstitutional, the respondents entered into a Voluntary Agreement to continue to cooperate in the observance of the Code provisions specifically mentioned as Articles 3, 4, 5, 7, 8 and 10 of the Code of Fair Competition for this industry. The first evidence of this is Commission's Exhibit 152-A and B, which is a telegram to A. K. Burgstresser, president of respondent Norristown from Lewis H. Brown, chairman of the Code authority. Following up this telegram, a committee prepared the Voluntary Agreement which is in evidence as Commission's Exhibit 18. While this is designated a "Voluntary

Agreement" section 3 provides that the members of the industry may prepare a Merchandising Plan incorporating the merchandising policies best calculated to promote fair competition and present it to the President for approval and if approved by the President, this Merchandising Plan is to have the same force and effect with respect to parties agreeing to it as the Voluntary Agreement. The Voluntary Agreement has provisions which could not be considered anything but a skeleton form of a merchandising plan. It has provisions with reference to secret rebates; special services or privileges; for the publishing and filing of price lists, discount lists and rebates and all other terms and conditions of sale; such list and all changes thereafter made to contain the terms of sale for all products of the industry sold and offered for sale by the members of the industry entering into the agreement; for the filing of customer classifications and qualifications and provides against the sale and distribution of products contrary to the price lists and terms and conditions of sale filed.

Section 7 provides, "merchandising plans adopted pursuant to section 3 of article VI shall be controlling with respect to members of the industry within the division who agree to such a plan, even though said provisions supplement or vary the publicity requirements of article IX."

Section 12 of said agreement provides for a liquidated damage agreement. The liquidated damage agreement referred to is attached to the Voluntary Agreement as Exhibit A and is in the record as a part of Commission's Exhibit 18.

The next Merchandising Plan in evidence is Commission's Exhibit 2, which is the Merchandising Plan formulated and put into force and effect in connection with the Tulloch License Agreement. Commission Exhibit 2 consists of 274 pages. It contains all provisions of the Merchandising Plan put into force and effect in connection with the Tulloch License Agreement from the date of its inception, and all changes and amendments up to and including March 22, 1941. This Merchandising Plan leaves nothing to the imagination with reference to the manufacture, sale and distribution of material manufactured through the use of and in accordance with the Toohey patent. It differs from the other Merchandising Plans hereinbefore described in that it specifically sets forth the prices at which the merchandise is to be sold and states that it applies to licensed material or material manufactured in accordance with the Toohey patent.

This Merchandising Plan either at the time it was originally formulated or as later revised and amended,

1. Fixes the prices at which and the conditions under which the products hereinbefore described were to be sold;

2. Requires uniform classification of customers for pricing purposes;

3. Fixes differentials in prices between different classes of customers;

4. Requires contracts for the sale of said products by respondent to be uniform in substance;

5. Zones the United States into zones for pricing purposes and requires certain items of said products to be sold at delivered prices only;

6. Designates standards for the sizes and thicknesses of said products and fixes the differential in prices between said products of different sizes and thicknesses;

7. Provides for freight equalizations on standard products and designates certain specific cities from which freight should be figured in equalizing the freight;

8. Provides for the rigid enforcement of the provisions of the Merchandising Plan and price schedules by the imposition of penalties for digression;

9. Requires a uniform method of computing prices through the use of a so-called manual of unit prices for pipe covering and insulating blocks.

The are many more provisions and practices covered by this Merchandising Plan designed to eliminate competition in price and otherwise the sale and distribution of said products and if carried out would make it impossible for a purchaser of said products to obtain said products from any manufacturer except at the same price and on the same terms and under the same conditions as he would be able to obtain them from any other manufacturer.

## ZONES

Respondents assert and contend that the use of zones is an old established practice in the industry and a practice about which there was no concert of action on the part of respondents but the record is to the contrary.

During the taking of testimony in this proceeding the attorneys representing the different respondents were asked to have a statement prepared showing the zone boundaries as used by their clients to go with the dates that such zones were used by them. Thirteen such statements were prepared and introduced in evidence. As to four of the respondents, their attorneys stated for the record that they did business in such a small area that they would not and did not use the zoning system (Com. Exs. 375 through 387).

As to respondent Norristown, it is stated that Norristown had used the zoning system since 1927, but that the respondent had no records showing the different zone boundaries prior to July 19, 1933 (Com. Ex. 384-A). With this statement, Norristown submitted a sheet from a price list, effective July 19, 1933, which described the zones then in effect as follows:

Zone 1--Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and New Hampshire; Zone 2--Alabama, Florida, Georgia, Mississippi, South Carolina, and Tennessee; Zone 3--Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri (a), Nebraska (Omaha only), Ohio, and Wisconsin; Zone 4--Arkansas, Kansas, Louisiana, Missouri (d), Nebraska (c), North Dakota, Oklahoma, South Dakota, and Texas (b).

Note: (a) That part of Missouri which is within ten miles of the Mississippi River.

(b) Except El Paso district, which is in Zone 5.

(c) Except Omaha, which is in Zone 3.

(d) Except that portion which is within ten miles of the Mississippi River, which falls in Zone 3.

In the statement prepared for respondent Johns-Manville, it is stated that the earliest record of zones used in the sale of asbestos pipe covering products retained in the records of the company is dated October 5, 1928, and that since that time zones have been used continuously but the selling policy with reference to different products has varied from time to time and that there have been changes in the zone areas. Under date of December 29, 1933, the respondent Johns-Manville put out a sales bulletin in which the different zones were described and this bulletin shows Zones 1 through 4 to be the same in every detail as those used by the respondent Norristown with the exception that Norristown has North Carolina in Zone 1 and respondent Johns-Manville has North Carolina in Zone 2 (Com. Exs. 381 X and Y).

In the statement prepared by the respondent Carey (Com. Ex. 379-A), it is stated that respondent used zone areas in the sale of some asbestos pipe covering products at least as early as August 10, 1929, which is the date of the earliest record the respondent now has. Without numbering the zones, the respondent Carey places all of the States named in the Norristown Zone 1 in one particular zone, with the exception of the State of North Carolina. These two descriptions are identical with Johns-Manville's Zones 1 and 2. Carey places all the States designated as Norristown Zone 3 in one particular zone. Respondent further states that it did not use the zoning system during the period from December 1, 1930, to March 1, 1932, in pricing its asbestos pipe covering products. There is in evidence as Commission's Exhibit 379-Z through 379 Z-2, a complete description of the zones as used by respondent Philip Carey from August 10, 1929, through April 11, 1935. The zones were changed by this respondent on May 8, 1935, and the zones as then changed correspond in every detail with the Norristown and Johns-Manville zones above described.

For respondent Sall Mountain it is stated that the only record it was able to find with reference to zones being used by it was a set of price lists dated October 21, 1939, showing four zones. The description of these zones vary slightly from the zones used by Norristown as above described. It is further stated that the present officers believe that during the time the merchandising plan was in effect under the Code of Fair Competition, it adopted and used the zones provided for in said plan and that during the time it was a licensee of respondent Tulloch, it used the zones prescribed by him insofar as and to the extent that they covered its marketing area (Resp. Exs. 385-A through 385-G).

The zones used by the respondent Sall Mountain Company (Com. Ex. 385) beginning in October, [illegible], varies slightly from the zones used by the respondents Carey, Norristown and Johns-Manville.

In the statement submitted in behalf of the respondent Empire (Com. Ex. 380), it is stated that this company used zone areas in selling asbestos pipe covering from the commencement of business in 1932 and continued to use zones up to the time it became a Tulloch licensee but no records were kept showing such zones.

In the statement submitted in behalf of the respondent Acme (Com. Ex. 376) it is stated that this company first used a zone plan of selling pipe covering about the year 1933 and has continuously used zones in the sale of asbestos pipe covering up to the present time and that the zones established under the Asbestos Code were used by this company while the code was in effect but that no zone descriptions were published until May, 1937. This company did not furnish any zone descriptions.

For the respondent MacArthur (Com. Ex. 383) a statement was filed in which it is stated that no records of zone descriptions could be found prior to August 1, 1933; that zone prices were used during 1933 in a zone comprising North Dakota, South Dakota, Western Wisconsin and Northern Iowa but the record showing this zone could not be found. While the asbestos code was in effect the zone areas established under the Asbestos Paper and Allied Products Division were used. Zone descriptions in effect August 1, [illegible], were Zone 3 - Iowa, Michigan, Wisconsin and Hennepin and Ramsey Counties, Montana, except Beaverhead, Flathead, Lake, Lincoln, Medicine, Mineral, Missoula, Ravalli and Sanders Counties, which are in Zone 5, North Dakota and South Dakota.

For respondent Keasbey and Mattison (Com. Ex. 384) it is stated that the first zone descriptions which could be found in the company's files were dated August 10, 1934. An examination of these descriptions shows that they correspond in every detail with the zones used by respondents Norristown, Johns-Manville and Carey; that these descriptions continued in effect until the Tulloch license agreement was signed on September 20, 1935. Then the respondent used the zones as prescribed by respondent Tulloch and continued to use these zones throughout the term of this license agreement; that in January, 1939, Keasbey and Mattison ceased using the license zone areas and published its own zone description. These latter descriptions will be dealt with further on in this brief.

For respondent Ruberoid (Com. Ex. 375) it is stated that this company first published a description of its zone areas October 25, 1935. An examination of these zone descriptions shows that they correspond in every detail with the zones used by the respondents Norristown, Johns-Manville, Carey and Keasbey and Mattison; that these descriptions continued in effect until the Tulloch License Agreement in October, 1935, when this company adopted the zones as prescribed by Tulloch to the extent that they covered the Ruberoid marketing areas; that the first zone description under the license agreement included only zones 1, 2, 3 and 4 and the Ruberoid Company added, for its own purposes, zones 5 and 6. In January, 1940, the respondent ceased using the said zones and published its own zone descriptions. These descriptions are given and will be referred to hereinafter.

For respondent Asbestos Asphalt it is stated that this respondent did not use a zoning plan prior to 1934, but early in 1934 the respondent began using the zoning plan established for the Asbestos Paper and Allied Products Division of the Asbestos Code and that the use of zones was continued by this respondent until the time it became a Tulloch licensee but the company has kept no record of these zones (Com. Ex. 377).

For the respondent Nott it is stated that this company first used zones in selling some asbestos pipe covering ten years ago and continued to use such zones until it became a Tulloch licensee and under the code it used code zones to the extent required by the code but no records have been kept of zone descriptions (Com. Ex. 386).

For the respondent Plant Rubber, it is stated that it became a licensee of the respondent Tulloch November 20, 1936, and cancelled the license agreement August 22, 1938, and that all records of the company of these early dates have been classed as out-of-date records and have been destroyed. It is further stated that this respondent never had any need to use definite zone definitions east of the intermountain section, it being a California corporation; that beginning approximately 12 years ago this company was selling its products on the Pacific coast on a delivered price zone basis and that that practice continued throughout the years prior to the company becoming a Tulloch licensee; that throughout the company's entire history to date the principal sales of the products in question have been in the Pacific coast zones; and when it became a licensee of the respondent Tulloch it adopted the zone definitions for the area which it covered and found them substantially like those already in use by respondent Plant Rubber (Com. Ex. 387).

For the respondent Atlantic Asbestos, formerly J. Ozurovitch, Inc., it is stated that this company did not sell any of its products outside of the New York metropolitan area either before or during the existence of its license agreement with respondent Tulloch. Therefore, this company had no occasion to use a zone system or to publish zone areas prior to its license agreement with respondent Tulloch or during the period when it was the licensee of Tulloch under the Toohey patent (Com. Ex. 378).

A comparison of the zones used by the respondents Norristown, Johns-Manville, Carey, Sall Mountain, Keasbey and Mattison and Ruberoid since the year 1940, shows that all of these respondents were using zones identical in every detail. The zones as used by respondent

Norristown are described in Commission's Exhibits 181-A through 181-D. Those used by respondent Johns-Manville are described in Commission's Exhibit 381-Z2. Those used by respondent Carey are described in Commission's Exhibit 2 which is the Merchandising Plan under the Tulloch License Agreement. The zones used by the respondent Keasbey and Mattison are described in Commission's Exhibits 382-E through 382-I. The zones used by the respondent Ruberoid are described in Commission's Exhibits 375-T through 375-Z8.

