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United States of America

Before Federal Trade Commission

Docket No. 4613

FEDERAL TRADE COMMISSION
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IN THE MATTER OF

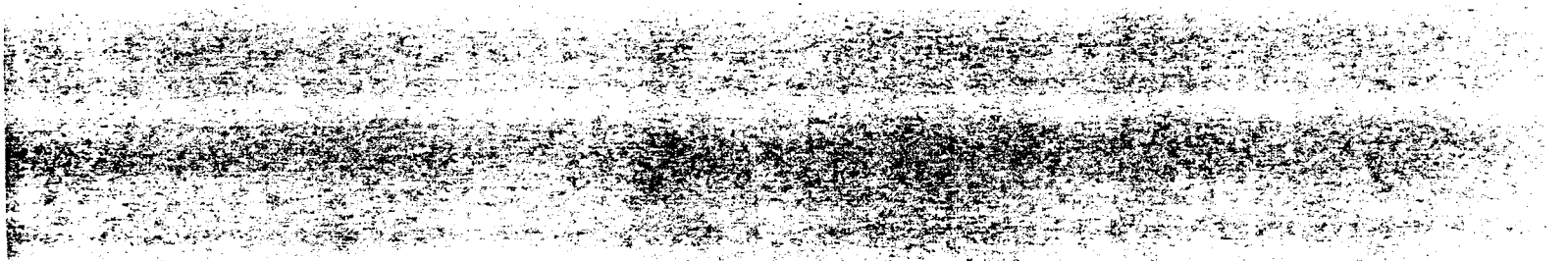
ACME ASBESTOS COVERING AND FLOORING COMPANY, et al.

BRIEF FOR KEASBEY & MATTISON COMPANY, ONE OF THE NAMED RESPONDENTS.

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BRIEF FOR KEASBEY & MATTISON COMPANY, ONE OF THE NAMED RESPONDENTS.

FOREWORD.

Counsel for Keasbey & Mattison has carefully reviewed the brief filed on behalf of the respondents Acme Asbestos Covering and Flooring Company; Asbestos, Asphalt and Insulation Manufacturing Company; Atlantic Asbestos Corporation; A. H. Bennett Company; The Philip Carey Manufacturing Company; The Clark Asbestos Company; Empire Asbestos Products, Inc.; Johns-Manville Corporation; L. A. Rubber & Asbestos Works, Incorporated; G. A. MacArthur Company; W. S. Nott Company; Pacific Asbestos & Supply Company; The Ruberoid Co.; and Donald Tulloch, Jr., by Cadwalader, Wickersham & Taft, Esquires, and is in general and complete agreement with the substance thereof. It seems advisable therefore to avoid repetition as far as possible and to confine the brief on behalf of Keasbey & Mattison Company to a brief summary of the facts and points which in counsel's judgment should be either further emphasized or affect primarily this respondent.

I. STATEMENT OF FACTS AND HISTORY OF THE CASE.

It is submitted that the questions involved in this litigation will present little difficulty if the facts, as indicated by the evidence, are clearly understood.

Prior to 1933 the Asbestos Industry had been generally in a chaotic state. Wide fluctuations in prices existed and cut-throat competition was such that indications were that the Industry as such could not survive. It was at about that time that the National Industrial Recovery Act was born and there is no contradiction of the fact that one of the primary purposes which the Government had in mind was to stabilize through the medium of codes the prices in the various industries throughout the Country. Prior to the Act, many merchandising practices had grown up in the Industry and the evidence points out that various of the respondents had merchandising plans which differed widely. Many practices had grown up over a period of years in the merchandising of these products, and of these the more important were classification of buyers, use of geographical zones for pricing purposes and allowance of special discounts to certain distributional accounts and many others. There had been since 1907 a standard list price of all asbestos products which was used as the basis for figuring prices and which were quoted in the terms of discounts from the standard list price. This list included a separate price for each of some 216 standard sizes and thicknesses of pipe covering and of 23 thicknesses of blocks. It is obvious that with the multitude of products in the asbestos Industry, some such standard unit of list prices was necessary.

This was the status of the Industry immediately before the passage of N.I.R.A. which became effective on June 16, 1933. The Act provided for the approval by the President of codes of fair competition for certain industries of which the Asbes-

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tos Industry was one. Immediately upon the passage of the Act, the Asbestos Institute was organized for the purpose of preparing such a Code for the Industry under the terms of N.I.R.A. A Code of fair competition was prepared for the five divisions of the Industry, one of them being the Asbestos Paper and Allied Products Division, which includes the manufacture of asbestos paper and wool felt insulating products involved in this proceeding. This Code, after being prepared, was approved by the President on November 1, 1933. The Code authorized the members of each division to prepare a merchandising plan, incorporating the merchandising policies best calculated to promote fair competition and, subject to the review of an Administrator, such merchandising plan when approved by three-quarters of the Code members of the Division and filed with the Sub-Code Authority became binding upon all members of the Industry who were members of that division. As the Code did not come into existence until approved by the President on November 1, 1933, the merchandising plan could not be adopted until after that date and as the result of final revisions and corrections, came into use by the Industry after approval on December 21, 1933.

Fifty-five manufacturers were members of the Division and abided by the terms of the Code Merchandising Plan by virtue of N.I.R.A., and continued to do so until on May 27, 1935 the Schechter Decision invalidated portions of N.I.R.A.

Immediately, the President, hoping to salvage something from the Act and in order if possible to forestall an even more serious chaotic condition in the Industry than had existed prior to N.I.R.A., requested various members of the Industry to voluntarily abide by the fair trade practice and labor provisions of their Codes, these being among those features of N.I.R.A. which had not been declared unconstitutional. He also requested that voluntary agreements be prepared by the various industries and submitted to him for approval. The President specifically omitted in his invitation to the industries to collaborate, the articles in the Act which referred to the merchandising plan. Immediately thereafter certain of

the members of the Industry, thirteen in number, agreed to abide temporarily by the articles in the Code relating to labor, fair trade practices and open-price filing. The latter was continued to a lesser extent as time went by, by these companies and then ceased entirely within 60 to 90 days after the Schechter Decision. Meanwhile a Voluntary Agreement was prepared by the members of the Industry and in accordance with the President's request submitted to him but it was never approved and no member of the Industry ever operated under it. This Voluntary Agreement when drafted and submitted, did not contain any merchandising plan and was submitted on behalf of all five divisions of the Code. It is obvious that it could not contain such a plan as the five divisions of the Asbestos Industry dealt with five fundamentally different kinds of products.

It can, therefore, be seen that up until this point nothing was done or could have been done which was subject to criticism or which could in any way have been construed to be contrary to the Anti-Trust Laws, for the Industry was only complying with what was at first the law of the land and thereafter attempting to follow a Presidential request.

Sometime prior to N.I.R.A. however a great need for a preshrunk, low pressure pipe covering had arisen. Asbestos Pipe Covering has a tendency to shrink after application. Due to the absorption of moisture from the air after it has been manufactured and prior to application, shrinkages between sections of pipe occurred, when applied to pipes, from as much as 6 to 10 inches per 100 foot lengths. This caused a great heat loss and was unsightly.

