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U.S. Supreme Court
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1924.

No. 342

25
2412
Part 1

MAPLE FLOORING MANUFACTURERS ASSOCIATION,
W. D. YOUNG & COMPANY, MITCHELL BROTHERS
COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the
Western District of Michigan

BRIEF AND ARGUMENT FOR APPELLANTS

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how
locked case

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Neither did the Government offer any proof that the standards adopted and maintained by the defendants were not fair and reasonable.

The proof showed that the quality of the flooring had been improved by means of the adoption and maintenance of such standards, that disputes between manufacturers and buyers had been greatly reduced, and that litigation had been eliminated.

The Government's own witnesses, as well as buyers all over the United States, were both unanimous and enthusiastic in their praise of the standardization of maple, beech, and birch flooring by the defendants. Buyers testified that the flooring manufactured by the defendants was superior to that manufactured by others, and that standardization of such flooring by the defendants had increased competition and greatly benefited the public. 169-194

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The undisputed proof also shows that prices during the earlier years were never uniform, because of the diversities mentioned on pages 66-75; whereas, from 1919 to 1921, inclusive, they were controlled by abnormal economic conditions, which found adequate expression in the rise of factory grade flooring from \$45.00 per M. feet to \$150.00, and its decline to \$15.00.

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X.

The present Articles of Association do not even attempt to regulate production, sales, prices, or to otherwise limit the discretion of members in the manufacture or sale of flooring. Except the agreement to manufacture flooring of standard quality and to report past transactions, each member is left wholly free to conduct his business as he pleases. There is no proof of any other agreement, express or implied, among said members.

In view of the undisputed proof that the PRICES of the members of the present Association for maple, beech and birch flooring

- (a) have always been FAIR and REASONABLE,
 - (b) were generally lower than the prices of non-members, although the flooring manufactured by members is superior to that manufactured by non-members,
 - (c) were never uniform and were often below the cost of production of both members and nonmembers,
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XI.

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- (a) by the Government's witnesses, including both competitors and buyers, that competition among the defendants themselves, as well as between the defendants and nonmembers, was strong, active and vigorous;
- (b) by dealers, large and small, in the principal centers of consumption, that there was and always had been vigorous competition among the defendants;
- (c) by dealers that the defendants were unusually fair, considerate and honorable in their dealings with purchasers of maple, beech and birch flooring;
- (d) by economists and statisticians that the prices of the several members had fluctuated in accordance with the laws of supply and demand.

No witnesses were produced by the Government to testify to fixation or uniformity of prices, unfair practices or restraint of trade.

In view of the foregoing facts, the Government's petition

(under the decision of this court in the Steel Corporation

case) should have been dismissed. 362-368

XII.

The following facts:

- (a) fundamental differences that exist among Association Members;
- (b) unstable basis of the maple, beech and birch flooring industry;
- (c) relation that Association members bear to the flooring industry as a whole;
- (d) lack of control of any appreciable proportion of raw material;
- (e) fragmentary character of statistics collected and distributed;
- (f) publication of statistics collected;
- (g) relatively superior position of lumber dealers who buy or handle 90 to 95 per cent of the flooring manufactured by Association members,

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 342

MAPLE FLOORING MANUFACTURERS ASSOCIATION, W. D YOUNG
& COMPANY, MITCHELL BROTHERS COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF AND ARGUMENT FOR APPELLANTS.

MAY IT PLEASE THE COURT:

This is an Anti-trust case. It is here on appeal (Tr. 63) from a final decree entered by the District Court of the United States for the Western District of Michigan. It originated in a petition (Tr. 1) filed by the United States against the Maple Flooring Manufacturers Association and others on *March 5, 1923*.

We wish to assure the Court that we are painfully conscious of the length of our brief and of the months of exacting labor which its preparation has required. Its length is due to our desire to place before the Court, properly classified and in a readily assimilable form, a

great mass of heterogeneous facts which lie in almost inextricable confusion in the 6 volumes that comprise the printed record. They relate not only to technical features of an unfamiliar industry and the articles and practices of a trade association organized during March, 1922, but—over our objection—to the articles and practices of numerous antecedent associations dating back to the late nineties of last century. After all, *length* is a relative term; and we hope that the length of our brief bears some appreciable proportion to an easy mastery of the facts by this Court.

For the convenience of the Court, we have prepared at the expense of considerable time, labor and money a separate volume of Appendices. These appendices contain the results of much labor which we did not desire to impose upon the Court.

In its petition the Government endeavored to set forth the existence of a combination and conspiracy among the defendants whereby interstate trade and commerce in maple, beech and birch flooring was unreasonably restrained, contrary to Section 1 of the Sherman Act. The Government did not charge that a monopoly existed or that any attempt had been made to monopolize interstate trade or commerce contrary to Section 2 of said Act.

A great deal of evidence was adduced in open court by both the petitioner and the defendants. On January 4, 1924, the District Court granted the injunctive relief asked by the petitioner under Section 4 of the Sherman Act (Tr. 60), but suspended the injunction until January 1, 1925, or the prior determination of this appeal. (Tr. 63.)

GOVERNMENT'S PETITION.

The learned District Court and counsel for the defendants differed with respect to both the form and the substance of the petition. The latter asserted that it conferred no jurisdiction upon the court; that it did not state a cause of action, and that it was a confused, ambiguous, contradictory jumble of conclusions, metaphors, and inconsequential facts. (Motions to dismiss, Tr. 13-24.)

The District Court announced that the petition was a model of good pleading, and denied the said motions. (Tr. 24.)

Inasmuch as we are of the same opinion still, it is difficult for us to state concisely the substance of the petition. We must, therefore, resort to quotation and analysis. By this means the issues will be made clear. We will then show that the undisputed proof not only fails to support the allegations of the petition, but confutes them, even if it be assumed that the petition states a cause of action.

THE DEFENDANTS.

There are three classes of defendants, viz.:

1st. The *defendant Association*, described as "an unincorporated organization" with offices at Chicago.

2nd. The *members* of the defendant Association, or manufacturers engaged in the maple, beech and birch flooring industry, referred to in the petition as the "defendant corporations."

3rd. The *individual* defendants, or the respective representatives of the several members, and George W.

Keeln, of Chicago, Illinois, the Secretary of the defendant Association.

In the margin are set forth the names of the members,¹ the names of their respective representatives (individual defendants, except George W. Keeln),² and the location of the several plants.³

Appendix A is a map which shows (in red) the location of the towns and cities mentioned in the margin.

The petitioner alleged that the defendant corporations were engaged in the manufacture of maple, beech and birch flooring.

It was also alleged:

"Approximately half of the defendant corporations own timber lands and saw mills as well as floor-

Members	Representatives	Location of Plants
W. D. Young & Company	B. P. Whedon	Bay City, Michigan
Mitchell Brothers Company	M. E. Thomas	Cadillac, Michigan
Wisconsin Land & Lumber Co.	G. W. Earle	Hermansville, Michigan
Cobbs & Mitchell, Inc.	M. E. Thomas	Cadillac, Michigan
I. Stephenson Co., Trustees	H. H. Shepeck	Wells, Michigan
Cummer-Diggins Co.	J. L. Colby	Cadillac, Michigan
Osgood & Blodgett Mfg. Co.	F. S. Blodgett	St. Paul, Minnesota
Holt Hardwood Co.	W. L. DeWitt	Oconto, Wisconsin
Kerry & Hanson Flooring Co.	F. R. Welsh	Grayling, Michigan
East Jordan Lumber Co.	J. J. Parter	East Jordan, Michigan
Nichols & Cox Lumber Co.	F. E. Holland	Grand Rapids, Michigan
Strable Lumber & Salt Co.	George Strable	Saginaw, Michigan
Foster-Latimer Lumber Co.	H. I. Latimer	Mellen, Wisconsin
West Michigan Flooring Co.	Edwin Vollmer	
	W. H. Greene	
J. W. Wells Lumber Co.	Mary Vollmer	Manistee, Michigan
	A. C. Wells	Menominee, Michigan
	C. H. Law	
Northwestern Cooperage & Lumber Co.	J. D. Staple	Gladstone, Michigan
Flanner-Steger Land & Lumber Co.	P. D. Flanner	Blackwell (Forest County), Wisconsin
Grand Rapids Trust Co., as Receiver for William Horner	T. M. Ralston	Newberry and Reed City, Michigan
North Branch Flooring Co.	C. A. Brand	Chicago, Illinois
The Bigelow-Cooper Co.	J. E. Dewey	Bay City, Michigan
Kneeland-McLurg Lumber Co.	P. S. McLurg	Phillips, Wisconsin
Oval Wood Dish Corporation	F. M. Hodges	Tupper Lake, New York

ing mills, and they conduct logging operations and saw the rough lumber which they use for the manufacture of flooring. *The other defendant corporations purchase rough flooring lumber in the open market and manufacture the same into finished flooring. The membership of defendant association comprises practically all of the manufacturers of maple, beech and birch flooring within the states of Michigan, Illinois, Wisconsin and Minnesota, and it represents approximately seventy per cent of the total manufacturing capacity of such flooring in the United States.*" (Tr. 3, fol. 5.)

THE ALLEGED COMBINATION AND CONSPIRACY.

"The defendant corporations, *from the date each became a party to any or all of the hereinafter described contracts or Articles of Association or minimum Price Plans of the defendant association, and during all of the time that each has been a party thereto, and the individual defendants, from the date each became a representative to the defendant association of a member thereof, or became an officer or an employe thereof, and during all of the time that each has been such representative, officer or employe, have contracted, combined and conspired with each other to eliminate all competition between the members of the defendant association*" in the manufacture, and sale throughout the United States, of maple, beech and birch flooring. (Tr. 3-4.)

The patent ambiguities of the foregoing excerpt are hardly cleared up by the following rather curious allegations of Paragraph V of the petition:

"The defendant association has been in existence since 1895, and it was reorganized by a mutual agreement or Articles of Association entered into by the defendant corporations and by other manufacturers of flooring under date of January 1, 1913, and it has been continued in existence by other mutual agreements or Articles of Association entered into by them at various dates thereafter. It is now being

maintained under and in accordance with the provisions of Articles of Association dated *January 1, 1922*, which will be in effect until *January 1, 1925*.

"All of the defendant corporations are *now* parties to said Articles of Association and through the individual defendants as their representatives they take an active part in all of the activities of the defendant association." (Tr. 4.)

It thus appears that there was not one association, but several successive and distinct associations, composed of different members, and operating under separate articles.

THE ALLEGED MEANS.

1. EARLY ACTIVITIES.

The petitioner alleged that all the articles above mentioned provided for the organization of the "defendant association" with headquarters at Chicago; "for the usual officers and a board of trustees," and "for a special fund or membership fee fund as a guaranty for the fulfillment of the obligations assumed by its members, and for an expense fund created and maintained by assessments levied on its members." (Tr. 4, fol. 7.)

"Said Articles of Association *prior to those of January 1, 1922*, also established a pooling arrangement * * * by allotting to each member a certain percentage of the total business, by creating a general fund through payments from all members on shipments over their prescribed allotted percentages, and by providing for payments from said general fund to members shipping less than their prescribed allotments. The defendant corporations operated under this arrangement for the pooling of their businesses continuously from *January 1, 1913*, until on or about *March 31, 1920*." (Tr. 4-5, fol. 7.)

(2) MINIMUM PRICE AGREEMENTS.

"Under dates respectively of *July 1, 1916, July 1, 1919, and January 6, 1921*, the defendant corporations and the other manufacturers of flooring who were members of the defendant association on said dates, entered into mutual agreements termed 'Minimum Price Bases' or 'Minimum Price Plans,' each of which constituted an amendment to the Articles of Association under which the defendant association was being maintained. By said minimum price plans the defendant corporations agreed to establish minimum prices for the sale of maple, beech, and birch flooring; and not to sell any such flooring below said minimum prices. Said plans specified certain elements which should be used as the basis for determining an average cost of manufacturing and selling flooring, and the average percentage of net profit which should be added to said average cost in order to establish said minimum prices. Said plans also provided that said minimum prices should be the delivered prices in the 'Table of Values' in the 'Association Rate Book and Index of Towns,' which is hereinafter described, and specified the concessions and commissions which could be allowed and the terms of sale that should be enforced." (Tr. 5, fol. 8.)

Of course, the purpose of the petitioner in bringing into this case long-extinct associations and plans which had been abandoned years before the institution of this suit, was to prejudice the *present association* and confuse the issues.

(3) THE PRESENT METHOD OF ESTABLISHING MINIMUM PRICES."

"In and by the aforesaid Articles of Association of *January 1, 1922*, the defendants substituted for the aforesaid Minimum Price Plans a statement of policy to the effect that a careful consideration of the question of cost is recognized as the only scientific method of conducting the business of manufac-

turing and marketing maple, beech, and birch flooring, and provisions that the defendant association furnish to its members information regarding the average cost of such flooring when manufactured, sold, and delivered F. O. B. cars at the flooring plants, as determined from time to time by surveys of costs. Said agreement specifies that certain enumerated fundamental elements are to be considered as entering into and determining such average costs, and said elements are identical with those employed in accordance with the aforesaid minimum price plans for the determination of minimum prices. The elements specified as entering into costs, both by the aforesaid Minimum Price Plans and by said Articles of Association, themselves contain many items of profit. With the addition of said so-called 'costs' of a percentage thereof to allow profit under said Minimum Price Plans, or to constitute 'a reasonable allowance to provide for contingencies or unforeseen hazards incident to manufacturing operations,' which was substituted for the item of profit by said Articles of Association, said so-called 'average costs,' as well as said minimum prices, in fact have (fol. 10) represented and now represent all possible elements of actual cost and also large profits to the defendant corporations." (Tr. 5, fol. 9.)

Bearing in mind that the purpose of the petitioner was to charge the existence on March 5, 1923, of an unlawful combination or conspiracy, contrary to § 1 of the Sherman Act, and to have future violations of the said Act restrained, we wish especially to direct the Court's attention to the following allegations:

"In accordance with the aforesaid minimum price plans, and with said 1922 Articles of Association, the defendants from time to time from 1913 until the present date have made surveys of costs, have determined therefrom minimum prices or so-called 'average costs,' and have recommended that the defendant corporations should not sell flooring at prices below said minimum prices or below said so-called 'average costs.'" (Tr. 6, fol. 10.)

It should be observed that the petitioner does not charge that any Minimum Price Plan has been in effect since January 1, 1922. As we have just seen, the petitioner expressly alleged that the Articles of Association of January 1, 1922, *substituted* for the Minimum Price Plan provisions for the determination of average manufacturing and marketing costs and the furnishing of information with respect thereto to the members. (Tr. 5, fol. 9.) It will also be remembered that the petitioner alleged that the defendant association "is now being maintained *under and in accordance with* the provisions of Articles of Association dated *January 1, 1922.*" (Tr. 4, fol. 7.) It therefore follows that so far as the acts of defendants *subsequent to January 1, 1922*, are concerned, the allegations last above quoted must be construed as follows:

That in accordance with the Articles of Association of 1922, the defendants from time to time since January 1, 1922, until the present date have made surveys of costs, have determined "average costs," and have recommended that the defendant corporations should not sell flooring at prices below said so-called "average costs."

Such construction harmonizes otherwise conflicting allegations, and is required by the rule that in case of ambiguities a bill must be construed against the pleader.

The petition does not specify what *kind* of "flooring" the defendants recommended should not be sold at prices below average costs. Neither is it alleged that the recommendations related to *interstate* sales of flooring.

It should also be observed that the petitioner does not allege that there was any *agreement* that flooring should not be sold for less than the average cost.

The petition continues as follows:

"The defendant corporations have at all times during said period *accepted* and *acted upon* said recommendations." (Tr. 6, fol. 10.)

What is the meaning of the word *accepted* in the phrase "*accepted and acted upon* said recommendations"?

If the *recommendations* were *agreed to*, or *adopted* why use the phrase "*accepted and acted upon*"? It is clear that *accepted* as used by the petitioner does *not* mean *agreed to* or *adopted*. If *recommendations* were made, then some committee or subordinate body must have made a *report*. The Century Dictionary gives as one meaning of the word *accept*:

"In a deliberative body to *receive as a sufficient performance of the duty with which an officer or a committee has been charged; receive for further action*; as, the report of the committee was *accepted*: Syn. take, etc."

That this is the meaning of the word in the phrase above quoted is borne out by the next succeeding words "*and acted upon*." The petitioner, however, does not aver *what* action was taken. The late Republican National Convention *acted upon* the platform planks prepared by the Wisconsin delegation, and presented to the Convention for adoption, but

According to the petitioner, then, *all the defendants* (including the defendant corporations) recommended that the defendant corporations should not sell flooring at less than "*average costs*"; the defendant corporations received said recommendations, and *severally* and in the exercise of an unfettered discretion,—since *no joint action or agreement to be bound by said recommendations is alleged*—*acted upon* them. *What* action was taken, the petition does not state.

The petition then proceeds as follows:

"and have *concertedly* established and maintained as the *basis* of their *individual* selling prices, the minimum prices or so-called *average costs* determined as heretofore described,—" (Tr. 6. fol. 10.)

It might be asked selling prices of *what*? If of *maple, beech or birch flooring*, did the selling prices apply to interstate shipments? Let us pass these questions for the moment.

If after January 1, 1922, the defendant corporations had not sold their flooring *for less than the "average costs"*, it would have been easy to allege the fact. *However, the petitioner makes no such allegation.* What does the allegation mean?

The *average costs* were *concertedly* established and maintained by the defendant corporations as the *basis* of their *individual selling prices*.

It appears then that *each* corporation defendant fixed its own *selling prices*. *But what relation did the selling prices bear to the "average costs"?* The petitioner does not state; and the allegation above quoted, if not meaningless, is at least susceptible of the following construction:

That the defendant corporations accepted in principle the proposition that selling prices should equal average costs, and that each corporation in determining its "*individual selling prices*" took into consideration the "*average costs*". *But the petitioner does not allege that the selling prices, either as the rule or as an exception, did equal average costs.*

It should be remembered that the petitioner is here endeavoring to set forth the *means* whereby the Sher-

man Act was violated. Reasonable certainty is therefore required. And in case of doubt either as to the acts done by defendants, or as to the meaning of doubtful phrases, or as to whether an unlawful act has been committed, such doubt—arising as it does from the *petition*—will be resolved against the petitioner.

The allegation must bear the construction above suggested—in which case no violation of the Sherman Act is charged—or the construction *that by means of concert of action the "individual selling prices" of the defendant corporations always at least equalled "average costs"*.

The petition then proceeds as follows:

"and by concertedly maintaining the same [that is, the 'average costs' as the basis of individual selling prices] and also the uniform terms of sale, the uniform rules with regard to allowing cash discounts, the uniform commissions, and the uniform rules regarding the allowance of commissions and concessions, *which were established by and in accordance with said Minimum Price Plans,*⁴ they have always maintained during said period [from 1913 to March 5, 1922] and they still maintain"—*what?*

"*a practical uniformity between [among?] themselves of net f. o. b. selling prices*". (Tr. 6, fol. 10.)

It is not alleged that the "practical uniformity" "of net f. o. b. selling prices",—whatever that means—ap-

⁴According to the petition the Minimum Price Plan was abrogated on January 1, 1922, (Tr. 5, fol. 9), and the defendant association "is now being maintained under and in accordance with the provisions of Articles of Association dated January 1, 1922." (Tr. 4, fol. 7.) There is no allegation that the articles last mentioned provided for uniform rules regarding terms of sale etc. When were the uniform rules maintained? Obviously, prior to January 1, 1922.

plied to *maple, beech or birch flooring*. If it be assumed that it did, then there is no allegation that the "net f. o. b. selling prices" applied to *interstate* trade and commerce. And to make either assumption is to *assume* rather than *plead* vital facts. For all that appears in the allegations above noticed, the selling prices may have related to other commodities than maple, beech or birch flooring, or if to such flooring then to the purely *intrastate* business of the defendants.

The following allegations contained in Paragraph II of the petition do not supply these defects.

"The *defendants* make *sales* of the flooring manufactured by them from [at?] their said offices in *this district*"—(Tr. 2.)

All the defendants, then, make sales of *the* flooring manufactured by them (that is, *all the flooring* manufactured by them) *at their offices* in the *Western District of MICHIGAN*.

"The term sale has a well defined meaning. It is the transfer of property from one person to another for a consideration of value". (*Arnold v. North American Chemical Co.*, 232 Mass. 196, 122 N. E. 283, 284.)

It therefore follows that the *sales* in question were made *wholly within the State of Michigan*. The property was *transferred* by defendants to other persons in Michigan. The petition continues:

"and they thereupon ship said flooring in interstate trade and commerce *from this district into other states*, to the wholesale and retail lumber dealers who have contracted for its purchase." (Tr. 2-3.)

The phrase "in interstate trade and commerce" as used above is tautological, if it have any meaning at all.

Obviously, the pleader's idea is adequately expressed by the words "and they thereupon ship said flooring * * * *from this district into other states*" * * *. A person may properly be said to be *engaged* in interstate trade and commerce; it is correct to say that *commodities* are *subjects* of interstate trade and commerce, or that they are shipped from one state into other states. But to say that *goods* are SHIPPED "IN *interstate TRADE and COMMERCE*" is to utter nonsense. The verb "to ship" originally meant *to put or take on board a ship or vessel*. It now means *to deliver to a common carrier* for transportation whether by land or water or both. And the *delivery* to the carrier must of necessity take place either within or without a state. It should also be remembered that the petitioner had just previously alleged *sales* within the State of Michigan. And what the petitioner obviously intended to allege was the fact expressed by the assertion that the flooring was thereupon shipped from the Western District of Michigan into other States. Furthermore, the assertion that the defendants *after making SALES* of flooring in *Michigan* thereupon *shipped* said flooring in interstate trade and commerce is, if not meaningless, a *conclusion*.

It is obvious that no *interstate* sales are alleged. Suppose that wholesale and retail lumber dealers from Philadelphia, Boston, New York and other cities are *at the offices of the defendants* in the Western District of Michigan; that the defendants then and there make certain *sales* of flooring to said dealers. Such *intrastate* transactions would not be converted into *interstate* commerce, by the action of the defendants in thereafter "shipping" the flooring into other states. The property would have been *transferred* within the State of Michigan; it would leave the state as the property of the

buyer, and in "shipping" said property—that is, delivering it to the common carrier for transportation,—the defendants would be engaged in a purely *intrastate* transaction. A sale or a contract to sell may be of a purely *intrastate* character so far as the *seller* is concerned and of an *interstate* character—or at least it may ultimately become such—so far as the *buyer* is concerned.

Under certain circumstances the result would not be different even if the buyers had entered into contracts of purchase with the defendants within the state of Michigan. And it must be remembered that the petitioner has not particularized here. For instance, if the contracts of purchase provided for delivery f. o. b. cars within the Western District of Michigan, the transactions would be of a purely *intrastate* character, so far as the defendants are concerned. Will it be *assumed* that the transactions above mentioned were otherwise, when the petitioner has not alleged that they were?

For instance, in

Addyston Pipe & Steel Co. v. United States, 175
U. S. 211, 247,

the Court said:

"In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the State eventually obtained it."

The fact that the proposal called for the delivery of pipe in the same State where some of the defend-

ants resided and carried on their business would be sufficient, so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to someone outside the State as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own State could not be reached by the Federal power derived from the commerce clause in the Constitution.

To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own State, it is modified, and limited to that portion of the combination or agreement which is interstate in its character. "As thus modified, the decree is

AFFIRMED."

The petitioner first alleges that sales were made by the defendants in the Western District of Michigan, but fails to allege to whom the sales were made. It is then alleged that the defendants delivered the flooring to common carriers for transportation into other states to the wholesale and retail dealers who had contracted for its purchase, but the petitioner does not allege either that said dealers had contracted with the defendants for the purchase of said flooring, or that the sales theretofore alleged were made by the defendants to said dealers. For all that appears in the petition, there may have intervened several intermediate sales and contracts of purchase between the original sales and the delivery by the defendants to the common carriers.

The foregoing considerations are important, not only because of the allegations analyzed on pages 8-13, *supra*, but because of the following allegations.

"Said sales and shipments [that is, the ones we have just been considering] are made pursuant to

and in conformity with the restrictive practices and agreements which are hereinafter described." (Tr. 3, fol. 4.)

It will be observed that here the petitioner differentiates between the *sales* and the *shipments* but says nothing of *contracts of purchase*.

The foregoing allegation is the only one in the entire petition that attempts to connect the *alleged restrictive practices and agreements*, which we have analyzed on pages 8-16, *supra*, with any *sales of maple, beech or birch flooring*.

And in view of the fact that "*said sales*" were made by the defendants at their offices "in this district", and it is not alleged *to whom or how or upon what terms* they were made, it follows that the petitioner has not pleaded facts which show that said "restrictive practices and agreements" applied to *interstate* trade or commerce.

The "*said shipments*" followed the *intrastate* sales; the flooring left the Western District of Michigan as the property of the buyers.

The defendants "*shipped*" the flooring into other States, but the alleged restrictive practices and agreements *had already operated* upon the *intrastate* sales.

(4) FREIGHT RATE BOOKS.

"In connection with the aforesaid determinations of minimum prices or of so-called average costs, the defendant association has (fol. 11) from time to time prepared and distributed to the defendant corporations so-called freight books. Said books contain tables of the freight rates from Cadillac, Michigan, to many cities and towns in all of the States of the United States. They also contain an average

cost chart showing the average costs f. o. b. cars of the principal items of maple flooring in the three established grades; other kinds of maple, beech and birch flooring by additions to or subtractions from said average cost chart; statements of the extra charges for special grades, for special sizes and for special lengths; statements of the terms of sale and of the rules for allowing cash discounts; and delivered cost charts showing the average so-called cost of any item of flooring, including the freight from Cadillac, Michigan, when delivered at any destination." (Tr. 6, fol. 10-11.)

That is what the *defendant association and its predecessors* are alleged to have done. Certainly, in the absence of some agreement or action on the part of others, no violation of the law is charged.

The petitioner continues:

"By means of said freight rate books, the defendants from 1913 continuously until the present date have been enabled to determine the delivered 'minimum price' for any item of maple, beech or birch flooring at any destination in the United States, in accordance with the aforesaid Minimum Price Plans, or the so-called 'average cost' thereof in accordance with the 1922 Articles of Association." (Tr. 6, fol. 11.)

The defendants have also been *able* to commit murder or treason, but ability to do is not equivalent to doing.

"The defendants agreed to adopt and have concertedly adopted Cadillac, Michigan, as an arbitrary freight basing point from which they compute and charge freight, regardless of the point from which each may actually ship flooring." (Tr. 6, fol. 11.)

The petitioner then continues:

"They also agreed to adopt, and have concertedly adopted and used, and they still continue to use, the minimum prices or so-called average costs stated in

said Freight Rate Books, as the *basis* of their *individual selling prices*, and by concertedly maintaining the same and also the uniform charges and practices heretofore described, they have always maintained, and they still maintain, *a practical uniformity between themselves of net delivered prices.*" (Tr. 6-7, fol. 11-12.)

What has been said above on pages 8-16 is applicable in all respects to the allegations last quoted.

Even if it be assumed that the petition states a cause of action, what the petitioner complains of—the *essence of its plaint*—is that *the defendants have maintained among themselves a practical uniformity of net f. o. b. mill prices and net delivered prices.*

The means are merely incidental—the *uniformity of price* is the evil which the petitioner seeks to eliminate. And if the alleged uniformity does not exist, then, of course, the petitioner must fail, so far as the foregoing portions of the petition are concerned.

5. EXCHANGE OF STATISTICS.

Petitioner alleges that in accordance with the Articles of Association of *January 1, 1922*, the defendant corporations made certain weekly, monthly and quarterly reports to George W. Keehn, the defendant Association's Secretary; who compiled the same and then distributed the information to members. (Tr. 7-9.)

It should be observed that the petitioner does *not* allege:

(a) That the data sent out from the Secretary's office are accompanied by any analysis, interpretation or comment. Each member must make his own deductions from the said statistics.

(b) That any forecasts of future market condi-

tions are made by an expert statistician or any one else.

(c) That any recommendations as to production, or prices are made by any one. Each member is free to manage his own business in his own way.

(d) That any member is in any way whatsoever restricted as to when, where or to whom or at what price he may sell his flooring, or as to the quantity he may manufacture.

Even the petitioner *does* allege:

"The aforesaid *monthly* statistical reports are published in certain trade papers, but at such times that the defendants have the information contained therein considerably earlier than does the general public. The distribution of the detailed information as to sales and prices is strictly confined to the defendant corporations." (Tr. 9, fol. 16.)

(6) - ASSOCIATION MEETINGS.

"Prior to 1922, defendant George R. Keehn, as Secretary of the defendant association, generally transmitted the aforesaid statistical reports of the open competition plan to the defendant corporations accompanied with his comments interpreting the same, and with statements and comments regarding general conditions in the industry. Since 1921, the defendants have substituted for said written comments and statements the system of holding frequent meetings, and they now assemble monthly at association meetings and discuss the prices and the supplies of rough flooring lumber, the costs of manufacturing and selling flooring, the conditions of supply and (fol. 17) demand in the flooring industry, and trade conditions and the flooring situation in general, and especially as reflected by the statistical reports of the defendant association. In short, they exchange with each other at said meetings, all the information which they have, and all the experiences which they have had in their several businesses, which can be of general interest to them as manufacturers of maple, beech, or birch flooring.

"For use at the aforesaid monthly meetings defendant George R. Keehn secures from the defendant corporations, on blank forms distributed by him, information as to orders, production, and shipments for the portion of each month preceding its monthly meeting. These data are compiled and are discussed at said meetings, and the defendants forecast therefrom the probable amounts of orders, of shipments, and of production for the entire month, and then compare the same with similar data for preceding months. The Committee on Cost Surveys of the defendant association also frequently reports at said meetings respecting the supplies of rough flooring lumber and gives its opinion as to the actual market value of such lumber and as to the average cost of manufacturing and marketing flooring." (Tr. 9.)

The petitioner does *not* allege that at such meetings:

1. There was any agreement or understanding, express or implied, as to production or prices.
2. That the *future* prices of flooring were even discussed.

7. UNIFORM TRADE-MARK AND GRADING RULES.

"The defendant association has adopted a trade-mark, which is used by the defendant corporations under and in accordance with (fol. 18) the terms of uniform trade-mark license agreements which have been entered into between each of them and said association. Said agreements grant each of said defendant corporations the right to use the uniform association trade-mark, followed by the index number of the individual corporation, so long as each continues a member in good standing of the defendant association, and provide that each member so licensed shall maintain the standard grades of flooring established by the defendant association and shall be subject to inspection by the association inspectors for the purpose of seeing that said standard grades are properly maintained. Standard grades and also detailed grading rules have been

adopted and copyrighted by the defendant association, and they are now being uniformly and concertedly maintained by the defendants." (Tr. 10.)

8. ASSOCIATION ADVERTISING.

"The defendant association has for a number of years conducted, and is still conducting, an extensive advertising campaign for the purpose of promoting the use of maple, beech and birch flooring and of emphasizing that purchasers should secure flooring bearing the aforesaid association trade-mark. Said advertisements carry the name of the defendant association alone, and not the names of its members, and they state that flooring bearing the association trade-mark is standardized and guaranteed by the defendant association. Many of said advertisements contain price propaganda urging (fol. 19) purchases of flooring at the time of the publication of said advertisements on the ground of the price being fully adjusted to then existing conditions. Inquiries received in answer to said advertisements are bulletined by the defendant association to the defendant corporations." (Tr. 10.)

ALLEGED RESULTS.

The petitioner then asserts the *conclusion* that as a result of the matters and things complained of, interstate trade and commerce in maple, beech and birch flooring has been unreasonably restrained. (Tr. 10-11.)

PRAYER.

Petitioner prays that the association be dissolved, and that the other defendants be perpetually enjoined, etc. (Tr. 11-12.)

DEFENDANTS' ANSWER.

Owing to petitioner's inveterate intermingling of conclusions, facts, epithets and misstatements in the petition, the first portion of the defendants' answer consists largely of specific denials. (Tr. 26-35.) Three separate defenses are then pleaded. (Tr. 35-45, 45, 45-46.)

No question as to the sufficiency of the said answer or any part thereof is involved; and inasmuch as all the facts must be examined at length, no further statement with respect to defendants' answer will be made at this time.

THE DECREE.

The District Court held that there was a combination in restraint of interstate trade and commerce; ordered the defendants to dissolve the defendant association, and restrained the defendants from thereafter doing any of the things charged in the petition. (Tr. 60-61.)

ERRORS RELIED ON.

The assignment of errors filed in the District Court contained twenty-five specifications of error. (Vol. I, pp. 64-68.) All these specifications may be summarized as follows:

1. The petition is not supported by the proof.
2. The decree entered is contrary to law.
3. The decree is contrary to the weight of the evidence.
4. The petition does not state a cause of action.

5. Even if certain practices of the defendants were objectionable the restraining of such practices would amply protect the public.

For a detailed statement of the propositions of fact and law relied on, please see Brief of Argument, pp. 79-96, *infra*.

We believe that much time and space will be saved if we set forth here certain technical data which are necessary to an understanding of much of the other evidence appearing in the record. There are also certain facts pertaining to the industry as a whole which are essential to an appreciation of many phases of this case. *These fundamental facts constitute the environment in which the defendant Association functions, and by which it is limited and circumscribed.* With this factual background the Court will readily understand the argument upon particular controverted points. The argument will also move more rapidly, if these fundamental facts are set forth here rather than during the discussion of particular propositions of fact and law.

SOME ESSENTIAL FACTS.

DISTRIBUTION OF THE THREE WOODS.

The maple is indigenous to the North Temperate zone, and is found most abundantly in China, Japan, United States and Canada. Rock, or sugar maple (of which the best flooring is made) "is especially characteristic of rich woods from Maine to Michigan and southward in the mountains to Georgia." The principal habitats of beech and birch are North America, Europe and Northern Asia, the latter wood being found even within the Arctic

Circle, whereas, the former also grows abundantly in Chile and Patagonia. (Authorities cited in footnote.)⁵

According to a report on Senate Resolution 311 by the Forest Department, United States Department of Agriculture, issued by the Government Printing Office in 1920, the stand of maple, beech and birch timber in the United States then amounted to 90,784,000,000 feet, distributed as stated in the margin.⁶ The total cut for the years 1920-1922, inclusive, is conservatively estimated at 5% of stand in 1920, or 4,784,000,000 feet, leaving the estimated stand in 1923 at 86,000,000,000 feet. (Vol. II, pp. 773-779.)

⁵Fossils of all three woods are found in Miocene strata. Maple, beech and birch trees, therefore, flourished long before Man's prehuman ancestors had abandoned their arboreal habits, and preceded the appearance of the Tool-maker and Dreamer by at least some 500,000 years. They made their appearance in the arts with the Runic tablets, which were of beech boards. Birch became an emblem of authority in the fasces carried by the Dictors in ancient Rome, and a means of discipline in the hands of countless parents and school-masters. The maple has long charmed man by its beauty and nourished him with its sap. In fact, a long line of scientists, historians, essayists, novelists and poets have praised these three trees for their matchless beauty and multiform utility. Man is indebted to them not only for warmth, shelter, domestic utensils, means of transport and sustenance, but because they have stirred his emotions and preserved his ideas.

The Outline of History, Vol. I, p. 51.

The Outline of Science, Vol. I, pp. 164, 104, 197.

3 Encyclopaedia Britannica, pp. 638, 958.

17 Encyclopaedia Britannica, p. 664.

13 The Americana.

3 The Americana.

New England..... 8,143,000,000

Middle Atlantic States..... 16,897,000,000

Lake States..... 36,076,000,000

Central States..... 20,505,000,000

South Atlantic..... 4,522,000,000

Lower Mississippi..... 4,641,000,000

(Vol. II, 773; Defts'. Ex. DD, Vol. 4, p. 838.)

PERCENTAGE OF MAPLE, BEECH AND BIRCH TIMBER
OWNED BY MEMBERS OF DEFENDANT ASSOCIATION.

Even if the 203,622,000 feet owned by the Wisconsin Land & Lumber Co. be included upon the theory that said company is a member of the defendant Association, the holdings of the different members of said Association would aggregate only 1,476,086,000 feet of maple, beech and birch timber, or 1.72% of the total stand for 1923. (Vol. II, pp. 773-779; Defts'. Ex. DD, DD-1, Vol. IV, pp. 838, 839.) The holdings of said members are 125,000,000 feet in the Middle Atlantic States, or 0.78% of the stand in such area, and 1,351,086,000 feet in the Lake States, or 3.94% of the stand in said last-named group. (Id.)

NUMBER OF PRODUCERS OF ROUGH MAPLE LUMBER IN
THE UNITED STATES.

The *flooring* produced by all the members of the defendant Association is distributed among the three woods as follows: Maple 90%; Beech 5%; Birch 5%. (Vol. II, pp. 630-1, 778; Defts'. Ex. CC-3, Vol. IV, fol. p. 5432.)

Only 14 of the 22 members of the defendant Association (if the Wisconsin Land & Lumber Co. be counted as a member) own maple, beech or birch timber. Eight members are forced to purchase *all* their raw material—that is, the *rough lumber* of which *flooring* is made—in the open market. (Defts'. Ex. DD-1, Vol. IV, p. 839; Vol. II, p. 779.)

In the margin is set forth the number, (together with the distribution by states), of sawmill operators producing rough *maple lumber* during the years 1912 to

1920, inclusive.⁷ The petitioner's evidence on this phase of the controversy agrees with and supplements the evidence introduced by the defendants.⁸

NUMBER, MANUFACTURING CAPACITY, PRODUCTION AND DISTRIBUTION OF NONMEMBER MANUFACTURERS OF MAPLE, BEECH OR BIRCH FLOORING.

Various lists of *nonmember* manufacturers of *maple, beech or birch flooring* were compiled by both the petitioner and the defendants. (Defts'. Gordon Ex. I, Vol. pp. 893-895, Vol. I, pp. 626-7; Defts'. Ex. CC-4, Vol. IV, fol. p. 5433; Vol. I, p. 778; Gov. Ex. 68, Vol. IV, fol. pp.

	1912	1913	1914	1915	1916	1917	1918	1919	1920
United States	8092	5060	5006	4294	4131	3944	3659	4583	4131
New York	1071	1172	**	861	846	786	699	724	857
Pennsylvania	1020	577	**	537	453	427	392	595	454
Michigan	602	402	**	279	271	249	178	255	212
Wisconsin	510	359	**	263	278	264	256	300	261
Ohio	826	499	**	407	359	328	321	445	342
Indiana	668	391	**	290	321	340	269	413	310
Vermont	370	234	**	245	216	206	169	340	197
West Virginia	339	188	**	213	208	193	171	220	186
Other States	2686	1238	**	1199	1179	1151	1204	1285	1309

Average for 9 years, 1912-1920, incl. for the U. S. equals 4,767.

**Data not available by States.

(Defts'. Gordon Ex. 5, Vol. V, p. 897; Vol. II, pp. 632-3.)

**Number of Manufacturers of Rough Maple Lumber
in the United States:**

Yr.	
1909.....	10,858
1912.....	8,092
1913.....	5,060
1916.....	4,131
1917.....	3,994
1918.....	3,659
1919.....	4,583
1920.....	4,131
1921.....	2,800
1922.....	2,999

(Gov. Ex. 57, Vol. IV, fol. p. 3419; Vol. I, p. 112-3.)

3557-3708; Vol. II, pp. 800-1; Defts'. Ex. 22, Vol. IV, fol. p. 5507; Vol. II, pp. 861-2.) The petitioner sent out inquiries to said manufacturers with respect to their *production* during certain years, whereas the *defendants'* interrogatories concerned both production and *capacity*. Some of the manufacturers reported that they had abandoned the manufacture of flooring, others responded only to the inquiries of the petitioner, some only to the inquiries of the defendants, some to the inquiries of both parties, and yet others made no response at all.

It was stipulated that all the reports received from said manufacturers might be admitted in evidence. (Vol. I, p. 142; Vol. II, p. 771.)

With the exceptions hereinafter noted, the Defendants' Ex. QQ combines the data received by both the petitioner and the defendants. According to this exhibit the *non-member* manufacturers of maple, beech or birch flooring during 1918, 1919, 1920, 1921 and 1922, were as follows:

New Hampshire	4
Vermont	5
Massachusetts	3
New York	9
Pennsylvania	2
Michigan	6
Wisconsin	9
Minnesota	3
Illinois	2
Ohio	3
Kentucky	1
Tennessee	6
West Virginia	6
North Carolina	2
Arkansas	1
Total	62 ^a

^aHowever, the number of producers was not constant. The total represents merely the number of operators who produced flooring at some time during the years above mentioned.

Their production and *capacity* for the years above mentioned were as follows:

<i>1918</i>	
Capacity	
Production	21,828,000 ft.
<i>1919</i>	
Capacity	131,450,000 ft.
Production	41,236,000 ft.
<i>1920</i>	
Capacity	174,450,000 ft.
Production	46,616,000 ft.
<i>1921</i>	
Capacity	220,000,000 ft.
Production	43,195,000 ft.
<i>1922</i>	
Capacity	238,000,000 ft.
Production	61,317,000 ft.
(Defts'. Ex. QQ, Vol. IV, fol. p. 5507; Vol. II, pp. 861-2.)	

According to Mr. Hughes, Investigator for the Department of Justice, there were 73 manufacturers who reported that they were producing (Vol. II, p. 801), which would add 11 manufacturers to the 62 shown on Defts'. Ex. QQ.¹⁰

Mr. Lawrence J. Koerble, Purchasing Agent and Traffic Manager for the John Schroeder Lumber Company, of Milwaukee, which handles about 750,000,000 feet of lumber annually, and which is a large buyer of flooring, testified that his list of maple, beech and birch flooring manufacturers contained "more than 100 names." (Vol. I, p. 447.)

¹⁰Some manufacturers were either unable or unwilling to give figures.

Mr. William C. McConnell, a large dealer of Boston, testified that he purchased about 20% of the maple, beech and birch flooring handled by him from Vermont, New Hampshire, Maine and Canadian companies. (Vol. II, p. 569.) He also testified that there were about 15 mills in Vermont, New Hampshire and Maine, which manufactured maple, beech or birch flooring. (Vol. II, p. 567.) It will be recalled that Defts' Ex. QQ contains the names of only 9 manufacturers in Vermont and New Hampshire, and *none* in the State of Maine.

Mr. Hodges also named three large manufacturers in New York and Vermont, who were not listed in Defts' Ex. QQ. (Vol. I, pp. 287-8.)

Mr. Ralston, of the Indiana Flooring Company (a *non-member*), who has traveled the country over in selling flooring, testified as follows:

"Q. State whether or not in different communities in West Virginia, Tennessee, Michigan, New York, Pennsylvania and other states—Vermont and the New England States—there are not many lumber companies who have merely one machine, and who are not known to the trade as manufacturers of maple flooring?"

A. I know of several such cases, and there is no question but that there are a *lot* of sawmills that have but one flooring machine, or perhaps two, making flooring at odd times, and do not advertise the fact much at all. They have a mixed grade [car?] trade; perhaps they are supplying certain yards throughout the country with different material,—different kinds of *lumber*—and they ship a *great deal* of their maple flooring to these yards." (Vol. II, p. 325.)

For similar testimony by Mr. Robertson, see Vol. II, pp. 524 (fol. 916) and 527. See also Defts' Robertson

Ex. 20, Vol. IV, p. 873, third line from bottom of page for the name of a Tennessee manufacturer which does not appear on Defts'. Ex. QQ.

CANADIAN MANUFACTURERS OF MAPLE, BEECH OR BIRCH FLOORING.

No attempt was made by either of the parties to gather statistics with respect to the number of Canadian manufacturers or the amount of flooring produced by them. However, the record abundantly shows that a great deal of maple, beech and birch flooring is produced in Canada, and shipped into all the border states. The Canadian manufacturers are especially strong competitors of American manufacturers in the New England states and New York, by reason of the proximity of certain large Canadian mills to those markets, and because there is no import duty on shipments of such flooring, into the United States. (Vol. II, pp. 524, 567-8-9; Vol. I, pp. 320-1, 245.)

The tariff on maple, beech and birch flooring shipped into Canada is 25% *ad valorem*. (Vol. I, pp. 320-1.)

POTENTIAL PRODUCERS OF MAPLE, BEECH AND BIRCH FLOORING.

We have seen that maple, beech and birch trees are widely distributed; that in 1923 the stand of such timber in the United States amounted to 86,000,000,000 feet; that only 14 of the 22 members of the defendant Association own timber, and that in the aggregate their holdings amount to substantially less than 2% of the total stand. (Page 26, *supra*.)

It is undisputed that one needs only a relatively small capital—\$30,000—in order to engage in the manufacture of maple, beech and birch flooring. All the necessary

equipment can be freely purchased—not from the defendants—but from the usual manufacturers of machinery, mill supplies, etc. (Vol. II, p. 632.)

We have also seen that in 1920 there were in Michigan and Wisconsin alone 476 sawmill operators engaged in the production of rough maple lumber; that in that year the number of such operators in the United States was 4,131; that in 1921, there were 2,800 producers of rough maple lumber, and that in 1922 there were 2,999. (Page 26, *supra*.) It is undisputed that these owners of timber and operators of sawmills could at *small expense* engage in the manufacture of flooring. (Vol. II, p. 633.) For instance, Mr. W. R. Gillette, of the Brown Lumber Company, Traverse City, Michigan, testified that his company installed flooring machinery in 1920; that

“our equipment for the manufacture of flooring cost us about \$5,000 not including the cost of installation. We bought the machine second-hand. It is an American Woodworking machine. *We saw our own maple lumber.*” (Vol. I, p. 92.)

Mr. Gillette's company produced 1,200,000 feet of maple flooring in 1922. The said company is not a member of the defendant Association. (Vol. I, p. 92.)

We have also seen that in 1922, even the nonmembers listed on Defts'. Ex. QQ had a capacity of 238,000,000 feet of maple, beech and birch flooring, but that they produced only 61,317,000 feet. If the profits in the industry were especially large,—if the public were charged unreasonable prices for flooring—this large reserve of productive capacity could and would be tapped without any preliminary expense whatsoever.

But there is at hand another and still larger source of supply at all times ready and able to produce maple

beech, and birch flooring. There are scores of manufacturers of oak and fir flooring in the United States. And they use the same kind of equipment that the manufacturers of maple, beech and birch flooring use. (Vol. II, pp. 520-1, 526, 771; Vol. I, pp. 84, 85, 88, 137, 446.) As a matter of fact, some of them manufacture maple, beech or birch flooring whenever they can do so at a profit; whenever they are unable to do so, they shift to oak, or stop manufacturing altogether, and buy maple, beech and birch flooring from the members of the defendant Maple Flooring Manufacturers Association. (Vol. I, pp. 137, 86-7, 93, 97, 435, 427-8; Vol. II, pp. 778-9, 497.)

**CAPACITY AND PRODUCTION OF MEMBERS OF THE
DEFENDANT ASSOCIATION.**

It will be recalled that the petitioner alleges that the membership of the defendant Association "represents approximately seventy per cent of the total manufacturing CAPACITY of" maple, beech and birch flooring "in the United States." (Vol. I, p. 3.)

For purposes of comparison we set forth in the margin the capacity of the members of the successive associations known as the Maple Flooring Manufacturers Association and the capacity of the nonmember manufacturers of maple, beech and birch flooring listed on Defts'. Ex. QQ, as well as the number of manufacturers that reported, and the percentage of the capacity of each group of the aggregate capacity of both groups.¹¹

MANUFACTURING CAPACITY.						
	MEMBERS.			NONMEMBERS.		
	Number Report- ing	Quantity	Per Cent	Number Report- ing	Quantity	Per Cent
1922....	22	158,400,000 ft.	39.9	38	238,610,000 ft.	60.1
1921....	22	158,400,000 "	41.8	36	220,900,000 "	58.2
1920....	21	154,800,000 "	47.	31	174,450,000 "	53.
1919....	21	154,400,000 "	54.1	26	181,450,000 "	45.9

(Defts'. Ex. 22 Vol. IV, fol. p. 5506; Vol. II, pp. 770-1, 861-2.)

It should be remembered that the nonmember manufacturers listed on Defts'. Ex. QQ are by no means all the nonmember manufacturers of maple, beech and birch flooring in the United States, to say nothing of the Canadian manufacturers of such flooring, or the manufacturers of oak and other flooring who use the same kind of equipment that is used by the producers of maple, beech and birch flooring. (See pages 32-33, *supra*.)

We also set forth (with the same reservations above stated) the figures with respect to production.¹²

Since the figures with respect to capacity and production were compiled, the Grand Rapids Trust Company, as Receiver for William Horner, bankrupt, (both William Horner and the Receiver were members of the defendant Association), sold Horner's Reed City, Mich., flooring plant to the Indiana Flooring Company, a *non-member*. (Vol. I, p. 318.) The sale was made during May, 1923. (Tr. Id.) It was testified that the "present output" of this *nonmember* manufacturer "is about eleven to twelve million feet a year. (Vol. I, p. 318.)

It will be recalled that Mr. Koerble, a large buyer of maple, beech and birch flooring, testified that his list of such flooring manufacturers contained more than 100 names. (Page 29, *supra*.) Mr. Ralston and Mr. Robertson both testified to the existence of many sawmill and

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PRODUCTION.

MEMBERS.				NONMEMBERS.		
	Number Report- ing	Quantity	Per Cent	Number Report- ing	Quantity	Per Cent
1922.....	22	148,313,000	70.7	58	61,317,000	29.3
1921.....	22	107,719,000	71.4	55	43,195,000	28.6
1920.....	21	129,523,000	73.5	50	46,616,000	26.5
1919.....	21	119,451,000	74.3	40	41,236,000	25.7

(Defts'. Ex. 22, Vol. IV, fol. p. 5506; Vol. II, pp. 770-1, 861-2.)

1922, 1921, 1920, 1919, 1918, 1917, 1916, 1915, 1914, 1913, 1912, 1911, 1910, 1909, 1908, 1907, 1906, 1905, 1904, 1903, 1902, 1901, 1900, 1899, 1898, 1897, 1896, 1895, 1894, 1893, 1892, 1891, 1890, 1889, 1888, 1887, 1886, 1885, 1884, 1883, 1882, 1881, 1880, 1879, 1878, 1877, 1876, 1875, 1874, 1873, 1872, 1871, 1870, 1869, 1868, 1867, 1866, 1865, 1864, 1863, 1862, 1861, 1860, 1859, 1858, 1857, 1856, 1855, 1854, 1853, 1852, 1851, 1850, 1849, 1848, 1847, 1846, 1845, 1844, 1843, 1842, 1841, 1840, 1839, 1838, 1837, 1836, 1835, 1834, 1833, 1832, 1831, 1830, 1829, 1828, 1827, 1826, 1825, 1824, 1823, 1822, 1821, 1820, 1819, 1818, 1817, 1816, 1815, 1814, 1813, 1812, 1811, 1810, 1809, 1808, 1807, 1806, 1805, 1804, 1803, 1802, 1801, 1800, 1799, 1798, 1797, 1796, 1795, 1794, 1793, 1792, 1791, 1790, 1789, 1788, 1787, 1786, 1785, 1784, 1783, 1782, 1781, 1780, 1779, 1778, 1777, 1776, 1775, 1774, 1773, 1772, 1771, 1770, 1769, 1768, 1767, 1766, 1765, 1764, 1763, 1762, 1761, 1760, 1759, 1758, 1757, 1756, 1755, 1754, 1753, 1752, 1751, 1750, 1749, 1748, 1747, 1746, 1745, 1744, 1743, 1742, 1741, 1740, 1739, 1738, 1737, 1736, 1735, 1734, 1733, 1732, 1731, 1730, 1729, 1728, 1727, 1726, 1725, 1724, 1723, 1722, 1721, 1720, 1719, 1718, 1717, 1716, 1715, 1714, 1713, 1712, 1711, 1710, 1709, 1708, 1707, 1706, 1705, 1704, 1703, 1702, 1701, 1700, 1699, 1698, 1697, 1696, 1695, 1694, 1693, 1692, 1691, 1690, 1689, 1688, 1687, 1686, 1685, 1684, 1683, 1682, 1681, 1680, 1679, 1678, 1677, 1676, 1675, 1674, 1673, 1672, 1671, 1670, 1669, 1668, 1667, 1666, 1665, 1664, 1663, 1662, 1661, 1660, 1659, 1658, 1657, 1656, 1655, 1654, 1653, 1652, 1651, 1650, 1649, 1648, 1647, 1646, 1645, 1644, 1643, 1642, 1641, 1640, 1639, 1638, 1637, 1636, 1635, 1634, 1633, 1632, 1631, 1630, 1629, 1628, 1627, 1626, 1625, 1624, 1623, 1622, 1621, 1620, 1619, 1618, 1617, 1616, 1615, 1614, 1613, 1612, 1611, 1610, 1609, 1608, 1607, 1606, 1605, 1604, 1603, 1602, 1601, 1600, 1599, 1598, 1597, 1596, 1595, 1594, 1593, 1592, 1591, 1590, 1589, 1588, 1587, 1586, 1585, 1584, 1583, 1582, 1581, 1580, 1579, 1578, 1577, 1576, 1575, 1574, 1573, 1572, 1571, 1570, 1569, 1568, 1567, 1566, 1565, 1564, 1563, 1562, 1561, 1560, 1559, 1558, 1557, 1556, 1555, 1554, 1553, 1552, 1551, 1550, 1549, 1548, 1547, 1546, 1545, 1544, 1543, 1542, 1541, 1540, 1539, 1538, 1537, 1536, 1535, 1534, 1533, 1532, 1531, 1530, 1529, 1528, 1527, 1526, 1525, 1524, 1523, 1522, 1521, 1520, 1519, 1518, 1517, 1516, 1515, 1514, 1513, 1512, 1511, 1510, 1509, 1508, 1507, 1506, 1505, 1504, 1503, 1502, 1501, 1500, 1499, 1498, 1497, 1496, 1495, 1494, 1493, 1492, 1491, 1490, 1489, 1488, 1487, 1486, 1485, 1484, 1483, 1482, 1481, 1480, 1479, 1478, 1477, 1476, 1475, 1474, 1473, 1472, 1471, 1470, 1469, 1468, 1467, 1466, 1465, 1464, 1463, 1462, 1461, 1460, 1459, 1458, 1457, 1456, 1455, 1454, 1453, 1452, 1451, 1450, 1449, 1448, 1447, 1446, 1445, 1444, 1443, 1442, 1441, 1440, 1439, 1438, 1437, 1436, 1435, 1434, 1433, 1432, 1431, 1430, 1429, 1428, 1427, 1426, 1425, 1424, 1423, 1422, 1421, 1420, 1419, 1418, 1417, 1416, 1415, 1414, 1413, 1412, 1411, 1410, 1409, 1408, 1407, 1406, 1405, 1404, 1403, 1402, 1401, 1400, 1399, 1398, 1397, 1396, 1395, 1394, 1393, 1392, 1391, 1390, 1389, 1388, 1387, 1386, 1385, 1384, 1383, 1382, 1381, 1380, 1379, 1378, 1377, 1376, 1375, 1374, 1373, 1372, 1371, 1370, 1369, 1368, 1367, 1366, 1365, 1364, 1363, 1362, 1361, 1360, 1359, 1358, 1357, 1356, 1355, 1354, 1353, 1352, 1351, 1350, 1349, 1348, 1347, 1346, 1345, 1344, 1343, 1342, 1341, 1340, 1339, 1338, 1337, 1336, 1335, 1334, 1333, 1332, 1331, 1330, 1329, 1328, 1327, 1326, 1325, 1324, 1323, 1322, 1321, 1320, 1319, 1318, 1317, 1316, 1315, 1314, 1313, 1312, 1311, 1310, 1309, 1308, 1307, 1306, 1305, 1304, 1303, 1302, 1301, 1300, 1299, 1298, 1297, 1296, 1295, 1294, 1293, 1292, 1291, 1290, 1289, 1288, 1287, 1286, 1285, 1284, 1283, 1282, 1281, 1280, 1279, 1278, 1277, 1276, 1275, 1274, 1273, 1272, 1271, 1270, 1269, 1268, 1267, 1266, 1265, 1264, 1263, 1262, 1261, 1260, 1259, 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1092, 1091, 1090, 1089, 1088, 1087, 1086, 1085, 1084, 1083, 1082, 1081, 1080, 1079, 1078, 1077, 1076, 1075, 1074, 1073, 1072, 1071, 1070, 1069, 1068, 1067, 1066, 1065, 1064, 1063, 1062, 1061, 1060, 1059, 1058, 1057, 1056, 1055, 1054, 1053, 1052, 1051, 1050, 1049, 1048, 1047, 1046, 1045, 1044, 1043, 1042, 1041, 1040, 1039, 1038, 1037, 1036, 1035, 1034, 1033, 1032, 1031, 1030, 1029, 1028, 1027, 1026, 1025, 1024, 1023, 1022, 1021, 1020, 1019, 1018, 1017, 1016, 1015, 1014, 1013, 1012, 1011, 1010, 1009, 1008, 1007, 1006, 1005, 1004, 1003, 1002, 1001, 1000, 999, 998, 997, 996, 995, 994, 993, 992, 991, 990, 989, 988, 987, 986, 985, 984, 983, 982, 981, 980, 979, 978, 977, 976, 975, 974, 973, 972, 971, 970, 969, 968, 967, 966, 965, 964, 963, 962, 961, 960, 959, 958, 957, 956, 955, 954, 953, 952, 951, 950, 949, 948, 947, 946, 945, 944, 943, 942, 941, 940, 939, 938, 937, 936, 935, 934, 933, 932, 931, 930, 929, 928, 927, 926, 925, 924, 923, 922, 921, 920, 919, 918, 917, 916, 915, 914, 913, 912, 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planing-mill operators in all parts of the United States who had one or more machines for the manufacture of maple, beech and birch flooring. Both these gentlemen have been connected with the flooring business for a long time, and have gone into all parts of the United States a great many times for the purpose of selling flooring, etc. (Vol. II, pp. 497-8, 518-520; Vol. I, pp. 319, 320, 325.)

In answer to a question put by the petitioner's counsel, Mr. Robertson testified that in his opinion the *non-member* manufacturers produced "somewhere from *sixty to seventy per cent*" of the total output in the United States of maple, beech and birch flooring (Vol. I, p. 527), and that nonmember manufacturers in the States of Michigan and Wisconsin produced "about forty to forty-five per cent" of the total quantity of such flooring produced in the said states. (Vol. I, p. 528.)

Mr. Robertson was of the opinion that the *members* of the defendant Association did not produce more than "fifty to fifty-five per cent" of the total output of maple, beech and birch flooring in the United States. (Vol. I, p. 324.)

Mr. Ralston was asked to estimate the proportion of the total output of such flooring for the State of *Michigan* that was produced by the *Michigan members* of the defendant Association. Upon being instructed by the Court to count the 11,000,000 to 12,000,000 feet per annum that was produced by the Reed City plant of the Indiana Flooring Co. (a *nonmember*) as *Association* production, "because at the time this bill was filed that plant" belonged to the Horner Estate (a *member*), Mr. Ralston estimated that the *Michigan members'* percentage of the total *Michigan* production was "probably 80%." (Vol. I, pp. 328-9.) Also that the *Wisconsin members'* percent-

age of the total Wisconsin output was "about 75,—probably a little less, because I think that there are more mills out of the Association [there] than in Michigan." (Vol. I, p. 329.)

In response to a question put by petitioner's counsel Mr. James E. Dewey testified as follows:

"I have no definite knowledge, but I should say that the members of the present defendant Association manufacture between 50 and 60% of the total production of maple, beech and birch flooring in the United States."

There was some correspondence carried on by officers of the defendant Association, wherein it was stated that the percentage of maple, beech and birch flooring produced by the members thereof was about 70% of the total amount produced in the United States. But as explained in one of said communications, this was a mere guess unsupported by data with respect to the production of nonmembers. (Vol. IV, pp. 842, 507.)

If, as the petitioner asserts, the Maple Flooring Manufacturers Association, has always been *one* association, and not *many successive* associations, then the said defendant Association has lost much ground since its organization in the 1890's. According to trade papers the members of the Maple Flooring Manufacturers Association in 1898 represented about 90% of the total supply. (Vol. IV, p. 827.)

THE MANUFACTURE OF FLOORING.

PRODUCTION OF ROUGH LUMBER.

Although mankind has for centuries fashioned flooring of divers materials, it was not until the 1890's that maple, beech and birch woods were extensively used for that purpose. The very excellence of these woods for flooring purposes is the reason why they were not sooner employed. They are very hard, and it was not until the apotheosis of the Machine that means were found to efficiently fashion these refractory woods into flooring on a large scale. It was not until then that maple, beech and birch trees became commercially valuable. In fact, even the wasteful white-pine operators formerly left these trees standing, as not worth the trouble to cut. (Defts'. Ex. BB, Vol. IV, p. 826; Vol. I, p. 769.)

The first step in the manufacture of flooring is, of course, the production of the rough lumber, or the raw material of which flooring is made. Inasmuch as some of the members of the defendant Association own maple, beech and birch timber and produce all or a part of the rough lumber used by them in the manufacture of flooring, let us see what is necessary to be done by them in order to get their raw material.

Mr. Robertson described this work as follows:

"The first move, as it now is practiced, is to establish camps in a given tract of timber. * * * These camps must be suitable for the accommodation of the men," who fell the timber and cut the logs into suitable lengths. "This is followed by the skidding crew, who skid it [the logs] to either a logging road or a spur of the railroad if we transport by rail. It is then brought to the mill, dumped into a pond of water, which in the winter season is

heated; this is for the purpose of cleansing the log" of sand. "It is then taken into the sawmill, which has usually a band saw or circular saw, which cuts the log into boards, or flitches sometimes. It then goes to the resaw, in most mills, where it is resawn from these larger flitches to boards of the required thickness. * * * From there it goes to what is called the edging saws, which are sometimes a single circular saw, sometimes a single band, sometimes a gang of each of these—where it is cut into suitable widths, and the larger defects are removed. And from this it goes to the trim saws, trimming out more of the unallowable defects. It then goes to the grader, who grades it for piling." (Vol. II, p. 511.)

Rough lumher (of the grades used in the manufacture of flooring)

"is then taken some distance from the mill to avoid fire hazard, and there it is piled, on cross piles, or what we call piling with stickers; usually we use dry stickers, to avoid sticker marks in the flooring lumber. *It remains in these piles anywhere from nine to eighteen months.*

Q. Why?

A. So as to give it what is called the air drying process.

Q. Is that necessary to properly season the lumber?

A. Well, we consider it so, after having given up some of these other ideas, which have been promulgated by certain kiln-manufacturers—that they can take it direct from the saw and save us that process of handling it, in piling from the sawmill, and from the long carrying charge of anywhere from nine to eighteen months; *but that has been tried out and has not proven satisfactory to the flooring manufacturers; hence we all give it the air drying process.*

Q. That air drying process is used, is it not, by the present members of the defendant Association?

A. Yes, sir." (Vol. II, p. 512.)

The flooring mills of some members of the defendant are located at from 200 to 250 miles from their source of rough lumber supply. (Vol. II, p. 771.)

GRADES OF ROUGH LUMBER.

Rough maple, beech and birch lumber is graded in the order of their excellence as follows:

Firsts and Seconds (or Clear), Selects, No. 1 Common, No. 2 Common, No. 3-A Common, No. 3 Common. (Vol. II, p. 511; Vol. I, pp. 197.)

Mr. W. L. Saunders testified:

"Firsts and Seconds, Selects, and the better end of No. 1 Common rough maple lumber are not generally used in the manufacture of maple flooring by manufacturers who produce their own lumber, because it is not profitable to do so. We are always able to get a better price for that class of rough lumber on the market than we can get by working it through the flooring factory. The better grades of rough maple lumber are very largely used by manufacturers of automobiles, pianos, vehicles, etc. As a rule, the Firsts and Seconds will bring as high a price in the market as Clear [the best grade] maple flooring." (Vol. I, pp. 197-8.) (See also Vol. II, pp. 511-512; Vol. I, pp. 94, 222, 447-8.)

Flooring is therefore, usually manufactured of No. 1 Common, No. 2 Common and No. 3-A Common, although "some members use Selects and Firsts and Seconds * * * or the entire product of the log in manufacturing flooring." (Vol. I, p. 405.) There have been times when even No. 1 Common sold for more than the best grade of flooring. (Vol. I, p. 198.)

HOW ROUGH LUMBER IS CONVERTED INTO FLOORING.

After the rough lumber has been air-dried for from nine to eighteen months, it is piled loosely in layers, separated by dry stickers or narrow strips of board, on large steel trucks which run on tracks into and through the dry kilns. These dry kilns are usually constructed of concrete or brick, sometimes of steel and concrete, and occasionally of wood. The walls must be quite thick in order to retain heat. One flooring unit (which consists of a matcher and two end matchers—Vol. I, p. 397), producing from 7,000 to 8,000 feet a day, requires a dry kiln area 100 feet long and 18 feet wide.

At the receiving end of the dry kiln the air is kept quite moist so as to prevent case hardening of the lumber. This moisture is gradually reduced until the second half of the kiln is reached where the air is dry and is kept at a temperature of 180 degrees.

It is six or seven days from the time lumber is put into the dry kiln before it is taken out. The kiln receives and discharges lumber once a day. (Vol. II, pp. 512-514.)

From the dry kiln, the lumber is discharged into the cooling room where it remains until its temperature has been reduced to that of the mill, for the reason that hot lumber will not take a highly polished surface. The lumber is then ripped into various widths. In some mills these various strips of lumber are next double-surfaced, but in the modern plants one machine (the matcher) not only double-surfaces the strips, but puts a tongue on one edge, a groove in the opposite edge and hollows out the back. The function of the tongue and groove is, of course, obvious, whereas the hollow back provides an air chamber under the flooring and thus prevents dry-rot,

as well as reduces the weight of and the freight on the flooring. (Vol. II, pp. 514-516.)

In some mills the material is then taken to saws where defects are cut out, and thence to the end-matcher, where a groove is put in one *end* and a tongue on the other *end* of each piece,—so that both ends and sides of the flooring may be matched. In other mills, one machine trims out defects and end-matches the material. (Vol. II, p. 516.)

The grader then classifies the material as to grade; after which the material is put into appropriate racks, and then bundled with either twine or wire. These bundles contain from six to twelve pieces each. (Vol. II, pp. 516-7.)

The finished flooring is then taken to the warehouse and piled,—the various grades and sizes, of course, being kept separate. With but one exception, all the members of the defendant Association even load the flooring into cars inside the warehouse. (Vol. II, p. 517.) It *cannot* be piled outside. (Vol. II, p. 591.) “We keep our flooring in steam-heated storage rooms * * * and as far as possible in an even temperature.” (Vol. I, p. 199.)

There is also *jointed* flooring, which is flooring that is neither tongued nor grooved.

THE DIFFERENT GRADES OF FLOORING.

Maple, as well as beech and birch, flooring is divided into three grades. In the order of their excellence these grades are: Clear, No. 1 and Factory.

The Clear is used in high-class homes, office buildings, apartments, schools, colleges, and textile mills. It must be free from stain and uniform in appearance.

The No. 1 is used in department stores, commercial, industrial and other buildings where the discolorations and other defects not permitted in the Clear grade, are unobjectionable.

The Factory is used in warehouses and industrial buildings where neither an absolutely smooth flooring nor one of fine appearance is essential. (Vol. II, pp. 518-519.)

For the Grading Rules now in force see Vol. IV, fol. pp. 5329-5336; Vol. I, p. 156, where the different grades are carefully defined.

The chief characteristic of maple is its hardness and durability. Beech and birch are almost as hard, and they are very easily stained and grained in imitation of other woods. (Vol. II, pp. 519-520.)

THE DIFFERENT THICKNESSES AND WIDTHS OF FLOORING.

Maple, as well as Beech and Birch, flooring is produced in the thicknesses and widths indicated in the margin.¹³ In working up the rough lumber some 3½" and 4" faces are also produced, as well as some jointed flooring of various dimensions, but the widths listed in the margin are the usual ones. (Vol. II, p. 514.)

Thicknesses	Widths or faces			
	1½"	2"	2¼"	3¼"
¾"	1½"	2"	2¼"	
½"	1½"	2"	2¼"	
⅝"	1½"	2"	2¼"	
⅞"	1½"	2"	2¼"	3¼"
1⅛"		2"	2¼"	3¼"
1⅜"		2"	2¼"	3¼"
1⅝"		2"	2¼"	3¼"

(Gov. Ex. 63-C, Vol. IV, pp. 497-501; Defts. Ex. F, fol. pp. 5249-5253; Vol. I, p. 156.)

ALL GRADES AND WIDTHS MUST BE PRODUCED AT THE SAME TIME, REGARDLESS OF THE QUALITY OF ROUGH LUMBER USED.

Mr. Hamlin J. Ward (a nonmember manufacturer) testified:

"Grades of flooring depend very largely upon the grades of lumber used, that is, so far as the *percentage* of each grade is concerned. A thousand feet of lumber will make a *number of items of different grades and sizes*. There are *three grades*, Clear, No. 1 and Factory, and *there are several widths* which must be made in order to avoid waste. The *product of every thousand feet of rough lumber will consist of flooring of each width and grade*. In other words, in manufacturing flooring all three grades are made at the same time." (Vol. I, p. 94.)

Mr. William L. Saunders testified as follows:

"In some localities you cannot sell 3½-inch face or 1½-inch face. In working up our lumber in the most economical method known in order to take care of our widths and avoid waste, we must make a certain amount of 3½-inch and an inch and a half and two-inch faces. It is necessary for us to sell such widths in the markets where they are used, regardless of price, when our surplus gets to a point where we feel that we must unload. *The manufacturer has no choice as to the grades that he will produce. All three grades of flooring can be manufactured from cull lumber. We cannot, for instance, manufacture Clear flooring at one time, No. 1 at another, and Factory at another. Only by sorting out rough lumber in the yards could we manufacture any particular widths of flooring, and that is not at all practicable, for the reason that every board slashed from a log varies in width from the previous board.* Of course, we attempt to save our material, hence in sawmill practice we edge on half-inch basis. One board drop may edge eight inches wide, the next one by stepping in on the circle may edge nine inches wide. We who manufacture our own lumber stock

those widths as much as we can, but nevertheless, we have the odd widths to handle some time. We must handle the odd widths sometime. It is not practicable to sort the lumber before it goes to the dry kiln, because in lumber practice those widths are piled all together, and you could not be changing your machine as to widths, and so on, all the time." (Vol. I, p. 199.)

Mr. J. L. Colby testified that

"You have got to take your widths as you find them. While of course you can temporarily sort out certain widths * * * you can't keep that up. Within the course of a month or two you have got to manufacture all of the widths that your flooring stock produces." (Vol. I, p. 211.)

See also: Vol. I, pp. 239, 386, 389-0; Vol. 11, p. 591.

PERCENTAGES OF VARIOUS GRADES, SIZES AND KINDS OF FLOORING PRODUCED BY MEMBERS OF DEFENDANT ASSOCIATION.

We have seen that, taking the Association as a whole, 90% of all the flooring produced by its members, is maple; 5% beech, and 5% birch. (Vol. II, pp. 630-1, 778; Defts'. Ex. CC-3, Vol. IV, fol. p. 5432.)

The average percentages of the three grades in all three woods are: Clear 50%; No. 1, 35%; Factory 15%. (Defts'. Ex. KK, fol. IV, p. 842; Gov. Ex. 409 YY, Vol. IV, fol. p. 1622.)

The 13/16 x 2 1/4 maple flooring (*all three grades*) constitutes about 70% of the entire output of flooring produced by the members. (Defts'. Ex. KK, Vol. IV, p. 842; Vol. I, pp. 122-3.)

HOW MAPLE, BEECH AND BIRCH FLOORING IS MARKETING,
AND TO WHOM IT IS SOLD.

Like steel, iron, wheat, flour, cotton, packing-house products, and other staples, flooring is sold months in advance of production. (Vol. I, pp. 403, 421, 341-2, 386; Vol. II, fol. p. 462, 465, 563.) Defts'. Grant Keehn Ex. 22, Vol. V, p. 955, is a graph which shows in feet the amount of unfilled orders of ~~the~~^{the} Association members at the end of each month, beginning with January, 1912, and ending with February, 1923. 4,000,000 feet for November, 1920, was the smallest amount, and more than 30,000,000 feet during 1917, 1919 and 1923 was the greatest amount of unfilled orders during the eleven years above mentioned.

SAID FLOORING IS SOLD LARGELY TO EXPERT AND
WELL-INFORMED BUYERS.

"About 90 to 95 per cent of all the flooring produced by members of the Association is sold through retail and wholesale lumber dealers, who take the trade journals above mentioned."¹⁴ (Vol. I, p. 171.) These journals also publish a great deal of other information and statistics with respect to market conditions, prices, sales, trend, etc., and are read generally by all dealers in flooring and other lumber products. (Vol. I, pp. 291-2.)

Most of these dealers, especially the large ones, send out inquiries by telegraph or mail, to from 3 to 40 or more flooring manufacturers asking for prices on specified quantities of different items, and buy where they can do so cheapest. (Vol. I, pp. 410-427, 429, 436, 448; Vol.

¹⁴The leading lumber journals of wide circulation wherein are published much of the data gathered by the defendant Association. (Vol. I, pp. 170-171.)