ARGUMENT AS TO THE FACTS

Before beginning the argument as to the facts, I want to call to the Commission's attention that during the presentation of the testimony in support of the allegations of the complaint, 17 witnesses were called. One witness was a member of the industry, but was not connected with the Tulloch License Agreement in any manner. One witness was an ex-licensee. One witness was the attorney-examiner who made the investigation. The other 14 witnesses were either respondents or officials of respondent companies. The respondents called 23 witnesses to give testimony in opposition to the allegations to the complaint, so in considering the evidence it is to be noted that all of the testimony, with the exception of the testimony given by the attorney-examiner Mr. Morgan and Mr. Bergman, is testimony produced by the respondents.

MERCHANDISING PLAN PERFECT SET-UP FOR PRICE FIXING

As testified by several witnesses, the industry had for a number of years used a table of standard list prices. Price quotations were made in terms of stated discounts from the table of list prices. The witness Hittner testified:

> Q. I thought you told me how long that standard list price had been in use in the industry, but apparently you did not. Will you state insofar as you know how long it has been in use in the industry?
>
> A. So far as I have been in business for myself, for 20 years. I have been working 25 years, and always had a standard list price.
>
> Q. And was it the same list they always used?
>
> A. All manufacturers use one standard list price.
>
> Q. And during all that period?
>
> A. That is right (Tr. p. 2410).

To the same effect is the testimony of the witness High (Tr. p. 2184) and the witness George (Tr. p. 2465).

The first Merchandising Plan (1933) under consideration required the use of such a standard price list by the members of the industry.

Article 8 of the Code of Fair Competition for the asbestos industry approved November 1, 1933 (Resp. Ex. 2), required all manufacturers to file with the division office a schedule of their prices, terms and conditions of sale then in effect for distribution to all members of the division; that, in the event of any change being made by a member of the industry in any price, term or condition of sale, such member should publish to the trade concerned every such change and coincidentally file in the office of the division complete copies of every such change in price, term and condition of sale, for immediate distribution to the other members of the industry. It further provided that the members should file complete copies of every contemplated change in prices, terms and conditions of sale in the office of the division and that such copies should then be distributed to the trade concerned. This price filing enabled a member of the industry to know in advance the the prices that would be charged by his competitors.

The plan specified standard sizes and thicknesses of products manufactured and designated specific differentials in prices for different sizes and thicknesses. This provision left no room for guess on the part of the manufacturer as to the prices his competitors would charge for an article of other than standard size and thickness inasmuch as he would have before him the prices of his competitors on products of standard sizes and thicknesses and the only thing left to be done to arrive at the prices of the non-standard material would be the adding or subtracting of points specified in the merchandising plan.

The plan provided for the sale of finished pipe covering on a delivered price basis and for the sale of asbestos paper and blocks and heavy materials on a freight equalized basis, that is, freight to be equalized with that from the nearest factory to the point of delivery. It specifically named Ambler, Pa.; Erie, Pa.; Norristown, Pa.; Chicago, Ill.; Waukegan, Ill.; Manville, N. J.; Jersey City, N. J.; Lockland, Ohio; Rockdale, Ohio, and Detroit, Mich., as freight equalization points, those places being points where factories were located. The freight equalization plan eliminated the item of freight as an element of competition. The factory prices being the same, the delivered prices would be the same because a purchaser would have to pay the same amount of freight on a shipment of merchandise regardless of the distance from the point of shipment to the point of delivery, the net result being as testified to by Mr. Tulloch on page 344 of the transcript.

> Q. Well, isn't it a fact that the net result of the freight equalization was that a buyer at any point could buy at the same price from any licensee, no matter where his factory was located in the United States?
>
> A. That is right.

The plan provided for the sale of some products on a delivered price basis and for the sale of some products on a freight equalized basis, that is, freight to be equalized with that from the nearest factory to the point of delivery. It specifically named freight equalization points. This eliminated freight charges as an element of competition among the members of the industry and prevented delivery charges.

The plan divided the United States into zones to be used in connection with the products sold on a delivered price basis and specifically designated the price differentials between the different zones and, further, that the price quoted by a manufacturer on a product would prevail throughout a zone notwithstanding the fact that freight charges from the factory to one point in such zone should vary from the freight charges to another point in such zone. This enabled the manufacturer to know that the price quoted by a competitor at one point would apply throughout the entire zone. The advantage and effect of zones is clearly pointed out in respondent Tulloch's The "Guiding Light" testimony as follows:

> Q. What is the advantage of all manufacturers having the same zones? Same boundaries?
>
> A. Well, it would be a distinct advantage to me if I were competing with other people to have the same zones, because I would know exactly how I was competing with them. I would be able to sell at prices which would at least match theirs and permit me to get a fair share of the business (Tr. 3316).

The plan classified buyers for pricing purposes. It prescribed the qualification for buyers of different classes such a AA buyers, A buyers, B buyers, C buyers, D buyers and all others, and required a manufacturer to compile a list of all customers according to classification and to file such list with the manager of the division of the industry.

It further provided that no addition could be made to such a list by a manufacturer except by application in writing upon a prescribed form to the manager of the division, and the approval of such additions to these lists was left to the manager of the division. The manager of the division was also given the power to delete names from such lists "for cause." Insofar as the plan is concerned, "for cause" was left to the manager's discretion. The effect of such provisions and what they were to prevent is very clearly pointed out in the following testimony of Respondent Tulloch, the "Guiding Light":

> Q. Would you in fact investigate the qualifications of members of the industry to determine whether they were being properly classified by your licensees?
>
> A. Yes, I would. In fact, one of the common ways of creating competitive situations, obtaining an advantage in the sale of goods, is to reclassify buyers in a class to which they do not properly belong, giving them the advantage of some more favorable price classification, and it was necessary that I know about that (R. p. 330).

The Merchandising Plan specifically defines what should be considered carload lots and less than carload lots and specifically fixed the price differential between the two classes of shipment. It prohibited a manufacturer from shipping merchandise as carload shipments unless the amount of merchandise so shipped amounted to or exceeded the quantity specified and prevented a manufacturer from shipping merchandise in one car to two different buyers and classifying it as a carload shipment. This in effect told a manufacturer that his competitor could not give a customer any advantage in freight rates through such a maneuver.

• The plan also prhibited manufacturers from selling more than one order of merchandise to a purchaser unless the purchaser would agree to abide by the Merchandising Plan and not sell from a list higher than that from which the products were purchased. This enabled a manufacturer to know in advance that he would not be bothered with price competition from a competitor's customer.

The plan also prescribes specific ways for the manufacturer to figure his prices and designated specific differentials to be used in figuring prices so that all manufacturers operating under the plan would figure prices in the same manner.

The plan provided for specific extra charges to be made for cutting material into specific sizes.

The plan specified the number of bands to be furnished with each section of pipe covering and specifically designated differentials in prices on different types of bands, and, further, specifically designated extra charges to be made for extra bands furnished.

The plan further provided that all federal sales and excise tax and other direct taxes upon the manufacturer or upon the sale of the materials covered should be added to the prices contained in the merchandise plan.

The plan further provided for the filing of sales contracts with the manager of the division and that these sales contracts should be uniform in substance and should provide for uniform delivery dates and that all protection provisions be uniform.

The plan specified terms of payments and designated specific discounts to be allowed on term payments and prohibited a manufacturer from allowing any cash discounts. Further it provided "consigned stocks are not permitted under any condition."

The plan provided that no substandard or second quality materials should be offered at prices below the normal selling schedule of the manufacturer. This prohibited a manufacturer from following a practice which has been considered as fair and legitimate competition for ages.

Another provision of the plan was "manufacturers shall not hire trucks from their customers nor rent their own trucks to their customers for the purpose of transmitting asbestos heat insulating materials." There shall be no allowance of trucking charges where material is picked up at factory or warehouse by customer's truck. This could not have been designed for any purpose other than to prevent a manufacturer from giving special service to obtain business.

It is very plain indeed that every precaution was taken to prevent a manufacturer from giving any special concession to obtain business and to enable one manufacturer to know to a mathematical certainty the prices his competitors would charge under any condition and to know that his competitors could not deviate from such prices without being subjected to the probability of assessed penalties. In other words, the [illegible] thing it did not regulate was the breadth of a smile a salesman would give to a prospective customer to obtain business.

The arrangement under the first Merchandising Plan continued in effect until May, 1935, the date of the demise of the NRA.

We next come to the Volumtary Agreement entered into by the respondents after the NRA decision. As it has been pointed out hereinbefore this Voluntary Agreement contained all the necessary elements of a merchandising plan, to eliminate price competition between the subscribers. While it was testified by Mr. Abraham and Mr. High of the Ruberoid Company and Mr. Tulloch that the respondents never acted under this agreement, there is no evidence that the respondents did not continue the same practices in which they were engaged prior to the agreement and while they were operating under the first merchandising plan above set out. There is no evidence that the respondents changed their methods of operation in any manner. There is evidence however that the respondents continued to file prices and distribute prices and this continued for several months. There is evidence that zones remained the same and customers were classified as usual. If the respondents acts and practices were those prescribed by the agreement is it not to be presumed they were operating under the agreement? Any other conclusion would be unthinkable.

Commission's Exhibits 288, 290, 291, 292, 293, 294, 296 and 297 are price schedules showing at least six of the respondents were carrying out the price filing provisions of the Voluntary Agreement that the prices filed were being distributed among the trade and the different members of the industry. Here I would like to point out that these documents show that the respondents were all quoting the same prices. Commission's Exhibits 375 through 387 show that the respondents were still using the same zones and customer classifications.

This brings us to the Merchandising Plan, (Commission's Exhibit 2) formulated and put into force and effect in connection with the Tulloch License Agreement and as has been pointed out this merchandising plan corresponds with the first merchandising plan (Resp. Ex. 3) in every particular, with the exception that this plan specifically designates the prices and specifies that it applies to products manufactured in accordance with the Toohey patent. This plan does not leave anything to conjecture. An examination of these plans and the Voluntary Agreement leads the writer to say that "when better and more letter perfect merchandising plans to eliminate competition are built the 'Guiding Light' will build them."

While the merchandising plan put into force and effect in connection with the Tulloch License Agreement stated that it applied to products manufactured in accordance with the Toohey patent, The acts of the respondents show that they did not so limit it and that it would not be feasible to try.

The "Guiding Light" testified as follows:

Q. And you don't know whether any of these companies used one zone or two zones or three zones?

A. For what products?

Q. For any other than licensed products?

A. Are you speaking of other than licensed but which are comparable?

Q. Yes.

A. It would seem to me it would be silly for a manufacturer to set up three or four zones for licensed and unlicensed. His field force would certainly be confused.

Mr. Moffit of the respondent Ruberoid testified:

"I may state, however, in connection with your question, as a general thing, it would be unbusinesslike to sell asbestos goods under several different policies. In other words, if I have a general sales policy for a line of materials, that generally applies to all the materials of that line.

"That is the only way you can operate a business to a reasonable degree" (Tr. 553).

PLANNED COMMON COURSE OF ACTION TO ELIMINATE COMPETITION IN PRICE

Having seen the similarity of the merchandising plans and practices of the respondents from early in 1933 on down to the date of the hearings, let us now look to the purpose and intent of the respondents.

There is in this record conclusive evidence of the intent on the part of the respondent to eliminate competition in price and otherwise in the manufacture, sale and distribution of the products in question.

It can readily be seen that the respondents were following a common course of action from the date of the first merchandise plan in evidence on down through 1941. Just when and where, the plan for this common course of action was promulgated is not clear but it began to reveal itself in 1933.

As stated before, the respondent Tulloch, "the Guiding Light," in 1933, several months before the NRA Code went into effect, went to see Mr. Morgan of Detroit, Mich., to try to interest Mr. Morgan in a license agreement. Mr. Morgan's testimony as to what transpired is in part as follows:

A. The plan that Mr. Tulloch proposed can be described as along the lines of a licensor arrangement by which the magnesia products were distributed and which I was familiar with (Tr. 1247) and that the basis of the plan was to use a patent which had to do with the preshrinking of the asbestos paper, such as we have been using in the fabricating and making of asbestos pipe covering.