One of the Respondents, Johns-Manville, had been conducting researches along this line for a number of years as a result of which a patent was granted on September 4, 1934. This was assigned to Johns-Manville by the inventors, Messrs. Toohey and Williams and has since been known as the Toohey Patent. By combining certain proportions of starch, wax and alum to the Asbestos or Wool Felt Fibers and heat treatment at specified gradations of temperature, an asbestos product

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which was water repellent was produced. It is obvious that pipe covering, manufactured by this process, while more expensive to make, had immediate advantages where heat losses were to be overcome. Johns-Manville, even prior to the granting of the patent, but after the application for the patent in 1931, had begun to manufacture what was termed "Pre-shrunk" products, and to advertise extensively their product looking to the advantages to be derived as soon as a patent was granted to them. The evidence also indicates that there were a number of other products manufactured by other respondents who also claimed to have a pre-shrunk product.

The Toohey Patent contained ten different claims covering three main classifications; (a) Corrugated paper, (b) Asbestos and Wool Felt Paper, and (c) Asbestos and Wool Felt Pipe Covering.

As soon as the patent was issued to Johns-Manville, they considered seriously bringing infringement suits against manufacturers who were making and selling pre-shrunk type products which Johns-Manville felt infringed on their Toohey Patent. It was about this time that Donald Tulloch, Jr., who had been associated in many capacities with the low pressure, asbestos pipe covering industry for over twelve years, came into the picture. Shortly after the issuance of the Toohey Patent, Tulloch approached Johns-Manville and suggested that it give him a license under the Toohey Patent with the right to sub-license other manufacturers, pointing out that in this way infringement suits could be eliminated, patented products could be sold at fixed prices without competition in the pre-shrunk field from competitors who were then infringing the Toohey Patent. Also, in this way, the general market for the product would be increased and would tend to increase the Johns-Manville sales. In so doing, Tulloch was acting in his own interests and as a result of negotiations on September 11th, 1935, some approximate five months after the invalidation of N.I.R.A., Johns-Manville granted a license to Tulloch under the Toohey Patent, receiving a sub-license from Tulloch and granting Tulloch the right to sub-license other

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manufacturers. Tulloch, on his part, agreed to pay Johns-Manville a substantial yearly cash payment for the life of the Patent. Prior to an agreement being reached with Johns-Manville, it was shown that Mr. Tulloch had only consulted with a few of the manufacturers in the East on the subject of whether they would be interested in taking a sub-license from him. In each instance, the evidence shows the interest of the manufacturer but subject to and providing Tulloch obtained a license from Johns-Manville with a right to sub-license.

The Merchandising Plan which was attached to the license granted Donald Tulloch differed in many respects from the merchandising plans in use by the Industry under the Code itself and was as shown by the document itself, changed, varied and corrected on the final day of signing which in effect precluded its submission to any other manufacturers prior to its adoption as part of the License Agreement between Tulloch and Johns-Manville. The Merchandising Plan, of course, contained the major practices of the Industry as developed in the past and was a composite of many points of view which had grown up over a period of many years.

Upon obtaining a license, Tulloch immediately set about to license other manufacturers and the evidence is uncontradicted that throughout the life of the license agreement, which still exists today, a total of 25 manufacturers, out of 55 who composed the industry, joined, only 23 were members at any one time, that only 19 were made parties respondent to this complaint, and that only two are licensees at the present time.

The Respondent, Keasbey & Mattison Company withdrew from the license agreement after notice in accordance with the terms of the agreement, on December 31, 1938. The evidence is again undisputed as will be more fully described in the brief of argument that since that time it has neither collaborated, cooperated or followed any of the rules, practices or schedules of the Licensor, Tulloch, and has in fact by documentary evi-

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dence refused requests by the Licensor to reconsider and again become a Licensee.

During this whole period unpatented products were constantly being sold in far larger quantities than the patented and were constantly in active competition with the patented. As a matter of fact this serious competition and the sale of the unpatented products at prices far below those of the patented were the real reasons for the withdrawal of the licensees from the Tulloch License Agreement. It was found that except in certain cases and for certain operations, dealers and jobbers and customers were more interested in the cheapness of the product than in its non shrinking qualities. The able brief of counsel for Johns-Manville details in great accuracy this large market of unpatented products at constantly varying prices below those of the patented material.

The Trial Attorney in his brief has sought desperately to show that the Tulloch License Agreement was born of a desire to control prices of the unpatented as well as the patented product and thus restrain competition. It is respectfully submitted that a careful review of the testimony in this case will show no such evidence or possible inference therefrom. It is obvious that it having been shown that unpatented products were sold in far greater quantities than patented products, the Trial Attorney's sole resort to show a restraint of trade or unfair competition was an attempt of this kind. It is submitted that he has ingloriously and ignominiously failed.

It was not until October of 1941 at a time when during a period of more than six months there still remained only two licensees, that the complaint was filed in this case, followed by an amended complaint on December 27, 1941. It might well be argued that except as to those two remaining licensees and the Licensor, the results of this litigation are purely academic. However, it must be remembered that the rights and good name of each and everyone of these manufacturers is in jeopardy unless those so charged can clear themselves of the accusation of endeavoring to restrain trade and fair competition and of fixing prices to the detriment of the purchasing

public. For that reason, this respondent, Keasbey & Mattison Company, with other respondents no longer licensees, as well as the two remaining licensees and the licensor, have defended their actions throughout and we believe that a careful study and analysis of the testimony given and documentary evidence offered will justify a clean bill of health by the Commission and a dismissal of this complaint.

II. ARGUMENT.

Outline of the Charges in the Commission's Complaint.

The substance of the charges against this Respondent and others as contained in the Amended Complaint is as follows:

1. That the Respondents engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act by conspiring to fix prices and merchandising terms of patented materials covered by United States Patent No. 1,972,500 (known as the Toohey Patent).

2. That the conspiracy to fix prices applied as well to "non-licensed materials such as solid brass, zinc and lacquered bands, flexible range boiler jackets and canvas covering."

3. That the Toohey Patent issued to the Respondent, Johns-Manville Corporation on September 4, 1934, was the vehicle for the conspiracy to fix prices and merchandising terms of the licensed and non-licensed materials.

4. That the form of the original license agreement between the Respondent Johns-Manville Corporation and Donald Tulloch, Jr. was agreed upon prior to its execution by the various Respondents pursuant to the conspiracy agreement.

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5. That the conspiracy resulted in the setting up of a licensing system to control the price and merchandising terms of patented pipe covering materials and necessary accessories which conspiracy was carried out through Donald Tulloch, Jr.

During the course of the taking of the testimony in this case which covered many days and resulted in approximately 3500 pages of testimony, the Trial Attorney attempted by constant insinuations to attack the validity of the Toohey Patent and further attempted to show, although this was nowheres pleaded in the Complaint, that the conspirators through the licensing agreement attempted and did in fact include the price fixing of all unpatented material in the low pressure pipe covering field.

We shall, but very briefly refer to each of the various contentions of the Commission as set forth in its Complaint.

1 and 3.

In order to show a long existing conspiracy prior to the Tulloch License Agreement, an attempt was made to prove a conspiracy dating way back, in fact prior to the days of N.I.R.A., following through an alleged illegal adherence to a so-called voluntary agreement up to the time of the Tulloch License Agreement and from then down to date.