II, pp. 450-458, 459-461, 466, 467, 469, 530-538, 560, 564, 571-577, 578, 581, 584, 588, 597, 605, 617-624.)¹⁵

Many of the defendants have representatives in the principal markets of the country, some of them traveling salesmen as well as representatives, and stock and price lists are sent out from time to time by most members. (Vol. I, 173, 260, 319, 322, 341, 393-4; Vol. II, pp. 560, 564-5, 579, 592.) Some depend principally upon established good will of regular customers, who are reached by means of telegrams and letters. (Vol. I, pp. 210, 218, 259.)

Frequently the buyer offers to buy in the first instance at a fixed price, or after getting a quotation he will report back that some other manufacturer has made a lower price, and offer an order at said lower price. (Vol. I, pp. 289, 303-305, 313, 316-317, 342-3, 350-1, 363, 369-370, 233, 211.)

IT IS UNDISPUTED THAT THE FLOORING MANUFACTURED BY MEMBERS OF THE DEFENDANT ASSOCIATION IS SUPERIOR TO THE MAPLE, BEECH AND BIRCH FLOORING MANUFACTURED BY NONMEMBERS; THAT ARCHITECTS SPECIFY FLOORING MANUFACTURED BY MEMBERS OF SAID ASSOCIATION OR ACCORDING TO RULES ADOPTED BY IT, AND THAT WHOLESALE AND RETAIL LUMBER DEALERS, COMMISSION MEN AND JOBBERS PREFER TO DEAL WITH MEMBERS OF THE DEFENDANT ASSOCIATION.

As shown on pages 169-188, *infra*, the defendant Association and its predecessors slowly standardized the flooring manufactured by their members. Grading rules, carefully defining the different grades, were formulated.

¹⁵Hundreds of quotations by different manufacturers, both members and nonmembers, were identified by buyers and introduced in evidence by the defendants.

Mr. Robertson was appointed inspector of the different Association mills; periodical trips to all the mills are made, instruction is given to graders and other employees, and numerous suggestions have been made from time to time for the improvement of the machine work.

Within the last few years uniform steel gauges were adopted by all the members (except one) *so that the flooring from one Association mill would match with the flooring from the other Association mills.*

A reinspection service was established and maintained by the defendant Association and its predecessors for the reinspection, upon the request of buyers, of flooring manufactured by Association members. Inspectors are sent anywhere in the United States, regardless of the amount involved.

Mr. Hawley, Vice President of the Burns Lumber Company, of Chicago, which has been engaged in the retail lumber business for the past 22 years and which owns two yards, testified that his firm handled about 750,000 feet of maple flooring annually;¹⁶ also—

"I know that there is now and has been an Association. We prefer to deal with them because we are pretty sure of getting what we buy, both as to grade and quantity, and usually we find the prices right."
(Vol. II, p. 462.)

On cross-examination, Mr. Hawley testified:

*"We purchase at least 95 per cent of our maple flooring from the Holt Hardwood Company. We do not always get Holt's prices first. * * * We frequently get prices from commission men without knowing whom they represent. We usually ask commission men whether flooring offered was made by*

¹⁶A minimum carload of flooring is 20,000 feet. (Vol. II, p. 458.)

a member of the Association or whose flooring it is they are quoting on. * * * *We have always preferred to do business with members of the Maple Flooring Manufacturers Association. I think their grades are more standard than the grades of outside people.*" (Vol. II, p. 466.)

Mr. Harris, the Manager of the Harris Flooring Company, of New York City, which represents the Harris Manufacturing Co., manufacturers of oak and maple flooring, testified that his company "handles about five million feet of flooring a year, of which 500,000 feet are maple flooring"; also

"We represent the Harris Manufacturing Company, and buy from other manufacturers. Lately we have been confining our purchases of maple flooring to members of the Maple Flooring Manufacturers Association because of the uniform quality of the flooring manufactured by them." (Vol. II, p. 584.)

Mr. Storm, a member of the firm of George H. Storm & Company, of New York City, large retail dealers in all kinds of lumber, testified that his firm handled about 2,000,000 feet of maple flooring a year. (Vol. II, p. 581.)

Mr. Storm testified as follows:

"The standardization of maple flooring by the Maple Flooring Manufacturers Association has been very beneficial to the purchasers of maple flooring.

Q. And in what respect, Mr. Storm?

A. Well, for example, we know that when we buy maple flooring manufactured by a member of the Association that it will be well manufactured and if it is not we do not have to take it. If we purchase from outside mills we cannot be so sure about it, it may or may not be. And in purchasing we always mention the fact that it shall be Association manufacture, because that protects us, sort of like a 14 karat mark on your jewelry. That is a fact. It is very, very helpful.

"We frequently purchase from various manufacturers when our own mills cannot supply us, but I will tell you frankly that we do not like to purchase from any mill that is not an Association mill. We have been burned that way several times and do not like to do it. If there were no Association all the different manufacturers would be making their own grades and sizes and you would not know what you were getting unless you got it from one mill. I do not remember any case in recent years where we have had to have reinspection. At times there have been complaints but the manufacturers themselves have always come on and adjusted them. We have, however, offered our customers the reinspection service and it is usually a very convincing argument. As a whole, the reinspection service is beneficial to the trade. * * * In our judgment the Maple Flooring Manufacturers Association has been decidedly beneficial from the standpoint of the user of the maple flooring." (Vol. II, p. 583.)

Mr. Earl Bartholomew, President of the E. Bartholomew Hardwood Co., of Chicago, which handles about 2,000,000 feet of maple, beech and birch flooring a year, besides oak flooring and hardwood lumber, testified:

"Q. And whom do you prefer to deal with, as a general rule?

A. We would rather buy from the Association members, for the reason that there is *uniformity of grade*; and then *in case of dispute with a customer there is a recourse of inspection, at any destination.*

Q. State whether or not you have found the grades of flooring manufactured by the different members of the Association satisfactory?

A. They have been very satisfactory.

Q. State whether or not you have found the reinspection service maintained by the defendant Maple Flooring Manufacturers Association satisfactory?

A. Yes. They have given prompt service, and

so far as we know it has been satisfactory to both buyer and seller.

Q. Do you consider that that service is efficiently and honestly and fairly maintained?

A. Yes, we believe so." (Vol. II, p. 455.)

This whole matter is summed up by Mr. C. A. Flanagan, who has had twenty-five years' experience in all branches of the lumber business. His company annually handles about 3,000,000 feet of maple, beech and birch flooring at its Chicago yards. (Vol. I, p. 427.) Mr. Flanagan's testimony on this point is set forth in the margin.¹⁷

¹⁷Q. Why do you prefer to deal with members of the defendant Association?

(fol. 760.) A. Well, for many reasons. One of our reasons is that we are surer of getting a uniform grade of flooring and uniform manufacture; and in case we have any complaint on it, as often will happen, even if the grade is right,—an architect may not be feeling just right when he looks at it, and he will think that it is off grade, or perhaps the owner is complaining to the architect, and it is very easy for the architect to fall back on the materialmen, the yard here, that is the go-between between the manufacturer and the consumer, and he will complain about the grade; well, if we are buying association flooring all we have to do is call for an association inspector, and if the flooring is right, that settles it, and if it is not right we want to protect the architect and the consumer. If it is right it settles any argument—which we could not settle otherwise.

Q. Have you had occasion to have re-inspections, as they are called?

A. Yes, sir.

Q. State whether or not these re-inspections have been satisfactory to you and your clients, or unsatisfactory?

A. Why, they have been satisfactory. We have had different results. I call to mind about a year ago, I think, that we had a complaint on some maple flooring, factory maple, from I. Stephenson Company; and we called for the association inspector, and he sustained

Similar testimony was given by dealers of Boston, Philadelphia, New York City, Grand Rapids (Vol. I, p.

our customer's complaint, and I. Stephenson & Company had to make good through us to our customer.

Q. Did they do that readily?

A. Oh, yes. They sent a man down here, their Mr. Shepeck, from Wells, came down here and authorized our customer to go ahead (fol. 761) and sort the flooring and use what he could, and they paid for the labor and replaced the flooring.

Q. Have such disputes as have arisen been adjusted satisfactorily to you and to your customers?

A. Yes, sir.

Q. Either one way or the other?

A. Yes. We have had complaints where the customer was wrong and where the inspector sustained the manufacturer; but it was always satisfactory; after the inspector had made his inspection and given his report, why, that settled it,—everyone was satisfied.

Q. Would you say that that inspection service of any of the associations that have been in existence since 1915 has been honestly and impartially conducted?

A. Yes, sir; decidedly so. We used to buy of R. Connor Company when they were members of the Association. When they discontinued their membership in the Association we ceased to buy from them because we felt that we had no protection if there should be a complaint on the grades.

Q. State whether there is any difference between the uniformity of grades manufactured by members of the Maple Flooring Manufacturers Association and the grades that are manufactured by non-members?

A. Outside of Cadillac I think the grades are very uniform. We consider Cadillac makes a better grade of maple flooring than any other manufacturer that we know anything about. In fact, they make a better grade of flooring than we made ourselves, and we thought we made as good a grade as could be produced.

Q. To whom do you refer by 'Cadillac'?

A. Cobbs & Mitchell—Cobbs & Mitchell and Mitchell Brothers, their grades are identical, the two plants.

Q. Leaving out Cobbs & Mitchell, and taking the grades manufac-

141; Vol. II, pp. 459, 467, 538, 562, 565-6, 579, 593, 604, 610, 618), and the petitioner stipulated that testimony to

tured by the other members of the Association, how does that compare with the grades of nonmembers?

A. I would say they were very uniform, outside of Horner's grades; I am not familiar with them since he has been a member of the Association; before that time his grades were unsatisfactory; so much so that we discontinued any business with him.

Q. How about the machine work on them?

A. *Their machine work is all very good; they interchange, you know, and if you have a carload of flooring from one concern it is a big advantage to be able to match that up with somebody else, in case you can buy a little cheaper from some other manufacturer, and you have a part of a carload on hand, it enables you to buy from some other manufacturer and mix it right in and ship it out. Otherwise you would have to keep a little of this man's flooring, and a little of the others, and if you had a little on hand you would have to keep it entirely separate and ship it separate, which would be quite a hardship on the lumber yards.*

Q. The matching of the products of the different Association members has been brought about, say, within the last two or three years, has it not?

A. Largely so, yes sir.

(fol. 763.) Q. You consider that change a distinct advantage to the buyer?

A. To the dealer, yes sir.

Q. To the dealer?

A. To the dealer, yes sir; it enables him to carry less flooring on hand, as I just explained. You do not have too many different kinds, in case he changes in buying from one to another.

Q. Have you bought any flooring of Horner's, after he became a member?

A. No, I think not.

(Vol. I, pp. 430-1.)

like effect would be given by representatives of the Hill Lumber Company, the Tozer Lumber Company and the Capital City Lumber Company, of St. Paul and Minneapolis, if called. (Vol. I, pp. 225-6.)

That architects specify that maple, beech and birch flooring shall conform to the Grading Rules of the defendant Association, see Vol. I, pp. 94, 140, 293, 307.

That the product of the Southern mills is considered inferior, see Vol. II, pp. 608, 610—the testimony of a large Philadelphia dealer.

With respect to the New England product, Mr. Robertson testified as follows:

“Q. And there is considerable flooring manufactured in the New England states, is there not?

A. Yes. It is not standardized, neither is it graded, according to our grading rules. They manufacture it in long lengths, but do not grade it in accordance with our grading rules, at all, on most of it.

Q. What are the differences between the Eastern grading and the grading of the present defendant Association?

A. There are defects allowed in their stock which are not allowed in our grading; and they will leave the boards as they come from the matcher, long, with the defects in. We trim them out, and make the grade, make the grade all Clear, No. 1 and Factory. Maybe there is a defect down there, pretty close to the end of the board; we will throw that end of the board into Factory. And they leave that the whole length, and call it a log run; it is just as it comes from the log or lumber.

Q. What do you say, if there is a defect in it? What defect do you mean?

(fol. 915.) A. Knots, shakes, splits, hard, or anything—such defects as have been mentioned before in my testimony.” (Vol. II, pp. 523-4.)

Mr. Robertson (the Association's inspector of plants and field representative) is corroborated by correspondence that passed between the P. W. Wood Corporation of Boston, Mass., and the Holt Hardwood Company during 1921. The former company paid the latter \$5 to \$9 a thousand feet more than it could buy Maine and Canadian flooring for. (Vol. I, pp. 245-247.)

THE PROOF WAS UNDISPUTED THAT THE PRICES OF ASSOCIATION MEMBERS FOR MAPLE, BEECH AND BIRCH FLOORING HAD BEEN AND WERE FAIR AND REASONABLE

The John Schroeder Lumber Co.—one of the largest in the country—abandoned the manufacture of maple, beech and birch flooring because they could not make it pay at Milwaukee.

"It costs more to manufacture flooring in the City of Milwaukee than we can buy it in the open market. We found that we could purchase to better advantage from other fields than manufacture the flooring needed for big jobs. Most of the people from whom we buy flooring call us shoppers. We shop around and get the lowest prices possible." (Vol. I, p. 93.)

"I think we started manufacturing flooring about 1890" and "quit in 1913. We had figured out that we could not make any money in the manufacture of flooring, and would not buy any more lumber for the manufacture of flooring. Later on our Government ordered us to start making maple flooring again. A lot of Government work was allocated to us, and we had to go back into the game. We continued the manufacture of flooring until after the war. We quit the manufacture of maple, beech and birch flooring at the beginning of 1922." * * *

We quit the manufacture of maple, beech and birch flooring at the beginning of 1922, because we could not make a dollar out of it. We were losing money on every foot we made. Since that time we have procured maple, beech and birch flooring for our retail yards in Milwaukee from other manufacturers." (Vol. I, pp. 435-6.)

Mr. Koerble, the General Purchasing Agent and Traffic Manager for the John Schroeder Co., is a large buyer of the flooring above mentioned, and has dealt with the different members of the defendant Association. (Vol. I, pp. 436-445.) He testified as follows:

“Q. What would you say as to the reasonableness or unreasonableness of the prices of maple, beech and birch flooring since you have been buying it, after your going out of business in 1921, that is, after you ceased manufacturing it in 1921?”

A. *The maple flooring, at the prices we have been paying for it, and against the price of rough lumber, we are far better off to buy the flooring.*

Q. *Than to manufacture it?*

A. *Yes, sir.*

Q. You consider that the prices that the public have to pay for maple, beech and birch are reasonable, or unreasonable?

A. *They are very reasonable.*

Q. *State whether or not you are familiar with the prices of the rough lumber, and the cost of manufacturing it?*

A. *Yes sir, I am.*

Q. And your testimony, that the prices are and have been reasonable is based upon your knowledge of costs, and your manufacturing operations before?

A. *Yes sir.*

Q. And the price of rough lumber?

A. *Yes sir.* (Vol. I, p. 446.)

Mr. Hawley, the Vice President of the Burns Lumber Co., of Chicago, retail dealers in all kinds of lumber products, including maple flooring, who, after testifying that he preferred to buy such flooring from members of the defendant Association because of the quality of their

flooring, their accuracy as to quantity, and because "usually we find their prices right," testified as follows:

"Q. Would you say that the prices that you have paid for maple flooring during the period you have mentioned have been fair and reasonable or unfair and unreasonable?"

A. *I would say they are very fair.*" (Vol. II, p. 462; see also p. 466.)

Mr. Charles J. Heniff, a small retail lumber dealer at Chicago, who buys about 80% of his maple flooring from a member of the defendant Association, testified:

"Q. Do you consider that the manufacturers have been fair in dealing with the retail yard dealers or wholesale yard dealers?"

A. I believe they have.

Q. Do you consider that the price of maple, beech and birch flooring has been fair and reasonable?"

A. I do." (Vol. II, p. 467.)

Mr. C. A. Flanagan, testified as follows:

"I am a citizen and resident of Chicago, Illinois, and am engaged in the lumber business. I am the Vice President of Rittenhouse & Embree Company. I have been engaged in the lumber business for 25 years, in practically all branches. I have been in the manufacturing end and the buying and selling of lumber of all kinds. Rittenhouse and Embree Company are wholesalers and retailers of all kinds of lumber in Chicago. We handle pine lumber, hardwood lumber, hardwood flooring, pine flooring of all kinds, everything, in fact, in lumber, both rough and dressed.

Rittenhouse & Embree Company does not manufacture any maple, beech or birch flooring at the present time. The company discontinued the manufacture of such flooring in 1915, I believe. Since 1915 our company has bought such maple, beech and birch flooring as it has handled. We handle approx-

imately three million feet of maple, beech and birch flooring annually. The Rittenhouse & Embree Company was once engaged in the manufacture of maple, beech and birch flooring in Chicago.

Q. Why did your company cease the manufacture of maple, beech and birch flooring?

A. *Well, it reached a point where we considered that we could make more money buying our flooring than manufacturing it; we had to bring the lumber in here green, and dry it; and of course there is a great deal of waste in manufacturing, there is a waste in kiln drying, and then a large waste in ripping the lumber. I do not know how elaborately you want me to go into this, but, if you know, lumber is produced from a log in random widths, and then it has to be ripped into flooring widths, widths that will make standard widths of flooring; and in ripping it there is a large waste to it. Well, of course, we had to pay freight on this lumber in the green, and there was a big loss there, over manufacturing it at the mills; of course they have the same loss in ripping and in waste, but they do not have to pay freight on it; and then other conditions, labor conditions, were against manufacturing in Chicago, also, so that we have found that we can make more money buying our maple and oak flooring, both, than manufacturing it.*

Q. Did you go into the matter of costs before you ceased the manufacture of it?

A. That is the reason that we ceased to manufacture it. For a good many years, like others, I presume, we ran our business all in together, and we were making some money, and did not know where we were making it; and when I took over the management of the manufacture of the hardwood flooring, I started keeping costs. I had a little suspicion that we were not doing as well out of that department as we thought we were; and I kept cost, very complete, kept cost of each department, even to the tying up of the flooring, the twine we used, and the cost of ripping it, kiln drying and waste, between the green lumber and the kiln dried, and the waste

between the kiln dried and the manufactured product, kept all those wastes (fol. 757) and all the costs of each operation; and I found at the end of the first year we would be better off if we were not manufacturing; and when I showed the results to our Board of Directors they gave me one year longer to test it out; they were not quite satisfied; but at the end of the second year the results were such that they immediately decided to discontinue manufacturing in Chicago.

Q. What did you do with that plant?

A. Wrecked it; sold the machines for what we could get for junk.

Q. You spoke about the waste between two different processes there. State where the waste is, and give the percentages, approximately, if you can?

A. Well, that is some time ago. As far as I can remember—as near as I can remember, the waste on maple between measurement as it came into our yard and the measurement as it came out of the kilns, was about eight per cent, as I remember it. And then the shrinking between the kiln and the manufactured product would vary according to the class of lumber; you will get better maple from one section than you will from another, you know; it will work up to better advantage; but as I remember it, it ran all the way from fifteen to twenty-two or twenty-three per cent waste.

Q. Additional?

A. Yes sir. Since 1915 we have bought such maple, beech and birch flooring as we have handled and have supplied the flooring for a great many large buildings here in Chicago, either before or since 1915. We furnished practically all the large buildings on State street, starting with Rothschild's; The Hub Department Store, The Boston Store, Marshall Field Store for Men, Hibbard, Spencer, Bartlett's stores and warehouses, Rock Island Depot, The Railway Exchange Building, both sections of the First National Bank Building, The Continental Bank Building, the building occupied by the Edison Com-

pany. We also furnished the flooring for both sections of the Illinois Merchants Bank Building; now under construction, which will use approximately 800,000 feet. The other buildings mentioned above are large, modern buildings and take on an average of about 200,000 feet each." (Vol. I, pp. 427-9.)

Mr. Flanagan also testified as follows:

"Q. What is your opinion as to whether the prices for maple, beech and birch flooring have been fair and reasonable to buyers and to the public since 1915 up to the present time?

A. Yes sir, I think they have been fair. They have fluctuated a great deal, due to supply and demand. During the war there was a shortage of flooring, and prices, like everything else, went out of sight; but I think they have been very fair and equitable at all times, compared to the price of rough material and the cost of manufacture." (Vol. I, p. 432.) (See also Vol. I, pp. 97, 367, 395.)

Mr. Charles A. Goodman, of the Goodman Lumber Co., Goodman, Wisconsin, and the Sawyer-Goodman Co., of Marinette, Wisconsin, manufacturers of maple flooring, hardwood, hemlock and white pine, testified that the capacity of his maple, beech and birch flooring plant at Goodman, Wisconsin, was 12,000 feet a day, and that the capacity of the Marinette flooring plant was from 12,000 to 15,000 feet a day. (Vol. I, pp. 85-86.) Despite this large capacity, the production of his two companies was quite small. (Vol. I, p. 86.)

He testified that "neither of our companies belongs or has ever belonged to the defendant Association." (Vol. I, p. 87.)

Mr. Goodman, a witness produced by the petitioner, on cross-examination also testified as follows:

"We manufacture our maple flooring from our own logs, our own lumber. There is almost no time

that I can recall when there was any money in making maple flooring out of the maple lumber we had on hand. We could usually sell the maple lumber to some one else at a price which if we put it into the factory at the same price would leave us no margin, but we have been making this maple flooring largely as a matter of taking care of our trade and accommodation to our customers. We sell flooring in mixed cars with other lumber. The demand for maple lumber is very much broader than the demand for flooring. There are a great many uses to which maple lumber is put, whereas maple flooring is limited almost entirely to use in factories, homes and commercial buildings and the demand for it is dependent on the condition in the building industry. At times we have purchased flooring from other manufacturers and resold it to our trade. * * * We have bought flooring from the Holt Hardwood Company, Wisconsin Land & Lumber Company, and mostly from the J. W. Wells Lumber Company because they are neighbors of ours and some from I. Stephenson Company." (Vol. I, pp. 86-7.)

All the companies last above mentioned are defendants in this suit.

See also Vol. I, pp. 97, 367, 395; Vol. II, pp. 574, 589, 609, 619, 778-9; Vol. III, p. 165, and pages 116-120, of this brief.

The foregoing evidence was undisputed. The petitioner did not produce a single buyer or manufacturer in the whole United States to testify that the prices of maple, beech or birch flooring ever had been or were unfair or unreasonable.

Moreover, as we shall later see, the foregoing evidence was corroborated by evidence with respect to costs of manufacture, etc. See Defts'. Gordon Ex. 6, Vol. V, p. 899, where the index of prices of "The Product" of the members of the defendant Association are compared with

the indices of the "All Commodity Prices," "All Building Materials Prices" and "Lumber Prices"; Defts'. Grant Keehn Ex. 17, Vol. V, p. 945, where the prices of "The Product" are compared with the prices of competing wood floorings; Defts'. Grant Keehn Ex. 18, Vol. V, p. 947, where the index of the prices of "The Product" is compared with the indices of the prices of competing wood floorings; Defts'. Grant Keehn Ex. 19, Vol. V, p. 949, *where the index of the prices of "The Product" is compared with the index of the prices of rough maple lumber*; Defts'. Grant Keehn Ex. 21, Vol. V, p. 953, *where the index of the prices of "The Product" is compared with the index of the "Average Manufacturing and Marketing Costs"*; Defts'. Grant Keehn Ex. 23, Vol. V, p. 957, *where the relation of the prices of "The Product" to the demand and supply thereof is shown*; Defts'. Grant Keehn Ex. 29, Vol. V, p. 971, *where the average cost of "The Product" is compared with the range of f. o. b. mills selling prices*; Defts'. Grant Keehn Ex. 30, Vol. V, p. 973, where the index of the prices of "The Product" and the index of the average cost thereof are compared with the indices of the prices of competing wood floorings.

It will be necessary to go into these matters in the argument, and further comment will not be made here.

THE PETITIONER DID NOT PRODUCE A SINGLE BUYER TO TESTIFY EITHER THAT ANY OF THE DEFENDANTS HAD EVER EXACTED UNREASONABLE PRICES FOR FLOORING, OR THAT THEY HAD EVER BEEN GUILTY OF DISHONEST, UNFAIR OR ARBITRARY PRACTICES.

THE RECORD ABOUNDS WITH PROOF THAT THE DEFENDANTS WERE UNUSUALLY FAIR, CONSIDERATE AND HONORABLE IN THEIR DEALINGS WITH BUYERS.

In addition to other instances heretofore mentioned, we wish to call attention to the following typical illustrations of the defendants' methods of doing business. We say that they are *typical*, for the reason that they help to explain *why* dealers *prefer* to trade with members of the defendant Association.

Mr. Bartholemew testified as follows:

“Q. You mentioned, I believe, one experience that you had with Cummer-Diggins Company. State what that was,—that you told me about.

A. Well, this year we bought from Cummer-Diggins quite a bunch of flooring in Clear, No. 1 and Factory, being I think, along the first of the year, around the first of the year, at \$110 a thousand.

Q. How large a quantity?

A. As I remember there was about 150,000 feet in this lot.

Q. *And that was for future delivery, was it not?*

A. *Yes, sir.*

Q. Now, go on.

A. And they afterwards changed their price to meet the conditions, to \$105, and later to \$100, and as I remember a little later on, to \$95—*voluntary on their part.*

Q. *In other words, they reduced the price on future deliveries to you, in accordance with the market at that time?*

A. Yes sir.

Q. Notwithstanding the fact that they had your contract for the whole lot at \$110?

A. Yes, sir.

Q. And you say they did that voluntarily?

A. Absolutely.

Q. You did not ask them to do it?

A. Oh, no.

Q. He mentioned that the market was softer or lower, and he thought that in fairness to you you should have the benefit of it?

A. That was the idea." (Vol. II, pp. 455-6.)

It is a matter of common knowledge that, not only when the prices of all commodities were rapidly rising owing to the unprecedented conditions that obtained during the war, but when the terrific slump came later on, commercial practices were as vicious as they could well be in any form of society. After commodity prices had advanced to undreamt of heights, many manufacturers would make new contracts and ignore previous ones made at lower prices, or withhold deliveries on various pretexts, or seek on technical grounds to evade their just obligations. *The conduct of the defendants conformed to the highest peace-time standards throughout those feverish times.*

Mr. Alexander B. Clancy testified as follows:

"Our dealings with the manufacturers above mentioned [members of the defendant Association] have always been very satisfactory. In no instance have any of them ever attempted to cancel a contract or to get higher prices after making a sale to us for future delivery when the price was later on advanced. Once we placed an order for about 350,000 feet of 2½-inch Clear maple flooring, and I think the price was

then \$56 a thousand. The manufacturer carried that order along for more than a year before we required shipment, and I am sure the price went up from \$56 to about \$225 or \$235 a thousand before the order was completely shipped. Delivery was made without complaint. Bigelow-Cooper Company was the manufacturer that made the shipment. They took their medicine like a man and delivered beautiful flooring without one word of complaint. The people who received the flooring were very technical, but they had no complaint to make with respect to this flooring. The flooring in question went into the Western Electric Company plant at 52nd and 22nd streets." (Vol. II, pp. 459-460.)

Mr. Albert P. Hawley testified that he had entered into a contract with the Holt Hardwood Co. for 150,000 ft. of 13/16 x 2 1/4 Factory maple flooring at \$37.50 per M., to be shipped as ordered. Owing to severe competition he had been compelled to sell 82,000 ft. of 13/16 x 2 1/4 Factory maple flooring to a customer at \$35 per M. The correspondence introduced shows that he acquainted the Holt Hardwood Co. with the facts and asked said company to let him have the 82,000 feet at \$35 per M., without applying said lot on the standing order for 150,000 feet. *The request was granted.* (Vol. II, pp. 463-4.)

Many nonmember manufacturers, as well as buyers, large and small, in numerous cities testified, but none of them had anything but praise for the methods, practices and conduct of the defendants.

COMPETING FLOORINGS.

Mr. Robertson testified as follows:

"Q. In your trips about the country you have become familiar, have you not, with the floorings, whether natural or synthetic, that compete with maple, beech or birch flooring?

A. Yes, I come in contact with that.

Q. I wish you would name the competing floorings.

A. Well, in wood there is the oak, and the yellow pine, white pine, Norway pine, fir, tamarack, cypress, gum, redwood, spruce, wood block; and they make even hemlock flooring.

Q. What are some of the synthetic floorings that compete?

A. Cement, and tile, and slate, and soapstone, terrazzo, asphalt, mastic, mastolith, gypsum, cork, linoleum and marble." (Vol. II, p. 520.)

That the manufacturers of the floorings above mentioned have at all times been in active, vigorous competition with the manufacturers of maple, beech and birch flooring, see Vol. I, pp. 288-9, 294, 211-2, 255; Vol. II, pp. 521, 522, 525-6; Gov. Ex. 15-CCC, Vol. III, p. 194; Gov. Ex. 15-II, p. 136; Defts'. Robertson Ex. 21, Vol. IV, p. 875; Defts'. Robertson Ex. 22, Vol. IV, p. 876-8; Defts'. Robertson Ex. 23, Vol. IV, pp. 880-2; Defts'. Robertson Ex. 24, Vol. IV, pp. 882-884; Defts'. Robertson Exs. 25, 27, 29, 30, Vol. IV, pp. 884-891.)

DIVERS FACTS WHICH ARE INSUPERABLE BARRIERS TO
CONCERT OF ACTION BY DEFENDANTS WITH RESPECT TO
PRODUCTION, PRICES, COMMISSIONS OR TERMS OF SALE.

We set forth in the margin the names of the members of the defendant Association, the amount of maple, beech and birch timber owned by each member, and the number of matchers (which determine capacity) in their respective plants.¹⁸

The *first fundamental difference* is the amount of maple, beech and birch timber owned by the different members of the defendant Association.

	Amount of Maple, Beech and Birch Timber	Number of Matchers
W. D. Young & Co.....	25,000,000 ft.	8
Kerry & Hanson Flooring Co.....	None	4
Strable Lumber & Salt Co.	None	4
*Bigelow-Cooper Co.	253,750,000	4
Mitchell Bros. Co.	None	0
Cobbs & Mitchell, Inc.	72,674,000	8
Cummer-Diggins Co.	125,000,000	2
East Jordan Lbr. Co.	116,000,000	3
Nichols & Cox Lbr. Co.	None	3
West Mich. Flooring Co.	None	4
**Wisconsin Land & Lbr. Co.	203,000,000	7
I. Stephenson Co., Trustees.....	99,040,000	7
J. W. Wells Lbr. Co.	75,000,000	3
Northwestern Cooperage & Lbr. Co....	86,000,000	5
Grand Rapids Trust Co., Receiver for Wm. Horner	100,000,000	11
Holt Hardwood Co.	None	3
Foster-Latimer Lbr. Co.	50,000,000	3
Flanner-Steger Land & Lbr. Co.....	50,000,000	3
Kneeland-McLurg Lbr. Co.....	105,000,000	1
North Branch Flooring Co.....	None	2
Osgood & Blodgett Mfg. Co.....	None	1
Oval Wood Dish Corporation.....	125,000,000	2

*Now Kneeland-Bigelow Company

**It is a question of law whether the Wisconsin Land & Lumber Co.
is a member of the present Association.

(Defts'. Ex. DD-1, Vol. IV, p. 839, Vol. II, p. 779; Defts'. Ex.
CC-2, Vol. IV, fol. p. 5431, Vol. II, p. 773.)

The *second fundamental difference* is quantity of flooring produced. For the year 1920 the production of the different members ranged from 618,000 ft. to 24,709,000 ft. (Defts'. Ex. CC-1, Vol. IV, pp. 836, 837; Vol. II, p. 772.) For the year 1922 the production ranged from 518,000 ft. to 21,431,000 ft. (Defts'. Ex. CC-2, Vol. IV, fol. p. 5431; Vol. II, p. 773.)

The *third fundamental difference* is location of plant. Members own plants in Chicago, St. Paul and Grand Rapids; in large towns such as Bay City, Saginaw and Cadillac, Mich.; in sawmill villages, such as East Jordan, Mich., Mellen, and Phillips, Wis., and so on down to mere lumber camps in the woods such as Blackwell, Wis. (See p. 4, *supra*, for the location of the different plants.) These differences result in different labor, manufacturing, marketing and other costs. (Vol. I, pp. 396, 213, 428.)

The *fourth difference* is the value and quality of the timber owned or the rough lumber available to the different members. The timber in the Southern Peninsula of Michigan is of higher quality and is worth more than the timber in the Upper Peninsula and Wisconsin. (Vol. I, p. 213.)

The *fifth difference* is that, whereas some members are engaged exclusively in the manufacture of flooring, others not only produce flooring but are also engaged in various branches of the lumber business, as well as in other lines of industry. The *entire output* of some members is flooring (Vol. I, pp. 338-9, 405), whereas, *flooring constitutes but 5% of the business of another member.* (Vol. I, p. 226.) Some produce white pine and other kinds of lumber, such as hemlock, basswood, elm, ash, as well as flooring, and sell maple, beech or

birch lumber; others convert into flooring all the maple, beech and birch lumber they produce; others produce as well as buy rough lumber for converting into flooring; others must buy all such rough lumber. *Some members are also engaged in the salt business or land business, or manufacture shoe-last blocks, bowling pins, broom handles, wood dishes, clothespins, pie plates, etc.* (Vol. I, pp. 197, 226, 233, 286, 338-9, 393, 405, 426.)¹⁹

The foregoing facts evidence marked diversity of size, equipment, organization, business relations, financial strength, credit, needs, business methods, ability, information and reaction to economic and political phenomena, especially as they affect the production and sale of maple, beech or birch flooring.

But there are other and more fundamental differences which preclude concert of action with respect to prices, etc. All the members manufacture maple flooring, 12 manufacture beech flooring, 15 birch flooring. "Some manufacture one wood [maple flooring] some two woods [maple and/or beech or birch flooring] and some all three woods [maple, beech and birch flooring]." (Vol. I, pp. 154, 161, 197, 226, 233, 260, 286, 393.)

As we have already seen, some use the full product of the log in manufacturing flooring; whereas, generally

¹⁹All the defendants did not testify. Court and counsel agreed that typical manufacturers should testify and that the other defendants would, if placed on the stand, testify to "substantially the same effect and to similar facts and circumstances . . . * * * and that they would produce data and correspondence similar in character to that" produced by the defendants that testified. (Vol. I, pp. 225, 409.) The names of the different members also give some indication of the character and magnitude of their business where the record is silent.

the better grades of rough lumber are not used for that purpose. (Page 39, *supra*.)

Different matchers, or flooring machines, which vary markedly in capacity, are also used. (Vol. II, pp. 524-5; Defts'. Robertson Ex. 866, Vol. IV, p. 866; Vol. I, pp. 226, 197, 86, 88, 93, 137, 339.)

All members are not engaged in producing the same thicknesses and widths of flooring.

"Some of them manufacture thick flooring, many of them don't manufacture it at all." (Vol. I, p. 154.)

"Some mills make items that are not made by others." (Vol. II, p. 457.)

Mr. Colby, of Cummer-Diggins Co., testified:

*"We manufacture all faces of 13/16 flooring, from inch and a half, two inch, two and a quarter, three and a quarter, and three and a half inch. We do not manufacture two and a half inch. We also manufacture $\frac{3}{4}$ by an inch and a half and $\frac{3}{4}$ by 2 inches. We manufacture half an inch by 2 inch; half inch by two and a quarter inches. I think that is all."*²⁰ (Vol. I, p. 211.)

"As a matter of fact, our production of different grades differs from the production of other manufacturers. I think we manufacture more of certain widths. For instance, we manufacture more three and a quarter inch flooring than many other manufacturers do." (Vol. I, pp. 221-2.)

Mr. Shepeck, of I. Stephenson Co., Trustees, testified that his company manufactured largely the narrow faces; that *"we have never made three and a quarter inch flooring."* (Vol. I, p. 263.)

²⁰See page 42 *supra* for list of thicknesses and widths.

Flanner-Steger Land & Lumber Co. does not manufacture any 13/16 x 2" maple flooring. (Vol. IV, p. 575,—fol. p. 4595.)

Mr. Greene, of the West Michigan Flooring Co., stated that the three and a quarter inch face *accumulated very slowly* with him (Vol. I, p. 350), whereas, members like the Kneeland-Bigelow Co., with a very large production, and who cater to Eastern trade, manufacture a great deal of the wider faces, because the East demands such flooring, whereas the Middle West prefers the narrower faces. (Vol. I, pp. 393, 262-3.)

Some members manufacture flooring one and one-sixteenth of an inch thick, others do not. (Vol. I, pp. 210, 236.)

And of course the principal trade of the members is different. Mr. McLurg, of the Kneeland-McLurg Lumber Co., of Phillips and Morse, Wisconsin, testified:

"We desire to make flooring so as to enable us to ship mixed carloads to the retail yard trade, and use flooring as a drawing card for other business. Flooring is a side line with us and constitutes about 5% of our business. * * * The freight rates on flooring are exactly the same as on other lumber products that we ship. We sell practically all of our maple flooring in the Middle West. Our birch flooring, however, goes to the eastern markets. We sell our maple flooring in the Middle West because we have the advantage there on freight rates. * * * For instance, if a retailer wants 200 feet of flooring and we can sell him about 16,000 feet of other yard stock, our ability to sell the flooring is nearly as much benefit to our business as a salesman would be. In the territory that we work there is a big demand for one and one-half inch flooring. The Michigan manufacturers don't have that trade. We are usually oversold on the narrow face, whereas the Michigan manufacturers are usually long on it. We

have to take that into consideration in making our prices. We very often buy narrow flooring from other manufacturers in order to take care of our trade." (Vol. I, pp. 226-7. See also Vol. I, pp. 262-3.)

Other manufacturers sell flooring throughout the United States, as well as export it. (Vol. I, pp. 234, 319, 384.) One sells most of his flooring in "Boston, New York, Philadelphia and other points in the same territory" (Vol. I, p. 288), whereas another testified that "the largest portion of our flooring is sold in the East and Middle West because the freight rates are an advantage to us over other manufacturers." (Vol. I, p. 393.)

Mr. Colby testified that—

"I think it was in 1920, the general supply of Factory flooring was immense, probably the largest stock that has ever been on hand—individually we didn't have any, we were oversold most of the time simply because we had worked up a trade for that particular item. Our prices on Factory were advancing while the rest of them were declining." (Vol. I, p. 217.)

See also, Vol. I, pp. 217, 222, 228, 360, 209-210, 261-2, 263, 288, 236, 292, 319, 384, 393-4.

And, of course, the members with plants at Chicago and St. Paul cannot pay the freight on rough lumber and then ship East, South and West in competition with members and nonmember manufacturers, especially with those owning timber. Their trade is necessarily largely confined to buyers in their respective territories, but they are in competition there with both members and nonmember manufacturers.

Different methods of marketing the flooring are also used.

Some members have traveling salesmen; others have none; some have exclusive representatives in different parts of the country, others have none; some depend exclusively upon correspondence; some sell to consumers direct, others will not; some broadcast individual price lists, others do not, etc., etc. (Vol. I, pp. 218, 227, 228-9, 260, 261-2, 288, 319, 360, 393-395, 341; Vol. II, pp. 538, 560, 564-5, 582, 592, 322.)

Some members have their own brands and trade-marks, and each of them pushes the flooring of his own brand or manufacture. (Vol. I, pp. 261, 362; Vol. II, p. 492.)

Quite naturally, or rather inevitably, some buyers expressed a preference for particular brands, or preferred the product of some manufacturer, at least in some grades, to that of others. (Vol. I, p. 431; Vol. II, pp. 455, 462, 466, 467, 562-3, 564, 607.)

Other especially vital factors, are individual stock conditions and warehouse capacity.

We have seen that the different grades and widths must be manufactured together, and that all of them accumulate, even though a manufacturer's *principal* trade and production are in certain instances largely confined to particular widths or thicknesses. (Pages 43-44, *supra*.)

The *ordinary* warehouse capacity of such members of the present Association as were members of the Association in existence during 1918, (16 in all), then ranged from 300,000 feet to 4,000,000 feet. (Gov. Ex. 52-J, Vol. IV, p. 441.) The *maximum* warehouse capacity of such members at that time, ranged from 450,000 feet to 5,000,000 feet. (Id.) No figures for later years are in the record.

The semi-annual report for July 14, 1923, is illuminating. The *stocks on hand* on January 1, 1923, of the various members ranged from 117,000 feet to 4,115,000 feet. On June 30, 1923, they ranged from 101,000 feet to 2,750,000 feet,—some members gaining, others losing during the interim. On January 1, 1923, the *unfilled orders* of the different members ranged from *nothing* to 2,837,000 feet; on June 30, 1923, they ranged from *nothing* to 4,635,000 feet,—some members gaining, others losing. The *shipments* of the different members for the first half of the year 1923, ranged from 146,000 feet to 11,260,000 feet; *production* from *nothing* to 11,466,000 feet; *new orders*, from 146,000 feet to 9,998,000 feet. (Gov. Ex. 41-2U, Vol. IV, fol. p. 2107.) See also Gov. Ex. 40-5R, Vol. IV, fol. p. 2050, for the report of April 17, 1923.

The different *buyers* as well as the *defendants*, testified that the controlling factors as to prices of the Association members were competition of other members and nonmembers and *individual stock conditions*. (Vol. I, pp. 198-200, 210-217, 229, 237-8, 243-4, 260-263, 289-293, 322, 327, 395, 398, Vol. II, pp. 537-8, 560, 564, 565-9, 580, 591-2.)

The reason for this is well stated by Mr. Klesner, a representative of the Grand Rapids Trust Co., Receiver for William Horner, as follows:

"We manufacture about 50,000 feet a day, and if we accumulate stock in the warehouses so that they are full, we have simply got to get rid of it. We couldn't shut down and disorganize our crew." (Vol. I, p. 335.)

Mr. James E. Dewey, of the Kneeland-Bigelow Co., testified:

"In determining what prices we shall charge, our

condition would govern almost entirely. I mean my stock conditions, my orders on hand. We have a very large output, practically fourteen million feet a year and we have difficulty in keeping that sold. It is of a great deal more importance to me to have my plant produce to full capacity at all times than it is to raise my prices every time it is possible to do so. We would lose a great deal more money if our plant were compelled to curtail its output than we would by failing to get the top of the market at all times." (Vol. I, p. 398.)

Members are compelled to move flooring by taking whatever prices they can get for it. (Citations on p. 73, *supra*; and Vol. I, pp. 243-4, 277.)

Mr. Charles T. Kerry, of the Kerry & Hanson Flooring Co., testified as follows:

"We have run our plant at full capacity except in 1920 or 1921,²¹ when the shed got full and we did not care to go out and purchase any more lumber because we knew we could not move flooring. We ran as long as we could and until the shed got full. In order to get through the winter I think we shut down for about two months, when we were sure that the men could be taken care of. Grayling is a small town and we lose our men if we let them get away from us. We ran until our storage capacity was ex-

²¹In 1920-1921 came the big slump after the unprecedented demand for building materials due to the lifting in 1918 of war-time building restrictions. Stocks on hand (~~45~~⁴⁵ members) mounted from about 7,500,000 ft. on January 1, 1920, to more than 25,000,000 ft. on December 31, 1920; unfilled orders on January 1, 1920, amounted to more than 30,000,000 ft., whereas, by December 31, 1920, they had dropped to less than 3,000,000 ft. (Defts'. Grant Keelha Ex. 22, Vol. V, p. 955.) These conditions were expressed in the prices. During the same period Factory flooring dropped from more than \$150 per thousand ft. to less than \$20; Clear from \$180 to less than \$100; No. 1 from more than \$170 to \$55. (Defts'. Gordon Ex. 7, Vol. V, p. 901.)

hausted. Flooring must be kept under cover."
(Vol. I, p. 406.)

Another factor was well stated by Mr. DeWitt:

*"The demand may be very large for one grade or one thickness or one face at one time and very small at others. The demand for each grade or thickness is not * * * constant, but it is continually fluctuating."* (Vol. I, p. 237.)

All the foregoing conditions produced the extraordinary variations in the prices quoted or received at any given time by the members of the defendant Association. The differences between the prices received by different members were as much as 65%. (Vol. II, pp. 715-16.)

SINCE 1913 COPIES OF ALL ARTICLES OF ASSOCIATION HAVE BEEN SUBMITTED TO THE DEPARTMENT OF JUSTICE, AND TO THE FEDERAL TRADE COMMISSION SINCE 1915.

THE DEFENDANTS HAVE DONE NOTHING SECRETLY; THEY HAVE AT ALL TIMES ACTED UPON THE ADVICE OF COUNSEL; THE STATISTICS GATHERED BY THEM HAVE BEEN SENT TO THE DEPARTMENT OF COMMERCE, AND THE AGENTS OF THE DEPARTMENT OF JUSTICE WERE GIVEN COPIES OF WHATEVER DOCUMENTS THEY WISHED BY THE ASSOCIATION'S SECRETARY.

Mr. DeWitt testified:

"We joined a Maple Flooring Manufacturers Association in March, 1919, and continued to be a member of it about one year. Upon the so-called Memphis decision, we felt that perhaps the Association as it was being conducted would be declared illegal and for that reason we resigned from the Association at that time. I don't just remember when we did resume our membership. I think we resumed our membership in the old Association perhaps sometime in 1921. We are members of the present Association. Subsequent to our first resignation and before resuming our membership, we received a legal

opinion from Mr. Newman and resumed our membership believing that the Association was legal at that time. Of course, we knew nothing about the law, and had to rely upon advice of counsel. We had no intention of violating the law. On the contrary we wish to comply with it." (Vol. I, p. 233.)

See also, Vol. I, pp. 163, 177.

For Mr. Newman's opinion after the District Court's decision in the Hardwood (or Memphis) case, see Defts'. Ex. A, Vol. IV, p. 797. For his analysis of the Supreme Court's opinion in the same case, see Gov. Ex. 15-AA, Vol. III, pp. 146-152.

That all articles of association, plans of operation, etc., were submitted to the Federal Trade Commission and the Department of Justice, see Vol. I, pp. 72, 74, 143, 77-8, 146, 79-80, 81-82, 98, 145, 148-149, 177; Vol. II, p. 794; Gov. Ex. 75, Vol. IV, p. 529; Gov. Ex. 10 and 11, Vol. III, pp. 76-84; Gov. Ex. 12 and 13, Vol. III, pp. 84-97; Gov. Ex. 14-D, Vol. III, p. 101; Gov. Ex. 15-M, Vol. III, p. 130; Gov. Ex. 15-BB, Vol. III, p. 152; Gov. Ex. 52-R, Vol. III, p. 448; Gov. Ex. 63-E, Vol. IV, p. 502; Defts'. Ex. A, Vol. IV, p. 797, Defts'. Ex. B, B-1 and C, Vol. IV, pp. 798-804; Defts'. Ex. I, Vol. IV, p. 818.

That the present Association has regularly furnished the Department of Commerce all the statistics that said department will receive, see Vol. I, pp. 167-171; Vol. II, pp. 787-8; Defts'. Ex. KK-4, KK-5, Vol. IV, p. 843.

That the agents of the Department of Justice were given copies of whatever documents they wanted by the Secretary of the Association at various times during some five or six years before the filing of the petition herein, see Vol. I, pp. 102, 109, 112, 122, 171; Gov. Ex. 14-K, 14-L, Vol. III, pp. 102-104.

Some three months before November 26, 1923, the District Court set the cause for hearing on the date last mentioned. During October, 1923, numerous depositions were taken by the parties. At that time counsel for the Government were advised by counsel for defendants

"that the solicitors of the defendants had collected a great mass of data, but had not been able to confer personally with all their clients in order to prepare for the hearing of said cause, but that schedules for appointments would shortly thereafter be prepared, and they intended to spend the major portion of November, prior to the 26th day thereof, in a series of conferences at Chicago, Illinois, with their clients in order to prepare for the hearing of said cause." (Vol. I, p. 50.)

Thereafter, and on or about November 1, 1923,—

"the Honorable A. T. Seymour, Assistant to the Attorney General of the United States, and of counsel for the plaintiff in said cause, demanded of Newman, Poppenhusen, Stern & Johnston, as solicitors for the defendants, the physical possession of all files, documents and other data that the said solicitors had received from their clients in order to ascertain the facts and to be in a position to advise their clients as to the law, and to represent them on the hearing of said cause. That the Honorable A. T. Seymour informed said firm of solicitors that unless his said demand was complied with he would take other steps to procure the information that he desired. That within a week or ten days after the ultimatum above mentioned, the subpoenas duces tecum above mentioned were issued." (Affidavit in support of motion for continuance, Vol. I, p. 52.)

Subpoenas *duces tecum* were issued requiring the defendants and one of defendants' counsel to appear before the Grand Jury at Grand Rapids, Mich., on November 9, 1923, despite the fact that the hearing of the cause had been set for November 26, 1923. (Vol. I, pp. 49, 50, 51.)

And *after* Judge Sessions had quashed the subpoenas (on the authority of *Hale v. Henkle*), and had suspended the operation of the decree herein pending appeal, the Government procured the indictment of the defendants by a Grand Jury at *Chicago*, Illinois. (Appellants' Suggestions in Support of the Government's Motion to advance this cause on Supreme Court docket.)

The manifestly untrue allegations in the Government's petition herein, that "the *defendants* make sales of the flooring manufactured by them from their said offices in this district [Western District of Michigan]" (Vol. I, p. 2), and the fact that the Association's headquarters had always been at *Chicago* (Vol. I, p. 1), and the further facts that this Court had reversed the decision of the Federal Court at *Chicago* in the Linseed Oil case *after* the institution of this suit at Grand Rapids and *before* the indictments above mentioned; the threat of Mr. Seymour and the legal frustration of his attempted perversion of the power of Government; the suspension of the decree by Judge Sessions, and the subsequent indictments at *Chicago*, are at least interesting.

Of course, all this took place during Mr. Daugherty's administration, and not during that of his successor.

BRIEF OF ARGUMENT.

I.

The proof shows that the petitioner's charge that

"The defendants agreed to adopt and have concertedly adopted Cadillac, Michigan as an arbitrary freight basing point from which they compute and charge freight, regardless of the point from which each may actually ship flooring." is not true.

Vol. I, pp. 335, 235, 260, 228.

II.

The proof showed that the terms of sale generally used by some of the defendants were those universally used in all branches of the lumber business. Moreover the defendants varied even their own terms to suit the convenience of buyers, or to conform to the customs that obtained in the different markets.

Vol. I, pp. 94, 95, 228, 236-307, 208, 209, 385, 155, 56.

Vol. IV, pp. 811-814, Fol. pp. 5249-5254.

III.

The proof showed that the commissions allowed by the different defendants ranged from nothing to \$4.00 per M. feet, and that there was no uniform practice followed by any defendant, much less by all the defendants.

Vol. I, pp. 286, 288-289, 393, 533, 535, 534, 94, 323, 229, 261, 262, 269-273, 173.

IV.

The petitioner wholly failed to support by proof the averments that the defendants had always maintained and still maintain "a practical uniformity between themselves of net f. o. b. selling prices," and "a practical uniformity between themselves of net delivered prices."

The undisputed proof showed the existence of great price variation and intense competition.

For proof:

By Government witnesses see:

Vol. I, pp. 84, 83, 85, 86, 88, 89, 92, 94, 97, 141.

By Defendants' witnesses:

Chicago dealers: Vol. I, pp. 409-427, 427-435;

Vol. II, pp. 449-458, 458-461, 461-466, 467-471.

Milwaukee dealer: Vol. II, pp. 445, 435-448.

Boston dealers: Vol. II, pp. 530-539, 560-564, 564-569.

New York City dealers: Vol. II, pp. 569-578,

578-581, 581-584, 584-587.

Philadelphia dealers: Vol. II, pp. 587-596, 596-

604, 605-616, 616-624.

Minneapolis and St. Paul dealers: Vol. I, pp. 225-226.

Association Statistics: Vol. II, pp. 781-782.

Defts'. Ex. GG: Vol. IV, fol. p. 5458.

Appendix B: Vol. II, pp. 780-781.

Defts'. Exs. FF to FF-9, inclusive: Vol. IV, fol. pp. 5438-5447.

Appendices C and D, Defts'. Exs. II-1 and II-2:

Vol. IV, fol. pp. 5458-5459.

Defts'. Grant Keehn Ex. 28: Vol. V, p. 969; Vol. II, pp. 714-717.

Appendix E, Defts'. Ex. HH: Vol. I, pp. 782-783; Vol. IV, fol. pp. 5449-5457.

Correspondence of members with agents and buyers: Vol. I, pp. 339-383, 303-317, 268, 273-285; Vol. II, pp. 409, 225.

Government's abandonment of its contention that that ever had been uniformity of prices: Vol. II, p. 857.

V.

The proof showed that the advertising campaign conducted by the defendant Association and its predecessors was necessary in order to meet similar campaigns that were being carried on by other associations and manufacturers of competing floorings, both wood and composition. This could not be done by the defendants individually.

The advertising was intended to promote the sale of maple, beech and birch flooring manufactured by Association members. Such flooring was standardized, of uniform quality, guaranteed by the Association and protected by an efficient inspection service. The advertising featured quality and service. It gave useful information. It said not a word concerning prices.

The Government adduced no proof that the advertising in question was dishonest or misleading.

Vol. I, pp. 150, 294-295, 221, 334, 225; Vol. III, pp. 124-125, 193-195.

VI.

The Government offered no proof whatsoever in support of the charge:

"The use of the uniform trade-mark and the character of the advertising put out by the defendant Association intensify the tendency to establish and maintain uniform prices, and also practically eliminate all competition between the defendants based on the quality of their respective products."

Neither did the Government offer any proof that the standards adopted and maintained by the defendants were not fair and reasonable.

The proof showed that the quality of the flooring had been improved by means of the adoption and maintenance of such standards, that disputes between manufacturers and buyers had been greatly reduced, and that litigation had been eliminated.

The Government's own witnesses, as well as buyers all over the United States, were both unanimous and enthusiastic in their praise of the standardization of maple, beech and birch flooring by the defendants. Buyers testified that the flooring manufactured by the defendants was superior to that manufactured by others, and that standardization of such flooring by the defendants had increased competition and greatly benefited the public.

Chaotic conditions that existed before standardization: Vol. II, pp. 480-483, 501.

First steps to improve conditions, Vol. II, pp. 481, 499.

The standards: Vol. II, pp. 499-502, 509-510.

Defts'. Robertson Ex. 2: Vol. IV, p. 868.

More explicit and detailed grading rules: Vol. II, pp. 486, 481-482; Vol. IV, fol. pp. 531-536.

Defts'. Ex. BB; Vol. IV, pp. 826-830; Vol. II, p. 769; Vol. IV, p. 829.

The adoption of standard gauges: Vol. II, pp. 486-492; Vol. IV, pp. 829-830; Vol. I, pp. 261, 420-426.

Inspector of Mills: Vol. II, pp. 503-504.

Reinspection service: Vol. I, pp. 425-430; Vol. II, pp. 455, 459, 565, 581; Vol. II, pp. 491-492, 504-505; Vol. I, pp. 149, 286, 293, 300, 298; Vol. II, p. 498.

Results of standardization: Vol. II, pp. 490-491, 506-507, 509-510, 490-491; Vol. I, pp. 220-221, 251-255, 286-287, 293-294, 300-303, 307, 334, 398-399; Vol. I, pp. 94, 140, 141, 92, 85.

Proof that standardization has increased competition and reduced cost of distribution: Vol. II, pp. 573-574, 579-586, 618, 593, 485.

Attitude of Department of Justice: Vol. I, p. 253.

Trade Association Activities and the Law (Jones), pp. 80-102.

VII.

The proof shows that the prices of maple, beech and birch flooring have at all times fluctuated in harmony with the laws of supply and demand. Distinguished statisticians and economists so testified and supported their evidence by a mass of statistics, charts and other data.

The record conclusively shows that the alleged minimum price plans were never enforced, and that in actual practice each member sold his flooring at whatever price he could get, and ran his business just as he pleased. (It is undisputed that said plans were never adopted by the present Association.)

The undisputed proof also shows that prices during the earlier years were never uniform because of the diversities mentioned on pages 66-75 supra; whereas, from 1919 to 1921, inclusive, they were controlled by abnormal economic conditions which found adequate expression in the rise of factory grade flooring from \$45.00 per M. feet to \$150.00, and its decline to \$15.00.

At no time does the proof show fixation or control of price by the defendants; and, as we have seen, even the Government admitted at the hearing that there had never existed any uniformity of prices among the defendants.

Abandonment of minimum price plans: Vol. I, pp. 101, 141-146, 227-228, 233-234, 258, 261, 378-379, 321-322; Vol. III, pp. 207, 230-231, 246-247, 249-251, 299, 333, 340, 411; Vol. IV, pp. 435-436, 519-521; Vol. I, p. 138.

Economic defense; Mr. Gordon's testimony: Vol. II, pp. 625-627, 628-629, 632-633, 634-635.

Defts'. Gordon Exs. 6 and 7: Vol. II, pp. 635-647; Vol. V, p. 899; Vol. II, pp. 635-647; Vol. V, p. 901; Vol. II, p. 646.

Appendix F, Defts'. Gordon Ex. 6; Vol. II, pp. 647-651.

Defts'. Gordon Exhibits 9-13: Vol. II, pp. 651-63; Vol. V, pp. 917-925.

Appendix G, Defts'. Gordon Ex. 14: Vol. V, p. 927; Vol. II, pp. 667, 669, 666; Vol. I, pp. 198, 234-35, 346-48, 381, 383, 432-33, 446; Vol. II, pp. 458, 574; Vol. I, p. 131.

Appendices H, I, J, K, L, M and N, Defts'. Exhibits K, L, T, T-1, CC₁, OO, PP: Vol. I, pp. 224, 229, 268; Vol. II, pp. 769, 797, 798; Vol. IV, pp. 820, 821, 822-25, 834; fol. p. 5505.

Defts'. Gordon Ex. 15: Vol. II, pp. 670-71, Vol. V, p. 932.

Defts'. Gordon Ex. 16: Vol. V, pp. 933-43, Vol. II, p. 672; Vol. II, pp. 673-76.

Mr. Grant Keehn's testimony, Defts'. Grant Keehn Exs. 17 and 18: Vol. V, pp. 945-947; Vol. II, pp. 679-685.

Defts'. Grant Keehn Ex. 19: Vol. II, pp. 686-688; Vol. V, p. 949; Vol. II, pp. 690, 697.

Appendix P, Defts'. Grant Keehn Ex. 21: Vol. II, p. 690; Vol. V, p. 593; Vol. II, pp. 692-700.

Defts'. Grant Keehn Exs. 22, 23 and 24: Vol. V, pp. 955-959; Vol. II, pp. 700-705.

Appendix Q: Vol. II, pp. 705-707, 708-712.

Defts'. Grant Keehn Exs. 25, 26 and 27: Vol. V, pp. 961-967; Vol. II, pp. 712-714.

Testimony of Profs. Hettinger and Vanderblue: Vol. II, pp. 722-739, 740-769.

VIII.

The Government failed to support by proof the essential allegations of the petition with respect to the activities of the present Association, which was organized on March 29, 1922.

A.

GENERAL PROVISIONS OF PRESENT ARTICLES.

Government's Ex. 8: Vol. III, pp. 64-74; Vol. I, p. 286; Vol. II, p. 789; Vol. I, pp. 149-150, 173-174, 126, 171, 150.

B.

ASSOCIATION MEETINGS.

The proof is undisputed that at Association meetings future prices of flooring were never discussed, owing to the explicit instructions of Mr. Newman.

Vol. I, pp. 132-134, 174, 178, 206-208, 213, 236, 210, 212, 295-298, 330, 332.

United States v. U. S. Steel Corporation, 223 Fed. 55, 154, 55.

C.

AVERAGE COSTS.

Article 14, Vol. III, p. 69.

The essentially hazardous nature of capitalist industry necessitates cost accounting.

Marshall's *Readings in Industrial Society* (University of Chicago Press), pp. 144, 166 *et seq.*, 474-519, 404-412, 483-485.

Hobson's *The Evolution of Modern Capitalism* (new ed. Scribner's), p. 1.

Ashley's *The Economic Organization of England*, pp. 35-36.

Jones' *Trade Association Activities and the Law*, p. 62.

Investigation and recommendations of the Federal Trade Commission, and Address of Hon. Edward N. Hurley, Vice Chairman of the Federal Trade Commission: Secs. 1 and 2 of Art. 14 are not contrary to law.

1 Taussig *Principles of Economics* (3rd ed. rev. 1922), p. 172.

Sec. 3 of Art. 14 contains only proper elements of costs.

Marshall's *Readings in Industrial Society*, pp. 451-453.

Trade Association Activities, issued by Government Printing Office for the Department of Commerce, pp. 76-77; Vol. II, p. 722.

Defts', Ex: "CC": Vol. III, p. 834.

MANUFACTURING AND MARKETING COSTS.

Government's Ex. 25: Vol. III, p. 279; Vol. I, pp. 104, 107, 151; Vol. III, pp. 153, 175, 183, 185, 313; Vol. IV, pp. 451, 464; Vol. I, pp. 107-188, 333, 173.

The elements contained in the manufacturing and marketing costs are proper.

Taylor's *Principles of Economics* (8th ed. 1923), pp. 312-318.

Taussig's *Principles of Economics* (2nd ed. rev. 1920), Vol. II, p. 26.

Accounts; Their Construction and Interpretation, by William Morse Cole (revised and enlarged ed., 1915), p. 301.

Article by Edward L. Suffern in 15 *Journal of Accountancy*, p. 330.

Cost Accounting, Theory and Practice, by J. Lee Nicholson, pp. 33 *et seq.*: Vol. II, p. 260; Vol. I, pp. 170, 151, 259; Vol. II, p. 789.

Defts'. Ex. LL: Vol. IV, fol. pp. 5467-5470; Vol. I, pp. 328, 237, 252, 200, 213, 260, 397, 431, 432, 219.

Costs Surveys Committee: Vol. I, pp. 395-96, 399-401, 104, 105, 297, 171-72, 126.

Test runs and average costs: Vol. I, pp. 396-97, 451, 468, 471, 493-95, 502-503; Government's Exhibit 63-G: Vol. III, pp. 504-606; Vol. I, pp. 105-107.

Taylor's Principles of Economics (8th ed.), pp. 344-46.

Vol. I, p. 107; Vol. IV, fol. pp. 5331-5336; Vol. I, pp. 176, 811-814, 151-52, 229, 92, 97; Vol. II, pp. 791-92.

Freight Rates, D.

Freight Rates, D.

FREIGHT RATE BOOKS.

Freight Rates, D.

Vol. I, pp. 412, 445; Vol. II, pp. 459, 465, 536, 361, 565, 573, 579, 585, 593, 623; Vol. I, p. 174; Vol. II, pp. 456, 450, 451, 453; Vol. I, pp. 209, 235, 243, 250, 268-273, 112, 115-117.

Appendices R and S, Government's Exhibits 36-A; Vol. I, p. 117; Additional Exhibits, fol. pp. 907-908, and Defendants' Exhibit EE:

Vol. II, p. 779; Vol. IV, fol. p. 5437; Vol. III, p. 329; Vol. IV, fol. pp. 5322-25, 5327-28; Vol. I, pp. 155, 111-116, 126; Vol. IV, fol. pp. 5288-5325; Vol. I, pp. 228, 259-260, 288, 235, 393, 383-84, 322-23.

AVERAGE COSTS.

Vol. I, pp. 155, 173, Vol. IV, fol. p. 5326.

DELIVERED COST CHARTS.

Vol. I, pp. 118, 153-56.

DIFFERENTIALS.

Vol. IV, fol. pp. 5249, 5252; Vol. I, pp. 152-53, 155, 201, 237, 245, 249, 250, 268, 269, 271, 335, 262-63, 217, 353, 360, 375.

WHAT FREIGHT RATE BOOKS NOW CONTAIN.

Vol. I, pp. 155-56; Vol. IV, fol. pp. 5162-5336.

E.

THE STATISTICAL REPORTS.

Monthly sales reports to Secretary: Vol. III, p. 70; Government's Exhibits 46, 46-A, 46-B: Vol. III, fol. pp. 2854-56; Vol. I, p. 123; Government's Exhibit 48: Vol. III, fol. p. 2858; Vol. I, p. 124.
Government's Exhibit 57: Vol. III, fol. p. 2857; Vol. I, pp. 123-24.
Government's Exhibit 45: Vol. III, fol. p. 2853; Vol. I, pp. 122-23; Vol. IV, pp. 572-73; fol. p. 4587.

Weekly sales reports to Secretary: Government's Exhibit 44: Vol. III, fol. p. 2852; Vol. I, pp. 122-23, 127, 155-58, 121.

Reports made by Secretary to Members: Vol. I, pp. 158, 163, 173, 176, 390, 399.

Weekly sales reports made by Secretary: Vol. I, pp. 125, 156-58; Vol. IV, pp. 812, 814; Vol. I, pp. 156-59, 162-63, 130-1, 390, 399, 123, 125-26, 127, 130, 204; Vol. III, pp. 390-97, 398-403; Defendants' Exhibit G: Vol. IV, fol. pp. 5337-39; Defendants' Exhibit G-1; Vol. IV, fol. pp. 5340-42.

Monthly report made by Secretary: Vol. I, pp. 128, 132; Government's Exhibit 50: Vol. III, fol. pp. 28, 61-69; Vol. I, pp. 128-132; Defendants' Exhibit H, H-1 and H-2: Vol. IV, fol. pp. 5343, 5353, 5362; Vol. I, pp. 158-163; Vol. IV, pp. 5352, 5361, 5370.

Quarterly reports: Vol. I, pp. 130-31, 160-62.
Reports are unaaccompanied by any analysis, comment, or recommendation: Vol. I, pp. 163-65; Defendants' Exhibit I: Vol. IV, p. 818; Vol. III, pp. 146-152.

There are no fines or penalties for failure to make reports: Vol. I, pp. 121, 161, 389.

No audits are made: Vol. II, p. 861.

The statistics collected have been given the widest publicity and go to buyers as well as Members of the Association: Vol. I, pp. 165-69, 169-171; Vol. II, pp. 787-88.

The statistics are only one of many sources of information possessed by Members: Vol. I, pp. 211-212, 291, 335, 385-86, 394-95, 397, 229, 260, 319, 324, 326.

Use made of statistics by Members and importance attached to them: Vol. I, pp. 397-99, 210-212, 215-216, 221-22, 227, 230-31, 386-87, 389, 252, 264, 291, 289, 292-93, 324, 326-27, 198-201, 211-12, 213, 222, 227, 229, 230-31, 237-38, 243-44, 248, 259, 263-64, 268-285, 288, 290, 292, 303-18, 322, 326-27, 335, 385, 388-89.

IX.

A comparison of the prices obtained by Members with the AVERAGE COSTS (issued by the present Association) and with the TABLES OF VALUES (issued by the Association immediately preceding), conclusively demonstrates not only that the Government's charge that there was uniformity of prices is not true, but that neither the Average Costs nor the Tables of Values were used by the members either as minimum prices or as a basis for determining individual prices.

Government's Exhibit 79: Vol. IV, pp. 583-796; Vol. II, pp. 847, 859; Vol. III, pp. 372, 390; Vol. II, pp. 850-59; Vol. IV, pp. 799-807; Vol. I, pp. 148-49; Vol. IV, p. 529; Vol. I, pp. 143-46; Vol. III, pp. 37-44.

Appendix T, Government's Exhibit 28-N: Vol. III, p. 315; Government's Exhibit 52-II, 52 II: Vol. IV, pp. 461-62; Vol. III, pp. 881-82; Vol. IV, pp. 975-77.

Appendix U, Appendix V, Appendix Q: Vol. II, pp. 539-556, 557-560, 785-87.

Principles of Economics, by F. W. Taussig (3d ed. rev.), Vol. II, pp. 439-440.

Appendix W (pp. 62-64).

X.

The present Articles of Association do not even attempt to regulate production, sales, prices or to otherwise limit the discretion of members in the manufacture or sale of flooring. Except the agreement to manufacture flooring of standard quality and to report past transactions, each member is left wholly free to conduct his business as he pleases. There is no proof of any other agreement, express or implied, among said members.

In view of the undisputed proof that the PRICES of the members of the present association for maple, birch and beech flooring

(a) have always been **FAIR AND REASONABLE**,
 (b) were generally lower than the prices of nonmembers, although the flooring manufactured by members is superior to that manufactured by nonmembers,

(c) were never uniform and were often below the cost of production of both members and nonmembers,

and that the flooring manufactured by members is in all respects satisfactory to the public, it necessarily follows that neither the contract nor the conduct of defendants has unreasonably restrained interstate trade or commerce.

2 Holdsworth's History of English Law (3rd ed.), pp. 459 *et seq.*

Unwin's *The Gilds and Companies of London*.

Ashley's *Introduction to English Economic History and Theory*, Vol. I (Part II); pp. 168-69, 126, 137.

Marshall's *Readings in Industrial Society*, p. 592.

Ashley's *Introduction to English Economic History and Theory*.

Darcy v. Allein, 11 Co. Rep. 84-b, 87-a.

27 Halsbury's Laws of England, 527-29.

- Attorney General v. Adelaide Steamship Co.*
(1913), 109 L. T. R. 258.
- F. Cade & Sons v. Daly & Co.* 1 I. R. 306.
- U. S. v. Trans-Missouri Freight Association*,
156 U. S. 290.
- U. S. v. U. S. Steel Corporation*, 251 U. S. 417.
- Montague & Co. v. Lowry*, 193 U. S. 38.
- American Column & Lumber Co. v. U. S.* 257
U. S. 377.
- Board of Trade of City of Chicago v. U. S.* 246
U. S. 231.
- Standard Fashion Co. v. Magrane-Houston Co.*
258 U. S. 346.
- U. S. v. U. S. Steel Corporation*, 223 Fed. 55.
- U. S. v. E. I. Du Pont de Nemours & Co.* 188
Fed. 127.
- Manchester & Lawrence R. Co. v. Concord R.*
Co. (N. H.) 9 L. R. A. 689.

XI.

In addition to the undisputed proof that the prices obtained by members of the present Association had always substantially varied; that the prices of such members were fair and reasonable, and that although the flooring manufactured by such members is superior to that manufactured by nonmembers, the prices of members are generally lower than those of nonmembers, there was the following undisputed proof:

(a) by the Government's witnesses, including both competitors and buyers, that competition among the defendants themselves, as well as between the defendants and nonmembers, was strong, active and vigorous;

(b) by dealers, large and small, in the principal centers of consumption, that there was and always had been vigorous competition among the defendants;

(c) by dealers that the defendants were unusually fair, considerate and honorable in their dealings with purchasers of maple, beech and birch flooring;

(d) by economists and statisticians that the prices of the several members had fluctuated in accordance with the laws of supply and demand.

No witnesses were produced by the Government to testify to fixation or uniformity of prices, unfair prices or restraint of trade.

In view of the foregoing facts, the Government's petition (under the decision of this court in the Steel Corporation case) should have been dismissed.

U. S. v. U. S. Steel Corporation, 251 U. S. 417, 447-49.

The Evolution of Modern Capitalism, pp. 170-173.

The Trust Movement in British Industry (Macrosty), pp. 6-9.

Trusts, Pools and Corporations (revised ed.), by Ripley, pp. 1-77.

XII.

The following facts:

- (a) fundamental differences that exist among Association members;
 - (b) unstable basis of the maple, beech and birch flooring industry;
 - (c) relation that Association members bear to the flooring industry as a whole;
 - (d) lack of control of any appreciable proportion of raw material;
 - (e) fragmentary character of statistics collected and distributed;
 - (f) publication of statistics collected;
 - (g) relatively superior position of lumber dealers who buy or handle from ninety to ninety-five per cent of the flooring manufactured by Association members,
- and many other facts disclosed by the record, conclusively demonstrate that the collection and distribution of statistics by the Association cannot injuriously affect interstate trade or commerce.

The necessity for the collection and distribution of trade statistics for the benefit of both buyers and sellers is recognized by all modern economists.

Monopoly and Competition, by Hermann Levy,
pp. 296, 179, 187, 190-96, 202, 203, 303, 307-316.

United States v. Quaker Oats Co. (C. C. A. 7th Cir.), 232 Fed. 499, 502.

United States v. American Can Co. 230 Fed. 859, 900.

United States v. Whiting, 212 Fed. 466, 475.

The Evolution of Modern Capitalism, by John A. Hobson, pp. 195-6, 193, 231-33, 403-405, 148-150, 329.

Readings in Industrial Society, by Leon C. Marshall (University of Chicago Press), pp. 141, 514, 833, 294-96, 419, 936-37, 498, 479.

Principles of Economics, by E. R. A. Seligman, p. 141.

Manufacturing Industries in America, by Malcolm Keir, pp. 293-94.

Industrial Democracy, by Sidney and Beatrice Webb, pp. 662 *et seq.*

The Combination v. The Consumer, by H. B. Reed. *International Journal of Ethics*, XXIII, pp. 159-69.

Social Theory, by John Bascom, pp. 145-54.

Elementary Principles of Economics, by Irving Fischer, pp. 427 *et seq.*

Principles of Economics, by F. W. Taussig (3rd ed. revised), Vol. I, pp. 391-97.

Principles of Economics, by F. W. Taussig (3d ed. revised), Vol. II, p. 52.

Trade Association Activities, issued by the Department of Commerce, pp. 3, 12, 27-29, 216-67.

Trade Association Activities and the Law, by Franklin D. Jones, pp. 44-60.

Previous decisions of this Court distinguished.

American Column & Lumber Co. v. U. S. 257 Fed. 377.

Taussig's *Principles of Economics* (3rd ed. revised), Vol. II, pp. 419-20.

Philosophy and Political Economy, by James Bonar, pp. 38, 22, 68, 61.

English Economic History and Theory, by Sir W. J. Ashley, pp. 128, 145.