He outlined the idea that they were to preshrink this material.

I asked the method of preshrinking and as I recall it it was to fix the paper in such a way that it would not shrink in the process.

I told him that I couldn't agree with his idea that you could prevent shrinkage by so treating the paper and that such a method was of no interest to me because I prevented shrinkage through the application of silicate of soda to both sheets of the asbestos paper, giving both the same affinity for moisture removal and by that token his fixing the paper, to begin with, wouldn't have any effect on my process or be of no advantage to my process, and I said I didn't care to along with any such idea.

The other part of the conversation had to do with the cleaning up of the industry, or stabilizing, if you please, of the industry. I said I would go along with any practical plan that would better the industry as a whole.

Trial Examiner Preston:

Q. By "stabilizing the industry," do you mean stabilizing prices?

Witness:

A. Yes and methods of selling and distribution (Tr. 1247 and 48).

When the witness was asked to designate the time of the conversation, he stated "I would say that if 1933 was the date that the Code became effective, that my talk with Mr. Tulloch was before that time" (Tr. 1258).

The respondent Tulloch testified that he had not conferred with the respondent Johns-Manville concerning a license agreement with reference to the Toohey patent until in 1934. His testimony with reference to this is:

Q. About when did you have the discussion with them on this subject?
A. Well, they started, as I recall, in the latter part of 1934, it may have been earlier than that (Tr. 348).

Does it not seem strange that the respondent Tulloch would be trying to interest a member of the industry in a license agreement under a patent before he had even discussed the matter with the owner of the patent. I say that the only reasonable conclusion that can be drawn is that the matter had been discussed before and that Tulloch was only acting as the "front man" or "Guiding Light" in "feeling out" the industry.

There is no further track of the respondents along this line until the Merchandising Plan of June 26, 1933.

This Merchandising Plan as pointed out hereinabove is a complete instrumentality for the elimination of price competition between the members of the industry and almost just what the "Doctor ordered." While his plan continued in force and effect until May, 1933, when the respondents entered into the Voluntary Agreement, it appears that the respondents were not satisfied with it for they formulated another plan dated June 27, 1934 (Com. Exs. 151A through 151W). This plan was never approved by the NRA authorities but this did not deter the respondents. The respondent Tulloch began to call meetings of the members of industry in 1934 to discuss a license set-up regarding the Toohey patent and prepared a proposed license agreement and sent it to at least one respondent for consideration as early as December 1934 (Almost a year before Tulloch received his license agreement from Johns-Manville). Respondent Tulloch continued his activities along this line until the demise of the NRA in May, 1935. Immediately following the demise of the NRA a voluntary agreement was formulated and submitted to the President for his approval and although this agreement was never approved, at least 9 of the respondents together with other members of the industry agreed to abide by its provisions. The Voluntary Agreement was sufficient in itself to enable the respondents to carry on their business as it was carried on under the first merchandising plan. It is admitted that part of this practice continued until the bringing out of the Tulloch license agreement and there is no evidence of any further interest in the voluntary agreement after that time.

The merchandising plan under the Tulloch License Agreement was something that effected the operation of the respondent's businesses with reference to all materials coming within the field of the materials set out in the complaint and this fact was recognized by respondents. See testimony hereinbefore quoted and referred to wherein the witnesses state in effect that it would be very impracticable, if not impossible, for a manufacturer to use two plans in manufacturing and selling similar products.

After respondent Tulloch obtained his license from respondent Johns-Manville he entered into sub-license agreements with twenty-five members of the industry. The dates the different respondents entered into the agreements is set out in Commission's Exhibits 3-A and 3-B. The Merchandising Plan (Commission's Exhibit 2) was put into force and effect in connection with the Tulloch License Agreement and it is admitted that the respondents adhered to and were governed by its provisions in connection with the manufacture, sale and distribution of material manufactured under the Toohey patent so long as their respective licenses were in effect.

Summarizing, we have the first Merchandising Plan in 1933. The provisions of which all of the respondents followed until May 27, 1935. Then until September 11, 1935, the Voluntary Agreement which did not change the practices of the respondents materially from that while operating under the first merchandising plan. From September 11, 1935, to the date of the first hearing, we have the Tulloch License Agreement and Merchandising Plan which included all of the practices theretofore followed. So the record shows a common course of action on the part of the respondents from June 26, 1933, to the date of the first hearing in this proceeding.

The respondent Tulloch testified that while discussing the license arrangement with officials of respondent Johns-Manville, he stated to them that "In the event that price control became a part of the license, I could assure them of the elimination of the price-cutting on the patented materials" (Tr. p. 349).

December 17, 1935, Mr. George Clark of the respondent Clark Asbestos, wrote a letter to respondent Tulloch in which Mr. Clark stated -

> "Not having received any further correspondence since November 14, 1935, we are anxious to know if the price set up on low pressure covering is in effect now.
>
> "The reason we ask, is that we have been following prices as you laid down and find that our competitors are not doing this. In fact, the Poevils Asbestos Company had stated that they had not received any new prices and are still quoting the old" (Com. Ex. 183).

On June 21, 1940, Mr. Parker, the attorney-examiner, interviewed Mr. Robert Clark and Mr. George Clark of the respondent Clark Asbestos and Mr. Parker's testimony with reference to what was stated to him on that occasion by the Messrs. Clarks is in part as follows:

> "Mr. Robert L. Clark stated that John P. DuBois was the vice president and sales manager of the Ehret Magnesium Company as well as president of the Clark Asbestos Company."

The witness continued -

> "Mr. DuBois insisted that the Clarks, Mr. Robert L. Clark and his affiliates execute an agreement with Mr. Tulloch, against Mr. Clark's better judgment.
>
> "Mr. DuBois told Mr. Clark that they had to sign the agreement in order to obtain the asbestos paper of that particular manufacturer, since all manufacturer's thereof want the same agreement, or would be shortly."
>
> "Mr. Clark at that time was under the impression that he could not obtain asbestos paper which was not manufactured pursuant to the process. He definitely recalled that Mr. DuBois stressed price control and stabilization pursuant to the patent process, rather than any advantage of the new process that it might yield from shrinkproof qualities" (Tr. pps. 1616-1617).

On June 24, 1940, Mr. Parker interviewed Mr. George Mladinich and Mr. J. Ozurovitch of the respondent Atlantic Asbestos. His testimony of what was stated to him on that occasion by these parties is in part as follows:

> Q. Mr. Parker, on that occasion did Mr. Ozurovitch and Mr. Mladinich make any statement to you with reference to the extent of their asbestos low pressure pipe covering manufactured by them under the Toohey Process?
>
> A. Yes, sir.
>
> Q. What statement did they make to you with reference to that?

A. They said -- (after objections the witness continued) - That they had become a party to the agreement pursuant to that agreement licensing agreement, that they were entitled to use the sizer which was embodied in the patent, but that they would have to obtain it from a firm by the name of Bennett, Inc., Bridgeport, Connecticut (Tr. 1586, 1587 and 1588).

The witness testified further -

Q. I say, what statement did they make to you on that occasion with reference to their understanding of the purpose of the licensing agreement and merchandising plan?
A. It was Mr. Mladinich's understanding that the licensing agreement and merchandising plan was merely a method adopted by the industry to stabilize asbestos products. That was Mr. Mladinich's statement (Tr. p. 1600).

He stated further -

Q. Did Mr. Ozurovitch make any statement to you on that occasion as to whether or not he was at that time manufacturing asbestos paper and low pressure asbestos pipe covering under the Toohey patent process?
A. Yes, sir.
Q. And what statement did he make to you with reference to that?
A. That he was not manufacturing it pursuant to the license and the formula and the sizer.
Q. Did he make any statement to you on that occasion with reference to the prices at which he was selling his products at that time?
A. Yes, sir.
Q. Did he make any statement on that occasion with reference to the price he was charging for his products in comparison with the scheduled prices issued by Mr. Tulloch?
A. Yes, he said that they were substantially the same, with slight variations (Tr. p. 1603).

The witness continues -

"Even though he was not using the sizer and was not manufacturing his products in accordance with the licensing agreement, he was selling his products at the prices set forth on the schedule and he was paying Mr. Tulloch the required royalties (Tr. p. 1604).

The witness was then challenged by the respondent's attorney to read his notes of the interview into the record. This was done by the witness and it appears that his notes were in part as follows:

"Mr. Mladinich knows that the sizer was seldom used and that this process was the only one covered by the patent.
"He understands that the whole thing was merely a method used by the industry for everyone to stabilize asbestos prices.

"Mr. Mladinich knows Mr. Donald Tulloch and has attended various meetings with members of the industry when prices and terms of sale as well as zoning for the continuation of freight equalization were discussed. These meetings were usually the result of price confusion in the New York area though any prices which those present considered advisable were actually set up by Donald Tulloch" (Tr. pps. 1608-1609).

The witness continued reading -

"Mr. Mladinich used the jobber list as the guide in accordance with the directions received, or instructions received from Donald Tulloch, and although it was abandoned by him, such list is still the controlling factor of the J. Ozurovitch firm for selling purposes" (Tr. p. 1609).

During the course of the investigation of this matter, Mr. Parker interviewed Mr. Callopy of the respondent Acme. Mr. Callopy testified that during the course of the interview he called in his secretary and had the secretary take notes on the questions and answers and transcribe the notes. The transcription was identified by the witness Callopy, (Tr. p. 1289) and the transcription is in part as follows:

Q. As I understand it, one of the principal reasons for you rescinding your license agreement with Mr. Tulloch was that local competition represented by competitors not operating under the agreement caused this to result to the other types of asbestos, which would enable you to meet lower prices of such non-licensees. If that is the case, please state why such competition could not have been anticipated when the license agreement was entered into by you with Mr. Tulloch?

A. Well, the license agreement was a new thing at the time it was proposed. I can't speak for him, but will say for myself that we could not forsee the extent to which it would be used or which it would not be used. That covers your question.

Q. With that in mind, was it a presumption or understanding at the time you entered into the agreement that the greater majority of competitive asbestos pipe covering manufacturers would also be governed by the agreement?

A. Yes, we were given to understand that there would be more complete subscription to the agreement; also, we were perhaps attracted, maybe I should say impressed, with the value of the patent to the merchandise itself. We felt a big demand would be built up for it and if we were to remain outside the license agreement our ability to sell the old style stuff would be impaired. It was held out to us, therefore, as the answer to the asbestos man's long search for something to stop shrinkage (Com. Ex. 245-A).

The record shows that during the "negotiation" by the respondent Tulloch and Johns-Manville with reference to the Johns-Manville licensing Tulloch to license others to manufacture, sell and use material under the Toohey patent, the "others" joined in the negotiation. (See Com. Exs. 5 through 17-C, which is a series of letters passing between respondent Tulloch and Mr. George W. Mills, attorney for the respondent, Philip Carey). On January 5, 1935, which was before the date of the Tulloch License Agreement, the respondent Tulloch sent a memorandum to Mr. Burgstresser of the respondent Norristown in which respondent Tulloch stated -

"I would like you to act as a member of an advisory committee on a merchandising plan under the Toohey patent" (Com. Ex. 4).

On December 26, 1934, the respondent Tulloch wrote a letter to Mr. Abraham, president of the respondent Ruberoid, in which he stated -

"I attach copy of revised license agreement.
"This is submitted for your consideration and I will be glad to have any comments you care to make" (Com. Ex. 51).

The document transmitted by respondent Tulloch with Commission's Exhibit 51 is in the record as Commission's Exhibit 52-A through 52-N. This document is entitled "License Under Letters Patent No. 1-972-500."

This evidence together with the testimony of Mr. Morgan hereinbefore referred to, shows that it was a carefully prepared and planned course of action on the part of the respondents, designed to eliminate competition in price and otherwise in the sale and distribution of such materials and products.