It is respectfully submitted that no such proof was produced and the brief of counsel for Acme Asbestos, et al in great detail analyzes the testimony and refutes the implications contained in the Trial Attorney's brief on this score.

As to this Respondent, Keasbey & Mattison Company there is no testimony whatsoever linking it up to any such conspiracy and in fact it is to be noted here that the Trial Attorney, although having subpoenaed two of the officials of Keasbey & Mattison Company, never placed them on the stand and never used any of their testimony. What was shown was that former officials of the Company, which was a member of the

Asbestos Paper & Allied Products Division of the Asbestos Code, had collaborated in the preparation of the Code Merchandising Plan submitted under N.I.R.A. (Record P. 291, 292 —Also Par. 2, P. 10 of the Trial Examiner's Report and Citations); that they were one of the thirteen companies who agreed to accede to the request of the President to abide by the labor and fair trade practices after the invalidation of the N.I.R.A. (Record P. 130, 131); that former officials of the Company were consulted by Donald Tulloch, Jr. as to some of their merchandising policies immediately prior to the execution of the License Agreement between Tulloch and the Johns-Manville Corporation (which license contained a merchandising plan which was amended as shown by the original document in numerous instances on the day of the signing of the said agreement at which time none but Tulloch and officials of the Johns-Manville Corporation were present). (Record P. 111). That a sub-license agreement from Tulloch to Keasbey & Mattison was signed by one of the Vice-Presidents of this respondent in the absence in Europe of the President of the Company with certain reservations and was then re-executed, with those reservations entirely eliminated by Tulloch, by its President in August of 1936 but dating back to its original execution on September 20, 1935. (Record P. 359-365, Com. Ex. 33 & 34, Res. Ex. 22, 23, 27, 28, 29, 30). That during the time this Respondent was a member of the licensing agreement, it from time to time by its officers attended meetings called by Tulloch for the purpose of discussing suggested changes in prices, zoning or other matters of importance to the licensees. That it abided by the terms of the Tulloch License Agreement in selling patented products at the schedules set forth by Tulloch. That on May 4th, 1938 by its then President, Ernest Muehleck it notified the Licensor of its intention to withdraw from the Agreement in accordance with its terms at the end of the then current year, or on December 31, 1938. (Res. Ex. 40). That on May 6th, 1938 Tulloch requested a reconsideration of their decision. (Res. Ex. 41). There is no evidence that this letter was ever acknowledged

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nor that any conferences between parties took place thereafter. That on January 3, 1939, this Respondent confirmed its withdrawal from the Tulloch License Agreement to the Licensor. (Res. Ex. 42 & 43). Thereafter on May 25, 1939 payment of the balance of the royalties on patented materials on hand as of December 31 was made to Tulloch. (Res. Ex. 44), and acknowledged by him on May 26, 1939. (Res. Ex. 45). Subsequently, although no evidence as to the reason therefor was produced by the Trial Attorney, this Respondent wrote to Tulloch on October 11, 1939 in these significant words (Res. Ex. 46):

> "Dear Mr. Tulloch:
>
> Replying to your kind invitation to discuss with you the possibility of this Company's resuming manufacture of low pressure insulations asbestos paper under the Toohey License, I must advise that our Company can see no reasons for deviating from its present policy. I therefore feel that discussions would be superfluous.
>
> Very truly yours,
> KEASBEY & MATTISON COMPANY
> /s/ Wm. C. Scott
> Vice President"

Thereafter there is not one iota of testimony that this Respondent in any way communicated with, collaborated with, or continued in any way its relations with the Licensor nor did it continue to operate in any way in accordance with the provisions of his License Agreement. The only testimony on this score is directly contrary to any such inference. (Record P. 462). Exhibits introduced by the Commission (Exhibit 382 A to I) indicate that as soon as this Respondent withdrew from the License Agreement with Tulloch, it adopted new merchandising zones easily distinguishable from those of the Tulloch License Merchandising Zones, thereby showing beyond the peradventure of a doubt, non-adherence of terms, prices or conditions of sale with anything issued by the Tulloch Licensing Agreement.

As to the distinction between the zones, reference is again made to the brief of counsel for Respondents Acme Asbestos, et al, which with great particularity shows the differences between zones published by Tulloch and this and other Respondents.

2.

The allegations that the conspiracy attempted to fix prices of non-licensed materials are without foundation.

For years, bands of solid brass, zinc or lacquered, and canvas coverings had been considered as an integral part of all pipe covering. This is, of course, because of the necessity of applying and holding the pipe covering in firm position, which cannot successfully be done except through the medium of such bands and canvas covering. Pipe covering was sold as a unit which included these accessories and only when the application of the covering required a larger number than the usual 2½ bands per section of pipe covering was there a different charge made, which charge was in the nature of a lesser discount from the standard list price. These accessories were never sold by the Respondent except in connection with pipe covering or flexible range boiler jackets. This for the logical reason that they were necessary in the applying of those products.

In the case of *General Electric Co. v. Willeys Carbide Tool Co.*, (1940) 33 Fed. Supp. 969, the Court in the only reported case has sustained the sale of accessories where they were reasonably and properly necessary in putting the patented material to practical use. In that case the Court considered as well the obvious fact that price fixing of a patented product would be ineffective if the licensee could not be prevented from making a gift of unpatented fixtures which were an integral part of the patented product. The Court said:

> "The requirement that the licensees shall not modify the established price of the patented material indirectly by the inclusion of other items at less than their regular

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> prevailing prices is obviously a reasonable and proper one. Obviously, the right of a patent owner to require his licensee not to undersell him would be an empty thing if with each sale the licensee could include something else of value, needed by the customer, at a fraction of its real worth.
>
> * * * * * * * * * *
>
> "It is my opinion that in mounting the patented material on simple unpatented steel supports the plaintiff has gone no farther than is reasonably and properly necessary in putting the patented material to practical use in such a way as to enable users to enjoy the full benefit of the patented material. Under the circumstances involved in this case the public interest is served since the public has been and is free to purchase the patented material at prices which include no allowance for supports, and to invite the keenest competition for the business of supplying the supports and affixing the patented material to them. Yet the Carboloy Company's right to protect its hoped-for profit is preserved and made effective."

We further submit that attempting to charge that a flexible range boiler jacket was a non-licensed material is entirely erroneous. Flexible range boiler jackets, which are large pieces of pipe covering used to cover range boilers and which include a flexible mechanical feature, subject to a patent owned by one of the other Respondents, can be made either with the Toohey Patented materials or without those materials. Nowheres was it shown or was there any inference that anything but flexible range boiler jackets made with the patented materials were subject to control of the Tulloch License Agreement. We further submit that the constant smokescreen thrown in by the Trial Attorney inferring some deep illegal conspiracy because of the patent held by the respondent, Norristown Magnesia Company on its flexible mechanical feature of the range boiler jacket was entirely unjustified and only beclouds the issue. Flexible range boiler jackets made with

the Toohey Patent were a proper subject of price control and royalties under the Tulloch licensing system.

4.

The allegation that the original license agreement between the respondent Johns-Manville Corporation and Donald Tulloch, Jr., was agreed upon prior to its execution by the various Respondents and pursuant to a conspiracy agreement is definitely unsubstantiated by any evidence whatsoever.