History of Economic Doctrines, by Gide and Rist, pp. 89, 410, 96.

U. S. v. American Linseed Oil Co. et al. 262 U. S. 371.

XIII.

It is both the privilege and the duty of equity not only to prevent evil but to hold fast to that which is good. Its decrees are, therefore, infinitely various and flexible.

The decree entered by the District Court herein is as unselective as a hurricane or an earthquake. If unleashed it will convert into junk machinery of great pecuniary and social value.

ARGUMENT.

I.

The proof shows that the petitioner's charge that

"The defendants agreed to adopt and have concertedly adopted Cadillac, Michigan, as an arbitrary freight basing point from which they compute and charge freight, regardless of the point from which each may actually ship flooring." (Tr. 6, fol. 11.),

is not true.

WHY THE DISTRICT COURT WENT ASTRAY.

The District Court refused to limit the petitioner with respect to time, subject matter, or space. Whatever evidence the petitioner offered, despite its fragmentary character, or source, was "received subject to objection," even though it concerned associations that had ceased to exist some two or three decades or years before the hearing. This great mass of irrelevant matter not only confused the issues and prejudiced the present association and its members, but caused the appellants here to pay some \$16,000 for printing (and Clerk's fees), despite the fact that counsel for petitioner stipulated that much of said matter need not be printed. (Vol. V, pp. 975-977.)

In the opinion filed herein, the District Court put to

himself the questions set forth in the margin.²² The question of *monopoly* or attempt to monopolize under *Section 2* of the Sherman Act was not raised by the petitioner. The petition herein was based *solely* upon *Section 1* of said Act. And, apparently, the great mass of irrelevant matter concerning long-extinct associations and practices that had been abandoned years before the institution of this suit, rested so heavily upon the mind of the District Court that the evidence concerning the *present* association, its methods, and practices, was, in comparison, lighter than the gossamer that "idles in the wanton summer air." Apparently, *all the facts heretofore set forth, as well as those which will be adduced during the course of our argument*, rested as lightly upon the scale "as sleep upon tired eyes." We believe that this court will be amazed at the amount, consistency and cogency of this evidence, of which not even a hint is given in the opinion filed by the District Court. *Furthermore, the learned District Court wholly disregarded the allegations of the petition herein, and made no effort to determine the relation that existed between the petition and the proof.*

^{22a}Does the conduct, past and present, of the defendants indicate a purpose to monopolize the maple, beech and birch flooring industry? Do the present Articles of this Association, either in and by their own force and terms or when viewed in the light of prior agreements of like nature, exert a pressure or compulsion toward the control of production and prices? Does the plan or system followed and pursued by defendants in their operations have a direct and necessary tendency to destroy the kind of competition to which the public has a right to look for protection and which the Congress intended to preserve in and by the enactment of the Sherman Anti-Trust Act? The decision of this case depends and hinges upon the answers to be given to these questions." (Tr. 55.)

CONTROLLING PRINCIPLES.

In order that the issues here may be clear, we take the liberty of recalling to the mind of this court a few elementary principles. Some of them are well stated in *United States v. United States Steel Corporation*, 223 Fed. 55, 59-60, as set forth in the margin.²³

In the same case, on appeal, this court said:

"Our present purpose is not retrospect for itself, however instructive, but *practical decision upon existing conditions*. * * * In other words, our consideration should be of *not what the corporation had power to do or did*, but what it has

²³Now unlawful restraints of trade are of three kinds, past, present and future. As to present and future restraints, Congress by section 4 empowered 'the Attorney General to institute proceedings in equity to prevent and restrain such violations,' and to that end invested the courts 'with jurisdiction to *prevent and restrain violations of this act*.' The jurisdiction here conferred is the chancery power of injunction, a power which is used to *restrain present wrongs or prevent threatened ones*. This is shown by the act providing even for temporary preliminary restraining orders while the case is being heard. 'The function of an injunction is to *afford preventive relief, not to redress alleged wrongs which have been committed already*.' *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368, cited in *Black v. Jackson*, 177 U. S. 360, 20 Sup. Ct. 648, 44 L. Ed. 801. Applying that general principle, the Supreme Court of the United States in the *Standard Oil Case*, *supra*, citing *Swift v. United States*, 196 U. S. 375, on page 377, 25 Sup. Ct. 276; 49 L. Ed. 518, said:

"It may be conceded that ordinarily, where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future."

now power to do, *is doing*, and what judgment shall be now pronounced. * * * (U. S. v. U. S. S. C. 251 U. S. 417, 444.)

And again on page 445:

"Monopoly, therefore, was not achieved, and competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but *transient in their purpose and effect. They were scattered through the years from 1901 (the year of the formation of the Corporation), until 1911, but, after instances of success and failure, were abandoned nine months before this suit was brought.*"

In the case of

United States v. New England Fish Exchange,
268 Fed. 732,

it appeared that certain practices of the Exchange had been abandoned *after* the filing of the bill. The court, therefore, merely restrained the *resumption* of such practices.

In equity the general rule is as stated in 10 Ruling Case Law, p. 559:

"In making its decree the Court is governed by the situation in regard to the respective rights of the parties existing at the time the decree is to be made, and not by that which existed at the inception of the litigation."

See also:

Randel v. Brown, 2 How. 406.
21 Corpus Juris, 663.

THE QUESTION.

Now let us see whether the members of the *present* association have adopted Cadillac, Mich., "as an arbitrary freight basing point from which they compute and charge freight regardless of the point from which each may actually ship flooring."

In the first place, it should be noted that the present association was not organized until *March 29, 1922*, although the *proposed* Articles were dated January 1, 1922. (Vol. I, pp. 78-79, 147, 149; Gov. Ex. 15-GG, Vol. III, pp. 155-6; Gov. Ex. 52-00, Vol. IV, p. 461.)

In *March, 1922*, Mr. F. C. Klesner became the representative of the Grand Rapids Trust Co., Receiver for William Horner,²⁴ with flooring plants at Newberry, and Reed City, Mich. (Vol. I, p. 333.)

Until May, 1923, all flooring was sold under Mr. Klesner's direction; thenceforth he was in exclusive charge of the sale of flooring under the direction of the Receiver." (Vol. I, pp. 333, 318.)

Mr. Klesner testified:

"I know of no understanding or agreement among the members of the Association that flooring shall be sold on an f. o. b. Cadillac basis, or that freight shall be charged from Cadillac regardless of the point from which the flooring is shipped." (Vol. I, p. 335.)

Mr. DeWitt, of Oconto, Wis., testified:

"I know of no understanding or agreement whereby the different members of this Association were to sell their flooring on an f. o. b. Cadillac basis." (Vol. I, p. 235.)

²⁴The said Trust Company, as Receiver, is a party defendant to this suit, but Mr. Klesner is not.

Mr. Shepeck, of Wells, Mich., testified:

"I do not know of any understanding or agreement among the members of the defendant Association * * * that flooring should be sold on the Cadillac basis, or that the delivered price should be arrived at by adding the Cadillac freight rate. *We have never used any such method.*" (Vol. I, p. 260.)

Mr. P. S. McClurg, of Phillips, Wis., testified:

"In selling our merchandise, we make a notation on the invoice that the amount of the paid expense bill is to be deducted. *We do not make any computation of the freight.* The buyer then deducts the freight and remits to us the net proceeds. The buyer learns the amount of the freight from the expense bill that he gets from the railroad company and turns in the expense bill to us as a receipt for the amount of freight deducted from the invoice. For instance, if a shipment of flooring, or a mixed carload of flooring and other lumber, is shipped by us to a buyer at Minneapolis, the buyer deducts the freight from Phillips to Minneapolis. He does not deduct the freight from Cadillac to Minneapolis. In every case the buyer takes the actual freight paid by him to the railroad company and sends in to us the paid expense bill." (Vol. I, p. 228.)

Mr. DeWitt, of Oconto, Wis., testified:

"When we invoice the flooring there is no separation of the flooring from the freight. No separate charge is made for freight as distinguished from flooring. Sometimes we prepay the freight, but not very often. When freight is not prepaid, the buyer deducts from the invoice the actual freight that he pays and then deducts whatever discount is allowed and remits the balance to us by means of check or draft. The buyer deducts from the face of the invoice the actual amount of freight he pays to the railroad company.

* * The Court: I take it that this testimony will be given in substance by every witness that is put on

the stand because that is the *universal* practice in shipping lumber.

Mr. Darby: In view of what the Court has said, we will put on no more testimony as to this matter." (Vol. I, p. 235.)

It was undisputed that buyers of maple, beech and birch flooring—indeed, of *all* lumber—deducted from the face of the invoice the *actual amount of freight paid to the carrier*. And, of course, the carrier collected the freight from *point of origin* to point of destination.

The petitioner did not adduce *any* proof to the contrary. Therefore, the proof failed to support the allegations of the petition that the defendants computed and charged freight from Cadillac, Mich., regardless of the point from which the flooring was shipped.

II.

The proof showed that the terms of sale generally used by some of the defendants were those universally used in all branches of the lumber business. Moreover, the defendants varied even their own terms to suit the convenience of buyers, or to conform to the customs that obtained in the different markets.

It will be recalled that the petitioner charges that uniform rules with respect to terms of sale and the allowance of cash discounts, were one of the means by which defendants maintained a practical uniformity of both "net f. o. b. selling prices" and "net delivered prices." (See page 12, *supra*.)

Mr. Hamlin J. Ward, a nonmember manufacturer of maple and beech flooring, and a witness for the petitioner, testified:

"The terms we quote our customers are 2% off from net amount of invoice for cash within 15 days, or 60 days net. I think these terms are quite generally used by other manufacturers. They are terms that are general in the lumber business, not only maple flooring, but lumber business generally."
(Vol. I, pp. 94-5.)

Mr. Ward has been engaged in the hardwood flooring business for about twenty-four years. (Vol. I, pp. 93-4.)

For a great many years the freight rate books issued by the defendant Association and its predecessors contained terms of sale. The freight rate book at the time of the institution of this suit contained the following matter:

"TERMS OF SALE.

Sixty days net or 2% for cash in 15 days or 1% discount for cash in 30 days from date of invoice after deducting freight.

If the car has not arrived, the discount may be deducted on 90% of the invoice less estimated freight for cash within proper discount period; the balance with original paid freight bill to be remitted net within 5 days after arrival of car. No cash discount will be allowed after 30 days from date of shipment." (Vol. IV, fol. pp. 5249-5254.)

Mr. P. S. McLurg (a defendant), testified that the terms of his company were as follows:

"Our terms of sale are 2%, 15 days, 60 days net, on both flooring and other lumber products. The terms used to be 2%, 10 days. They were changed about 15 years ago, I think. I do not know of any Association rule with respect to terms of sale." (Vol. I, p. 228.)

Mr. DeWitt (a defendant), testified as follows:

"Our regular terms of sale are cash less 2% 10 days from date of shipment after freight was deducted, but those terms are varied to suit particular conditions. In fact, I am sure that there are more (fol. 428) sales that varied from the regular terms than there are that conformed with them. For instance, the New York custom has always been to discount either five or ten days after the arrival of cars and in most of the markets no payments are made until after receipt of car. We have one customer in Chicago, who discounts all invoices immediately upon receipt of them. On our coast shipments we have one customer that we allow 2% 90 days after the freight is deducted. *We vary our terms of sale according to our past relation with the individual buyer or according to our financial needs. Terms of sale fluctuate continually and it is a matter of compromise and adjustment. Some buyers are*

always wanting special terms and if they are good customers, we don't haggle over it. This has been our practice since we have been manufacturing flooring.

I knew that the freight rate books contained so-called terms of sale. They are standard terms of sale on which practically all lumber products are handled. I do not regard the terms of sale appearing in the freight rate books as limiting my discretion or as being in any wise binding upon me. We followed those terms when our customers liked them. The present Association has no rules with respect to terms of sale." (Vol. I, pp. 236-7.)

The testimony of Messrs. Colby and Greene (defendants) is set forth in the margin.²⁵

See also, Vol. I, pp. 263, 324, and Vol. II, pp. 240-242.

²⁵Mr. Colby:

"Our terms of sale on maple flooring are 2 per cent cash discount for payment within 15 days from date of invoice; one per cent for payment within thirty days, and sixty days net. Our terms on flooring are an outgrowth of the lumber terms that our company has used for a good many years. We use the same terms in our lumber business, except that in selling lumber we give a two per cent discount for cash in ten days. This difference between the 10-day period and the 15-day period is because flooring moves to a greater distance than lumber does. The bulk of our lumber is marketed in the State of Michigan, whereas flooring moves very largely to New England and Pacific Coast points; hence, we have to allow a little longer time for cash discounts because a customer naturally does not like to pay for a car of material until he sees it in his yard. The terms I have mentioned have been used by our company since I have been connected with it. These terms, however, are not invariably followed. We do not split hairs on the matter of terms and agree to anything that seems fair and reasonable. In the New York market some buyers insist on taking a two per cent cash discount five days after arrival of car. We do not like that and tell our customers that if they will send us within ten days after receipt of invoice a substantial amount to apply on the car, we will allow them the two per cent cash discount, which they can take five days after arrival of car. If we

While Mr. George W. Keehn, the Association's Secretary, was on the stand the following colloquy took place:

"The Court: * * * One question more: The terms of sale, have they varied materially over a considerable period of time? Isn't the usual term 60 days net, or 2% for cash?

A. I think that has been the general custom in

need business we sometimes accept their terms, and if we are not in need of orders we exact our own terms. The matter of terms is governed largely by supply and demand. The Pacific Coast buyers also demand an extension of the usual terms and we meet their demands. *We have never considered ourselves bound by any terms of sale that might have been established by the Association. We used our own judgment entirely. I do not know of any uniform terms of sale so far as the present Association is concerned that are being lived up to. I think the Association has gathered from different members what might be termed a consensus of opinion as to what the prevailing cash discount terms were, but any statement that was issued with respect to such matters was not considered binding by anyone that I know of. We have always made our own terms of sale in order to meet conditions as they changed from time to time.*" (Vol. I, pp. 208-9.)

Mr. Greene:

"Our terms of sale are 2 per cent cash fifteen days, or 60 days net. They are what we call our regular terms of sale. However, we make special terms as conditions might require. We have for example the Pacific Coast trade, California trade, which I mentioned; we make terms to those people of two per cent discount upon the arrival of the car, recognizing the fact that there is a certain delay, for the privilege of unloading and examining the stock, and it requires a little more than fifteen days for that car to go across the continent and so they can't take advantage of the discount in the 15-day period, and so we make it more or less elastic in cases of that kind; and we also recognize in selling through representatives who guarantee our accounts, that where we invoice to them, if their customers take their discount from their invoice a few days later than fifteen days, we recognize their right to also take that discount from our invoice, otherwise they would be the loser in the transaction.

I know of no rules of the present Association regarding terms of sale. I consider myself free to follow any rule I like and have always done so." (Vol. I, p. 385.)

the lumber industry, 60, 2 off ten, sometimes 60, 2 off fifteen.

The Court: *It prevails in all branches of the lumber industry, doesn't it?*

A. I think in a general way it does. You know some buyers in the eastern market, for example, will not follow such terms. They insist upon the discount 5 days after arrival of car or two days after arrival of car. The same is true with respect to shipments to California. Purchasers out there also insist upon the discount so many days after arrival of car. My observation has been that manufacturers are compelled to accede to the terms of buyers in different markets, according to the customs in force there. These different customs have always prevailed in different parts of the United States." (Vol. I, p. 155.)

Pursuant to resolution adopted on *July 19, 1923*, the terms of sale and much other data objected to by the petitioner were eliminated from the freight rate books. (Vol. I, pp. 155-6, Defts' Exs. E, and F-1, Vol. IV, pp. 811-814, and fol. pp. 5249-5254.)²⁶

The proof therefore failed to support the allegations of the petition that the defendants had established and maintained uniform rules with respect to terms of sale. The slightest knowledge of commercial practices would have prevented the making of any such allegations. In all trades and lines of industry there are customs and practices (elastic in operation) with respect to terms of sale.

²⁶F-1 is the proper exhibit number for the eliminated matter, although the F resembles the figure 2.

III.

The proof showed that the commissions allowed by the different defendants ranged from nothing to \$4 per M feet, and that there was no uniform practice followed by any defendant, much less by all the defendants.

The present Association has never taken any action, either directly or indirectly, with respect to commissions. In the freight rate book issued by the Association in existence during 1921 there appeared the matter set forth in the margin.²⁷

The Oval Wood Dish Corporation, of Tupper Lake, N. Y., began the manufacture of maple, beech and birch flooring during June, 1921, and joined the Association then in existence in August, 1921. (Vol. I, p. 286.) Mr. Hodges testified:

"I am in charge of the sale of our flooring. Our commissions range all the way from nothing to \$4.00 a thousand. When we joined the Association there was nothing said about our maintaining any standard scale of commissions or limiting our discretion as to when or how much commissions we should pay."

COMMISSIONS.

"A Commission not exceeding \$2 may be allowed to your own Registered Special Representative, or a Commission not exceeding \$1.50 may be allowed to Registered Wholesalers and Commission Men.

Your Registered Special Representative may allow the Wholesaler's Commission of \$1.50 when selling Registered Wholesalers and Commission Men, but the Commission to be paid to your Registered Special Representative on his sales to Registered Wholesalers and Commission Men to whom he allows the \$1.50 Wholesaler's Commission shall not exceed \$1. In no event shall the total Commissions allowed exceed \$2.50." (Gov. Ex. 34, Vol. III, fol. p. 695.)

We have at all times considered that we were free to do as we pleased with respect to commissions. We have followed no uniform rules with respect to commissions. We sell largely to jobbers and wholesalers and to some big yards, who maintain a force of floor layers who both sell flooring and lay it. We occasionally sell to contractors and consumers direct. For instance, we sell Stone & Webster, Boston contractors, who used the flooring in a building for the Victor Talking Machine Company of Camden, New Jersey." (Vol. I, pp. 288-9.)

Mr. Dewey, of the Kneeland-Bigelow Co., Bay City, Michigan, testified:

"Our commissions vary from \$1.50 to as high as \$4.00 per thousand. I know of no rule of the Association which in any wise limits members with respect to what commission shall be paid, to whom, or when. I have never known of any such rule since I have been a member. We have always paid whatever commissions we pleased without objection by any members of the Association or the secretary." (Vol. I, p. 393.)

Mr. Godfrey, a wholesale lumber dealer of Boston, gave in evidence quotations received on February 14, 1922, from three of the defendants, and the commission offered by one of them was \$3.00 per M. feet; whereas the other two offered a commission of \$2.00 per M. feet. (Vol. I, p. 533.) He also gave in evidence other quotations received from certain defendants during November, 1922, with the same range of commissions (Vol. I, p. 535); likewise quotations received during April, 1922, and testified:

"The Strable Lumber & Salt Company's commission was 5% and the commission of William Horner was \$2.00 per thousand. Some companies allow us a commission of 5% and others allow us a commission of \$2.00 per thousand. The commissions allowed by the different manufacturers vary." (Vol. II, p. 534.)

See also the quotations given in evidence by Mr. L. L. Barth, of the Edward Hines Lumber Co., Chicago, where the commissions range from *nothing* to \$2.00 per M. feet, (Vol. I, pp. 412-419), as well as the quotations identified by the other dealers whose depositions were taken.

Mr. Hamlin J. Ward, of Ward Brothers, Big Rapids, Michigan, *nonmember* manufacturers of maple flooring, testified as follows:

"Quite generally, the quotation to wholesalers and others dealing in maple flooring is made subject to commissions. *The usual commission at the present time is \$2.00 a thousand.* Such an allowance is quite generally made in the maple flooring industry." (Vol. I, p. 94.)

Mr. Ward was produced as a witness by the petitioner.

Mr. Greene, a defendant, testified as follows:

"Our commission varies from nothing up to \$3.00 per thousand.

Q. Do you know of any rule of the present Association which attempts to prescribe the commission?

A. I do not.

Q. What were your commissions, before the present Association was organized, in previous years?

A. *Well we paid at one time as low as fifty cents per thousand, one dollar per thousand, a dollar and a half up to two dollars per thousand; in some instances, to the present time, three dollars per thousand; as the price of the product advances we advance it a little more; it costs a little more to the other fellow, with the responsibility of carrying the account, and therefore he is entitled to a little larger commission.*"

Mr. Ralston explained that during the war when the prices of flooring had advanced the commission men

asked for and were given higher commissions than had been paid before because their cost of doing business had kept step with the advance of the cost of living. Mr. Ralston also stated that when *net* quotations are made the commission men have to look to their customers for commissions. (Vol. I, p. 323.)

See also the testimony of Mr. Colby, (Vol. I, p. 229), and Mr. Shepeck, (Vol. I, pp. 261-2, 269-273), who stated what their companies paid as commissions. *They also testified that the present Association had never had any rules on the subject, and that during the existence of previous associations the commissions had varied.*

Mr. George W. Keehn, the Secretary, testified:

"There is not now and has never been under the present Articles of Association, or since January, 1922, any registration of special representatives or brokers." (Vol. I, p. 173.)

See also Vol. I, p. 210.

The petitioner adduced no evidence to the contrary; neither was a single jobber or retail or wholesale dealer, or broker produced to testify that larger commissions should be paid by the defendants, or were paid by other manufacturers of flooring or of lumber products.

The allegations of the petition with respect to uniform commissions are not supported by the proof.

IV.

The petitioner wholly failed to support by proof the averments that the defendants had always maintained and still maintained "a practical uniformity between themselves of net f. o. b. selling prices," and a "practical uniformity between themselves of net delivered prices."

The undisputed proof showed the existence of great price variation and intense competition.

As pointed out in our analysis of the petition herein, the petitioner charged that the defendants infringed the Sherman Act, in that by *various means* they had always maintained and still maintained "*a practical uniformity between themselves of net f. o. b. selling prices,*" and "*a practical uniformity between themselves of net delivered prices.*" (Pages 12, 19, *supra*.)

The means were (a) the establishment of minimum prices until 1922, and "average costs" subsequently; (b) recommendations that defendants should not sell flooring below said minimum prices or said average costs; (c) the establishment and maintenance by defendants "as the basis of their individual selling prices," the minimum prices or so-called "average costs"; (d) the use of the Freight Rate Books containing freight rates from Cadillac, Michigan, average cost charts showing average cost f. o. b. cars of flooring, tables of differentials, delivered cost charts, etc.; (e) the charging of freight from Cadillac regardless of point from which flooring was shipped; (f) the establishment and maintenance of uniform terms of sale, cash discounts, commissions "and concessions which were established by and in accordance with said minimum Price Plans."

The alleged *means* are, of course, merely *incidental*. Or rather they are *instrumental*. According to the petitioner, the defendants *employed them* to violate the Sherman Act just as a burglar employs a jimmy to break into a house. The (alleged) unlawful *result* of the use of such means was *the practical uniformity among the defendants of "net f. o. b. prices" and "net delivered prices."* This unlawful *result* is the gravamen of the petitioner's charge. This alleged *result* is adduced by the Government as *proof* that there exists an *unreasonable restraint of interstate trade*. Or rather, the (alleged) *unreasonable restraint of interstate trade* is deduced from the (alleged) existence of *practical uniformity of "net f. o. b. prices" and "net delivered prices."*

We have already seen that it is undisputed that the defendants' *prices* for maple, beech and birch flooring were *fair and reasonable*. (Pages 54-61, *supra*.) We have seen that the buyers of the country *prefer* the flooring manufactured by the defendants, and have praised the said defendants for their honesty and fair-dealing. (Pages 62-64, *supra*.)

Manifestly, if the alleged *uniformity of prices* has never existed, or *does not now exist*, the petitioner's entire case must fail. Why? For the good and sufficient reason that the *public* has not been *injured*. Because an *unreasonable restraint* of interstate trade does not exist. For the reason that the petitioner has based its case upon the *alleged uniformity of prices*.

Let us make the violent assumption that *all* the alleged means were *continuously* employed by *all* the defendants, and examine the record for the purpose of ascertaining what *results*, if any, they produced. Let us determine

whether there ever existed among the defendants any uniformity of either f. o. b. mill or delivered prices for maple, beech or birch flooring. Let us ascertain what the record shows with respect to price competition among the defendants.

It is significant (or rather characteristic of the *unbridgable gulf* that exists between the *petition* and the *proof*) that on March 7, 1923, or *two days* after the petition herein was filed, a lumber dealer in Baltimore wrote to the defendant West Michigan Flooring Co., of Manistee, Michigan, a letter asking for quotations on 39,000 feet each of 13/16 x 2 $\frac{1}{4}$ Clear, No. 1 and Factory maple flooring. This letter also contained the following paragraph:

"I shall be very glad indeed to have you keep me posted as to prices and conditions pertaining to orders for maple flooring from time to time, as *there seems to be such a wide spread between the different quotations that our customers receive that they hardly know how to make a consistent estimate.*" (Vol. I, p. 383.)

On November 4, 1920, Mr. Sam E. Barr, a large dealer of New York City, wrote to the defendant above mentioned in part as follows:

"Your letter of the 2nd received, and in reply wish to say that prices on maple flooring are lower than they have been for a long time. This situation no doubt you know about, and *I can't find where two manufacturers are quoting the same prices on any one item.* I have prices on 13/16 x 2 $\frac{1}{4}$ " Number 1 as low as \$125.00 and as high as 145.00; Factory as low as \$75 and as high as 90; Clear as low as \$140.00 and as high as \$148.00." (Vol. I, pp. 343-4.)

GOVERNMENT'S WITNESSES.

But let us see what the *Government's own witnesses* testified. The following persons were called by the Government and interrogated with respect to their *production*. On cross-examination they testified as follows:

Mr. August O. Bublitz, of Beck & Co., Milwaukee, *nonmembers*:

"We sell most of our flooring at St. Louis, and all the way up to Chicago and St. Paul. We keep in touch with market conditions through salesmen, or we solicit by mail. If we make quotations and our orders are turned down we have got to come again. *We have pretty strong competition.* In the course of our business we have learned of the prices made by Kerry & Hanson, J. W. Wells Company, I. Stephenson, Trustees, Cummer-Diggins Company, West Michigan Flooring Company, Cobbs & Mitchell, and Mitchell Bros. [all defendants]. *They have been competitors of ours in selling in the territory above mentioned.*"

Q. State whether or not you have at times found any of the firms you have mentioned quoting lower prices than yours or sometimes higher. How has that been, generally?

A. Well, we have found them sometimes lower and a few exceptions where they were higher—they have often a better price than we—as a rule *they are always lower.* We try to get prices, you know—we *have to meet competition in order to get the business.*"

"*Sometimes we were able to meet their lower prices and to get the business and sometimes they got the business.*" (Vol. I, pp. 84, 83.)

Mr. Carl Barnes, of A. H. Krauskoph Co., Richland Center, Wis., *nonmembers*:

Sell maple flooring as far east as Madison, Wisconsin, and west throughout Iowa.

"In selling maple flooring we have met competition from other manufacturers who sometimes sell at lower prices than we do. We came into competition with the *Northwestern Cooperage & Lumber Company*, *W. D. Connor Company*, *Wisconsin Land & Lumber Company*.

I am not sure as to the difference in prices as between Connor and *The Cooperage Company*, but as between them and us I have noticed a difference. We are higher than they are. That is true also of the *Wisconsin Land & Lumber Company*, but not so much so I think. I am not so conversant with the prices recently that they have made." (Vol. I, p. 85.)

Mr. Charles A. Goodman, of Goodman Lumber Co., and Sawyer-Goodman Co., of Goodman, and Marinette, Wisconsin, respectively, nonmembers:

"We sell most of our flooring in Wisconsin, Illinois, Michigan and Ohio to wholesale dealers and retail lumber yards. In the sale of our maple flooring we have met competition from other manufacturers and that competition has always been pretty active since we have been in business. The manufacturers whom I come most directly in competition with are *I. Stephenson Company* and *Cobbs & Mitchell*; *Mitchell Bros.*, *Wells Lumber Company*, *Wisconsin Land & Lumber Company*, *Northwestern Cooperage Company*, *William Horner*, *Ward Bros.*, *W. D. Young & Co.* In selling in competition with these various manufacturers we have found that competition took the form of varying prices quoted by different manufacturers. Sometimes their prices were lower than ours and sometimes we were able to meet their prices or perhaps better them. There has at all times been substantial variations in the prices quoted for the same grades and same sizes of flooring by the different concerns above mentioned. We find the prices are extremely variable.

The competition we meet is quite difficult for us to locate because we can't depend upon the same prices at all. We will quote a price on a carload of a certain kind of flooring and maybe get the order and the next day quote the same price for flooring again and lose the order by several dollars. The condition above described so far as the spread in prices between manufacturers for the same grades and sizes of flooring has existed right along since we have been in business and exists to-day. There have been many times when we could figure no profit in manufacturing flooring. At times the prices of flooring has been high enough to permit a substantial profit; other times the prices has permitted no profit. We manufacture our maple flooring from our own logs, our own lumber." (Vol. I, p. 86; and see pp. 59-60, *supra*.)

Mr. George Bulgrin, of R. Connor Company, Marshfield, Wisconsin, large nonmember manufacturers, who discontinued association membership on February 1, 1920, (Vol. II, p. 478):

"I am the sales manager of the R. Connor Company. As such I come in competition with other manufacturers of maple flooring. Our principal competitors are I. Stephenson & Co., Trustees, Northwestern Cooperage & Lumber Company and Wisconsin Land & Lumber Company; Foster-Latimer Company, Kneeland McLurg Company, J. W. Wells Lumber Company. I have been sales manager of the R. Connor Company for about six years, and during all of said time have kept in close touch with market conditions. I have always found that competition was very keen and that very rarely would there be any prices alike. Some would be lower and some higher all the time. The variation in prices was very substantial. The normal variation in price per thousand feet was \$5.00 per thousand. In 1919 and 1920 the variation for a given size and grade of maple flooring was sometimes as high as \$25 to \$30 a thousand. There were times when there was a spread as

high as \$50.00 a thousand. *In order to meet this competition since 1918 I have found that at times our prices were higher than the prices of our competitors who were members of the Association. That has occurred frequently. At other times we were able to meet their prices or perhaps better them and get the business.*" (Vol. I, pp. 88-9.)

Mr. W. R. Gillette, of Brown Lumber Co., Traverse City, Michigan; *nonmembers*; began to manufacture maple flooring in 1920:

"Most of our flooring goes to Chicago, practically 80% of it, and the balance to Detroit. In the Chicago and Detroit markets in the sale of our flooring since 1920 we have met competition. *At times we find the competition very keen and we are able sometimes to get the business, other times we find that the other fellow apparently has a lower price than we have, so we don't get the order. Our principal competitors are the Northwestern Cooperage & Lumber Company, Wisconsin Land & Lumber Company, Holt Hardwood Company. I have often been told by our salesmen that some of our competitors were quoting lower prices for the same grade and size of maple flooring than we were. That situation has existed since 1920.*" (Vol. I, p. 92.)

Mr. Hamlin J. Ward, of Ward Brothers, Big Rapids, Michigan, large *nonmembers*; in maple flooring industry twenty-four years:

"During the time that I have been in the maple flooring business I have found *quite active competition. That competition has been represented by variation in prices quoted by different manufacturers for the same size and grade of flooring at any given time. That competition has always existed and exists today.*" (Vol. I, p. 94.)

Mr. Sidney L. Eastman, jobber of maple flooring, hardwood lumber, etc., has not manufactured flooring since 1917:

"I purchase the maple flooring sold by me from

different manufacturers in Michigan. I bought from four different manufacturers and have solicited quotations from a number of others. In 1917 my mill burned. In soliciting prices from various manufacturers of maple flooring I have found that there are *hardly any two prices alike*. There is *always* a variation on most purchases I make. *At times the prices vary anywhere from \$2.00 to \$10.00 a thousand on the same size and grade*. Most of our flooring is largely for export. I have to charge a higher price in order to take care of expenses incidental to export business. I have made the largest purchases from *Kerry & Hanson Flooring Company of Grayling, Kerry & Way Manufacturing Company of Saginaw, the East Jordan Lumber Company, and the West Michigan Flooring Company*. Before 1917 I belonged to the Maple Flooring Manufacturers Association." (Vol. I, p. 97.)

Mr. R. F. Hooker, retail lumber dealer, Grand Rapids, Michigan:

"We buy maple flooring from various manufacturers. We have bought from *Nichols & Cox, J. W. Wells Lumber Company, Mitchell Bros., Cobbs & Mitchell, Wisconsin Land & Lumber Company, Kerry & Hanson Company, Cummer-Diggins Company, Bigelow Cooper Company, West Michigan Flooring Company*. In buying flooring we send out inquiries to several different manufacturers. We buy less than half a million feet a year in both carload and less than carload lots. *We address inquiries to several different manufacturers in order that we may buy to best advantage*. There is *always* a variation in the quotations made by *different manufacturers on one inquiry*. *I don't recall that I ever found all of them quoting the same price*. At all times there has been a *variation between prices quoted on the same inquiry by the different manufacturers above mentioned*. *This variation fluctuates*. We buy other lumber products as well as maple flooring. At times the variation in prices of maple flooring was as large as the variation in prices of oak flooring or other

lumber products. We have bought flooring from *Horner of Reed City* and Ward Bros. of Big Rapids. Sometimes the prices of Ward Bros., as compared with the prices of the other manufacturers above mentioned, were lower and sometimes higher." (Vol. I, p. 141.)

WITNESSES FOR DEFENDANTS.

CHICAGO DEALERS.

So much for the Government's witnesses. Let us now turn to the evidence of *buyers* of maple, beech and birch flooring.

Mr. L. L. Barth, 73 years of age, engaged in lumber business since 1878; senior vice president, stockholder and director of Edward Hines Lumber Co., which was organized in 1891 or 1892. Buying and selling done under his direction. Company owns numerous mills and subsidiary corporations, and largest lumber yard in the world at Lincoln street and Blue Island avenue, Chicago, where 300,000,000 feet of lumber handled annually. All told company and subsidiaries handle about 1,000,000,000 feet of lumber annually. *Chicago yard handles from three to five million feet of maple, beech and birch flooring annually.*

Has done business with members of defendant Association.

Keeps in touch with market conditions and prices of maple, beech and birch flooring by means of inquiries addressed to practically all manufacturers of maple flooring; talks with representatives of such manufacturers, other yardmen, customers; competitors' prices on some jobs, etc., etc. (Vol. I, pp. 409-410.)

"We do not make any distinction in purchasing

flooring between members of the Maple Flooring Manufacturers Association and nonmembers. We do not care from whom we buy flooring so long as we get what we buy." (Vol. I, pp. 425-6.)

"I consider that it is to our interests as a buyer that there should be free and full competition among the manufacturers of maple, beech and birch flooring, and that is what I am in favor of. If a person were to tell me that during all the time since 1895 or any part thereof there had been no competition among the manufacturers of maple, beech and birch flooring, and that by various devices said manufacturers and their confederates had established and maintained a practical uniformity of f. o. b. mill and delivered prices of maple, beech and birch flooring, I would say that he did not know what he was talking about. I do not think that a man that has had any experience in the lumber business would make such a statement. He might know something about the lumber business, but his experience would be very limited. I have never suspected that I was being victimized in the manner charged by the Federal Government in its petition in this case. From my knowledge of the lumber business and talks with other yard men, I can say that all yard men in Chicago feel that there has always been competition among the manufacturers of maple, beech and birch flooring.

I have never observed any uniformity, whether practical or otherwise, in the prices for maple, beech and birch flooring by the different manufacturers. There might be a case or two where on one item they might be the same, but as a general proposition no. The prices have always varied and that variation has been pretty substantial in many cases. From my knowledge of the lumber business I can say that the variation or difference in prices of the different manufacturers of maple, beech and birch flooring has been as great as the variation in prices of the other lumber products that I buy. If there had been a practical uniformity of prices, or, if the prices of maple, beech and birch flooring had been artificially regulated and controlled by a group of manufac-

turers, I do not think that such a condition could exist 24 hours before I would become aware of it. This for the reason that we are buying every day and we would immediately learn of any uniformity of price. I do not think there was ever a time during my extended experience when all the quotations that we received were all the same.

There has never been a time when they were practically uniform. From my experience I would say that the prices of maple, beech and birch flooring in Chicago have been governed by the law of supply and demand, and that such prices have not been artificially manipulated and fixed by some group of manufacturers. This information [opinion?] is based upon my experience in the purchase and sale of from three to five million feet of maple, beech and birch flooring annually. I believe that there is now and has always been free, active and vigorous competition among the different manufacturers of maple, beech and birch flooring." (Vol. I, pp. 410-411.)

Fortunately, some quotations received during a period of two years before the date on which Mr. Barth gave his deposition, were located. (See explanation of office system on pages 426-7, Vol. I.) Let us notice the quotations received in response to the first three inquiries that appear in the record. It should be stated that the quotations are per thousand feet delivered at Chicago, unless otherwise specified.

"The papers you hand me which have been marked Defendants' Barth Ex. 1 for identification are an inquiry dated September 15, 1922, that was sent out by the Edward Hines Lumber Company for 15,000 feet 13/16ths by 1 1/4 inch face Clear maple flooring, and also for a car of 13/16ths by 2 1/4 inch face Clear maple flooring, addressed generally to manufacturers of maple, beech and birch flooring, and the answers of different manufacturers who quoted on said inquiry. Said quotations received by us on the 15,000 feet of

13/16 by inch and a half clear maple flooring were as follows:

Nichols & Cox, \$85.50, less \$2.00 commission.
 J. W. Wells Lumber Co., \$87.50, less \$2.00 commission.
 Wisconsin Land & Lumber Co., \$102.25.
 Kerry & Hanson Lumber Co., \$85.00, less \$2.00 commission.
²⁸Below Lumber Co., Marinette, Wis., \$87.50.
²⁸Beck Lumber Co., \$89.75.
 I. Stephenson trustees, \$92.75.
 Strable Lumber & Salt Co., \$94.50, less \$2.00 commission.
 W. D. Young & Co., \$92.50, less \$2.00 commission.

The prices above mentioned were f. o. b. cars Chicago. I think that we buy about 95 per cent of our flooring f. o. b. cars Chicago. This enables us to know in advance what the flooring is going to cost us here and we prefer that the manufacturers accept the risks incident to transportation.

The documents you hand me marked Defendants' Barth Exhibit 2 for identification are an inquiry of the Edward Hines Lumber Company, dated January 30th, 1923, for a car of *13/16th by 3 1/4 inch face clear maple flooring*, 7 to 14 feet long, and the quotations that we received in response to said inquiry. Said quotations were as follows:

William Horner \$108.00
 Kneeland-Bigelow Lumber Co., ... 129.50

Defendants' Barth Exhibit 3 for identification, is an inquiry sent out by the Edward Hines Lumber Company, on July 28th, 1922, for *175,000 feet of 13/16th by 2 1/4 inch clear and No. 1 maple flooring*, shipments to be made in *six months* together with the

²⁸Nonmember: A list of the lumber companies in the

quotations received from manufacturers. Said quotations were as follows, for the *Clear*:

²⁹Ward Bros. \$96.25.

Cummer-Diggins, \$97.00.

Horner, \$97.75, less \$2.00 commission.

I. Stephenson, \$97.75.

J. W. Wells Lumber Co., \$95.00 f. o. b. cars Menominee.

The freight from Chicago to Menominee would be \$2.50 per thousand.

Kerry & Hanson Lumber Co., \$99.50 less \$2.00 commission.

Northwestern Cooperage & Lumber Co., \$94.75.

Flanner & Steger Land & Lumber Co., \$97.75.

Strable Lumber & Salt Co., \$99.75, less \$2.00 commission.

The quotations received on the No. 1 were as follows:

²⁹Ward Bros., \$86.25.

William Horner, \$87.75.

I. Stephenson, \$87.75.

Kerry & Hanson Lumber Co., \$89.50, less \$2.00 commission.

Northwestern Cooperage & Lumber Co., \$84.75.

Flanner & Steger Land & Lumber Co., \$82.75."

(Vol. I, pp. 411-413.)

Now let us look at the quotations received in response to the *last two* inquiries that appear in the record.

"Defendants' Barth Exhibit 21 for identification are an inquiry sent out by the Edward Hines Lumber Company on April 28th, 1923, for *one car of inch and*

²⁹Nonmember.

16th by 2½ inch face No. 1 Maple flooring delivered at Pittsburgh, Pennsylvania, and the quotations received in response thereto. Said quotations are as follows:

Kneeland-Bigelow, \$105.00 less \$2.00 commission.

Holt Hardwood Company, \$100.50 less \$2.00 commission.

The documents you hand me marked Defendants' Barth Exhibit 22 for identification are an inquiry of the Edward Hines Lumber Company, sent out on April 3d, 1923, for five cars of flooring and the quotations received in response thereto. One of the inquiries related to 13/16ths by 2½ inch No. 1 Maple Flooring delivered at Chicago, and the quotations received with respect to such flooring were as follows:

Holt Hardwood Company, on 5 cars, \$94.00, less \$2.00 commission.

Holt Hardwood Company, on 5,723 feet, \$94.50.

The inquiry also related to 13/16th by 2½ inch Factory Maple Flooring and the quotations received were as follows:

Holt Hardwood Company, on two cars, \$54.50, less \$2.00 commission.

J. W. Wells Lumber Company, \$59.00.

³⁰Ward Brothers, on two cars, \$59.25. (Vol. I, p. 420.)

Mr. Barth testified also:

"The inquiries and quotations that have been read in evidence are *typical* of our experience, for the time that we have been in business, of variations in quotations that have been received from different manufacturers." (Vol. I, p. 426.)

The Edward Hines Lumber Co. is a competitor of some

³⁰Nonmember.

members of the defendant Association in some lines of the lumber business. (Vol. I, p. 426.)

That the price variations above set forth are *substantial* is evidenced:

(a) By the previous testimony of the witness that they were substantial.

(b) By the difference in dollars and cents on the number of feet involved between the results obtained by using the high and the low quotations as multipliers.

(c) By the fact that (when not purchasing for stock) both wholesalers and retailers buy for specific jobs, and their profit ordinarily consists of merely the commission allowed. (Vol. II, p. 595 (fol. p. 1041), and pages 111-112, 138.)

Mr. C. A. Flanagan, Mr. Earl Bartholomew, Mr. Alexander B. Claney, Mr. Albert P. Hawley, and Mr. Charles J. Heniff, other Chicago dealers (large and small), gave equally strong testimony as to the variation in prices. They also testified that strong, active competition existed among the defendants, and many other quotations were read into the record. (Vol. I, pp. 429-434; Vol. II, pp. 449-458, 458-461, 461-466, 467-471.)

MILWAUKEE.

Mr. Lawrence J. Koerble, of John Schroeder Lumber Co., also gave similar testimony with respect to the existence of competition among the defendants. (Vol. I, pp. 445-6.)

The Edward Hines Lumber Co. destroyed all quotations more than two years old. Mr. Barth was therefore unable to read into the record quotations received during 1920, the period of high prices. Let us notice a few of the quotations received by Mr. Koerble during that year.

All the quotations are *per thousand feet f. o. b. cars*, Milwaukee, unless otherwise specified. We quote from the record:

"Defendants' Koerble Exhibit 4 for identification is an inquiry we sent out dated September 20, 1920 for certain items of flooring and the responses that we received thereto.

The quotations received on 13/16 x 2 1/4" *clear* maple flooring are as follows:

I Stephenson Company	\$225.00
Cummer-Diggins Company	177.00
Bigelow-Cooper Company	201.50
Nichols & Cox	187.50
Northwestern Lumber & Cooperage Co.	185.00
Cobbs & Mitchell	182.50
Kerry & Hanson Flooring Co.	182.50
West Michigan Flooring Co.	197.50

The quotations we received on the 13/16, 2 1/4" *face No. 1* maple flooring were as follows:

Wisconsin Land & Lumber Co.	\$170.00
G. H. Tennant Co.	185.00
East Jordan Lumber Co.	173.00
Strable Lumber & Salt Co.	171.00

On the 13/16, 2 1/4" *face factory* maple flooring, we received the following quotations:

Foster-Latimer Company	\$150.00
W. D. Young & Co.	140.00
Bigelow-Cooper Co.	159.50
Nichols & Cox	137.50
Northwestern Cooperage & Lumber Co.	150.00
Cobbs & Mitchell	127.50
G. H. Tennant Co.	155.00
East Jordan Lumber Co.	130.00
Kerry & Hanson Flooring Co.	132.50
Strable Lumber & Salt Co.	146.00
Wisconsin Land & Lumber Co.	135.00
I. Stephenson Company	150.00
Cummer-Diggins Lumber Co.	126.00"

(Vol. I, p. 440.)

All the firms above mentioned were members of the Maple Flooring Manufacturers Association then in existence. (Vol. II, pp. 477-8.) Many other quotations were read into the record by Mr. Koerble. Some of these quotations were from nonmember manufacturers as well as from *brokers*. If the names are not on Defendants' Exhibit QQ, and are not listed as members of the defendant Association or its predecessors (Vol. II, pp. 472-479), then where only individual names are given, such as Paul Knolk, Clayton Gibson, etc., it is safe to assume that such persons are *brokers*. *Of course, it does not appear by whom the flooring they were offering for sale was manufactured.* The District Court's assertion that "somewhat lower prices have usually been quoted by nonmembers" (Vol. I, p. 59), is opposed to the testimony of both nonmembers and buyers, and is conclusively disproved by the actual quotations appearing in the record. For names of members of the different associations since 1913, see Vol. II, pp. 472-479.

BOSTON.

Mr. Lester N. Godfrey, Treasurer of the Godfrey Lumber Co., has been handling maple, beech and birch flooring for 30 years, and has been engaged in the wholesale lumber business in Boston for 43 years. Mr. Godfrey testified in part as follows:

"Q. Now, in the many years that you have been engaged in the purchase of maple, beech and birch flooring, *has there ever been a time in your experience when all of the manufacturers of that flooring, or at least all with whom you come in contact as a purchaser, were quoting uniform prices for their product?*

A. *I cannot remember such a thing, no.*

There has *always* been competition among the manufacturers of maple, beech and birch flooring in

the sale of flooring to large dealers such as my company. That competition has expressed itself in varying prices quoted by the manufacturers on the same grade and size of flooring. That condition has always existed as far as I remember. It certainly has existed during the last ten years.

I gave you such inquiries as I was able to find that were sent out by my company to the flooring manufacturers during the year 1922 and the replies that were received in response thereto. The documents you show me are copies of letters and the letters that I received in answer thereto that I sent out dated January 6, 1922, addressed to William Horner, Cummer-Diggins Company and the Kerry Hanson Flooring Company.

(Said documents marked Defendants' Godfrey Exhibit 1, and received in evidence.)

In my letter of January 6, 1922, addressed to the manufacturers above mentioned, I asked for quotations on 13/16 x 2 1/4" Clear Maple Flooring. The quotations that I received were as follows:

William Horner.....	\$98.50
Cummer Diggins	99.50
Kerry-Hanson	94.50

All the prices above mentioned were f. o. b. cars Boston and were subject to the usual commission.

While I have not had direct charge of the buying during the last few years, I go through all the correspondence every day. I haven't had a vacation for years and it is only a matter of convenience whether Mr. Fisher or either of my sons dictate an inquiry or have the stenographer send one out. I am the head of the business of our company and direct the affairs of it and devote all my time to the management of said company.

In the letter of William Horner dated January 9, 1922, which forms a part of Exhibit 1, it is said, 'We do not see how we can possibly cut this figure, but if it will help you out any, we would be willing to go \$1.00 per thousand lower.'

It has been my experience frequently, in dealing with manufacturers, that they endeavor to give me a price which would enable me to meet competition and would cut their own prices accordingly below prices previously quoted by them. *If the prices were uniform, or substantially uniform, for the same grades or sizes of maple flooring, we would not have to send out any inquiries at all.*

In the telegram of Kerry & Hanson Lumber Company dated January 9th, they state, 'Will make up to five dollars per thousand reduction. Do best you can on price.' It is quite a frequent occurrence, where manufacturers endeavor to meet competition by giving us as low a price as they feel they can. In that particular case Kerry & Hanson practically left the price to us.

The letters you show me are copy of an inquiry that my Company sent out on February 11, 1922 and the answers that were received in response thereto. All these letters were received in the regular course of mail.

(Said documents marked Defendants' Godfrey Exhibit 2 and received in evidence.)

On 13/16 x 2 1/4" No. 1 Maple flooring, the following quotations were received:

William Horner	\$72.00
Kerry & Hanson Flooring Co.....	74.50
Flanner-Steger Land & Lumber Co....	69.50

On 13/16 x 2 1/4" No. 1 Beech flooring, we received the following quotations:

William Horner	\$62.00
Kerry & Hanson Flooring Co.....	64.50

All the foregoing prices were per thousand f. o. b. cars Boston or New England delivery rate and subject to the same commission.

The documents you hand me are a copy of an inquiry our Company sent out on February 14, 1922, and the letters that were received in response thereto.

(Said letters marked Defendants' Godfrey Exhibit 3 and were received in evidence.)

On 13/16 x 2 1/4" Clear Maple flooring, we received the following quotations:

Flanner-Steger Land & Lumber Co.	\$94.25
Cummer-Diggins Co.	99.50
William Horner	98.00

On 13/16 x 2 1/4" Clear Beech flooring, we received the following quotations:

Cummer-Diggins	\$84.50
William Horner	80.00

On the 13/16 x 2 1/4" No. 1 Beech flooring, we received the following quotations:

Cummer-Diggins	\$64.50
William Horner	60.00

On 13/16 x 2 1/4" face No. 1 Maple flooring, we received the following quotations:

Cummer-Diggins	\$44.75
William Horner	43.00

All the prices above mentioned were on a delivered basis.

The Flanner-Steger Land & Lumber Company's prices were subject to a commission of \$3.00 per thousand and the prices quoted by the other manufacturers were subject to a commission of \$2.00 per thousand.

In our letter to Cummer-Diggins Company, which is a part of Defendants' Godfrey Exhibit No. 3, we state: 'Beg to advise that our customer had a price of \$80.00 on 13/16 x 2 1/4" inch clear beech and \$94.25 on 13/16 x 2 1/4" clear maple. Therefore we were not in it.' That represents a typical case where some other wholesaler was able to quote a lower price than our Company was. Sometimes our competitors are able to underbid us and sometimes we underbid them. There are a good many wholesalers of maple, beech and birch flooring in this territory, and all of us are bidding for the business. The competition

has at all times been vigorous and active and we send out inquiries in order to find out what we can buy the flooring at. *We get the business sometimes because we are able to make a better price through getting the flooring cheaper than our competitors and sometimes vice versa. Such conditions have always existed.*" (Vol. II, pp. 531-533.)

And on cross-examination:

"As a general rule, we buy from Cummer-Diggins, William Horner and Kerry & Hanson, and very frequently from Flanner-Steger Land & Lumber Company, perhaps more frequently from them than the others.

Some of the manufacturers of maple flooring have exclusive representatives here and if they have we don't address inquiries to them. They give their representatives the benefit of their distribution and would not quote us. That is one of the reasons why we don't send out to more than five or six manufacturers at one time. It might be a material advantage to address inquiries to a larger number of manufacturers. *Even among the small number to whom we address inquiries, there is a great variation in price.* We send inquiries to about all we know about who make good flooring and manufacture in large enough quantities to supply our orders. We dick around with the different manufacturers as to commissions and prices in order to obtain as low a price as possible so that we may meet competition. Of course, if a manufacturer gives us a larger commission, his profit would be less. The purpose of allowing a larger commission is to secure orders and the one allowing a larger commission may underbid the other fellow.

I could not state what the average variation in the various prices on a certain grade of maple flooring would be. My correspondence is accessible to either the plaintiff or the defendant. You will find quite a variation at different times. It is owing, a great deal, I imagine, to the amount of lumber they have on hand of certain grades. I don't know whether the difference in freight rates has a bearing upon the

price of flooring. I don't know what effect standardization of flooring has had upon prices, *but I do know that it has been of great assistance to us. We now have a more dependable grade.*

I buy all our flooring outright." (Vol. II, p. 538.)

Other quotations were also read into the record by Mr. Godfrey.

Similar testimony was given by Mr. William Bacon, of the Davenport-Peters Co.; Mr. William C. McConnell, of the McConnell Company, Boston dealers of long experience. (Vol. II, pp. 560-564, 564-569.)

NEW YORK CITY.

The following quotations, which were made to dealers in New York City during the latter part of *February, 1923*, or less than 30 days before the filing of the petition herein, are interesting, especially in view of the different grades and sizes involved:

	13/16x2" clear	13/16x2 1/4" clear	13/16x2" No. 1	13/16x2 1/4" No. 1
East Jordan Lbr. Co.....	98.25		88.25	
Horner	101.50	108.50		98.00
Holt Hardwood Co.....	93.25	98.25	63.25	68.25
J. W. Wells Lbr. Co.....		108.25		98.25
	13/16x2 factory	13/16x3 1/4 factory	13/16x3 1/4 factory	13/16x3 1/4 factory
Horner	53.00	57.00		
J. W. Wells Lbr. Co.....	53.25	59.25		
	13/16x3 1/4" clear	13/16x3 1/4" No. 1	13/16x3 1/4" factory	13/16x3 1/4" factory
East Jordan Lbr. Co.....	84.25		54.25	
Horner		84.00	57.00	
J. W. Wells Lbr. Co.....	94.25	89.25	59.25	

(Vol. II, pp. 577-578.)

Mr. Ralph A. Brown, of the John A. Daley Lumber Co.; Mr. George A. Yaest (with Sam E. Barr); Mr. Ray-

mond W. Storm, of George H. Storm & Co.; Mr. Paul G. Ribett, of the Harris Flooring Co., dealers in New York City, all testified to the existence of competition and the variation in prices. Many quotations were also identified and introduced in evidence. (Vol. II, pp. 569-578, 578-581, 581-584, 584-587.)

PHILADELPHIA.

Mr. Elmer M. Phisterer testified as follows:

"I live at Philadelphia and have for practically all my life—45 years. I am Sales Manager for the William M. Lloyd Company of this city. That Company has been engaged in the lumber business in Philadelphia since 1868. I have been Sales Manager for the William M. Lloyd Company for three years. Before that I was their Traffic Manager.

As Sales Manager I purchase and sell lumber. Our Company handles Long Leaf Yellow Pine, Short Leaf Yellow Pine, Yellow Pine Floorings, Maple Flooring, Oak Floorings, White Pine, Hemlock, Spruce, practically all lumber that is used in building construction. Our Company deals in these products, both wholesale and retail. We sell principally to the lumber yards throughout the eastern portion of the United States. We also sell to builders, contractors, consumers in and around Philadelphia. *During the past two years I think our Company had handled about a million feet of maple flooring a year.* We purchase maple flooring from different flooring mills. During the past two years we have specialized in the product of Kneeland-Bigelow Company, formerly the Bigelow-Cooper Company. Before we began to handle the product of the Kneeland-Bigelow Company, we purchased maple flooring from various mills. We sent out inquiries addressed to several manufacturers in order to determine from whom we would buy. These inquiries were addressed to probably six or eight different mills in different sections.

The prices quoted by the different mills varied. That was always the case. The variation in prices

was a matter of dollars per thousand feet. I was also then familiar with the prices of oak floorings. I think that the variations in prices quoted by the maple flooring manufacturers were as great, or greater, than the variations in prices quoted by the manufacturers of other competing flooring, such as oak. Sometimes the variations would be much greater than at others. I have known of variations of six or seven or eight dollars per thousand feet on different grades of maple flooring. In the sale of the product of the Kneeland-Bigelow Company we are constantly in competition with the product of other manufacturers. W. D. Young & Company of Bay City, Michigan and the West Michigan Flooring Company of Manistee, Michigan are represented in this territory and are the principal ones that we come into competition with. Competition is active all the time and the prices quoted by the representatives of other flooring manufacturings vary from our prices. This variance is sufficient to swing the business to or from us, according to whether our prices are lower or higher than the prices of our competitors.

To my knowledge this condition has existed all the time that we have been handling Kneeland-Bigelow flooring. I don't want to give the impression that we were always higher because there were lots of occasions when we have been equal to or lower than other quotations and received the business; maybe through friendship or through business association we received business, possibly on the same basis or maybe 25 or 50c higher than other quotations.

During all the time that I have been selling flooring I have found very substantial variations in the prices quoted by other manufacturers in competition for a given job. That variation is sometimes as much as four or five or six dollars per thousand feet of flooring. The Philadelphia market is a large consumer of maple flooring, which is used in office buildings, schoolhouses and construction of that character. To my knowledge there has [never] been a time when substantially all the manufacturers of maple flooring, either directly or indirectly, quoted

uniform or practically uniform prices. As we encountered competition, we took the matter up with Kneeland-Bigelow Company.

The letters you show me are correspondence passing between our Company and the Bigelow-Cooper Company or the Kneeland-Bigelow Company. This correspondence was carried on in the ordinary course of business. The correspondence in question was taken directly from our files.

Our letter of January 7, 1922, addressed to Bigelow-Cooper Company, Bay City, Michigan, reads as follows:

'Recently I quoted John L. Conrad & Sons at Port Carbon, Pa., on 10,000 ft. 4-4 Factory Maple Flooring at \$38.50 f. o. b. car their city.

I have followed this matter very closely and received a re- (fol. 1032) sponse from them this morning (as I have a friend in their employ) stating that it was bought from Young at \$31.50 delivered.'

That letter is typical of the competition between ourselves and some other manufacturer or manufacturer's representative in the sale of factory flooring. I recall the case referred to in that letter. By Young I meant W. D. Young & Company of Bay City.

The letter of March 6, 1922, written by the Bigelow-Cooper Company to our Company, reads as follows:

'You understand of course that we have discontinued the operation of our plant and do not intend to resume operations until conditions are stabilized to a point where we can pay the present market prices for rough lumber and sell our flooring at a profit.

Our supply of flooring lumber was reduced to a very low point and we realize it would be necessary for us to go out on the market and replenish our stock. When we learned the market price on lumber and compared the prices for the finished product, together with our cost of operation, we promptly discovered that figures were in the red.'

The letter written by the Bigelow-Cooper Company addressed to our Company, under date of March 14, 1922, reads in part as follows:

'We have a great deal of confidence in the future, however, and feel that the extensive proposed building program throughout the country will improve values, while, on the other hand, the crop of rough lumber produced during the past winter will soon be ready for the market and there is a possibility that prices on the rough lumber will be lower. With this in view we are anxious to have our house in order so that it will be possible to take advantage of the conditions and operate our plant to full capacity.

On our last price list we made concessions on certain items which we believe represent the present market, *but in any instance where you are offered business for these items at prices lower than our list, we will allow you to meet legitimate competition, in order secure the business.*

We fully appreciate your position under these conditions and assure you that it is our desire to co-operate to the fullest extent possible without serious loss to ourselves, and we are confident that you do not expect any more than this. *Of course we want you to handle our stock exclusively, but there is absolutely no objection to your purchasing elsewhere items that we cannot furnish, or that it is possible for you to buy to better advantage.'*

When we met active competition and lower prices quoted than we were able to meet, we usually submitted the matter to Kneeland-Bigelow Company. Sometimes they would authorize us to take the business at lower prices and sometimes they would not. We usually have specific cases which we submitted to them where the business had been offered to us and before we would accept we would naturally get in touch with the mill and get their acceptance. Of course, we were always authorized to accept business at the prices fixed in Kneeland-Bigelow Company's current price list. What we took up with them was whether we could accept certain specific orders at less than the prices stated in their current price lists. It was the practice of the Kneeland-Bigelow

Company, as well as the practice of other manufacturers, to send out their price lists from time to time. This is true of the lumber trade generally. Price lists of some character are received in almost every mail. On July 6, 1922 we received a letter from the Bigelow-Cooper Company calling attention to the stocks on hand in various sizes, etc. Said letter reads in part as follows:

'We have made concessions in prices on these items and believe they are considerably below the present market; therefore, we urge you to call the attention of your trade to these particular items.'

'We would appreciate an expression from you regarding the conditions in your market in reference to prices and the prospective future demand. It is essential that we have all of the information possible so that we may keep in line with our competitors and plan our future policy.'

'It was our practice from time to time to advise the Kneeland-Bigelow Company of the competitive conditions in this market. It was our intention to keep said Company fully informed as to what their competitors were doing because our getting orders depended always upon being in line with the market or being able to at least equal or undersell other dealers.'

On August 9, 1922, we received a stock list and prices from the Bigelow-Cooper Company, accompanied by a letter which reads in part as follows:

'We have endeavored to make prices on these items that are attractive, but are perfectly willing to meet legitimate competition from reputable Maple Flooring manufacturers, if necessary to secure orders.'

'We will welcome any information that you can give us regarding conditions in your territory, especially with reference to competitive prices, and also any suggestions which you may have to offer that will lead to our mutual benefit in the distribution of our products.'

'When a manufacturer has a considerable quantity of given grades and sizes of maple flooring on hand,

the usual procedure is to make a special effort to move those sizes at the list price, if possible, and if not, of course, at lower prices. A flooring mill has to have a continual flow through the mill. Otherwise, if the warehouse becomes filled with maple flooring, the mill portion must stop. It is of such a character that you cannot pile it outside. It must be protected all the way through the manufacture, and then it must be kept in the warehouse until it is loaded on cars and shipped out. Consequently there must be that even flow through the warehouse continually, and if they cannot sell a certain size of certain dimensions, or a certain grade, that piles up, and it is produced all the time in the manufacture of the other grades, that is, you cannot stop it, it comes on continuously, then that flooring much be moved out of that warehouse. All different grades and sizes are and must be produced at the same time. It has been our experience that when a manufacturer becomes stocked up on one particular grade, he cuts the price.

We received a letter from the Bigelow-Cooper Company dated August 23, 1922, reading as follows:

'We desire to again call your attention to the surplus items on our list, and urge you to make a more earnest effort to secure orders for this stock. We are especially anxious to move some of the shorts.

If you find that our prices on this item are not in line with our competitors, it will be satisfactory for you to meet the market price. Our weekly sales reports show that other manufacturers are selling the short lengths, and we see no reason why it should not be possible for you to secure a portion of this business.'

On January 24, 1923, we sent a letter to the Kneeland-Bigelow Company, reading as follows:

'Will you be kind enough to let me know what information you have regarding Wisconsin Land and Lumber Company, as these people were in competition with us with a contract of this city on 200,000 feet 13/16 x 2 1/4" #1 Maple Flooring, on which they quoted \$92.00 per thousand feet.'

I understand they manufacture the IXL brand, and inasmuch as their price is \$.75 lower than yours I did not think it advisable to wire you the offer as you do not show any of this grade on your stock list.'

We received from time to time stock lists, as well as price lists, from the Kneeland-Bigelow Company. We had those stock lists in order that we might know just what to sell and what not to sell.

On April 17, 1923, we wrote to the Kneeland-Bigelow Company a letter, reading in part as follows:

'For your information, we understand that Ward is willing to take on the business, shipping as outlined, and their price is 50 cents under ours, but we can secure the business on our price.'

The business referred to was 102,000 feet of 13/16 x 24" clear maple flooring. The Ward mentioned in said letters is Ward Brothers of Michigan. I do not know whether Ward Brothers are members of the Maple Flooring Manufacturers Association.

In Philadelphia we sell to contractors and consumers and come in competition with yardmen and other dealers who handle maple flooring of other manufacturers. Outside of Philadelphia we have a wholesale business, and in such business we come in competition with other manufacturers in the sale of maple flooring.

We received a letter from the Kneeland-Bigelow Company dated May 3, 1923, reading in part as follows:

'We are surprised to note that you are losing business on lower competitive prices, as other mills report that they are receiving orders at higher prices than our list. As a matter of fact, we have acted very conservatively in raising prices and it was our conviction that it was advisable for us to accept orders for shipment during the third quarter of this year, which you know has not been our policy theretofore.'

The instance you report on Factory Maple Flooring may be unusual in some respects as, of course,

in this grade we have competition from various sections of the country.

We are very glad to have you keep us advised of competitive conditions that you have to contend with and assure you that it is our desire to co-operate with you to the fullest extent possible in order to increase the business.'

We received a letter dated June 18, 1923, from the Kneeland-Bigelow Company, reading in part as follows:

'We have been advised in several instances that some manufacturers of Maple Flooring are offering reductions in certain items. It is our desire to keep in line with the market in order to secure a fair share of the business offered.'

'We desire to co-operate with you on future orders and in any cases that you encounter lower prices, we would appreciate it if you would inform us by wire and we will immediately give you definite response.'

We also received the letter dated June 3, 1923, from Kneeland-Bigelow Company, reading as follows:

'Referring to our stock list of June 15th, we call your attention to the surplus of 17-16 by 3 1/4" face Factory.'

'In order to secure prompt orders for this stock, we will allow a special concession of \$2.50 per M to you for the entire quantity shown in our list.'

We also received the letter dated June 27, 1923, from the Kneeland-Bigelow Company, reading in part as follows:

'We have your favor of the 25th inst. with reference to quotations in your territory and since this letter was written, we have mailed you new price lists with reductions on a great many items. This now makes our price on the 13-16 by 2 1/4" face Factory \$57.75 delivered your rate. You realize, of course, that we have been heavily oversold and consequently have hesitated in reducing our prices. However, we wish to keep in line with the market'

and as previously advised you, it is necessary for us to depend upon our representatives to keep us informed of the competitive price conditions.'

The letters which have been introduced in evidence are typical of the correspondence that has passed between our Company and the Kneeland-Bigelow or the Bigelow-Cooper Company. The competitive conditions described in said letters have at all times existed in the flooring business in the Philadelphia market." (Vol. II, pp. 587-593.)

Mr. George Lippincott, who represented William Horner and the Grand Rapids Trust Co. as Receiver for Horner; Mr. W. N. Lawton, who represented the West Michigan Flooring Co., identified and read into the record price lists received from the above named defendants, as well as others. (Vol. II, pp. 605-616, 616-624.)

A comparison of these price lists will amply substantiate their testimony that competition among the defendants had always existed.

Many quotations were read into the record by Mr. W. J. Barnett, of Watson, Malone & Sons, Philadelphia dealers in lumber since 1854. (Vol. II, pp. 596-604.)

MINNEAPOLIS AND ST. PAUL.

It will be recalled that the petitioner stipulated that similar testimony would be given by representatives of the John C. Hill Lumber Co., the Tozer Lumber Co., and the Capital City Lumber Co., of Minneapolis and St. Paul, if called as witnesses. (Vol. I, pp. 225-6.) They were not called because of a desire by counsel for all parties and the Court to expedite the hearing at Grand Rapids.

ASSOCIATION STATISTICS.

F. O. B. FLOORING MILL SALES.

Appendix B to this brief is a facsimile of Defendants' Exhibit GG, which is contained in Vol. IV, fol. p. 5448. Concerning this exhibit Mr. George W. Keehn, the Association's Secretary, testified as follows:

"This statement which we have here starts out with the year 1922, shows every f. o. b. mill price where the flooring was sold f. o. b. flooring mills, during the months of January to December inclusive 13/16ths x 2 1/4 inch face clear, number one and factory maple flooring standard grades and lengths of clear, number one and factory. In this report we have indicated the identity of the member of the Association who made the sale by recording his Association membership number in red ink above the price. During January, February and March, 1922, identifying numbers of members who reported their sales were not disclosed in our weekly record of completed transactions from which all the f. o. b. mill selling prices given on this statement were compiled. During that period of time no identifying numbers appear upon the weekly sales reports." (Vol. II, pp. 781-2.)³¹

³¹These identifying numbers were used for brevity in making out reports. (Vol. II, pp. 474, 479-480.) In order to eliminate possible objections to the Weekly Sales Reports, the use of identifying numbers has been discontinued. (See pages 308-311, 273, *infra*.)

The numbers of the members of the defendant association are as follows:

- No. 2, W. D. Young & Co., Bay City, Michigan.
- No. 3, Mitchell Brothers Co., Cadillac, Michigan.
- No. 4, Wisconsin Land & Lumber Co., Hermansville, Michigan, with the explanation heretofore made concerning said company.
- No. 5, Cobbs & Mitchell, Inc., Cadillac, Michigan.
- No. 7, I. Stephenson Co. Trustees, Wells, Michigan.

As a reference to Appendix B will show, there was not only the widest variation in prices among the different members, but in the prices of individual members during any given period.

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- No. 14, Cummer-Diggins Co., Cadillac, Michigan.
 - No. 22, Osgood & Blodgett Manufacturing Co., St. Paul, Minnesota.
 - No. 23, Holt Hardwood Co., Oconto, Wisconsin.
 - No. 24, Kerry & Hanson Flooring Co., Grayling, Michigan.
 - No. 26, East Jordan Lumber Co., East Jordan, Michigan.
 - No. 30, Nichols & Cox Lumber Co., Grand Rapids, Michigan.
 - No. 33, Strable Lumber & Salt Co., Saginaw, Michigan.
 - No. 34, Foster-Lutimer Lumber Co., Mellen, Wisconsin.
 - No. 37, West Michigan Flooring Co., Manistee, Michigan.
 - No. 42, J. W. Wells Lumber Co., Menominee, Michigan.
 - No. 44, Northwestern Cooperage & Lumber Co., Gladstone, Michigan.
 - No. 45, Flanner-Steger Land & Lumber Co., Blackwell, Wisconsin.
 - No. 47, Grand Rapids Trust Company, Receiver for William Horner, Reed City.
 - No. 48, North Branch Flooring Co., Chicago, Illinois.
 - No. 49, Kneeland-Bigelow Co., Bay City, Michigan.
 - No. 50, Kneeland-McLurg Lumber Co., Phillips, Wisconsin.
 - No. 51, Oval Wood Dish Corporation, Tupper Lake, New York.

The Bigelow-Cooper Company's name was changed to the Kneeland-Bigelow Company about January 1, 1923. All the persons, firms and corporations above mentioned have been members of the present defendant Association from the date of its organization, and are members at the present time, with the reservation, of course, heretofore made with respect to the Wisconsin Land & Lumber Company. (Vol. II, p. 479.)

The identifying numbers are not in sequence, for the reason that members of previous Associations dropped out for one reason or another. A number once given a member was retained by him in succeeding Associations in order to avoid confusion. New members were numbered consecutively, beginning with the next number after the highest number already assigned to a member. (Vol. II, pp. 479-480.)

DELIVERED PRICES OBTAINED BY MEMBERS IN SAME REPRESENTATIVE MARKETS DURING MONTHLY PERIODS IN 1922.

Statements of delivered prices obtained in large markets such as Minneapolis, Chicago, Cleveland, Boston, etc., during different months in 1922 were compiled by the Association's Secretary, Mr. George W. Kechn, who testified that

"all prices checked have been verified by comparison with prices on original orders and invoices which will be submitted as supporting data.

2. All prices circled are without supporting orders or invoices but they were included in members' reports of delivered selling prices obtained in the thirty representative markets.

3. Members No. 2, 4, 34, 47 and 50 did not find time to select from their records their orders and invoices supporting their statements of delivered selling prices obtained." (Vol. II, p. 780.)

These statements were marked Defts'. Ex. FF to FF-9 inclusive, and received in evidence. (Vol. II, p. 781.) They will be found in Vol. IV, fol. pp. 5438-5447.

The same absence of uniformity is shown by the statements above mentioned.

RECORD OF AVERAGE PRICES REALIZED.

Appendices C and D are copies of monthly reports entitled as above. At the end of each month each member tabulated all sales of 13/16" x 2 1/4" Clear maple flooring and prices obtained. He then deducted from the *delivered prices* the *actual freight* paid by the different purchasers to common carriers. And from the aggregate quantity sold and the net amount realized each member would arrive at the *average* price received by him *f. o. b.*

his mill for 13/16" x 2 1/4" Clear maple flooring during the previous month. The same method was also used in order to ascertain the *average price f. o. b. mill* of 13/16" x 2 1/4" No. 1, maple flooring, as well as the average price f. o. b. mill of 13/16" x 2 1/4" Factory maple flooring,—all three grades of maple flooring of the size above mentioned constituting about 70% of the aggregate shipments of flooring by the members of the Association. (Page 44, *supra*.) From the reports of all members the Association's Secretary formerly compiled reports showing the *average prices* received by the different members f. o. b. their respective mills for 13/16" x 2 1/4" Clear, No. 1 and Factory maple flooring during two months preceding the date of the report. (Pages 308-311, 273, *infra*.)

Appendices C and D are facsimiles of Defendants' Exhibits II-1 and II-2, which appear in Vol. IV, fol. pp. 5458-9. (See Vol. I, pp. 782-4.)

These averages are also shown on a bar chart. (Defts' Grant Keehn Exhibit 28, Vol. V, p. 969; Vol. II, pp. 714-717.)

As testified by Mr. Grant Keehn the difference between the high and low averages amounted to as much as 65%.

The explanation should here be made that Member No. 3 (Mitchell Brothers Company) and Member No. 5 (Cobbs & Mitchell, Inc.), both of Cadillac, Michigan, are allied interests having a common sales manager. (Vol. I, p. 431.)

RANGE OF AVERAGE SELLING PRICES FROM 1913 TO 1922
INCLUSIVE.

Appendix E is a part of Defendants' Exhibit HH, which was compiled from the *monthly* reports mentioned on pages 146-147, *supra*, and shows the high and low *average* prices f. o. b. mills for 13/16" x 2 1/4", Clear, No. 1 and Factory maple flooring by *months* from September, 1913, to December, 1922, both inclusive. These average prices are shown for different groups, as well as for all Michigan and Wisconsin members, who have at all times constituted a large majority of the different associations. This exhibit is explained on pages 782-3 of Vol. I, and appears in Vol. IV, fol. pp. 5449-5457.