I

RESPONDENTS' PURPOSE WAS TO FIX AND MAINTAIN PRICES ON ALL PRODUCTS IN THIS FIELD

Before the year 1934 the respondent Carey had obtained a patent on a product known as Careycel hereinbefore described. During the year 1934, respondent Tulloch tried to obtain licensees for this product (Tr. pp. 398, 399).

In respondent Tulloch's negotiation with respondent Keasbey & Mattison, Mr. Donohue of respondent Keasbey & Mattison, wrote a letter to respondent Tulloch in which Mr. Donohue stated, "If manufacturers and small winders representing a sufficient percentage of the output of the products coming within the scope of this patent agree to become licensees, and you will make the changes we have suggested in the proposed agreement, we should be pleased to give the matter further consideration" (Tr. p. 361).

Respondent Norristown never did license respondent Tulloch to manufacture and sell flexible range boiler jackets nor ever assigned to respondent Tulloch any rights or interests in the range boiler jacket patent (Tr. p. 701). As stated hereinbefore, no price schedule was issued with the license agreement from respondent Norristown to respondent Carey with reference to flexible range boiler jackets but price schedules were issued with the license agreement to respondent Johns-Manville.

Respondent Tulloch, before any license agreement with reference to the Toohey patent, distributed price lists for respondent Norristown on flexible range boiler jackets (Tr. pp. 706-707).

In 1937 respondent Tulloch included flexible range boiler jackets in his price schedule under the Tulloch License Agreement and after that time Norristown did not issue any further price lists (Tr. pp. 718, 719, 870). After Norristown licensed respondent Carey to manufacture flexible range boiler jackets, respondent Norristown tried to get respondent Carey to accept a price control provision in its agreement but was unsuccessful in its efforts and did not try further after respondent Tulloch included flexible range boiler jackets in his price schedule (Tr. pp. 911, 912).

Respondent Empire manufactured flexible range boiler jackets without a license agreement up until 1939 (Tr. pp. 855, 856).

Respondent Keasbey & Mattison manufactured and sold flexible range boiler jackets without a license agreement up to 1938 (Tr. p. 856). Respondent Ruberoid manufactured and sold flexible range boiler jackets without a license up to 1938 (Tr. pp. 856, 857).

Respondent Carey manufactured and sold patented paper but did not pay a royalty to respondent Tulloch on the paper sold (Tr. pp. 1013-1134).

Respondent Carey also manufactured and sold flexible range boiler jackets but did not pay any royalty on these sales (Tr. p. 1013).

Respondent Clark continued to sell asbestos materials at the prices listed by respondent Tulloch in his price schedule after respondent Clark had cancelled its license agreement (Tr. pp. 1231, 1232, 1229).

In a letter from respondent Johns-Manville to respondent Norristown dated January 8, 1935, the writer states, "We assume you will keep us advised periodically regarding your negotiations with Keasbey & Mattison and other range boiler cover manufacturers in regard to their accepting a license under your patent, as it would seem that this will have to be accomplished if we are ever able to realize stabilization of prices in this field" (Com. Ex. 91).

April 8, 1935, respondent Johns-Manville wrote a letter to respondent Tulloch asking respondent Tulloch to make an investigation of a report that respondent Clark was selling range boiler jackets contrary to respondent Johns-Manville's license agreement with respondent Norristown (Com. Ex. 103).

July 22, 1935, respondent Tulloch, in a memorandum, makes a report to respondent Norristown on an investigation of a report that the Biddle Company (not a licensee) had sent a wrong price schedule into Zone 3, and on July 25, 1935, respondent Norristown made this reply "This may be true but the damage is done and unless I am wrong I am afraid this will break prices in Zone 3. Something should be done to correct such affairs and the more I think of this situation the more I believe the policies in Zone 3 territory should be dictated by manufacturers and dealers in that territory rather than by the Eastern manufacturers. Until this is done, I am of the opinion nothing satisfactory can be worked out" (Com. Ex. 123).

On January 16, 1936, respondent Norristown wrote a letter to respondent Tulloch reporting prices quoted by non-licensees in Philadelphia and made suggestions how to correct the situation (Com. Ex. 141).

Respondent Ruberoid had manufactured flexible range boiler jackets since 1934 and respondent Norristown had never said anything to respondent Ruberoid about it until a short while before Ruberoid obtained a license in 1938 (Tr. p. 2263).

On December 21, 1935, the Ehret Magnesia Manufacturing Company, a non-licensee, wrote a letter to respondent Tulloch in which the writer stated:

> "If you expect the Ehret Company to live up to the letter of your merchandising plan, it is going to be necessary for you to send direct to us any memos or rulings, particularly regarding change in price or price clarification. * * *
>
> "We realize we are not a licensee under your patent, but we are desirous of living up to all the rules and regulations just as if we were, but we cannot do it unless we get the information just as soon as all licensees get it" (Com. Ex. 137).

It is to be remembered that the Ehret Company owns a controlling interest in the respondent Clark.

Commission's Exhibit 139 is a letter from respondent Tulloch to the respondent Norristown, in which he consents to the request of the Ehret Company.

Commission's Exhibit 302 is dated November 1, 1935, and signed W. H. Fogarty of the respondent Johns-Manville, and is addressed to all Power Products and industrial department salesmen. This document is in part:

> "We have been advised that effective November 1, 1935, the low pressure insulation manufacturing industry begins operations under a patent and license agreement. The patent covers the manufacture of 'preshrunk' insulation materials."

On July 8, 1939, respondent Clark wrote a letter to respondent Tulloch in which the writer stated:

> "You will also note by our quotation that we are abiding by the price set-up by you, even though we are not members" (Com. Ex. 201).

This evidence shows that the respondents were trying to control the prices on all products in this particular field.

## II

### PRICES FIXED ON PRODUCTS FOR WHICH NO ROYALTY CHARGED

The testimony is that even though asbestos paper and flexible range boiler jackets were manufactured under the Toohey patent, respondent Tulloch fixed the prices on these products but did not charge any royalties (Tr. pp. 1013, 1134, 1135). I cannot see how he can consistently contend that he was fixing the prices to protect his interest in the patent because respondent Tulloch was not manufacturing and selling the products himself and his interest in the different sales was limited to the royalties which he received.

## III

### TESTIMONY OFFERED BY RESPONDENTS DISPROVES CONTENTION THAT LICENSE AGREEMENT WAS TO PLACE ON THE MARKET A SUPERIOR PRODUCT

The respondents have contended that the product manufactured under the Toohey patent was a product of superior quality and a product which if used would eliminate complaints as to shrinkage; that the complaints as to shrinkage were numerous and had caused users of asbestos material to change to supplantive products. The testimony of officials of the respondent companies and the testimony of witnesses called on behalf of the respondents disproves this contention.

Mr. Steffens of the respondent Carey testified:

> TRIAL EXAMINER PRESTON: In other words, as I understand, you did not push the preshrunk or Toohey patented?
> THE WITNESS: We not only did not push, but in every possible way, we avoided it (Tr. p. 2856).

The witness further testified:

"You said you avoided in every possible way, the bringing up of the matter of preshrunk material to your customers?

> A. I did.
> Q. You did not advertise it any?
> A. We did not (Tr. p. 2876).

Mr. Abrams, president of respondent Ruberoid, testified that his company had had no demands for patented products since its license was cancelled; that the patented products were merely a flash-in-the-pan at the time of the granting of the Toohey patent due to the propaganda which was imposed by respondent Johns-Manville to their trade (Tr. p. 2377).

Mr. Saul R. Shapiro was called as a witness for respondents and testified that he had been connected with the Hoboken Plumbing Supply Company for 22 years (2431) and was engaged in buying asbestos, low pressure asbestos pipe covering material, and that

Q. Did you ever hear of their preshrunk materials?

A. I have heard the name mentioned but I never took the trouble of looking into it. It is my guess, I imagine that all coverings are preshrunk that are made today (Tr. 2436).

Mr. Stuart H. George was called as a witness by the respondent and testified that he had been connected with the Robert A. Keasbey Company for about 26 years and that that company dealt in asbestos products and does business in the State of New York, including Syracuse, and formerly part of Jersey and Connecticut (Tr. p. 2451); that during that time he had made no attempts to obtain waxed paper and that he did not find any demands for waxed paper; that he dealt with contractors, steam fitters, plumbers and jobbers and that they did not care about the quality of the paper and that situation was true all during his experience in the business and was existing at the date of the hearing (Tr. pp. 2485, 2486).

Mr. Morris Sussman was called as a witness on behalf of the respondents and testified that he was connected with the Plumbing Supply Company of 154 Brookfield Street, White Plains, and that that company had been in the plumbing supply business since 1925; that the witness had handled asbestos pipe covering previous to that time as a plumber (Tr. p. 2497); that he bought from respondent Norristown, respondent Johns-Manville and respondent Empire and that he never bought any waterproof pipe covering from any of them (Tr. pp. 2420, 2421). The witness further testified that he had never sold any waterproof pipe covering and that no demands had ever been made upon him by his customers for waterproof pipe covering (Tr. p. 2523).

Mr. B. F. Gilmore was called as a witness for respondents and testified that his business was located at Bridgewaters, Long Island, and that he had been connected with the company since 1920 (Tr. p. 2524); that he bought asbestos insulating material principally from respondent Johns-Manville (Tr. p. 2525); that his customers frequently asked for Johns-Manville material and complained when they did not get it and that they asked for Johns-Manville material "because it was more rigid and easier to apply" (Tr. p. 2531).

Mr. Samuel H. Gelles was called as a witness on behalf of respondents and testified that his place of business was at Bell Harbor, Long Island, N. Y.; that he was with the Daniel Morris Company and that he was shipping manager and assistant buyer and had worked in that capacity for at least 15 years (Tr. p. 2285); that during that time he had bought asbestos insulating materials from Standard Asbestos Company, Empire Asbestos Company, Johns-Manville, Clyde Asbestos Company and from Ace Asbestos Company (Tr. p. 2286). Witness testified that he had been a distributor of respondent Johns-Manville for about two and one-half years and before that time he had never heard of preshrunk paper (Tr. p. 2298). It was never brought to the witness' attention by any of these parties that respondent Empire or anyone except Johns-Manville manufactured preshrunk pipe covering (Tr. pp. 2297, 2298, 2299).

Mr. William F. Reed was called as a witness on behalf of respondents and testified that he was connected with the Asbestos Distributors, Inc. (Tr. p. 2413), and that he started in the business about ten years ago (Tr. p. 2414); that the Asbestos Distributors, Inc., are located in Port Chester, N. Y., and Bridgeport, Conn. The witness stated that none of his customers ever asked him for preshrunk material and the way that he heard of preshrunk material was by noticing the statement on the cartons of respondent Johns-Manville; that he asked Mr. Ozurovitch, of respondent Atlantic Asbestos, to put "preshrunk" on his cartons and that Mr. Ozurovitch replied, "No, I don't think that we should do that, as we would be getting into trouble. He said that is a certain process, and he did not have the process to make, and he did not dare to put it on the cartons" (Tr. p. 2424).

Mr. Harry Lampert was called as a witness on behalf of respondents and testified that he was connected with the Middlesex Supply Company; that he was connected with quite a few companies and that the general nature of the different companies business, was plumbing and heating supplies; that these companies were located at Brewer, Main, Waterville, Augusta, Lewistown, Portland; in the State of New Hampshire - Portsmouth, Dover, Concord, Manchester and Nashua; and in Massachusetts, Loyal, Woburn, Boston, Gloucester and one plant located at Niagara Falls (Tr. p. 2616); that he had been personally connected with the asbestos insulating materials for 19 or 20 years (Tr. pp. 2617, 2618); that between the years 1935 and 1940 he bought insulating materials from the York Manufacturing Company, Carey, Empire, Norristown, Taft, Sall Mountain, Keasbey & Mattison and the National Asbestos Company (Tr. p. 2620); that no one ever tried to sell him paper or pipe covering on the proposition that it was waterproof or preshrunk and that he did not know that respondents Carey, Sall Mountain, Norristown or Keasbey & Mattison Company could manufacture waterproof paper and preshrunk paper and no one quoted him on such products (Tr. p. 2631).