As a matter of fact all of the testimony is definitely to the contrary. Both Mr. Hoff, President of the Johns-Manville Sales Corporation and Mr. Vandiver Brown, General Counsel of the Johns-Manville Corporation, testified that, in their negotiations with Mr. Tulloch concerning an exclusive license to him of the Toohey Patent and a sub-license agreement from him to them, they never discussed the matter with any other members of the industry or with these Respondents. The testimony is clear that on the day of signing the agreement between the parties on September 11, 1935, the entire day was spent by Tulloch, Hoff and Brown as well as other lesser officials of the Company in correcting the merchandising plan attached to the license agreement. It is obvious therefore that as the agreement was signed at the end of that day, none of the terms of the merchandising plan, could have been known to any of the other Respondents. Tulloch, of course, when he entered into negotiations with Johns-Manville for an exclusive license had communicated with some of the manufacturers in the East to ascertain whether if he were successful in his dealings with Johns-Manville, they, in turn, would be interested in taking sub-licenses from him. This was an obvious necessity on his part. What purpose could there have been in his obtaining the license from Johns-Manville if, in turn, he were unable to sub-license others. The Trial Examiner has properly reported in his Report to your Honorable Commission at Paragraph 33 the gist of these negotiations.

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"33. While these negotiations were in progress respondent Tulloch talked with some of the other manufacturers in the eastern part of the United States asking whether they would be interested in taking a license to manufacture "pre-shrunk" products; submitted copies of the patent to these manufacturers and also a draft of a license agreement to four of them, The Ruberoid Co., the Philip Carey Mfg. Co., the Keasbey & Mattison Co., and the Norristown Magnesia & Asbestos Co. There is evidence that these manufacturers informed Tulloch that they would not be able to negotiate a license agreement with him or to make any commitments until he had obtained the right to grant licenses from Johns-Manville Corporation (R. 253-4, 357, 2348-9, 3064, 3069-71, 3095)."

We submit that this is a correct statement of what the evidence in this case shows and that the allegation of the Complaint tending to show a conspiracy and an agreement as to the license prior to its execution between Tulloch and Johns-Manville is unfounded and unjustified in the light of the evidence produced.

5.

The Complaint alleges that the foregoing conspiracy resulted in the setting up of a license system to control the price and merchandising terms of patented pipe covering and necessary accessories and that this conspiracy was carried out through Donald Tulloch. At the same time, during the taking of testimony in this case, the Trial Attorney attempted by constant insinuations to attack the validity of the Toohey Patent although no such charge was made in the Complaint, and to further prove that the Respondents through the licensing agreement did in fact fix the prices of unpatented materials in the low pressure pipe covering field as well.

We submit that none of this is again either substantiated

by the evidence or by the law which controls the rights of the holder of a Patent.

It was definitely shown by the testimony in this case that the Toohey Patent was the result of many years of research on the part of two men in the employ of Johns-Manville Corporation. The research was necessitated by the fact that as previously stated low pressure pipe covering absorbs moisture from the air before it is applied, and when it is applied shrinks to the extent that gaps are left between sections of the pipe, causing loss of heat in the pipes and leaving an unsightly condition. All of the Industry recognized this fault and the testimony indicates in numerous instances reports of complaints made to various respondents of this situation. Even before the granting of the Toohey Patent, one of the Respondents, Johns-Manville was manufacturing only pre-shrunk products and since the granting thereof has manufactured nothing but these products. The fact that many and almost all of the other respondents withdrew from the License Agreement which permitted them to manufacture patented products is explained throughout the testimony by the fact that as there was so much unpatented material sold at lesser prices than the patented material, the market for patented material was drying up. The fact that the unpatented material which still shrank was in great demand was primarily due to the fact that except on particular jobs and in some Departments of the United States Government, price of the material was of paramount importance to jobbers and dealers and the ultimate customer. This attitude is and can be no reflection on the pre-shrunk material which all Respondents and their customers agreed was far superior but can be attributed to the National attitude of our Country which demands the cheapest material possible within the limits of propriety.

The factors that so much unpatented material, greatly in excess of the patented material, was sold and the withdrawal of the Respondents from time to time from the Tulloch License Agreement, disproves the charge made by the Trial Attorney during the course of these hearings that the licensing

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agreement fixed the prices of unpatented materials in the low pressure pipe covering field. If, in effect, that contention was true, it is obvious that the members of any such conspiracy would have held on grimly to the licensing agreement which would have stabilized all prices of both patented and unpatented materials.

The contrary was, however, definitely shown. Numerous witnesses were produced who testified that the unpatented material was constantly in competition with the patented material, that different prices could always be obtained and were constantly being quoted by various Respondents and there always was all of the unpatented material necessary for the consuming public. Not a single witness was produced by the Trial Attorney who contradicted in any way this mass testimony. There were also introduced hundreds of invoices for unpatented products, showing different prices (below those of the patented products) quoted by various Respondents at the time when the License Agreement was in force. (Res. Exs. 257-268 inclusive). At this point, it might be wise to allude to the plaint of the Trial Attorney in his brief in which he refers to the fact (Page 17 Trial Attorney's Brief) that in support of the allegations of the Complaint he called 17 witnesses, of which 14 were Respondents or officials of Respondent Companies, and only one was a witness who had not been connected with the Tulloch License Agreement in any manner; that the Respondents called 23 witnesses in opposition to the allegations of the Complaint. The Trial Attorney implies that therefore all of the testimony was colored by witnesses favorable to the Respondents.

This calls to mind the oft quoted statement that "you can't have your cake and eat it too." If the Trial Attorney was ham-strung in the obtaining of his testimony by so many witnesses, who were favorable to the Respondents' position, what was to prevent him from subpoenaing the witnesses from the other 30 members of the Low Pressure Pipe Covering Industry, who never were at any time members of the Tulloch License Agreement, and/or the six members of the License

Agreement, who were not named in the Complaint, and who, certainly if they had been in any way injured or damaged in their business by an alleged conspiracy such as is complained of, would have been the first to complain and give evidence of a restraint of trade, of a price-fixing scheme which was to their detriment, or to a scheme to restrain competition. But no, the Trial Attorney does no such thing. He relies on the testimony of Respondents and other witnesses except in one instance and then puts on the "crybaby act" when he can't produce the testimony which he had hoped to obtain to sustain his Complaint.

Finally, it is submitted that the exclusive license by Johns-Manville Corporation to Donald Tulloch, Jr. and the granting by him subsequently, of sub-licenses, was within the lawful scope of the patent monopoly and was not in violation of the Anti-Trust Laws.

The law has never changed to the effect that the holder of a valid patent has a right to license other manufacturers to use his invention and, further, to sell the products made as the result of the patent to the public at prices satisfactory to the patentor and licensor. As far back as 1902 the United States Supreme Court so held in the case of *Bement v. National Harrow Co.*, 186 U. S. 70, and that decision has been followed consistently by the Court since then. In fact in the late case of *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 436 (1940) cited by the Trial Attorney in his brief in support of his position, the Court stated at page 456:

> "He may grant licenses to make, use or vend, restricted in point of space or time with any other restrictions upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give."