Appendix E is a facsimile of such portion of the said Exhibit that gives the figures for the years 1920 to 1922, both inclusive.

The figures show not only a wide range of prices at all times, but also *absence* of artificial fixation or control.

CORRESPONDENCE OF MEMBERS WITH AGENTS AND
BUYERS.

MR. GREENE OF THE WEST MICHIGAN FLOORING CO.

Let us notice a few of the many letters that were introduced in evidence by the defendants.

On February 6, 1922, Sam E. Barr, wholesale lumber dealer of New York (Vol. II, p. 578), wrote the following letter to the defendant West Michigan Flooring Co., of Manistee, Mich.

"GENTLEMEN: This will acknowledge receipt of your letter of Jan. 27th with price list on Maple Flooring to apply on orders for shipment during February. We thank you very much for same and

will be glad to send you any orders that we can secure, but of course you know as well as we do the present chaotic condition of the Maple Flooring market. If our old friend Horner succeeds in getting rid of the stock he has it will probably help some, as he is the only one I have heard of who is making a price as low as \$25.00 on Factory, although I have had several of my customers tell me that they have had prices as low as \$27.00.

Prices on 2 $\frac{1}{4}$ " No. 1 seem to range from \$68 to \$73.00 and on Clear, \$95.00 seems to be the average.

There is quite a variation in prices on 3 $\frac{1}{4}$ ". Your price on 3 $\frac{1}{4}$ " Factory is as low as any I have seen, but 3 $\frac{1}{4}$ " No. 1 has been quoted as low as \$63.00 and 3 $\frac{1}{4}$ " Clear as low as \$83.00, so there you are.

I certainly do wish that business would get good enough so that prices could be made more stable. It gives me a great deal more pleasure to send an order to a mill that I know they can make a profit on, than to send at some of those competitive prices that I know when they get the order they are bound to lose money on.

I will be very glad to keep you posted as to price conditions in this particular territory, and will be glad to have you keep me posted as to any surplus stock that you may want to move from time to time. Your very truly." (Defts'. Ex. W-17 $\frac{1}{2}$, Vol. I, p. 367.)

On September 27, 1921, the West Michigan Flooring Co. wrote to the Wyman-Allen Lumber Co. of Boston, as follows:

"GENTLEMEN: We have your letter of Sep. 23rd in which you ask for price on a car 13/16 x 3 $\frac{1}{4}$ " face Clear Maple Flooring for your yard stock. We have only a small quantity, or less than a carload of this size and grade on hand today and as 3 $\frac{1}{4}$ " Clear accumulates very slowly with us it would be at least 30 days before we could furnish a car.

Subject to prior sale we could make prompt ship-

ment of one half car 3 $\frac{1}{4}$ " Clear and one half car 3 $\frac{1}{4}$ " No. 1 on which we quote you the price of \$85.50 per M for the Clear and \$60.50 for the No. 1 delivered Boston rate.

We have your letter of Sep. 23rd, advising that our recent quotation on 2 $\frac{1}{4}$ " No. 1 was out of line and that your customer bought at a lower price. It has become evident to us that we must revise our values particularly on No. 1 and Factory grades, and accordingly we are enclosing herewith our List No. 52, the basis upon which we trust you will be able to send us some business.

It has always been our policy when establishing prices on our product from time to time to stand pat on these prices and we possibly are making a mistake in doing so under present conditions as there are three or four mills in this territory who evidently do not take costs into account in arriving at selling values, who have no fixed price and are out to meet competition regardless.

Having faith in your good selves to treat us right on any leeway that we may give you in the question of quoting our Maple Flooring to meet competition, we will until further notice authorize you to quote our product at any reasonable concession necessary from Price List No. 52, excepting 2 $\frac{1}{4}$ " Clear, to meet competition of any of the Wisconsin or Michigan mills providing the business can be secured for our Maple Flooring on an equal basis of price. We will not care to make any concession on 2 $\frac{1}{4}$ " face Clear at this time as we find a ready sale for it at our asking price, in fact, we are sold ahead on it to some extent, and most of the manufacturers are situated in the same way.

All the way 'round, it would seem to us that our List No. 52 is low enough to compete with reliable manufacturers although, if not, we are going out to meet their competition.' (Defts'. Ex. W-12A, Vol. I, p. 350.)

On June 25, 1920, Mr. John C. Hill of St. Paul, wrote

to the defendant W. H. Greene of the West Michigan Flooring Co., as follows:

"MY DEAR MR. GREENE: I have been diligently trying to get at something definite regarding the market. It is a very hard matter to do. In the first place, things are very quiet and they are adopting the policy of the Dutchmen in Milwaukee, buying just as little as they can and therefore they are not as hungry as they were six months ago, and as some of the mills are taking care of their orders better now, they are not anticipating their wants ahead.

I have gathered up the following information, however, which you can look over and govern yourself accordingly.

Wish that you would kindly treat this confidentially, because I may want to get you information later on, and I don't want to let them know that I am passing it on.

Hermansville claim are filling open price orders at \$185.00 for Clear; \$175.00 for #1. (This is their idea of market prices.)

Foster-Latimer & Connor claim to be getting \$200.00 for Clear; \$190.00 for #1; and \$150.00 for Factory, on new business.

L. Stephenson Company authorize new business on basis of prices Foster & O'Connor.

J. W. Wells have nothing to sell as they have strike on and not running.

Twin City Hardwood Lumber Company representatives for Cooperage Company, claim they have recently bought 1½" Clear at \$191.00; 2½" Clear for \$186.00 and ¾ x 1½" Clear at \$155.00.

Chicago market-Factory is offered as low as \$131.50 up to \$160.00, we are trying to get \$150.00 to \$155.00 in C/L; #1 is \$185.00 and Clear is \$195.00 to \$200.00.

This information from Chicago is Nashville Hard-

wood Flooring Company, which account we have West of the Miss. River,—

Oak market is weak and unsettled.

Horner thinks the market is \$185.00 for Clear, \$180.00 for #1, and \$140 for Factory, is as low as it should be quoted.

With kind personal regards I am, yours very truly." (Defts'. Ex. W.-19L, Vol. I, p. 378.)

On August 6, 1922, the Strable Hardwood Co. of Oakland, California, wired the West Michigan Flooring Co. as follows:

"Quote delivered f. o. b. Sacramento forty thousand feet one by three also one by four number one maple flooring tongue and grooved for delivery sixty days *competition unusually keen* some firms shading prices rush wire protecting quotation up to and including August fifteenth."

In answer the West Michigan Flooring Co. wired as follows:

"Your wire sixth *meet legitimate competition other reliable manufacturers.*" (Defts'. Ex. W-21 and W-2, Vol. I, pp. 340-1.)

In the printed transcript it is stated that the foregoing telegrams were dated August 6, and 7, 1923, respectively. That this is due to a typographical error, either on the part of the stenographer or the printer is evidenced by the context. The witness (Mr. Greene) had already identified two other communications dated, January 5, 1922, March 29, 1922, then the two telegrams above quoted. Whereupon the witness testified that

"the foregoing letters are typical instances of conditions that existed right along before the beginning of this suit. * * *

Mr. Darby: Telegram from the Strable Hard-

wood Company dated January 17, 1922, to West Michigan Flooring Company, Manistee, Mich." (Vol. I, p. 341.)

Two telegrams dated January 17, and 18, 1922, respectively, were then read. Then came a long series of communications which were exchanged during 1923, 1921 and 1920, (Vol. I, pp. 342-383), whereupon Mr. Greene testified:

"The foregoing letters dated in 1920, 1921 and 1923 are typical of our experience in the sale of flooring." (Vol. I, p. 383.)

MR. HODGES OF THE OVAL WOOD DISH CORPORATION.

On May 27, 1922, the Jones Hardwood Co., of Boston, wrote the defendant Oval Wood Dish Corporation, of Tupper Lake, N. Y., as follows:

"Your letter of May 23rd with new price and stock list came to hand while I was away, and I would like to know if these new prices are subject to the special arrangements for discount which you gave me when you were here last. I want to know about this as we are quoting prices continuously and want to be sure where to place the business. *It seems to the writer that your price on 2 1/4" Factory of \$39.50 is pretty stiff. The Western mills as a rule, are asking \$34.50 less commission, while your price on the 3 1/4" face Factory is lower than theirs somewhat.*" (Defts' Ex. X-84, Vol. I, p. 309.)

On October 24, 1923, Mr. Sam E. Barr wired the Oval Wood Dish Corporation as follows:

"Have order immediate shipment twenty-seven thousand one by three Clear Maple, one hundred dollars delivered Spring Lake, N. J. stop. Thirty thousand same width, thickness number one Maple ship about two weeks New York City, New York Central delivery eighty-seven. Wrote several manufacturers and have their reply. Can purchase their

*"prices; offer immediate acceptance. Wire answer
prices subject regular commission." (Defts'. Ex.
X-4, Vol. I, p. 306.)*

On the same day the said defendant wrote the following letter to Barr:

"Your telegram is received, and we have wired you as follows: 'Your telegram 24th accept both orders.' And now confirm."

This covers twenty-seven thousand feet of thirteen sixteenths x 2 1/4 Clear Maple flooring at \$100, less commission, delivered Spring. (fol. 547) Lake, N. J. for immediate shipment. Also 30 M feet of 13/16 x 2 1/4 No. 1 Maple Flooring for shipment in two weeks at \$87.00 less commission, delivered New York City. We are satisfied that the stock can be purchased for these prices, and are, therefore, meeting the competition. However, we do not believe we want to accept any further orders on this basis." (Defts'. Ex. X-4, Vol. I, p. 306.)

On June 27, 1922, George H. Storm & Co., New York City, wrote to the Oval Wood Dish Corporation as follows:

"GENTLEMEN: We have been doing a lot of scraping lately over the big order of Maple Flooring for John Lowry. He has been a good customer of ours for years, and we could not let the order pass. He has offered us the job at the other man's figure, and we have today agreed to accept it, although it is altogether too low considering the class of work that he expects. He had a combination figure from some wholesaler and some lumping floorlayer here in town, which was what caused all the trouble."

We received your telegram that you could not cut the price, and suppose you are right in your stand, although it did seem that considering the special conditions surrounding this order, and the fact that you have been so anxious to move your Clear stock, you should have been able to help us a little."

We have submitted samples of your flooring and we want to supply your stock, so that you may expect to receive an order from us very shortly. It will be for about 150,000' for shipment between now and September 1st. We believe this ought to make you feel good." (Defts'. Ex. X-16, Vol. I, p. 314.)

On June 29, 1922, the said defendant wired Storm & Company as follows:

"Advance prices on two and quarter Clear, number one and factory Maple flooring five dollars per M—Will accept Lowry order if sent promptly." (Defts'. Ex. X-15, Vol. I, p. 314.)

(For other telegrams and letters see, Vol. I, pp. 303-317.)

MR. SHEPECK, OF I. STEPHENSON CO., TRUSTEES.

On March 17, 1923, the Schneider-Deschamps Lumber Co., of Milwaukee wrote to the defendant, I. Stephenson Co., Trustees, the following letter:

"We have yours of the 16th inclosing maple flooring stock sheet and note what you say about orders for 13/16 x 24 clear. We do not seem to be able to get posted on the flooring situation at present. We lost several orders at Madison recently on account of a difference of 5.00 per thousand in the price on clear, and the dealers here advise us that they have prices from a number of mills quoting 103.00 on clear and from what we can learn this price is being quoted by southern Michigan mills. We wish you would give us what information you have on the market and this may be of some help to us." (Defts'. Ex. V-15, Vol. I, p. 278.)

On March 20, 1923, the said company wrote the said defendant as follows:

"We are returning herewith your sales report of

maple flooring and of course it is very interesting to us.

We can now see where some of the business we did not get has been placed, and while the price on flooring has not hurt our business very much in the country towns, we do notice the difference in Milwaukee and Madison and towns of that size that seem to be worked harder by the southern Michigan mills.

We hope you will find time to stop off here on the 22nd." (Defts'. Ex. V-17, Vol. I, p. 279.)

That the "Sales report" above mentioned was the *Weekly Sales Report* issued by the defendant Association, see Defts'. Ex. V-36, Vol. I, p. 285, and Defts'. Ex. V-16, Vol. I, p. 278.

On January 26, 1923, Mr. J. O. Mackie, traveling salesman for said defendant, wrote his employers as follows:

"These Dower orders look pretty good with the exception of the one item of 4,000' of 1½" No. 1 on order #21. Mr. Dower showed me a quotation from Hermansville of \$81.25 f. o. b. Wadena, on a lot of about 60,000' of this, also a price of \$42.00 on about 100,000' of 7 inch to 22 inch 2½" clear maple, also a letter dated Jan. 22nd, in which they said their prices of Sept. 15th would not be changed. *In view of this and the fact that they gave me all their flooring orders, even the car for Wadena where they have always used IXL, I thought it all right to meet the Hermansville price.* Mr. Dower showed me the Hermansville letters in confidence so if you have occasion to say anything, please do not refer to them." (Defts'. Ex. V-29, Vol. I, p. 282.)

"Hermansville" is, of course, the defendant Wisconsin Land & Lumber Co., of Hermansville, Mich.

On Sept. 22, 1921, the Schneider-Deschamps Lumber Co., wrote the said defendant as follows:

"GENTLEMEN: Inclosed find our order for a car

of flooring for Northside Lbr. and Fuel Co., and in connection with this will say that in the past week we have called on every retail yard in the City and we get the same story at every yard, that is, Beck is selling the yards at 90.00 delivered on the job and we find that Holt and the Cooperage Co. are quoting \$89.00 on the clear and we were told that they are shading our price on the number one. *We cannot sell Hilty Lbr. Co. at 89.00 and we feel that they are buying it for less, so it is up to us to take the business at competitive prices or leave it and if you feel that you do not care for any of this business we of course will pass it up.*

We have tried to get started at Sheboygan this year as there has been considerable business there, and while we have quoted on nearly every inquiry we were never low enough to get the order. Last week Deschamps was at Sheboygan and quoted Hildebrand 90.00 to try them out but was advised that the Cooperage Co. made them a price of 89.00 through Newfeldt of Green Bay. We are advising you of these facts so you will understand what we are up against." (Defts'. Ex. V-9, Vol. I, p. 275.)

"Beck" is August C. Beck Co., Milwaukee. (Defts'. Ex. QQ, Vol. IV, fol. p. 5507.) "Holt" is the defendant Holt Hardwood Co. The "Cooperage Co." is the defendant Northwestern Cooperage & Lumber Co.

For other communications, see Vol. I, pp. 268-285.

In this connection it should be remembered that the Government stipulated "that the individual defendants and the officers and agents of the corporate defendants who have not testified in this suit, would, if placed on the stand, testify to substantially the same effect and to similar facts and circumstances as did the witnesses De Witt, Ralston, Greene, McLurg, Dewey, Saunders, Klesner, Colby, Shepeck, Kerry and Hodges, and that they would produce data and correspondence similar in character

to that produced by, and offered in evidence in connection with the testimony of, the witnesses above mentioned." (Vol. I, pp. 409, 225.)

TESTIMONY OF THE DEFENDANTS.

All the gentlemen mentioned in the foregoing stipulation as having testified gave evidence of the most positive and convincing character as to the existence of competition in the sale of maple, beech and birch flooring. However, *inasmuch as the evidence given by the witnesses for the Government and the lumber dealers throughout the country, to say nothing of the correspondence above mentioned, is undisputed*, we need not take the time to set forth or discuss this cumulative and supererogatory evidence of the said defendants.

THE FIELD REPRESENTATIVE'S REPORTS AND TESTIMONY.

Mr. De Witt aptly described Mr. Robertson as the *missionary* for the defendant Association and its predecessors.

"Q. And I wish you would state briefly to the court as to the field representative's work, the work that is done by Mr. Robertson, the official field representative of the Association.

A. Well he is what we call our 'missionary,' that is what I call him anyway; *he visits the architects all over the country and consults with them as regards the building conditions in their territories and the prospective—*

The Court: I am very glad you used that word, because it was running through my mind all yesterday afternoon, when I was listening to the witnesses, that the principal business of this Association was to be a home missionary.

A. He consults with architects and tries to induce them to use our product in buildings where it is possible, tries to show them the benefit of using that material in the place of other.

Q. And on the different grades, does he tell them where one grade is satisfactory and the other one is not?

A. Just as we were doing, just the same as in the Tolona high school job, where I tried to make them understand that Factory flooring was not suitable for that building, that is one of Mr. Robertson's jobs, and he keeps us well informed of the building prospects over the country. He really is a missionary, that is what he is, trying to introduce the right flooring into the proper buildings.

Q. And to advise the members of the building conditions and operations in different parts of the country?

A. Yes, sir

Q. And he occasionally sends in the name of some lumber dealer whom you get in touch with if you happen to have your [no?] flooring carried in that district, etc.

A. Very often." (Vol. I, pp. 254-5.)

Mr. Robertson made written reports from time to time. These reports describe competitive conditions in different parts of the country. They show what local manufacturers of maple, beech and birch flooring were doing to get business. They tell what efforts the nonmember manufacturers of Michigan and Wisconsin were making along the same lines. They relate what the oak flooring manufacturers, and the makers of composition floorings were doing, etc., etc. A reading of these reports (Defts' Robertson Exhibits 20 to 30, inclusive, Vol. IV, pp. 872-891) will show not only the existence of the intensest competition, but also the utter impossibility

of maintaining uniformity of prices by the members of the defendant Association. See also Mr. Robertson's testimony in Vol. I, pp. 520-527.

**THE GOVERNMENT'S ABANDONMENT OF ITS CONTENTION
THAT THERE EVER HAD BEEN UNIFORMITY OF PRICES.**

Practically at the close of the hearing when the Government introduced some data alleged to have been compiled from the weekly sales reports of the defendant Association and its predecessors for the years 1920 to June 30, 1923, inclusive, Mr. Fowler said:

“We are not insisting on uniformity.” (Vol. II, p. 857.)

Upon what, under the petition herein, can the Government insist? *Uniformity of f. o. b. mill prices and net delivered prices is the very crux of the Government's petition.*

And inasmuch as the evidence is *undisputed* that the prices for maple, beech and birch flooring were *fair and reasonable*; inasmuch as the alleged uniformity *never existed*, and the keystone of the arch of the petition has been *withdrawn by the Government*; inasmuch as it is undisputed—indeed, *proved by the Government's own witness that competition in the sale of said flooring existed and had always existed*—how, we ask, can it be contended with even a *semblance* of logic or good faith that the activities of the defendants have resulted in an unreasonable restraint of interstate trade?

At any rate, the proof *wholly* fails to support the allegations of the petition that the defendants “*have always maintained * * * and they still maintain a*

practical uniformity between themselves of net f. o. b. selling prices" and "of net delivered prices."

In the opinion filed herein the learned District Court makes the astounding assertion that "*the actual results flowing from such plans, agreement and execution and performance thereof, are of secondary importance.*" (Vol. I, p. 59.)

Apparently *a priori* reasoning is more to be trusted than the results obtained by actual experiment. If such results contradict theories arrived at by the deductive method from uncriticized assumptions or allegations of fact unsupported by proof, so much the worse for the results!

Nature herself is the great Experimenter; she recognizes no other test than trial and error. The methods employed by the learned District Court in arriving at a decision herein were discarded hundreds of years ago in every existing science upon the suggestion of Bacon of Verulam. And the brilliant advancement of all the sciences, the rehabilitation of philosophy, and progress in all the arts has, broadly speaking, been due to the patient observation of experiments and acceptance of the results. Notwithstanding the dictum of the learned District Court, we still believe with the Son of Man that a tree is best judged by its fruit.

The learned Court also makes the remarkable assertion that

"No method has been discovered and probably none can be discovered by which to measure either accurately or even approximately the *effect* of the agreements and doings of these defendants upon prices, production and competition in the maple,

beech and birch flooring industry, for the reason that there are no satisfactory standards of comparison." (p. 59.)

Then, the Government has failed to prove that the combination has resulted in a direct restraint of interstate trade or commerce; *the petition should have been dismissed. (United States v. U. S. Steel Corporation, 251 U. S. 417.)*

Besides the undisputed evidence of buyers, there was the evidence of statisticians and economists that the methods used by them *did* satisfactorily disclose the effect of the agreements and doings of the defendants. (Pages 207-230 *infra*.)

V.

The proof showed that the advertising campaign conducted by the defendant Association and its predecessors was necessary in order to meet similar campaigns that were being carried on by other associations and manufacturers of competing floorings, both wood and composition. This could not be done by the defendants individually.

The advertising was intended to promote the sale of maple, beech and birch flooring manufactured by Association members. Such flooring was standardized, of uniform quality, guaranteed by the Association, and protected by an efficient inspection service. The advertising featured quality and service. It gave useful information. It said not a word concerning prices.

The Government adduced no proof that the advertising in question was dishonest or misleading.

The expense of field representative work and the inspection service is paid out of the advertising fund. The rest of the fund is devoted to the printing and distribution of pamphlets, folders, etc., and to magazine advertising. All this work was described by the Association's secretary, Mr. George W. Keehn, as follows:

"The association has an official inspector and also a field representative who has been employed by the different associations for a great many years. This inspector makes frequent trips to the flooring mills to see that the flooring is kept up to the standards to satisfy the association. If any purchaser complains that the quality of the flooring is not up to standard grade we send this inspector or some other inspector to reinspect the flooring and if there is a variation of more than 5% of it below the standard grade, then an adjustment is made with the purchaser. That applies to any shipment in the United States from any member of the association."

In order to provide for the general expenses of the association we make an assessment of 25 cents per thousand on the shipments of each quarter. We started out originally with an advertising fund of 10 cents per thousand on shipments during each quarter and that assessment was afterwards raised to 25 cents per thousand feet of flooring shipped, that is, 25 cents per thousand feet shipped by each individual member of the association. *There is some effort now being made to increase the advertising assessment to 40 cents per thousand, but it has not yet been agreed on. This increase was suggested on account of the competition of oak flooring and other flooring materials. It seems necessary to expend more money in advertising in order to hold our places in the market. We raise funds from the members in proportion to their volume of business. The advertising fund, of course, is spent for advertising maple flooring and also covers the field representative work.*

For example, we recently sent Mr. Robertson to California to investigate the competition of Philippine mahogany. This flooring is known as Begae and Orion. We have been informed that these floorings were coming in from the Philippines and were supplanting maple and beech for school houses and other business in California. Mr. Robertson does considerable field work during the year." (Vol. I, p. 150.)

Mr. Frank M. Hodges testified as follows:

"Q. How about the field representative work, how about the field representative work by Mr. Robertson, I wish you state as to that.

A. Why I think that is very valuable. He goes to these various markets and gets in touch with the architects there and finds out what kinds of flooring are being used in that particular market, he gets a list of the public buildings that are being constructed, schools, various things of that kind, and that information is all sent out to the members.

Q. How about the advertising done by the Association, is that a benefit?

A. That is very valuable I think.

Q. Why?

A. Well because every association is advertising, the oak flooring association are spending a vast amount of money in the eastern territory to advertise oak flooring.

Q. How about the Linoleum people?

A. The linoleum people are very active, they do more advertising than anyone else I know of down there.

Q. And various synthetic floorings and other woods?

A. Yes, sir.

Q. Could the manufacturer meet the propaganda and advertising carried on by the Associations of competing woods and other sorts?

A. No, we could not.

Q. Do you consider that the guaranty of your quality by the Association is a valuable asset to your company in the sale of your flooring?

A. We think enough of it so we specify in all of our advertising that we are members of the Association.

Q. The Association has paid a great deal of attention, in advertising, to the quality of its product?

A. Yes, sir.

Q. And advertises the fact that it is guaranteed and there is reinspection service. State whether or not some dealers will pay more and some architects prefer to specify the product manufactured by the members of the Maple Flooring Manufacturers Association because of these things?

A. I think so." (Vol. I, pp. 294-295.)

Mr. J. L. Colby testified:

"Q. How about the benefits that you have received or the value you place upon the benefits that you have received from a membership in the Association, from the advertising in pushing maple, beech and birch against the oak people?

A. *We think that the advertising program of the Association during the past two or three years has been the most important part of it. The Association really had to put on this program of advertising in order to compete with the vast amount of advertising that was being done by the oak flooring people, and there is no question but that from that standpoint, the Association has been of a great benefit to us.*" (Vol. I, p. 221.)

Mr. F. C. Klesner, of the Grand Rapids Trust Co., Receiver for William Horner, testified that

*"personally I think that the Association, especially in their advertising, is very strong, for the average concern couldn't make the expenditures that we as a class can * * * for the past several months [we] have been putting on extensive campaign, which we couldn't do individually."* (Vol. I, p. 334.)

See also Mr. DeWitt's testimony on page 225 of Vol. I.

The report of the Advertising Committee of the Association in existence during 1915 is set forth (in part) in the margin.³²

³²(fol. 195) Advertising Committee Report.—Mr. Whedon, Chairman, verbally reported in substance as follows:

Since the last Association Meeting the Committee had ordered printed 60 M copies of Grading Rules and 80 M copies of 'Maple, Beech and Birch Floors—The Proper Nail to Use and How to Lay the Flooring,' which had been distributed as follows:

For the report made at the meeting held on November 15, 1922, see Vol. III, pp. 193-195. The advertising in

Sent to	Grading rules	Maple, beech, and birch floors
Architects	7,000	7,000
Building Contractors	15,000	15,000
School boards in towns of 1,000 popu- lation and up.....	6,000	6,000
Cotton mills	1,000	1,000
	29,000	29,000
Members	16,000	40,000
Reserved for future use.....	15,000	11,000
	60,000	80,000

The Advertising Assessments for the first half of 1915 were sufficient to liquidate all advertising expenses up to July 1st, not including the new edition of 60 M Grading Rules and the 80 M of the new pamphlet 'Maple, Beech and Birch Floors.'

Four Advertising Booklets are in course of preparation by Mr. Christine:

- (1) For the Home Builder.
- (2) For the Contractor—about finishing floors, etc.
- (3) For the Retail Lumber Dealer.
- (4) For School Boards.

The Committee expects to complete the revision of the manuscripts and have them ready for publication within a few weeks.

Mr. Whedon also stated that at the meeting of the Advertising Committee held the day previous, ways and means of securing to our membership the benefits of Association Advertising were considered, and the Committee recommends that the members have printed in their advertisements in the trade journals 'Members of Maple Flooring Manufacturers' Association,' so that purchasers of flooring will be in a position to know they are getting the flooring we are advertising. On motion, the recommendation was adopted by unanimous vote." (Vol. III, pp. 124-125.)

magazines is directed by experts. (Report last mentioned.) The necessity for extensive magazine advertising is also shown in the said report.

Although denigrative epithets were freely used in the petition, the Government did not even attempt to support them by evidence.

Surely, it is fantastic to claim that the *advertising activities* of the defendant Association and its predecessors have even *tended* to restrain interstate trade and commerce. Surely, there existed many activities on the part of numerous individuals and groups which had a more pernicious effect upon the public welfare than the dissemination of information as to *how to lay maple, beech and birch flooring*, or the beating of rhetorical tom toms in order to attract the public's attention to their manifold virtues. Under the circumstances, the assault upon such activities by the Department of Justice, under the leadership of Mr. Daugherty, is not unlike that never-to-be-forgotten assault upon the windmills by that valiant knight, Don Quixote.

VI.

The Government offered no proof whatsoever in support of the charge:

"The use of the uniform trade-mark and the character of the advertising put out by the defendant association intensify the tendency to establish and maintain uniform prices and also practically eliminate all competition between the defendants based on the quality of their respective products." (Vol. I, p. 10.)

Neither did the Government offer any proof that the standards adopted and maintained by the defendants were not fair and reasonable.

The proof showed that the quality of the flooring had been improved by means of the adoption and maintenance of such standards, that disputes between manufacturers and buyers had been greatly reduced, and that litigation had been eliminated.

The Government's own witnesses, as well as buyers all over the United States, were both unanimous and enthusiastic in their praise of the standardization of maple, beech and birch flooring by the defendants. Buyers testified that the flooring manufactured by the defendants was superior to that manufactured by others, and that standardization of such flooring by defendants had increased competition, and greatly benefited the public.

That during this industrial age a department of Government—even the Department of Justice during the administration of Mr. Daugherty—should seriously object to the standardization of flooring almost surpasses belief. We feel that by his promotion of the standardization movement in many branches of industry, as well as by his intelligence, common-sense, efficiency, modernity, helpfulness, and broad vision, Mr. Secretary Hoover has dishonored and betrayed the traditions, methods and practices of bureaucracy, of which he is such an unworthy member.

The standardization of maple, beech and birch flooring has been accomplished step by step during the past fifteen years. (Vol. I, p. 206.) It will take some little time to go into these technical matters; however, inasmuch as the Government has raised the issue, such matters must be gone into, at least to the extent that the absurdity of the Government's position will clearly appear.

The standardization of maple, beech and birch flooring by the defendant Association and its predecessors rests upon *five things*. *First*, the formulation of practical standards for the guidance of graders at different mills. *Second*, the precise definition of the three grades for the benefit of Association members, architects, lumber dealers and the general public. *Third*, the creation of the office of Mill Inspector for the purpose of keeping Association mills up to the mark. *Fourth*, the establishment and maintenance of a reinspection service for the mutual protection of Association members and the general public. *Fifth*, the use of uniform templets or gauges in the manufacture of flooring so that the product of one Association mill will match with the product of other Association mills and can be used together for all purposes.

Let us look at the happy conditions that obtained in pre-standardization times—those good old days over which the Department of Justice heaves sentimental sighs, and which it seeks to restore.

THE GOOD OLD DAYS.

Mr. George W. Keeln testified that he had been Secretary of the various Maple Flooring Manufacturers Associations since 1905; also:

"In about 1912 or 1913 there was a movement initiated by the manufacturers of maple, beech and birch flooring with respect to the standardization of the different grades of flooring. Before and at that time the flooring was manufactured in three grades, namely, the Clear grade, which is the best quality, the No. 1 grade, which is the second quality, and the Factory grade. Along in 1910, 1911 or 1912 there was considerable agitation with respect to standardizing the grades. This agitation became quite strong in 1913. In 1914 an effort was made to standardize the grades in order that manufacturers would know what they were expected to furnish and that architects and the consumers of flooring generally would be protected and get the grades of flooring that they wished to use. Some manufacturers were strongly in favor of standardization, some were luke warm and others were opposed to standardization. All of them felt the importance of standardization in a general way, but like every movement of that kind it grew and developed somewhat slowly.

The conditions that lead to the agitation for standardization of grades were the many complaints that were received by the manufacturers regarding the flooring that they had shipped. There was an absence of a precise definition and authoritative interpretation of grading rules. Each one put his own interpretation upon what constituted Clear or No. 1 or Factory. This was also true of architects, dealers and consumers. They knew in a general way that there was a Clear grade and a No. 1 and a Factory grade, but there was confusion and disagreement as to what was meant by Clear, No. 1 and Factory as applied to grades.

Maple, beech and birch flooring were shipped to

all parts of the United States and the grading rules were differently interpreted in different parts of the United States. As a result of the agitation for standardization, grades were more precisely and clearly defined so that the manufacturer and architect and the consumer would know what was intended by Clear grade, No. 1 grade and the Factory grade. The Association that brought about the standardization was the one that was organized on January 1, 1913. That Association took up the movement for standardization in the spring of 1914." (Vol. II, pp. 480-481.)³³

"Mr. Keehn also testified as follows:

"It has been the custom for a great many years for various lumber Associations to adopt standard grades for their products. As a matter of interest, I have been collecting some of the grading rules of these other Associations. I have also been looking through the publications of the United States Chamber of Commerce of the War Industries Board regarding grading rules that have been adopted by the various Associations. In looking over some of these matters, the first reference that I can find with respect to grades of lumber and inspection service, etc., is in the charter that was granted to the Lumbermen's Exchange of Chicago by the State of Illinois on March 31, 1869, which reads as follows:

"Said corporation shall have power to appoint inspectors, as many as they shall see fit, to examine, measure and inspect lumber, timber, shingles, wood and every article of traffic commonly dealt in by the members of said corporation or any of them or by persons engaged in what is commonly understood to be the lumber business, and to prescribe the rules and fix the grades by which such inspectors shall be governed in the discharge of their duties, and a certificate of such inspector as to the quality, quantity or character of such article thus inspected, and their mark thereon, shall be evidence between buyer and seller of the grade, quantity, quality or character of the same, and shall be binding upon the members of said corporation or others interested who shall obtain, require or assent to the employment of such inspector.

Nothing herein contained, however, shall compel the employment by any one, of any such inspector."

I might add that in those days very large quantities of lumber

Mr. Robertson testified that before 1914:

"We had what was called an Arbitration Committee, or official inspectors, whose business it was when a complaint was lodged with a member, and

*were shipped to Chicago by cargo. * * * The full product of the log came upon the market and was offered for sale without a tally from the shipper and had to be inspected and tallied and sold in the different yards engaged in business in those days. Then later on, when the source of production was farther away from the market, different Associations were formed and they adopted grading rules for the different species of lumber.*

In former days there were no official grading rules in any of the markets and if a dealer wanted to buy a lot of lumber, it was necessary for him to go to the saw mill, look the stock over, purchase it and then have it shipped. Lumber, as well as flooring, is very bulky and it would not be practical to carry on the business of selling lumber or flooring and shipping samples all over the country. For example, if a lumber dealer in California or in New England wanted to buy a carload of flooring and there were no standard grades established, it would be necessary for him to make a trip to the flooring mill to find out what he was going to get, for a manufacturer might call flooring Clear, No. 1 or Factory. On the other hand, if he wanted to have a sample shipped, that would be very cumbersome. A manufacturer might be obliged to ship 100 pieces of flooring as samples of Clear grade, and in that case they would not be typical of all the flooring contained in the grade. Consequently, in order to carry on the business it became necessary for all the different Associations to establish standard grades so that the buyer would know what he was to furnish and the seller would know what he was going to get.

In the earlier days of the maple flooring industry and generally in the lumber business, many honest differences of opinion arose between the buyer and the seller because the grades were not clearly defined. It is my experience that the more clearly the grade of flooring or lumber is defined, the more satisfactory it is to the honest buyer and the honest seller. A clear definition of the different grades eliminates ambiguities and sources of confusion and disagreement. For these reasons grading rules have been adopted by the various Associations." (Vol. II, pp. 482-3.)

The witness then identified grading rules of numerous Lumber Associations. (Vol. II, pp. 483-485.)

it could not be adjusted between the shipper and the consignee it was referred to this committee, and some member, or more, one member or more of this committee inspected, and heard the complaint and passed judgment whether or not the complaint was justifiable or not. *It became a burden to the Association. I was one of this committee, and I did a good deal of traveling, and I saw that there was a wide diversity of quality in what was termed the same grade although we had the same rules; both the manufacturer and the buyer had the same rules, but they put different interpretations on those rules; there was not a specific declaration in the rules relative to the smaller, intricate features of the application of a rule. Hence what seemed to be a great grievance to one man might be much less to another; and so those differences of opinion continued until it became, as I say a burden; and I agitated myself, and so did some others, until we had a standardization of the mills, both as to the grading of the stock, and the manufacturing of it, and all features pertaining to it.*" (Vol. II, p. 498.)

"A. There was room for complaint. Many times when I would go out on these reinspection trips I would find that the manufacturer had by some means misinterpreted his grade and there was cause for complaint. The same dealers, or the same consumer, whichever it might be, may have bought another car, of the same mill, and the grade did not correspond—there was somewhat of a difference, quite a difference, in the grading of the same grade from the same mill.

Dissatisfaction of buyers with grades discredited the whole industry because each manufacturer was somewhat of an underwriter for all the members belonging to the Association." (Vol. II, p. 501.)

FIRST STEPS TO IMPROVE CONDITIONS.

Mr. George W. Keehn testified that in 1914 the Association then in existence

"employed an expert flooring man, Mr. M. H. Robertson of East Jordan, Michigan. *Mr. Robertson had had a wide experience in every branch of the lumber business.* He had been a manufacturer of maple, beech and birch flooring.

In the earlier days he was an inspector of rough maple and other lumber and had a thorough knowledge of the characteristics and grades of the raw material. He was also thoroughly familiar with logging operations and saw mill processes because at one time he had been an employee of the East Jordan Lumber Company, who had a saw mill and extensive timber holdings. As above stated, Mr. Robertson had been engaged in the manufacture of maple flooring with a plant at East Jordan, Michigan. After that he was engaged in the superintendence of the manufacturing operations and in the sale of maple flooring produced by the East Jordan Lumber Company after that Company took over Mr. Robertson's flooring plant. *Mr. Robertson was a man of very high integrity and impartiality and had the confidence of the trade and of the other members of the Association.* In the sale of flooring, Mr. Robertson had come in contact with architects, buyers and dealers in traveling about the country. *The Association was convinced that if anyone was capable of standardizing the grades, Mr. Robertson was the man.* They therefore employed him to do the work and requested him to make preliminary trips among the mills in 1914." (Vol. II, p. 481.)

Mr. Robertson testified:

"In 1914 I made three several trips and visited each mill on each of these trips. On my first trip I paid particular attention to the grading of the product as it passed all the machines. I also got a general opinion as to how each one was doing his grading. I took the high and the low and the inter-

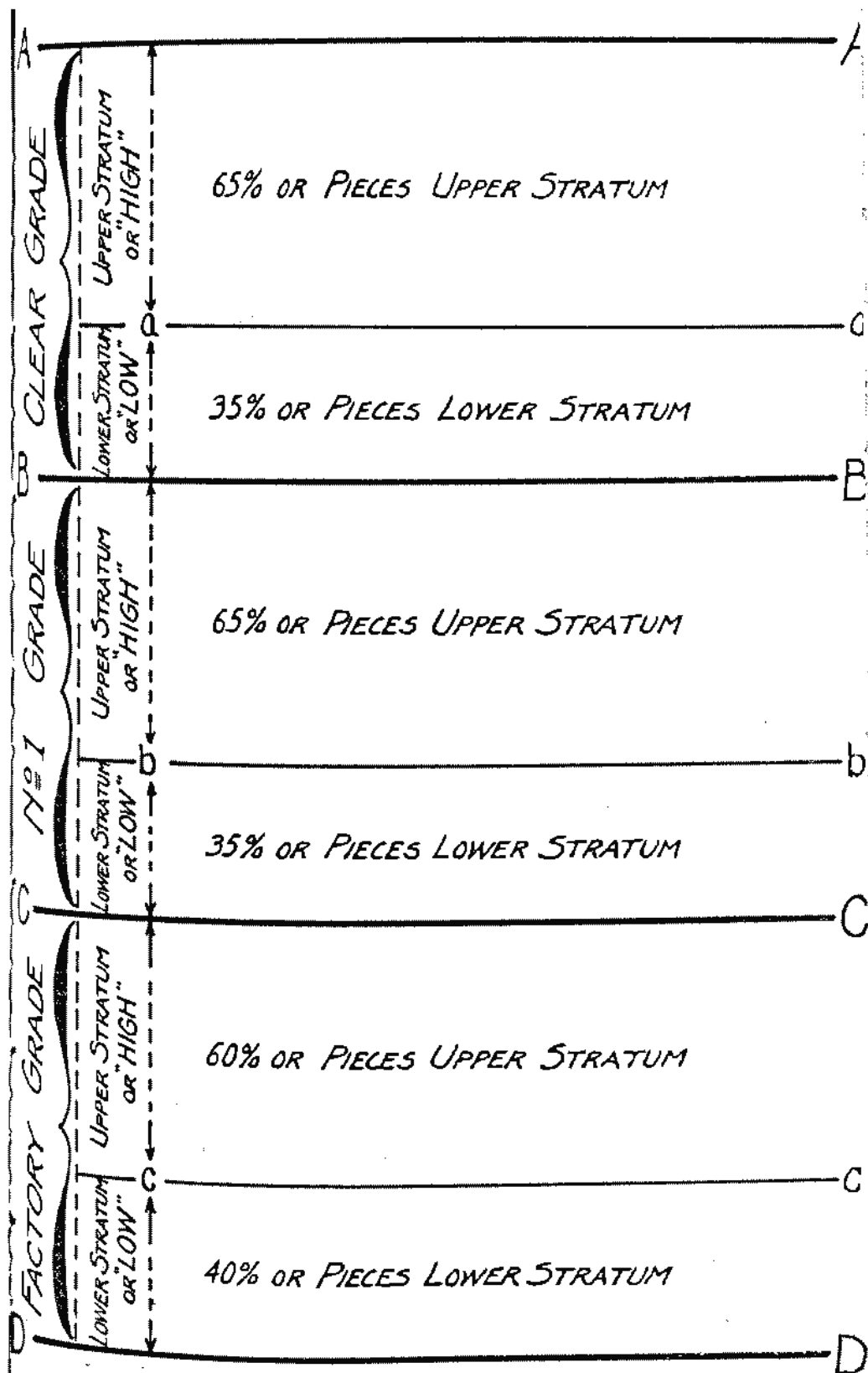
mediate and tabulated all these data and from them I arrived at a standard. *I did this after visiting the mills three times and going over the grading. I also made a list of the types of machines used, number of machines, etc., at each plant. My first trip was largely an observation trip and in order to learn the conditions at the different mills. My first trip was made in April and May. I think my second trip was during the mid-summer of 1914. On the second trip I examined conditions more thoroughly and discussed with the various managements imperfections in machinery and in the handling of the product. My third trip, in 1914, was made in October, I think.*" (Vol. II, p. 499.)

THE STANDARDS.

From the data gathered Mr. Robertson formulated standards for the three grades of flooring. The standards represented the averages of all the mills for the three trips in 1914. These standards and the testimony of Mr. Robertson can be best understood by referring to the attached diagram.

There are three grades of maple, beech and birch flooring. In the order of their excellence (as to grade) they are Clear, No. 1 and Factory. Inasmuch as all three grades must be produced at the same time, regardless of the quality of rough lumber used (pages 43-44 *supra*), *the flooring as it comes from the machines is not of uniform quality.*

It consists of pieces or lengths of Clear, No. 1 and Factory. *And in each grade there are some pieces or lengths much better than others, no two pieces being exactly alike, and the rules specifying what are allowable defects in each grade. Pieces or lengths of flooring containing these allowable defects, belong in the lower*



Scale $2\frac{1}{2}"$ or $\frac{40}{16}" = 100\%$ or 100 pieces.

400 of Pieces Lower, STRAIN	NO. 101	NO. 101	NO. 101
400 of Pieces Lower, STRAIN	NO. 101	NO. 101	NO. 101
400 of Pieces Lower, STRAIN	NO. 101	NO. 101	NO. 101
400 of Pieces Lower, STRAIN	NO. 101	NO. 101	NO. 101
400 of Pieces Lower, STRAIN	NO. 101	NO. 101	NO. 101
400 of Pieces Lower, STRAIN	NO. 101	NO. 101	NO. 101
400 of Pieces Lower, STRAIN	NO. 101	NO. 101	NO. 101
400 of Pieces Lower, STRAIN	NO. 101	NO. 101	NO. 101

Scale 20" or 25" = 100' or 100 ft

strata of each grade, and were designated "low" by Mr. Robertson, whereas, *the best pieces or lengths* would go in the *upper strata* of each grade and were designated "high" by Mr. Robertson. However, *neither the pieces in the upper strata nor those in the lower strata can have unallowable defects.* In other words, *all pieces in the upper strata and all the pieces in the lower strata of each grade must not have unallowable defects.*

Mr. Robertson determined that the Clear grade should contain 65 pieces (or percentage in feet) of the best quality (upper stratum or "high") and only 35 pieces (or percentage in feet) of flooring having allowable defects (lower stratum or "low.") *The 100 pieces (or per cent), however, would all be Clear grade.*

The standard for the No. 1 was 65 of upper stratum and 35 of lower stratum. The standard for the Factory was 60 of upper stratum and 40 of the lower.

It is perhaps needless to say that pieces classifying as upper stratum of Factory would not classify as even lower stratum No. 1. Neither would the upper stratum of No. 1 classify as lower stratum Clear. The upper stratum of each grade is simply the best of *that* grade.

The diagram is drawn to scale, and the distance between the heavy lines AA and BB is $2\frac{1}{2}$ inches or 40 *sixteenths* inches. The distance between the heavy line AA and the light line aa is 26 *sixteenths* inches or 65% of the distance between the lines AA and BB—the *amount of the best quality of flooring* the Clear grade must contain being 65%.

In the No. 1 the amount is the same, whereas in the Factory the amount is 60%, and the distance between

the heavy line CC and the light line cc is 24 sixteenths inches or 60% of the distance between the heavy lines CC and DD which represent the Factory Grade.

Mr. Robertson's testimony on these points is as follows:

"Q. You say you formulated a standard. How did you formulate the standard?

A. I took a hundred pieces, for example, a hundred pieces of say the clear grades, first; and of a hundred pieces on the average sixty-five of those would stand up in what I call the high strata; and thirty-five of them will fall below, down toward the lower extremity or lower edge of that strata.

Q. But the whole hundred pieces would be clear?

A. The whole hundred pieces would be clear. None of them will contain any defects which are not allowable. We have what we call allowable and unallowable defects. What we call the unallowable defects may occur in a grade; if so, we describe that, and throw it down into the next grade below.

Q. What is the next grade below?

A. The next grade below is our No. 1.

Q. And the grade below that?

A. Is our Factory.

Q. Now, can you graphically represent the method by which you formulated this standard for the grading of the product.

A. I think we drew, according to my interpretation, something a while ago, and it will save my drawing it again, if we have it." * * *

"A. It is understood by lumber men practically no two pieces are exactly alike, as no two faces are exactly alike; hence we cannot say that they all, in the clear grades, are alike in any respect; there will be some distinguishing feature which will distinguish one piece from another. Now, those pieces which are almost free from all defects are what I call my

upper strata of the clear grade; and those which have allowable defects are in the lower strata. That may grade from one allowable defect to the extreme number of allowable defects; but they are almost free from all defects, in the upper strata. Now, I found, after giving this the three times interpretation, that the standard rested, at sixty-five pieces out of a hundred, rested in the upper chamber—as it were, of this diagram—sixty-five pieces will run in what I call the high. That I have termed it all through my report, 'high.' And thirty-five pieces in the lower strata, which is denominated 'low.' Now, that holds good in the No. 1, as well, sixty-five high, thirty-five low. The Factory grade rested first as fifty-nine pieces high and forty-one low. It afterward was advanced to sixty high and forty low, where it stands today or at the last inspection I made." (Vol. II, pp. 499-500.)

The figures set forth in the margin show the Association's average and a member's average for the first two trips made by Mr. Robertson in 1914.³⁴ It will be observed that neither average equalled the standards ultimately established, and that the Clear grade contained some No. 1; the No. 1 some Clear and Factory, and the Factory some No. 1 and a small percentage of flooring which did not classify as Factory at all. (See Vol. II, pp. 501-2.)

Before the standards were adopted, a buyer might receive a shipment of Clear grade with only 45 per cent of higher stratum and 55 per cent of the lower stratum.

	Clear			No. 1				Factory			
	(High	Low	No. 1)	(High	Low	Clear	Fac'y)	(High	Low	No. 1	No. 2)
1st Trip:											
Assn. Av.....	64.5	35.5	3.6	65.1	34.9	2.3	1.8	59.2	40.8	1	.9
Your Av.....	62	38	4.5	61	39	2	2	61	39	3	
2nd Trip:											
Assn. Av.....	64.6	35.4	3.8	65.8	34.2	2.9	2	58.8	41.2	2.4	.7
Your Av.....	62	38	10	62	38	1.5	6	60	40	6.5	

(Defts' Robertson Ex. 2, Vol. IV, p. 868.)

The next shipment might be 70-30, the next 40-60 and so on, to the confusion and dissatisfaction of the buyer.

Mr. Robertson also testified as follows:

"Q. Now, as the result of your efforts to produce standard rules and interpretation and definition of the rules, would you say that the quality of the product as now manufactured is worse or better than the product that was manufactured say in 1914, and before that, or 1915? In other words, has the product been improved, or has it deteriorated since 1914?"

A. The whole product cannot be improved, except by machinery. If you take a hundred pieces of the natural production of the trees, or lumber, as it comes as a whole, you cannot improve that any, because you cannot re-make that lumber; you cannot improve the grades perhaps, very much, excepting to interpret them, and closely interpret what is called the off-grade, that is, the grade of No. 1 that may be found in the Clear and should belong in the No. 1. You cannot improve that any. It will all be in that space that I have defined there as belonging to the Clear grade. But you can't have it all in there; that is what we are expecting.

Q. What do you mean by cannot have it all there?

A. Well, there are what I call sharp practices, taking out a little of the upper Clear and putting a little of the upper No. 1 over into this Clear, and putting a little Factory over into the No. 1, and calling it a grade in which it does not belong. If I take out some of that grade; it should all be there.

Q. Assume that the rules are followed strictly, and a person is given 65 of the upper strata in the Clear and 35 of the lower strata, would you say that he now receives less service or better service than what he was receiving in 1914?

A. Better service than when?

Q. Than in 1914.

A. Before 1914?

Q. Yes, or before 1914.

A. He is receiving better, because it is uniformly that; there is no departure from that rule,—that is, there is a slight departure, I had better put that; humanly speaking we do not get things perfect.

Q. Why not give them a hundred pieces of the upper strata instead of 65?

A. Because the timber would not make it, or the lumber would not make it; and if that is done, he has got to rob some other shipment to do it, in other words, it is what we call robbing Peter to pay Paul.

Q. You say the rules provide for 65 of the upper strata of clear and 35 of the lower strata?

A. Yes.

Q. It being all Clear. Now, why not give the buyer 100 of the upper strata?

A. Because the product will not make it, the raw material will not make it.

Q. Did he at any time ever receive 100 of the upper strata when he was buying?

A. Not unless some other shipment was robbed to do it.

Q. If the rules now in force are strictly followed by the manufacturer is the buyer in a worse or better position than he was before 1914?

A. He is in a better position.

Q. In what respect?

A. Because they [the Association members] have come to a better knowledge of what this standard is and what it means, and they adhere to it very tenaciously—with some departures, of course, but they still adhere to that, and thus there is a uniformity. A new grader comes on, and they are afraid to trust that new grader until he has been instructed either by me or by the former grader, who has had his instructions from me; and thus that uniformity exists, not only in a given mill but in all the mills—

so much so that it is surprising how nearly they conform to the standard. And that makes it very satisfactory to the buying public." (Vol. II, pp. 509-510.)

MORE DETAILED AND EXPLICIT GRADING RULES.

Mr. George W. Keehn testified:

"Along in 1916 grading rules were compiled and the characteristics of the different grades were clearly defined. That work was done by a committee consisting of different manufacturers and was finally completed by Mr. Robertson and Mr. Fred R. Welsh, who, at that time, were official inspectors of the Association then in existence. Mr. Welsh also had had large experience in the manufacture of maple, beech and birch flooring. Mr. Robertson was one of the leaders of the movement for the standardization of grades." (Vol. II, p. 486.)

Mr. Keehn also testified:

*"When the present Association came into existence * * * it continued to use the same grading rules. The Association which originally adopted said rules on January 28, 1920, had about 40,000 copies of the rules printed and distributed all over the country to architects, contractors, retail lumber dealers, wholesale lumber dealers and others, so that everyone interested in the use of maple, beech or birch flooring could be fully informed as to said grading rules. * * * the present defendant Association has merely continued to use such printed copies as had not been distributed."* (Vol. II, pp. 481-2.)

The grading rules have been changed from time to time as experience suggested. The rules now in force will be found in Vol. IV, fol. pp. 5331-5336. Some of the former rules and much historical data will be found in the statement prepared by one of the leaders in the standardization movement, Mr. Kerry, of the defendant

Kerry & Hanson Flooring Co., (Defts.' Ex. BB, Vol. IV, pp. 826-830; Vol. II, p. 769.)

As a reference to the various rules will show, *the wasteful processes of earlier days have been eliminated.* As stated by Mr. Kerry:

"It will be observed by a comparison of the previous grading rules and those now in force that the grades are much more fully defined. *Modern perfected methods of manufacturing hardwood flooring produced a larger proportion of shorter lengths than the old time methods, because the defects are cut out closer, thus improving the average quality of the flooring, and experience has demonstrated that shorter lengths combined with longer lengths cost no more to lay and make as good or better floors at a material saving in cost, than all long lengths. Shorter lengths can always be used to advantage in closets and other small spaces.*

The stand of maple, beech and birch stumpage is limited and is becoming rapidly depleted, and the sentiment in favor of conservation of forest resources is strongly in favor of the utilization to the greatest extent of these valuable woods, especially when the result obtained in a finished floor is in no wise depreciated. In the extravagant process of earlier times the shorter lengths now used were burned as offal. Were it not for the utilization of these shorter lengths the cost of the longer lengths to the consumer would be greatly increased. In other words, if these shorter lengths were thrown away as was done in the early days of the industry, the cost to the consumer per thousand feet of the other product composed of longer lengths would be greatly increased." (Vol. IV, p. 829.)

THE ADOPTION OF STANDARD GAUGES.

Mr. George W. Keehn testified as follows:

"In 1920 the shape of the flooring was standardized in order that the product of the different mills would match up. *Prior to that time the grades had been standardized as to quality but the matching had not been standardized, so that a man could buy flooring of a mill in Wisconsin, the flooring of a mill in Michigan and the flooring of an Eastern Lower Michigan mill or of a Saginaw Valley, and use it altogether in one building. A standard thickness was adopted and steel templates and blue prints were made and furnished to each member so that all of them would know exactly what to do in manufacturing their flooring.*

This made it necessary to bring out a new edition of the grading rules, which was done on July 29, 1920. On Page 6 of said grading rules under the title "Standard Measurement," there appears the following language:

'The actual thickness of 13/16 inch and thicker flooring is 1/32 inch scant of the thickness used as the trade name. The 1/32 inch scant is taken from the under side of the flooring, leaving the thickness of the wearing surface unchanged.'

In other words, the consumer of the flooring got just as good service as before because the wearing surface of the flooring was not changed." (Vol. II, p. 486.)

Upon being asked why this change was made, Mr. Keehn stated that it was due to his experience with Government agencies during the war. *As Secretary of the Association then in existence orders for large amounts of flooring were sent to Mr. Keehn. Owing to the Association's statistical work Mr. Keehn knew what mills made maple, beech or birch flooring of the desired thicknesses and faces, and, what was more important, the*

stock on hand at each mill. These large orders were distributed to the different mills, so that shipment could be made without delay.

However, it was then necessary to give instructions to the Government agencies that the flooring received from the different mills for one job must be kept separate and used for different floors, for the reason that it would not match. (Vol. II, pp. 487-492.)

As shown on page 74 *supra*, the stocks on hand in 1920 were lower than they had ever been before. It was therefore an opportune time to make this desirable change. Modern buildings require all the way from 200,000 to 800,000 feet of flooring. (Page 59 *supra*.) The different mills have their regular trade, and 300,000 feet of one size represents a considerable portion of a year's run of any one mill. (Vol. I, pp. 420-426.) It is obviously of great advantage to dealers and contractors to be able to get the desired quantity of any size without delay from several mills, especially when the flooring from such mills can be intermingled and used together.

Other advantages are described by Mr. Kerry as follows:

"For many years I took an active interest in standardization, both as a manufacturer of maple flooring and subsequently as a member and chairman of the Grades Committee. I found that some manufacturers were center matching, also using a large round tongue, which left a lesser wearing surface, and others were using a smaller tongue, and some of them a wedge shaped tongue. We finally in our own factory established the use of the smaller wedge-shaped tongue. By having a smaller tongue and putting it below the center gives a better wearing surface. We also had letters of comment from some of our users, advising that they could lay floors where the wedge shaped tongue was in use for at

least \$1.00 per thousand less than where the round shaped tongue was used.

Taking those things into consideration, our Committee thought it advisable to establish uniformity of matches and selected the smaller wedge-shaped tongue as preferable. Some of the manufacturers insisted on staying by their present methods of matching, thinking it gave them a preference over the other manufacturers regarding their individual customers, thinking that their customers would not want to change if the new matching was different from theirs as this would necessitate their carrying two manufactures of flooring. However, we finally got them all to agree to use the same size tongue and groove and put it in the same location as to distance from top and bottom. *This gives purchasers of maple flooring an opportunity to purchase their flooring wherever they could do so to the best advantage as to price.*

In order to establish this uniformity in matching it was necessary to get the committee together at various times. After it was agreed upon I looked after the manufacturing of these steel templets to be furnished to every member of the Association; also blue prints covering this uniformity of matching. Some of these templets were sent direct to the manufacturers by me and some of them were sent to Chicago and distributed by the Association." (Vol. IV, pp. 829-830.)

The uniformity as to *grades* applies to *all* Association members. The uniformity as to *gauges* applies to all members of the *present* Association except *one*, the I. Stephenson Co., Trustees. Mr. Shepeck of said company testified:

"We have advertised our 'Ideal' brand of flooring for years at considerable expense. We have special machinery of our own patents, and we do not believe that it would be to our advantage to change. We have established trade with wholesale and retail lumber dealers who handle our flooring, *and the fact that our flooring is different from other flooring eliminates some competition.*" (Vol. I, p. 261.)

INSPECTOR OF MILLS.

Mr. Robertson is the inspector of mills, and makes periodical trips to all of them in order to keep them up to the mark. His work is described by him on pages 503-504, Vol. II.

The learned District Court was rather inclined to pooh-pooh the importance of the standardization work of the present Association. (Vol. I, pp. 220-1, 254, 293, 301.) His attitude seemed to be that because standardization had been established by previous Associations, there was nothing left for the present Association to do. The Court, however, overlooked the eternal warfare that exists between order and chaos. If the unifying mind and visitorial powers of the Inspector of Mills were withdrawn chaotic conditions would soon arise. Many non-member mills use the defendant Association's grading rules, yet buyers testified that the flooring manufactured by members of the Association was more uniform and of a better quality. (Pages 47-54 *supra*.) Grading rules do not execute themselves.

Unlike the District Court, Mr. Secretary Hoover, who is a modern business man and economist of wide experience in dealing with industrial problems, realizes the importance of *police work by trade Associations*. (Pages 191-2, *infra*.) The learned District Court might just as well assert that inasmuch as we now have constitutions and laws the executive and judicial branches of our state and national governments might safely be abolished.

And what about the integration of the teachings of future experience? We lawyers are all too prone to talk and act as if this were a *static* world.

REINSPECTION SERVICE.

In case of dispute as to grade, inspectors are sent anywhere in the United States to reinspect the flooring. As shown on pages 47-54, *supra*, the dealers praise this service very highly. See also Vol. I, pp. 425, 430, Vol. II, pp. 455, 459, 565, 581.

The Government did not produce a single instance where any buyer had been unfairly treated.

The reinspection work was described at length by Mr. Robertson, chief inspector, and by Mr. Keehn. (Vol. II, pp. 491-492, 504-5.)

It should also be stated that the flooring manufactured by Association mills is stamped in such a way that it can be readily determined whether it was manufactured by an Association mill, and if so the mill that manufactured it. (Vol. II, p. 492.)

And of course all flooring manufactured by Association members is guaranteed by the Association. (Vol. I, pp. 149, 286, 293, 300, 298; Vol. II, p. 498.)

RESULTS OF STANDARDIZATION.

DEFENDANTS' WITNESSES.

Mr. Robertson and Mr. Keehn testified that complaints had been materially reduced; that the relations with architects, lumber dealers and consumers had been improved; that every one had praised the work accomplished by the Association. (Vol. II, pp. 490-1, 506-7.)

They also testified that the quality of the flooring had

been improved, and that it was better now than ever before. (Vol. II, pp. 509-510, 490-1.)

For the opinions of some of the defendants, see Vol. I, pp. 220-1, 251-255, 286-7, 293-4, 300-3, 307, 334, 398-9.

GOVERNMENT'S WITNESSES.

Mr. Ward, a *nonmember*, manufactures his flooring according to Association rules. (Vol. I, p. 94.)

Mr. Foreman, a *nonmember*, testified:

"I am familiar with the grading rules of the Maple Flooring Manufacturers Association. *We manufacture our flooring strictly according to those rules. They are standard and we could not sell flooring if we didn't. Architects specify flooring to be made under those rules. Standardization of maple flooring has been of great benefit to the public as well as to the yard men and wholesalers. It gives them something to stand on. The quality of flooring is tested by reference to those rules. It is a benefit to the dealer because he can carry the product of three or four different mills or a dozen different mills and all of the different floorings can be used on the same job. That condition did not exist in early days. My flooring will match up now with the flooring of other manufacturers. That is because I was formerly a member of the association and have continued to manufacture my flooring in the same way.*" (Vol. I, p. 140.)

Mr. Hooker, a Grand Rapids lumber dealer, testified:

"*I believe standardization of maple flooring is a good thing. We know exactly what we are going to get when we send out an inquiry and place an order.*" (Vol. I, p. 141.)

Mr. W. R. Gillette, a *nonmember*, testified:

"We manufacture our flooring according to the grading rules of the Maple Flooring Manufacturers

Association. We have found it an advantage to do so. *It enables us to say to our customer that the flooring is made in accordance with the Association rules, and we claim that our flooring is equally as good as that made by members of the Association. I think the rules are all right. They give the purchaser a standard grade of flooring—uniform flooring.*” (Vol. I, p. 92.)

See also Vol. I, p. 85.

It should be stated, however, that the grading rules merely describe the different grades. The standards formulated by Mr. Robertson for the guidance of graders at Association mills are not contained in the grading rules. This, in part, perhaps, accounts for the superiority of Association flooring.

THE PROOF WAS UNDISPUTED THAT STANDARDIZATION INCREASES COMPETITION AND REDUCES COST OF DISTRIBUTION.

Mr. Ralph A. Brown, a large dealer of New York City, testified:

“My experience has been that the standardization of maple flooring has been beneficial to the trade. It has been beneficial with respect to uniform matching of the flooring and uniform grades so that when a certain grade is asked for it can be obtained, not necessarily from one particular mill, but from several mills. Standardization makes competition better and, in my opinion, increases rather than decreases competition. It provides a wider field from which a buyer can select flooring for a particular job.

I have had occasion to ask for the reinspection service maintained by the Maple Flooring Manufacturers Association. Such service has been beneficial to the trade. It insures the purchaser of maple flooring fair treatment and the delivery of exactly

what he has contracted to buy. *I do not think that the Maple Flooring Manufacturers Association has had the effect of keeping up the prices of maple flooring above the level which the ordinary law of supply and demand would put it.*" (Vol. II, pp. 573-4.)

Similar testimony was given by other large dealers. (Vol. II, pp. 579, 586, 618.)

And as Mr. Phisterer of the William M. Lloyd Company, of Philadelphia, pointed out:

"Standardization of flooring is of benefit to all concerned. That benefit would be to the consumer in the appearance of the flooring after it has been put down. It would also, I should think, be a basis on which you could judge the prices that the different mills were asking for that particular grade of flooring. If you had a standard grade of flooring, called clear, then, if they were manufacturing under that standard, then the difference in the price would be of advantage, but if the one manufacture was excellent and the other manufacture was poor, the lower price might be a high price in the long run and at the end of the sale. In the absence of standardization, there is no real basis for the comparison of prices." (Vol. II, p. 593.)

In the Tenth Annual Report issued by the Department of Commerce, Mr. Secretary Hoover states:

"Agitation has been current for many years for the extension of the Federal laws to the establishment of grades and qualities of different commodities. The lack of such established grades and standards of quality add very largely to the cost of distribution, because of the necessity of buying and selling upon sample or otherwise, and because of the risk of fraud and misrepresentation, and consequently larger margins in trading. It was considered by the Department, however, that it would be infinitely better if such grades and qualities could be established voluntarily in the trades themselves,

instead of by *legislation, and policed by trade associations, as is the case in several old established trades.* To this end a number of conferences have been held in different branches of the lumber, textile, paper and other trades.

The service of the Department has been to bring the different branches of the trade, the manufacturers, wholesalers, retailers and representatives of larger consumers' associations together, and to develop committees of different branches of trades. The plan has been generally welcomed, and applications have been received from many trades for such assistance. The expert services of the Bureau of Standards, Bureau of Foreign and Domestic Commerce, and the other Bureaus of the Department, have been brought into service for technical advice in these matters; and *results of important bearing upon the improvement of business ethics and cheapening of distribution have been attained.*" (Vol. II, p. 485.)

For a good account of the standardization movement and the results thereof see *Trade Associations and the Law* (Jones), pp. 80-102.

THE TWEEDLEDUM AND TWEEDLEDEE ATTITUDE OF THE DEPARTMENT OF JUSTICE.

While Mr. DeWitt was on the stand, he was asked whether architects did not specify that flooring be manufactured according to the grading rules of the defendant Association, whereupon the following proceedings were had:

"**Mr. Fowler:** Your Honor, that has been gone over by witnesses a dozen times if not two dozen times, a repetition of the same thing, and it is a waste of time. There will be no question but that architects require that and that that is what they ask for, and there will be no testimony to the contrary. It is unnecessary to repeat that so often.

Mr. Darby: *Well, Mr. Fowler, you allege that these standardization rules violate the Anti-Trust Act. If you will withdraw that charge—*

Mr. Fowler: *That is a certain line of evidence here that they have gone over and over, and I don't see any necessity for going over it so often, and especially that particular line of evidence, that we will not introduce proof to the contrary and there will be none so far as the standardization is concerned. I am not eliminating anything so far as the charge is concerned.*

Mr. Darby: The Court suggested he would be interested in the subject of the benefits obtained [from Association membership] and I intend, subject to the ruling of the Court, to go into the matter of the benefits and advantages, fully.

The Court: Proceed." (Vol. I, p. 253.)

As heretofore stated the Government did not introduce any evidence that even tended to show that the standards adopted by the defendant Association were not fair, nor any evidence that even tended to support the charges of the petition heretofore quoted in our Point VI.

As Mr. Bacon of Boston testified:

"I haven't noticed any tendency to uniformity of price because of standardization. In fact, standardization of the product has tended to broaden the field. New manufacturers have gone into the business because they would know what grading rules they could use in working up their lumber into flooring. Before that everything was at sixes and sevens, they didn't know how to grade flooring."
(Vol. II, p. 561.)

In the entire record there is proof of but one respect in which the value of the standardization of maple, beech and birch flooring was questioned. Mr. Robertson testi-

fied concerning his conversation with some lumber dealers, as follows:

"A. Yes, I have had them question the value of that, on the subject of *price* only.

Q. What was said?

A. *They would ask me what value the standardization feature would be to them, when the quotations were so widely apart, from different members of the Association. We adhere to no standard on price.*

Q. And what did you say to that?

A. *I always say to that that we have no standard on price, that our Association members are at liberty to quote as they choose."* (Vol. II, pp. 522-3.)

That dealers prefer the product of Association mills, see pages 47-54, *supra*.

In the face of all the foregoing *undisputed evidence* it will not do for the Government to indulge in *a priori* reasoning as to the effect of the standardization of maple, beech and birch flooring.

VII.

The proof shows that the prices of maple, beech and birch flooring have at all times fluctuated in harmony with the laws of supply and demand. Distinguished statisticians and economists so testified, and supported their evidence by a mass of statistics, charts and other data.

The record conclusively shows that the alleged minimum price plans were never enforced, and that in actual practice each member sold his flooring at whatever price he could get, and ran his business just as he pleased.

The undisputed proof also shows that prices during the earlier years were never uniform because of the diversities mentioned on pages 66-75 supra; whereas, from 1919 to 1921, inclusive, they were controlled by abnormal economic conditions, which found adequate expression in the rise of Factory grade flooring from \$45 per M feet to \$150, and its decline to \$15.

At no time does the proof show fixation or control of price by the defendants; and, as we have seen, even the Government admitted at the hearing that there had never existed any uniformity of prices among the defendants.

Before the District Court filed its opinion herein we had assumed that in equity cases pleading without proof, or proof without pleading, was insufficient to support a decree. We had thought that it was the duty of a court to ascertain the relation that existed between a complainant's pleading and the proof, and that in this process *all* the evidence would be considered. The record in the case at bar shows that the District Court did not follow these fundamental rules, and that his opinion herein and the decree based upon it are demonstrably erroneous.

The Government's allegations with respect to the Minimum Price Plans are set forth and analyzed on pages 7-17 *supra*. It will be observed that the Government first alleges that certain Minimum Price Plans were adopted by the defendant corporations and others; then the terms of the Plans are generally described; next comes the allegation that minimum prices were ascertained from time to time and that "*recommendations*" were made that the defendant corporations and other members should not sell flooring "at prices below said minimum prices." It is then alleged that

"the defendant corporations have *at all times* during said period accepted and acted upon said recommendations, and have concertedly established and maintained as the *basis* of their individual prices, the minimum prices * * * and by concertedly maintaining the same," and the uniform terms of sale, etc., "they have *always maintained* during said period * * * a *practical uniformity* between themselves of net f. o. b. selling prices" and "of net delivered prices." (Tr. 6-7.)

It is clear that the burden was upon the Government to *prove* the allegations above quoted. The District Court summarily considered the *mere terms* of the said Minimum Price Plans, and held that they were obnoxious to the Sherman Act.

Besides ignoring (in the opinion filed herein) the *undisputed* proof that there had *never* existed a *practical uniformity of prices* for maple, beech and birch flooring, and that *price competition among the defendants had always been strong, active and vigorous*, (pages 116-162 *supra*), the District Court also ignored the following evidence, which clearly proves that the Minimum Price Plans were abandoned and never enforced.

Mr. George W. Keehn testified:

"Another provision of the minimum price plan was that if a member sold flooring at less than the minimum price, he was to pay into the expense fund of this Association ten per cent on that sale. *As a matter of fact, no penalties were ever exacted from any member of the Association under the minimum price plan and no criticisms were ever made to any member of the Association either by the secretary's office or by any other member of the association regarding any prices at which he sold his flooring.*" (Vol. I, p. 101.)

And again:

"During the period that these four articles of association which have been referred to by me were in force there was also in force or at least there was an agreement containing a provision for the carrying out of the minimum price plan. That is the minimum price plan dated July 1, 1915, introduced in evidence as government exhibit 11. That plan was entered into about July 1, 1916.

Q. How long did that continue in effect?

A. Well, this particular plan says July 1, 1916, to November 1, 1916.

Q. Was that plan or agreement in force during that period?

A. *It was never enforced.*

Q. When you said in your direct examination that it was never enforced will you explain just what you meant by that? What was done by the association then existing under this minimum price plan, Government exhibit 11, if anything?

A. Some of the statistical data and lists of surplus stock, etc., were submitted to the association, but no penalties or fines or assessments of any kind were ever made upon or claimed for or ever paid into the general fund or the treasury of the association or were demanded by the association. In other words, the members continued on and so far as my

Such being the condition of the

judgment and opinion goes they sold their flooring at whatever prices they pleased.

I had an opportunity to observe the prices the members were selling their flooring at this period from statistical data I received from them and according to my observation the prices during all that time varied and we assembled considerable statistical data showing average prices realized, f. o. b. flooring mills and at different markets in the United States which will surely substantiate that statement. I might also add that no criticism was ever made by the officers of the association regarding the prices at which any member sold its flooring, and so far as I know no members of the association criticised other members of the association regarding the prices at which they sold their flooring or called them on the carpet as the saying is. I certainly never did it as secretary of the association.

The Court: That doesn't answer the question, at least as I understood it. The question was this: Was there a general observance of the minimum price plan by the members of the association. In other words, did the members of the association generally refrain from selling below the minimum price?

A. According to my observation they did not.

It is my recollection that this minimum price plan of July 1, 1916, government exhibit 11, came to an end in November, 1917, but according to this letter that we read today it seems to have been extended until January 1, 1919. I wouldn't be sure whether that letter refers to the articles of association. It might have referred to the minimum price plan because later on the minimum price plan was reprinted under date of January 1, 1919, running to July 1, 1919. That was the same plan, government exhibit 11, but a reprint of the same, together with the petition. It was not sent to the Trade Commission. I think it was given to Mr. McKeague when he was in Chicago.

Q. What was the status during that period from January, 1919, on, with respect to the operation of this minimum price plan?

A. Mr. Johnston, there seems to have been an extension of some kind made in there, you know, between 1917 and January, 1919.

Q. Well, during that period was there any change in the situation as you have described it in answer to my previous questions with respect to the operation or effect of this plan?

A. No, sir.

Q. Was it in force in the same way that you have testified the original plan of July 1, 1916 was in force?

A. You mean "in force"?

Q. In force, yes.

A. We figured it was the same proposition all the way through.

Q. Was it enforced?

A. None of the provisions in regard to penalties, etc., of any of the minimum price plans were ever enforced." (Vol. I, pp. 144-6.)

Mr. P. S. McLurg testified:

"There were certain so-called Minimum Price Plans in 1919. When we signed those Minimum Price Plans, we were of the opinion that they would be lived up to. We found out they weren't and that everyone sold their flooring at any price they wanted to, and we did the same. We took what we were able to get for our flooring. We learned that the Minimum Price Plan wasn't being observed through our traveling salesman. He gave information that he got from his customers. If he failed to land a certain order, he would telephone the office and say that the customer had told him another mill had made a certain price. It might be an Association mill or a nonmember mill. If we were long on stock, or if we needed the money, which we usually did, we told him to get the order." (Vol. I, pp. 227-8.)

And again:

"Our company never paid any fines or penalties for not living up to the rules of any of the associa-

tions. I know of no demands that were ever made on any of the other members." (Vol. I, p. 233.)