It is to be noted that all of these witnesses were witnesses called by the respondents and witnesses who contacted the trade and the people who applied insulating materials, and the testimony of these witnesses shows that the respondents did not try to sell asbestos paper and asbestos pipe covering on the proposition that it was waterproof and preshrunk. So I say that the contention of the respondents that the purpose of the license agreement was to place a product on the market to eliminate complaints with reference to shrinkage is disproved by their own witnesses.

## UNIFORM PRICES AND TERMS RESULTED FROM PRICE AGREEMENTS

### I

### PRICES DURING CODE UNIFORM

Mr. John M. High of the Ruberoid Company testified that when one company would publish a price decline, it was the universal practice that all other manufacturers would immediately follow (Tr. p. 2161).

Mr. Abrahams, president of the Ruberoid Company, testified:

Q. Well, Mr. Abrahams, during the period were the prices as between the members of the industry the same at a given time or were there differences in the prices?

A. Generally speaking, they were the same with minor variations (Tr. pp. 2345, 2346).

Respondent Tulloch testified that when one company filed price changes during the code days, if it were a price decline, the other companies hit it on the nose immediately; that there might be some lag about meeting higher prices (Tr. p. 3059). See also Commission's Exhibits 111 and 113-123.

## II

## PRICES DURING VOLUNTARY AGREEMENT UNIFORM

After the entering into of the voluntary agreement, respondent Empire, respondent Johns-Manville, respondent Norristown, respondent Carey and respondent Keasbey & Mattison filed price schedules with respondent Tulloch; and respondent Tulloch in turn distributed these price schedules to other manufacturers. The Robert A. Keasbey Company and the Smith and Kenzler Company also filed price schedules with respondent Tulloch. These price schedules were distributed to the other manufacturers and are in evidence as Commission's Exhibits 288 through 300. These schedules were all filed and distributed during the months of June and July, 1935, and show uniform prices throughout. Commission's Exhibit 291 dated July 1, 1935, is a sales bulletin distributed by the Asbestos Cement Products Division of the Asbestos Industry giving notice of the prices of respondent Johns-Manville. Commission's Exhibit 292 dated July 9, 1935, is a notice distributed by the Asbestos Paper and Allied Products Division of the Asbestos Industry giving respondent Norristown's prices. Commission's Exhibit 293A and B are notices distributed by the Asbestos Paper and Allied Products Division of the Asbestos Industry giving notice of respondent Robert A. Keasbey's prices. This notice is dated July 9, 1935. Commission's Exhibit 294, is a notice dated July 11, 1935, sent to the members of the Asbestos Paper and Allied Products Division giving Smith & Kenzler's prices. Commission's Exhibit 296 is a sales bulletin distributed by the Asbestos Paper and Allied Products Division giving respondent Carey's prices. This notice is dated July 11, 1935. Commission's Exhibit 297 dated July 12, 1935, is the notice which was distributed giving respondent Keasbey & Mattison's prices. All of these exhibits show uniform prices throughout with the exception of the prices of Robert A. Keasbey, and these were price notices filed with respondent Tulloch in compliance with the voluntary agreement. See also Commission's Exhibit 123.

## III

## PRICES ON PATENTED MATERIAL SAME AS PRICES ON UNPATENTED MATERIAL

The respondents produced numerous witnesses to testify with reference to variations in prices between the different companies manufacturing and selling asbestos paper and asbestos pipe covering. These witnesses generalized, guessed, summarized, assumed, argued, speculated and prophesied in their answers to questions. When they were asked to give specific prices quoted by specific companies other than from the company from whom they bought they could not do so.

Mr. Roderic J. MacDougal was called as a witness on behalf of the respondents and testified that he had been connected with the Puritan Sanitary Supply Company for 16 years and that during all that time he had been connected with the asbestos insulating material business (Tr. p. 2592); that the areas in which his company did business were Boston and vicinity, Cambridge, Arlington, Somerville, Concord, and metropolitan Boston (Tr. p. 2593). This witness testified that when the respondents Ruberoid, Empire and any other company called him about asbestos pipe covering, that they would not quote "two prices on the same size material" but would just quote him one price and one discount (Tr. p. 2613).

Mr. Douglas W. Haire was called as witness for the respondent and testified that he was connected with the S. S. Glauber Company and that this company was engaged in the purchase and sale of insulating materials and had been engaged in that business for 45 years (Tr. p. 2562); that witness had been connected with the company about 19 years (Tr. p. 2563).

The witness' testimony is in part:

> Q. And did you find that Keasbey and Mattison Company would have two prices on their pipe coverings? Did they have two grades of pipe covering and two prices?
>
> A. I have never had that. I can't say that I have ever had that. About the only thing that I have had brought up to me from the salesmen in connection with the competition from Keasbey and Mattison was where there has been a price proposition lower than ours.
>
> Q. And it has never been brought to your attention during your years of experience and when you were coming in contact with Keasbey and Mattison's competition that they had two sets of prices?
>
> A. I never have, no (Tr. pp. 2576, 2577).

The witness testified that the same was true with reference to respondents Norristown and Empire (Tr. p. 2577).

The witness Mr. High of the respondent Ruberoid testified that there was no differential in the prices with reference to the flexible range boiler jackets made of licensed and nonlicensed material, that is material processed under the Toohey process (Tr. p. 2265). He further testified that when the respondent Ruberoid would sell the processed paper to respondent Empire, that the price was the same regardless of whether the Ruberoid Company sold to Empire either processed or unprocessed product (Tr. p. 2267).

Mr. Parker, the attorney-examiner, testified that Mr. Ozurovitch told him that he sold paper at scheduled prices when the paper was not manufactured under the Toohey patent.

Mr. Riordan, a witness called by the respondents, testified that as far as he could check, all manufacturers had the same list price and the same discounts (Tr. p. 2690); that he compared the price sheets and found the prices the same (Tr. p. 2693).

Mr. Kaplan, a witness called by the respondents, testified that he examined price sheets of the different respondents and he found that all price sheets were the same (Tr. pp. 2718, 2719).

Mr. Roth, a witness for the respondents, testified that he knew respondent Sall Mountain's prices and discounts, and the prices and discounts of the respondent Acme, and these were the same (Tr. p. 2742).

Mr. Karpen was called as a witness for the respondents and testified that the list price and basic discounts of the respondents were the same and that their published sheets were the same (Tr. pp. 2781, 2782).

Mr. Hoffman, witness for the respondents, testified that the respondents' price lists were all the same (Tr. p. 2815).

Mr. Burgstresser of the respondent Norristown testified that about 6 months before Norristown cancelled its license agreement with Tulloch, he noticed price cutting, but before that the prices had remained very nearly the same (Tr. pp. 7072, 7073). Mr. Steffens of the respondent Carey testified that Philip Carey made no distinction between patented and unpatented material on the price sheet it put out (Tr. p. 2874).

The evidence above referred to is evidence offered by the respondents and is not the testimony of witnesses offered by the Commission. The respondents vouch for their truthfulness, and I say that they should be believed.

## IV

## SALES CONTRACTS UNIFORM

The provision in the Tulloch License Agreement with reference to contracts between manufacturers and purchasers is -

> "Contracts may be offered to any class of buyer and may be of a continuing type but must be subject to the price and condition changes specified in this schedules. All contracts must be negotiated in the form of, approved by, and on file with the licensor."

On November 11, 1935, respondent Tulloch sent the following memorandum to his licensees:

> "It is desirable that contracts on license material be as uniform as possible on their principal points.
>
> "Would you mind supplying six copies of your jobber and industrial contracts for exchange with others who follow a policy of making annual contracts?" (Com. Ex. 127).

Complying with this request, the respondents Ruberoid, Keasbey and Mattison, Johns-Manville, Norristown and Carey sent copies of their contracts. These are in evidence as Commission's Exhibits 129-B through 129-P. An examination of these documents show that they are uniform on all material questions.

Respondent Tulloch testified:

"I naturally had something to do with the contracts which my licensees made with their classes of trade because I prescribed the conditions under which they should operate in my license" (Tr. p. 494).

Mr. Steffens of respondent Carey testified:

Q. How are those forms arrived at in your company; the terms of them?

A. They were arrived at by first an examination of all competitive types of — may I change that? They were arrived at by an examination of similar types of contracts used by competitors, abstracting from such contracts those features which we thought were desirable; eliminating those items which we thought were unnecessary or undesirable and by addition of whatever items we thought should be included in such documents (Tr. p. 1075).

The documents transmitted to respondent Tulloch show that after the addition and subtraction spoken of by Mr. Steffens had been done, the contracts were uniform in all material respects (Com. Exs. 127-128-129-129-A through 129-P, Tr. pp. 494-1075. See also Com. Exs. 22, 50).

Respondents have contended throughout this proceeding that respondent Tulloch only fixed the minimum price, but the evidence is that respondent Tulloch fixed the selling price. Part of respondent Tulloch's testimony is:

A. It was limited to minimum price, which as you probably know, tended in competitive market to become maximum prices.

Q. Or, in other words, would become the selling price?

A. That is generally true. Particularly in the buyers' market (Tr. 468).

Other witnesses testified to the same effect, but I do not think it necessary to quote any further testimony along this line, inasmuch as there are numerous exhibits which show that respondent Tulloch was sending out specific instructions to his licensees as to the prices to be charged.

UNIFORM PRICES FIXED ON BANDS ON WHICH THERE WAS NO PATENT

As has been pointed out before, the bands used in connection with the application of asbestos pipe covering are no part of the materials covered by the Toohey patent. They are not mentioned anywhere in the patent and could not be manufactured through the use of any process described in the patent. They are separate and distinct articles, but the prices to be charged for bands were fixed by respondent Tulloch (Com. Ex. 2). Respondents contend that prices on bands were not fixed as such, but were included in the prices to be charged for sections of pipe covering. Commission's Exhibit 330-F shows that the respondent Tulloch was fixing the price to be charged for bands as such, quoting in part:

"For extra bands (more than three per jacket), a charge of 10¢ each shall be made."

Mr. Fitzgerald of respondent Standard testified:

"But you did from time to time get notices from Mr. Tulloch that where you sent more than a specified number of bands, that you were to charge an additional amount for that, didn't you?"
A. That is right, it raised your discount (Tr. p. 1457).

Mr. High of the respondent Ruberoid testified:

Q. Well, the additional charges for bands and canvas, do you have a price list on that?
A. That appears in our price schedules as so many points of the list price to be added for these various additions over the standard furnished.
Q. It goes in as an additional charge?
A. That is right (Tr. p. 2337).

Liquidated damages were collected from some of the respondents for a failure to make the proper charges for bands to their customers (Com. Exs. 36 and 40).

RESPONDENT TULLOCH'S PRICE FIXING ACTIVITIES NOT FREE AND INDEPENDENT ACTS OF A PATENT LICENSOR

Respondents have contended that the negotiations carried on between respondent Tulloch and respondent Johns-Manville with reference to the licensing agreement between respondent Tulloch and respondent Johns-Manville were free and independent of any of the other respondents. The evidence is to the contrary. Commission's Exhibit 5 is a letter from respondent Tulloch to Mr. George W. Mills, Jr., attorney for respondent Carey, in which respondent Tulloch states that he is enclosing -

"* * * agreements for your consideration in connection with proposed licenses under the Toohey patent.

"I understand that you will advise me Monday whether these meet your approval for signature by your company."

Commission's Exhibits 6 through 17-C are letters passing between Mr. Mills and respondent Tulloch with reference to the proposed license agreement.

Commission's Exhibit 51 is a letter from respondent Tulloch to Mr. Herbert Abraham, president of Ruberoid Company. This letter is dated



December 26, 1934, almost a year prior to the Tulloch License Agreement. In this letter the writer states -

"I attach copy of revised license agreement.

"This is submitted for your consideration and I will be glad to have any comments you care to make."

Commission's Exhibits 52-A through 52-N is the license agreement transmitted with the above letter.

Commission's Exhibit 53-A and B is a letter written by respondent Tulloch to Mr. Herbert Abraham of the respondent Ruberoid Company. This letter is dated February 11, 1935, more than six months before the Tulloch License Agreement. In this letter the writer states -

"With reference to the agreement forwarded to you some time ago on proposed license under the Toohey patent, I have had the following comments made by one member of the industry."