Whether or not the conditions imposed on Licensees were "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly" is the test. It is obvious

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that a provision preventing Licensees of Johns-Manville from selling patented products at a price below that maintained by Johns-Manville in its sale of patented products must be considered a reasonable provision. (See also *United States v. General Electric Co.*, (1926) 272 U. S. 476 at page 490).

It is, therefore, obvious that Johns-Manville as patent owner had a legal right to license others to use its patent invention and to fix prices and merchandising terms under which its Licensees could dispose of the patented products.

The fact that instead of licensing manufacturers direct Johns-Manville licensed Tulloch to sub-license others to manufacture the patented products, in no way changes these rights. The reasons for such a procedure were obvious and were testified to in great detail. In order to enforce a price structure, it was necessary for the Licensor to have access to the licensees' books to determine whether the royalties were being properly paid and whether or not prices set out in the License Agreement were being maintained and followed. It is a well known fact that all manufacturers are loath to submit to a competitor information of this type. The thought that an independent individual, who had a far reaching understanding of the Industry, its confidence, and who had served in various capacities prior to and during the Code days of the Industry occurred to Tulloch who broached it to Johns-Manville in order that he might obtain an exclusive license and in turn sub-license other manufacturers.

Tulloch worked out the merchandising terms and plan, which, when once they were agreed upon and had become a part of the license agreement between Johns-Manville and Tulloch, became a part of the sub-license agreement. Thereafter, Tulloch, made various changes in this plan, in various prices from time to time, and in the operation of the various zones, etc. and in all instances, it was testified that he alone exercised control over any changes to be made, although as a matter of courtesy and information he, at various meetings with his Licensees, obtained their various points of view, but alone made the decision. Instances were shown where con-

stantly Tulloch's decisions were greatly to the displeasure of some or many, if not all, of his sub-licensees.

Certainly, the patent owner has a right to grant to an exclusive licensee its right to control prices on patented goods and this proposition is so sound that it has only been questioned in one case. In *Edison v. Ira M. Smith Mercantile Co.*, (1911), 188 Fed. 925, the Court stated at page 927:

> "It is urged that the sales were made and the licensed conditions inaugurated, not by the patentee, but by a licensee. The bill alleges that the complainant, as licensee, held under a grant of exclusive right to make, use, and sell the patented invention throughout the United States. Under such a grant, there is no difference, so far as this question is concerned between patentee and licensee."

Tulloch paid Johns-Manville for the exclusive license covering the patent. The testimony indicates that this amount was based on a figure which would repay to Johns-Manville the cost of its research for a pre-shrunk material.

The Trial Attorney has relied to a great extent in his brief on the case of *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (1912), but even in that case the Supreme Court did not question the right of the Standard Sanitary Mfg. Company to exercise price control for its own benefit through an exclusive licensee, or in any other way.

The Trial Attorney has also relied heavily on the case of *United States v. Univis Lens Company*, (1942) 316 U. S. 241, in support of his contention that under the Toohey Patent, the price of patented pipe covering could not be fixed if patented price fixed paper had been used by the Licensee in manufacturing the patented pipe covering. In the *Univis* case only one patent and one patented article was involved and there the Court held that the price could not be fixed twice on this one article. There, one licensee partially manufactured blank lenses, sold them at fixed prices to another licensee who completed the manufacture of the lens by grinding, and resold the finished article at a fixed price.

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This is not the case in this proceeding. Here the Tulloch patent contains 10 specific claims, as was found by the Trial Examiner in his report at page 14, paragraph 43:

> "The Toohey Patent contained 10 different claims. Claim 1 covered corrugated paper. Claims 3, 4, 5, 6, 7, 8, and 9 covered Asbestos and Wool Felt Paper, Claims 2 and 10 covered Asbestos and Wool Felt Pipe Covering."

Each claim embodies a complete invention under the law and in the Toohey Patent three separate and distinct products were covered by the 10 claims for which each had a particular market and was used for different purposes than each of the others. Corrugated Asbestos Paper, Asbestos and Wool Felt Papers were completed patented products. They might be sold as completed products or might be used in the course of manufacturing Asbestos or Wool Felt Pipe Covering. If used in manufacturing pipe covering, the product was a completely different one created under a different patent claim.

This definitely shows, therefore, that our case is not in any way ruled by the *Univis Lens Co.* (Supra) case where only one single patent invention was involved. (See Page 248 of the Court's Opinion.)

III. CONCLUSION.

We respectfully submit on behalf of this Respondent, Keasbey & Mattison Company, that there has been no testimony whatsoever to show that it was at any time, a member of a conspiracy to restrain trade, restrain free competition, or fix prices in derogation of the right of the public to buy materials freely and at competitive prices in the open market.

It is further submitted that it has been shown that Keasbey & Mattison Company withdrew at the end of the year 1938 and that now for a period of more than five years, it has hewn its own road and has in no way been subject to the rules and regulations or provisions of Donald Tulloch's Licensing ar-

rangement with the remaining licensees. On this score, we should like to point out to your Honorable Commission that in two cases you have gone so far as to hold that the discontinuance of a practice claimed to be illegal may be considered as sufficient reason to dismiss a Complaint especially where there is no reason to believe that the practice will be resumed. (See your decisions in *United Importers and Distillers, Inc.*, 24 F.T.C. 1379 and *Oppenheim Collins & Co., Inc.*, 30 F.T.C. 1390. In *Winston v. F.T.C.*, 3 Federal (2d) 961 (1925) the Circuit Court of Appeals for the Third Circuit vacated a cease and desist order entered by the Commission as a result of a Complaint charging unfair practices in respect to methods of sale. There, the party complained against ceased and desisted the alleged illegal practice on the advice of counsel after an investigation by your Commission and there was no evidence that the practice had been or might reasonably be expected to be resumed.

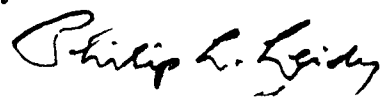
In our case, this Respondent, Keasbey & Mattison Company, withdrew from the License Agreement, December 31, 1938 refused to reconsider its decision in 1939 and it was not until three years later that an investigation was made of the licensing scheme by your Honorable Commission.

It is therefore, respectfully submitted as to this Respondent, Keasbey & Mattison Company, that under all of the evidence adduced and the law applicable, this Complaint should be dismissed. It is respectfully requested that oral argument before your Honorable Commission on these proceedings should be granted.

Respectfully submitted,

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APPENDIX

EXCEPTIONS TO TRIAL EXAMINER'S REPORT

Now comes KEASBEY & MATTISON COMPANY, one of the Respondents in the above entitled matter, by Philip L. Leidy, Esquire, and Pepper, Bodine, Stokes & Schoch, their attorneys, and except to the report upon the facts of the Examiner of the Federal Trade Commission, Honorable Randolph Preston, filed with the Commission March 15, 1943 in the following particulars.

1. To the first paragraph on Page 2 of the Report, wherein the Examiner fails to make mention of the fact that this Respondent, Keasbey & Mattison Company, filed an answer to the original complaint within the time allowed therefor, and without requesting an extension for the filing thereof, on November 3, 1941; and an amended answer to the amended complaint of the Federal Trade Commission, on January 3, 1942. (See Docket in the matter of Acme Asbestos Covering & Flooring Company, et al, No. 4613.)