Mr. Walter L. De Witt testified:

"When there was a minimum price plan or minimum price basis *certain prices were recommended but they were never observed. I know that because we found in selling our product that we were obliged to meet competition, and sometimes our price was higher and sometimes our price was lower.*" (Vol. I, p. 234.)

On cross-examination Mr. De Witt testified:

"Q. Then when you made your agreement you didn't consider that you were bound by a single solitary thing in the thing you signed, is that it?

A. We knew when we signed that agreement that we were not going to be compelled to maintain any price.

Q. Well, why did you know that when it is specifically stated on that page that you are bound to observe the minimum price?

A. Because there had been those same agreements and practically the same agreements in force for a long time, and *they had never been observed, they never had been enforced, and we knew they would not be.*" (Vol. I, p. 258.)

Mr. H. H. Shepeck testified:

"There wasn't any uniformity of price when the so-called Minimum Price Plans were in effect. I knew that from daily contact with the trade. We were meeting competition. We were seeing the quotations made by others and knew what orders were being placed with other concerns. There never was any demand for a fine or penalty and none was ever imposed upon us for a failure to observe Minimum Price Plans. I know of no demand that was made upon anyone else for a fine or penalty for failing to observe the so-called Minimum Price List." (Vol. I, p. 261.)

The situation that obtained in the old days before the organization of the present Association is well stated by Mr. Greene in a letter to the John C. Hill Lumber Co. of St. Paul dated Nov. 8, 1920:

"Gentlemen: This acknowledges receipt of your letter of November 4th in which you submit a list of ten cars of Maple Flooring for which you have inquiry and in which you ask us to give you a line on the going prices on these items. To be candid with you we would not know what kind of price to put on the stock ourselves if we had the flooring for sale.

At the last meeting of the Association held on September 29th the Market Conditions Committee recommended as a fair value for 13/16" Maple Flooring of Full List for Clear, \$5.00 Off List on No. 1 and 40.00 Off List on Factory. This refers to the list of March 1st, 1920, using C.J. freight for delivery to Twin Cities.

We expect there will be another meeting of the Association sometime this month although we do not know the exact date. *However, in any event the Association does not have iron clad prices. Our Market Conditions Committee after analyzing stocks on hand, production, unfilled orders, new business, etc. merely recommends what in their judgment ought to be the asking price. This is merely a guide to the manufacturer and he is at liberty to quote his stock at any old price either more or less than the recommended values.*

The flooring business is certainly in a demoralized condition and everybody seems to be running wild. We have reports from some of our Eastern connections to the effect that no two manufacturers are quoting within gun shot of the other and that prices are varying from \$5.00 to \$15.00 and \$20.00 on the same items. This certainly is not a healthy condition and it of course is due to the fact that there is very little demand and some mills are very anxious for business and some disregard altogether the cost of production." (Vol. I, pp. 378-9.)

Mr. T. M. Ralston testified as follows:

Q. You spoke of the variation in prices, competition among the different manufacturers. Did that group of manufacturers include the members of the Maple Flooring Manufacturers Association?

A. Yes, both members and nonmembers.

Q. You say there has always been active competition not only among members, not only by members among themselves, but of members against nonmembers?

A. Absolutely, yes, sir.

Q. How do you explain the existence of that condition, when you consider the fact that during the previous years there was supposed to be in force and effect, at least the so-called Minimum Price Plan of the Maple Flooring Manufacturers Association?

A. I really don't know, unless, if there was any such agreement, it was not carried out. Whatever I saw of prices that were being quoted, my own opinion would be that the law of supply and demand for flooring controlled it.

The Court: It must have been one of two things: Either they didn't carry out their bargain, or the prices quoted must have been above the minimum price.

Q. What was your observation as to whether those Minimum Price Plans were observed in the practical conduct of the business?

A. I would say absolutely that they were not.

Q. How do you know that?

A. From prices that I have seen at different times and my own personal knowledge of the prices that other mills were quoting.

Q. You compared the prices that you saw and were able to get, with the minimum prices, so-called, in force at that time?

A. With the prices—

Q. So-called minimum prices. I think in some of the articles they set forth what shall be the minimum price Frame "A." Did everybody get higher than that price, or get that price all along?

A. My judgment would be that there wasn't much attention paid to it. In some cases, the price would be higher and in some cases lower.

Q. Each fellow got the business on such terms as he could?

A. Yes, sir.

Q. That is the way you conducted the sales department of Horner?

A. Absolutely, at all times.

Q. Was it your observation the others conducted their business along the same line, the other members?

A. I would judge from the quotations I have seen, and what I know of their business, that they did.

Q. You were getting statistics, were you, that were issued by the Association?

A. Yes, sir.

Q. Did you ever have occasion to compare the reported sales with the so-called minimum prices which were supposed to be in effect?

A. I don't know as I ever did, because I never paid much attention to the prices that were given in the completed list.

Q. What would you take into consideration when you fixed the price of your flooring? You had to arrive at some price at which you would sell it; how did you arrive at the price, what factors did you take into consideration?

A. Our cost of production based on the cost of the rough lumber, manufacturing costs, selling costs, and a profit.

Q. And the conditions in the respective markets where you wanted to sell?

A. And market conditions very largely.

Q. The amount of inquiries you received, did you take that into consideration?

A. Not so much that as the amount of business on our books, or our wish to move a certain article, certain size or grade, of maple flooring; all those things entered into it.

Q. Did you feel free to exercise your own independent judgment during all that time, or did you feel constrained by some rule or data that were issued by the Association, or any recommendations of the Market Conditions Committee?

A. I always felt free to make my own prices, and I always did make them.

Q. You always did?

A. Yes.

Q. How did you advise your trade as to what your prices were, or your representatives, or special agents?

A. We sent out lists on our own stationery, showing the different items and our price f. o. b. cars mill, freight at the bottom, the amount to add for freight in dollars and cents to cover the point which that representative covered.

Q. You made out and distributed your own price lists?

A. Yes.

Q. Did you use any books or data that were issued by any of the associations as price lists?

A. None whatever. (Vol. I, pp. 321-2.)

As stated by the District Court, "Either they didn't carry out their bargain, or the prices quoted must have been above the minimum price." But it was incumbent upon the Government to prove either that the defendants had carried it out, or that "the prices quoted" were "above the minimum price."

The Government did not even undertake to show the minimum prices which were alleged to have been determined from time to time. There are a few scattering recommendations in the record, but there is no proof that these were all that were made.

The Government did not even undertake to prove the relation that existed between the recommended minimum prices and the prices at which members sold their flooring, nor what effect if any the said recommendations had upon the prices of the different members.

The Government did not even *allege* that the minimum price plans were carried out, or that flooring was sold by the defendants at prices equal to or more than the recommended or alleged minimum prices. As pointed out in our analysis of the Government's petition on pages 10-12 *supra*, all that the Government alleges is that the defendants "concertedly established and maintained as the basis of their individual selling prices," the aforesaid minimum prices. What this allegation means, we do not know. (For its possible meanings, see pages 10-12 *supra*.) At any rate, the foregoing allegation was incorporated in the petition merely by way of inducement. The Government alleged that the defendants *by concertedly maintaining the minimum prices as the basis of their individual selling prices* (and the uniform terms of sale, commissions, etc.) "have always maintained during said period and still maintain, a practical uniformity between themselves" of "net f. o. b. selling prices" and "net delivered prices."

It is the alleged *uniformity of prices* upon which the Government based its case. Of course, the evidence is conclusive that the alleged uniformity never existed (Pages 116-162 *supra*.)

For further proof that the minimum price plans, scientific price lists, etc., did not work out in actual practice, see Vol. III, pp. 207, 230-1, 246-7, 249-251, 299, 333, 340, 411; Vol. IV, pp. 435-6, 519-521. All the foregoing evidence was introduced by the Government.

Furthermore, Mr. Thomas Forman, a witness called by the Government, testified that he was a member of the various associations from 1898 until 1918 or 1919, (Tr. 137-8); that in the early days, say in 1903 or 1904, an attempt was made to fix the price of flooring, but that "it was a dead failure" for the reason that "we couldn't hold together, all the time somebody breaking the price, we got disgusted with it." He also testified that the members therefore ignored the price that had been fixed and sold their flooring as best they could. *And the same conditions obtained with respect to the alleged minimum prices which were recommended—"we were never controlled in any way at all—we all went and sold our stuff as we were a mind to."* (Vol. I, p. 138.)

The District Court's conclusion is squarely opposed by the testimony of Mr. Edward B. Gordon, Mr. Grant Keehn, Professor Albert John Hettinger and Professor Homer B. Vanderblue. Mr. Gordon is on the Research Staff of the Bureau of Business Research of Harvard University. Mr. Grant Keehn is a graduate of the Harvard Graduate School of Business Administration and is employed in the Statistical Department of Goldman Sachs & Company of New York City. Professor Hettinger is the Assistant Professor of Business Statistics of the school above mentioned and Consulting Statistician for the Federal Reserve Bank of Boston and the Ludlow Manufacturing Associates. Professor Vanderblue is Professor of Business Economics in said School and Economist with the Harvard University Committee on Economic Research.

MR. GORDON'S TESTIMONY.

Mr. Gordon testified that prices may be kept (1) at an unreasonably low level, or (2) at an unreasonably high level, or (3) at a reasonable level, or (4) intermittently at one or the other levels previously mentioned. (Vol. II, p. 625.) He stated that if the defendant Association and its predecessors had controlled the prices at an unreasonably low level *there would have been no other supply produced*. Inasmuch as other supply was continuously produced by nonmembers, (see pages 27-31 *supra*) he concluded that prices had not been kept at an unreasonably low level. (Vol. II, p. 626-7.)

He testified that prices had not been kept at an unreasonably high level, for the following reasons:

If the price of a commodity is kept at an unreasonably high level there would be special inducement in the form of attractive profits for the production by others of an additional supply. This supply would either break the market or deprive the original producers of their trade.

To control prices at an unreasonably high level, it is necessary to control the potential supply. The potential supply of a commodity rests upon control of raw material, equipment, capital, management and labor. The raw material of maple, beech and birch flooring is the rough lumber, which accounts for about *seventy-five per cent* of the cost of the finished product. Investigation showed that the members of the defendant Association controlled *less than 2%* of the total stand of maple, beech and birch timber in the United States, and that from 1912 to 1920, inclusive, the members of said defendant and its predecessors devoted to flooring purposes less than 20% of the annual cut of maple lumber.³⁵ (Vol. II, pp. 628-9.) See also page 26, *supra*.

Machinery for the manufacture of flooring can be freely purchased. And it requires only an expenditure of \$30,000 to embark upon the production of maple, beech and birch flooring. Furthermore, there are the oak flooring manufacturers and the saw-mill operators who could without any additional (or only nominal) expense engage in the manufacture of maple, beech and birch flooring. (See pages 31-33, supra.) And the large productive capacity of nonmembers, of which not more than 15 to 20 per cent was used, could likewise be tapped if prices were unreasonable. (See page 29, supra.)

We assume that not even the Government will contend that the defendants ever had control of capital, managerial ability or labor.

It was concluded, therefore, that neither the defendants nor their predecessors had controlled prices at an unreasonably high level. (Vol. II, pp. 632-633.)

It was testified that investigation had disclosed that there was no fixation or control of price at a reasonable level, because the defendants did not have control of the raw material, or capital, equipment, management or labor necessary to the production of flooring. (Vol. II, p. 634.)

With reference to intermittent fixation of price at one or another of the three levels already discussed, Mr. Gordon testified as follows:

"A. Well, this method of price manipulation would be done in the following manner:

The seller, A., with control of a portion of the supply would raise his price to an unreasonably

²²Maple flooring constitutes about 90 per cent of the total (flooring) output of Association members. (Page 44, supra.)

high level in order to secure additional profit. Provided he did not have control of the potential supply of the product, other supply would be produced and sold under the inducement of an adequate margin of profit.

The seller, A., who was attempting price control, would find additional supply placed upon the market at a lower price. He would be forced to lower his price in order to retain his market. The failure to do so would mean the loss of his market to the cheaper supply, which was available to the purchaser,—to the buyer. If he maintained his price at the unreasonable level he would be forced out of business. If he lowered his price, in order to keep his market, he would cut below the price of the additional supply which was being offered to buyers. The price of the seller, A., would be below the price of the uncontrolled supply for two reasons: First, the cost of production of the seller, A., would be less than the cost of production of the additional supply, for if this were not the case this additional supply would have been produced before; secondly, the additional supply, with the same demand, would cause the price to decline.

Thus, the result would be to drive the producer of this additional supply from the market. *This manipulation of prices would be reflected in the prices realized by the seller, A., and would be evident in comparison with other prices, particularly the prices of similar commodities.*

Q. For the purpose of ascertaining, therefore, whether there was in this case any such attempted fixation of prices at alternately high and low levels in the manner in which you have described, have you made a comparison of the prices realized by the members of the Maple Flooring Manufacturers Association with an index of all commodity prices, an index of all building material prices, and an index of lumber prices, and also a comparison with the prices of competing floorings.

In addition we have compared the prices realized by members of the Association with the cost of the

raw material, and with the cost of other manufacturing and marketing expenses." (Vol. II, pp. 634-5.)

The witness then identified and verified defendants' Gordon Exhibits 6 and 7. (Vol. II, pp. 635-647.) Defendants' Gordon Exhibit 6 is a comparison of the index of the prices of "The Product" with the United States Bureau of Labor Statistics indices of "All Commodity Prices," "All Building Materials Prices" and "Lumber Prices," by months from 1913 to 1923. (Vol. V, p. 899.)

The prices of "The Product" were arrived at by taking the *monthly* average prices of 13/16" x 2 1/4" Clear, No. 1, and Factory (see pages 146-148, *supra*) and combining them in the proportion of their production, viz., 50 per cent, 35 per cent and 15 per cent, respectively. This method is known as "weighting" and is used by the United States Bureau of Labor Statistics and statisticians generally. It is fully explained by Mr. Gordon on pages 635-647 of Vol. II. Defendants' Gordon Exhibit 7 (Vol. V, p. 901) is the proof of the validity of the method used in arriving at the prices of "The Product."³⁰ (Vol. II, p. 646.)

Mr. Gordon's analysis of Defendants' Gordon Exhibit 6 appears on pages 647-651 of Volume II. A reproduction of said exhibit is Appendix F to this brief. The witness concluded this study as follows:

"Now, a study of the movements of the four indices reveals the fact that during the years 1916, 1917 and 1918, and the first half of 1919 the price

³⁰It should be stated that in some instances the supporting data were not printed, for the reason that it was undisputed that the graphs or charts were correct representations of the data upon which they were based.

levels of the four indices were dissimilar. The index of all commodities prices was on the highest level, and the index of all building materials prices upon the next highest level, followed by the index of lumber prices and with the index of the Product upon the lowest level.

During the last half of 1919 this relationship changed. The Product advancing to the highest level, all building materials to the third highest level and all commodities upon the lowest level.

A study of the indices themselves, that is, the commodities which make them up, will explain this relationship. Maple flooring is a specialized product and cannot be used for a variety of purposes,—its sole outlet being for flooring purposes in building construction. Lumber, on the other hand, is a less specialized product, although the major proportion, it has been estimated sixty per cent, of all lumber goes into new building construction. There are also a variety of other uses, such as for boxing, crating, shipbuilding and such outlets for lumber. All building materials is a still less specialized group. Many of the products making up this index are used in a variety of industries, and in addition many of them are made from raw materials, such as iron and steel, which, if the prices are not attractive will be diverted and processed into other commodities. The all commodity index has no specialization, being made up of all manner of commodities and will be influenced by an increase or decrease in the amount of building in the United States only to the extent that those products used in the building industry make themselves felt in the general average of the 404 commodities which are included in the index. (Vol. II, pp. 650-1.)

A series of charts (Defendants' Gordon Exhibits 9-13, both inclusive) were then introduced in evidence. (Vol. II, pp. 651-662; Vol. V, pp. 917-925.) *These charts show that the demand for maple flooring is dependent upon the volume of new building construction in the United*

States, and explain the reversal of price level that took place in 1919-1921. They show

"that as the volume of new building advanced or increased or decreased the volume of new orders booked by Association members advanced and increased or decreased in a corresponding manner." (Vol. II, p. 662.)

Mr. Gordon testified:

"Q. Now, having discussed the question of the dependence of new orders booked by members of the Association upon the volume of building construction in the United States, will you go back to Defendants' Gordon's Exhibit 6, and point out, if there is anything that you desire to point out there, the relationship of the dependence or the importance of the dependence in the reading of this chart, Exhibit 6?"

A. *The purpose of determining the dependence of the demand for maple flooring upon the volume of building construction in the United States was to explain the change in price level as shown by the chart Exhibit 6.*

During the years 1916, 1917 and 1918, when the index of the Product was upon a lower relative level than the other three indices, there was very little new building construction in the United States because of restrictions placed upon that industry.

As a result this failure of demand for flooring inevitably caused its price to stay upon a low level. The continuance of this low volume of building, during the years 1917 and 1918 created a shortage of building, which at the close of the war and the removal of restrictions upon the industry was allowed expression and explains the tremendous increase in demand for flooring and other building materials during the period 1919 to date. This shortage and the consequent high level of building since 1919 is shown in a chart.

Mr. Johnston: That is Exhibit 14.

A. Exhibit 14." (Vol. II, pp. 662-3.)

Appendix G is a reproduction of the Defendants' Gordon Exhibit 14. (Vol. V, p. 927.)

*"It is apparent that * * * from 1916 to 1918 the volume of building declined to a level lower than at any other time since 1900. The area underneath the line of trend [1900-1916 projected] will give you an approximation of the accumulation of building shortage."* (Vol. II, p. 667.)

Mr. Gordon also testified:

"The difference in level of price before and after the end of 1919, it has been shown, was caused by the specialization of the Product, which can be used only as flooring in the construction of new building. The changes in the quantity of new building in these periods offers explanation of the change in relative price levels of these four indices." (Vol. II, p. 669.)

This falling off in the volume of building was due to the restrictions imposed by the Government during the war. (Vol. II, pp. 666-7.)

Mr. William L. Saunders testified as follows:

"In 1919, there was a marked shortage of good lumber in the market, in fact, at that time it was practically a runaway market. It was only a question of whether you had the thicknesses and grades that were required by the industries demanding such lumber. During that time we sorted out a large amount of No. 1 Common flooring stock and sold it on the market to other industries. The prices of rough maple lumber during 1919 and 1920 compared very favorably with the prices of maple flooring, although at that time there was a great expansion in the building trades, and owing to a couple of serious fires that occurred in the flooring industry, I think flooring had a tendency to fluctuate a little more in value probably than the rough lumber. The first fire occurred in the dry kiln department of the Horner people, whose plant was located at Newberry. A couple of months later their mill at Reed City burned. The Horner people manufactured

about 20 per cent or better of the entire output of Michigan or of the so-called Association, and at the time of the fires they had something like 19,000,000 feet of orders on their books. Their customers immediately attempted to get other manufacturers to supply them with flooring. I took on some of that business at prices which were to be fixed at time of shipment. These prices were to be at whatever I was then selling flooring at. When the Horner supply was cut off and their customers had to buy flooring elsewhere, it made it very difficult for many contractors to get the material for buildings already contracted for. During 1919 and 1920 the demand for flooring was very great, and it was necessary for my company to allocate almost every carload of flooring to the customer that was pressing us hardest for shipment, so that our warehouses were entirely empty. We were then running continuously and bending every effort to manufacture all we could." (Vol. I, p. 198.)

Mr. W. L. De Witt testified:

"We have never been a party to any agreement or understanding of any kind to limit our production. We have steadily increased our production since 1918, when it was between three and four million. This year it will be over eight million. We had a little falling off in 1920, as our plant was closed by the I. W. W. strike for a period of about three months. That was in the early part of 1920, beginning about May 1st and continuing until practically August 1st, 1920. There had been talk of a strike or a threat of strike for nearly a year before. Practically all the mills in Wisconsin and the Upper Peninsula of Michigan were closed down from May 1st to about August 1st, 1920. This caused a great shortage of flooring and was probably one reason why the prices fluctuated so much. Prices were then very high. There was a great variation in prices during that period. The I. W. W. strike was general among the mills in Northern Wisconsin and the west portion of the Upper Peninsula of Michigan." (Vol. I, pp. 234-5.)

That during 1919-1920 contractors and others were bidding for deliveries irrespective of price in order to get flooring for building already under construction, see Vol. I, pp. 346-8, 381, 383, 432-3, 446; Vol. II, pp. 458, 574; Vol. III, p. 131.³⁷ For a statement of the wages paid, the prices of supplies and rough lumber, see Appendices H, I, J, K, L, M and N, which are copies of Defendants' Exhibits K, L, T, T-1, CC-1, OO and PP, respectively. (Vol. I, pp. 224, 229, 268; Vol. II, pp. 769, 797, 798; Vol. IV, 820, 821, 822-5, 834, fol. p. 5505.)

Mr. Gordon also pointed out that there were 21 commodities mentioned in the United States Bureau of Labor Statistics, Wholesale Price Bulletins that had a higher relative peak price than did "The Product" (Defendants' Gordon Ex. 15, Vol. II, pp. 670-1, Vol. V, p. 932), and 146 other commodities that had a higher average price for the period of 1913 to 1922, inclusive, than did "The Product." (Vol. II, p. 672, Defts.' Gordon Ex. 16, Vol. V, pp. 933-943.)

For Mr. Gordon's summing up, in support of his conclusion that the defendant Association and its predecessors did not control the price of maple, beech and birch flooring, see Vol. II, pp. 673-676.

* * * in the English parliamentary debates upon the corn laws about the year 1840 it was estimated upon data furnished by Mr. Tooke in his *History of Prices*, that a deficiency of one-sixth in the English harvest resulted in a rise of at least one hundred per cent in the price of corn; and another estimate by Davenant and King, at the close of the seventeenth century corroborates this apparently excessive statement." (Marshall's *Industrial Society*, p. 414.)

MR. GRANT KEEHN'S TESTIMONY.

Mr. Keehn identified two charts, Defendants' Grant Keehn Exhibits 17 and 18 (Vol. V, pp. 945-7) where the prices of "The Product" were compared with the prices of competing wood floorings, viz.: Oak (a hardwood) and Arkansas Soft Pine, Southern Yellow Pine and Douglas Fir, which are soft woods. The second chart above mentioned is a comparison of the *indices* of the prices of all the floorings above mentioned. (Vol. II, pp. 679-683.) Mr. Keehn testified:

"A. This chart, Exhibit 18, indicates that the prices of all five floorings started to rise sharply at about the same time, in March and April of 1919. *The rise of the prices of The Product, however, was not as accelerated as that of the prices of the other four wood floorings.* The last half of 1919 saw a reaction in the advance of the prices of the other floorings, whereas the price of The Product, which as can be seen, was still upon a relatively lower level, continued to advance.

In November and December of 1919 the upward movement was recommenced in all series, with The Product still upon a lower level. This rise was continued by all five wood floorings until early 1920. The soft woods, Arkansas soft pine, Southern yellow pine and Douglas fir reached their peaks coincidentally in February of 1920.

The hard woods, oak and The Product, continued to advance and did not reach their peaks until April of 1920. The decline which has set in after the peak prices in all of the five series was broken in all by a slight reaction in the third quarter of 1920, but the precipitous downward movement was again resumed.

The downward movement of all indices was broken only in February, 1921, save for Southern yellow pine, and culminated in the low points in 1921. Douglas fir was the first to reach its low point in

April, 1920 [1921]. The next two months saw a slight reaction in all prices, and, with the exception of Douglas fir, July again brought a decline.

This marked the low point for the other two soft wood floorings, Arkansas soft pine flooring and Southern yellow pine flooring.

The next month saw a sharp rise in the indices of the soft wood flooring prices. The two hardwood floorings, however, continued to decline in price. Oak flooring reached its low point two months later, in September.

Mr. Newman:

Q. What year?

A. September, 1921.

Mr. Johnston:

Q. Yes?

A. *And The Product continued to decline until October, when the bottom was reached. Thus the price of The Product was the last one to advance, having continued its downward movement in the face of the sharp advance in other flooring prices.*

A reaction from the upward trend was felt by all of the flooring prices in the early months of 1922; but the upward movement was again resumed in the second quarter of that year, and continued with but few interruptions to May of 1923.

The Product price index has risen since its low point in 1921 at a slower rate than all other flooring indices except for that of Douglas fir flooring, from their respective low points.

This comparison indicates the price movements and fluctuations of these competing floorings to have been practically identical with those of the prices of The Product. All have moved together with soft wood floorings and coincidentally reached their peaks and troughs earlier than did the prices of the hardwood floorings.

The Product is shown to have advanced less sharply on the upswings, both in 1919 and again in

1921. It would appear that the existence of the Maple Flooring Manufacturers Association has not tended to accelerate the upward movement of the price of its product.

It would appear further that the Maple Flooring Manufacturers Association could not have had control of the prices of its product when the price of its product did not advance in the face of sharp advances of other flooring." (Vol. II, pp. 683-4.)

Mr. Grant Keehn also testified:

"We investigated the prices of The Product, or the prices realized by the members of the Association [see page 210, *supra*] with their cost of production, and in comparing the prices with the costs of the raw material and the other manufacturing and marketing costs. * * *

The cost of the raw material in the production of maple flooring is approximately three-quarters of the total cost of the finished maple flooring. * * * In making the comparison of the costs of the raw material and prices realized it was not our purpose to show the relative amount of profit secured at one time as compared to another, but merely to indicate changes in the cost of the raw material and the finished product, and to compare the fluctuations in their price." (Vol. II, p. 685.)

Mr. Grant Keehn then identified Defendants' Grant Keehn Exhibit 19, which compares the index of the f.o.b. mill prices of 4/4 rough maple lumber of three grades (Firsts and Seconds, No. 1 Common and No. 3 Common)³⁸ with the price of "The Product," for the period of 1913 to 1923. (Vol. II, pp. 686-8; Vol. V, p. 949.)

³⁸The prices of the three grades of rough lumber were added and the arithmetic average was taken as the price of the combined grades.

"We could not weight the prices of these three grades in proportion to their use, because we did not have figures on the relative consumption of these three grades by the members of the Association. It was necessary, therefore, to combine them on some arbitrary basis, and the arithmetic average seemed the reasonable method of combining them." (Vol. II, p. 687.)

Appendix O is a reproduction of the exhibit last above mentioned.

Mr. Keehn concluded his exposition of the chart in question as follows:

"From this comparison it is evident that the prices of The Product, of the Maple Flooring Manufacturers Association, were not unreasonable from the point of view of the cost of raw material. Moreover, from this single point of view it appears clearly that the members of the Association would have been justified in securing a higher price in the years 1917 and 1918 and the first part of 1919, and the last half of 1920, and the first one-half of 1921, and the first part of 1923. The prices of The Product were on a relatively higher level than the price of its raw material for only about one year in the 11 under consideration." (Vol. II, p. 690.)

Mr. Grant Keehn also testified:

*"We made a comparison of the price of The Product with an index of the average manufacturing and marketing costs of the members of 'the Association'. This index includes costs other than raw material. These average costs were made recently quarterly by the Association. * * * The comparison has been made from 1916 to 1923. The only other year in which a survey was made was in 1913, which year we have used as a base. We did not believe it necessary to chart previous to 1916, because it would merely be a straight dotted line from 1913 to 1916."* (Vol. II, p. 690.)

The foregoing comparison appears on Defendants' Grant Keehn Exhibit 21, (Vol. II, p. 690; Vol. V, p. 953) which is Appendix P to this brief.

Mr. Keehn concluded his exposition of said chart as follows:

"It is apparent from this comparison that there

is little similarity, except in general direction, in the movements of these two indices. For approximately half of the period the average manufacturing and marketing costs were upon a higher relative level than the prices of The Product, and during approximately one-half of the period this relationship was reversed.

"A study of the items which make up the average manufacturing and marketing costs, and the conditions and forces which affect them, will provide an explanation of the divergence and dissimilarity in the movements of these two indices.

"Of the items which go into Average Manufacturing and Marketing Costs, other than raw materials not here included, labor cost is dominant. Because of agreements with labor and the lack of an immediate necessity to raise wage rates, wages practically always lag after prices of products upon which this labor is expended. So great is the lag that the payments made to labor increase even after the peak in prices has been reached and continues to decline even after the prices have reached their low points and have again started upon the upswing.

"Delay is also caused in the action of labor costs by the increased per unit expenditure after the peak has been reached and the rate of production decreases; and conversely, after the rate of activity has increased the per unit expenditure for overhead and labor decreases. The other manufacturing and marketing costs, which are the overhead expenses, fluctuate in a similar manner, and are less flexible in their fluctuations.

"This comparison indicates the fact that the prices of The Product during the last half of 1917, 1918, and the first half of 1919 were upon a much lower relative level than the average manufacturing and marketing costs.

"As was stated when a comparison was made of the prices realized to the costs of the raw material, the Association would have been justified had it secured higher prices during this period. And it was

pointed out that the cause of the low relative price level of The Product at this period was due to low volume of building construction and the consequent lack of demand for The Product." (Vol. II, pp. 691-2.)

Mr. Keehn stated that he and Mr. Gordon had investigated the relation of the price of The Product to supply and demand. Mr. Keehn discussed the laws of supply and demand, including their relation to *crises*, or Business Cycles, in order to show how they operate *when unhampered by artificial control*. (Vol. II, pp. 692-700.)

A series of three charts were then introduced in evidence. These charts all relate to the supply of and demand for The Product, and show the relations of each to the price thereof for the period of 1912-1923. (Vol. II, pp. 700-705; Defendants' Grant Keehn Exhibits 22, 23 and 24, Vol. V, pp. 955-959.) Mr. Keehn explained the methods employed as follows:

"A. Yes. In order to compare the prices of the product with the supply and the demand, of the product of the Maple Flooring Manufacturers Association, it was necessary to have some indices of the supply and the demand. We took, to represent supply, in this case, the stocks on hand of the fifteen identical members of the Association, which were used previously, or, whose new orders booked were used previously to represent the demand. To represent the demand in this instance, we used the unfilled orders at the end of the month, of the same identical fifteen members. The reason that we used the unfilled orders instead of the new orders booked in this case, is apparent from the explanation that I gave previously of the effective sources of supply and demand, which was, namely, that while the new demand would be the genesis for the activity of the business over a long period of time, it would be the accumulated demand and the accumulated supply

which would regulate the necessity for accepting new demand, and at what price the new demand would be accepted. The unfilled orders, obviously, would better represent this accumulated demand than would the new orders booked. That the stocks on hand are represented by the supply actually ready for sale there can be no question." (Vol. II, p. 700.)

Appendix Q is a copy of the final chart of the series above mentioned. Mr. Keehn interpreted this chart as follows:

"To discuss in detail, now, this Exhibit 24, which shows corrected indices, it can be seen that in the first part of 1912, demand was low, and the stocks on hand, which represent supply, were high; and as a consequence the price was falling. Throughout 1912 demand rose steadily, demand represented by unfilled orders, but suffered a temporary reaction in November and December, reaching its high level again in January and February of 1913. During the last half of 1912 stocks on hand, which represent supply, fell, and, after a lag, which we have explained to be natural, the price of the product began a gradual upward trend.

Throughout 1913 the trend of demand was downward, and, with the exception of the last four months, the trend of supply was upward; and as a result, and after the natural lag, the prices of the product reached the peak, in the middle of 1913, started downward. The stocks on hand, representing supply, fell off in the last four months, but not to as great an extent as did the demand, in the last part of 1913. The result of that falling off of supply is seen in the leveling of the prices of the product in the last two months of 1913.

Q. Falling off of supply?

A. Yes. Through the entire year 1914 the trend of supply, stocks, again was upward; demand—unfilled orders—after an abrupt jump to a high level in the first quarter of 1914, declined during the entire

year. In the face of a situation of declining demand and increasing supply, the price of the product was forced to decline throughout the entire year.

In the first quarter of 1915, a reaction occurred. Demand increased, and supply declined. This condition was only temporary, and did not affect the price. In the middle of 1915, however, conditions again changed, the demand rising sharply, and supply dropping off. These factors caused the price to advance, after a short period of lag. Through the first half of 1916, demand and supply merely maintained the levels secured at the end of 1915; and the price also remained [at the] levels secured at the end of 1915; and the price also remained level. In the second half of 1916, however, demand again advanced sharply, and supply fell off rapidly. The price, after a short lag, advanced. The trend of demand was downward in 1917. The trend of supply, with the exception of the first few months, was upward. Prices continued to rise, until this change in conditions was felt, in the middle of the year when the price, as could be expected, declined.

This condition continued through the early months of 1918. In March, April and May of 1918, demand again increased abruptly, with a concomitant falling off in supply. As a result the price of the product advanced sharply in May and June. In June, however, demand fell off heavily, and continued to do so for the remainder of the year. Supply, which had been falling off, increased again in the last half of the year. In consequence of these forces the price discontinued its advance in July, the month after the decline began in demand. This position was held by the price during the remainder of 1918 and the early part of 1919. In early 1919 a great change took place. Demand started a sharp advance to an unprecedentedly high level, which lasted until January of 1920; and supply fell off precipitously throughout the entire year, to an unprecedentedly low level.

After a few months lag the price of the product inevitably rose to unprecedented heights.

Beginning with the first month of 1920 demand reached its peak, and started to decline sharply; and supply reached its low point, and started a sharp advance. After a few months lag, during which the prices continued to feel the effect of the great accumulation of orders still unfilled, the price of the product inevitably fell, and continued to do so for the remainder of the year.

January, 1921, saw a slight reaction in both supply and demand, followed one month later, in February, by a reaction in the price.

Since the beginning of 1921 the reaction of the price to conditions of supply and demand has been particularly sensitive. Demand had reached an unprecedentedly low level by the end of 1920. The return of demand, which occurred in the first three quarters of the year, merely served to bring it up to an ordinary low level. Supply, which was already above normal, continued to rise during this period. As a natural result of these conditions, prices continued to decline, although less sharply. In September, October and November, demand rose sharply, and supply began to decline. This was followed, after two months lag, by a reaction in prices, which advanced slightly in November and December. In December, 1921, January and February, 1922, demand again decreased heavily. In December, 1921, and January, 1922, supply increased slightly. This increase was followed in January, February and March of 1922, by a slight decline in prices.

In March and April, demand again advanced sharply, and supply continued to fall off. One month later, in April, prices again resumed the upward movement. From May to October the demand hardly more than maintained its level. Supply, for the first three of these months, continued to decline, and then merely maintained its level. Price, in consequence, advanced less sharply, and in the last three months of 1922, advanced not at all.

In the last two months of 1922, and through February of 1923, the demand increased rapidly, and

supply declined sharply. As a result, after a short lag, prices advanced sharply.

Thus it is clear that the prices of the product of the Maple Flooring Manufacturers Association fluctuated in harmony with the forces of supply and demand. It is apparent that, with practically every increase in the excess of demand over supply came, with a natural lag, an increase in the price; and with every increase in the excess of supply over demand came, with a natural lag, a decrease in the price of the product.

It can be noted that in the latter part of '18 and the early part of 1919 the price of the product did not decline, but remained level, while demand was decreasing and supply was increasing. *It must be remembered, however, that at this period the cost of the raw materials and the cost of manufacturing and marketing were upon a higher relative level than the prices of the product; that the prices of practically all other commodities were upon a higher relative level; and after the close of the war there was a condition of uncertainty. In addition to these factors, and perhaps most important of all, is the fact that during the latter half of 1918, there were restrictions placed upon building. Because of these restrictions people could not build, even though they so desired. A cut in price of the product at that time, therefore, would not have stimulated demand.*

Moreover, it may be contended that the price of the product should not have gone as high in 1919 and early 1920. *Unexpressed demand had accumulated because of the restrictions placed upon new building. It is necessary merely to regard the extent to which the unfilled orders increased in this period, to prove this statement. In addition to the accumulation of demand, production was low and the plant organizations had become disorganized throughout the years of 1918,—1917 and 1918.*

It might also be contended that the price of the product in early 1920 should not have continued upon such a high level so long a time, in face of the drastic decline in demand and increase in supply.

It has already been stated that such a condition was a reasonable one, because the manufacturers had on their books enough unfilled orders to maintain production at a high rate, without accepting new orders. Furthermore, stocks were low and could not be brought up to normal. Costs were still high, and many of them rising. It would be unreasonable to expect a producer to cut his prices, in face of these circumstances, until such a step became an absolute necessity." (Vol. II, pp. 705-707.)

Other explanatory charts were introduced in connection with the foregoing subject. (Vol. II, pp. 708-712; Defts.' Grant Keehn Exhibits 25, 26 and 27; Vol. V. pp. 961-967.)

Mr. Keehn concluded his summing up of all his testimony (Vol. II, pp. 712-714) with the following paragraph:

"To sum up finally, therefore, the study which Mr. Gordon and I made developed data and material such as to clearly indicate that the members of the Association did not have the ability to continuously control the prices of maple flooring, or, even if it be assumed that they had such ability, comparisons with other prices, with prices of competing floorings, with the costs of maple flooring, and with the conditions of supply and demand of that product, do not offer any evidence of fixation or unreasonableness." (Vol. II, p. 714.)

There were other charts, but the foregoing ones are the most important.

THE TESTIMONY OF PROFESSORS HETTINGER AND
VANDERBLUE.

Professor Hettinger as a statistician, and Professor Vanderblue as an economist, unqualifiedly praised the work done by Messrs. Gordon and Grant Keehn. They stated that the charts and methods used were correct, and that they concurred in the conclusions of Messrs. Gordon and Keehn as stated in their depositions. (Vol. II, pp. 722-739, 740-769.)

The discussion by the District Court of the foregoing evidence strikes as being wholly inadequate. (Vol. I, p. 59.)

From the mere fact that there were other associations in the lumber industry, there can be no legitimate inference that the manufacturers of competing floorings illegally fixed the prices thereof.

Comparisons of one industry with other industries are of the greatest value; and such comparisons are made by economists, by bankers, investment brokers, speculators, captains of finance and industry, sociologists, legislative committees, and every person of scientific training or habits of mind. Such a method substitutes information for ignorance, it discloses relations, it develops standards, it provides proper *data* as grist for the mills of the mind, which otherwise would produce only the chaff of *a priori* conclusions from a heterogeneous mass of vagaries, unjustifiable assumptions and phantasies.

The statement that "every industry is so *dependent* upon and intertwined with others that the trends of prices and market conditions *necessarily must be* in the *same* general direction in *all*" is a dogmatic and unjusti-

fiable misstatement of the principle that in the present phase of capitalist industry the prices of all commodities have a *tendency* to move in the same general direction. So, the air has a *tendency* to maintain a certain pressure; the ocean has a tendency to keep its level. All terrestrial things *tend* toward the center of the earth. In modern times there is even the augmenting tendency of all citizens to participate according to their needs in the intellectual, moral, esthetic and economic wealth of civilization. But the most appalling inequalities still exist.

Have copper companies participated in the recovery from post-war depression? Has the grower of wheat and other farm products? Have the leather manufacturers? or the railroads? or the packers? During the war steel and iron companies piled up millions while other industries were going broke. Shortly after the war automobile companies reaped a harvest, while the producers of oil products were in the dumps. In 1919-1920 the buildings trades were in clover, while the merchants, wholesale grocers and others were in the slough of despond.

There always exist these diversities even in ordinary times, although, of course, all industries are responsive to the systole and the diastole of inflation and depression. But their degree of response varies greatly, as reference to Defendants' Gordon Exhibits 15 and 16, Vol. V, pp. 932-943 will abundantly prove.³⁰

³⁰And of course every industry is not dependent upon all other industries; else the 'death' of one would be the end of all. In the industrial, no less than in the organic, world, there is a strenuous and constant struggle for existence. The past history of industries may be condensed into as few words as *l'histoire des hommes*: "*ils naquirent; ils souffrirent; ils moururent.*" Like creeds, philosophies, nations, they rise, flourish and pass into the maw of Time,—and leave not a wrack behind!

Furthermore, the conditions pertaining to the maple flooring industry, or, rather, *to the business of the defendants*, were *specifically* investigated by Messrs. Gordon and Grant Keehn. The evidence of these gentlemen, especially when it supplements and is supported by a great mass of other undisputed evidence, cannot be lightly brushed aside by means of unoriented generalities.

APPENDIX TO CHAPTER III. 1907-1908

VIII.

The Government failed to support by proof the essential allegations of the petition with respect to the activities of the present Association, which was organized on March 29, 1922.

A.

GENERAL PROVISIONS OF ARTICLES.

That the defendant Association was not organized until March 29, 1922, see page 101, *supra*.

For the present Articles of Association, which differ markedly from all previous articles, see Government's Exhibit 8, Vol. III, pp. 64-74.

Membership in the Association is open to any manufacturer of maple, beech or birch flooring. (Vol. III, p. 65, Vol. I, p. 286; Vol. II, p. 789.)

For the provision concerning the Membership Fee Fund, see Article XIII, Vol. III, p. 68. For the evidence regarding said article, see Vol. I, pp. 149-150, 173-4.

"The *total* yearly expenditures of the Association do not amount to more than a quarter of one per cent, or three-tenths of one per cent of the value of the flooring sold by the members." (Vol. I, p. 174.)

For the different committees, see Vol. I, pp. 126, 171.

For the evidence concerning the Expense Fund (Article XVI), see Vol. I, p. 150.

The Advertising Fund (Article XVII) has been discussed on page 164, *supra*.

The obligations of members are merely to pay all dues and assessments. (Article XIX, Vol. III, p. 72.)

There are no fines or penalties prescribed for failure to make reports, or to attend meetings. The only penalty prescribed by the articles is for failure to pay dues or assessments. (Vol. III, p. 72.)

B.

ASSOCIATION MEETINGS.

The allegations concerning the holding of meetings are set forth on pages 20-21, *supra*. As there pointed out, no infraction of the Sherman Act is charged by the Government. Surely, it has not become unlawful for business men to hold monthly meetings for the purpose of discussing the supply and prices of the raw material used by them, manufacturing and marketing costs, and general trade conditions. *United States v. U. S. Steel Corporation*, 223 Fed. 55, 154-55.

The District Court stated that it was a heavy tax on one's credulity to believe that at Association meetings the members turned their eyes solely to the past and "carefully avoided, in both conversation and discussion, all reference to the highly important subjects of present trade conditions, and future trade outlook." (Vol. I, p. 58.) Such a statement is merely another evidence of how easily important facts in a voluminous record may be either forgotten or remembered without discrimination. No such evidence was given by the defendants, nor was any such contention advanced by counsel.

The evidence—the undisputed and wholly credible evidence—was that future prices for maple, beech or birch flooring were not discussed, because before the organization of the present Association Mr. Newman gave explicit written instructions that such matters should not

even be discussed. (Vol. I, pp. 132-34, 174, 178, 206-208, 213, 236, 210, 212, 295-98, 330, 332.)

There is nothing strange or sinister in the fact that meetings of the defendant Association were held monthly. There were several committees which were engaged in important work. Manufacturing difficulties, marketing problems, advertising matters, traffic questions, the Canadian tariff on flooring, freight rates, labor troubles, manufacturing costs, the rough lumber market, and other matters which affected all members were constantly recurring. Moreover, great quantities of flooring and lumber are daily sold in Chicago. All members have customers there. Chicago also affords opportunities for both instruction and diversion that are not available in smaller communities. *And inasmuch as the expenses of members to and from the monthly meetings were paid by the Association* (Vol. I, p. 150), *it is not surprising that a majority of the members usually attended these meetings.* After a session of a few hours and a good lunch, most members called on their representatives, or customers, or went to theatres, ball games, etc. These meetings also afforded manufacturers of rough lumber opportunities for selling it to other members, and for different members to sell surplus flooring to others who were short certain sizes or grades. (Vol. I, pp. 205-6, 330, 332, 295-8, 132, 134, 178, 206, 208, 236.)

The Government does not even charge that at such meetings there was any understanding or agreement, either express or implied, with respect to prices.

There are about 1800 trade associations in the United States. (*Trade Association Activities*, p. 304.) There are probably tens of thousands of fraternal organiza-

tions, lodges, clubs, societies, etc. All of them grow out of the fact that man is a social animal. Individuals desire new experience, response, recognition. And when associations, lodges, etc., are once organized and habits of attendance at meetings are formed, continued attendance follows almost automatically by virtue of the well-known laws of habit. The meetings also afford opportunities of escape from monotony, business worries, other troubles, or self. Most men cannot long endure solitude. They must rejoin the herd, even though they derive but little, if any, personal profit or satisfaction from it, other than a mystical feeling of identity with the herd—a fleeting illusion that the individual self is not utterly alone in the universe. This desire for association with one's fellows is often so strong that even a solitary person will often seek the society of others, although he knows from past experience that he will either offend his fellows, or be inexpressibly bored by them.

During his argument Mr. Johnston stated that the defendants placed no particular importance upon the monthly meetings; and that if the District Court felt that they were contrary to either the letter or the spirit of the Sherman Act "we are perfectly willing to have those meetings enjoined." And Mr. J. Stanley Thompson, of counsel for the Government, will recall that he and Mr. Darby (of counsel for defendants) agreed that the foregoing statements might be incorporated in the Certificate of Evidence, but that the District Court refused to sanction such agreement, for the (to us rather curious) reason that the said statements merely had been made during the course of argument and were not binding upon the defendants!

C.

AVERAGE COSTS.

Article XIV is set forth in the margin.⁴⁰ Subsection f of Section 3 was subsequently annulled. (Pages 308-311, 273, *infra*.)

ARTICLE XIV.

DETERMINING AVERAGE COST.

SECTION 1. The sound business principle advocated by the Federal Trade Commission that manufacturers should carefully consider the question of cost in manufacturing and selling their product is recognized by the Association as the only scientific method of conducting the business of manufacturing and marketing Maple, Beech and Birch flooring.

SECTION 2. For the purpose of furnishing to its members information regarding the average cost of manufacturing and marketing Maple, Beech and Birch flooring, Surveys of Costs to ascertain such average cost shall be made from time to time by the Association and such Surveys of Costs shall be filed with the Federal Trade Commission at Washington, D. C.

SECTION 3. In the judgment of the Association the following (following) fundamental elements enter into and determine the average cost of Maple, Beech and Birch flooring to the manufacturers when manufactured, sold and delivered F. O. B. cars at the flooring plant:

- (a) The actual market value of the raw material, as established from time to time by current sales of rough flooring lumber on the open market.
- (b) The average cost and expense of manufacturing, selling and delivering flooring F. O. B. cars at the flooring plant;
- (c) Interest on the capital actually invested in the flooring business at the rate of six per cent per annum;
- (d) Annual depreciation of plant as is usually allowed by the United States Government;
- (e) The usual overhead charges in carrying on the flooring business and
- (f) A reasonable allowance to provide for contingencies and unforeseen hazards incidental to manufacturing operations. This allowance is estimated at five per cent of the average total cost of Maple, Beech and Birch flooring when delivered F. O. B. cars at the flooring plant. (Vol. III, p. 69.)

Before taking up the methods employed by the defendant Association pursuant to Article XIV, let us arrive at some criteria by which such methods may be tested.

Professor Marshall⁴¹ states that "the story of the transition from mediaeval to modern industrial society is the story of the coming in of capitalism." Hobson * defines capitalism as "the organization of business upon a large scale by an employer or company of employers possessing an accumulated stock of wealth wherewith to acquire raw materials and tools, and hire labor, so as to produce an increased quantity of wealth which shall constitute a profit."

It is commonly said that Capitalism was due to the Industrial Revolution, and "that the Industrial Revolution lasted from 1750 to 1830, but such a statement lacks historical perspective. In a very real sense it is true that the revolution began in the early Middle Ages. It is equally true that it has not yet completed its course." (Marshall, p. 144.)

After describing the earlier haphazard, sporadic acquisition of wealth by means of freebooting and rapine, the squeezing of peasants or townsmen by means of rents, aids, taxes, and extortion, in order to squander the avails on war, personal display and in other "unproductive consumption," Hobson continues thus:

"Only as the lust of accumulation spread among

⁴¹*Readings in Industrial Society*, (University of Chicago Press), p. 144. This book is the result of years of teaching by Professor Leon C. Marshall in the School of Commerce and Administration of the University of Chicago. The libraries of the world have been made to yield up their treasures of light upon the outstanding features of modern industrial society. The book is somewhat similar to the case-books used in law schools. The material selected is beyond praise.

The Evolution of Modern Capitalism, (new edition, Scribner's), p. 1.

lower and more peaceful sorts of men did money-lending and commerce begin to be recognised as means to get money by the use of money. 'Economic Rationalism' is the suggestive name which Sombart gives to the change of spirit from the romantic, adventurous money-hunting of the Middle Ages to the pursuits of modern commercialism. *In this process he assigns a very significant part to the discovery and use of technical business methods in account-keeping, the application of exact calculation to Industry.* Two names mark the early advances towards modern book-keeping—Leonardo Pisano, whose *Liber Abbaci*, published in 1202, may be said to indicate the beginning of modern industry, coinciding as it did with the Venetian assault upon Constantinople; and Fra Luca, whose completed system of double entry was essential to capitalistic account-keeping. The development of book-keeping, accompanied as it was by a wide general application of rational and mathematical system throughout commerce, in the shape of exact measurement of time and place, forms of contract, land surveying, modern methods of weights and measures, city plans, public accounts, was at once an indispensable tool and an aspect of modern industry. *It rationalised business, releasing it from caprice and chance, and giving it a firm objective character from the profit-making standpoint.* This was the most definite and direct contribution to industry of the Renaissance, with its emphasis on individual interests, personal responsibility, and free competition—the same spirit which wrought in art, literature, religion and politics.”*

Economists roughly distinguish four stages in the history of industry during mediaeval and modern times. “It is common to speak of them as (1) the *family or household system*, (2) the *guild or handicraft system*, (3) the *domestic system or house industry*, and (4) the *factory system*.”²¹⁴²

*See also *Industrial Society* (Marshall). pp. 160 et seq.

The Economic Organization of England, (Ashley) pp. 35-36.

Bookkeeping was not of much importance when the craftsman worked on either the customer's materials or his own, and was in direct contact with his "market." It was of considerable importance in the *domestic system* of industry, where the entrepreneur financed production and maintained business relations with numerous workmen who performed different operations at their homes. Bookkeeping, like industry, was then a comparatively simple matter.

But we have come a long way from that comparatively simple organization of industry. The slow accumulation of wealth, increase in population, the discovery and exploitation of deposits of precious minerals, the contributions of mathematics, chemistry, physics and biology which resulted in multitudinous inventions and labor-saving devices, improved means of communication and transport, and the raising of production and consumption to the *nth* degree, have made cost-accounting of tremendous importance.

Simple bookkeeping has evolved into the science of accounting, of which cost-accounting is a recent development. It was a necessary incident to large-scale production and distribution and the hazards of capitalist production. Large corporations have developed cost-accounting to a very high degree of efficiency, but it is notorious that, until recent years, the average manufacturer knew but little, if anything, of such methods, while the small business man, even now, knows no more about cost-accounting than he does about relativity.

The essentially *hazardous* nature of capitalist production is demonstrated on pages 474-519 in Marshall's *Industrial Society*. Aside from *static* risks, such as damage by lightning, hail, earthquake, storms, disease, fires, bankruptcies, accidents, etc., there are the *dynamic* risks, such as changes in the wants of society, changes in the methods of production, growth of population, increase of capital, seasonal fluctuations, labor disturbances, etc., etc.

Moreover, the dependence of all industries upon transport and finance (Marshall, p. 404), the complementary or subsidiary relation that most industries and trades bear to certain other industries or trades (405), the interdependence of prices (408), the relation of crops to industry (412), the action of government, etc., are also of far-reaching effect. We set forth in the margin Professor Marshall's excerpt from Professor Irving Fisher's *Elementary Principles of Economics*, which is prefaced by the statements:

"Ours is a pecuniary society. Industry is conducted on a price basis. This selection shows how numerous are the risks of the business man, *no other factor than change of price being considered.*"⁴³

"We may now fitly review the theory of prices by enumerating the various possible causes which might decrease the price of, let us say, pig iron in New York. Its price might fall for any one or more of the following reasons:

- I. A RISE IN THE MARGINAL DESIRABILITY OF MONEY DUE EITHER TO—
 - A. A rise in the purchasing power of money through
 1. A decrease in money or deposit currency, or
 2. A decrease in their velocities, or
 3. An increase in the volume of trade; or to
 - B. An impoverishment or reduction of incomes.
- II. A FALL IN THE MARGINAL DESIRABILITY OF PIG IRON DUE EITHER TO—
 - A. An increase in the amount of pig iron used, through
 1. Importation of pig iron from other places where its price is lower than in New York, or
 2. Short sales of pig iron for future delivery in expectation of a fall of price, thus releasing to present use such stocks as would otherwise be held over for the future, or
 3. A decrease in its cost by
 - (a) A saving of waste,
 - (b) A saving of labor,

Man's inability to cope with these inconstant and incalculable factors results in periodic crises with their

(c) A decrease in the price of iron ore or other prices entering into its cost,

(d) An increase in the price of by-products, or

4. A trade war; or to—

B. A fall in the marginal desirability of a given quantity of pig iron, through—

1. A decrease in the price of iron products through decrease in marginal desirability of the satisfactions they yield, because of

(a) An increase in their amount,

(b) A change in fashion, etc., or

2. An increase in substitutes for pig iron, or

3. A decrease in complementary articles, or

4. An increase in the rate of interest whereby the value of pig iron is obtained (by discounting the value of iron products) through an increase in the marginal rates of impatience,

(a) From a change in human nature

(1) By decreasing foresight,

(2) By decreasing self-control,

(3) By increasing shiftless habits,

(4) By decreasing regard for posterity, or

(b) From a change in incomes

(1) By shifting their distribution in time toward the future,

(2) By reducing their size,

(3) By increasing their uncertainties.

Back of these causes lie other causes, multiplying endlessly as we proceed backward. But if we trace back all of these causes to their utmost limits, they will all resolve themselves into changes in the marginal desirability or undesirability of satisfactions and of efforts, respectively, at different points of time, and in the marginal rate of impatience as between any one year and the next." *Industrial Society*, pp. 483-485.

huge toll of business mortality and social injury. Any means whereby the hazards of business may be minimized without social injury, or violation of law, is of course desirable.

INVESTIGATION AND RECOMMENDATIONS OF THE FEDERAL TRADE COMMISSION.

In Jones' *Trade Association Activities and the Law*, it is said:

"The Federal Trade Commission, by its educational campaign several years ago urging the importance of an accurate knowledge of costs in our various industries, greatly stimulated the interest of businessmen and trade associations in this subject. Many trade associations have developed uniform cost accounting systems within the past few years." (p. 62.)

A list of some 60 associations which had adopted or were then planning to adopt cost accounting systems is given by the author above mentioned.

In an address by Hon. Edward N. Hurley, Vice Chairman of the Federal Trade Commission before the Boston Commercial Club on March 28, 1916, it is said:

"The Federal Trade Commission has been in existence one year, and after surveying the field we found from a preliminary investigation that 200,000 corporations out of a total of 260,000 engaged in the manufacturing and mercantile business of the United States were eking out an existence; 100,000 of them did not earn a penny. Out of 60,000 suc-

"The Commission has issued the following pamphlets on cost accounting which have had a very large circulation: 'Fundamentals of a Cost System for Manufacturers,' July 1, 1916; 'A System of Accounts for Retail Merchants,' July 15, 1916. See also numerous addresses of E. N. Hurley while Chairman of the Commission."

successful corporations doing a business of \$100,000 a year, over 30,000 charged off no depreciation whatever. Only 10 per cent of our manufacturers and merchants know the actual cost to manufacture and sell their products; 40 per cent estimate what their costs are, and 50 per cent have no method but price their goods arbitrarily. Most of the manufacturers and merchants who do not know what their goods cost are basing their selling price on what their competitors sell for and with only this knowledge for a basis they are frequently cutting prices and demoralizing the industry in which they are engaged.

There were over 22,000 business failures in the United States last year; more than 20,000 of them were small concerns. We all know that a large percentage of business is run at loose ends, haphazard and without the proprietors really knowing at any time how they stand or whether they are making a profit or a loss. * * * *

When business was done on a large percentage of profit, questions of accurate cost and of operating efficiency were not so important, but in most lines of industry to-day the large percentage of profit has passed. Manufacturers are working on smaller margins and must absolutely know what their goods cost. With margins of profit so close, any unreliable method of arriving at cost of production must be eliminated.

It is a fact well understood among business men that the general demoralization in a large number of industries has been caused by firms who cut prices not knowing what their goods actually cost to manufacture, and the cost of selling, which is equally important, is almost wholly lost sight of. Are the officers of the companies who are cutting prices right and left, irrespective of their costs, fair to their customers, stockholders, or competitors?

A manufacturer who does not know with a close degree of accuracy what it costs him to produce the different articles he manufactures, and what it costs him to sell them, is not in a position to meet intelligently competition and invites business disaster.

Many of the larger manufacturers have thorough cost accounting systems, which they recognize as necessary in order to give them the information essential to successful management. On the other hand, the number of small manufacturers who have no adequate cost accounting system and who price their goods arbitrarily is amazing.

Proper accounting for the smaller manufacturer is most essential. It is necessary for his success that he knows on what particular article he is making a fair profit and on what he is making only a narrow margin of profit or losing money. If he has this information he can concentrate on the manufacture and sale of the product on which the profits are satisfactory.

Whole industries, in many instances, are suffering from a general lack of intelligent knowledge of cost.

HOW THE COMMISSION CAN HELP.

How can the Federal Trade Commission help to improve this situation.

The Commission has no intention and no desire to use compulsory methods. But it does hope to reach the desired end by encouraging improvements in accounting practice, by indorsing standard systems of bookkeeping and cost accounting, and by assisting in devising standard systems, either at the request of individual merchants and manufacturers, or through the association that represents the industry.

It is recognized that no one standard system of accounting is applicable to all classes of business, but that special systems are required for each group or class of commerce and industry.

The Commission, however, while recognizing the commercial advantages to be derived from uniformity of systems, does not advise making a change where systems already installed give adequate information and are economically operated."

DEPARTMENT OF COMMERCE.

Defendants' Exhibit NN-1 (issued by the Government Printing Office) "presents the results of an inquiry made by the Department of Commerce to ascertain and illuminate those activities of trade associations which contribute to public welfare." (Vol. II, p. 795.) It is called *Trade Association Activities*.⁴⁵ On page 4, Mr. Secretary Hoover states:

"Goods must be sold at a profit or industry and commerce will not survive. Truly remarkable were the findings of Government agencies in the war years regarding the knowledge and understanding of costs in production and distribution. Losses often were confused with profits, all for the lack of knowledge of the fundamentals of cost accounting. So to-day the trade association is proving itself the most potent organized influence in the study of costs in industry and trade. Standard costs systems applicable to the peculiar conditions are being developed within each business group. All tend to more scientific knowledge of business and ultimately lowered costs."

Among the advantages of a cost accounting system, Jones names the following: Sound basis for determination of price, location and elimination of waste, improvement of quality, stimulation of production, better credit standing, increased trade, aid in making tax returns, etc. (Jones, *Trade Association Activities and the Law*, pp. 64-68.)

⁴⁵This report was not printed, because of its length, and for the reason that it was issued by a department of Government.

SECTIONS 1 AND 2 OF ARTICLE XIV.

In Section 1 the defendants merely record their acceptance of the principle that manufacturers should carefully consider the question of the cost of production and distribution, which the Federal Trade Commission had advocated. There was no agreement that the members would not sell their flooring for less than cost.

Section 2 merely provides that surveys of cost shall be made from time to time in order to arrive at the average cost of manufacturing and marketing maple, beech and birch flooring, and that the results shall be furnished to Association members and filed with the Federal Trade Commission.

The defendant Association has more than 20 members, among whom exist great differences. (Pages 66-75 *supra*.) Manifestly, the Association could not undertake to furnish its members with the cost of producing and distributing maple, beech and birch flooring. As said in 1 Taussig *Principles of Economics* (3d edition revised, 1922) p. 172:

"Cost is never actually equal for all producers. In the previous exposition, such equality has been assumed. The fact that a general change in cost may take place, affecting all producers, does not necessarily alter the application of the reasoning. An invention or improvement may lower cost for all; the horizontal supply line on the diagram may be lowered; but the result is merely adjustment to a new level, not the introduction of a new set of conditions. If, however, the lowering of cost takes place not at the same time for all the producers, nor in equal degrees, we have a new principle and a different case—production at varying cost. This is what in fact happens when inventions bring about a

reduction in cost. The change takes place by successive steps. The more shrewd and enterprising of the competitors introduce the improvements first; others follow suit; gradually all adopt it. And by the time all have adopted one improvement, another may be introduced, and the same steps are again gone thru. If there be a succession of changes—and such are likely in the highly progressive modern industries—equality of cost never exists. There are always some producers who are turning out their goods at lower cost than others.

None the less, over probably the greater part of the industrial field there is a tendency to equality of cost. The differences in cost are not permanent; the process is simply one of gradual and irregular adjustment to the new level, instead of prompt and even adjustment.

All that the Association could do was to undertake to furnish its members with the *average* cost of the production and distribution of maple, beech and birch flooring. Of course, this means the average cost of members of the defendant Association. However, the members themselves ascertained their own actual costs, and the secretary merely determined and announced the average.

It should be noted that there was no agreement that any Association member should sell his flooring at any price whatsoever. Each member was left perfectly free to do as he pleased.

SECTION 3 OF ARTICLE XIV.

In the Government's petition it is charged that "the elements specified as entering into costs * * * contain many items of *profit*", and that the average costs as determined by the Association "in fact have represented and now represent *all possible elements* of actual cost and also *large profits* to the defendant corporations." (Vol. I, p. 5.)

In Marshall's *Readings in Industrial Society*, pages 451-453, appears the following adaptation of pp. 24-32 of J. L. Nicholson's *Cost Accounting*:

"Production costs are classified into three principal divisions, known as the elements of costs: (1) material; (2) labor; (3) expense. These may be subdivided into:

(1) Material	{ Direct
	{ Indirect
(2) Labor	{ Direct or productive
	{ Indirect or non-productive
(3) Expense	{ Direct
	{ Indirect

Direct charges. 'Direct charges' is that element of cost that enters into, and can be charged directly to, the product.

The cost of the substance out of which the product is made is the direct material charge; the cost of the labor applied directly to the productive process is the direct labor charge; and any other expense that can be charged directly to an order, job, or process may be included as a direct charge under the caption 'direct expense.' The expense of workmen in traveling to and from a job, as well as their hotel expenses while engaged out of town on a particular job, are examples of direct expenses.

Indirect charges.—Indirect material consists of such material as factory supplies, which, while used in processes, either does not enter into the product itself, or else enters in such a way as not to be chargeable conveniently to any particular article.

Indirect or non-productive labor is that used in repairing, handling, supervision, etc.—in short, any labor not expended directly on the article or process itself.

Indirect expense as used here refers only to those expenses incurred in the manufacturing end of the business which are properly a part of the cost of production; e. g., supervision, repairs, light, power, depreciation, etc.

(C. G. I. 107)

Items composing the indirect charges.—The following list shows some of the more constant items which compose the indirect charges. The classification will vary in almost every factory, but the items listed almost invariably appear.

Indirect material	Interest
Oil	Depreciation
Supplies	Maintenance
Insurance	Repairs

Freight and express inward, when not charged to direct material cost.

Indirect labor	Taxes
Supervision	Power or power plant
Inspection	Light
Experimental work	Heat
Rent	Small tools

Wastes of material, shrinkage of weight, defective work.

Production costs and selling costs.—A clear distinction must be made between production costs and selling costs. The latter include the selling expenses, such as advertising, commissions, salaries, etc., which are necessary elements in determining the price for which an article may sell, but have no direct bearing on the cost of producing the article itself. The cost of production ends when the finished stock is ready for sale.

The expenses that arise from advertising, commissions, salaries of officers, etc., are known as commercial or selling and administrative expenses.

The segregation of administrative expenses, as a distinct class, is sometimes a matter of convenience. In the majority of cases the time of the administrative force is spent in supervising the selling organization, in solving problems of production, and in looking after the finances of the business. Therefore, administrative expense is partly a production cost, and partly a selling cost. The purposes of cost-finding are best served by separating expenses of such a nature from those expenses which arise from production proper and its direct supervision.

Relation of cost elements to selling price.—The sum of the direct material and labor cost is known as the 'prime cost'. This, combined with the indirect costs, gives the final 'factory cost'. The total of the selling and administrative expenses, plus the factory cost, shows the cost of making and marketing the article; and this total—plus the profit—gives the actual selling price."

See also *Trade Association Activities*, issued by the Government Printing Office for the Department of Commerce, pp. 76-77.

Certainly element (a) of Section 3 of Article XIV—"the actual market value of the raw material, as established from time to time by *current sales of rough flooring lumber on the open market*"—is a proper element of cost. As we have already seen, only 14 members of the defendant Association own timber; in 1920 there were more than 600 producers of rough maple lumber in the States of Michigan and Wisconsin alone. (Pages 26-27 *supra*.) The market was, therefore, free and uncontrolled, especially in view of the fact that in 1923 the members of the defendant Association owned less than 2 per cent of the total stand of maple, beech and birch timber in the United States, less than 4 per cent of the stand of such timber in the Lake States and less than 1 per cent of the stand in the Middle Atlantic States. (Pages 26-27, *supra*.)

Rough lumber fluctuates in price. And Surveys of costs are properly based upon the market value of such lumber as established by *current sales*.

Aside from ascertaining profit or loss, an inquiry into the cost of production and distribution at a given time in a going business is for the purpose of obtaining data upon which to base an opinion as to what prices should

be. And it is the *present* cost, based upon *present conditions*, not upon conditions that obtained several months ago, provided, of course, there has been no substantial change, that should control.

Even if rough lumber had been purchased months before at a lower price, the *present* value should be taken, for the reason that the *rough lumber having such a value* is converted into flooring. It is a common business practice for manufacturers and other buyers of raw material, and even merchants, to take advantage of the appreciation in value of raw materials and stocks of goods. They are forced to do this in order to compensate the losses that are sustained where the market value of stocks of goods or raw materials decline in value before they can be disposed of or converted into finished products and sold.

So far as determining the *profits* of a manufacturer, the actual cost of the rough lumber should be taken. But the *individual* members must determine that for themselves. They must determine their own selling prices also, in view of their own manufacturing and marketing costs, what their own supplies of rough lumber cost them, and all the other conditions that obtain at any given period.

For the purpose of arriving at the *average costs* from time to time and placing such information before each individual member for such action as he may think proper, the method used by the defendant Association is entirely correct.

Some members produce all their rough lumber; others produce a part only, still others produce a surplus and sell it on the market, while some members are forced to

buy all their rough lumber. Some may have large stocks of raw material, others may have practically none, etc., etc. The *average costs* at a given time for a group so differently situated, could be best and most fairly arrived at by taking the *then* market value of rough lumber. And of course there should be no distinction between members who produce all or a part of their rough lumber and those who buy all they need. The only *evidence* on this subject is set forth in the margin.⁴⁶

"A. By no means—there should be no differentiation, because there will be only one market price, which will include the costs of what is known as the marginal producer. By marginal producer is meant that last producer who will be induced to produce and can produce, at a profit, at the market price. It is used in connection with changes or with differences in the expenses of production. The members who own their own timber and process it into hard maple lumber, or rough maple lumber, and then into maple flooring, could, if they were not permitted to secure a profit on both operations, sell their rough maple lumber in the open market, and secure a profit on both operations,—sell their rough maple lumber in the open market, and secure a profit, selling it at the market price; they could then purchase the rough maple lumber and process it into maple flooring, selling it at the market price for maple flooring. It is only reasonable that they should secure a double profit, because of the double operation, that is, more profit than a manufacturer who merely buys the rough maple lumber in the open market and processes it into maple flooring, this because he has need of a greater organization, he has need of a greater investment, and it also necessitates greater managerial worries and functions than in the case where there is only the one operation. To continue, on that: It is only reasonable that the manufacturers who perform both functions in this particular industry, namely, cutting the rough lumber from the timber, and the processing of it into flooring, should consider as their raw material costs the market price, which the rough maple lumber which they are using brings." (Vol. II, p. 722.)

That the defendant J. W. Wells Lumber Co., a producer of rough lumber, charged its flooring factory much less than the market value of the rough lumber, see Defendants' Ex. CC- $\frac{1}{2}$, Vol. III, p. 834, which is Appendix L to this brief.

The other subsections of Section 3 are not sufficiently definite, and hence it now becomes necessary to ascertain the methods actually used by the defendants.

The investigations and recommendations of the Federal Trade Commission resulted in the action taken by the predecessors of the defendant Association with respect to ascertaining average costs. (Vol. II, p. 794.) On July 14, 1915, the Association then in existence filed a petition with the Federal Trade Commission for the approval of a minimum price plan based upon average cost plus a reasonable profit, the books and activities of the Association to be under the supervision and control of the said Commission. (Gov. Ex. 10, Vol. III, pp. 76-78.)

The Surveys of Cost made by the *defendant Association* are based upon (1) reports by members of manufacturing and marketing costs, which are forwarded to the Secretary, (2) reports of the Cost Surveys Committee of sales of rough lumber, and (3) test runs made by members. These test runs are the working up of a given quantity of rough lumber, during which the percentage of waste, the exact quantity of each size of flooring produced, etc., are carefully ascertained. From these data, the Secretary computes the *average costs* and informs the members of the results. Let us look at—

THE MANUFACTURING AND MARKETING COSTS.

We set forth in the margin Government's Exhibit 25, Vol. III, p. 279.⁴⁷ Mr. George W. Keehn testified that he sent out questionnaires from time to time to *Association members* who forwarded to him "itemized statements of costs." (Vol. I, p. 104.)

These manufacturing and marketing costs are sent in quarterly. (Vol. I, pp. 99, 104, 107.) The Government in-

SURVEY OF COSTS.

MANUFACTURING AND MARKETING COSTS PER 1 M FEET OF FLOORING PRODUCED DURING JANUARY, FEBRUARY AND MARCH, 1922.

	Per 1 M ft. of flooring produced
Average of replies received,—	
1. Labor taking lumber off of dock, car, pile or wagon and placing in dry kiln, including expenses of night fireman	\$1.16
2. Cost of manufacturing into flooring and putting flooring in warehouse, including twine, oil, bolting and other factory supplies, and factory repairs and including manufacturing administrative expenses.....	8.84
3. Warehouse expense and loading into cars or on wagons..	.90
4. Insurance and taxes. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February and March).....	1.07
5. Interest at 6 per cent on value of plant and on value of average stock carried of rough flooring lumber and of finished flooring. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February and March).....	1.92
6. Selling expenses, including commissions and advertising, and office expenses including selling administrative expenses.....	3.75
7. Cash discount.....	.80
8. Annual depreciation on flooring plant as is usually allowed by the United States Government. (Divide $\frac{1}{4}$ of annual amount by quantity of flooring produced during January, February and March).....	1.37
9. Total per M Feet.....	19.31
10. Less net profit from wood and other by-products of flooring lumber, per 1 M-foot of flooring produced during January, February and March.....	1.32
11. Actual Manufacturing and Marketing Costs per 1 M feet of flooring produced during January, February and March.....	17.99

May 31, 1922.

introduced no proof that they were not made honestly and accurately made. The Government introduced no evidence whatsoever by accountants or others that any of the items mentioned in Government's Exhibit 25 contained profit, or were improper from an accounting standpoint. The undisputed evidence was to the contrary. (Vol. I, pp. 107, 151.) We set forth below a few excerpts from minutes of meetings, letters, statistics, etc., with respect to these costs.⁴⁸

February 8, 1922: "At this writing we have received 8 Surveys of Costs for the last quarter of 1921 and they show a substantial reduction. The average cost is about \$17.00.

It is earnestly urged that other members will send in their Surveys in a few days, so that our compilation to be submitted to the meeting will be more complete and represent a larger proportion of the industry." (Vol. III, p. 153.)

July 13, 1922: "It is hoped that the members who have not yet sent in their reports of Manufacturing and Marketing Cost during the second quarter of 1922 will do so at once so that the data can be compiled in advance of the meeting." (Vol. III, p. 175.)

August 16, 1922: "Mr. Dewey also stated that the reports from eleven members giving their Manufacturing and Marketing Costs during the second quarter of 1922, showed an average of \$16.93 compared with \$17.99 for the first quarter of 1922, and that the average waste in the second quarter was 23.5 per cent compared with 22.4 per cent in the first quarter." (Vol. III, p. 183.)

October 17, 1922: "At this writing only a few members have sent in their reports of their Manufacturing and Marketing Costs during the third quarter of 1922, but it is hoped that other members who can do so will make this report by the end of this week so that the Committee on Cost Surveys will have sufficient information upon which to base a report that will represent average conditions in the industry during the past few months." (Vol. III, p. 185.)

April 9, 1921: "Reports for the last Survey of Costs were made by ten members, and the average was \$25.13 instead of an average of \$22.00, as was hoped might be the case when the Tables of Values Based Upon Average Costs was compiled as of January 6, 1921." (Vol. III, p. 313.)

March 2, 1921: "You can appreciate the importance of our Survey of Costs being kept up-to-date and that the more reports we receive

It will have been observed that an honest effort was made to obtain typical results. Also that some members

from the members the better will our compilation of average cost prove representative of conditions in the industry as a whole. We are enclosing blank forms to those members who have not yet sent in their Survey of Costs." (Vol. IV, p. 451.)

August 4, 1922: "At the last general meeting of the Association, I was instructed to write to the Members who have not yet sent in their survey of Manufacturing and Marketing Costs during the second quarter of 1922 and to request and urge them to send in their Surveys as soon as possible, so that our averages will portray typical conditions in the industry.