The writer then sets forth the comments.

Commission's Exhibit 358 is a letter written by the respondent Tulloch to Mr. Stone of the respondent Keasbey and Mattison. This letter is dated October 11, 1934, and the writer states that he is enclosing a copy of the Johns-Manville patent.

There are 92 exhibits in this record showing that the respondent Tulloch was calling meetings of respondents to devise and formulate a satisfactory license agreement and a satisfactory merchandising plan and after the form of the license agreement had been worked out and executed and the merchandising plan had been formulated and put into force and effect, there were numerous changes in the amendments made to the merchandising plan and the price schedules and the respondent Tulloch was constantly calling upon his licensees for their approval of the proposed changes (See Com. Exs. 21, 24, 26, 28, 29, 30, 33, 35, 38, 39, 42, 43-A, 45-A, 46, 48, 49, 66, 69, 78-A, 120, 125, 140, 142, 145, 146, 147, 148-A-B, 187-A-B, 188-A, 189, 190, 192, 197, 205, 206, 207, 208, 209-A, 210-A, 212, 214, 215-A, 216, 221, 223, 224, 226, 232, 233, 253, 256, 260, 261, 262, 263, 266, 270, 276-A and B, 278, 305, 308, 309, 311, 312, 313, 316, 317, 319, 321, 324, 326-A, 327, 329, 332, 334, 335, 336-A and B, 338, 339, 340, 341, 342, 4, 5 through 17-C, 51, 52-A through N, 53-A and B, 355, 358, 361).

Representative of the things discussed at the meetings held are set forth in Commission's Exhibit 187-A through B. This exhibit is entitled -

"MEMORANDUM OF MEETING
Low Pressure Covering
3/25/37
New York City, New York

TO ALL LICENSEES:
The following items were discussed but left for final disposition later."

The items set out were (1) equipment accounts, (2) copper tubing, (3) price protection, (4) carload quantity, and (5) extra charges for canvas.

Representative of the different notices of proposed changes is Commission's Exhibit 22-B, which is a memorandum from the respondent Tulloch to his licensees.

"The attached proofs are sent you for your comments. Certain typographical errors that appear in these proofs will be corrected in final printing. Note page 2 - line 54, will start 'Prices include the following accessories.' Line 57 will be omitted.

"If we obtain licensee's approval in time, we can make this schedule effective May 3rd."

EXCLUSION OF EVIDENCE AND EXHIBITS

During the hearings in this proceeding, numerous documents and considerable evidence were excluded as to certain of the respondents, and numerous rulings of the trial examiner were reserved. The number of rulings reserved and the number of rulings made along this line are too numerous to set forth in a brief and will be referred to by page number in the transcript. At a special hearing in Washington on October 1, 1942, at which time respondents presented special motions, giving the page numbers as to the testimony and the specific exhibit numbers, these motions were read into the record and appear on pages 1687 through 1822. The trial examiner's opinion and general ruling appears on pages 1822 through 1831 and 1840 through 1860. Ready reference to the specific testimony and specific exhibits ruled out appear on pages 1865 through 1869. The trial examiner, in his ruling, stated in part:

"The examiner, as a general proposition, allows the said motion C to strike testimony as therein set out and motion E to exclude certain exhibits dated after the withdrawal of any moving respondent from the Tulloch license agreement.

"The examiner holds, as hereinbefore intimated by him, that exhibits bearing date, or conversations or transactions, occurring after the withdrawal of any respondent as a licensee in this case are not admissible against said licensee, unless there is evidence in the record to show some connection on the part of such licensee.

"The examiner also holds that so far as he is now advised, there is no substantial evidence which would tend to show any continued cooperation on the part of any of the respondents who withdrew or resigned from the Tulloch License after the date of such withdrawal" (Tr. pp. 1850-1851).

It is my contention that it had been shown that all of the respondents either entered into a general agreement to fix prices or later joined in the movement and that they participated in the acts and practices alleged in the complaint from 1933 up until the date of the cancellation of their respective license agreements and that the agreement to fix prices was a general agreement and the Tulloch License Agreement was just one of many instrumentalities used in carrying out the general agreement to fix prices; that after it had been shown that the respondents participated in the acts and practices for a number of years whether or not they had abandoned the general agreement became a question of fact, and evidence that they had withdrawn from and ceased to use one of the instrumentalities used in carrying out the general agreement was not conclusive evidence that they had abandoned the general agreement.

It is further shown that now and for a number of years there has existed what respondents called a "sellers' market," and there is nothing to indicate that the respondents who withdrew from the Tulloch License Agreement will not go back into the agreement should conditions change and it become a "buyers" market. I say that the trial examiner was in error in his ruling, and I respectfully ask the Commission to consider the testimony and the exhibits so excluded by the trial examiner.

## THE LAW

### PRACTICES OF RESPONDENTS DURING NRA CONTRARY TO PUBLIC POLICY DECLARED IN THE SHERMAN ACT

If the respondents had formulated and put into force and effect the merchandising plan of June 26, 1933, together with the revisions on November 27, 1933, December 13, 1933, and December 21, 1933, without reference to, or connection with, the NRA, the courts would have held it to be a price fixing agreement contrary to the public policies declared in the Sherman Act and stopped its continuance. In the case of United States vs. Socony-Vacuum Company, 310 U.S.R. 150, the court stated:

> "The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changing conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity (p. 221) (Underscoring supplied).

Further,

> "For as we have seen, price fixing combinations which lack Congressional sanction are illegal per se; they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils" (p. 228).

See also U. S. vs. Trenton Potteries Company, 273 U.S.R. 392; Ethyl Gasoline Corporation, et al, vs. United States, 310 U.S.R. 436; United States vs. Trans-Missouri Freight Association, 166 U.S.R. 291.

It cannot be said that the merchandising plan of June 26, 1933, together with its amendments and revisions, does not deal directly with the price structure of asbestos paper, low pressure asbestos pipe covering and allied products. While the plan does not name specific prices to be charged, it does provide for the filing of prices to become effective in the future. It designates delivered price zones and zone boundaries and specifically states the differentials in prices between the different zones. It specifies standard products and sizes and names specifically the differentials in prices between the different products. It prohibits secret rebates and any and all special favors to customers. It classifies customers and specifically states the differentials in prices applicable to the different classes of customers. It has a provision to the effect that all manufacturers are at liberty to name the prices which they will charge for their merchandise, but, as testified by respondent Tulloch (reference to which has been made hereinbefore), if there should be a price change by one manufacturer, as a usual thing others would follow in line. If it should happen to be a price reduction, all the other manufacturers would "hit it on the nose" immediately. If it should be an increase in price, the other manufacturers would not follow it so quickly.

The evidence with reference to the activities of the respondents during the NRA was offered for the purpose of showing a continuous common course of action on the part of the respondents. Had the matter stopped with the demise of the NRA and after the court had characterized the NRA Act as a method adopted by Congress for alleviating the penalties of the Sherman Act, I do not offer any argument that the respondents should have been criticized for their acts; but the respondents did not stop. While the obituary of the NRA was still ringing in their ears, they formulated the "Voluntary Agreement," which had all of the earmarks of the previous Merchandising Plan.

THE VOLUNTARY AGREEMENT CONTRARY TO PUBLIC POLICY
DECLARED IN THE SHERMAN ACT

As has been pointed out hereinbefore, the Voluntary Agreement formulated by the respondents carried all the necessary elements of a price-fixing agreement. The respondents have contended that they did not operate under the Voluntary Agreement and that the Voluntary Agreement was "invited" by the President. The evidence is that the respondents continued to file prices; they continued to use delivered price zones; they continued to classify customers for pricing purposes. There is no evidence that they stopped any of the practices theretofore engaged in, so whether or not they acted under Voluntary Agreement is of no consequence.

The contention that the respondents should not be criticized or held liable because of the Voluntary Agreement, inasmuch as it was invited by the President, is fully answered in the case of U. S. vs. Socony-Vacuum Oil Company, supra. The court in that case had a similar question under consideration and disposed of it by stating:

> "As to knowledge or acquiescence of officers of the federal government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority. * * * * Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. The method adopted by Congress for alleviating the penalties of the Sherman Act through approval by designated public representatives would be supplanted by a foreign system."

The court stated further:

> "For as we have seen, price-fixing combinations which lack Congressional sanction are illegal *per se*."

As stated with reference to the Merchandising Plan of June 26, 1933, evidence of the Voluntary Agreement and activities of the respondents in connection therewith was offered to show the general pattern of the respondents' plans and to show a continuous common course of action on the part of the respondents.

THE TULLOCH LICENSE AGREEMENT AND MERCHANDISING PLAN VIOLATES THE FEDERAL TRADE COMMISSION ACT AS A PRICE FIXING AGREEMENT NOT ENTERED INTO IN GOOD FAITH TO PROTECT PATENT RIGHTS

Briefly stated, the outstanding facts leading to the inescapable conclusion that the Tulloch License Agreement and Merchandising Plan are products of bad faith conceived by respondents to by-pass laws against price fixing agreements, are:

Respondent Tulloch's conversation with Mr. Morgan in 1933 prior to NRA, in which conversation respondent Tulloch tried to interest Mr. Morgan in a license agreement covering preshrunk paper and preshrunk pipe covering, the purpose of said agreement being to stabilize the industry and stabilize prices.

The price fixing practices of respondents while acting under the shield of the NRA Act.

The Voluntary Agreement following the demise of the NRA.

The conversation respondent Tulloch had with the officials of respondent Johns-Manville when he told Johns-Manville's officials, among other things, that if Johns-Manville would license him to license others to manufacture patented products that he would assure Johns-Manville that price cutting on patented products would be stopped.

Competitors of Johns-Manville advised with and were consulted by respondent Tulloch as to the contents of the agreement between Johns-Manville and respondent Tulloch before the agreement was executed.

Respondent Tulloch asked competitors of Johns-Manville, who later became licensees, to serve on a committee to assist in formulating a merchandising plan to be used in connection with the Tulloch License Agreement. This occurred more than eight months before respondent Tulloch had received his License Agreement from Johns-Manville.

Respondent Tulloch submitted drafts of his proposed License Agreement to competitors of Johns-Manville eight months before he obtained his License Agreement from Johns-Manville.

Respondent Tulloch held meetings with officials of manufacturers of Asbestos Paper and Low Pressure Asbestos Pipe Covering several months before he obtained his License Agreement from Johns-Manville. At these meetings methods of merchandising the products were discussed. Prices were discussed. The question of whether it would be necessary to meet the prices of unpatented articles "squarely on the nose" or if the superior quality of the patented products would command a premium were discussed.

Practically all of the more important manufacturers became licensees.

Respondent Tulloch suggested price changes from time to time and submitted the suggested changes to his licensees for their comments and approval.

Licensees would suggest price changes from time to time and respondent Tulloch would submit such suggestions to the other licensees for their comments and approval.

Licensees other than respondent Johns-Manville never advertised the patented products.

One official of one of the larger manufacturer licensees testified that his company did not push the sale of patented products, but on the other hand avoided it if possible.

Licensees did not distinguish between patented and unpatented products in their price lists.

Articles not mentioned in and not covered by the latter's patent were included in the License Agreement and Price Schedule connected therewith.

In the case of Standard Sanitary Mfg. Co. vs. United States, 226 U.S.R. 20, the court had under consideration a case involving similar groups of facts, and concluded:

> "The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They pass to the purpose and accomplish a restraint of trade condemned by the Sherman law."