2. To the second paragraph on Page 2 of the Trial Examiner's Report concerning the differences between the original and amended complaint.

While the original complaint alleged a conspiracy with respect to both licensed and unlicensed materials (paragraphs EIGHT and NINE), the amended complaint limits the charge to "licensed" and "non-licensed" materials as defined therein (Amended Complaint, paragraphs ONE, EIGHT and NINE). The amended complaint also contains an allegation in subdivision 10 of paragraph NINE which was not included in the original complaint and which should be cited.

> "This merchandising plan was adopted during the period the National Industrial Recovery Act was in effect by respondent corporations, including The Philip Carey

Company, the wholly owned subsidiary of respondent, The Philip Carey Manufacturing Company, but it was never approved by the Administrator of the National Industrial Recovery Administration."

3. To Paragraph 6 on Page 3 of the Report in which the Trial Examiner states that Paragraph NINE of the Complaint alleges a violation of the Federal Trade Commission Act on the part of the respondents by

> "Agreeing upon the inclusion of *unlicensed* materials in the merchandising plan and controlling license and methods of business as to the same." (Italics ours.)

The amended complaint omits the words "unlicensed materials" and includes only such unlicensed materials as fall in the definition of "non-licensed materials" as stated in paragraph ONE of the amended complaint. This statement in the Trial Examiner's Report, therefore, incorrectly expands the scope of the amended complaint.

4. To the last paragraph on Page 3 of the Report wherein the Trial Examiner states

> "The complaint covers two broad fields; First, those violations connected with the Toohey Patent and the Tulloch licenses thereunder; second, other violations not connected therewith."

No violations are alleged in the complaint except those which are connected with the Toohey Patent or the Tulloch licenses thereunder.

5. To the fourth paragraph on Page 8 of the Report, where it is stated:

> "* * * it appears that in the Toohey process the same methods of manufacture were used as in the unpatented products, with the exception that in the Toohey process a wax sizer purported to make the pipe covering water

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repellant is beaten into the asbestos fiber in the vats and before it is rolled into paper."

This statement is contrary to the evidence and to Paragraph 17 on Page 13 of the Examiner's Report which correctly reports the facts shown by the evidence in the case. (R. 115, 1928, 1930, 1972-3, 3298; Respondents' Exhibits 12, 71).

6. To the failure of the Examiner to report in connection with statement of Paragraph 5, Page 11 of the Report, that

"This revised Merchandising Plan was never used by the members of the Division including the Respondents in marketing their products."

Otherwise the statement is incomplete and misleading. (R. 2156-7, 2254-5, 2329, 2369-2370, 3159-3163).

7. To the failure to report in connection with the statements set forth in paragraph 12, Page 12 of the Report, that

(The voluntary agreement included a provision that it was not to become effective until approved by the President) "*and it was never put into effect or acted under by any Respondent.*" (R. 386-7, 1075, 2338-9, 3053-5; Coms. Ex. 18).

8. To the last sentence of Paragraph 26 on Page 15 of the Report wherein the Trial Examiner states that

"This hostile attitude toward pre-shrunk continued with some competitors after they took a Tulloch license."

The evidence in the case indicates that this related to only one respondent, The Philip Carey Manufacturing Company, and there is no evidence which could be interpreted as denoting a hostile attitude as such. (R. 989, 2855, 2876-7, 2894).

9. To the use of the word "directly" on the second line, and the words "but there is evidence that there were com-

munications with and through Tulloch with other prospective licensees," being the last two lines of Paragraph 32 on Page 16 of the Report.

There is no evidence that Johns-Manville Corporation communicated either directly or indirectly with any competing manufacturer or through Tulloch to the same effect until the Tulloch License Agreement was signed, September 11, 1935. (R. 356-7, 1098, 1100, 2048-9, 2075, 2104, 2106-7, 2352, 3096-7).

10. To the failure to report in connection with statement in paragraph 33 on Page 16 of the Examiner's Report, that

> "The draft of a license agreement submitted to four of the respondents was never used." (R. 2349, 3064; Compare Coms. Exs. 1 and 52).

11. To paragraph 37, Page 17 of the Report wherein the Trial Examiner states in connection with the merchandising plan attached to the Johns-Manville sub-license agreement that

> "There is also testimony that prior thereto Tulloch had conferred and communicated with other prospective licensees with reference thereto."

The evidence cited does not support this statement. Tulloch never discussed the plan with any officials of prospective licensees nor with anyone connected with them prior to September 11, 1935. He discussed merchandising plans with merchandising men to enable him to prepare a plan susceptible to approval by all prospective licenses. (R. 368-9, 2103-4, 2274, 3067-8, 3076-7).

12. To the failure of the Trial Examiner to state in connection with Paragraph 38, Page 17 of his report, that

> The manufacturers whom Tulloch approached after September 11, 1935 had never seen the merchandising plan attached to the license agreement prior to that time

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and only a few of the manufacturers had seen drafts of a proposed license agreement under the Toohey patent prior thereto. (R. 361-9, 1212-3, 1279, 1428, 1475, 1491, 1539, 1549, 2102-4, 2274).

13. To paragraph 42, Page 19 wherein the date of resignation of this respondent, Keasbey & Mattison Company is given as 12/3/38 or 5/3/39 and the Sub-Note indicating that

> "There was a dispute as to which date was correct, both are given."

The undisputed documentary evidence is to the effect that on May 4th, 1938, Keasbey & Mattison Company notified Tulloch that in view of the license period expiring on December 31, 1938, they were at that time ceasing to operate under the Tulloch License Agreement (Respondents' Ex. 40, Record Page 456), and that on January 3rd, 1939, Keasbey & Mattison Company notified Tulloch that they had ceased operating or paying any further royalties to him as of December 31st, 1938 except as to those patented articles remaining in stock and unsold (Respondents' Ex. 42, Record Page 458) and that an acknowledgment of discontinuance of operations under the license was sent to Keasbey & Mattison Company by Tulloch dated January 6, 1939 (Respondents' Ex. 43, Page 458 of the Record.)

14. To paragraph 46, Page 21, sub-paragraph (d) wherein in the last sentence thereof in parenthesis the Examiner reports regarding the requirements of uniform contracts

> "(This provision doesn't seem to have been enforced during a portion of the licensing period.)"

This statement is not borne out by the evidence which shows that no uniform contract was ever established or used under the license agreements and that each licensee used his own form. (R. 489, 490, 1075-6, 1322, 1442, 2181-2, 3151-2, Com. Exs. 1, 50, 363).

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15. To paragraph 54, Page 23 of the Report wherein the Trial Examiner, in referring to the changes made by Tulloch in prices, terms and conditions of sale under his license agreement, states that these were made "usually after consultation with licensees" and further that "only a few decisions were arrived at during the meetings." There was no consultation with the licensees. Tulloch met with groups of them and gave the licensees an opportunity to express their opinions on changes he suggested and possible results therefrom. He made his changes independently. (R. 122, 391-3, 397-8, 1124-5, 1216, 2078).

As to the last sentence above quoted which states that "only a few decisions were arrived at during the meetings", the evidence shows no decisions of any kind arrived at and insofar as the statement implies that any decisions were made by mutual agreement, majority rule or by anyone other than Donald Tulloch, Jr., it is objectionable and not borne out by the evidence. (R. 1072, 1320-1, 1495-6, 2049, 2168-9).