Several of the Members who were present at the last meeting said they had already compiled their Surveys, but did not feel that it is incumbent upon six or seven Members to do all this work for the benefit and information of the other Members and that they were of the opinion that the other Members should do their part and make this report, as provided for in the new Articles of Association.

You will also recall that our attorney, Mr. Newman has strongly urged at several of our meetings that all the Members should make this report and that if some of them could not make it with exact accuracy, that they should do the best they could in computing their Manufacturing and Marketing Costs.

The following Members made this report some time ago—three of the reports were received early in July and the other one since the meeting was held:

Holt Hardwood Company, Oconto, Wisconsin.

East Jordan Lumber Company, East Jordan, Michigan.

Northwestern Cooperage & Lumber Co., Galdstone, Michigan.

North Branch Flooring Company, Chicago, Illinois.

Hoping to hear from you early next week, so we can have the Surveys tabulated and the averages compiled in time for the general meeting on the 16th, we are

Yours very truly,

GEORGE W. KEELIN,
Secretary.
(Vol. IV, p. 464.)

were indifferent to what was really important. The Government would have this Court believe that the defendants were an alert band of conspirators who used the average costs for the purpose of agreeing upon prices. If this were so, every member would have sent in his costs, so as to be sure that his costs would be taken into account in arriving at the average.

During the trial, while Mr. George W. Keehn was testifying as a Government witness, the following proceedings were had:

The Court: What you are lacking thus far, is the details of the manufacturing costs.

A. Yes.

The Court: And selling costs.

A. I am going to get to that now, your Honor. Suppose we use this one as an illustration, the one of November 10, 1923. November 10, 1923, we have a manufacturing and marketing cost, the third quarter of 1923, \$18.34. *Here are the reports of the members of the Association who made these reports.*

The Court: You take into consideration all of the reports which you received from your members.

A. All of them.

Mr. Darby: Not all of them.

A. Except in this case, we had the report from the Grand Rapids Trust Company, Receiver, for William Horner, showing their cost was \$34.81, and we concluded that was abnormally high, so we omitted it from this calculation. If we put their cost in to get the average, our average marketing and manufacturing costs would have been about \$21.00, and we would have been justified in using it instead of \$18.34.

Mr. Fowler: They are sometimes abnormally low.

A. We always put in the low ones.

Mr. Fowler: Always exclude the high ones.

A. When they are shut down or something like that. This is a fair illustration; there we have the actual manufacturing and marketing cost on this schedule, which I will read to you. 'Survey of Costs.'

Now, we have this tabulation as to number five, Cobbs and Mitchell, Inc.; Total cost 16.44; less wood, etc. 1.09; actual manufacturing and marketing costs 15.35; percentage of waste 10½%.

No. 26, East Jordan Flooring Company; total cost 18.58; wood 1.22; actual manufacturing and marketing costs 17.36; percentage of waste 26.4%.

No. 34, Foster and Latimer Lumber Company; total cost 19.661, less wood, etc. 1.74; actual manufacturing and marketing cost 17.92; percentage of waste 27.6%.

No. 42, J. W. Wells Lumber Company; total cost \$21.50; less wood, etc. 4.09; actual manufacturing and marketing costs 17.41; percentage of waste 31%.

No. 48, North Branch Flooring Company, total cost 26.60; less wood 2.92; actual manufacturing and marketing costs 23.68; percentage of waste 23%, a total of 102.78 in the first column; the wood is 11.06; actual manufacturing and marketing costs 91.72, and the simple average total cost 20.55; less wood, etc. 2.21, and the actual manufacturing cost 18.34, and the percentage of waste it so happens is 24%.

Mr. Darby: Your Honor, may we read what the manufacturing cost of the Grand Rapids Trust Company, Receiver was?

A. Yes, I am going to do that now. Here is the survey of costs third quarter 1923, manufacturing and marketing costs per thousand feet of flooring produced during July, August and September, 1923. The same set of question and answers set opposite each question.

Mr. Fowler: What is the date?

A. The date of their report is—our blank is dated October 5, 1923.

Mr. Newman: Whose report is that?

A. Grand Rapids Trust Company, Receiver for William Horner. Their total cost figured at 37.34, less net profit from wood and other by-products for one thousand feet of flooring produced 2.53; actual manufacturing and marketing costs during July, August and September 34.81; quantity of flooring was nearly 3 million. Their waste was about 18%, so we did not use that in our calculation in arriving at the arithmetic average.

Mr. Darby: Was any explanation given you as to those costs?

A. I spoke to Mr. Klesner; he said he would try to look it up when he arrived home. It may be explained in their letter transmitting it.

Mr. Darby: They did not explain why their costs were high?

A. No, I spoke to Mr. Klesner about it. This same method has been pursued at different times and we have a number of those calculations going way back to 1913, and of course, we can repeat them and repeat them, but the Government, I think, has a record of all these things; they have a record of every survey of costs that we could find in our office, going back to 1913, 1914, 1915, but you haven't any very recently; I think the last one I gave to Mr. Frank some time in May or June, 1922.

Mr. Newman: Who is Mr. Frank?

A. A special agent of the Department of Justice." (Vol. I, pp. 107-108.)⁴⁹

Mr. Keehn asked one of counsel for the defendants

⁴⁹Mr. Klesner explained that the high costs of The Grand Rapids Trust Co., as Receiver, were due to their setting up a reserve in order to cover interest on large claims against the estate and receivership expenses. He also testified that Mr. Keehn "told me that our costs were too high, and that he could not use it because it would throw the average costs too far out of line." (Vol. I, p. 333.)

whether he might read into the record the individual figures of reporting members, for the reason that no information received by him as Secretary from members is divulged to other members except in the regular reports. (Vol. I, p. 173.) So far as costs are concerned, only the *average* is given to members.

Let us now consider the elements contained in the reports of Manufacturing and Marketing Costs, a specimen of which appears in the margin on page 252, *supra*. There can be no question as to the propriety of including items 1, 2, 3, 6, 7; and we assume that the Government will not object to the defendants' deducting from the total manufacturing and marketing costs the value of the wood and by-products.

According to Mr. Hurley and Mr. Nicholson (cited as and authority by Professor Marshall) insurance and taxes are proper elements of cost. And inasmuch as the manufacturing and marketing costs are determined quarterly, no fairer division could be made than to take one-fourth of the annual amount expended for insurance and taxes. Depreciation is also proper; and the annual depreciation allowed by the Federal Government for the purpose of arriving at income taxes is at least *prima facie* fair and reasonable. The Government put in no evidence to the contrary.

That item 5 is proper—or at least does not exceed what would be proper to include for items which have not been included, the following discussion in Professor F. M. Taylor's⁵⁰ *Principles of Economics* (8th edition, 1923), abundantly proves:

⁵⁰Professor Taylor is Professor of Economics in the University of Michigan.

"COST AND SUPPLY PRICES.

The most obvious, as also the most important, fact about the normal supply schedules of producible goods is that the *supply prices* of such a schedule, that is, *the prices on which depends the forthcoming supply*, are fixed by *costs of production*, including, of course, suitable remuneration for such contributions as are made by the entrepreneur himself. If a certain price will insure to the entrepreneur that he will get back the money he has put into a product and in addition will get a reasonable return for his own direct contributions, he will surely be ready to furnish the product at that price. Doubtless he would be glad to get a higher price; and, under some conditions, he may be able to do so. But that fact has no relation to our present problem, which is concerned solely with the normal supply schedule—the series of mutually dependent supplies and prices. What price will be necessary to secure the forthcoming of a given supply? or what volume of supply will follow the appearance of a given price?—these are the questions of immediate interest. And the general answer is that the price which will be necessary to bring forth a given supply is that *price which equals the greatest cost of producing said supply, supposing differences of cost to exist*; and the volume of supply which will follow the appearance of a given price is that volume which will have as its greatest cost an amount equal to said given price.

Test of a Cost.—It follows from the relation between cost and supply prices above brought out that *one method of testing whether or not a given element is a cost is to see whether or not it appears in the supply price*. Supposing competition to be free, *does the producer insist on getting a price higher than would otherwise be necessary just because the element under consideration has to be supplied?* If the answer is 'yes,' that element is certainly a cost; if the answer is 'no,' that element is not a cost.

Money Costs: Explicit and Implicit.—The largest constituent in entrepreneur's cost is usually direct money cost—the money outlay for factors of differ-

ent sorts which he *buys on the open market*, for example, raw materials, fuel, machinery, labor, the use of capital, etc. A closely allied constituent consists of the *money value* of such of the above purchasable factors as *the entrepreneur himself* furnishes. Thus, the *individual entrepreneur* commonly supplies labor services of much importance which he might purchase on the open market. Again, in almost all cases he is obliged to put in some capital of his own. Further, he may use his own land, instead of renting from some one else. Now, for his labor services, he will naturally try to get as good wages as he would have to pay others for the same services. Similarly, on the capital which he put it, he will of course insist on getting the usual interest. So, for the use of his land, he will expect as large a return as the rent which he would have to pay another landlord. Accordingly, in estimating what the product costs him, he will make allowances for all these items. They will, therefore, constitute a part of the cost of production,—quasi-money costs, we might call them, or *implicit money costs*, as contrasted with his direct money outlay which we may call *explicit money costs*.

Cost of Entrepreneur's Contribution.—We have just remarked on two constituents of entrepreneur's cost, explicit and implicit money costs. There is still a third which must not be ignored. In addition to the various contributions often made by the entrepreneur which he might buy from others,—*implicit* or quasi-money costs,—there is another, *one corresponding to his distinctive function as entrepreneur*. Some person natural or legal must undertake the responsibility of deciding, willing, that production shall go forward, else of course there will be no production. This distinctive function of the entrepreneur is, therefore, a factor in production.

But the fact that the distinctive contribution of the entrepreneur is a necessary factor in production is not sufficient to make it an element in cost. In

order to be such an element, it must also be an *economic* factor, a factor having an economic character, having value. But the question whether this factor has an economic character is not so easily determined as in the case of the other factors which have been considered. Just because the services of labor, of capital, and of land are purchasable on the open market, we have no difficulty deciding whether or not they have value, for that is evidenced by the prices at which they are bought and sold. The distinctive function of the entrepreneur, on the contrary, cannot thus be bought and sold. The assumption of final responsibility and a certain residue of management cannot be separated from the ownership of the business, hence cannot be delegated to anyone else, cannot be hired from anyone else, therefore cannot be bought and sold, so cannot have a price to prove its economic character. It follows that we must look elsewhere for the value element needed to show that the function of the entrepreneur is an *economic* factor. That 'elsewhere' is the price at which the entrepreneur stands ready to supply the commodity in question—his supply price. If said supply price should contain something in excess of the costs hitherto enumerated, the function of the entrepreneur would be an economic factor. Finally, the presence in the supply price of this 'something in excess' would prove that profit, the remuneration of the entrepreneur, is an element in cost.

Meaning of Profit.—But at this point it becomes quite important to avoid a possible misunderstanding as to the meaning of this word profit. Profit is the implicit price of *those services of the entrepreneur which are peculiarly his own, distinctive of his office*. We do not have a profit, in the strict sense, just because we have a return in excess of the money outlay, the *explicit* money cost. Such an excess would very likely be necessary to cover the wages due the entrepreneur as a laborer or to cover the interest due him as having supplied a portion of the capital. The excess in return which spells profit must go *beyond the implicit*, as well as the explicit,

money cost. Thus, a small merchant investing \$2,000 and clearing \$1,600 a year from the business might be thought of as getting 80 per cent on his investment; when in fact \$1,300 out of the \$1,600 was the wages of his labor as manager, salesman, etc., while \$120 was interest on his \$2,000 at 6 per cent; so that his true profit was only \$180 or 9 per cent.

Profit a Part of Cost.—That this peculiar contribution of the entrepreneur, or the profit representing that contribution, is at the present time a true cost of production can scarcely be doubted, and is seldom denied by economists.³¹ Generally speaking, marginal entrepreneurs, those who will drop out if price falls, include in their supply price something in excess of explicit and implicit money costs. During the late war, most governments, when making contracts for supplies and when taxing business, assumed that, as a matter of course, producers must be allowed to make from ten to fifteen per cent gross profit or five to ten per cent *net* profit—profit in excess of interest. It seems to follow that, in the opinion of practical men, true profit commonly is, and in fact must be, an element in cost.

Interpretation of Profit.—We have seen that profit forms a necessary element in the cost of production: the supply price of a commodity—the price necessary to bring out the marginal units of supply—must be great enough to include a profit to the entrepreneur as well as to cover the other items which have been enumerated. This topic, profit, must not, however, be passed without a further word of explanation as to how the word is to be interpreted. There has been from the first, and continues to be, considerable confusion in economic writing in respect to the proper *method of computing profit*. Even business practice is not wholly uniform, though

³¹ "Some economists hold that profit would not continue to exist as a cost under a static set of conditions. Some even hold that this element is not a part of cost at present. For comments on some arguments in support of this opinion, see Note 4 in the Appendix."

the interpretation which will here be given is probably the generally accepted one. Profit proper should be computed on the basis of *the capital invested*, not on the basis of *the outlay*. Thus, let us suppose that \$50,000 is invested in a given business; that this business yields an annual output of 100,000 units; that the cost per unit—profit not included—is \$4; and that the rate of profit proper required is 8 per cent. Under these conditions, the producer does not say: 'Since each unit of product costs me \$4, and since 8 per cent of this is \$.32, I will supply the commodity in question for \$4.32'; instead, he says: 'Since I have in the business an investment of \$50,000, since 8 per cent on this is \$4,000, and since the other costs equal \$4 per unit, I will supply the commodity at \$4 plus \$4,000 divided by 100,000 units, that is, for \$4.04.'⁵²

Rent Commonly a Part of Cost.—In the above account of entrepreneur's cost, it was more than once implied that such cost includes *rent*, that which is paid for the use of land unmodified or modified only by such improvements as are practically irremovable and indestructible. We seem to be justified in doing this, in view of the precise nature of the problem before us: What are the elements included in the cost of the individual entrepreneur? For, from this standpoint, rent must, in the great majority of cases, be looked on as a part of cost. The reason for this is that, in the great majority of cases, a given piece of land may be put to many different uses, and the individual entrepreneur will be obliged to compete against other entrepreneurs who want

⁵² "This of course does not mean that producers would not be glad to get the larger profit reached by the former method of computation. If they are regulated by government and have to get the consent of government in fixing their price, they often try to induce the regulator to adopt the method of reckoning which gives the larger profit. But where competition is free, producers will in the long run offer to supply the commodity provided the price is high enough to give them a profit on the capital actually invested."

that land for other purposes, just as he would be obliged to compete against them for labor services or capital services. That is, rent would participate in determining the entrepreneur's supply price just as truly as wages or interest." (pp. 312-318.)

We have seen that rough lumber requires 9 to 18 months for the air-drying process. This ties up a great deal of capital and ordinarily would require bank loans. That 6% (especially for the Middle West since 1900,—particularly since 1914) is a proper interest rate, see 2 Taussig's *Principles of Economics*, (2nd edition revised, 1920), p. 26.

Flooring has to be carried in stock in large quantities. The demand for it is largely seasonal. (Vol. II, p. 260.) This also necessitates the tying up of a large amount of capital and the borrowing of money. Certainly, most producers would "insist on getting a higher price than would otherwise be necessary just because the element under consideration has to be supplied."

In *Accounts, Their Construction and Interpretation*, by William Morse Cole, Associate Professor of Accounting in Harvard University (Revised and Enlarged Edition, 1915), page 301, it is said:

"Though the main elements of selling cost are obvious, some are likely to be forgotten without special attention. First, almost all large establishments are obliged in the dull seasons to accumulate stock ready for the demand of the active seasons. We have, therefore, interest, insurance, depreciation and taxes, to figure on this accumulated stock. This is not exactly manufacturing cost, for the manufacturing division cannot always make goods at the variable rate of the demands of the seasons. It must produce them when it can. It is, however, the task of the selling division to keep goods moving as rapidly as possible, and to find such in-

ducements as may be worth while to get them out of the warehouse in the dull season. The most effective stimulus to the selling division for keeping the warehouse clear is to debit this division with the cost of accumulating the stored stock. Though this may sometimes seem a hardship, it is unavoidable; for charging to manufacturing would to some extent nullify the careful cost-keeping, especially in the matter of comparative costs. Some overlapping of function is bound to occur between the manufacturing and the selling division, and that is just why the need exists for a general manager, whose expenses are divided between the two divisions. It is the manager's task to determine how far it is cheaper for the manufacturing division to accommodate itself to the varying demands of the seasons, and how far the task of accommodation shall be laid on the selling division. Whatever cost of this sort is incurred, however, seems properly to belong to the selling division."

Interest on value of plant is also a proper element.

In 15 *Journal of Accountancy*, page 330, Mr. Edward L. Suffern quotes Mr. A. Hamilton Church, as follows:

"Wherever capital is made use of, whether in the power plant, in the erection of buildings, or in the purchase of costly special machinery, the use of such capital has to be paid for, somehow and somewhere. It is only rational that it should be paid for by just those processes (and therefore those jobs) which involve its use. To exclude interest charge from cost of these jobs is to ignore one of the most important matters that we should know, namely—how far this use of capital is economically justified."

The writer of the article (Mr. Suffern), then proceeds as follows:

"The citing of some examples may tend to throw additional light on this most interesting subject.

Take, for example, a textile plant. This plant

comprises a yarn mill, a weaving mill, and a knitting mill. The yarn mill manufactures the yarn for both the other mills. As there are many mills manufacturing yarn exclusively, this company is in position either to buy yarn or manufacture it itself.

The prime question of importance in reference to the yarn mill is whether or not it is profitable to maintain this mill considering the capital tied up. The capital invested in this particular mill, we will say, amounts to \$200,000.00. If the yarn were bought instead of manufactured, this \$200,000.00 could be invested in other departments of the business, or invested to draw interest for the company, or distributed to the stockholders, thereby allowing them to invest the proportion they receive at interest.

It is the writer's opinion, considering that the total investment is used in manufacturing, that it is necessary to charge the interest of the investment to the cost of production. No true comparison can be made between the cost of the yarn manufactured and the purchase price of yarn, unless the interest is charged as stated."

See also *Cost Accounting, Theory and Practice*, by J. Lee Nicholson, C. P. A., Instructor in Cost Accounting at Columbia University, pages 33 *et seq.*

So is *rent*, which is not included in the costs returned by the defendant members. Neither is there *any* profit.

The Government put in no evidence whatsoever that any of the items mentioned in Exhibit 25 were improper, neither did it even attempt to prove that they contained any *profit* whatsoever. The *undisputed evidence* was to the contrary. (Vol. I, pp. 107, 151.)

The evidence is undisputed that the defendant members also kept their own costs; that by comparing such

costs with the average cost, they were able to reduce the former; and that the activities of the defendant Association and its predecessors had reduced the cost of producing and distributing maple, beech and birch flooring.

The defendant Oval Wood Dish Corporation began to manufacture flooring in June, 1921, and joined the defendant Association in August, 1921. (Vol. I, p. 286.) Mr. Hodges, of that company, testified as follows:

“Q. How about the exchange of manufacturing experience, when you come in contact with these other manufacturers, have you found that helpful?”

A. Very helpful, especially valuable on the start; we had no experience in manufacturing maple flooring whatever and we were able to get some very valuable information.

Q. How about these test runs and the average costs reports, have you found them helpful?

A. Very helpful.

The Court: Just in what way?

A. Well the average cost reports are made up in detail showing what each operation costs all the way through. *We kept all our own cost figures and we were able to check them with these, and if we found an item of cost that was abnormally large we were able to check it up and look into it and find out where the trouble was and correct it. We had no experience and some of our costs were abnormally high at the start.*

Mr. Darby: Q. Do you believe that the activities of the association have reduced the cost of manufacture or raised it?

A. Reduced the cost considerably.

Q. They pay a great deal of attention to the cost of manufacture?

A. Yes, sir.” (Vol. I, p. 295.)

See Vol. II, p. 789, for the testimony of Mr. George W. Keehn who introduced in evidence a statement that had been taken from the files of the Oval Wood Dish Corporation. This statement shows that the cost of that company for the first quarter of 1922 had been compared in the ordinary course of business with the *average costs*. Within three months the Oval Wood Dish Corporation was able to reduce its own manufacturing and marketing costs \$3.60 per thousand feet or \$0.37 below the *average costs*, whereas, at the start the costs of said company were \$3.23 per thousand feet more than the *average costs*. (Defendants' Exhibit LL, Vol. IV, fol. pp. 5467-5470.)

Mr. T. M. Ralston (who was formerly sales manager for William Horner, but at the time of the trial was sales manager for the Indiana Flooring Co., a non-member), testified as follows:

"Q. By the way, what was your opinion of the value of those test runs and the data furnished with respect to average manufacturing costs?"

A. They were very valuable to us from a standpoint of keeping our own costs in shape and of knowing how our costs compared with those of the other plants. At Reed City we didn't have any accurate cost; at Newberry we had a very thorough one and we were naturally very interested in knowing what the other manufacturers, it cost them to manufacture their stock, and in that way trying to check up and seeing that we were making them as cheap as possible." (Vol. I, p. 328.)

Mr. Walter L. De Witt testified:

"We keep a very close survey of our costs, and we always try to sell at a price that will get us a profit. This is not always possible." (Vol. I, p. 237.)

And again:

"I personally have derived benefits from the exchange of information with respect to manufacturing costs from different members of the Association. This has helped me to reduce my own costs and enabled some other members to reduce their costs of manufacturing maple flooring."

Mr. Darby: I read a letter from the Kneeland-Bigelow Company under date of August 13, 1923, addressed to the Holt Lumber Company, Oconto, Wisconsin (Defendant's Exhibit U-16):

"We will appreciate it very much if you will advise us what your cost for racking, bundling and tying your hardwood flooring is. Ours for last week was \$2.80 and we think this entirely too much, and will certainly appreciate any accurate information on the subject you can give us."

Thanking you in advance for your reply, we are."

That is the Kneeland-Bigelow Company of Bay City, Michigan, a member of this Association.

The answer of the Holt Hardwood Company dated August _____ and [fol. 455] the date has been punched out—addressed to Charles A. Bigelow, Bay City, Michigan (Defendants' Exhibit U-17): "Dear Sir: Your letter of the 13th to the Holt Lumber Company was referred to us for reply as we and not the Holt Lumber Company manufacture the flooring. For the period from January 1st to July 1st, 1923, it cost us 97.3 cents per M ft. to rack, bundle, and tie our hardwood flooring."

The Holt Hardwood Company has no financial or other interest in the Holt Lumber Company, but they turned over the letter to us.

The matter of costs of manufacturing and marketing flooring has been given a great deal of attention by the Association. They send out the average results of test runs every so often and manufacturing costs are discussed quite frequently at Association meetings." (Vol. I, p. 252.)

See also, Vol. I, pp. 200, 213, 260, 397, 431-2.

The defendant, Mr. J. L. Colby, testified on cross-examination as follows:

“Q. You never helped make out one of these cost sheets, did you?”

A. Not for a number of years.

Q. You are controlled in your market price considerably by the cost of production, aren't you?

A. Well sometimes that is a factor, of course we always aim to take it into consideration, but for certain items of flooring you can't always say that you are going to get the full cost or more, sometimes you have to sell it for less than that.

Q. In estimating your cost of production you always use that estimate made by the Association, don't you?

A. In estimating our cost?

Q. Yes.

A. No, sir.

Q. What do you use?

A. We use what we think in our own minds is our own cost.

Q. Don't you report to the Association your cost of production?

A. No, sir, we have not for a number of years.

Q. You are asked every month, aren't you? Two or three months?

A. We are asked every quarter I believe.

Q. Did you never answer it?

A. Well, I wouldn't say we never answered them but we never gave them the information, that is, we haven't for a number of years.

Q. Why don't you give them your information?

A. Well, because we have a peculiar condition in that our flooring factory is under the same roof with some of our other business and at least quar-

terly it is a little bit hard for us to segregate the individual items that are applicable to flooring separately and we don't want to give the Association anything excepting what would be an actual cost. Now if it were yearly instead of quarterly we probably would be in better position to give those costs.

I should say offhand that our cost is probably a little higher than the average cost reported by the Association. Costs are somewhat higher around Cadillac." (Vol. I, p. 219.)

The members making the reports necessarily ascertained their own costs. All members were urged to send in reports. Members checked their own costs against average costs, and some of them were thereby enabled to reduce their own costs. None of them used the average costs for any other purpose.

See also pages 116-120 *supra* for testimony of nonmembers that their prices were usually higher than the prices of members.

See also testimony of manufacturers who testified that they were forced to quit manufacturing maple, beech and birch flooring, because they could not make a profit. (Pages 54-60, *supra*.)

See also the testimony of Mr. Goodman, who manufactured his rough maple lumber, yet testified that he could not manufacture flooring at a profit. (Pages 59-60 *supra*.)

See 54-60, *supra*, and Vol. I, p. 137, for testimony of producers who when unable to manufacture at a profit, bought flooring from the defendants.

See 54-60, *supra*, for the undisputed testimony that the prices of defendants have always been fair and reasonable.

And yet the Government would have this court believe that the defendants' interest in the matter of manufacturing and marketing costs was a subterfuge and a fraud in order to fix prices, eliminate competition and mulet the public by including in their costs "large profits."

COST SURVEYS COMMITTEE.⁵³

Mr. James E. Dewey testified as follows:

"I am Chairman of the Cost Survey Committee and have been since it was organized in 1922. The document you hand me marked Defendant's Exhibit 'Z' is a letter that I wrote to Mr. Keehn giving information regarding sales of rough lumber of which I had knowledge, or rather the document is a copy of a letter that I wrote to Mr. Keehn. The copy was taken from my file. I wrote the letter as part of my duties as Chairman of the Cost Survey Committee.

Mr. Darby: I would like to read it to the court.

'June 2, 1922

George W. Keehn, Secretary Maple Flooring Manufacturers Association, Chicago, Illinois:

"I believe it would be advisable to have a short meeting of my committee previous to the general meeting on June 21st, and therefore wish that you would send out notice to the members accordingly. We should have some information regarding the market price on lumber up to that date, and it might be well to appeal to the members of the Association

⁵³The present Association has never had a Market Conditions Committee. That committee used to make reports on market conditions and recommendations as to prices to be charged. Mr. George W. Keehn testified as follows:

"The Market Conditions Committee went out of existence in the Summer or Fall of 1921. That Committee and its operations did not extend into the new Association." (Vol. I, p. 173.)

again, although our last effort did not avail much. The following sales are reported for week ending May 27th:

	No. 1 C	No. 2 C	No. 3 C A
1,000,000 ft. 4/4 f. o. b.			
cars Boyne City.....	\$45.00	30.00	22.00
435,000 ft. 4/4 f. o. b.			
cars Grayling	45.00	26.00	

I had information as to those sales at the time I wrote the letter. The Cost Survey Committee have done very little as a matter of fact. Practically all they do is to gather information regarding the cost of rough lumber and transmit it to Mr. Keehn. Mr. Keehn also receives the results of test runs from members as well as the marketing and manufacturing costs. He tabulates these data and shows us the result of such tabulation. In other words, he gives us the average result of those test runs and the manufacturing and marketing costs. From such data and the price of rough lumber he arrives at the cost of manufacturing and marketing flooring. The Cost Survey Committee has held not more than three separate meetings since its organization. We have had disputes from time to time. *I think Mr. Dregge once objected to the cost as it was arrived at, claiming that it was too low. Dregge's company is located at Grand Rapids where labor and other costs and plant investment are high and his cost was much higher than the average cost quoted by Mr. Keehn. In arriving at the average we did not consider Mr. Dregge's costs because he was operating under peculiar conditions at Grand Rapids. His higher cost was not representative of the cost of mills in smaller communities or mills that are closer to the supply of lumber or timber.*

The Cost Survey Committee does not make any report about market conditions, nor does it make recommendations of any kind. It has never done so. The only report that has ever been made is the report regarding the prices of rough lumber. Our Committee never sees the reports that are made to Mr. Keehn by different members concerning test runs. Those reports are held confidential by Mr.

Kechn. Mr. Kechn merely reports what is the average result of those test runs." (Vol. I, pp. 395-6.)

See also, Vol. I, pp. 399-401, 104-5.

That the Cost Surveys Committee has never expressed any opinion as to the value of flooring, or made or attempted to make any recommendations with respect to the prices to be charged for flooring, or expressed an opinion as to market conditions, or attempted to forecast future conditions, see Vol. I, pp. 297, 171-2, 126.

TEST RUNS AND AVERAGE COSTS.

The test runs are succinctly described by Mr. James E. Dewey as follows:

"Our Company has made test runs from time to time. We usually take two full kilns of rough lumber—about 80,000 feet, after making a careful inspection of the lumber as to grade. We separate the rough lumber from all the other rough lumber that goes through the mill. We clean up everything ahead of it—clean out the racks of finished product so that our floors are clean of all flooring and all rough stock that has previously gone into or come out of the mill. We then put the 80,000 feet of rough lumber through the mill and keep an accurate labor cost on it and then make a tally of the stock that is produced that goes into the warehouse. We ascertain the percentage of waste from the difference between the tally of the rough lumber and the tally of the finished product. We tally each face and grade of flooring separately in order to know just what is produced. It is considerable trouble to make one of those test runs and it cuts down our production a little because of the time and pains involved in making one. The test runs are very accurate." (Vol. I, pp. 396-7.)

That all members were urged to make test runs in order that a representative result might be obtained, see Vol. IV, pp. 451, 468, 471, 493-495, 502-3.

[fol. 3505]

GOVERNMENT'S EXHIBIT No. G3-G

Average Cost Based Upon Composite Result of Five Test Runs.

These test runs were made as follows: 1 in January and February 1922, 1 in December 1922, and 3 in January 1923.

Rough Lumber Used	
579 M ft. No. 1 Common	53%
307 " " No. 2 Common	23
28 " " No. 3 Common A	3
181 " " No. 3 Common	16
1093 M ft.	100

Present Average Cost of Rough Flooring Lumber
FOB Cars Flooring Mills

579 No. 1 Common @ \$64	\$33.92
29 " No. 2 Common " 44	12.32
3 " No. 3 Com. A " 32	.96
18 " No. 3 Common " 24	3.84

100%	
1000 ft. Lumber Costs	51.04
700 " Flooring Costs	51.04
1000 " Flooring Costs	67.16
Manufacturing and Marketing Cost First Quarter 1923—Average	17.85

Average Cost FOB Flooring Plant of 1000 ft. of
Flooring Sold

\$5.01

Flooring Product	
Clear	316 M ft. 35%
No. 1	366 " 44
Factory	120 " 15
Other Product	21 " 3

Waste	832 M ft. 100%
	261 " 21

Lumber Used..... 1093 M ft.

Approximate Relative Average Costs of Flooring Product
FOB Cars at Flooring Mills

Clear:	
13/16 x 1 1/2" 1.9%	@ \$97..... \$ 1.41
2" 1.4%	97..... 1.36
2 1/2" 27.4%	102..... 27.85
3 1/2" 3.2%	87..... 2.78
4" 1.6%	87..... 1.39
Jtd. 3 1/2" .5%	92..... .46
3/8" All Faces 2 %	97..... 1.31
38 %	 37.12

No. 1:	
13/16 x 1 1/2" 1.4%	@ \$82..... 1.15
2" 1.7%	87..... 1.48
2 1/2" 33.2%	92..... 30.51
3 1/2" 4.6%	82..... 3.77
4" 1.2%	82..... .98
Jtd. 3 1/2" .7%	87..... .61
3/8" All Faces 1.2%	47..... .56
44 %	 39.09

Factory:	
13/16 x 1 1/2" .6%	\$32..... 19
2" .6%	42..... 25
2 1/2" 11.1%	47..... 5.23
3 1/2" 2.3%	52..... 1.20
4" .7%	52..... .36
Jtd. 3 1/2" .2%	57..... .11

Other Prod. 3.5%	 7.33
Totals..... 100 %	60..... 1.50
	 85.04

Grades	13/16 x 1 1/2"	2"	2 1/2"	3 1/2"	4"	Jtd 3 1/2"	3/8" all faces	Totals
Clear	1.9%	1.4%	27.4%	3.2%	1.6%	.5%	2 %	35 %
No. 1	1.4%	1.7%	33.2%	4.6%	1.2%	.7%	1.2	44 %
Factory	.6%	.6%	11.1%	2.3%	.7%	.2%		15.5%
Other Product			11.1%	2.3%				2.5%
Totals	3.9%	3.7%	71.7%	10.1%	3.5%	1.4%	3.2%	100 %
July 19, 1923.								

We set forth on the attached sheet a copy of Government's Exhibit 63-G, Vol. IV, pp. 504-6. This document is explained by Mr. George W. Keehn on pages 105-107 of Vol. I.

Test runs were made by five different members whose separate reports showed the quantity of each grade of rough lumber used, the waste in converting the rough lumber into flooring, and the number of feet of each grade and size of flooring produced. All these reports were consolidated by Mr. George W. Keehn.

Inasmuch as the members making the test runs merely reported the data above mentioned, viz., the grades and quantities of rough lumber used, the waste, and an itemized statement of the flooring produced, *the time of making the test runs is unimportant.*

In order to arrive at the average cost, Mr. Keehn first reduced the "Rough Lumber Used" to a percentage basis for the different grades. He then took the "Present Average Cost of Rough Lumber f. o. b. cars Flooring Mills," (as reported by the Cost Surveys Committee) and the percentages of the grades of rough lumber used in the test runs, and ascertained the value on July 19, 1923, of 1000 feet of rough lumber containing the percentages of the grades used in the test runs.

Inasmuch as the waste in working up the rough lumber amounted to 261,000 feet, or 24 per cent—see upper right-hand column,—1000 feet of the rough lumber which cost \$51.04 produced only 760 feet of flooring. 1000 feet of flooring, therefore, cost \$67.16, exclusive of manufacturing and marketing costs.

The average manufacturing and marketing costs for the first quarter of 1923—determined as heretofore ex-

plained—were \$17.85 per thousand feet. Thus, the average cost per thousand feet f. o. b. cars flooring mills of the 832,000 feet of flooring produced was \$85.01.

Referring to the last group of figures on the sheet below, the Court will observe that the percentages of the different sizes and grades are set forth. These grades differ both *quantitatively and qualitatively*. They are used for different purposes and the demand for them fluctuates. (Pages 41-42, 75, *supra*.) The same is true with respect to the different widths or thicknesses even of any one grade. *And they were all produced at the same time, and the average manufacturing and marketing cost f. o. b. cars, flooring mills of each thousand feet of each grade, width and thickness is \$85.01.*

We have here a condition which is analogous to, and for all practical purposes *identical* with, what economists call *Joint-Cost Products*. In Taylor's *Principles of Economics* (8th edition), pages 344-6, appears the following very illuminating discussion of Joint-Cost Products:

"In studying not a few producible goods, we strike a complication due to the fact that *several different commodities emerge from the same productive process*. Thus, the dairyman simultaneously and by productive efforts, a large share of which are inseparable, brings into existence milk, butter, cheese, beef, and hides. The refining of petroleum yields not only common illuminating oil, kerosene, but also vaseline, gasoline, and naphtha. Again, the coal tar (resulting from the distillation of coal for the making of gas gives us a whole line of by-products, including various drugs, perfumes, and a large number of dyes. Now, in cases like these it is impossible, save in very small measure, to isolate the share in the cost of production which is properly chargeable to each of the several products. This being true, we

surely cannot apply to these goods, without qualification, the principle laid down for other producible goods.

The special theory needed here was set forth by Mill. It is that *the price of each of the individual products must be such as to equalize supply and demand for that product; while the money value of the whole group of products must equal their cost of production.* In consistency with the modern analysis which goes behind demand to significance or utility, we should change the first part of this formula to read 'the price of each of the individual products must tend to be that price which expresses the marginal significance of the quantity of that particular product which is put upon the market.' The second part of the formula can remain unchanged.

The argument in support of this principle is as follows: First, the price of each member of the group of products must be such as to express its marginal significance, because, under the conditions given, the quantity of each of the products is virtually fixed, and hence it comes under the laws of fixed-supply goods. This, of course, does not mean that the supply of each commodity is literally unchanging; but that its changes do not take place in response to conditions which affect that commodity itself only, but rather in response to conditions which affect all the commodities of the group. When, therefore, the price of any one of them is in process of determination, the supply of that one is virtually fixed; and hence the principle governing its price is the one which governs the price of fixed-supply goods. But the principle in question makes the price of these goods depend upon marginal significance; and so marginal significance governs the case now before us.

It is no less certain that the prices of all the members of the group must be such that the sum total of their money values will equal their joint cost of production. This result is bound to be brought about through processes already thoroughly familiar. If at any point the sum total of the group prices

should rise above this total cost of the group products, capital will move into the industry, supply all along the line would increase, marginal significance would fall, and so prices would fall. Conversely, if the total costs were not covered by the total values, capital would withdraw from the industry, the supply of the several commodities would fall off, their marginal significance would rise, and so prices would rise. Doubtless this readjustment would be much more complicated and hence much slower than in the case of isolated individual products, but in the long run it would inevitably come about.

Principle. *The price of each member of a group of joint-cost products tends to be that price which expresses the marginal significance or utility of the quantity of that particular product which is put upon the market, provided that the sum of the money values of all products of the group tends to equal their joint cost of production."*

It is manifestly impossible to accurately determine just how much less it cost to produce and distribute 13/16" x 24" Factory maple flooring than the 13/16" x 24" Clear flooring, yet the latter will always sell for a great deal more than the former. And in approximating the "relative average costs" of the different grades, widths and thicknesses, the Secretary resorts to methods analogous to those stated by Professor Taylor. He thus estimates that the 38 per cent of the Clear grade flooring costs \$37.12 per thousand feet; the 44 per cent No. 1 grade, \$39.09 per thousand feet, and 15.5 per cent Factory grade, \$7.33 per thousand feet, which, plus \$1.50 for the 2.5 per cent of other product, makes the total "approximate relative average cost" of all grades, widths and thicknesses of flooring \$85.04 f. o. b. cars flooring mills. Some of it must be sold for more than \$85.01 per thousand feet, some of it must be sold for less. *Each member must determine that for himself.*

It might be argued *a priori* that the use of the dollar figures in order to arrive at the cost of the different grades, widths, etc., might be used by all the defendants for the prices of their products. As we shall presently see, any such argument would not be supported by the facts.

The relative values of the different grades, widths, thicknesses, etc., fluctuate, of course, but they have been pretty well established by usage and custom during the thirty or more years that maple, beech and birch floorings have been on the market. Custom and usage, as modified by supply and demand, determine the differentials, but all of them respond to the cost of rough lumber. For instance, Mr. George W. Keehn testified as follows:

"Now, we come to November 10, 1923, with exactly the same information, and according to the best information obtainable through the Committee on Costs, there appears to have been a decline in the average cost of rough flooring lumber of \$7.00 per thousand. So this is made on the basis of 57, 37, 27 and 20 dollars, and all these relative costs of the flooring product were horizontally reduced \$8.00 a thousand. In other words, on July the 19th, this flooring product cost \$85.00. On account of the decline in the market value or cost of the rough lumber, it comes down to \$77.00, so that makes a difference of \$8.00, while the decline in the lumber is \$7.00. On account of the waste in the flooring it amounts to \$8.00 on the other." (Vol. I, p. 107.)

Furthermore, it is not accurate to say that it costs no more to produce 1000 feet of Clear grade flooring than it costs to produce the same quantity of Factory grade. As a reference to the Grading Rules (Vol. IV, fol. pp. 5331-5336) will show, the defects are much more closely trimmed out of the Clear grade than they are in the No. 1, or Factory grades; and they are also trimmed out

much more closely in the No. 1 grade than they are in the Factory. Hence *more labor and machine work* are required in order to produce the better grades. It is also obvious that the *best* portions of *each* grade of *rough lumber* go to make up the *better grades of flooring* and that the proportion of shorter lengths varies inversely as the excellence of the grades. (See Grading Rules.) Hence, while the cost of the several joint-cost products cannot be absolutely determined, it can be said that it costs more to produce the better grades of flooring than it does to produce the inferior grades.

If any portion of the figures are considered objectionable, it would be easy to enjoin their use.

Only the *combined* results are distributed to members by the Secretary—as shown by Gov. Ex. 63-G.

“With respect to the average cost as disclosed by test runs made by different members, only the *total* is shown. The individual figures of the different members are not. In other words, only the average is shown, and not the individual results of each member.” (Vol. I, p. 176.)

Subsection f of Section 3 of Article XIV—5 per cent allowance for contingencies and unforeseen hazards—was annulled, and was never thereafter taken into account in arriving at average costs. (Vol. IV, pp. 811-814; Vol. I, pp. 151-2.)

That the lumber business is an essentially hazardous one, and that an allowance of 5% to cover such hazards was very reasonable, see Vol. I, pp. 151-2, 229, 92, 97; Vol. II, pp. 791-2.

Before comparing the average costs with the prices for flooring it is necessary to examine into certain other practices of the defendant Association.

D.

FREIGHT RATE BOOKS.

The allegations concerning the books above mentioned are set forth and analyzed on pages 17-19, *supra*.

We have already seen that the allegation that

"the defendants agreed to adopt and have concertedly adopted Cadillac, Michigan, as an arbitrary freight basing point from which they charge freight, regardless of the point from which each may actually ship flooring."

is not true. (Pages 97-103, *supra*.)

We have also seen that the proof does not support the allegations of the petition with respect to uniform commissions, terms of sale, cash discounts, etc. (Pages 104-112, *supra*.)

FREIGHT RATES.

Mr. L. L. Barth, of the Edward Hines Lumber Co., Chicago, testified:

"I think that we buy about 95 per cent of our flooring f. o. b. cars Chicago. This enables us to know in advance what the flooring is going to cost us here, and we prefer that the manufacturers accept the risks incident to transportation." (Vol. I, p. 412.)

Similar testimony was given by many other witnesses. All lumber, including flooring, is almost universally sold delivered. Purchasers of flooring usually will not buy it on any other basis. (Vol. I, p. 445; Vol. II, pp. 459, 465, 536, 561, 565, 573, 579, 585, 593, 623.)

Mr. George W. Keehn testified:

"In a vast majority of cases lumber products and maple flooring are sold at delivered prices, because the buyer insists upon knowing the cost of the flooring, we will say in this instance, delivered at destination. Therefore, the flooring manufacturers will quote him the delivered price on the flooring, and when this purchaser receives the flooring he deducts from the invoice for the flooring which is sold to him at the delivered price, the *actual* freight paid from the *point of origin* to destination of the shipment. Then he remits the balance to the manufacturer. In other words, if a lumber dealer at Nashville, Tennessee, buys a carload of flooring and it is shipped from Saginaw, Michigan, that lumber dealer deducts the actual freight that he pays to the railroad company on this car of flooring from Saginaw, Michigan, to Nashville, Tennessee, and remits the balance to the shipper. I think that about 90 or 95 per cent of the flooring produced is sold at delivered prices. The actual freight is paid by the customer from points of origin to point of destination, the customer deducting the freight paid by him from the invoice price of the flooring." (Vol. I, p. 174.)

However, the defendants have no objection to selling flooring f. o. b. cars flooring mills. The evidence is undisputed that they quote and sell on an f. o. b. mill basis whenever purchasers so request. (Vol. II, pp. 456, 450, 451, 453; Vol. I, pp. 209, 235, 243, 250, 268-273.)

Most of the members of the defendant Association are located in small towns in Michigan and Wisconsin. It happens that the *average* freight rates from all these producing points in Michigan and Wisconsin to the principal centers of consumption in the United States are approximately the same as the average freight rate from Cadillac, Michigan, to the aforesaid centers of consumption. (Vol. I, pp. 112, 115-7.)

Appendices R and S are copies of Government's Exhibit 36-A, (Vol. I, p. 117, Additional Exhibits, fol. pp. 907-908) and Defendants' Exhibit EE, (Vol. II, p. 779; Vol. IV, fol. p. 5437), and show the freight rates from the said Association mill points to the principal centers of consumption, together with the averages. These diagrams were sent to the members in order that each might be informed as to the differences between the freight rates from several producing points and the *average* or Cadillac rate. (Vol. III, p. 329.)

The Court will observe that in many instances the freight rates from points where members are located are identical with the freight rates from Cadillac, that in others they are slightly less and that in still others they are slightly more. It should perhaps be stated that the freight rates shown in said exhibits are per 100 pounds. 13/16" x 1 1/2", 2" or 2 1/4" flooring weighs 2,000 pounds per thousand feet; 13/16" x 3 1/4", 2,250 pounds per thousand feet. (Vol. IV, fol. pp. 5322-25.) 3/4" x 1 1/2", 2" or 2 1/4" weighs 1000 pounds per thousand feet. (Vol. IV, fol. pp. 5327-8.) See also Vol. I, p. 155. Appendix A shows the location of the cities and towns where members have mills. There are three mills at Cadillac, Michigan.

For many years the defendant Association has had compiled by traffic experts the freight rates from Cadillac, Mich., to some five or six thousand cities and towns in the United States. In the compilation fractions were disregarded, and letters were used instead of figures. The freight rate books contained the key A=1, B=2, etc. (Vol. I, pp. 111-116, 126; Vol. IV, fol. pp. 5288-5325.)

The necessity for the distribution of freight rate books, and the use made of them by members (so far as

freight rates are concerned) are well stated by the defendant, Mr. Percy S. McLurg, of Phillips, Wisconsin. After stating that in all instances, the purchaser deducted the actual freight paid to the carrier, Mr. McLurg testified as follows:

"In shipping to points where we are not familiar with the freight rates, we use the rate books issued by the Association. Phillips is a very small town and it is very difficult to get freight rates from the railroad agent there. In our regular territory we know what the rates are, but in shipping east or west, we use the rate book in order to ascertain the freight rates. It is impossible to get those tariffs from the railroad agent at Phillips, which is a town of 2,200 inhabitants located on the Soo Line. It would sometimes take a week to get a freight rate from the railroad agent. In shipping to points not in our regular territory, we use the freight rate in the book issued by the Association in order to compute the freight, so that we can quote a delivered price, but the buyer deducts the actual freight from Phillips, which he pays to the carrier.

Sometimes there is a difference between the rate from Phillips and the rate mentioned in the book. I know that there might be *slight* differences between the rates quoted in the rate book containing the average rate of freight and the actual freight from Phillips. If we want business, we have to quote on that rate in order to compete with the mills that are located where the rate applies from. It is a matter of competition. *We have an advantage over the Cadillac freight rate to Minneapolis. That is why we market our stuff in that territory. Our rate into Minneapolis is 11½ cents and the Cadillac rate is 27 cents. We take advantage of our geographical situation. If we ship east, we have to absorb the difference between our rate and the Cadillac rate, or else get a higher price for our flooring. The only time we ship east is when we can't sell in our nearby territory.*" (Vol. II, p. 228.)

Mr. H. H. Shepeck, of the L. Stephenson Co., Trustees, Wells, Mich., testified as follows:

"Our Company is located at Wells, Michigan and owns the Escanaba & Lake Superior Railroad, which connects with the Soo Line at North Escanaba and with the Chicago, Milwaukee & St. Paul Railroad at Channing, Michigan. *Our railroad has very full and complete tariffs and in every case we determine what our flooring should net us f. o. b. mill and then add the actual freight to destination before making quotations. We use the freight rate book issued by the Association very little. If we ship birch flooring to the east, we look in the freight rate book issued by the Association in order to ascertain what the Cadillac rate is to the east for the reason that if we want to move birch flooring, it is necessary to cut the price. On birch flooring shipped to the east, we figure what our price at the mill and what the actual freight is and then cut the price from \$3.00 to \$7.00 because we know that other manufacturers can ship into the east more advantageously than we can because of lower freight rates.*" (Vol. I, pp. 259-260.)

Mr. Frank M. Hodges, of Tupper Lake, New York, testified as follows:

"We sell most of our flooring in Boston, New York, Philadelphia and other points in the same territory. We sell our flooring there because they are the broad basic markets of the east. There is a lot of flooring used there, and we also sell our rough lumber there very largely, and of course, it is easier to sell our flooring in the same market in which we sell the rough lumber.

Flooring is shipped into these markets from practically every producing territory in the country. They even ship large quantities of fir flooring from the Pacific Coast by way of the Panama Canal. Oak flooring comes from all points in the south. Maple flooring comes in there from West Virginia, Tennessee, Michigan, Wisconsin, New York, the New

England States, Canada and Pennsylvania, although there are not many mills in Pennsylvania. Hard pine flooring also comes in there in direct competition with hardwood flooring.

"We could ascertain the cost of our flooring f. o. b. mill and then add the freight rates to New York and figure on that basis for our flooring, but if we did we wouldn't get any business. Manufacturers can't do that if they want to get into those markets with flooring because the freight rates from any one section won't control the prices. There are so many points from which flooring is coming in there. The manufacturer must get all the information he can as to what prices are being made in those markets, not only on maple flooring or beech or birch, but on oak, pine and every other kind that comes in competition with the flooring he desires to sell. The manufacturer must sell his flooring in New York at what it will bring there if he wants to get into that market. He must begin there to figure and work back to the flooring mill and find out whether he can get into those markets rather than begin at the mill and work the other way." (Vol. I, p. 288.)

Mr. Walter L. De Witt, of Oconto, Wis., testified:

"Oconto is a town of 5,500 inhabitants located on the Chicago & Northwestern and the Chicago, Milwaukee & St. Paul Railroads. We used the freight rate books that were issued by the Associations almost entirely for securing the rate of freight in making our delivered prices. It happens that Oconto and Cadillac take practically the same rate of freight to all parts of the country with the exception of the west, and we have inquiries coming in every day from all over the United States. If we had to ask the local agent for a freight rate, in a good many instances the point would not be listed in the tariff he had on file, which would result in a delay of anywhere from two days to a week before the freight rate could be obtained. We would have to hold up our quotation to our customer who demands a delivered price in nearly every instance. Consequently, the order would probably be placed

elsewhere before we were able to quote a delivered price.

The average freight rate from Cadillac to thirty representative markets in the United States on flooring is 44.7 cts. and the average from Oconto is 42.9 cts. *One cent's difference in freight per thousand feet on 13-16 x 2½ maple flooring would be 20 cts. Such a difference would not have any material effect upon the delivered price of flooring in Boston, New York, Philadelphia or any other of these thirty representative markets because it is too small to take into consideration.*

I have found that these freight rate books are a great assistance to me in the conduct of our business. In the absence of the freight rate books we would have to secure the rates from the local agent, or through a traffic association or install a traffic department of our own." (Vol. I, p. 235.)

Mr. James E. Dewey, of Bay City, Mich., testified:

"The largest portion of our flooring is sold in the East and Middle West because the freight rates in that territory are an advantage to us over other manufacturers. We have the shortest line into the East of any of the manufacturers [in Michigan or Wisconsin]." (Vol. I, p. 393.)

Mr. William H. Greene, of Manistee, Mich., testified as follows:

"We use the freight rate book gotten out by the Association exclusively as a lumber tariff. The freight rates from Manistee are practically identical to all points in the United States with those from Cadillac. There may be a few points where there is perhaps a difference of one or two cents per hundred weight, but I do not recall any point where the difference in freight rate between Manistee and Cadillac would exceed 50 cents per thousand on 13/16 maple flooring. That difference would not ordinarily affect the delivered price of maple flooring. The average freight rate on carload lots of maple flooring from 17 producing points in Michigan and

Wisconsin to 30 representative markets in the United States from *Cadillac* is 44.7 cents and the average rate from *Manistee* is 45 cents. *That difference would not affect the delivered price of flooring at all.* Manistee has about 9,000 inhabitants and is located on the Pere Marquette and the Manistee & Northeastern. The Manistee & Northeastern is a short line running from Manistee to Traverse City, connecting with the Pennsylvania there and connecting with the Michigan Central at Grayling. Up to a comparatively short time ago we had been more or less handicapped with respect to being able to obtain reliable information as to freight rates and for that reason we found that the rate book published by the Association was very valuable. It also served as a check against the rates quoted by our railroad offices, in which errors often occur. I understand the Association rate book is compiled by traffic experts and we have found it very reliable. *We sell our flooring generally throughout the United States. The morning's mail may contain all the way from 10 to 20 inquiries from Maine to California and as far south as Louisiana.*

Q. I wish you would state what your experience was there in Manistee in attempting to get freight rates from the local agents.

A. We were considerably handicapped when we first went into the business there, back in 1907, by having no railroad office with complete sets of tariffs and files at that time. While Manistee has always been recognized as a lumber manufacturing center, the lumber produced has been hardwoods, hemlock, pine and products of that kind, which were marketed very largely in the State of Michigan, Illinois, Ohio, Indiana, Eastern Pennsylvania, some in the Western part of New York; and the railroad offices in our town were very well equipped with freight tariffs so far as that particular market was concerned. When we went into the maple flooring business, necessitating our shipping our product to *all* markets, like the western markets, intermediate points in the west, we could not get that information, and very often we lost out on the business as the result of having

to ask for those rates of our railroad connections; and by the time the rate was quoted me very often it happened the other fellow had the business on his books.

We do not make a separate charge for freight as distinguished from the flooring when we make a delivered price on flooring. The purchaser pays the freight to the railroad company. He pays the actual freight and submits the freight bill to us, deducting the amount of the expense bill from the invoice." (Vol. I, pp. 383-4.)

See also, Vol. I, pp. 322-3.

The Government offered no proof that any different practices obtained. It was undisputed that the purchaser deducted the *actual* freight paid by him to the carrier. (Pages 101-103, *supra*.)

It also appears that there was no common practice with respect to freight rates. *No member could take advantage of his geographical position if all members were using the Cadillac freight rate.*

The differences between the Cadillac (or *average*) freight rate and the actual freight were either non-existent or negligible, or else the member used the Cadillac rate merely for the purpose of *estimating* the approximate freight charges in order to quote a delivered price.

No separate charge was made for freight as distinguished from flooring. (Pages 101-103, *supra*.) Some members merely used the freight rate books in some cases in order to arrive at a delivered price, and to more effectively compete with other manufacturers, both members and nonmembers.

The diagrams or charts heretofore mentioned (Gov. Ex. 36-A and Defts.' Ex. EE) gave each member the

freight rates from all other Michigan and Wisconsin (member) mills to the principal centers of consumption, so that in fixing delivered prices, each member knew what the freight charge would be from other producing points. Unquestionably, an allowance was made for such differences as actually existed in order to arrive at a delivered price.

As Mr. Hodges said, the manufacturer cannot begin at his mill, fix a price on his flooring, and then add the amount of the freight. He must begin at the other end—the market he wishes to get into—and fix a delivered price in view of competitive conditions that obtain there. *Mills farther away from such markets must absorb the differences that exist between freight charges from their mills and the freight charges from mills more advantageously located.* (See pages 153-4, where Michigan and Wisconsin mills were quoting lower delivered prices in the East than was the Oval Wood Dish Corporation of Tupper Lake, New York.) For instance, at a given time wheat will fetch not more than a certain price in Chicago, regardless of the point from which it is shipped. And the wheat grower in Washington who sells in the Chicago market does not net so much for his wheat as the wheat grower in Iowa, or Minnesota, or the Dakotas. The consumer does not always pay *all* the freight. Or if he does, there is great inequality of participation among producers in the delivered prices paid by the consumer.

If all the defendants had ever used the freight rate from Cadillac, Michigan, there would not exist the great differences in delivered prices made in the same centers of consumption. (See Defts. Ex. FF to FF-9, Vol. IV, fol. 5438-5447.)

Large corporations maintain expensive traffic departments. Small manufacturers are unable to do this. And, manifestly, the defendant Association was forced to distribute information as to freight rates in a form that would be of the greatest benefit to the greatest number. The expense of having traffic experts compile freight rates from 22 producing points to six or seven thousand cities and towns in the United States would have been prohibitive.

By comparing the quotations and sales made by the different members (pages 121-43, *supra*), it will be found that the lowest delivered prices were often quoted by a member from a point having the highest freight rate. The delivered prices always varied, and neither the average costs nor the freight rates offer any explanation of the prices quoted or obtained.

Furthermore, the Government's allegations with respect to freight rates were merely by way of inducement. The freight rate book, and all that was therein contained, were merely factors which resulted in the alleged—but non-existent—uniformity of net delivered prices.

AVERAGE COSTS.

Included in the Freight Rate Books are the *average costs*, arrived at by the methods described on pages 274-280, *supra*. They were printed on loose-leaf sheets for insertion in the freight rate books. (Vol. I, pp. 155, 173; Vol. IV, fol. p. 5326.)

DELIVERED COST CHARTS.

There were *formerly* included in the freight rate books Delivered Cost Charts. These charts merely added the *average* or Cadillac freight per thousand feet (to the cities and towns listed in the freight rate books) and the average costs. (Vol. I, pp. 118, 153-6.)

To a lawyer sitting in his office this seems entirely superfluous. If one knows his own f. o. b. mill manufacturing and marketing costs per M. feet, and the *average* manufacturing and marketing costs and the *average* freight rate per cwt. and market conditions, he ought to be able to readily fix a delivered price per M. feet of flooring to customers in San Francisco, New York City, or any other city in the United States. But this would involve the making of calculations, with opportunities for error. Hence the *delivered average costs per M. feet* of flooring were carefully figured out by skilled persons and put into the hands of the members. Having in mind the differences that existed between the average costs and his own, the average freight and his own, and his warehouse conditions, his financial needs, building conditions, information obtained from his representatives or traveling salesmen as to competitive conditions in a particular market, the offers made by buyers, his past relations with the person who wanted to buy, and many other facts and circumstances, the member could fix a delivered price at a given point by naming a figure which would be the resultant of all these factors. The use of such charts would merely furnish a rough approximation or starting-point for calculations, if one desired to start there and work either forward or backward. *There was no*

common practice. The Government offered no proof on the subject. Each member was free to do as he pleased. And what he pleased to do, can only be inferred from the great range of prices, which has already been shown, and the relation that existed between the average costs and the prices received, which we shall show later.

The Delivered Cost Charts do not differ essentially from interest tables and other devices which banks put into the hands of their employees in order to minimize chances of error. In view of the astonishing results obtained by means of intelligence tests during the late war with subjects obtained by a selective process, and the varying degrees of intelligence—and stupidity!—that exist among minor employees in small towns, the use of the Delivered Cost Charts was justified. The mere combination of average costs and average freight (which already appeared separately in the freight rate books) could not reasonably put these useful and lawful books into the *Index Expurgatorius* of the law.

The Delivered Cost Charts were eliminated, and are not used now. (Vol. I, pp. 118, 153-6.)

DIFFERENTIALS.

Until July, 1923, the freight rate books issued by the present Association contained so-called "Differentials." (Vol. IV, fol. pp. 5249-5252.) They were merely the average costs of the different grades, sizes and woods, determined as described on pages 274-280, *supra*. These data are no longer distributed or included in the freight rate books, except as hereinafter stated. (Vol. I, pp. 152-3, 155, 201.)

Mr. George W. Keehn testified as follows:

The Court: Let me ask you a question: Have there been any considerable changes in these differentials, so-called, * * * over a period say of two or three years?

A. There may have been changes in the differentials from time to time depending upon the market cost of the raw material, etc. * * *

The Court: For instance, the first differential in this sheet before me is the average cost of beech, 13/16ths dressed and matched, all faces?

A. Yes.

The Court: And clear, that is clear beech, \$10 less than maple?

A. Yes.

The Court: Has that been the differential substantially?

A. Not at all times. It depends upon the supply and demand of these different floorings, to what a man's stock conditions are, and the cost of it too. Beech lumber ordinarily costs in the market less than maple lumber and consequently the cost of the beech flooring would not be as much as the cost of the maple flooring.

The Court: I understand, but has the difference been substantially the same over a considerable period of time?

A. I would say yes in a general way.

The Court: And the same would be true as to birch?

A. Sometimes birch flooring brings more than maple, sometimes it sells for less than maple, that depends upon the supply and demand and the stock conditions of the members selling the product. A good many of them don't manufacture beech flooring and a good many of them don't manufacture birch flooring and some manufacture only maple flooring.

The Court: The next that I find is the Average Cost of wide faces. Has there been any substantial change in the differences between prices of the 2 $\frac{1}{4}$ —which I understand to be standard?

A. Yes.

The Court: And the wider?

A. That might vary from time to time for the same reasons.

The Court: Has it?

A. I think it has.

The Court: Substantially varied?

A. I can look that up and make a comparative statement of the costs during a period of time of those different things.

The Court: The next item is the average cost of thick flooring, as I understand it, the standard is 13/16th?

A. 13/16ths.

The Court: Has there been any change, substantial change, in the differences between the price of 13/16ths flooring and say 17/16ths?

A. *There would be differences back and forth, the 13/16th inch flooring is manufactured from four quarter maple lumber and the inch and 16th maple flooring is manufactured from five quarter thick maple lumber.*

The Court: The difference is caused then by the extra material which is used?

A. *The market cost of the five quarter lumber is generally considerably higher than the four quarter lumber. On some markets it might be ten dollars, on others eight dollars, on others five dollars, of course that cost would all be regulated by supply and demand. Some of them manufacture thick flooring, many of them don't manufacture it at all. The cost would vary you know with the different conditions. The principal cost I would say—*

The Court: That difference would be almost a matter of computation, wouldn't it?

A. A matter of computation, yes, sir. I would say the principal difference would be caused by the difference in the market value of five quarter maple lumber and four quarter maple lumber rough stock. The same thing would apply to those special grades of white clear maple and red clear beech and red clear birch.

The Court: Are jointed floorings as a rule higher in price than dressed and matched?

A. Sometimes it is and sometimes it is not. I think sometimes it brings about the same price and sometimes it brings more." (Vol. I, pp. 153-5.)

The defendant, Mr. William L. Saunders, of Cadillac, Mich., testified as follows:

"Q. I notice that the Association has distributed from time to time some freight rate books and average costs were in there, and sometimes delivered values, etc. Have you used the figures in there as a price list at any time?

A. Not at all, never.

Q. What did you use the book for, so far as the average cost there, or the delivered values, were concerned?

A. We used that book as a rate book, both for maple flooring and for lumber, because it is more accurately compiled than the freight rates we can get from the depots in the small towns in which we are located.

Q. That is at Cadillac?

A. At Cadillac.

Q. I think I recall that in some of these books there were some data there with respect to differentials or spreads between the different faces, or between the different widths, or between Maple, Beech and Birch, etc. Did you ever follow that as mandatory or binding upon you, that you should charge

those prices; or, if you did not, state how you did use the data that was in those books.

A. That data was of very little benefit to any of us, particularly us, that is, in our business. Beech flooring has most always been on a lower value than maple.

Q. Why?

A. Because the rough lumber sells from ten to fifteen dollars less a thousand than the Maple lumber.

The demand for beech is very limited and is restricted to certain markets. It is more pronounced when there is a scarcity of maple. In the practical conduct of the flooring business it is impossible to observe any fixed price relations between the different widths or between the different grades or faces or thicknesses. For instance, if we have a long season of demand for 2½" face, we will naturally run timber that is best adapted for 2½" face. Later on, however, we must clean up our tag widths and when we get a surplus of these odd widths and various stuff of that kind, we attempt to sell it to the best advantage on the market. The demands for the different widths or faces or thicknesses or grades fluctuate from time to time and never move in harmony. Sometimes there will be a very big demand for factory flooring, at other times for clear, and at other times for No. 1, and inasmuch as all of them are produced at one time, it is necessary to reduce prices on some of them at times to move surplus stocks. That is one reason why no fixed price relation can be observed. The present Maple Flooring Manufacturers Association, which was organized in the early part of 1922, has never taken any formal action with respect to spreads, although there have appeared some data in the freight rate books since 1922." (Vol. I, pp. 200-1.)

The defendant, Mr. Walter L. De Witt, testified thus:

"Concerning the data in said freight rate books with reference to spreads or differentials between the different grades, sometimes we followed them

and sometimes we didn't, according to whether that spread represented the actual difference in value and the difference in the cost of material. In the conduct of the flooring business, it is not practicable to maintain any fixed price relation between the different woods or between the different grades or between the different thicknesses and faces. That is all governed by supply and demand and the cost of the rough material from which the article is made and the cost of producing it. The demand for each grade or thickness is not always constant, but it is continually fluctuating. Theoretically, the value of inch and 16th flooring is supposed to be greater than 13/16ths, but at times we sell them at exactly the same price. Sometimes the inch and 16th is sold lower than the 13/16ths, at times higher. Just at the present time we are selling inch and 16th by 2 1/2 factory at a lower price than we are 13/16ths by 2 1/2 factory on account of the supply and demand. The inch and 16th is theoretically more valuable than the 13/16ths because the inch and a quarter lumber from which the inch and 16th flooring is made is nearly always higher priced than the one inch lumber from which the 13/16ths is made. We get a little more footage through the machine from the inch and 16th and the actual machine work is a little less, but the cost of the rough lumber is almost always considerably more.

The present Association has no rule with respect to maintenance of differentials or spreads between the different grades, woods, faces or thicknesses of flooring. I consider that I am at all times free to fix any price I please on my flooring." (Vol. I, p. 237.)

For illustrations of Mr. De Witt's testimony, see quotations made by him. (Vol. I, pp. 245, 249, 250, 268, 269, 271.)

As Mr. Klesner testified:

"The matter of spreads depends largely upon demand and stock conditions. For instance, one manufacturer might be very long on No. 1, and we might

be short. Hence the price will vary. Stock conditions are constantly changing." (Vol. I, p. 335.)

See also Vol. I, pp. 262-3, 217. For illustrations, see Vol. I, pp. 353, 360, 375, and the quotations set forth or mentioned on pages 121-143, *supra*.

Of course, the matter of spreads is also governed by the diversities mentioned on pages 66-75, supra.

So far as the present defendant Association is concerned, the differentials contained in freight rate books have always been merely the *average costs*, determined as described on pages 274-280, *supra*.

WHAT THE FREIGHT RATE BOOKS NOW CONTAIN.

Mr. George W. Keehn testified as follows:

"The differentials and the terms of sales, which were formerly on colored sheets in the freight rate books, are no longer contained in such books and are no longer sent to members in any form. The delivered cost charts have been entirely eliminated from the freight rate book.

The freight rate book now issued by the association contains the freight rates from Cadillac, Michigan, to points all over the country and the average cost chart of 13/16" maple flooring, F. O. B. cars at flooring mill, according to compilations of average costs that are made from time to time. The freight rate book also contains average cost of 3/4" beech or maple, F. O. B. cars flooring mills, and the average cost of freight, which is a table showing what the cost of freight would be on 13/16", and also on 3/4" flooring on certain rates of freight and on certain weights.

For example, 13/16", 1 1/4" x 2" and 2 1/4" face weighs about 2,000 pounds and the rate of 20 cents would indicate that the cost of the freight would be \$4.00

a thousand. The 13/16" x 3 1/4" weighs 2,250 pounds and the cost of freight on that would be \$4.50 a thousand. 3/4" flooring weighs 1,000 pounds so that the cost of that on a 20 cent rate would be \$2.00. This table appears in the back of the book.

The grading rules also may appear from time to time in these or different books. The purpose of the table or chart, with respect to ascertaining the cost of freight, was in order to enable a member to find out what the cost of freight would be on any given rate of freight from point of shipment to point of destination. That is a mere matter of computation and could be left out.

The average cost which appears in the rate book is the average cost of flooring about which I have heretofore testified. This average cost is based upon test runs. For example, our present average cost of maple flooring, F. O. B. cars at the flooring mills, are based upon five test runs which were made by different members of this association since its organization. These average costs are determined from time to time whenever there are changes in the cost of rough maple lumber, F. O. B. cars at flooring mills, and also whenever there are changes in the average manufacturing and marketing costs. We might issue one every two or three months or every three or four months, or oftener if there are violent fluctuations in the cost of rough maple lumber. I have here a rate book which will illustrate just what we are doing today.

(Said rate book marked Ex. F and the data that had been eliminated from said book marked Ex. F-1, and said exhibits were received in evidence.)
(Vol. I, pp. 155-6.)

For the exhibits above mentioned, see Vol. IV, fol. pp. 5162-5336.

Before the organization of the present Association the recommended prices, concessions, additions, etc., were contained in the Freight Rate Books. As we have already seen, even then members did as they pleased.

(Pages 196-206, *supra*.) No such recommendations have ever been made by the present Association. (Pages 273-4, 310-313.)

It will be very interesting to ascertain the relation that has existed between the average costs and the prices obtained. However, inasmuch as the prices obtained necessitate an explanation of the statistics compiled and distributed by the present Association, let us first describe the statistics. If the statistics are as potent for evil as the Government has alleged, then the prices obtained should show the trail of the serpent.

E.

THE STATISTICAL REPORTS.

Neither this nor any other court has ever held that the collection and distribution of statistical information by either an association or any other group of business men is unlawful *per se*. This court has merely held that *certain agreements* for the collection and distribution of statistical information by *certain groups*, and *what was done pursuant thereto*, unreasonably restrained interstate trade and commerce.

Plans for the collection and distribution of business statistics may *vary indefinitely*; the *effect* of such plans may be either noxious or beneficial to society. It all depends upon *circumstances*.

Edmund Burke, the great philosophical statesman, has well said:

"But I cannot stand forward, and give praise or blame to *anything* which relates to human actions, and human concerns, as it stands, *stripped of every relation, in all the nakedness and solitude of meta-*

physical abstraction. Circumstances (which with some gentlemen pass for nothing) give in reality to every political principle its distinguishing colour and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind." (*Reflections on The Revolution in France.*)

Now, whether a plan for the collection and distribution of business statistics is noxious, innocuous, or beneficial—unlawful or lawful—can be legitimately determined by considering, not only the plan itself, but the condition of the group that adopted it; the relations that exist between the various members of the group; what they manufacture; the distribution and control of the raw material; the presence or absence of competing manufacturers; whether the commodities manufactured by the group are necessities of life; the number of substitutes there are for such commodities; how such commodities are marketed, to whom they are sold, and the relation of such group to buyers; whether the statistics are available to the general public, and if so upon what terms; what buyers say about the members of the group; and if such a plan has been in operation, the *effect* of such plan upon prices, and the relation between the prices obtained by the different members of said group.

Why? Because the plan is a part of reality. It is related in time and space, not only to specific commodities and a small group of manufacturers, but to all other commodities and individuals—indeed, to the rest of reality in all its ramifications. In its operation the plan reacts to and upon all other economic phenomena. And it can be neither sanctioned nor condemned *apart from its relations*—or, in the phrase of Burke, as it stands "in all the nakedness and solitude of metaphysical abstraction."

We should like to reproduce here the 'environment' of the defendants' plan and then set forth the plan itself, so that the Court might envisage the plan in its most important relations, and thus see it as it really is. However, upon second thoughts we have decided to set forth the plan at once, with the request that the Court keep an open mind until the argument, when the plan, its relations and effect will be discussed.

MONTHLY SALES REPORTS.

(To Secretary.)

Article XV of the present Articles of Association is set forth in the margin.⁵⁴

"SECTION 1. In order that the relations of supply and demand and the statistical conditions existing from time to time in the Maple Flooring industry may be known, the following statistical monthly reports shall be made to the Secretary by each member of the Association on or before the 5th day of each month:

- (a) Report of Stocks on Hand of Maple, Beech and Birch Flooring at the end of the previous month.
- (b) Report of Unfilled Orders on Hand for Maple, Beech and Birch Flooring at the end of the previous month.
- (c) Report of the amount in feet of Shipments made during the previous month of all kinds of Maple, Beech and Birch Flooring for use within the United States, except Maple, Beech and Birch Flooring purchased from other members of this Association.
- (d) Report of Production of Maple, Beech and Birch Flooring during the previous month.
- (e) Report of New Orders Booked for Maple, Beech and Birch Flooring during the previous month.
- (f) Report of Average Prices Realized F. O. B. Flooring plant, after deducting freight, for 13/16" x 2 1/4" face Clear, No. 1 and Factory

The forms of the reports made by members pursuant to subsections (a), Stocks on hand; and (b), Unfilled orders—of Article XV are shown by Government's Exhibits 46, 46-A, and 46-B, Vol. III, fol. pp. 2854-6. (Vol. I, p. 123.) It will be observed that each of these reports goes into detail as to the quantity of each wood grade and size.

The form of report made pursuant to subsection (c), Shipments, is shown by Gov. Ex. 48, Vol. III, fol. p. 2858. (Vol. I, p. 124.) This report merely gives a statement (by days) of the *total* amount of feet of maple flooring, the total amount of feet of beech flooring, the total amount of birch flooring shipped during the previous month, without other details.

The form of reports made pursuant to subsection (d), Production, is shown by Gov. Ex. 47, Vol. III, fol. p. 2857.

Maple Flooring, standard grades and lengths, sold during the previous month.

SECTION 2. In addition to the foregoing monthly reports, each member of the Association shall send to the Secretary promptly at the end of each week a report of all sales made during that week of Maple, Beech and Birch Flooring. These weekly sales reports shall state the quantity, kind and grade of flooring sold, the delivered price sold at, the average freight rate to destination of shipment, and the commissions paid, if any.

SECTION 3. All the foregoing statistical reports shall be made upon blank forms furnished by the Association and shall relate wholly and entirely to past and completed transactions. Said reports shall be mailed by the members to the Secretary, who shall report the same to the members. Said statistics shall be filed by the Association with the Department of Commerce, Washington, D. C., and shall also be made known to the public, in such form and manner as the Department of Commerce may approve. (Vol. III, p. 70.)