I want to set out briefly a comparison of the facts in the Standard Sanitary case with the facts in the present case. In the former case, James W. Arrott, Jr., obtained a patent on a sieve used for sifting enameling powder over the surface of ironware. This patent was sold to a man by the name of Wayman who was not engaged in manufacturing enamelware. Prior to the invention of Arrott, the enameling powder was applied by a sieve operated by hand and did not permit an even continuous flow of powder. This caused, in many instances, an unequal distribution of the powder and produced defective articles which either had to be thrown away or sold as "seconds." The Arrott invention corrected this defect. At the time the contract was entered into some of the other manufacturers were infringing the Arrott patent. The art was in a very unsatisfactory condition and no means had been discovered of accomplishing the result produced by the Arrott invention without laying the user of such means open to a suit for infringement by the owner of the Arrott patent. The manufacturers who were not using the Arrott invention were unable to successfully compete with those using the Arrott invention and produced a disproportionate number of defective, unsatisfactory, and substantially unsalable articles. "The consumer was deceived and defrauded and the use of Sanitary Enameled Iron-ware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective." The court stated that the defendants contended that Wayman saw these evils and conceived a way to correct them; that Wayman was familiar through his connection with another enameling company with the enamelware trade and had been convinced of the advantages and necessity of the use of the Arrott invention. Wayman tried to secure it, but the Standard Company seemed unwilling at that time to confer its utility upon other companies; that some time before Wayman obtained the invention from the Standard Company, the assignee of Arrott, he tried to get the Standard Company to grant a license to other companies in order to improve trade conditions, and to this end he tried to interest other gentlemen in the project. The Standard Company was unwilling to grant and the other manufacturers were equally disinclined to accept. Wayman then tried to interest the manufacturers in a holding company, but the Standard Company still refused and stated its unwillingness to enter into any kind of arrangement which would lessen the advantage which it had by reason of the ownership of the Arrott patent. About a year later Wayman was approached by a person connected with one of the manufacturing companies and advised to apply for the position of secretary of an association of Enamelware Manufacturers which was about to be reorganized. The position, it was stated, would give Wayman an excellent opportunity to continue his efforts to buy the Arrott patent and place him in a most favorable position to present his ideas to other manufacturers in regard to the Arrott patent. Wayman obtained the position and again started his negotiations with the Standard Company for the Arrott patent. "Finally he impressed the manager of the Standard Factories with the greater advantages which would come to his company by the elimination of seconds and removing them as competitors of the better articles of the Standard, confining the competition to such articles of which the Standard produced 50 percent. The manager of the Standard and that company yielded to the representation of these advantages."

The Standard Company fixed a price upon the Arrott patent and gave Wayman an option upon it. Wayman obtained options on patents on two similar articles, which were claimed to be infringements of the Arrott device. Wayman then began to engage the manufacturers in his proposition. Wayman was advised by able counsel of the legality of his plan. It was asserted that Wayman's motive was to make money for himself not as a manufacturer, but as owner of a patent receiving royalties from those whom he licensed to use his patented invention. "The form of his license, it is further asserted, followed the precedence and was based on that principle of the patent law which gives to the owner of an invention the power to grant to others its use or to withhold it, or grant it upon such terms as he may choose to impose." It was the defendants' argument that to make the use of the device universal was a prompting of Wayman's energies to unite the manufacturers and to remove the evils which beset the trade and which were discrediting the ware and demoralizing the market and business. Defendants contended that such representations were what finally broke down the resolution of the Standard Company not to share the use of the device with other manufacturers. On March 30, 1910, the Manufacturers Association passed a resolution, and a committee to be known as the Price and Schedule Committee was appointed to which License Agreements and Resale Price Agreements should be referred. This committee was to interview various manufacturers and obtain their consent to the agreements which were to become effective when the consent of 83 percent of the production was had. At this meeting a resolution was passed whereby the manufacturers agreed to take no orders for delivery beyond May 31, 1910, and that the agreement was not binding upon the signers unless all members of the Enamel Ware Manufacturers Association were parties thereto. At the same meeting a memorandum of agreement was proposed which was to be executed with Wayman as licensor of various patents covering pneumatic dredgers. The agreement covered selling schedules of the ware and provided for the royalties to be paid. The selling price to jobbers to be established by the licensor through a committee appointed by the various manufacturers. It provided penalties for the violation of the price regulations and preferential discounts from the selling prices. Agreement also provided for a Jobbers License Agreement with reference to resale prices and also provided for certain discounts and details as to shipments and deliveries; that the sales were to be made by the purchasers at prices to be established and provided for the various zones into which the goods were shipped regardless of the point of purchase. It also provided that articles might be added to or removed from the schedule at any time.

The court stated "in this statement certain things are prominent. Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others not to sell and produce to the jobbers except at prices fixed not by trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination to make its subjection complete and its purpose successful." The court further stated that the agreements clearly, therefore, transcended what was necessary to protect the use of the patent or monopoly which the law conferred upon it. The court further stated "this court has had occasion in a number of cases to declare its plan. Two of those cases we have cited, the others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its efficiency to prevent evasions of its policy 'by result of too many disguises or subterfuge of form' or the escape of its prohibitions 'by any indirection.' United States vs. American Tobacco Company, 221 U. S. 106, 181, Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the court cannot be set up against it in a supposed accommodation of its policy with the good intention of parties. And it may be, of some good results." The court stated with reference to the contentions of defendants that there were provisions of security against the production of seconds "by granting that there was provision or security against the production of seconds of all the articles, it seems from what we have said above that all of the substantial good which is asserted to have been the object of the agreement could have been attained by simple sale of the right to use the Arrott patent, conceding to it the dominant effect which it attributed to it."

The same question is applicable to the present case. If the Toohey patent was sold, materially increasing the efficiency and quality of the patented products, why could not the evils of placing inferior products on the market be cured by a simple sale of the use of the patent to other manufacturers by respondent Johns-Manville. It was one of respondent Tulloch's arguments to Johns-Manville and officials of the respondent Johns-Manville recognized the truthfulness of the contention that the inefficiency of asbestos paper and low pressure asbestos pipe covering not manufactured through the use of the Toohey process was causing the purchasing public to turn away from asbestos paper and low pressure asbestos Pipe Covering and to buy instead competing products. The respondent Johns-Manville contends that it spent considerable money and time developing and proving the Toohey invention and that it sold to respondent Tulloch the right to manufacture and sell and the right to license others to manufacture and sell patented products and the price to be paid by Tulloch was $1,250.00 per year.

The Merchandising Plan formulated and put into force and effect in connection with the Tulloch License Agreement as has been stated before, consists of 270 pages covering every conceivable question connected with the manufacture, sale and distribution of asbestos paper and low pressure asbestos pipe covering. It is inconceivable to see how anyone could believe that all of the acts and practices of the respondents and all of the provisions of the License Agreement and Merchandising Plan were necessary to secure to the patentee the pecuniary reward to which he was entitled.

In the case of United States vs. The Masonite Corporation, et al., 316 U.S.R. 265, the court had under consideration an agreement whereby The Masonite Corporation had appointed several other manufacturers as del credere agents to sell hardboard. The agreement contained an option whereby the agents could, within a given period of time, if they so desired, obtain from Masonite the right to manufacture hardboard. In this agreement the parties agreed to follow the price schedule fixed by Masonite. The Masonite Corporation was to manufacture the hardboard and fix the price at which it should be sold and was to follow the price schedule in selling the hardboard. Before entering into the agreement, some of the defendants, other than Masonite, were manufacturing hardboard and Masonite contended that these other companies were infringing Masonite's patent and started infringement suits against several of these companies. Before any of the cases were terminated in favor of either party the agreements in question were entered into and the pending cases were either withdrawn or dismissed. The original agreements were entered into in 1933, 1934, and 1935, and were revised and practically new agreements were consummated in 1936. The court in its opinion stated -

> "We need not stop to analyze the 1936 agreements. They contain numerous changes and elaborations. But they are not important for the purpose of this case since the pattern of the relationship between appellees was fixed in 1933 and its fundamental characteristics were maintained, not basically altered, in 1936. * * * * For there is one phase of the case which is decisive. That is, the agreement for price fixing. But, for Masonite's patents and del credere agency agreements there can be no doubt that this is a price fixing combination which is illegal per se under the Sherman Act (United States vs. Trenton Potteries Company, 273, 392, Ethyl Gasoline Corporation vs. United States 309 U. S. 436, United States vs. Socony-Vacuum Oil Company, 310 U. S. 150), that is true though the District Court found that in negotiating and entering into the first agreements each appellee, other than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require, as a condition of its acceptance that Masonite made such an agreement with any of the others, and had no discussions with any of the others. It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that as the arrangement continued, each became familiar with its purpose and scope."

In the closing paragraph of the opinion the court stated -

> "But it is urged that the agreements made by the appellees in 1941 after the present suit was instituted marked an abandonment of the former combination and that since the new arrangement is unobjectionable, there is nothing to enjoin. The difficulty with that contention is that the 1941 agreements, although improved models of an agency arrangement, removed none of the features which we have found to be fatal. They still are unmistakable price fixing agreements with competitors. And if there were any lingering doubt as to

whether the appellees were parties as to a conspiracy, it was dispelled at this point. A committee of appellees was appointed to draft the new agreement. The agreement was completed after meetings at which representatives of all of the appellees attended. The 1941 agreements were the product of joint and concerted action." (Underscoring supplied.)

TULLOCH LICENSE AGREEMENT AND MERCHANDISING PLAN VIOLATES FEDERAL TRADE COMMISSION ACT BY EXCEEDING THE RIGHTS OF A PATENT OWNER

The court in deciding the case of United States vs. General Electric Co. et al., 272 U.S.R. 476, 490, stated:

"The patentee may make and grant a license to another to make and use the patonted articles, but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. He owns the material of them and may use them. But if he sells them he infringes the right of the patentee, and may be held for damages and enjoined. If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he shold say to the licensee, 'Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself.'"

The court in the Masonite Case, supra, stated:

"There are strict limitations on the power of the patentee to attach conditions to the use of the patented article. As Chief Justice Taney said in Bloomer v. McQuewan, 14 How. 539, 549, when the patented product 'passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.' And see Adams v. Burke, 17 Wall. 453; Hobbie v. Jennison, 149 U. S. 355. In applying that rule this Court has quite consistently refused to allow the form into which the parties chose to cast the transaction to govern. The test has been whether or not there has been such a disposition of the article that it may fairly be said that the patentee has received his reward for the use of the article. Straus v. Victor Talking Machine Co., 243 U.S. 490; Boston Store v. American Graphophone Co., supra. And see United States v. Univis Lens Co., Inc., No. 855, decided this day. In determining whether or not a particular transaction comes within the rule of the Bloomer case regard must be had for the dominant concern of the patent system.

As stated by Mr. Justice Storey in Pennock v. Dialogue, 2 Pet. 1, 19, the promotion of the progress of science and the useful arts is the 'main object'; reward of inventors is secondary and merely a means to that end. Or, in the words of Mr. Justice Daniel in Kendall v. Winsor, 21 How. 322, 329, 'Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these.'"

It appears from these opinions that the primary test, so far as applicable to the present case is, are the provisions and restrictions of the License Agreement, together with those of the merchandising plan, "normally and reasonably adapted to secure pecuniary reward to which the licensor is entitled"? In arriving at a logical answer to this question it is necessary to look at the position of the licensor.

In all the cases referred to with the exception of the Standard Sanitary Case, supra, the licensor was engaged in manufacturing and vending a patented article and selling it in direct competition with the licensees. In such cases it appears that the court took into consideration the profit the licensor would make on the patented articles manufactured and sold by him. In the present case the licensor does not manufacture and vend any of the patented articles and could not therefore be interested in the selling price from that viewpoint. The licensor in the present case derives his remuneration in the form of a royalty, the royalty being one-fourth of 1 percent of the list value of the products as set forth in the schedule put out by the licensor. The royalty being such a small percentage that a variance in the selling price would not materially affect the licensor's remuneration.

There are other facts present in this case which would indicate that the volume of patented material would have been increased had the selling price been lowered, and in such case the total amount received by the licensor would have been greater.

Respondent Tulloch testified that in the meetings held before putting his price schedule into effect that he and the manufacturers present discussed the question of whether it would be necessary to hit the prices of unpatented products with which the patented products would be in competition "squarely on the nose" or if the quality of the patented products would be such as to command premium. This would indicate that the manufacturers were willing to manufacture and sell patented products at the prices at which unpatented products were being sold. There is in the record evidence that some of the manufacturers did sell patented products at "cut prices" before and after the License Agreement.

The respondents contend that the patented material is far superior to the unpatented material and is so recognized by the trade. This being true, the only reasonable conclusion is that the volume of sales would have increased and the licensor's remuneration would have increased in proportion.