16. To paragraph 55 on Page 24 of the Report wherein the Examiner states that in connection with the changes made under the license agreement "The licensees agreed to and did give Tulloch the authority to so act and confirmed his action thus taken."

The evidence indicates that the only authority which Tulloch had was that contained in the original sub-license agreement between him and his various licensees. There is no evidence that the licensees ever confirmed Tulloch's actions. The evidence indicates that many of Tulloch's actions were unsatisfactory to many of the licensees. (R. 391-3, 397-8, 465-6, 907, 1001, 1124-5, 1216, 1512, 2169, 2170, 2257, 2275, 3148-9).

17. To the use of the words "usually" and "at times" in the sentence in paragraph 64, Page 26 of the Report wherein the Trial Examiner states that

> "Jobbers and distributors throughout the country were usually able to obtain unpatented products similar to the

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> Toohey patent products during the period of the Toohey License Agreement and were able at times to buy them at different prices from various respondents and their companies in the industry."

Testimony indicates that distributors and independent jobbers could always obtain ordinary unpatented paper and pipe covering during the license period at different prices by the process of bargaining. It also indicates that the price of ordinary unpatented paper and pipe covering was never uniform as between the different licensees. (R. 308-9, 317-320, 389-390, 485-6, 624-8, 631-3, 981-3, 1057, 1062, 1064, 1133, 1206, 1208, 1210, 1226, 1229, 1332-4, 1355, 1365, 1425, 1434, 1440, 2016, 2050-1, 2173-4, 2179-2180, 2189, 2202, 2204, 2209, 2247, 2249, 2257, 2265, 2286-9, 2302-3, 2305-2310, 2346, 2356, 2359, 2360, 2375, 2377, 2388-2390, 2398-9, 2401-2, 2415-7, 2419-2422, 2427, 2432-5, 2439-2442, 2453-8, 2463-4, 2469, 2479, 2484, 2487, 2492-4, 2498-2502, 2504-5, 2512-8, 2526-8, 2533-4, 2571, 2574-5, 2578, 2604-6, 2618, 2620-3, 2625-6, 2643-4, 2654-7, 2668, 2672, 2682-3, 2688-9, 2704-5, 2707, 2715, 2720-1, 2733, 2735-6, 2738-9, 2740, 2743-6, 2766-7, 2773-5, 2777-9, 2790, 2797-9, 2806-7, 2811, 2839, 2843-6, 2850-1, 2854, 2857-2860, 2872, 2887, 2889, 2921-2, 2947-8, 2952-4, 2955, 2960, 2968, 2970-1, 2984-6, 2991-9, 3001, 3003, 3009, 3015-7, 3020, 3028, 3035-3038, 3045-8, 3081-2, 3108, 3133, 3229, 3360-1; *Resps. Exs.* 15, 16, 18, 19, 80, 82-126, 148-151, 205, 206, 211-215, 226-233, 236-249, 252, 253, 257-272.)

18. To paragraph 65 on Page 27 of the Report wherein the Trial Examiner states

> "The selling prices varied from time to time and were not always uniform *but the original list prices were usually uniform.*" (Italics ours.)

This is not borne out by the evidence which shows that the manufacturers fixed their own prices for these products independently prior to the license period except as to patented products thereafter. (R. 879, 1365, 2053, 2161-4, 2179, 2255-6, 2371-2, 2903, 2949, 2951-2).

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19. To the first sentence of the third paragraph on Page 28 of the Report wherein Record Page 3127 is cited in support thereof.

This page in the Record supports only that portion of the first sentence which is to the effect that there were price lists.

20. To the third paragraph on Page 28 of the Report wherein the Trial Examiner states that

> "There is some divergence in the evidence as to whether or not the general merchandising plan which contains the policies and practices of the industry was substantially the same among all respondents prior to the N.R.A., that is beginning November, 1933."

There is no evidence that there ever was a general merchandising plan. In fact all indicates the opposite. (R. *2145*, 2326-8, 2364-5, 2373-5, 2906, 3423; Coms. Exs. 375-387).

21. To the third paragraph on Page 28 of the Report in which the Trial Examiner states that

> "While the quoted prices were usually the same, a number of witnesses testified that as customers of respondents they were able to get special or supplemental discounts in certain instances which did not appear upon the price lists and which varied the actual prices paid from those appearing on said lists."

The great weight of the testimony is that quoted prices were always different as between respondents and other members of the industry and the various witnesses stated that they were invariably able to obtain prices lower than those shown on published price lists as distinguished from quoted price lists, when they were buying unpatented ordinary paper or pipe covering. (See citations under Exception 17 and the following: R. 2422-3, 2446-7, 2713-4, 2815-6, 2821-3).

22. To the second sentence in the first paragraph on Page 29 of the Report, wherein the Trial Examiner states

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> "Witness MacDougal testified that salesmen did not usually discuss prices as it was known in advance what the price lists and discounts would be (R. 2611-2)."

This statement is misleading as an examination of the record and the pages cited show clearly that the witness MacDougal was testifying as a Johns-Manville Distributor and was talking about Johns-Manville's salesmen exclusively.

23. To the third paragraph on Page 29 of the Report wherein the Trial Examiner in speaking of classification of customers states that

> "and there is evidence that the industry recognizes the same classifications as does Johns-Manville."

Tulloch established all classifications under his license agreement. Johns-Manville as one of the licensees was required to recognize those classifications as were all of the other licensees. The statement gives an erroneous impression in that it tends to indicate that Johns-Manville as a licensee controlled the classification into which the various customers were placed. (R. 2368-9, 3133-4, 3333, 3358).

24. To the fifth paragraph on Page 31 of the Report in which the Trial Examiner states that

> "There is evidence that after the various respondents had from time to time withdrawn as Tulloch's licensees they were still carrying out substantially the same policies and practices as those contained in the merchandising plans."

The uncontroverted evidence in this case shows that Tulloch's licensees, including this respondent carried out their own merchandising policies after ceasing to be licensees. The evidence shows that after the licensees terminated their license agreements they differed among themselves as to prices, extra charges and all other details. As to Keasbey & Mattison Company, this respondent, it should be noted that the Re-

spondents' Exhibits 43, 44, 45, 46, 172, 173 and 174 indicated that they refused to rejoin or further discuss the license agreement with Tulloch after once having withdrawn on December 31, 1938. (See also paragraph 67 on Page 27 of the Trial Examiner's Report which more accurately describes the evidence on this point.) (R. 1216, 1322, 2236-7, 3172; Resps. Exs. 43, 44, 45, 46, 172, 173, 174).

25. To the last sentence of the sixth paragraph on Page 31 of the Report wherein the Trial Examiner states

> "Some parties were taken off the jobber list to prevent their obtaining products at jobber prices."

Tulloch testified that when a jobber did not perform the function of a jobber, he was, after investigation by him, placed in another classification. The statement in the Report as made infers that Tulloch arbitrarily removed customers from jobbers' lists. This is not borne out by the evidence. (R. 337, 1074-5, 1500-1, 2242, 3133-4; Resps. Ex. 155).