(Vol. I, pp. 123-4.) This report merely gives the quantity of feet of flooring of *each grade of each wood* produced during the previous month without further detail.

The form of reports made pursuant to subsection (e), New Orders Booked, is shown by Gov. Ex. 47, Vol. III, fol. p. 2857. (Vol. I, pp. 123-4.) This report gives merely the total amount of feet of new orders booked during the previous month for maple flooring, for beech flooring and for birch flooring and the aggregate of the three totals, without further detail.

The form of the reports made by members pursuant to subsection (f) is shown by Gov. Ex. 45, Vol. III, fol. p. 2853. Concerning these reports, Mr. George W. Keehn testified as follows:

"A member also makes a monthly report of average prices realized f. o. b. flooring plant after deducting freight for 13/16" x 2 1/4" face, clear No. 1 and factory maple flooring, standard grades and lengths (fol. 220) sold by us during the month of..... That provides for the number of feet, delivered price sold at, the amount extended, and the freight to destination. Applying to the clear grade, the No. 1 grade and the factory grade, those are added up showing the gross amount, then less *freight from our flooring plant* to destination so much, then the net amount; then the net per 1,000 feet of each grade, clear, No. 1, and factory. That report is sent in to us by the different members of the Association but all of them don't make the report at all times.

Q. Does that report show each particular sale?

A. No, it just shows—it might show each particular sale, or it might be an aggregate of the sales. The report that we send out to the members doesn't show the details.

Each particular sale is reported in the weekly reports and it may not be reported in the monthly report because this report only applies to the standard grades and lengths, while the other product is not reported. This only refers to the 13/16 x 2 1/4" face

maple flooring and does not apply to the beech and birch and the other stuff.

Q. Why is it limited to that particular variety?

A. That is the major part of the product. I imagine it represents about 70% of the maple product and the other would be so voluminous it would be almost impossible to compile the stuff in a practical way.

(The monthly report Blank form marked Government Exhibit 45 and received in evidence.)" (Vol. I, pp. 122-3.) See also page 44, *supra*, of this brief.

Of course, neither the destination of any shipment, nor the name of any purchaser is given.

It should also be observed that in the reports above mentioned the *actual* freight, and not the amount of freight computed by using the *average* (or Cadillac) rate of freight, is used by the members in arriving at the net amounts received and the averages. (Vol. IV, pp. 572-3, fol. p. 4587.)

All the foregoing monthly reports made by the members to the Secretary pursuant to Section 1 of Article XV are received by him between the 5th and the 10th of the succeeding month. (Vol. I, pp. 123-4.) Before going into the matter of what the Secretary does with reports made to him by members, let us take up Section 2 of Article XV.

WEEKLY SALES REPORTS.

(To Secretary.)

The form of reports made by members pursuant to Section 2 of Article XV—weekly sales reports—is shown by Gov. Ex. 44, Vol. III, fol. p. 2852. (Vol. I, p. 122-3.) It will be observed that each member reports every sale of flooring made by him during the previous week, with

the following details: date, quantity, thickness and face, grade, wood, delivered price, *average* freight rate to destination, and rate of commissions paid, if any.

Neither the name of any purchaser, nor the destination of any shipment is shown. (Vol. I, pp. 123, 127, 155-8.)

Only the *average* (or Cadillac) rates of freight on the several shipments are given in the *Weekly Sales Reports* to the Secretary. (Vol. I, pp. 123, 127.) And it is impossible to tell even the section of the country to which any of the shipments moved, for the obvious reason that there are points East, North, South and West having the same rates of freight from Cadillac.

The weekly reports above-mentioned are received by the Secretary at Chicago on the following Tuesday or Wednesday. (Vol. I, p. 121.)

REPORTS MADE BY SECRETARY TO MEMBERS.

The reports made by the members to the Secretary are compiled, and *only the aggregates are distributed to the members.* What each member's report (to the Secretary) shows is known only to such member and the Secretary. Access to such reports cannot be had, and the information therein contained is not available to others in any form, except in the regular reports made by the Secretary. (Vol. I, pp. 158, 163, 173, 176, 390, 399.)

WEEKLY SALES REPORTS MADE BY SECRETARY.

The data contained in the weekly sales reports made by the members are tabulated by the Secretary, who makes a weekly sales report. This report is always sent to the members who furnished the data for it—some-

times to all members. (Vol. I, p. 125.) Numerous sales of small lots are lumped in the Secretary's Weekly Sales Reports without showing the prices. (Vol. I, p. 125.) Such reports also include "a summary of what the average prices realized were during that week." (Vol. I, p. 125.)

All this work is done by the Secretary's office force. (Vol. I, p. 125.)

Prior to and including July 19, 1923, the Weekly Sales Reports made by the Secretary disclosed by whom the different sales had been made. This was done by inserting the *numbers* of the Association members (pages 144-5, *supra*) opposite items or groups of items appearing in the Secretary's Weekly Sales Reports. (Vol. I, pp. 156-158.) That practice was abandoned pursuant to a resolution of date July 19, 1923. The resolution is set forth in the margin.⁵⁵ In a communication addressed to members, dated August 2, 1923, it is stated:

"The Association membership numbers which identify the individual members of the Association have been eliminated from all our reports issued since July 19 and are to be eliminated from all reports issued hereafter by the Association so that the information which is consolidated and transmitted to the members from time to time will not disclose to any member or members any of the particulars or intimate details of any other member's business respecting his Stock on Hand, Unfilled Orders, Shipments, Production and New Orders Booked or which

⁵⁵RESOLVED, That in order to meet the special objections of the Department of Justice, the Association's Counsel in conjunction with the Secretary be and are hereby authorized and directed, to make such changes and modifications as they may decide upon in the compilation and distribution of statistical data to the membership of the Association. (Vol. IV, p. 812.)

will identify the average prices he realizes or identify as his prices the prices at which he sells any Maple, Beech or Birch Flooring." (Vol. IV, pp. 813-4.)

Both the letter and the spirit of the resolution and the communication have been faithfully followed in the making of subsequent reports. (Vol. I, pp. 156-9, 162-3, 230-1, 390, 399, 123, 125-6, 127, 130, 204.)

Copies of the Secretary's Weekly Sales Report for the week ended July 14, 1923, and for the week ended July 27, 1923, are shown in Vol. III, pp. 390-7, and pp. 398-403, respectively. See also Defts'. Ex. G (Vol. IV, fol. pp. 5337-9) and Defts'. Ex. G-1 (Vol. IV, fol. pp. 5340-2.)

MONTHLY REPORT MADE BY THE SECRETARY.

The monthly reports received from members are combined into one report by the Secretary, who makes only one monthly report to members of the defendant Association. (Vol. I, p. 128-132.) See Gov. Ex. 50, Vol. III, fol. pp. 2861-9, which is explained by Mr. George W. Kechn on pages 128-132 of Vol. I. See also Defendants' Exhibits H, H-1 and H-2, Vol. IV, fol. pp. 5343, 5353, and 5362, respectively, and Vol. I, pp. 158-163, where said exhibits are also explained by Mr. George W. Kechn.

Inasmuch as the Secretary's monthly report is merely a combination of the monthly reports received by him from members, it is unnecessary to go into further detail.

There are no identifying numbers used in such report. (Pages 308-9, *supra*.)

The report is not received by members until sometime after the 15th and before the 22nd of the succeeding month. (Vol. IV, fol. pp. 5352, 5361, 5370.)

QUARTERLY REPORTS.

These reports are merely combinations of some or all the data contained in the preceding monthly reports. (Vol. I, pp. 130-1, 160-2.)

THE REPORTS ARE PURELY STATISTICAL, AND ARE UN-
ACCOMPANIED BY ANY ANALYSIS, COMMENT OR RE-
COMMENDATION WHATSOEVER.

While Mr. George W. Keehn was on the stand the following proceedings were had:

"The Court: * * * In other words, your system is not as complete as it used to be?

A. It doesn't show who has any surplus stocks; it doesn't reveal the identity of any manufacturer as to who has surplus stocks.

Mr. Johnston:

Q. In other words, Mr. Keehn, if a member is to ascertain the facts with respect to stocks on hand, prices realized, or other data, individually as to any member, he must obtain that by going directly to the member himself—it is not disclosed by the Association?

A. That is correct.

Q. Whether that member is willing to disclose those facts to the other member is a matter which rests with him entirely?

A. That is a personal matter between themselves and entirely.

Q. But there is no understanding or agreement in the Association between the members as members of the Association, that such data will be interchanged upon request by any member?

A. No, sir; we do not exchange any individual data in any form or manner between different members of the Association, or among any of the mem-

(THE COURT: "Now, does any one of the mem-

bers of the Association. Whatever information any member may know about individual stock conditions of the other members, the only way he can obtain it is by correspondence direct with the member. *All reports are now sent out without any comments, analysis or interpretation of any kind. We consulted our attorneys about these different matters some time after the Supreme Court handed down this decision in the so-called Memphis case and they advised us as to how the activities of the Association should be conducted and we have strictly followed their advice in every respect. The statements are now sent out simply as statistical data and without comment, analysis or interpretation for each member to analyze and interpret for himself and draw his own conclusions.* A copy of the opinion of our attorney is attached to the minutes of the meeting, January 12, 1922.

(Said minutes marked Defendant's Ex. I and received in evidence.) [Vol. IV, p. 818; Vol. III, pp. 146-152.]

Q. Now, referring to the first paragraph of that conclusion in Mr. Newman's opinion of January 11, 1922, since the organization of the present Association, that of January 1, 1922, have you as Secretary of the Association or has the Association sent out to its members recommendations or forecasts as to the market prices or market conditions?

A. Not as to market prices, but sometimes as to the results of the month's business, as is shown by what the Government calls 'Forecasts.' We explained that in our previous testimony, where certain data is collected regarding stocks, production, new business for twenty days in the month, and then the estimate is made as to what the business may be, the remaining ten days of the month; and that is compared with the totals of the preceding month. But, there have been no individual figures given. That appears in the minutes of the various meetings.

Q. What are those entitled?

A. It is an estimate of how the business for one

month may compare with the business of the preceding month, based upon the data furnished by the members who may report it. If you will pardon me, you will find July 19th, 1923, and that will tell the story.

Q. That is what we want exactly.

A. That is in a previous exhibit; you have that exhibit already in.

Q. That is the one already in?

A. Yes.

The Court: There have been several of those exhibits. As I remember the testimony, it was this. For instance, if a meeting of the Association was to be held on the 25th day of November and the notice was sent out on the 18th day of November, the data accumulated from the reports of members up to the 18th or 15th, whatever the date might be, would be given, and the statement would be made that the indications are that if production holds up during the balance of the month, the month of November will compare with the month of October, or the month of November of last year in the following manner:

A. Not as to last year; just for the preceding month.

The Court: That may be.

Q. That is the matter that you refer to.

A. Yes, sir.

Q. Now since the organization of the present Association has anything else been sent out to the members of this Association?

A. According to my recollection, we make no comments or interpretations, or forecasts regarding the future in the industry, except as outlined here, what we term classification, etc. The reports speak for themselves. I don't know whether you consider the tabulations of statistics according to grades and faces, a classification or not.

Q. Of course the statistics those are the classification?

A. The statistics themselves speak for themselves.

Q. What I am referring to particularly, is, any interpretation matter going along with or at about the same time with the statistics, either weekly or monthly statistics go out?

A. No, sir.

Q. In which you say to the members 'these show so and so' and 'indicate so and so for the future,' anything of that character?

A. No, sir.

Q. Under the present Association?

A. Under the present Association.

The allotment plans previously mentioned related solely to shipments and had nothing whatever to do with production. The classification of statistics contained in Mr. Newman's letter of January 11th, 1922, embraces all the statistics that we sent out." (Vol. I, pp. 163-5.)

For previous testimony as to monthly forecasts, see Vol. I, pp. 124, 163-4.

THERE ARE NO FINES OR PENALTIES FOR FAILURE TO MAKE REPORTS, AND NO AUDITS OF THE BOOKS OF MEMBERS ARE MADE.

That there are no fines or penalties, see Vol. I, pp. 121, 161, 389.

That no audits have been made since the organization of the present Association, see Vol. II, p. 861.

THE STATISTICS COLLECTED BY THE ASSOCIATION HAVE BEEN GIVEN THE WIDEST PUBLICITY, AND ARE ACCESSIBLE TO WHOEVER MAY ASK FOR THEM. AT THE HEARING, THE DEFENDANT ASSOCIATION OFFERED TO PAY FOR THE PUBLICATION OF ALL REPORTS BY ANY TRADE NEWSPAPER THE COURT MIGHT DESIGNATE.

That the statistics above mentioned are regularly sent to the Department of Commerce and to the Federal Reserve Bank at Chicago, see Vol. I, pp. 165-67; 167-69.

TRADE PAPERS.

Mr. George W. Keehn also testified:

"Q. Now in addition to the Bureau of the Census and the Federal Reserve Bank to what other source has your data been going and since what time?

A. After we returned from Washington we took this matter up at the meeting of the Association, and they instructed me to follow the advice of our attorneys and give to the lumber trade papers such data as might be useful to the public and might be desired by the public, and we took as the foundation of the data which we gave to the lumber trade papers, the statistical data which the Department of Commerce, Bureau of the Census, elected to use, feeling that inasmuch as the Department of Commerce, Bureau of the Census, is functioning for the benefit of the public, that whatever it thought was adequate for the public to have, should be satisfactory; so we simply followed that outline, except that we have gone further and we give them, the lumber trade papers, reports of average prices realized each week, beginning on May 18th, 1922. We wrote a letter to the various lumber trade papers, and here is a sample of the letter:

'American Lumberman, Manhattan Building, Chicago, Illinois.

The Maple Flooring Manufacturers Association gathers the following statistics relating to basic conditions in the industry:

1. Total stocks on hand at the end of each month.
2. Total unfilled orders at the end of each month.
3. Total shipments during each month.
4. Total production during each month.
5. Total new orders booked during each month.
6. Average prices realized F. O. B. cars at Michigan and Wisconsin flooring mills during each month for 13-16 x 2 $\frac{1}{4}$ " Face Clear, No. 1, and Factory Maple Flooring.

These statistics are portrayed in the form of a barometer, and are filed with Department of Commerce, Bureau of the Census, Washington, D. C., and believing that you may wish to publish them for the information of the public, we shall be glad to send them to you regularly about the middle of the month. We are enclosing the barometer for the month of April, 1922. Yours very truly, Maple Flooring Manufacturers Association, George W. Keehn, Secretary.

Q. To what other trade papers did you send that communication?

A. Here is a mailing list of this statistical data.

Q. Yes, read it.

Department of Commerce, Bureau of the Census, Washington, D. C. Federal Reserve Bank of Chicago, Statistical Department, Chicago. American Lumberman, Manhattan Building, Chicago.

They recently requested data regarding the Maple Flooring Industry and we sent it to them. They said they would like to have the information a little in advance of when they might need it for publishing in the lumber trade papers, as a survey of current

business. We mail it out, however, all at the same time to everybody.

'Lumber,' St. Louis, Missouri;
Chicago Journal of Commerce, Chicago;
Hardwood Record, Chicago;
Lumber World Review, Chicago;
Lumber and Veneer Consumer, Chicago;
Southern Lumberman, Nashville, Tenn.;
National Lumber Manufacturers Association,
Washington;
S. W. Strauss and Company, Chicago.

We also send them weekly reports in this form:
Maple Flooring Manufacturers Association. Maple
Flooring Wholesale prices. Sales by Michigan-Wisconsin
Flooring Mills 13/16 x 2 1/4" maple flooring,
average values F. O. B. cars flooring mills during
the week ended so and so.

We give clear, Number 1 and Factory, and that is
published in the lumber trade papers, the Chicago
Journal of Commerce and others. We also send
them from time to time quarterly reports showing
statistical conditions, and semi-annual reports.

We send only a summary of the weekly reports to
the publications above mentioned. We have never
refused to furnish any data requested by the trade
papers or any one else. The trade papers published
the statistics we sent them. The trade papers above
mentioned are generally recognized trade publica-
tions, having a very wide circulation, and I presume
they are taken by every one in the lumber trade and
by buyers of lumber products. About 90 or 95 per
cent of all the flooring produced by members of the
Association is sold through retail and wholesale lum-
ber dealers who take the trade journals above men-
tioned. (Vol. I, pp. 169-171.)

OFFER TO PAY FOR PUBLICATION.

Mr. George W. Keehn also testified as follows:

Q. I will ask you now whether there is the slightest objection on your part or the members of this Association to the widest distribution of all of the data sent to members, to any source that is willing to receive it?

A. No objections whatever.

Q. Are you and have you been perfectly willing that the trade papers should publish every statistical report, weekly, monthly, quarterly, semi-annually, or annually or whatever it may be that your association puts out?

A. We are willing to have them do so.

Q. You have furnished them with everything that they would publish, they were willing to publish as news?

A. We furnish them the same material that the Department of Commerce, Bureau of the Census elected to publish in the survey of current business and we have told them about this other statistical data but none of them have ever asked for it. We frequently send them quarterly reports and things like that—every week now and have been for some time, the average prices realized.

Q. From the sales from the weekly sales reports?

A. From the weekly sales report.

Q. Have you and have you had any objection to the full publication of everything which your office sends out to the members in these weekly or monthly publications or in any other source that will provide distribution of that data?

A. We have no objection so far as I know either on my part or on the part of any of the members of the Association, we have had this up several times at Association meetings. They have always told me

to give the Lumber Trade Papers whatever information they wanted, to give the Department of Commerce, Bureau of the Census whatever information they wanted. We have certainly filed volumes of this stuff with the Federal Trade Commission and the Department of Justice at different times.

Q. *I am talking now particularly of the distribution of these statistics through publications which will reach the public generally or at least that portion of the public which subscribes to and reads the trade papers.*

A. Yes, we would be willing to do that. As far as that is concerned, if it should be thought that more of our statistical data should be published we would be willing to have it published in any trade paper which the Court might select, like the *American Lumberman*, and we would pay for it as an advertisement if the publication is not willing to accept it as news items.

Q. In other words, the publications are not interested in a great deal of this data?

A. It is too voluminous, it is too inconsequential. For instance, see how much space it would take to publish our weekly sales reports and all of these statistical reports, it would take about as many pages of the *American Lumberman*, as our reports consist of, ten or twelve pages sometimes.

Q. But they do publish and have been for some time publishing or averaging those?

A. They publish the Barometer and they publish the stock conditions from time to time. You will find that in the *American Lumberman* and other papers and they also publish the prices which we send them not only in the lumber trade papers, we also send them to the *Chicago Journal of Commerce* which is a financial paper published in Chicago." (Vol. II, pp. 787-8.)

ASSOCIATION MEMBERS DEAL ALMOST EXCLUSIVELY WITH WHOLESALE AND RETAIL LUMBER DEALERS, WHO ARE EXPERT AND WELL-INFORMED BUYERS AND IN CONSTANT CONTACT WITH BOTH MEMBERS AND NONMEMBERS. THEY ALSO TAKE THE TRADE PAPERS THAT PUBLISH THE STATISTICS FURNISHED BY THE ASSOCIATION AND MUCH OTHER INFORMATION CONCERNING PRICES AND MARKET CONDITIONS.

Besides the testimony of Mr. George W. Keehn on page 316, *supra*, see the testimony of Mr. Hodges on pages 45-46, *supra*. Likewise, the correspondence on pages 148-157, *supra*, and the testimony on pages 121-143, *supra*.

Dealers in flooring circularize both members and non-members, work one against the other, offer to buy at certain figures, and are in contact with contractors and consumers. They are in a better relative position than are manufacturers, who cannot circularize dealers in order to find out what they will pay for flooring, and who have no direct contact with contractors and consumers.

The foregoing facts and the publication of Association statistics by numerous trade papers, demonstrate that Association members have no advantage over wholesale and retail lumber dealers.

THE STATISTICS ARE ONLY ONE OF MANY SOURCES OF INFORMATION POSSESSED BY MEMBERS.

Members are in daily contact with buyers, who are "continually...telling us what other manufacturers are getting for their product." (Vol. I, p. 211); the members also get information from customers as to competition of other woods. "Hardly a day goes by that we don't get information from our trade as to what we have got to do to meet competition." (Vol. I, pp. 211-2.)

Mr. Hodges testified that he had representatives in Boston, New York and Philadelphia—where he markets most of his flooring—who kept him informed as to prices and market conditions there by means of the telephone and correspondence. (Vol. I, p. 291.) See also the correspondence between Mr. Hodges and others set forth on pages 153-155, *supra*.

Mr. Klesner testified that representatives informed him of prices, of competition, and that he allowed them a leeway of \$2.00 per thousand feet in order to meet competition. (Vol. I, p. 335.)

See pages 148-153, *supra*, for specimens of correspondence between the defendant West Michigan Flooring Co. and others. Mr. Greene of that company testified that he was "continually hearing from wholesalers, representatives and other persons with respect to market conditions." (Vol. I, p. 383.) Mr. Greene also testified that he subscribed for the Babson statistical service in an endeavor to anticipate general business conditions, but "I don't know as I get very far with it." (Vol. I, pp. 385-6.)

Mr. James E. Dewey testified as follows:

"I testified before that we had special representatives all over the United States. We keep in very close touch with them concerning market conditions in their respective territories. We send out a weekly statement giving our stock conditions, orders on hand, surplus items, and usually accompany the same with a letter. Our representatives answer the letter and usually give some idea of what the conditions are in their markets. We hear from our representatives regularly about once a week. In a great many instances they advise us what flooring is being offered at by other concerns, so far as they are able to ascertain, and of course if our prices are high they usually notify us. The price lists we send

out are ironclad. In some instances we make concessions on certain items in this weekly statement. In others our representatives notify us that our price on a certain item would be high and we would advise them to meet competition. The concessions that we give from our price lists would be on surplus items that we desire to move so as to keep our stock well balanced. Changes in our price lists or the sending out of new price lists depend upon market conditions. Price lists are sent out practically once a month, but at no fixed times. Market changes determine when they are sent out." (Vol. I, pp. 394-5.)

See pages 135-143, *supra*, for copies of letters that passed between Mr. Dewey and Mr. Phisterer of Philadelphia.

Mr. Dewey also testified that he took "the Babson Service, Brookmeier's [Brookmire's] and Whaley & Eaton's" as well as several trade papers. (Vol. I, p. 397.)

Mr. McLurg kept in touch with competitive conditions through his travelling salesmen. (Vol. I, p. 229.)

Mr. Shepeck testified:

"A. We have four representatives in the State of Wisconsin; and we have a man at Minneapolis, and a man at Chicago, and we get information from them all the time. We also keep very close track of building reports, as to the amount of building that is going on.

Q. Is that through the Dodge Service?

A. Yes, sir; Dodge Service and the Improved Bulletin of Minneapolis, we use that a great deal.

Q. And Lumber and Trade papers?

A. Yes, sir; and newspaper information." (Vol. I, p. 260.)

He also testified that he had the information as to what the prices of competitors were before he received the Weekly Sales Reports from Mr. George W. Keehn. For proof of this assertion, see pages 155-157, *supra*, where copies of the letters are set forth.

Mr. Ralston testified that Horner had personal representatives in all the large centers; that he was in daily contact with them, and that by that means and by visiting all such centers at least once or twice a year he was kept informed as to market conditions, especially as to prices. (Vol. I, pp. 319, 324, 326.)

USE MADE OF STATISTICS BY MEMBERS AND IMPORTANCE ATTACHED TO THEM.

Mr. James E. Dewey testified as follows:

"I analyze the statistics that are furnished us from time to time by the Secretary of the Association so as to get as intelligent an idea as possible of the conditions of the industry. These statistics throw a great deal of light on that subject. I use the statistics in the same way as I use other information regarding general conditions. I prefer light rather than darkness so far as business conditions and the conditions of the industry are concerned. We also take the Babson Service, Brookmeier's [Brookmire's] and Whaley & Eaton's, as well as several of the trade journals. We find that all of them are helpful. We do not regard the statistics sent out by the Association as conclusive. We consider them, of course, but our own conditions are after all the controlling factor.

The most important thing to me in the weekly sales reports issued by the Secretary is the quantity that is moved, that is, the quantity of the different sizes and grades, and the total quantity. That is the important thing. I never considered that the prices shown in the weekly sales report were important because they are from a week to four weeks old; that

is, they are based on quotations from a week to four weeks old, and I get information with respect to prices from my own connections before I get it from the weekly sales reports. We get information with respect to prices from different parts of the country from our representatives by letter or telegram.

The weekly sales reports are based on quotations from a week to four weeks old. For instance, if a quotation were made yesterday to a prospective buyer on the Pacific Coast, it may be two weeks before an order is received, if at all. Then the report of that would not go in until the following Monday. The members of the Association would not get it until the last of that week, so that the sale contained in the report would be based upon a quotation made practically four weeks before.

The reports would be of much greater value if they covered all manufacturers in the United States. I have no definite knowledge, but I should say that the members of the present defendant Association manufacture between 50 and 60% of the total production of maple, beech and birch flooring in the United States.

Q. In the practical conduct of your business, would the mere fact that in one of these weekly sales reports there were certain sales made by some manufacturer, a member of the Association, at prices higher than you had been getting, necessarily and of itself result in your raising your prices?

A. From one manufacturer?

Q. Yes.

A. No, that would not affect me at all.

Q. But say there were several sales?

A. Well, as a rule those prices fluctuate, so that there are as many above me as below me.

Q. I beg your pardon.

A. I say, as a rule the prices fluctuate so that there are as many above me as there are below me.

You are talking about an ideal situation that would not exist.

Q. That does not exist in practical business?

A. It would not exist, no.

In determining what prices we shall charge, our condition would govern almost entirely. I mean my stock conditions, my orders on hand. We have a very large output, practically fourteen million feet a year and we have difficulty in keeping that sold. It is of a great deal more importance to me to have my plant produce to full capacity at all times than it is to raise my prices every time it is possible to do so. We would lose a great deal more money if our plant were compelled to curtail its output than we would by failing to get the top of the market at all times.

Q. Has it been your observation that merely because during one week some manufacturers get higher prices, than you do, that that means permanently higher prices, or would conditions fluctuate?

A. They fluctuate, of course.

Q. One week they might be higher and one week lower, and it would be sometime before it could be determined whether the market would be at a higher, or a lower level, would it not?

A. As I say, we usually have that information long before it is reflected in those weekly reports.

The weekly sales reports received from the Secretary do not give any identifying numbers of the members making the sales. The fact that a sale is made on a BD or any other rate would not give me any information as to who made the sale, or where the shipment went to. We have no means of knowing or finding out who made the sale or where the shipment went to. The Secretary of the Association does not divulge any information as to who makes the sales or where the shipment went to. We cannot tell where the shipment went to because the rate stated in the report might apply to points in any direction.

There are many different points with the same rate or with the same average rate of freight." (Vol. I, pp. 397-9.)

And again:

"In determining our prices on flooring, the first consideration is our costs and then we are governed entirely by market conditions, supply and demand—competition. We fix our prices according to our own discretion without regard to any rules or data furnished by the Association. When we can't sell above cost or at cost, we naturally curtail our operations. We purchase about 50% of our rough lumber from outside sources and naturally if conditions are such that prices for flooring are below cost, we no longer purchase rough lumber from others but run just enough to use up rough lumber of our own production. We have had to do this at various times. Our own situation determines this entirely. We have acted alone in this matter. I know of no agreement with any other person, firm or corporation whereby our production was to be curtailed or limited." (Vol. I, p. 395.)

Mr. J. L. Colby, sales manager for the defendant Cumer-Diggins Co., testified he and the general manager who looked after production always had a conference before making any general change in that company's prices for flooring. (Vol. I, p. 210.) Also that the factors they considered—and the order of their importance—were *first*, "the amount of stock that we have on hand unsold in our warehouse of each particular item of flooring"; *second*, ability to produce certain sizes and grades during the next few months; *third*, the amount of orders coming in, and the attitude of buyers towards existing prices; *fourth*, miscellaneous information concerning market conditions, including the statistical reports distributed by the defendant Association. (Vol. I, pp. 210-212.) See also Vol. I, pp. 215-6.

Mr. Colby also testified as follows:

"I don't want to give any one the impression that we don't pay any attention to the statistics distributed by the Association. I do want to state that the statistics are *not* the *primary* consideration with us. *If they fit in with what we think is the market and with what we think and what we know is our individual stock condition and our own situation with regard to customers, then we give them consideration.* The Cummer-Diggins Company and the partnership that preceded it have been in business for a great many years. They have many customers who have been with them for a great many years and who look to them for their principal source of supply. As a matter of fact, our production of different grades differs from the production of other manufacturers, I think we manufacture more of certain widths. For instance, we manufacture more three and a quarter inch flooring than many other manufacturers do. *We are more concerned with our own supply and ability to produce and with the demand of our own customers than with the supply of some other manufacturer, because we are in such position we can at any time turn this lumber or a large part of the lumber into the market and sell it instead of manufacturing it into flooring.* At times we can make more money by selling the rough lumber than we can by manufacturing it into flooring." (Vol. I, pp. 221-2.)

Mr. Percy S. McLurg testified as follows:

"In determining at what price we shall sell our flooring, we keep in touch with the market principally through our travelling salesman. We also take into consideration the statistics that we get from the Flooring Association and also watch the price reports. The matter of price is governed a great deal by our stock on hand. In the territory that we work there is a big demand for 1½" flooring. The Michigan manufacturers don't have that trade. We are usually oversold on the narrow face, whereas the Michigan manufactures are usually long on it. We have to take that into consideration in making our prices. We very often have to buy narrow face

flooring from other manufacturers in order to take care of our trade. I do not consider that my discretion is in any wise limited in the matter of determining what prices I shall charge for our products. I am not now a party to any understanding or agreement with respect to maintaining any prices for maple, beech or birch flooring and I have never been a party to any such understanding or agreement since the organization of the present defendant Association." (Vol. I, p. 227.)

Mr. McLurg also testified that in fixing prices he relied more on the reports received from his travelling salesmen than he did upon the statistics, for the reason that "we have so much outside competition." (Vol. I, pp. 230-1.) Also:

"In the sale of flooring, we come in competition with the manufacturers in the Northern Peninsula of Michigan and Wisconsin, both members of the Association and nonmembers. The nonmembers in that territory are R. Connor Company, Marshfield, Wisconsin, Robbins Flooring Company, Rhinelander, Wisconsin, and Sawyer-Goodman Company, Marinette, Wisconsin. The R. Connor Company is about 86 miles from Phillips, Wisconsin, and is one of our strongest competitors because it is in the same line of trade that we are. It manufactures lumber in large quantities and sells maple flooring to the small retailer, just as we do. The R. Connor Company also own considerable stumpage." (Vol. I, p. 227.)

Mr. Greene testified that in fixing his prices he considered the statistics and the information obtained as to market conditions from his correspondents. Also:

"A. They are valuable to me, as I just stated, the weekly sales report, the weekly sales report of completed transactions, I use them as one factor in arriving at the prices that I should ask for my product, or try to obtain for it, and the stock conditions reports are particularly interesting and valuable to me in enabling me to determine or outline a policy of manufacture somewhat in advance of actual oper-

ation as to the quality of flooring that I shall aim to produce in the largest quantity to take care of the particular trade at the time when that trade demands that particular kind of flooring.

Q. Illustrate what you mean by that.

A. It is generally understood in the manufacture of maple flooring, that in the process of manufacture all three of the grades, Clear, No. 1 and Factory are produced at the same time. It is also true, however, that a manufacturer can manipulate his rough lumber by putting through certain qualities of rough lumber into his plant to produce the largest percentage of any one grade at any given time.

Q. What will produce the largest percentage of Clear and No. 1?

A. Well the quality that would run largely to No. 1 common and No. 2 common, particularly No. 1 common.

Q. What will produce the largest percentage of Factory?

A. I would put in my plant 3-A and possibly straight and 3-A and B combined. I am producing that at the present time. I realize from analyzing those statistics and from other sources of information that there is a great demand for factory flooring right now, and I fully realize most of the manufacturers are loaded up with orders on it, and I am putting through my plant stock No. 3-A and B which I know will produce from experience anywhere from forty to sixty percent of my total grade will represent factory. On the other hand, if I put through certain stock which I have purchased from the Louis Sands Lumber Company, which is Michigan southern maple, very high grade, running about seventy percent No. 1 Common, thirty percent No. 2, I know that particular lot of lumber when manufactured into flooring, would produce not to exceed fifteen to eighteen factory, the balance 82, 85 No. 1, Clear, therefore I avoid as much as possible the accumulation in my warehouse of Clear and No. 1 during the time this demand for factory is on. That is one of

the principal benefits that I receive from those stock reports, stock conditions or stocks on hand, unfilled orders and so forth, and I consider that very valuable to me, for the reason that as a manufacturer who purchases his rough lumber on the open market it is necessary for me to purchase rather large quantities at the present time, in advance of information, and sometimes I am able to manipulate this stock from time to time to suit the market conditions and may be able to turn it over quickly and get away from the congestion in the warehouse.

The Court: Do you not regard that part of the report which deals with unfilled orders of considerable importance?

A. Unfilled orders; all those statistics are taken into consideration, your Honor.

Q. The unfilled orders—what feature in the report gives you an idea of what is short and so you can manipulate your rough lumber and manufacture the grade particularly in the greatest demand, that is the unfilled orders?

A. I know from looking over this report the amount of stock on hand, the amount of business booked against them, I know what unit they had oversold or undersold as the case may be.

Q. What do you do in case it is over sold or under sold?

A. I try to produce the over-sold and produce less that is under-sold.

Q. And that in your opinion is the most valuable of the statistics so far as you yourself are concerned?

A. *That is the most valuable to me so far as I am concerned, yes, sir.*" (Vol. I, pp. 386-7.)

Mr. Greene also testified that he did not receive the Weekly Sales Reports from the Secretary until Thursday of the following week, and that the price information contained therein was stale by then. (Vol. I, p. 389.)

For similar testimony by Mr. DeWitt, see Vol. I, pp. 238-9. Mr. DeWitt also testified:

"A. Well one of the big advantages is the statistical reports that we get; it enables us to find out what the market is doing, and as I testified before on that, then we can put the proper grade of lumber into our mills to produce the grade of flooring that is demanded by the market, and it is not only an advantage to the manufacturers, but it is also an advantage to the consumer. *If we did not do that there would be times when there would be a great shortage of some particular kind of flooring, naturally the price of that would be high and the consumer would suffer, but from the fact that we have that information it gives us a chance to keep our stock pretty well balanced with the requirements of the market; also that same report gives us the prices being obtained by other members of the association, although that information is generally about two weeks old when we get it, it is valuable to us.*" (Vol. I, p. 252.)

Mr. Shepeck testified as follows:

"The statistics issued by the Association are a big benefit to us. The information that we gather from these statistics as to stocks on hand, production, new orders booked, also the weekly sales reports, are of considerable benefit to us. They enable us to form an opinion as to what the conditions are and assist us in intelligently handling our flooring business.

Q. How do you handle your flooring business, whether you consider present prices or future prices, or both?

A. We are concerned with both.

We try to figure out what conditions are going to be for thirty or sixty days ahead, because flooring prices in our experience, have fluctuated very fast and to a very large amount, and we have gone through some years when we felt we should get so much money for our stock and we would hold it instead of cutting two dollars, and inside of thirty days we would cut ten, and we are trying not to have that recur if we can. We had that happen

thirty days ago, to give an example, with factory flooring; we were asking, I think, \$51.00 at Wells for factory flooring and were piling it up. We went out and took two or three big orders one day from one of the members of the Association at \$6.00, I think, under that price. We felt that inside of thirty or sixty days factory flooring would be selling for \$40.00, and we would rather cut five or six dollars then, than to cut ten or fifteen dollars in thirty days, based on the sales report. We took one large order from California at a cut of \$4.50 from that price, but that did not make us feel bad because we were satisfied with the price obtained.

Q. Because you thought the future condition would make the price of flooring lower still?

A. Yes, sir.

Q. Those statistics set forth in the weekly reports and other reports made by the Secretary do enable you then to form an opinion based upon a certain amount of facts which are gathered as to what future conditions may be?

A. Yes, sir.

Q. And it gives you a good idea of what present conditions are?

A. *The volume of the sales is really more interesting to us, I think, than the prices.*

Q. Why is that so?

A. *The information we get from the sales reports as to prices is a little too old to do us much good; we generally have it beforehand.* (Vol. I, p. 264.)

Mr. Hodges, of Tupper Lake, New York, testified as follows:

"I think the statistics that are furnished our Company by the Secretary of the Maple Flooring Manufacturers Association are very valuable.

A. The weekly reports are valuable as showing a trend of the market, whether the prices are going

up or going down, and another valuable feature is the amount of sales, that enable us to know approximately how much of each grade for instance has been sold within a certain time.

Q. Do you regard the prices there more or less important than the statistics with regard to volume?

A. I think the statistics in respect to volume are fully as valuable as the price statistics, because oftentimes it does not matter to me what somebody in Michigan is getting in prices; if I know my competitor who lives eleven miles from me is getting two dollars less than my figures show, that would influence me more than what I might see in the sales reports.

The Court: And in that same connection I take it that the competition which you meet from your locality, and when I say locality I mean that part of the country, is more potent than the competition which you meet from Wisconsin or Michigan.

A. Yes, sir, because—

The Court: That is because of the freight rates, isn't it, and the difference?

A. Yes, and because those people are—their customers in many instances are my customers. They live in the same territory and they ship to the same points.

Q. Well how old are these statistics when they are received by you.

A. Well usually about ten days or two weeks.

Q. And I believe you say you kept in constant touch with respect to prices, etc., in Boston, New York and Philadelphia, by means of correspondence and telephone?

A. We have representatives in all those markets that keep us informed constantly by phone and letters.

Q. You say they are about two weeks old when you get them?

A. Ten days to two weeks. They are sent in for instance Saturday and Mr. Keehn compiled them and they are sent out along the middle of the week something or in there; usually about ten days or two weeks after the transactions." (Vol. I, p. 291.)

Also:

"A. Well we are in daily correspondence with the big jobbers down there and we get information from them and very often as to what others are quoting. If our prices are too high they don't hesitate to tell us so, and tell us why we can't get the business, and whenever I go down there why I go to see them and talk these matters over with them, and they usually show their cards on the table and tell me what prices I have got to meet in order to get certain business. That is the way I go at it usually." (Vol. I, p. 289.)

With respect to the matter of prices Mr. Hodges gave an answer, which cannot fail to impress anyone on account of the ability and frankness which it evidences:

"Q. Now do you regard the information contained in these reports sent out by the Secretary of the Association as of major importance or as controlling in what you shall do with respect to your own prices or production?

A. No, sir.

Q. What do you regard them as?

A. Well I think the most potent factor is the condition of my stock at the time.

Q. Do you regard the statistical information as one factor, if you don't regard it as of controlling importance? I would assume then you would regard it is one of many factors.

A. Yes, sir.

Q. In looking over those sales reports what would you take into consideration, *what else would you take into consideration in determining what your own prices would be?*

A. Well, in the first place I think I would take into consideration the economic situation, that is, the general trend of the market, whether it was up or down, and then I would take into consideration my own particular stock conditions. If I had a surplus of some one item and wanted it moved, why I would be apt to make a lower price, particularly if I saw that some one else was making a lower price on that same item. On the other hand, if the general trend of the market was upwards and I had no accumulation of that stock and I saw somebody was getting more money than I was, it may tend to influence me to raise my prices.

I would also consider my own budget at that time, our plan of operation of the flooring department, whether we were running nights and days or days only or expected to shut down for repairs or anything like that. I would also consider the labor conditions at our plant and our plan of operations for our logging department, political conditions, etc. The mere fact that someone else was charging higher prices or lower prices than I had been would not automatically cause me to lower or increase my prices. I would consider my own stock and the other conditions above mentioned. The fact that someone else was charging higher or lower prices than I was would be considered as one factor and would be given consideration by me." (Vol. I, pp. 292-3.)

Mr. Ralston testified that the statistics were not so valuable as they might be, for the reason that there were so many nonmember manufacturers. (Vol. I, p. 324.) With respect to the prices shown in the Weekly Sales Reports he testified he did not think they were "of much value, and I never considered them; in fact, some weeks I never even bothered to look them over or check them up." (Vol. I, p. 324.) Also that the figures with respect to production, stocks on hand, etc., were more important, because he had the information as to prices from his representatives before he received the Weekly Sales Reports. (Vol. I, pp. 326-7.)

He also testified as follows:

"Q. State whether or not in the conduct of the flooring business, quotations may be made, especially to distant points and the order will not be accepted, or a contract come definitely into existence until maybe a month or two or three weeks after that.

A. That is very often the case. We make a price that goes to, perhaps, a contractor that is just bidding on a job, putting in his figures, and it may be a month, before it is closed. You may say that you will hold that price open for thirty days or such time as he knows he is awarded the contract?

Q. You say that is quite usual?

A. It is so far as we are concerned. I know it has happened a great many times, with us. I can't say as to others.

Q. So if a sale were reported as being made, we will say on December second, it might reflect prices thirty days or six weeks before?

A. Absolutely, in many cases I think it would.

Q. In that respect, the statistics were not so good as they might be?

A. No." (Vol. I, p. 326.)

For the other factors Mr. Ralston took into consideration when making his prices, see Vol. I, p. 327.

As to how members fixed prices; that there was no agreement as to prices, that they never regarded any data distributed by the present Association as in any wise limiting their discretion; that they ran their respective businesses just as they pleased, etc., etc., see Vol. I, pp. 198-201, 211-2, 213, 222, 227, 229, 230-1, 237-8, 243-4, 238, 259, 263-4, 268-285, 288, 290, 292, 303-318, 322, 326-7, 335, 385, 388-9, 389.

And the testimony of *buyers* that individual stock conditions of members control in the making of prices (page 73, *supra*) corroborates the testimony of members.

IX.

A comparison of the prices obtained by members with the Average Costs (prepared by the present Association) and with the Tables of Values (issued by the Association immediately preceding) conclusively demonstrates not only that the Government's charge that there was a uniformity of prices is not true, but that neither the Average Costs nor the Tables of Values were used by members, either as minimum prices, or as a basis for determining individual prices.

It will be recalled that the Government charged that both before and after the organization of the present Association on March 29, 1922, the defendants by means of surveys of costs determined minimum prices or so-called "average costs" and recommended that the defendant corporations should not sell flooring at prices below said minimum prices or below the so-called "average costs." That the defendants accepted and acted upon said recommendations "and have concertedly established and maintained as the basis of their individual selling prices, the minimum prices or so-called average costs"; that by issuing the freight rate books, which contained average costs, delivered cost charts, freight rates, etc., and charging freight from Cadillac, Michigan, regardless of the point from which flooring was shipped, *and by maintaining uniform rules with respect to commissions, terms of sale, etc.*, the defendants "have always maintained, and they still maintain, a practical uniformity between themselves" of "*net delivered prices*" and "*net f. o. b. selling prices.*" (Vol. I, pp. 6-7.)

During the hearing of the cause a great many of the Weekly Sales Reports issued by the defendant Association, and its predecessors, were introduced in evidence

by the Government. On the last day of the hearing the Government also introduced in evidence a series of compilations which purported to be based upon said Weekly Sales Reports for the years 1920-1922 inclusive and the first six months of 1923. (Gov. Ex. 79, Vol. IV, pp. 583-796; Vol. II, pp. 847-859.)

The Government's witness, Mr. Lewis, testified that he and others had gone over all (with a few exceptions) the Weekly Sales Reports above mentioned and had compiled therefrom three statements which contained all reported sales of 13/16" x 2 1/4" Clear, No. 1 and Factory maple flooring.

The witness testified that the Weekly Sales Reports showed the date of the several sales, the quantity, the size, grade and wood—maple, beech or birch—the delivered price, *average* rate of freight, and the commissions, if any. He stated that he had computed the amount of freight by using the *average* freight rate; and that by deducting from each delivered price the amount of freight and the *commissions*, if any, he had thereby arrived at the "*Net Factory Price*." (See Vol. III, pp. 372, 390 for specimens of Weekly Sales Reports, and Vol. IV, p. 583, for specimen page of Mr. Lewis' compilations.) Having thus arrived at the "*Net Factory Prices*," Mr. Lewis began a series of comparisons of the Average Costs with the *net factory prices* for the 13/16" x 2 1/4" Clear, No. 1 and Factory maple flooring (or 70 per cent of the flooring output of Association members), but he was able to complete the comparisons for the 13/16" x 2 1/4" Clear grade only, or but 35 per cent of the output. (See page 44, *supra*.)

But in making the comparisons, for the purpose of arriving at the percentages of flooring which were sold

below, at or above the average cost, respectively, Mr. Lewis did not use the "Net Factory Prices." He deducted the average freight from the delivered prices, but did not deduct the commissions. (Vol. II, p. 851.) In other words, after deducting both the average freight and the commissions in order to arrive at the "Net Factory Prices," he added to the "Net Factory Prices" the commissions for the purpose of obtaining "Net Factory Prices" to compare with the Average Costs! These comparisons will be found on pages 583, 586, 589, 591, 593, 595, 597, 599, 601, 603, 605, 607, 609, 612, 614, 617, *et seq.*, Vol. IV. They purport to be based upon the data immediately following each of the pages above mentioned.

At the hearing there was much loose talk by counsel (including counsel for defendants) and the Court as to whether the commissions should or should not be deducted. (Vol. II, pp. 850-859.)

Of the data above mentioned only those which deal with Weekly Sales Reports dated November 19, 1921, to June 30, 1923, inclusive, have been printed.

Before discussing the data, we must first determine whether in arriving at the "Net Factory Prices" the commissions allowed (as well as the average freight) shall or shall not be deducted from the delivered prices.

During the hearing the following colloquy occurred:

"Mr. Thompson: In other words, it seemed to us the theory was that the commission was practically absorbed as a part of the selling expense.

The Court: I don't know that it makes very much difference except in this: that in any event it is against the Government. This method of computation [failure to deduct the commissions] is against the Government.

Mr. Johnston: On one theory, but in their favor on another. It is against them on the theory of the Minimum Price, but it is in their favor on the theory of variation, because the prices show greater variation if you take off the commissions.

Mr. Fowler: *We are not insisting on uniformity.*

Mr. Johnston: Well, you couldn't on those figures.

The Court: Let us proceed." (Vol. II, p. 857.)

The District Court was of the opinion that the commissions should be deducted. Also that if the minimum price plans permitted members to allow a commission not exceeding \$2.00 per M. feet the correct minimum price was really \$2.00 less than the formal minimum price.

However, the compilations and the comparisons appearing in the printed record begin with *the week ended November 19, 1921*. And long before that date both the minimum price plan and the minimum price basis had been formally annulled. The latter was abandoned on *February 4, 1921*, immediately after receipt of Mr. Nebeker's opinion that it was unlawful. (Vol. IV, pp. 799-807; Vol. I, pp. 148-9.) The last minimum price plan passed out of existence on *February 12, 1920*. (Vol. IV, p. 529; Vol. I, pp. 144-6.) Hence in determining whether the commissions should be deducted in order to arrive at the "Net Factory Prices," as well as in determining with what such prices shall be compared, neither the minimum price plan nor the minimum price basis can be logically considered.

Naturally the Articles of Association in force during the latter part of 1921, and the subsequent articles should be examined.

The Articles of Association in force during 1921 were those dated July 1, 1919, which were to have continued in force until July 1, 1922, but which were abandoned and discontinued on December 31, 1921. (Vol. I, pp. 143-146; Vol. III, pp. 37-44.)

The Articles of July 1, 1919, throw no light on the inquiry. Recourse must therefore be had to the evidence as to the practices that obtained during the latter part of 1921.

As shown on page 109, *supra*, there appeared in one of the Freight Rate Books during 1921 a statement that a commission not exceeding \$2.00 per M. feet might be allowed. But that statement is dated *January 6, 1921*. (Vol. III, fol. p. 695.) And the Minimum Price Basis is also dated *January 6, 1921*. (Vol. III, p. 92.) And the statement in the freight rate book is a copy of a part of Article VI of the Minimum Price Basis. (Vol. III, p. 94.) Manifestly, when the Minimum Price Basis was annulled on February 4, 1921 (page 339, *supra*), the foregoing rule with respect to commissions was annulled.

Furthermore, the undisputed evidence shows that commissions always varied, and that each member did as he pleased in selling his flooring. (Pages 109-112, *supra*.)

It therefore seems to us that for the year 1921 what Mr. Lewis calls "Average Cost" should be compared with the delivered prices, less average freight, less commissions allowed.

In other words, the "net factory prices," or what the seller received, should be compared with the so-called "Average Cost."

The same method should be followed in making comparisons for the period beginning January 1, 1922, and ending March 29, 1922, (the date of the organization of the present Association) inasmuch as statistical activities were continued during that period.

As heretofore explained, the present Association has never had any rules or issued any data with respect to commissions. (Pages 109-112, *supra*.) The Surveys of Costs of the present Association differ from the Surveys of Costs made by previous Associations.

The elements contained in the present average costs have been justified item by item on pages 244-280, *supra*. As there pointed out the Government offered no proof that the test runs were not honestly and fairly conducted, or that the prices of the rough lumber were not accurate, or that the average manufacturing and marketing costs were not accurately ascertained. The defendants' proof as to the accuracy of all these data was undisputed.

Other than the mere fact such data were distributed to the members, there is no proof whatsoever that there were any recommendations as to prices during the existence of the present Association. The proof is undisputed that each member is free to do just as he pleases. Besides advertising and protecting and guaranteeing the quality of the flooring sold by members, the present Association's work is purely statistical.

It therefore follows that the *average costs* of the present Association must be accepted as accurate; and that the average costs must be compared with the "Net Factory Prices," which must be ascertained by deducting from the delivered prices, both the average freight and the commissions.

(Although the purchaser always deducted the *actual* freight, the average freight was deducted by Mr. Lewis; and while that does not always agree with the actual freight, the difference is not material for purposes of comparison.)

As heretofore pointed out, the Government's theory is that the average costs, the *average freight* and the *uniform* rules as to *commissions* resulted in a practical uniformity of both "f. o. b. selling prices" and "*net delivered prices.*" In other words, the average costs were minimum prices, and *both* the average freight and *uniform commissions* were *factors which resulted in the uniformity of "f. o. b. selling prices" and "net delivered prices."* If the *average freight* is deducted from the delivered prices of the various members to points throughout the United States why shouldn't the commissions be deducted?

What practical difference is there between a sale at \$100.00 per M feet, no commission, and a sale at \$102.00 per M feet, subject to a commission of \$2.00 per M feet? And of course, where two members sell at \$100.00 per M feet, the one that allowed a commission received that much less than the one who allowed none.

Moreover, as we have seen, there was no uniform practice followed by any member, much less by all members, with respect to the allowance of commissions. Net prices were frequently quoted; and the commissions, when allowed, ranged from \$1.00 to \$4.00 per M feet. The allowance of commissions is merely a means of meeting competition or reducing one's price. (Vol. II, p. 538.) In order to reduce to a common basis for purposes of comparison, the delivered prices made by different members in numerous markets, both the freight and such

commissions as were allowed must, of course, be deducted. Only by the use of such a method can the "Net Factory Prices" of all members be ascertained.

It should also be pointed out that there cannot be a uniformity of "net delivered prices" and a uniformity of "net f. o. b. selling prices," so far as flooring sold delivered at point of destination is concerned. This, for the reason that the freight rates from the different mills vary. It is possible to have a uniformity of prices f. o. b. cars mills, or a uniformity of delivered prices in a given market or in markets taking a common freight rate.

The Government charges that there was a practical uniformity of "*net delivered prices*." It is certain that such prices cannot be ascertained by deducting either the actual or the average freight from the delivered prices. When the freight is deducted, the result is (or may be) the price, *not at point of delivery* or destination, but f. o. b. cars, mills! It *cannot* be the *delivered* price, whether net or otherwise.

Mr. Thompson, of counsel for the Government, stated in open court that in the statements compiled by Mr. Lewis only the sales f. o. b. cars at destination were taken from the Weekly Sales Reports. (Vol. II, p. 858.) Reference to the compilations will show that Mr. Thompson was mistaken. Retail mill sales of small quantities are included. Of course, these sales are usually made at much higher prices than sales of larger quantities.

Although numerous errors occur in the comparisons made by Mr. Lewis, we have compiled his figures just as they are, and have also prepared an accurate compilation of the supporting data identified by Mr. Lewis

and introduced by the Government. In our statement the average freight and the commissions have been deducted from the delivered prices. *Both the figures of Mr. Lewis and our own figures are combined in one statement for purposes of comparison.* (Appendix T.)

By referring to the Appendix the Court will observe that on November 17, 1921, what Mr. Lewis calls the "Average Cost" of 13/16" x 2 1/4" Clear maple flooring was \$90.00 f. o. b. cars flooring mills, or what was then called "Cadillac, Michigan, Basis." The average cost of such flooring had been \$90.00 since September 23, 1921. (See Gov. Ex. 28-N, Vol. III, p. 315.)

For the week ended Nov. 19, 1921, the Government's own figures show that there were 66 sales (or 94.2 per cent of the total quantity of feet sold during that week) at less than \$90.00; 5 sales (or 5.1 per cent) at \$90.00; and 2 sales (or 0.7 per cent) for more than \$90.00. The corrected figures show 68 sales (or 97.3 per cent) below \$90.00; 3 sales (or 2.1 per cent) at, and 2 sales (or 0.6 per cent) for more than \$90.00. Also that the prices ranged from \$80.00 to \$96.50 per thousand feet.

The range for the next week was from \$78.50 to \$103.25; for the next, from \$71.25 to \$96.50; for the next from \$79.50 to \$103.25; for the next from \$80.00 to \$99.00, although the average cost was still \$90.00. The percentages of the total quantity of feet sold below \$90.00 for the weeks last above mentioned were 93.3, 75.6, 95.5 and 81.4, respectively. The percentages at \$90.00 were 2.8, 2.3, 0.4 and 12.6, respectively, whereas the percentages above \$90.00 were 3.9, 22.1, 4.1 and 6, respectively.

We set forth in the margin a summary of our figures.⁵⁶

It should also be observed that Mr. Lewis continued to compare the sales made by members after the organization of the present Association on March 29, 1922, with the so-called "Average Cost" (\$90.00) of November 17, 1921.

The first *average costs* calculated by the present Association were dated May 31, 1922. (Gov. Ex. 52-II, Vol. IV, pp. 461-2.) The average cost of 13/16" x 2 1/4"

SUMMARY.				
	Compared with Average Cost	Percentage of Total Number of Sales	Percentage of Total Feet	Weekly Average Percentage of Feet
1921.....	(Below	81.3	89.0	88.6
(5 weeks)....	(At	5.9	2.9	4.1
	(Above	12.8	8.1	7.3
		100%	100%	100%
1922.....	(Below	64.9	73.9	72.9
(51 weeks)...	(At	10.4	6.6	6.2
	(Above	24.7	19.5	20.9
		100%	100%	100%
1923.....	(Below	63.9	70.6	61.9
(26 weeks)...	(At	8.9	6.8	7.3
	(Above	27.2	22.6	30.8
		100%	100%	100%
Total.....	(Below	65.6	73.8	70.4
Averages.....	(At	9.7	6.4	6.4
(82 weeks)....	(Above	24.7	19.8	23.2
		100%	100%	100%

Clear maple flooring "f. o. b. cars at Flooring Mill" was also \$90.00, on May 31, 1922. (Vol. III, pp. 881-2.)

Mr. Lewis was very unfair in compiling his figures for the weeks ended September 30, October 7, October 14, October 21, and October 28, 1922, in that he compared the prices during those weeks with the *average costs* obtained on *October 25, 1922*, or \$95.00, instead of \$90.00. The market had been steadily advancing, and

by using \$95.00 Mr. Lewis was able to show a greater number of sales at the (nonexistent) average cost of \$95.00, and thus support to some extent the utterly discredited theory of the Government that the *average cost* was a minimum price, or a recommended price, and not a *bona fide* attempt to arrive at the *average cost* of manufacturing and marketing such flooring. In compiling our figures for the weeks above mentioned, we also used \$95.00 just as Mr. Lewis did.

It should also be observed that the average costs follow the market, and that the prices do not follow the average costs. This corroborates Mr. George W. Keehn's testimony that calculations with respect to average costs (based upon test runs) are made from time to time after changes either in the prices of rough lumber or in manufacturing and marketing costs. (Page 300, supra, and Vol. I, p. 110, fol. 196.)

The prices shown in this appendix should also be compared with defendants' Grant Keehn's Exhibit 24, Appendix Q, which compares the index of the prices of The Product with the indices of Unfilled Orders and Stocks on Hand. In doing this the Court should also bear in mind the evidence that the demand for the 13/16" x 2 1/4" Clear maple flooring is usually much greater than the demand for other grades or sizes of maple flooring. Also that ordinarily the variation in the prices for 13/16" x 2 1/4" Clear maple flooring is not so great as the variation in the prices for other grades and sizes.

In order that the Court might have additional data, we caused the Clerk to print from certain Weekly Sales Reports all the data in said reports with respect to sales of some other grades and sizes. (See stipulation, Vol. V, pp. 975-977.) The additional matter is contained in the Additional Exhibits, pages 1-48. (Cer-

Sales Below Average Cost		Sales at Average Cost		Sales Above Average Cost	
Sales	% of Feet	Sales	% of Feet	Sales	% of Feet
Our Grade Sales Totals	4,385,504 feet - 100%	31	237,373 5.9%	55	324,154 7.9%
For 1,476,606 feet - 33.7%		43	354,603 8.8%	53	381,918 9.5%
For 1,476,606 feet - 33.7%		46	346,000 8.8%	109	661,832 16.3%
For 1,476,606 feet - 33.7%		103	779,856 18.0%	217	1,656,904 40.0%
For 1,476,606 feet - 33.7%			947,776 21.6%		

13, 16 x 12", 2", 21", 23", faces

... the week ended March 4, 1922. If Mr. Lewis's theory be adopted, the Average Cost of such flooring was then \$25.00 per M. feet f. o. b. extra flooring mill. During the week in question, the prices ranged from \$16.25 to \$27.20. Nineteen sales, (91 per cent of the total quantity of feet) were at prices less than \$25.00; 1 sale (or 5 per cent of the total quantity of feet) was at \$25.00, and only 4 sales (or 4 per cent of the total quantity of feet) were at prices exceeding \$25.00.

As heretofore pointed out, the costs of members located at Chicago, Grand Rapids and St. Paul are higher than the costs of other members—higher than the average costs—and the prices obtained by members located in the cities above mentioned are usually the highest.

Appendix V contains the figures for all the other weekly sales reports that appear in the printed record.

We set forth on the attached sheet the final figures shown on page 4 of Appendix W, (pp. 62, 64.) In Appendix W we have worked out in detail along the lines indicated on the attached sheet the figures contained in Appendices U and V.

All these figures conclusively demonstrate the utter absurdity of the Government's contention (1) that there has always been uniformity of prices; (2) that the average costs of the present Association are recommended or

Such errors do not affect any of our Appendices, for the reason that they are based on the original exhibits in the Clerk's office.)

In Appendix U we have deducted the freight and commissions, and have compared the "Net Factory Prices" with the average costs. For instance, page 1 of Appendix U shows (among other things) all the sales of 13/16" x 2 1/4" Factory maple flooring made during the week ended March 4, 1922. If Mr. Lewis's theory be adopted, the Average Cost of such flooring was then \$25.00 per M. feet f. o. b. cars flooring mill. During the week in question, the prices ranged from \$16.25 to \$37.50. Nineteen sales, (91 per cent of the total quantity of feet) were at prices less than \$25.00; 1 sale (or 5 per cent of the total quantity of feet) was at \$25.00; and only 4 sales (or 4 per cent of the total quantity of feet) were at prices exceeding \$25.00.

As heretofore pointed out, the costs of members located at Chicago, Grand Rapids and St. Paul are higher than the costs of other members—higher than the average costs—and the prices obtained by members located in the cities above mentioned are usually the highest.

Appendix V contains the figures for all the other weekly sales reports that appear in the printed record.

We set forth on the attached sheet the final figures shown on page 3 of Appendix W. (pp. 62, 64.) In Appendix W we have worked out in detail along the lines indicated on the attached sheet the figures contained in Appendices U and V.

All these figures conclusively demonstrate the utter absurdity of the Government's contention (1) that there was always uniformity of prices; (2) that the average costs of the present Association are recommended at

minimum prices; (3) that the members make prices based upon the average costs, irrespective of their individual costs.

In the District Court's opinion there appears the following assertion:

"Thus, by the simple process of adding together the 'average cost' of the product, so ascertained and furnished, and the customary percentage of the net profits, each member of the Association, taught by long experience and example, is enabled to, and undoubtedly is expected to, convert the present somewhat vague and concealed price plan into the old definite but obnoxious minimum Price Plan." (Vol. I, pp. 56-7.)

There is not a word of proof in the entire record that any member ever used such a method in determining his prices, or that any member was expected to do so.

And again.

"While the evidence shows that, at all times, there has been *some* spread in the prices demanded and obtained by the different members of this Association, it also shows that both quoted and accepted prices have *rarely* been below those fixed in the earlier 'Minimum Price' plans and *suggested* in the later 'average cost' plan." (p. 59.)

Only by giving *some* the current slang meaning would the first part of the court's statement above quoted accord with the facts shown by the record. And appendices T, U and V conclusively disprove the latter part of such statement.

As to the price-spreads in other lines of industry, see Vol. II, pp. 539-556, 557-560.

The undisputed proof was that the profits of representative members were very modest. (Vol. II, pp. 785-787.) See in this connection, *Principles of Economics* (Taussig) Vol. II, pp. 439-440.

X.

The present Articles of Association do not even attempt to regulate production, sales, prices or to otherwise limit the discretion of members in the manufacture or sale of flooring. Except the agreement to manufacture flooring of standard quality and to report past transactions each member is left wholly free to conduct his business as he pleases. There is no proof of any other agreement, express or implied, among said members.

In view of the undisputed proof that the **PRICES** of the members of the present Association for maple, beech and birch flooring

(a) have always been **FAIR AND REASONABLE**,

(b) were generally lower than the prices of nonmembers, although the flooring manufactured by members is superior to that manufactured by nonmembers,

(c) were never uniform, and were often below the costs of production of both members and nonmembers,

and that the flooring manufactured by members is in all respects satisfactory to the public, it necessarily follows that neither the contract nor the conduct of the defendants has **UNREASONABLY** restrained interstate trade or commerce.

Since the organization of the present Association on March 29, 1922, the defendants have not done anything except what was authorized by the Articles of Association which were dated back to January 1, 1922. There is no proof whatsoever of any agreement, combination or conspiracy by or among the defendants subsequent to March 29, 1922, other than the articles above mentioned and what was done pursuant thereto.

Aside from the usual provisions for the conduct of the Association, the articles provide for merely the standardization of flooring, the maintenance of an inspection service and the collection and distribution of statistics.

Except the agreement to manufacture flooring of standard quality, each member was left absolutely free to conduct his own business as he pleased. There was no division of territory; there was no restriction placed on production, neither was the discretion of any member fettered in any way whatsoever with respect to when, where, how, to whom or at what price he should sell his flooring. The parties to such agreement were to conduct their respective businesses as they pleased, and to report past transactions. In other words:

1. The present Articles of Association do not *expressly* limit production, fetter competition or otherwise directly interfere with the discretion of the parties thereto in the manufacture or sale among the several states and territories of maple, beech or birch flooring. (Neither is there any proof of any other such agreement since the organization of the present Association.)

The other essential facts may be stated thus:

2. The undisputed proof showed:
 - (a) That the prices of the members of the present Association for maple, beech and birch flooring were and always had been *fair and reasonable*. (Pages 54-61, *supra*.)
 - (b) That such prices were generally lower than the prices of nonmember manufacturers. (Pages 116-143, *supra*.)
 - (c) That the prices of the members of the present Association had an unusual range, and were very often below the costs of production of both members and nonmembers. (Pages 116-143, *supra*.)
 - (d) That each member in the exercise of his sole discretion and in view of his own stock conditions and financial needs determined for himself at what prices he would sell his flooring. (Pages 335, 72-3, 322-334, *supra*.)

(e) That the flooring manufactured by the members was superior to that of nonmembers, and was in all respects satisfactory to the public. (Pages 47-54, *supra*.)

(f) That the inspection service was honestly and efficiently conducted. (Pages 47-54, 188, *supra*.)

In view of the *nature of the said agreement*, and the absence of any proof of concert of action with respect to prices, how can it be reasonably said that there has been an *unreasonable* restraint of interstate trade or commerce when the undisputed proof shows that the *prices* of the members of the present Association for maple, beech and birch flooring have always been *fair and reasonable*?

An entirely different question might be presented by an express agreement as to prices, even though such prices were fair and reasonable. We do not care to discuss such a question.

But both historically and logically, there can be no doubt that *in the absence of an agreement as to prices or of an agreement which limits the discretion of the parties thereto with respect to production or sale*, there can be no *unreasonable* restraint of trade or commerce if the prices of such parties are *fair and reasonable*.

In other words, our contention is that the agreement (including in such term the conduct of the members of the present Association) in this case is not unlawful *per se*, and that the proof shows that the execution of such agreement has not injured the public. That if such agreement had not been in operation, speculation or *a priori* reasoning as to its *probable* effect upon interstate trade and commerce would be proper. But where it has been in operation for more than two years, the *results* are the only proper criteria by which it can

be tested. And that given such agreement and uncontroverted proof that the prices of the defendants have at all times been *fair and reasonable*, the assertion that there has been an *unreasonable* restraint of interstate trade and commerce is manifestly untenable.

ENGLISH STATUTES.

In

2 Holdsworth's History of English Law (3d ed.), pp. 459 *et seq.*,

it is said:

"The Statutes of Labourers bear witness to far-reaching economic and social changes. These changes might perhaps have proceeded more silently and have left fewer marks upon the Statute Book had it not been for the Black Death (1349), which swept off nearly half the population. The commutation of the labour services of the villein for money rents, and the new practice of cultivating the demesne farm by hired labour, received a sudden check. Landlords could get neither tenants nor labour, and masters could not get artificers. Labourers of all kinds found themselves in a position to exact what wages they pleased. At the same time the rise of this class of free labourers presented for the first time in its modern shape the problem of the pauper—the man who cannot or will not maintain himself by his work.

The statutes of Labourers were passed to deal with this new situation. They applied to hired servants—not to tenants who held land and occupied themselves thereon. *It is to these laws, as developed by subsequent legislation, that we must look not only for the beginnings of the law as to master and servant, but also for the origins of ideas which in later days gave birth to the Poor Laws and the Combination Laws.* The principles which underlay them were mainly four: (1) All persons coming within the statutes and able to work, must do so. (2) They

must work at a *reasonable* rate. Later statutes recognized that this reasonable rate could not be absolutely fixed, but must vary with the price of the necessities of life. *But both the wages of labour and the price of necessities must be fixed at a reasonable rate.* (3) A refusal to work for this *reasonable* wage by those who were able to do so was a criminal offence. It was also an offence to give more wages than those fixed by law; and proceedings, which, like the writ of trespass, partook both of a criminal and of a civil character, could be taken against a servant who left his master's service and against a person who enticed him away. (4) Only the impotent poor were allowed to solicit alms.

The statutes themselves were numerous and detailed. They enumerated many different kinds of labour, and many different kinds of workmen—shoemakers, carpenters, tilers, masons, carriers, and, by later statutes, even chaplains.”

The number of such statutes cited by Cunningham in his *Growth of English Industry and Commerce* will astonish most persons. The dominant idea running through all of them is the protection of the public weal by requiring laborers to work for a *reasonable* wage, and a very large number of craftsmen, purveyors and others to sell their goods or services at reasonable prices.

Such statutes and similar regulations by the guilds persisted till the close of the 18th Century⁵⁷. In Volume 1 (Part II) of Ashley's *Introduction to English Economic History and Theory*, pp. 168-9, it is said:

“A tree is known by its fruits; and by its fruits the Gild System may well be judged. Within it grew up a wide middle-class of opulent traders and comfortable craftsmen; and it was the appearance of this class by the side of, and, in a sense, between,

⁵⁷Cowin's, *The Guilds and Companies of London*.

Cunningham's *Growth of English Industry and Commerce*.

the lords of the soil and the tillers of the soil that led to the transformation of feudal society into the society of modern times. This middle class, it has become a commonplace to say, has been the peculiar representative and introducer of modern ideas; but such a class had no existence when the guilds first arose; and although it is conceivable that under a strong government it might have arisen without the support and the restrictions of the guilds, still it is to be remembered that as a matter of fact strong government did not exist, and that it was under the Guild System that the 'bourgeoisie' actually came into being. *Then, again, it is the merit of the Guild System that it did for a time, and in a large measure, succeed in reconciling the interests of consumers and producers. The tendency of modern competition is to sacrifice the producers; to assume that so long as articles are produced cheaply, it hardly matters what the remuneration of the workmen may be; but the guild legislation kept steadily before itself the ideal of combining good quality and a price that was fair to the consumer, with a fitting remuneration to the workman. The method by which this was attempted could not be permanent; it broke down owing to material forces as well as to change of opinion. But it was something that such an ideal should be aimed at; and the endeavour to view the processes of production and sale in their relation to general social well-being conveys a perpetual lesson to modern economists.*"

An ancient analogue of the statutes providing for reasonable prices is the "just price" doctrine of *Corpus Juris Canonici*⁵⁸. The Physiocrats also believed in a *bon prix*. And in modern times there are the statutes in both England and the United States that provide for the fixation and enforcement of minimum wages⁵⁹, and of just and reasonable rates by common carriers and others.

⁵⁸Ashley's *Introduction to English Economic History and Theory*, pp. 126-137.

⁵⁹Marshall's *Readings in Industrial Society*, p. 592.

Ashley's *Economic Organization of England*, pp. 108 et seq.

ENGLISH DECISIONS.

In

Darcy v. Allein (The Case of Monopolies), 11
Co. Rep. 84 b,

it was urged that there were "three inseparable incidents to every monopoly," viz: Inferior goods at increased prices and displacement of labor. (P. 87a.)

The idea of *reasonableness* of prices is everywhere present in the English cases. Even *express agreements* as to prices are upheld if the prices are *reasonable*.

27 Halsbury's *Laws of England*, 527-9, it is said:

"Where an agreement, taken together with all its surrounding circumstances, including agreements made between the parties to it and third persons, discloses an attempt on a very large scale to obtain the control of a market, and particularly of a market in one of the necessities of life, and to keep up prices at an artificial figure, by means of restrictions which are more stringent than is reasonably necessary for the protection of a particular or local trade, to the obvious detriment of the public, such an agreement will not be enforced. *A fortiori* is this the case when there is anything in the methods adopted which tends to mislead the public.

Such a contract is merely unenforceable: it is not unlawful in any criminal sense, nor does it give any cause of action to a third person injured by its operations. The court takes cognizance of its illegality though it is not pleaded.

It is, however, no monopoly if the control, being lawfully and fairly obtained, is limited to particular persons or places; and an agreement among traders to prevent competition among themselves and even to keep up prices is not necessarily invalid, if it is carried out by provisions reasonably necessary for the purpose and not detrimental to the public."

In

Attorney-General v. Adelaide Steamship Co.
(1913), 109 L. T. R. 258,

it was said:

"The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. 3, c. 71. It also lay at the root of the common law offence of Ingrossing, which, according to *Hawkins' Pleas of the Crown* (Vol. 1, book 1, c. 29, sect. 9), consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen, L. J. J. as a pernicious monopoly—that is to say, a monopoly calculated to enhance prices to an unreasonable extent. In this connection it should be noticed that the Act of 7 & 8 Viet. c. 24, which abolished the common law offence of engrossing, does not apply to the States of the Commonwealth, and that monopolies in the popular sense of the word are more likely to arise, and if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protective tariff prevails than in countries where there is no such tariff. It is, however, in their Lordships' opinion, clear that the onus of showing that any contract is calculated to produce a monopoly, or enhance prices to an unreasonable extent, will lie on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one."

See

F. Cade & Sons v. Daly & Co., 1 I. R. 306,

where a manufacturing association had agreed upon a scale of prices for beer, stout, etc., within a radius of sixteen miles from the post office Cork, with two exceptions. The agreement was to run from year to year, terminable upon a month's notice before expiration of each current year. The contract was upheld. The court said:

"In point of fact, when the facts of that case are closely examined, the judgment delivered in the Court of Appeal affirms what I have always thought was the law, namely, *that a covenant between persons interested in a particular trade for the purpose of keeping the trade as far as possible among themselves, and perhaps incidentally of keeping up the prices, or, as I would prefer to put it, not cutting down the prices to a low level, is perfectly legitimate, provided that the parties to the covenant do no more than is necessary or reasonable to effect the object they have in view.* * * *

This is a covenant of cooperation for what may be a brief period between a few local bottlers, operating within a distance of sixteen miles from the General Post Office in the City of Cork, subject to this important exception, that the towns of Middleton and Queenstown are excluded from the ambit of the covenant. To my mind, when the sphere of operations is 'cabined, cribbed, confined' within such limits of time and space, when there is no prohibition, and can be no prohibition, against outsiders coming in and competing against any one or all of the persons named as parties to the covenant, *the public, at all events, cannot suffer wrong.* The public can suffer no injustice; and, in the ordinary sense of the word, cannot be detrimentally affected. The arrangement seems in reality to have been found necessary by a few local bottlers to prevent some of their number obtaining an undue advantage during a short period by selling at unduly low prices. No one was compelled to execute the deed. But, as be-

tween the firms or individual traders who executed it, the deed prevented 'cutting.' A reputation for low prices once gained by a firm or individual trader sometimes lingers for a long time after normal trade prices have been adopted.