The cases referred to, except the Standard Sanitary Case, supra, deal with the price question generally and do not deal with such questions as establishing delivered price zones, freight equalization, customer classification, secret rebate and provisions dealing with unfair trade practices. By no stretch of the imagination can I see how it can be said that such provisions are "normally and reasonably adapted to secure the pecuniary reward to which the licensor is entitled."

The undisputed evidence is that manufacturers manufacturing paper by the use of the Toohey process sell the paper to winders and converters to be rolled into finished sections of pipe covering. The price of this paper if fixed by Tulloch. The winders and converters trim and roll the paper into finished pipe covering. The selling price of the finished pipe covering is fixed by respondent Tulloch.

In the case of U. S. v. Univis Lens Company, Inc., et al., 316 U.S.R. 241, the court held that such acts exceeded the scope of the licensee's right under the patent law and were not excluded by the patent monopoly from the operation of the Sherman Act. The Univis Lens Company was owner of a number of patents and two trade-marks relating to multifocal lenses. It organized the Univis Corporation and holds a majority of the stock of the corporation. The corporation licenses the Lens Company to manufacture lens blanks and to sell them to designated licensees of the corporation upon the Lens Company's payment to the corporation of an agreed royalty. The blanks are composed of two or more pieces of glass of refractory power and of such size and shape and composition that when fused together in the blank it conforms to the specifications of one of the corporation's patents. The corporation issues three classes of licenses--one to the wholesaler, one to the finishing retailer and one to the prescription retailer. The license to the wholesaler authorizes the licensees to purchase the blanks from the Lens Company, finish them by grinding and polishing and sell them to the prescription licensee by prices fixed by the corporation. In finishing the lenses to conform to the licensees' prescriptions it is necessary for the wholesaler to grind and polish them. The finishing retailers purchase the blanks from the Lens Company and grind and polish them and adjust the lenses in frames for their customers and sell them at prices fixed by the corporation. The prescription retailer sends his prescription to the licensee wholesalers to be finished and the corporation fixes the prices at which the prescription retailer sells to the purchaser. The Lens Corporation holds several patents relating to the shape, size, composition and disposition of the pieces of glass of this refractory power in the blanks into which they are fused. The court stated:

> "As appellees concede, the invention of only a single lens patent is utilized in making each blank and finishing it as a lens. We therefore put to one side questions which might arise if the finisher of a particular lens blank utilized the invention of some patent other than the patent which was practiced in part by the manufacturer of the blank. And we assume for present purposes, without deciding, that the patent is not fully practiced until the finishing licensee has ground and polished the blank so that it will serve its purpose as a lens. But merely because the licensee takes the final step in the manufacture of the patent product, by doing work on the blank which he has purchased from the patentee licensee, it does not

follow that the patentee can control the price at which the finished lens is sold. Notwithstanding the assumption which we have made as to the scope of the patent, each blank, as appellees insist, embodies essential features of the patented device and is without utility until it is ground and polished as the finished lens of the patent."

Further,

"But in any case it is plain that where the sale of the blank is by the patentee or his licensee--here the lens company-- to a finisher, the only use to which it could be put and the only object of the sale is to enable the latter to grind and polish it for use as a lens by the prospective wearer. An incident to the purchase of any article, whether patented or unpatented, is the right to use and sell it, and upon familiar principles the authorized sale of an article which is capable of use only in practice and the patent is a relinquishment of the patent monopoly with respect to the article sold."

Further,

"The declared purpose of the patent law is to promote the progress of science and useful art by granting to the inventor a limited monopoly, the exercise of which will enable him to secure the financial rewards for his invention."

Further,

"We think that all the considerations which support these results lead to the conclusion that where one has sold an uncompleted article which, because it embodies essential features of his patented invention, is within the protection of his patent, and has destined the article to be finished by the purchaser in conformity to the patent, he has sold his inventions so far as it is or may be embodied in that particular article. The reward he has demanded and received is for the article and the invention which it embodies and which the vendee is to practice upon it. He has thus parted with his right to exert the patent monopoly with respect to it and is no longer free to control the price at which it may be sold, either in its unfinished or finished form."

Further,

"The first vending of any article manufactured under a patent puts the article beyond the reach of the monopoly which that patent confers. Whether the licensee sells the patent article in its completed form or sells it before completion for the purpose of enabling the buyer to finish and sell it, he has equally parted with the article, and made it the vehicle for transferring to the buyer ownership of the invention with respect to that article. To that extent he has parted with his patent monopoly in either case, and has received in the purchase price every benefit of that monopoly which the patent law secures to him."

Further,

> "The price fixing features of appellees' licensing system, which are not within the protection of the patent law, violate the Sherman Act save only as the fair trade agreements may bring them within the Miller-Tydings Act. Agreements for a price maintainance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition."

After reciting provisions of the Miller-Tydings Act relating to contracts providing for resale contracts agreement, the court stated:

> "But the lens company manufactures the blanks and not the finished lenses to which the resale prices apply. It is therefore not the manufacturer of the 'commodity' which the licensees sell, and the licensees are not engaged in the 'resale' of the same commodity they buy. We find nothing in the language of the Miller-Tydings Act, or in its legislative history, to indicate that its provisions were to be so applied to products manufactured in successive stages by different processors that the first would be free to control the price of his successor. The prescribed prices are thus not within the Miller-Tydings exceptions to the Sherman Act."

In the present case, the manufacturer licensees manufacture the patented paper and sell it to the winder licensees. The winders convert the paper into finished pipe covering. Therefore, the commodity which the winder sells is not the commodity which he purchased from the manufacturer. And the respondent Tulloch by fixing the price at which the manufacturer should sell paper to converters and winders and then fixing the prices at which the winders and converters should sell the finished pipe covering exceeded the monopoly which the patent conferred and violated the provisions of the Sherman Act and ipso facto, violated the provisions of the Federal Trade Commission Act.

THE TULLOCH LICENSE AGREEMENT AND MERCHANDISING PLAN VIOLATES THE PROVISIONS OF THE FEDERAL TRADE COMMISSION ACT IN THAT THEY INCLUDE ARTICLES NOT COVERED BY THE PATENT

The schedule of prices which is part of the License Agreement includes solid brass, zinc and lacquered bands, flexible range boiler jackets and canvas covers. These items are not mentioned in the Toohey letters patent.

The respondents contend that bands are necessary to the proper application of pipe covering and that a unit of pipe covering without bands is not a complete unit. The testimony is that pipe covering can be applied without the use of bands. But conceding for the sake of argument that bands are necessary for the proper application of pipe covering, the respondents can find little comfort in the case of Carbice Corporation of America vs. American Patent Development Corp., et al., 283 U.S.R. 27. The American Patent Development Corporation was the owner of a patent on a transportation package for DryIce. Each transportation package sold bore a notice, "The merchandise herein described is shipped upon the following condition: that DryIce shall not be used in DryIce cabinets or other containers or apparatuses provided or approved by the DryIce Corporation of America; and that DryIce cabinets or other containers or other apparatus provided or approved by the DryIce Corporation of America shall be refrigerated or used only with DryIce. These used of DryIce are fully covered by our basic method and patent No. 1511306 granted October 14, 1924, and other patents pending." The Carbice Corporation manufactures and sells solid carbon dioxide and it sold some of its product to be used in the packages on which the American Patent Development Corporation had a patent. The American Patent Development Corporation brought a suit to enjoin the Carbice Company for contributory infringement and for an accounting of profits and for damages. The court, after discussing the rights and liabilities under the patent law, stated:

> "The relief here sought is indistinguishable from that denied in the motion picture case. There, it was held that to permit the patent owner to 'derive its profit, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used' is 'wholly without the scope of a patent monopoly."

The court stated further:

> "The attempt to limit the licensee in the use of unpatented materials purchased from the licensor is comparable to the attempt of a patentee to fix the price at which the patented article may be sold."

The court stated further:

> "Plaintiffs seek to distinguish the motion picture case from that at bar by pointing out that there, as in Henry v. A. B. Dick Co., 224 U.S. 1, 32, S. Ct. 364, 56, L. Ed. 645 and Ann. Cas. 1913D, 770, the unpatented supplies, over which the licensor sought to extend its monopoly, were merely used in the patented machines, whereas here the unpatented refrigerant is one of the necessary elements of a patented product, and to distinguish the case at bar from Morgan Envelope Co. v. Albany Perforated Wrapping Co., 152 U.S. 425, 433, 14 S. Ct. 627, 30 L. Ed. 500, it is pointed out that the Carbice Corporation is not furnishing not a passing element in the combination, like the paper in the Morgan Envelope fixture, but the dynamic element which produces refrigeration. These distinctions are without legal significance. * * * The DryIce Corporation has no right to be free from competition in the sale of solid carbon dioxide. Control over the supply of such unpatented material is beyond the scope of the patentee's monopoly; and this limitation, inherent in the patented grant, is not dependent upon the pecuniary function or character of the unpatented material or on the way in which it is used."

The same argument is true and the same law is applicable to the provisions in the Tulloch Agreement with reference to canvas covers.

The patent on flexible range boiler jackets was owned by the respondent Norristown, and the respondent Tulloch had no interest in the Norristown patent. It is true that the flexible range boiler jacket could be manufactured either with the Toohey process or it could be manufactured without the use of the Toohey process, but when the respondent Tulloch included the flexible range boiler jacket in the price schedule he did not charge the manufacturer any royalty on the sales of flexible range boiler jackets. He could not therefore have been including the flexible range boiler jacket in his price schedule for remuneration. The courts have said that such practices are outside the scope of the patentee's authority.

THOSE WHO JOINED IN THE AGREEMENT AFTER IT WAS FORMULATED ARE AS MUCH LIABLE AS THE ORIGINATORS

Some of the respondents, during the proceeding, objected to evidence offered as to acts and practices of other respondents prior to the date when their clients entered into the Tulloch License Agreement, and it is presumed from these objections that the respondents intend to contend that the acts and practices of the other respondents prior to such time are not binding on their clients. In the Masonite Case, supra, the court stated:

> "But for Masonite's patents and the del credere agency agreement, there can be no doubt that this is a price-fixing combination which is illegal per se under the Sherman Act. * * * That is true though the District Court found that in negotiating and entering into the first agreements each appellee, other than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others. It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that as the arrangement continued each became familiar with its purpose and scope. Here, as in Interstate Circuit, Inc. v. United States, 306 U. S. 208, 226, 'It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.'"

The court continued:

> "'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators - - - Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' And as respects statements of various appellees that they did not intend to join a combination or to fix prices we need only say that they 'must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary.'"

THE DELEGATION OF AUTHORITY TO RESPONDENT TULLOCH TO SPECIFY PRICES DOES NOT RELIEVE RESPONDENTS OF LIABILITY

The respondents, other than Tulloch, have contended that they did not fix the prices in the schedule of prices under the Tulloch License Agreement, but that these prices were fixed by respondent Tulloch. The evidence is to the contrary, as shown by the numerous exhibits heretofore referred to wherein respondent Tulloch was asking for the advice and approval of the other respondents on suggested price changes. But granting for the sake of argument that there is no such evidence in the record, this does not relieve the respondents of liability. Quoting further from the Masonite case, supra:

"Nor can the fact that Masonite alone fixed the prices and that the other appellees never consulted with Masonite concerning them make the combination any the less illegal. Prices are fixed when they are agreed upon. * * * The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action." (See also Interstate Circuit, Inc. vs. United States, 306 U. S. 208).

CONCLUSION

It is respectfully submitted that every material allegation of the complaint has been proved and that an order to cease and desist should be issued. For a concluding paragraph permission is respectfully asked quote from the opinion of the Univis Lens case, supra:

"Appellees stress the features of their licensing system by which it is said that they protect the public interest and their own good will by the selection as licensees of those who are specially skilled and competent to render the service which they undertake. But if we assume that such restrictions might otherwise be valid, cf. Fashion Guild v. Trade Commission, 312 U.S. 457, 467, these features are so interwoven with and identified with the price restrictions which are the core of the licensing system that the case is an appropriate one for the suppression of the entire licensing scheme even though some of its features, independently established, might have been used for lawful purposes."

Respectfully submitted,

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