26. To the first sentence of the first paragraph on Page 32 of the Report wherein the Trial Examiner states

> "There is evidence that the Tulloch licensing system of the Toohey patented products was not as successful as those interested had hoped it would be."

There is no such evidence and there is nothing in the evidence specifically concerning the failure of the "Tulloch licensing system." There is evidence to the effect that the demand for patented products was not as extensive as had been expected, and that certain of the respondents terminated their license agreements when they found their trade and customers were more interested in lower priced products than in higher priced patented products. This statement of the Trial Examiner is not corroborated by any citation by him in his Report. (R. 641-2, 1229, 1330-1, 1367, 2240, 2360, 2378).

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27. To the last sentence of the second paragraph on Page 32 wherein the Trial Examiner states

> "There is evidence that certain *respondents* were not aware of the fact that any manufacturer except Johns-Manville could sell pre-shrunk or that there was a patent on same." (Italics ours.)

There is not a scintilla of evidence to the effect that any respondent was unaware of the fact that other manufacturers could sell pre-shrunk or that it was covered by a valid patent. It is obvious that the Trial Examiner meant to use the word "customers" instead of "Respondents". However, even with this substitution of words, the statement is contrary to the evidence and the testimony cited in the Report in support of that statement does not bear out the statement excepted to. (R. 2686, 2962-6, 3011, 3022).

28. To the fifth paragraph on page 32 of the Report wherein the Trial Examiner states

> "Tulloch further testified that for many years he had made a practice of meeting executives in the pipe covering industry and discussing conditions of business with them, and that he had called numerous such meetings prior to September 11, 1935, and had discussed the conditions which had arisen after the Schechter decision as everyone felt something would have to be done about the confused and chaotic condition of the industry."

This statement is not supported by the evidence. What Tulloch testified to was that he had called some merchandising men together in the Fall of 1935 to discuss conditions and obtain views to enable him to prepare a merchandising plan acceptable to his prospective licensees for licensed materials only. There is no evidence that he called numerous meetings or made a practice of it to discuss matters with the executives in the industry for many years prior thereto. As Manager of the Asbestos Paper Division of the Code, he had meetings

concerning the operation of N.R.A. and under a proposed voluntary agreement after N.R.A., but the evidence discloses no such meetings as stated in the Report. There is nothing in the Record or in the citations of the Trial Examiner which indicates that there was anything in the industry which was confused or chaotic which had arisen after the invalidation of N.R.A. or prior thereto. (R. 3065-3071).

29. To the sixth paragraph on Page 32 of the Report in which the Trial Examiner states

> "Tulloch said he called these meetings because he had been familiar with these conditions in the industry since 1922. (R. 3071)."

There is no testimony as to this effect on the cited page of the record, 3071, nor can any such statement be found to this respondent's knowledge anywhere in the record.

30. To the first paragraph on Page 33 of the Report wherein the Trial Examiner states

> "There is evidence to the effect that Tulloch fixed the prices upon certain articles used in connection with the pipe covering sold under the Toohey Patent, such as brass bands, staples, canvas jackets, wool felt covering with waterproof jackets, tape and possibly others."

Wool felt covering with waterproof jackets and asbestos tape were manufactured and sold under the Toohey patent. Tulloch did not fix the price on any of the other articles mentioned on the above statement. Those were shown and testified to as being an integral part of the complete piece of pipe covering and certain qualities and quantities of the articles mentioned were delivered and sold with the pipe covering at no extra cost. This was shown to have been a common practice and use in the industry for many years previous thereto. Where, because of the necessity therefor in applying the products, additional quantities of the particular articles were

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necessary, the price of the particular pipe covering was increased. There was no separate price fixed by Tulloch for the sale of these articles and if a licensee sold them separately he fixed his own price. This practice is well set forth by the Trial Examiner in Paragraph 62 and 63 on pages 25 and 26 of his Report and the present statement is inconsistent therewith. (The citations set forth in paragraphs 62 and 63 amply bear out those statements. R. 327, 427-8, 1437, 1457, 2030, 3130-1, 3167, 3179, 3184; Resps. Ex. 203).

31. To the last sentence in the second paragraph of Page 33 of the Report wherein the Examiner states

> "The price fixed on these unlicensed materials affected the total price of licensed materials. (R. 407)."

The uncontradicted evidence shows that Tulloch did not fix any price for rings or bands as such. See citations under Exception 30. It is suggested that the citation referred to by the Trial Examiner on page 407 of the Record in support of this statement has no relation whatsoever thereto.

32. To the failure of the Trial Examiner to report that

> The evidence is to the effect that Tulloch did not attempt to control the prices or terms and conditions of sale of asbestos or wool-felt paper and/or pipe covering except such as was manufactured and sold by his licensees under the Toohey patent. (R. 316, 337-8, 632, 1084, 1206, 1322, 1355, 1440, 2183, 3177-8; Coms. Exs. 1, 251; Resps. Exs. 11, 19, 87 to 126, incl., 148 to 151, incl., 211 to 215, incl., 226 to 233, incl., 236 to 248, incl.).

33. To the failure of the Trial Examiner to report that

> Various types of pipe covering that were not included in the Tulloch license agreements serve the same general purposes as asbestos and wool felt pipe coverings and are sold in competition with them. Among these are mag-

nesia, cork, kraft paper, rock wool, clay and asbestos, vermiculite, glass wool, and hair felt pipe coverings. (R. 245-7, 300, 1082, 1087-8, 1310, 1429, 2098, 2185; Resps. Ex. 132).

34. To the failure of the Trial Examiner to report that

Under the license agreement for the Toohey Patent, Tulloch classified customers, basing this classification on the function which the particular type of customer served. Prior to 1935 various members of the industry had classified their customers so as to allow price differentials between different classes. During the early part of the license period, Tulloch required the listing with him of the licensees' customers who claimed to come under Jobber classification and who, as such, were entitled to purchase patented products at jobber's prices as fixed by the license agreement. When these jobbers failed to classify as such under accepted merchandising standards they were removed by him from such list. Tulloch discontinued doing this early in 1938. (R. 126-7, 272, 329, 330, 337, 1014-5, 1072, 1074, 1500-1, 1503-4, 2060-2, 2146-9, 2184, 2242, 2325-8, 2368, 2905, 3133-4, 3178, 3326-7, 3356; Coms. Exs. 1, 47, 252, 309; Resps. Exs. 155-160, 256).

35. To the failure of the Trial Examiner to report that

Two and one-half metal bands and a canvas outer covering were supplied with each three foot section of pipe covering. These are integral parts of a complete piece of asbestos or wool felt pipe covering and have been considered as such by the trade and by consumers throughout the entire history of the low pressure pipe covering industry. (R. 115, 323-4, 614-5, 2030, 3130-1; Resps. Ex. 203. See also citations to Exception 30).

This Respondent, KEASBEY & MATTISON COMPANY, by its attorneys respectfully requests that these specific exceptions to the Trial Examiner's Report be not deemed to

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have waived the objections made and the exceptions granted thereto, by the Trial Examiner, to the testimony of witnesses and offered exhibits as made during the course of the hearings in these proceedings, and further that such objections and exceptions granted thereto may be argued in the brief and oral argument before your Honorable Commission.

Dated: April 2nd, 1943

Respectfully submitted,

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