Having regard to all the facts and circumstances of this case, I am prepared to hold out merely that this contract is not *per se* unlawful, but that it is a legitimate and fair arrangement to which a Court of Equity can give effect without infringing upon the principles by which the court is fettered by authority. The prices, no doubt, are prices which impose the maximum prices as the minimum limit. That was stated in evidence, and not contradicted. In other words, the maximum prices which the signatories to the deed were in the habit of getting are the minimum prices set forth in the schedule to the deed. *But the evidence in the case satisfies me that all parties concerned, bottlers and their customers, considered the scheduled prices reasonably fair. How does this circumstance affect or injure the public?* Outsiders are absolutely free to compete, and if the scheduled prices are too high, the public can buy elsewhere. I do not think, then, that the prices can render this contract objectionable."

DECISIONS BY THIS COURT (AND OTHERS).

In

United States v. Trans-Missouri Freight Association, 166 U. S. 290,

an association composed of eighteen railroad corporations had agreed upon *rates* for all competitive traffic west of the Mississippi River. A majority of the court held that the contract was *reasonable*, but that the Sherman Act prohibited every contract in restraint of trade, whether reasonable or not. Mr. Justice White, with whom concurred Justices Field, Gray and Shiras, argued that inasmuch as the contract was *reasonable* it was not obnoxious to the Sherman Act.

The views of Mr. Justice White were subsequently adopted by this court in the Standard Oil case; and it is now the settled rule of this court that only contracts which *unreasonably* restrain interstate trade or commerce are obnoxious to the Sherman Act.

In the following cases *injury to the public* by means of charging *excessive prices* was emphasized:

United States v. U. S. Steel Corporation, 251 U. S. 417.

Montague & Company v. Lowry, 193 U. S. 38.

American Column & Lumber Co. v. United States, 257 U. S. 377.

Board of Trade of City of Chicago v. United States, 246 U. S. 231.

Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346.

United States v. United States Steel Corporation, 223 Fed. 55.

United States v. E. I. Du Pont De Nemours & Co., 188 Fed. 127.

Manchester & Lawrence R. Co. v. Concord R. Co. (N. H.), 9 L. R. A. 689.

As we have heretofore shown, the Articles of Association do not undertake to fix or regulate prices, limit production or in any wise restrict members as to when, where or to whom they shall sell their flooring. Each member is left absolutely free to determine his own prices, output, terms, customers, etc. There is no proof of any concerted action by members of the present Association with respect to production or prices. Contrary to the allegations of the petition, the undisputed proof showed great and unusual variation of prices. And in view of the undisputed proof that the prices of mem-

bers have always been *fair and reasonable*, how can it be reasonably said that there has been an *unreasonable* restraint of interstate trade or commerce?

This doctrine does not involve any price-fixing by courts.

The proof merely shows that there has been no violation of the Sherman Act. The petition should, therefore, have been dismissed. It is time enough to take action when there is an agreement or conduct which results in an unreasonable restraint of interstate trade or commerce.

Even if there had been proof of a much closer approximation of prices obtained by members to the Average Costs, the result would not be different. We may safely assume that (within limits) flooring can be produced more cheaply on a large scale than it can on a small scale. It is a commonplace of economics that given a *perfect competitive market* "the price of diminishing-cost goods tends to equal their cost to producers working on the largest scale justified by the existing conditions of demand."⁶⁶ As stated by Ashley: "It has been the doctrine of orthodox English economists that *normal value*, or price (*i. e.*, value expressed in terms of one particular commodity, gold, when the value of the latter itself does not fluctuate), is, in the case of the vast majority of articles, determined by cost of production." The proof was that the Average Costs were honestly

⁶⁶Taylor's *Principles of Economics*, pp. 242-253, 347. Of course in economic theory the term *cost of production* includes ordinary profit upon the capital employed. (Ashley's *Economic History and Theory* (Part I), p. 139.) It is also true that a perfect competitive market never exists.

and accurately ascertained; also that the elements contained therein were proper. The prices of different members varied—*some above, a few at, and the great majority of them below the Average Costs*. Is it strange that there was some relation between the Average Costs and the prices?

To say that the Average Costs were minimum prices, or that there was any agreement, express or implied, that the Average Costs should be maintained, is, of course, to utter nonsense.

XI.

In addition to the undisputed proof that the prices obtained by members of the present Association had always substantially varied; that the prices of such members were fair and reasonable, and that although the flooring manufactured by such members was superior to that manufactured by nonmembers, the prices of members were generally lower than those of nonmembers, there was the following undisputed proof:

(a) by the Government's witnesses, including both competitors and buyers, that competition among the defendants themselves, as well as between the defendants and nonmembers, was strong, active and vigorous;

(b) by dealers, large and small, in the principal centers of consumption, that there was and always had been vigorous competition among the defendants;

(c) by dealers that the defendants were unusually fair, considerate and honorable in their dealings with purchasers of maple, beech and birch flooring;

(d) by economists and statisticians that prices of the said members had fluctuated in accordance with the laws of supply and demand.

No witnesses were produced by the Government to testify to fixation or uniformity of prices, unfair practices or restraint of trade.

In view of the foregoing facts, the Government's petition (under the decision of this court in the Steel Corporation Case) should have been dismissed.

For the evidence in support of the first paragraph of Point XI, see pages 116-143, 54-61, 47-54, *supra*; for that in support of (a), see pages 116-143, *supra*; for that in support of (b), see pages 121-143, *supra*; for that in support of (c), see pages 62-64, *supra*; for that in support of (d), see pages 207-229, *supra*.

In

United States v. United States Steel Corporation, 251 U. S. 417, 447-9,

the court said:

"From this digression we return to the consideration of the conduct of the Corporation towards its competitors. Besides the circumstances which we have mentioned there are others of probative strength. *The company's officers and, as well, its competitors and customers, testified that its competition was genuine, direct and vigorous, and was reflected in prices and production. No practical witness was produced by the Government in opposition.* Its contention is based on the size and asserted dominance of the Corporation — alleged power for evil, *not the exertion of the power in evil.* Or as counsel put it, 'a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors.' Such composition and its resulting power constitute, in the view of the Government, the offence against the law, *and yet it is admitted 'no competitor came forward and said he had to accept the Steel Corporation's prices.'* But this absence of complaint counsel urge against the Corporation. Competitors, it is said, followed the Corporation's prices because they made money by the imitation. Indeed the imitation is urged as an evidence of the Corporation's power. 'Universal imitation,' counsel assert, is 'an evidence of power.' In this concord of action, the contention is, there is the sinister dominance of the Corporation—'its extensive control of the industry is such that the others (independent companies) follow.' Counsel, however, admit that there was 'occasionally' some competition, but reject the suggestion that it extended practically to a war between the Corporation and the independents. *Counsel say, 'They (the Corporation is made a plural) called a few—they called 200 witnesses out of some forty thousand customers, and they expect with that customer evidence to overcome the whole train of price movement shown since the Corporation was formed.'*

And 'movement of prices' counsel explained 'as shown by the published prices * * * they were the ones that the competitors were maintaining all during the interval.'

It would seem that '200 witnesses' would be fairly representative. Besides the balance of the 'forty thousand customers' was open to the Government to draw upon. Not having done so, is it not permissible to infer that none would testify to the existence of the influence that the Government asserts? At any rate, not one was called, but instead the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employee in the Bureau of Corporations. His deduction was that when prices are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal of itself even though the facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution. Of course competition affects prices but it is only one among other influences and does not more than they, register itself in definite and legible effect.

We magnify the testimony by its consideration. Against it competitors, dealers and customers of the Corporation testify in multitude that no adventurous interference was employed to either fix or maintain prices and that they were constant or varied according to natural conditions. Can this testimony be minimized or dismissed by inferring that, as intimated, it is an evidence of power not of weakness; and power exerted not only to suppress com-

petition but to compel testimony, is the necessary inference, shading into perjury to deny its exertion? The situation is indeed singular, and we may wonder at it, wonder that the despotism of the Corporation, so baneful to the world in the representation of the Government, did not produce protesting victims."

And again on page 451:

"The Corporation was formed in 1901, no act of aggression upon its competitors is charged against it, it confederated with them at times in offence against the law, but abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it except its existence be such an act. This is urged, as we have seen, and that the interest of the public is involved, and that such interest is paramount to corporation or competitors. Granted—though it is difficult to see how there can be restraint of trade when there is no restraint of competitors in the trade nor complaints by customers—how can it be worked out of the situation and through what proposition of law? Of course it calls for nothing other than a right application of the law and to repeat what we have said above, shall we declare the law to be that size is an offence even though it minds its own business because what it does is imitated? The Corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law and the law does not make mere size an offence or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible."

It is true that there is considerable evidence in the record which shows attempts to fix prices in the years that preceded the organization of the present Association. But the diversities set forth on pages 66-75, *supra*, and other factors rendered all such attempts

futile just as similar attempts in other lines of industry had been futile.⁶¹ *There was no abandonment of independent ownership and control of their several businesses; there was no direct control over output, nor monopoly of raw material; there were too many non-member manufacturers, too many competing floorings, both wood and composition. It cost too little to engage in the manufacture of flooring. The industry was unprotected by patents or the tariff. And although various plans were formulated, all of them necessarily broke down in practice, and each member did as he pleased, without the imposition of any penalties whatsoever. All that was accomplished was the improvement and the standardization of flooring.*

Even all formal attempts to regulate production or prices were abandoned long prior to the filing of the Government's petition. A new Association was formed. An opinion as to what the members might lawfully do was obtained; and the undisputed proof shows that the explicit directions contained in said opinion with respect to the conduct of the Association have been carefully observed. (Pages 231-2, 273-4, 298, 308-9, 310-313, supra.)

The members of the present Association have no power to control prices. There is no proof that they have ever even attempted to do so. According to the rule announced in the Steel Corporation case, the petition herein should have been dismissed, especially in view of the facts stated in our Point XI.

⁶¹Hobson's *The Evolution of Modern Capitalism* (new Edition), pp. 170-173.

⁶²Macrosty's *The Trust Movement in British Industry*, pp. 6-9.

⁶³Ripley's *Trusts, Pools and Corporations* (revised edition), pp. 1-77.

XII.

The following facts:

- (a) fundamental differences that exist among association members;
- (b) unstable basis of the maple, beech and birch flooring industry;
- (c) relation that association members bear to the flooring industry as a whole;
- (d) lack of control of any appreciable proportion of raw material;
- (e) fragmentary character of statistics collected and distributed;
- (f) publication of statistics collected;
- (g) relatively superior position of lumber dealers who buy or handle from 90 to 95 per cent of the flooring manufactured by association members,

and many other facts disclosed by the record conclusively demonstrate that the collection and distribution of statistics by the association cannot injuriously affect interstate trade or commerce.

The necessity for the collection and distribution of trade statistics for the benefit of both buyers and sellers is recognized by all modern economists.

We have already seen that *all* the activities of the present Association, *including the collection and distribution of statistics*, have not restrained interstate trade or commerce. The evidence is undisputed:

1. That the prices of Association members for maple, beech and birch flooring have at all times been fair and reasonable.
2. That such prices have never been uniform; that the spread between the high and the low prices quoted or obtained for any item at a given time has been unusually large, and that ordinarily the prices of Association members for flooring are lower

than the prices of nonmembers, despite the inferiority of the flooring manufactured by the latter.

3. That the prices of Association members for maple, beech and birch flooring have fluctuated in accordance with the laws of supply and demand.

4. That in the sale of flooring there has always existed strong, active and vigorous competition, not only between members and nonmembers, but among the members of the defendant Association.

The record shows that several factors concurred in producing the foregoing results. They are:

(a) The absence of concerted action by the defendants,—their obedience to the directions contained in Mr. Newman's written opinion.

(b) The fundamental differences that exist among Association members.

(c) The unstable basis of the maple, beech and birch flooring industry.

(d) The relation that Association members bear to such industry as a whole.

(e) The nature of the statistical and other activities of the defendant Association.

(f) The publication of the statistics collected by the Association.

(g) The relatively superior position of lumber dealers who buy or handle 90 or 95 per cent of the flooring manufactured by Association members.

Most of the factors above mentioned are constant and fixed. They could be eliminated only by means of a combination or trust with a capital of some \$50,000,000. They are the *circumstances* that render the statistics of the present Association innocuous from a legal point of view, and beneficial to both the general public and Association members.

FUNDAMENTAL DIFFERENCES AMONG MEMBERS.

These differences consist in (a) amount of timber owned, (b) quality of timber or rough lumber owned or available, (c) flooring capacity, (d) location of plant, which results in different labor, manufacturing and marketing costs, (e) percentage of capital invested in production of flooring, which ranges from a nominal amount to 100 per cent, and results in diversity of size, equipment, organization, business relations, financial strength, credit, needs, business methods, ability, information and reaction to business conditions, (f) kinds of flooring manufactured, all members producing maple flooring, others beech and birch also, still others beech or birch, (g) grades of rough lumber used, (h) kinds of matchers or flooring-machines used, which vary markedly in capacity, (i) thicknesses and widths of flooring produced, (j) class of trade ordinarily catered to, (k) warehouse capacity, which compels disposition of surpluses (arising from necessity of manufacturing all grades and widths at same time) wherever and at whatever prices can be obtained, (l) marketing methods, and (m) individual brands and trade-marks, which result in preferences among buyers. (Pages 66-75, *supra*.)

Furthermore, the members are merely *manufacturers*. Hobson, who certainly is no champion of the capitalist system, says:

"Regarding the single large corporation as the instrument of monopoly, there is no evidence to show that these *industrial* corporations have yet developed sufficient strength even in America to limit output or to hold up prices for any considerable time except in the case of a small number of commodities. If we add to these Trusts the industrial

pools and other combines, the durable monopoly exercised through industrial combination does not affect any large number of commodities. Regarded as a solid instrument of capitalist control the industrial trust is as yet feebly developed. Local combinations in retail trade in all probability exercise a larger and more widespread influence upon the prices paid by consumers.

With a few exceptions the proved power of capitalist 'monopoly' in America is vested, *not in the industrial trusts*, but, as we shall see, in transport and financial corporations and in corporations handling local services under charters or other privileges. The aggregate influence of the disturbances of price exercised by industrial trusts is doubtless considerable, but their power to hold up prices has hitherto been weak, irregular, and short-lived, so far as the great majority of the commodities they handle are concerned. *It is very doubtful whether a combination of mere manufacturers can maintain an effective monopoly even in a national market for which they obtain tariff protection. The real strength of a manufacturing or industrial trust is commonly, if not universally, derived from non-manufacturing processes with which it is connected.*" (*The Evolution of Modern Capitalism*, pp. 190-1.)

ASSOCIATION MEMBERS HAVE NO CONTROL OF RAW MATERIAL.

Maple, beech and birch timber is widely distributed. (Pages 24-25, *supra*.) The members of the present Association own substantially less than 2 per cent of the total stand of such timber in the United States; only 3.94 per cent of the stand in the Lake States, and but 0.78 per cent of the stand in the Middle Atlantic States. (Page 26; *supra*.)

In 1922 there were 2999 producers of rough maple lumber in the United States. In 1920 there were 476

such producers in the States of Michigan and Wisconsin alone. (Page 26, *supra*.)

All writers on economics, all students of monopolies and trusts emphasize the great importance of monopoly or control of raw material so far as the regulation of prices by industrial trusts or combinations are concerned.

The distinguished German economist, Hermann Levy (*Monopoly and Competition*) has said that most cartels and trusts in Germany and the United States are directly based on either monopolization or indirect control of raw materials. (Page 296.)

Also:

"A considerable number of cartels and trusts in all parts of the world are essentially dependent on the existence of mineral deposits which are easily convertible into a monopoly. In the first place, certain minerals, being found only in a single country or in one or two countries, are from the outset a monopoly to the rest of the world. In this connection may be mentioned the powerful monopolies of the potash deposits in Germany, of kaolin in Austria, nitrate in Chili, marble in Italy, petroleum, copper and borax in America, zinc in Germany, Belgium and America, and diamonds in the Transvaal. Secondly, certain areas of production, such as the coal and iron ore districts of America and Germany, hold monopolies, if not in the world's market, at least in a given national area, generally as a result of the freight charges which a foreign competitor would have to face.

The naturally narrow limits of such mineral wealth and the marked tendency of mining from the very beginning to accumulate fixed capital have created relatively early and with comparative ease close monopolist combinations or a semi-monopolist predominance of particular interest in all such areas of production." (p. 179.)

And again: "In the United States the ore-producing country

of Lake Superior belongs to the Steel Trust, which was interested in the years 1902-7 to the amount of 50-60 per cent in the deliveries from this large district, and which by agreement two years ago with the railway magnate Hill obtained power to dispose in the future of the remaining riches of the district. In Germany, Minette iron, now the most valuable iron ore, has been monopolized by the manufacturers of finished products. In Siegerland there is the Iron Syndicate in iron mining proper, while but a small portion of the large iron production of Lorraine-Luxemburg reaches the market directly, most of it being further manufactured by the large iron concerns themselves—a fact which makes any special monopoly organization such as a cartel or a syndicate for the most part superfluous. This is at least true so far as sales to outside smelters in the Minette and Saar regions is concerned, as the big sellers, who are comparatively few in number, can command a complete view of the whole market and check mischievous underbidding without any special system of regulating prices. It is only in the case of the relatively small sales to outsiders in Rhenish Westphalia that Spanish competition detracts from the power of the large mines to influence prices by their monopoly. In the United States the position is similar. The trust and a few similar enormous combines control most of the iron production, and only small quantities come on the market.

In England things are very different. Again, in the case of the quarrying of stones and earths (specially sandstone, slate, limestone, chalk, clay) monopolization is out of the question owing to home competition. The supply of these minerals is so abundant and distributed through such an extremely large number of competing districts that any monopolist movement is impossible. The trade also in many of the branches of production is extremely small and the plant comparatively undeveloped, so that in these cases even local monopolist associations would give an immediate stimulus to fresh competition.

Thus in England competition is still the ruling principle in the three most important mineral products. As we shall see later on, the same thing cannot be said of the fourth one, but its importance as compared to the sum of English minerals and of their three chief groups is insignificant.

We can therefore affirm generally: firstly, that England has no raw material in minerals possessing that monopoly in the world's market which favours the development of cartels or trusts; and secondly, that it is precisely in the most important of the existing raw mineral products that the conditions are most unfavourable for monopoly. *Monopolist combinations are consequently for practical purposes excluded from the sphere in which their success in other countries has been most marked.*" (pp. 187-190.)

And on pages 202-3:

"In the United States and in Germany, however, matters are different. Monopolies of raw materials in all kinds of industries make it impossible to start new works in any finishing manufacture. Witness the American Paper Trust, which owes its power to the fact that, aided by high duties on wood and pulp, it has monopolized the native forests and consequently lamed fresh competition. Witness again the steel trade in America and Germany, in which the creation of new undertakings on a large scale is hindered by the monopolization of the deposits of ore, or the soda cartel in Germany, which has combined with the salt cartels in refusing to supply new works with salt. Similar cases often occur in countries where extensive monopolies of raw materials exist side by side with finishing manufactures; but they are not to be found in England where there are only isolated monopolies of raw materials, and even these, as we shall see later on, have only a comparatively limited sphere of operation, the great mass of raw material required by English manufacturers being imported duty free and at low freight rates. It might be thought within the bounds of possibility to create a trust in English finishing man-

manufactures by the aid of a foreign raw material monopoly, and one such attempt has been made by the American Borax Trust which owns a few refineries in England. But generally speaking it has not been found possible by monopolizing raw materials to promote monopolies in remote stages of finishing manufactures otherwise exposed to competition.

There are therefore a number of circumstances which serve to explain the continued existence of competition in many English finishing trades. Two of these circumstances—the existence of a large number of undertakings and the comparative ease with which this number may be increased—are very marked in one English industry in particular in which the conditions of competition stand in sharp contrast to those in Germany and America. This is the tin-plate industry.”

If the members of the defendant Association had a monopoly of maple, beech and birch timber, then the collection and distribution of statistics by them might be harmful, especially if such statistics were not accessible to the public. But the assertion that Association members controlling less than 2 per cent of the stand of maple, beech and birch timber in the United States could maintain prices by any means whatsoever is ridiculous, especially in view of the diversities existing among them and the facts hereinafter set forth. *United States v. Quaker Oats Co.* (C. C. A., 7th Cir.) 232 Fed. 499, 502; *United States v. Whitney*, 212 Fed. 466, 475. *A fortiori*, the collection and distribution of statistics by such a group can have but little, if any, material effect upon market conditions. And so long as the statistics are available to the general public, what possible harm can result?

The finished product is not a necessary of life; it has numerous substitutes, and is not protected at any stage by either patents controlled by defendants, or a tariff.

That there are 12 competing wood floorings and 11 competing composition floorings, see page 65, *supra*. Matchers or flooring-machines, of which there are several makes, can be freely purchased in the open market, where Association members make their purchases. (Pages 31-32, *supra*.)

In his work on *The Evolution of Modern Capitalism*, Hobson says:

"The real danger of Trusts in their control of prices appears when we consider this control in relation to the various classes of commodities which form the subjects of monopoly.

(a) *The urgency of the need which a commodity satisfies enables the monopolist to charge high prices.* Where a community is dependent for life upon some single commodity, as the Chinese on rice, the monopolist is able to obtain a high price for the whole of a supply which does not exceed what is necessary to keep alive the whole population. Thus a monopolist of corn or rice in a famine can get an exorbitant price for a considerable supply. But after the supply is large enough to enable every one to satisfy the most urgent need for sustenance, the urgency of the need satisfied by any further supply falls rapidly, for there is no comparison between the demand of famine and the demand induced by the pleasures of eating.

*A monopoly of a necessity of life is therefore more dangerous than any other monopoly, because it not merely places the lives of the people at the mercy of private traders, but because it will often be the interest of such monopolists to limit supply to the satisfaction of the barest necessities of life. * * **

As we descend in the urgency of wants supplied we find that the comforts and luxuries form a part

of the standard of life of a smaller and smaller number of persons, and satisfying intrinsically weaker needs, are more liable to be affected by a rise of price.

(b) Closely related to this consideration, and working in with it at every point, is the question of the possibility of *substituting another commodity for the one monopolized. This everywhere tempers the urgency of the need attaching to a commodity.* There are few, if any, even among the commodities on which we habitually rely for food, shelter, clothing, that we could not and would not dispense with if prices rose very high. *The incessant competition that is going on between different commodities which claim to satisfy some particular class of need cannot be got rid of by the monopoly of one of them.* This is probably the chief explanation of the low prices of the Standard Oil. *As an illuminant, oil is competing with gas, candles, and electricity, and unless the monopoly were extended laterally so as to include these and any other possible illuminants, the Trust's prices cannot be determined merely by the pressure of the need for artificial light.* Though to a modern society artificial light is probably even more important than cane sugar, a Sugar Trust may have a stronger monopoly and be able to raise prices higher than an Oil Trust, because the substitutes for cane sugar, such as molasses and beetroot, are less effective competitors than gas, candles, and electricity with oil.

The power of railway monopolies largely depends upon the degree in which their services are indispensable, and no alternative mode of transport is open. Sometimes, however, they miscalculate the extent of their power. The high railway rates in England have recently led in several quarters to a substitution of road and canal traffic in the case of goods where rapidity of conveyance was not essential. So also in other cases sea-transport has been substituted.

The stronger monopoly of American railways consists partly in the fact that distances are so great, and the sea-board or other water conveyance so re-

note, that over a large part of the Continent the monopoly is untempered by alternative possibilities of transport.

The reverse consideration, the possibility of substituting the article of monopoly for other articles of consumption, and so securing a wider market, has quite as important an influence on prices. The possibility of substituting oil for coal in cooking and certain other operations has probably a good deal to do with the low price of oil." (pp. 231-2.)

In Marshall's *Readings in Industrial Society*, p. 894, appears the following adaptation of page 141 of Professor E. R. A. Seligman's *Principles of Economics*:

"By commodity competition is meant the competition due to the existence of social choices. Every individual is continually debating with himself whether to purchase one commodity in preference to another. Where he is on the margin of doubt or of indifference the slightest alteration in the price will cause him to substitute something else. The principle involved is hence called the principle of substitution. The vendor must constantly be on the watch lest any increase of price cause the disappearance of his sales. We substitute, however, not only one thing for another, but also one agency of production for another; in the crucible of economic wants everything is finally tested by its capacity to afford the greatest satisfaction. Not only will the consumer choose now this and now that commodity, but the employer will increase now his labor force, now his stock of machinery, so as to secure the best results. The least change in the rate of wages or of interest may lead him to substitute the one for the other. It is only by replacing the less efficient by the more efficient factor that the producer is able to induce the consumer to select one commodity in preference to another. Competition of factors of production is thus really an adjunct to commodity competition. Competition through substitution is hence important in that it fixes a maximum limit beyond which prices cannot go. Every economic fac-

tor, like every economic good, may be in either actual or potential competition with another."

Malcolm Keir, Professor of Economics in Dartmouth College, states that the substitution of numerous other materials for wood

"already accounts for *nearly a fourth* of the lumber formerly cut, and since most of the change has occurred within the last 15 years, we may expect an even greater relative decline in the use of wood in the future." (*Manufacturing Industries in America*, pp. 293-4.)

We have already seen that the flooring industry is not protected by a tariff, and that Canadian manufacturers of maple, beech and birch flooring are important factors in the American market because they dump their flooring here. (Page 31, *supra*.)

All economists are agreed that regulation of commodity prices by even a trust is extremely difficult in the absence of a tariff. Levy attributes England's freedom from cartels and trusts in many industries to free trade, and gives numerous illustrations. (*Monopoly and Competition*, pp. 190-196, 307-316.)

See also Hobson's *Evolution of Modern Capitalism*, pp. 195-6.

The importance of patents, or monopoly of finishing processes at some stage, is, of course, obvious so far as price-control is concerned. (Hobson, p. 193.)

It costs only \$30,000.00 to engage in the manufacture of flooring from the ground up.

One producer of rough maple lumber bought a second-hand machine at an expense of \$5,000.00, exclusive of costs of installation, and engaged in the production of maple flooring. There are hundreds of these rough maple lumber producers in the States of Michigan and Wisconsin, and practically 3,000 in the United States, to say nothing of manufacturers of fir and oak flooring, who manufacture some maple flooring, and who could produce it on a large scale if the prices made it profitable to do so.

For the evidence in support of the foregoing statements, see pages 31-33, *supra*.

Two members of the present Association have only 1 flooring machine each; three members 2 machines each, and six members 3 machines each. (Page 66, *supra*.)

In Levy's *Monopoly and Competition*, it is said:

"We have seen that the formation of monopoly depends largely on the number of existing manufacturers, and now we see why it did not result earlier, even where that was small. *It is not the absolute number of competing firms which is decisive, but rather how far they could maintain a monopoly if they combined. If a relatively small concern is economically profitable, so that a slight increase in demand or price gives a new competitor a fair chance of existence, existing makers cannot maintain a monopoly even if they can obtain it.*" (p. 303.)

See also pages 372, 374, *supra*, and the following cases:

United States v. Quaker Oats (C. C. A. 7th Cir.),

232 Fed. 499, 502.

United States v. American Can Co. 230 Fed. 859, 900.

In his *The Evolution of Modern Capitalism*, Hobson states:

"Lastly, there is the influence of existing or potential competition of other producers upon monopoly prices. Where prices and profits are very high a Trust is liable to more effective competition on the part of any surviving independent firms, and likewise to the establishment of new competitors. This ability of outside capital to enter into competition will of course differ in different trades. Where the monopoly is protected by a tariff the possibility of new competition from outside is lessened. When the monopoly is connected with some natural advantage or the exclusive possession of some special convenience, as in mining or railways, direct competition of outsiders on equal terms is prohibited. Where the combination of large capital and capable administration is indispensable to the possibility of success in a rival producer, the power of a monopoly is stronger than where a small capital can produce upon fairly equal terms and compete. If the monopoly is linked closely with personal qualities and with special opportunities of knowledge, as in banking, it is most difficult for outside capital to compete effectively." (p. 233.)

There are also many nonmember manufacturers of maple, beech and birch flooring throughout the United States with a combined capacity much greater than that of the members of the present Association.

Competition between members and nonmembers and among the members themselves has always been active and vigorous.

For the evidence in support of the foregoing assertions, see pages 116-143, *supra*.

The defendants manufacture standardized products, which lowers manufacturing and marketing costs, and increases competition.

See pages 188-194, *supra*.

The statistics collected and distributed by the present Association are manifestly incomplete, not only with respect to the flooring industry, but with respect to the business of members.

The assertion of the District Court that the defendants' statistics cover "in minute detail every phase and feature of the Maple, Beech and Birch flooring industry as conducted by such members," (Vol. I, p. 57), is manifestly inaccurate.

No data are gathered with respect to any of the following matters:

- (a) Active and idle units or machines.
- (b) Employment conditions, such as number of wage earners on last pay roll by classes, average wages by classes, time employed, labor turnover, etc.
- (c) Geographical distribution of shipments.
- (d) Names of customers, or distribution by classes, such as brokers, contractors, wholesale or retail lumber dealers, etc.
- (e) Details with respect to new orders booked, such as names of customers, or geographical origin.
- (f) Details with respect to unfilled orders such as names of customers, or geographical origin.
- (g) Names of members having surpluses or stocks on hand. (Only the aggregate stock on hand is shown.)
- (h) Rough lumber on hand, grades, when purchased or produced, cost of production or purchase price, etc.
- (i) Cancellations of contracts or orders.
- (j) Prices quoted, or to whom.

The statistics do not cover the entire industry, for the reason that there are so many nonmember manufacturers.

The price data contained in the Secretary's Weekly Sales Reports are stale by the time such reports are received by the members. (Pages 322-335, *supra*.)

Knowledge of the quantity of flooring moved, of the amount of stock on hand, and of unfilled orders, enables members to produce larger percentages of the grades that are oversold. This is an advantage to the public. (Pages 327, 330, *supra*.)

There is no magic in business statistics. Like other data presented to one's consciousness they must be correctly evaluated and interpreted. What inferences will be drawn from any data depends upon *past experience and present needs*. Even if one draw correct inferences from statistics, ability to shape one's course accordingly might not exist.

As compared with the total stock of economic phenomena the fragmentary statistics distributed by the defendant Association are infinitesimal, in both number and significance. They are the smallest of straws; and who by regarding only them can prophesy whence, when or whither the economic winds may blow?

Other barometers used by bankers and business men are:

I. Buildings and real estate: (1) including all new building and fire losses.

II. Bank clearings: (2) total bank clearings, (3) bank clearings excluding New York.

III. Business failures: (4) failures, by number, amount of liabilities, and percentages of failures to number of firms in business.

IV. Labor conditions: (5) immigration figures.

V. Money conditions; (6) money in circulation, (7) comptroller's reports, (8) loans of the banks,

(9) cash held by the banks, (10) deposits of banks, (11) surplus reserve of banks.

VI. Foreign trade; (12) imports, (13) exports, (14) balance of trade.

VII. Gold movements: (15) gold exports and imports, (16) domestic and foreign exchange and money rates.

VIII. Commodity prices: (17) production of gold, (18) commodity prices.

IX. Investment market: (19) stock exchange transactions, (20) new securities.

X. Condition of crops: (21) crop conditions and production of other commodities.

XI. Railroad earnings: (22) gross and net earnings, (23) idle-car figures, (24) miscellaneous.

XII. Social conditions: (25) political factors." (Marshall's *Readings in Industrial Society*, p. 514.—adaptation of Babson's "Barometric Indices of the Conditions of Trade.")

The defendants, like most other manufacturers, also get the trade papers, reports from salesmen, representatives, brokers, dealers, customers, etc., etc. One's own stock conditions, financial needs, and a thousand and one other factors, both objective and subjective, determine one's course. Modern business is exceedingly complex. And to attribute any decisive effect to the statistics distributed by the defendant Association is to take an exceedingly simple view of a very complex matter.

Furthermore, the statistics gathered by the defendant Association are (a) published in trade journals (which are read by the persons who purchase 90 to 95 per cent of the flooring produced by Association members), (b) sent to the Department of Commerce (which publishes monthly a *Survey of Current Business*), (c) forwarded

to the Federal Reserve and other banks, and (d) available at any time to anyone desiring them.

Mr. George W. Keehn offered in behalf of the defendants to pay for the publication of the statistics in any paper that the Court might direct.

The lumber dealers and brokers who buy outright or handle 90 to 95 per cent of the flooring produced by Association members are in constant contact with contractors and other consumers, as well with flooring manufacturers, both members and nonmembers. It is an easy matter for them to circularize all flooring manufacturers and to play one against the other. Members sell flooring almost exclusively to dealers in lumber and brokers. In Marshall's *Readings in Industrial Society*, pp. 833 et seq. appears the following adaptation of pages 662 et seq. of *Industrial Democracy* by Sidney and Beatrice Webb:

"Paradoxical as it may appear, in the highly developed commercial custom of the England of to-day the capitalist manufacturer stands at as great a relative disadvantage to the wholesale trader as the isolated workman does to the capitalist manufacturer. First, we have the fact that the manufacturer stands to lose more by failing to sell his product with absolute regularity than the wholesale trader does by temporarily abstaining from buying. To the manufacturer, with his capital locked up in mills and plant, continuity of employment is all-important. To the wholesale trader, on the other hand, it is comparatively a small matter that his stocks run low for a short time. His unemployed working-capital is, at worst, gaining deposit interest at the bank, and all he foregoes is a fraction of his profits for the year. Moreover, as the wholesale trader makes his income by a tiny profit per cent on a huge turnover, any particular transaction is comparatively unimportant to him. The manufacturer, earning a relatively large percentage on a small turnover, is much more concerned about each part of it." The disparity is no less

great with regard to that knowledge of the market which is invaluable in bargaining. The manufacturer, even if he has a resident agent at the chief commercial center, can never aspire to anything like the wide outlook over all the world; and the network of communications from retail traders and shipping agents in every town, which make up the business organization of the wholesale trader.

Thus, when the manufacturer negotiates for an order, he is, within certain undefined limits, at the mercy of the wholesale trader. He is told that the price of his product is too high to attract customers; that the shopkeepers find no demand for it; that foreign producers are daily encroaching on the neutral markets; and, finally, that there has just come an offer from a rival manufacturer to supply the same kind of article at a lower price. The manufacturer may doubt these statements, but he has no means of disproving them. He is keenly alive to the fact that his brother manufacturers are as eager as he is to get the order, and some of them, he knows, are always striving to undercut prices. Unless he is a man of substance, able to wait for more profitable orders, or unless his product is a specialty of his own, which no one else makes, he is almost certain to be tempted, rather than lose the business, to accept a lower offer than he meant to. The price he has accepted can only work out in a profit by some lowering of the cost of production."

The proof shows that lumber dealers and brokers employ these methods against the defendants. (Pages 148-157, *supra*.) They also take the trade papers, and have access to all the statistics gathered by the defendants.

In view of all these facts what possible harm can result from the collection and distribution of fragmentary statistics by the defendants? The buyers testified to the existence of active competition among the defendants, and that they preferred to deal with Association members.

The District Court's assertion that since the spring of 1922 the statistics "have been more voluminous and in greater detail than ever before," (Vol. I, p. 57), is inaccurate. The statistics gathered have varied from time to time. The charts constructed by the statisticians and economists are graphic representations of statistics collected both before and subsequent to 1922. See also the Appendices in the volume accompanying this brief. So long as the statistics are given to both the buyer and the seller the more voluminous they are the better.

THE NECESSITY FOR BUSINESS STATISTICS.

No one who believes in *free competition* can possibly have any valid objection to the collection and distribution of business statistics by a group of manufacturers, provided such statistics are available to the general public. A believer in liberty might, with as much reason, object to constitutional safeguards. One believing in education might as justifiably object to the endowment of schools and institutions for scientific research, the establishment of universities and colleges and primary schools.

What does the phrase *free competition*, which is so glibly used, really mean? Upon what fundamental assumptions does it rest?

Roughly, *free competition* means a free and open market, fair competition, and a knowledge of all essential facts by both buyers and sellers. Anything which tends to produce such conditions is highly desirable.

In Marshall's *Readings in Industrial Society*, pages 294-6, appears the following excerpt from H. B. Reed's

"The Combination versus the Consumer" published in the *International Journal of Ethics*, XXIII, pp. 159-69:

"The soundness of the argument for the natural and automatic justice resulting from the competitive system depends altogether upon the truth of the underlying assumptions, namely, *those of fair competition and an open and free market. With reference to the open market it assumes a free flux and change of all the factors of industry.* If the laborer is engaged in an industry in which there is an over-production, he is free either to withdraw or to change to an industry in which there is a scarcity of production. Similarly, the capitalist can either shut down his plant or take up another line of manufacturing, and the landowner can either withdraw his land or begin growing crops in which production is scarce. That is to say, a laborer is free to stop coal-mining and promptly begin work either as a baker or as an engineer or as a skilled mechanic in a steel plant. The rolling mills in steel could stop turning out steel rails and begin the manufacture of shoes or lumber."

Not only is such a perfect flux required to make the system always yield natural prices; there must be also a pre-knowledge of the conditions and factors that bring about changes in the market price. For example, if, during the next year, there were going to be a dry season in Western Canada and a favorable season in Southern Russia, the Russians, in order to avoid scarcity in the wheat market, would have to know this fact and bring a greater number of fields under cultivation, and the Canadians would have to know it so as to avoid an oversupply of labor and a useless putting out of crops. The oversupply of labor in Canada would either have to move to Russia or find employment in other industries in which there would be a scarcity of production. In fact, nothing short of an absolute knowledge of the world would satisfy the necessary conditions.

It is well known that this mobility with respect to industry does not exist. There is an element of permanency to be considered. In the laborer it is habit; in the capitalist, the fixity of machinery; and in

land, the nature of the soil in the relation to the seasons of the year. The laborer cannot change and train his habits for a new trade and in the meantime support his family; nor is he free to withdraw his labor, for he usually has no surplus. The capitalist cannot shut down his plant for a very long time without infringing upon his dividends and credit. Nor can the landowner usually forego his rent without some injury or failure in his business relations. So far, then, as there is permanency in any of the factors of industry, the natural or fair price in an open competitive market will not be obtained.

In this view, then, the assumption of the free mobility of the factors of industry is taken with too much extravagance and in so far invalidates the natural and automatic justice of the competitive system. There is an equal extravagance with regard to the assumption of fair competition. For competitors, *fair competition obtains when the rules and opportunities under which they operate apply equally to all.* It is not so important what the rules are as it is to have them affect all alike. There are many ways in which this condition is violated."

Professor Marshall himself says:

"One illustration will suffice. Under simple industry there grew up a faith in 'free' competition as an efficient organizing force for industrial society. *Free competition involves, among other things, adequate knowledge of the essential facts by all interested parties, and mobility with respect to productive forces.* Under simple industry these conditions obtained. Men could ascertain essential facts; furthermore, it was easy to abandon an unprofitable line of activity and easy to take up a new one. Under complex industry, however, adequate knowledge and mobility of productive forces are not readily secured; consequently the conditions which would render competition efficient as a universal regulator no longer obtain in large sections of industry. None the less there still rests firmly in the minds of the general public, and, as a result, in the minds of most of our legislators, the conviction that competition is under

all circumstances 'the life of trade.' Accordingly, much of our legislation (witness the Interstate Commerce Act and almost all of our trust legislation) proceeds calmly on the assumption that most matters may wisely be left to 'free' competition. It is, of course, true that competition still has very important functions and possibly an increasing range of functions to perform in our industrial society. Little is gained, however, by attempting to apply eighteenth-century philosophy concerning competition to twentieth-century conditions." (p. 419.)

On pages 935-6 appears the following adaptation of pages 145-54 of Bascom's *Social Theory*:

"An open market is the presupposition of competition. Competition, as a wholesome law, means no more than the adjustment of the terms of production and of exchange to each other over a certain area, so that each shall have the advantage and render the service that, from the nature of the case, belong to it. Competition does not create the productive forces, but assigns their relation in reference to each other. The accidents of trade and the tricks of trade and the combinations of trade, which prevent a genuine expression of the facts involved, constitute no part of competition as an economic law, any more than a lie is a constituent of the narrative in which it is embodied. A productive territory, fully represented, is the essential notion of a market. Any limitation is so far a loss of a market. If bad weather prevents the usual attendance in the public square of a city of those who supply it with vegetables, the market, to that degree, fails. If bad roads render this light attendance frequent, the economic forces involved are correspondingly straightened. Competition alone does not suffice to cure the evil. The broader conditions of civilization which enclose it are at fault, and demand correction. As a matter of fact, there are comparatively few complete markets. We are constantly therefore, giving an ideal completeness to the law of competition, which does not belong to it. It would possess this perfection only if the way had been perfectly prepared for it.

If we wish competition to become an adequate and beneficent force, we must intermeddle with it; we must provide the suitable conditions under which it takes full effect.

Not only is any given market seldom adequate; it is seldom open. By an open market we understand one that gives free admission to all economic forces, and excludes all others. Deception and restriction of all sorts set aside considerations which should guide purchase and sale, or introduce considerations which are not pertinent to them. The open market discloses the facts in the case, and leaves the adjustment of prices to them. Competition which conceals or distorts the facts is no more a law of production than are theft and violence."

In Hobson's *The Evolution of Modern Capitalism*, pages 403-5, it is said:

"So far as the waste of economic maladjustment consists in the excessive or defective application of various kinds of productive force at different points of industry, upon the existing basis of individual initiative and control, the reforms which are desirable must be considered as contributing to the more complete establishment of 'free' competition in industry.

The complete breakdown of all barriers which impede the free flow of commerce and the migration of capital and labour, the fullest and widest dissemination of industrial information, are necessary to the attainment of the individualistic ideal of free trade. Perfect transparency of industrial operations, perfect fluidity of labour and of wealth would effect incalculably great economies in the production of commercial wealth. The free-trader, in his concentration upon the achievement of the latter economy, has generally failed to do full justice to the importance of the former. He has indeed to some limited extent recognized the value of accurate and extended industrial information as to the intellectual basis of free trade. But, in common with most economists, he has failed to carry this consideration

far enough. It is generally admitted that the increased publication of accounts and quotations of stock, springing out of the extension of joint-stock enterprise, the growth of numerous trade journals, the collection and dissemination of industrial facts by government bureaus and private statisticians, are serviceable in many ways. But the extreme repugnance which is shown towards all endeavors to extend the compulsory powers of acquiring information by the state, the extreme jealousy with which the rights of private information are maintained, show how inadequately the true character of modern industry is grasped. In the complexity of modern commerce it should be recognized that there is no such thing as a 'self-regarding' or a private action. No fact bearing on prices, wages, profits, methods of production, etc., merely concerns a single firm or a single body of workers. Every industrial action, however detailed in character, however secretly conducted, has a public import, and necessarily affects the actions and interests of innumerable persons. Indeed it is often precisely in the knowledge of those matters regarded as most private, and most carefully secreted, that the public interest chiefly lies. Yet so firmly rooted in the business mind is the individualistic conception of industry, that any idea of a public development, of those important private facts upon which the credit of a particular firm is based, would appear to destroy the very foundation of the commercial fabric. But, although in the game of commerce a single firm which played its hand openly while others kept their well concealed might suffer failure, it is quite evident that the whole community interested in the game would gain immensely if all the hands were on the table. Many, if not most, of the great disasters of modern commercial societies are attributable precisely to the fact that the credit of great business firms, which is pre-eminently an affair of public interest, is regarded as purely private before the crash. As industry grows more and more complex, so the interest of the public and of an ever-wider public in every industrial action grows apace, and a correspondingly growing recognition of this public interest, with provision for

its security, will be found necessary. So far as the natural changes of industrial structure in the private business fail to provide the requisite publicity, the exercise of direct public scrutiny must come to be enforced. The reluctance shown alike by bodies of employers and of workers to divulge material facts is in large measure due to the false ideas they have conceived as to the nature of industrial activity, which education can do something to remove, but which, if not removed, must be overruled in the public interest."

In Marshall's *Readings in Industrial Society*, p. 498, appears the following adaptation of pages 427 et seq. of Professor Irving Fisher's *Elementary Principles of Economics*:

"Uncertainty being regarded as an evil by practically all normal persons, there is a constant effort to avoid or reduce uncertainties. This may be accomplished in various ways, of which the following are important: (1) by increasing their knowledge of the future; (2) by employing safeguards against mischances; (3) by insurance; (4) by speculative contracts, especially 'hedging.' We shall take these up in order:

1. Risk, being simply an expression for human ignorance, decreases with the progress of knowledge. The chief lines of progress in industry at the present time may be said to be those which tend to lift the veil which hides the future. Countless trade journals exist principally to enable their readers to forecast the future more accurately than they otherwise could. This the journals accomplish by supplying data as to past and present conditions as well as by instructing their readers in the relations of cause and effect. Our government weather bureau supplies weather forecasts which somewhat reduce this form of uncertainty for the farmers. Government reports of crop conditions and information as to diseases of plants and animals are more important influences in the same direction."

The collection and distribution of business statistics tends to provide "*the suitable conditions*" under which "*free competition*" takes full effect. It tends to reduce the hazards of capitalist production. Some of these hazards have been mentioned on pages 235-243, *supra*. Hobson well states another factor:

"Modern methods of production have also brought about a great expansion in the time-area of the market. Competition covers a wider range of time as well as of space. Production is no longer directed by the quantity and quality of present needs alone, but is more and more dependent upon calculation of future consumption. A larger proportion of the brain power of the business man is devoted to forecasting future conditions of the market, and a larger proportion of the mechanical and human labour to providing future goods to meet calculated demands. This expansion of the time-market, or growth of speculative production, is partly cause, partly effect of the improved mechanical appliances in manufacture and in transport. The multiplication of productive power under the new machinery has in many branches of industry far outstripped the requirements of present known consumption at remunerative prices, while increased knowledge of the widening market has given a basis of calculation which leads manufacturers to utilize their spare productive power in providing against future wants. So long as industry was limited by the labour of the human body, assisted but slightly by natural forces and working with simple tools, the output of productive energy could seldom outstrip the present demand for consumable goods.

But machinery has changed all this. Modern industrial nations are able to produce consumables far faster than those who have the power to consume them are willing to exercise it. Hence there is an ever-increasing margin of productive power redundant so far as the production of present consumptive goods is concerned. This excess of productive power is saved. It can only be saved by being stored up in some material forms which are required not for

to direct consumption but for assisting to increase the rate at which consumables may be produced in the future. In order to make a place for these new forms of saving it is necessary to interpose a constantly increasing number of mechanical processes between the earliest extractive process which removes the raw material from the earth and the final or retailing process which places it in the consumer's hands. New machinery, more elaborate and costly, is applied; special workshops, with machines to make this machinery—other machinery to make these machines; there is an expansion of the mechanism of credit, the system of agents and representatives is expanded, new modes of advertising are adopted. Thus an ever-widening field of investment is provided for the spare energy of machine-production. The change is commonly described by saying that production is more 'roundabout.' A larger number of steps are inserted in the ladder of production. This increased complexity in the mechanism of production is not, however, the central point of importance. We must realize that the change is one which is essentially an increase in the 'speculative' character of commerce. The 'roundabout' method of production signifies a continual increase in the proportion of productive forces devoted to making 'future goods' as compared with those devoted to making 'present goods.' Now future goods, plant, machinery, raw material of commodities, are essentially 'contingent goods': their worth or waste depends largely upon conditions yet unborn: their social utility and the value based upon it depend entirely upon the future powers and desires of those unknown persons who are expected to purchase and consume the commodities which shall come into existence as results of the existence and activity of these future goods.

The actual time which elapses between the extractive stage and the final retail stage of a commodity may not be greater and is in many cases far less under the new methods of industry. The raw cotton of South Carolina gets on the wearer's back more quickly than it did a century and a half ago. But when we add in the time-elements involved in the

provision of the various forms of intricate plant and machinery whose utility entirely consists in forwarding these cotton goods, and whose existence in the industrial mechanism depends upon them, we shall perceive that the 'roundabout' method signifies a great extension of the speculative or time-element in the market." (*Evolution of Modern Capitalism*, pp. 148-50.)

And again:

"In a word, while it is the interest of each producer of machine-made goods to give regular employment, some wider industrial force compels him to irregularity. What is this force? It is uncontrolled machinery. In the several units of machine-production, the individual factories or mills, we have admirable order and accurate adjustment of parts; in the aggregate of machine-production we have no organization, but a chaos of haphazard speculation. 'Industry has not yet adapted itself to the changes in the environment produced by machinery.' That is all.

Under a monetary system of commerce, though commodities still exchange for commodities, it is an essential condition of that exchange that those who possess purchasing power shall be willing to use a sufficient proportion of it to demand consumptive goods. Otherwise the production of productive goods is stimulated unduly while the demand for consumptive goods is checked,—the condition which the business man rightly regards as over-supply of the material forms of capital. *When production was slower, markets narrower, credit less developed, there was less danger of this big miscalculation, and the corrective forces of industry were more speedily effective. But modern machinery has enormously expanded the size of markets, the scale of competition, the complexity of demand, and production is no longer for a small, local, present demand, but for a large, world, future demand. Hence machinery is the direct material cause of these great fluctuations*

which bring, as their most evil consequence, irregularity of wages and employment." (p. 329.)

See also: *Principles of Economics*, (Vol. I) pp. 391-7.

Taussig's *Principles of Economics*, (Vol. I) pp. 391-7.

Marshall's *Readings in Industrial Society*, p. 479.

In order to produce flooring trees have to be felled in the forest, trimmed and sawed to proper lengths; then the logs have to be transported to the saw mills where the rough lumber is made. The rough lumber must be air-dried, which takes from 9 to 18 months. Then it must be kiln dried, etc. (Pages 38-40, *supra*.)

Moreover, flooring must be produced and stored in large quantities in advance of sale. And the demand for flooring is largely seasonal. As said by Professor Taussig:

"Among individual industries, some seem to be more than others in danger of occasional, even of recurrent, over-production; that is, of such large output that they must sell at a loss. Industries of a familiar kind, which use a very large plant, seem to be in this case; especially if they are subject to seasonal irregularities of demand." (*Principles of Economics*, (Vol. 2), p. 52.)

COLLECTION AND DISTRIBUTION OF STATISTICS BY TRADE ASSOCIATIONS. RECOGNITION OF IMPORTANCE BY GOVERNMENT.

In *Trade Association Activities*, issued by the Department of Commerce (page 243, *supra*), it is said:

"Trade associations have been collecting production statistics of one kind or another with increasing momentum for over 60 years." (p. 12.)⁶²

In *Trade Association Activities and the Law*, by Franklin D. Jones, it is said:

"An investigation by the Federal Trade Commission shows 474 associations, or more than thirty per cent of the associations reporting to the Commission, to be compiling and distributing trade statistics." (p. 44.)

The same investigation also disclosed that 150 associations were distributing price information. (p. 60.)

In Chapter I of *Trade Association Activities*, (issued by the Department of Commerce) it is said:

"The Department of Commerce is charged with the promotion and development of trade and industry. To properly fulfill these duties it is necessary for it to have adequate current information as to the exact state of commerce and industry, and the Secretary of Commerce is empowered to collect from time to time such figures as he deems essential.

Early in 1921 the department organized a division in the Bureau of the Census for the systematic collection and presentation of such current figures. In doing this the department attempted to make use of

⁶²Chapter 1, p. 12, written by Richard A. May, of the Bureau of Foreign and Domestic Commerce, and Frank M. Surface, of the Bureau of the Census. (AS-TC 111) 11-2-21

current information so far as this was already available in a satisfactory form from trade associations, technical journals, and other commercial sources, as well as that compiled by Government departments.

The results of this work proved so useful to the executive officers of the Government that it was decided to publish the figures for the benefit of business men. The results are embodied in the monthly 'Survey of Current Business.' *More than 100 trade associations are actively cooperating with this department by furnishing their statistics for publication in this bulletin.*

The department believes that through such active cooperation with trade associations more satisfactory results will be obtained than could be done if the department attempted to collect all the information itself. Where no association or other figures are available the department has collected such data as seemed essential. In other instances the Bureau of the Census has supplemented the reports from associations by securing data from nonmember firms and adding these to the association totals. The results of this form of cooperation have proved very satisfactory from the standpoint of the department as well as that of the cooperating association. * * *

*Again, it must always be borne in mind that the abuse of statistics, whether they relate to production, stocks, orders, prices, or other movements, lies not in the knowledge of the actual figures but in the improper use made of that knowledge through concentrated action. * * * Current business statistics, if they are to be of value in guiding business judgment, must be distributed promptly. The Department of Commerce does not possess the necessary organization nor the funds to enable it to insure such prompt dissemination of association statistics as the business of the country demands. In order to overcome this difficulty and at the same time insure wide publicity to current statistics, considerable attention has been devoted to working out the details of a practical plan whereby this department might cooperate with associations in the distribution of statistics." (pp. 27-29.)*

And again:

"Statistical data, properly prepared and properly presented, supply a very necessary insight into the business facts of the day. Someone has said, 'Statistics are as necessary to the navigator on the sea of business as are the compass, sextant, and barometer to the mariner on the high seas.' Statistics present a perspective of the past, whereby a vision of the future is obtained, and are a means of gauging market requirements, a guiding hand to intelligent competition, and thus of immeasurable value to industry and trade and to the public in general. *Statistics, however, offer no royal road to business success. Their greatest and only real value is obtained by individuals properly qualified to interpret their real significance through indicated surface or long-time tendencies. They therefore offer only one additional basis, yet a very fundamental one, in reasoning regarding economic tendencies.*" (p. 9.)

In the same volume Mr. Secretary Hoover states:

"Most trade associations have evidenced active interest at some time or other in the collection, compilation, preparation, and dissemination of statistical material relative to their industries or trades. They have been considered with particular emphasis as to production, stocks, shipments, or cancellations. Sometimes the greatest desire has been for data regarding prices and orders. Statistical activity by trade associations has legal limitations. However, there is no question but that the curves in the business cycle from activity to depression have been less disastrous in those industries or trades where accurate, lawful statistical data have been available to all. Fundamentally it is impossible for business men to form those vital judgments as to their future course of action in the wise and safe direction of their activities unless they are informed as to the changing currents of production and consumption, not only in their own lines but also in other lines of business, which indicate broader currents of economic life. *The only criteria are statistics, and if industry is to march with reasonable profits instead of*

undergoing fits of famine and feast, if employment is to be held constant and not subjected to vast waves of hardship, there must be adequate statistical service. Whether these services are to be maintained by the Government or by trade associations, they must be maintained if we are to have an orderly economic life. To the trade associations are due the vast majority of our statistical services, and if they be conducted alike for the benefit of the producer and consumer they are constructive." (p. 3.)

For a detailed statement of the activities of the Federal Government in the compilation and distribution of statistics, see volume last cited, Chapter XV, pp. 216-270.

PREVIOUS DECISIONS OF THIS COURT DISTINGUISHED.

The District Court was of the opinion that the decision rendered in

American Column & Lumber Co. v. United States, 257 U. S. 377,

was decisive of the case at bar. This court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record.

A mere statement of the essential facts in both the *American Column* case and the case at bar is all that is necessary to demonstrate that the decision in the former case is wholly inapplicable to the latter.

PLEADINGS.

In the *American Column* case it was alleged that the defendants' "Plan" constituted a combination and conspiracy to restrain interstate commerce in hardwood lumber by restricting competition "and maintaining and

increasing prices." (p. 39.) In the case at bar the Government does not allege that the defendants' plan increased prices. What the Government complains of is that there existed among the defendants *a practical uniformity of both f. o. b. selling prices and net delivered prices.* In the *American Column* case the Government proved the essential allegations of the petition, whereas in the case at bar, the Government admitted at the hearing that the alleged uniformity of prices did not exist.

PLANS.

In the *American Column* case the members of the Plan were required to make

"1. A *daily* report of all sales actually made, with the *name and address of the purchaser*, the kind, grade and quality of lumber sold and all special agreements of every kind, verbal or written with respect thereto. These reports are to be exact copies of orders taken." (p. 394.)

In the case at bar the evidence shows that *no daily* reports are made by members. In the *weekly* sales reports *the name and the address of the purchaser are not given, and there is no means of otherwise obtaining such information.* No copies of contracts or orders are required in the case at bar. (Pages 306-7, 310-311, *supra.*)

In the *American Column* case the defendants were required to make

"2. A *daily* shipping report, with exact copies of the invoices, all special agreements as to terms, grade, etc." (p. 395.)

In the case at bar, the evidence shows that only *monthly* shipping reports are made by members, and that these reports contain only "the amount in feet of

shipments made during the previous month of Maple, Beech and Birch flooring'' *without giving grades, thicknesses, widths, names of customers, destination, terms of sale, or copies of invoices.* (Page 304, *supra.*)

In the *American Column* case members were required to make

"3. A monthly production report, showing the production of the member reporting during the previous month, with the grades and thicknesses classified as prescribed in the 'Plan.' " (p. 395.)

The evidence in the case at bar shows that members make a monthly production report of the quantity of feet of each *grade of each wood* produced during the previous month *without further detail.* (Pages 304-5, *supra.*)

The monthly stock report made by members of the "Plan" described in the *American Column* case (p. 395) is substantially the same as the monthly report of Stocks on Hand made by members of the defendant Association. (Page 304, *supra.*)

In the *American Column* case members were required to make

"5. Price-lists. Members must file at the beginning of each month price-lists showing prices f. o. b. shipping point, which shall be stated. New prices must be filed with the Association as soon as made." (p. 395.)

In the case at bar no price lists whatsoever are either filed or required to be filed with the Secretary. (Vol. I, pp. 173, 213, 308, 335, and pages 303-4, *supra.*)

As Hon. Nelson B. Gaskill, of the Federal Trade Commission, has well said:

"Yet such statistics, [statistics of production,

stocks, and *sales prices*] can be collected, tabulated and distributed without taking on the significance of unlawful intent or without producing an unlawful result. * * *

Careful distinction must be drawn between this operation and the Eddy 'open-price' association. Nothing in this discussion has any relation to the 'open-price' plan.

Knowledge of prices at which sales have been consummated is one thing. Exchange of prices proposed to be quoted is quite a different matter. One is the record of a fact which affords an essential factor in the equipment of an individual to deal competitively. The other is a submission of plans which almost certainly results in unanimity of action or agreement in effect if not in form." (Chapter II, *Legal Aspects of Statistics*, p. 42, in *Trade Association Activities*, issued by the Department of Commerce.)

In the *American Column* case members were required to make

"6. Inspection reports. These reports are to be made to the association by a service of its own, established for the purpose of checking up grades of the various members and the 'Plan' provides for a chief inspector and sufficient assistants to inspect the stocks of all members from time to time.

The declared purpose of the inspection service is not to change any member's grading except with his consent, but to furnish each member a basis on which he can compare his prices with those of other members, thereby making all members' reports more intelligible and accurate." (p. 395.)

In the case at bar the evidence shows that the flooring manufactured by members is standardized; also that the information as to prices is stale by the time it is received.

In the *American Column* case

"all these reports by members are subject to complete audit by representatives of the association.

Any member who fails to report shall not receive the reports of the secretary, and failure to report for twelve days in six months shall cause the member failing to be dropped from membership."

Reports of members of the defendant Association are not subject to audit, and no such audits have ever been made since the organization of the present Association. (Page 313, *supra*.) There are no penalties of any kind for failure to make reports, and all reports are always sent to all members by the secretary, except that weekly sales reports are sometimes withheld from nonreporting members. (Pages 313, 307-8, *supra*.)

In the *American Column* case the Secretary was required to send to members reports which corresponded with the reports received from members.⁶³ It is necessary to take up only one or two of such reports.

(a) . . . "A weekly report, not later than Saturday, of all sales, to and including the preceding Tuesday, giving each sale and the price, and the name of the purchaser." (p. 396.)

The weekly sales reports of the defendant Association are not sent out by the Secretary until Wednesday or Thursday of the following week. Many of the sales reported result from quotations made a week to four weeks previously. (Pages 322-335, *supra*.) The evidence is undisputed that the information as to prices is stale by the time it is received by members, who receive price information daily from traveling salesmen, representatives, customers, brokers, and other sources. (Pages 319-335,

⁶³And of course, the Secretary of the defendant Association is also required to send to members reports that correspond to reports received by him from members. However, the identity of members making sales or having stocks on hand, etc., is not now disclosed by the Secretary. (Pages 308-9, *supra*.)

supra.) The names of neither sellers nor buyers are contained in the weekly sales reports. (Pages 306-7, 310-311, *supra.*)

No weekly shipment report is made by the Secretary of the defendant Association; and in the monthly shipment report the identity of members making shipments is not disclosed. (Pages 304, 308-9, *supra.*) Neither is the identity of members now disclosed in the monthly Stocks on Hand report, or in any other report whatsoever. (Pages 304, 308-9, *supra.*)

In the *American Column* case the Secretary was required to send out

"6. A market report letter * * * to each member, of the Association (whether participating in the 'Plan' or not) pointing 'out changes in conditions both in the producing and consuming sections, giving a comparison of production and sales and in general an analysis of the market conditions.' " (p. 396.)

Since the organization of the present Association no such reports have ever been sent out by either the Secretary or any committee or officer or member of the Association. Each member must draw his own conclusions from the statistics received by him. (Pages 310-313, 372-4, *supra.*)

In the *American Column* case the "Plan" provided for monthly meetings for the discussion "of all subjects to the interest of members." (pp. 396-7.) In actual practice the Southwestern territory was divided into four districts, and approximately weekly meetings were held. (p. 397.)

In the case at bar the evidence is undisputed that at the monthly meetings of the defendant Association future prices for maple, beech or birch flooring were never discussed. (pp. 231-33, *supra.*)

In the *American Column* case the proof showed:

"*Second.* Before each of these meetings a questionnaire was sent out to the members, and from the replies received, supplementing the other reports, the statistician compiled an estimate of the condition of the market, actual and prospective, which was distributed to the members attending each meeting, and was mailed to those not present. There were eleven questions on this list of which the most important were:

'4th. What was your total production of hardwoods during the last month? What do you estimate your production will probably be for the next two months?'

'10th. Do you expect to shut down within the next few months on account of shortage of logs or for any other reason? If so, please state how long mill will be idle?'

'11th. What is your view of market conditions for the next few months? What is the general outlook for business? State all reasons for your conclusions.'

The 'Plan' on paper provided only for reports of past transactions and much is made of this in the record and in argument—that reporting to one another past transactions cannot fix prices for the future. But each of these three questions plainly invited an estimate and discussion of future market conditions by each member, and a coordination of them by an expert analyst could readily evolve an attractive basis for cooperative, even if unexpressed, 'harmony' with respect to future prices." (pp. 397-8.)

Before the monthly meeting of the defendant Association members were asked to report amount in feet of Shipments, Production and New Business up to a day or two preceding the date of the meeting. (Pages 311-313, *supra*, and Vol. IV, p. 457.) The Secretary then computed what the Shipments, Production and New Orders

would be if conditions remained the same for the balance of the month, and compared the (computed) results with the actual figures for the previous month. For instance, from reports (received from 14 members) covering the first 13 days of February, 1923, it was estimated that Shipments would be about 26 per cent less; Production about 21 per cent less and New Orders about 41 per cent less than they were for January, 1923, "if the business during the remainder of February averages about the same as the first 13 days and if the trade experiences of the other 8 members are about the same." (Vol. IV, p. 488.) Such estimate added nothing substantial to the weekly and monthly reports already in the possession of members. They differ materially from the reports in the *American Column* case. In the case at bar members reported only past transactions.

In actual practice the "Plan" in the *American Column* case was also modified as follows:

"Third. The 'Plan' provided for a monthly 'market report letter' to go to all members of the association. In practice this market report letter was prepared by F. R. Gadd, Manager of Statistics, but his review of the market and forecast for the future were contained, almost from the beginning, not only in these market letters but also in the weekly sales reports, so that they were sent out to all of the members nineteen times between February 1 and December 6, 1919, and they were discussed at all but one or two of the forty-nine meetings which were held. All the activities of the 'Plan' plainly culminated in the counsels contained in these letters and reports." (p. 398.)

In the case at bar, the evidence is undisputed that since the organization of the present association the Secretary's reports consist merely of the statistics without comment, analysis, interpretation or recommendation. (Pages 310-313, *supra*.)

Concerning the "Plan" in the *American Column* case, this Court said:

"This elaborate plan for the interchange of reports does not simply supply to each member the amount of stock held, the sales made and the prices received, by every other member of the group, thereby furnishing the data for judging the market, on the basis of supply and demand and current prices. It goes much farther. It not only furnishes such information, with respect to stock, sales and prices, but also reports, giving the views of each member as to 'market conditions for the next few months'; what the production of each will be for the next 'two months'; frequent analyses of the reports by an expert, with, we shall see, significant suggestions as to both future prices and production; and opportunities for future meetings for the interchange of views, which the record shows were very important. It is plain that the only element lacking in this scheme to make it a familiar type of the competition suppressing organization is a definite agreement as to production and prices." (pp. 398-9.)

In the case at bar only the past transactions are reported, and each member must draw his own conclusions.

The distinguished writer of the majority opinion then brought forth the *homo oeconomicus* of Adam Smith, (an animal that has never existed on land or sea since the beginning of the evolutionary process), and stated that the definite agreement was supplied

"by the disposition of men 'to follow their most intelligent competitors,' especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of 'harmony' of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are, financial interest, intimate

personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals." (p. 399.)

"The system of reports" in the case at bar informed with reasonable despatch each member of the prices at which other members had sold flooring. Yet the proof is undisputed that at all times the prices of members varied greatly. It therefore follows, either that the 'disposition' and the 'sanctions' above mentioned were not active or present in the case at bar, or else that conclusions based upon such a *naïf* psychology are untrustworthy. As a matter of fact the history of attempts at price-control by groups of manufacturers decisively shows that the theories of the learned justice above quoted are not supported by the facts. Certainly, universal validity cannot be claimed for them.⁶⁴

"Combinations, pools, and price agreements among manufacturers and dealers have been among the most common phenomena of modern industry. Almost invariably (unless bolstered up by some independent cause conducive to monopoly control) they have gone to pieces of themselves. The persons forming them have been both shortsighted and covetous. It has often been the case that all would have made larger gains if all had stuck to their restrictive agreements. But each has been desirous of increasing his own particular gains, and each has been suspicious of his associates. The usual result has been that price combinations are no sooner made than broken, with much lament that there is so little honor among these quasi-thieves. Even where the would-be monopolists have held together for a while, competition from outside has soon caused their compact to crumble away. Usually the outside competitors also have been covetous and shortsighted, failing to see that their own entrance into the field tended to destroy the very gains in which they were trying to share. The truth is that few men, in business or in other doings, look beyond the present and immediate future. Had they a more resolute and intelligent eye to ultimate results, the policy of letting people try at monopoly, but

It seems to us that whether in any case there is "a definite agreement as to production and prices" (apart from an express written agreement), cannot safely be determined by creating defendants in the image of *homo oeconomicus*. The facts shown by the record must determine the matter.

That the decision in the *American Column* case did not turn on the *a priori* reasoning above quoted is clear. The court continued thus:

"Obviously the organization of the defendants constitutes a combination and confessedly they are engaged in a large way in the transportation and sale of lumber in interstate commerce so that there remains for decision only the question whether the system of doing business adopted resulted in that direct and undue restraint of interstate commerce which is condemned by this Anti-Trust statute," (pp. 399-400.)

The court then proceeded to "consider what the record shows as to the purpose of this combination and as to its effect upon interstate commerce." (p. 401.)

"The record shows that the lumber market was inactive in the months of January and February and the first part of March of 1919. It grew better late

refusing legal sanction to their monopolistic agreements, would have proved much less effective."

Taussig's *Principles of Economics*, (3d ed. revised), Vol II, pp. 419-420.

And see pages 365-6, *supra*.

Long before the organization of the present Association the defendants had learned by experience the fundamental truths above stated. They therefore abandoned all attempts at price control.

And the proof shows that the defendants' plan for the collection and distribution of statistics among members and buyers has not caused either uniformity of prices, or unreasonable prices. The proof is undisputed that competition among the defendants is very active.

in March and progressively stronger until in July, when it became very active, with prices high; and so continued until the end of the year we are considering.

In the first quarter of the year the problem was to maintain the war prices then prevailing rather than to advance them, and although the minutes of the various meetings were kept in barest outline, we find that beginning within a month of the consolidation of the two associations, the members of the 'Plan' began actively to cooperate, through the meetings, to suppress competition by restricting production. This is very clearly shown by the excerpts following from the minutes of meetings and from the market letters and sales reports distributed at them." (p. 402.)

There is no such evidence in the case at bar concerning the present Association.

And again:

"Next, the record shows clearly that the members of the combination were not satisfied to secure, each for himself, the price which might be obtainable even as the result of cooperative restriction of production, but that throughout the year they assiduously cultivated, through the letters of Gadd, speaking for them all, and through the discussions at the meetings, the general conviction that higher and higher prices were obtainable and a disposition on the part of all to demand them. The intention to create such a common purpose is too clear to be doubted, evidenced as it is by the following excerpts from much of like character in the testimony." (pp. 404-405.)

There is no such evidence in the case at bar.

And again:

"But not only does the record thus show a persistent purpose to encourage members to unite in pressing for higher and higher prices, without re-

*regard to cost, but there are many admissions by members, not only that this was the purpose of the 'Plan,' but that it was fully realized. * * **

These quotations are sufficient to show beyond discussion that the purpose of the organization and especially of the frequent meetings was to bring about a concerted effort to *raise prices regardless of cost or merit*, and so was unlawful, and that the members were soon entirely satisfied that the 'Plan' was *'carrying out the purpose for which it was intended.'*

As to the price conditions during the year. Without going into detail the record shows that the prices of the grades of hardwood in most general use were increased to an unprecedented extent during the year. Thus, the increases in prices of varieties of oak, range from 33.3% to 296% during the year; of gum, 60% to 343%, and of ash, from 55% to 181%. While it is true that 1919 was a year of high and increasing prices generally and that wet weather may have restricted production to some extent, *we cannot but agree with the members of the 'Plan' themselves, as we have quoted them, and with the District Court in the conclusion that the united action of this large and influential membership of dealers contributed greatly to this extraordinary price increase.*" (pp. 407-9.)

In the *American Column* case the decision turned not upon the fact that statistics were collected and distributed, but upon the effect of the "Plan" and the conduct of the defendants. Both the purpose of the members and the effect of their activities were unlawful. The purpose was to limit production and to *"unite in pressing for higher and higher prices, without regard to cost."* That purpose was achieved.

In the case at bar there is no such evidence. The uniformity of prices charged by the Government never existed. The undisputed proof is that competition among members was strong, active and vigorous; that the

prices for flooring were fair and reasonable; that such prices were often below cost and usually below the prices of nonmembers; that the prices fluctuated in accordance with the laws of supply and demand, and in harmony with the prices for rough lumber; that each member determined his own prices, and that there was no limitation of production.

After basing the decision upon the *effect* of the "Plan" and the unlawful activities of the defendants, the writer of the majority opinion then indulged in some *a priori* reasoning as to what genuine competitors do and do not do. The District Court echoed the *dicta* in question:

"Business rivals do not disclose to each other the minute details of their transactions unless such disclosure is made for some ulterior and unworthy purpose." (Vol. I, p. 58.)

The learned court may be right, "and probably his methods are everything they should be; certainly I cannot go so far as to say that they are wrong: but still, at the same time—!"

Aristotle, Plato, Aquinas, Tertullian, S. Jerome, Augustine and many other wise and holy men were equally positive that buying and selling for the sake of profit is *base in itself, and a form of cheating; that in every bargain there is one that wrongfully gains at the expense of another, and that deceit and wrongdoing are inseparable from trade for profit.*

All the wise men above mentioned and many others were equally positive that to lend out money at interest is infamous.

Philosophy and Political Economy, by James Bonar, pp. 38, 22, 68, 61.
English Economic History and Theory, by Sir W. J. Ashley, pp. 128, 145.

Adam Smith was equally positive of the identity of private and public interests; that merchants are best left to follow their own gain without *any thought of the public welfare*, since an "*invisible hand*" *always overrules their selfishness for the common advantage*"¹⁶⁵.

History of Economic Doctrines, by Gide and Rist, pp. 89, 410.

Philosophy and Political Economy, by James Bonar, pp. 162-63.

Endless examples of erroneous settlement of complex questions by means of *a priori* reasoning or Johnsonian pronouncement might be given.

We may be wrong, but it seems to us that the *facts* as disclosed by the record in the case at bar are deserving of some consideration. Indeed, with all due respect to the learned District Court, it seems to us that his fear of statistics is not unlike the ancient popular fear of engrossing or forestalling, which Adam Smith has compared to "the popular terrors and suspicions of witchcraft." (*English Economic History and Theory*, (Ashley), p. 188.)

The particular "*Plan*" of the defendants in the *American Column* case was also condemned. (pp. 410-411.) The purpose of the minute regulation was to

"promptly expose to his associates any disposition of any member to deviate from the tacit understanding that all were to act together under the subtle"

¹⁶⁵Smith's equal positiveness that only four kinds of business enterprises could be conducted by joint-stock companies, because of the absence of personal interest, is known to every one.

History of Economic Doctrines, by Gide and Rist, p. 96

¹⁶⁶Without a misuse of terms can it be said that Mr. Gadd's direction was *subtle*? To us his hortatory letters (pp. 402-407) suggest the Reverend William A. Sunday or Mr. Bryan (W. J.), rather than Bergson or Anatole France.

direction of a single interpreter of their common purposes, as evidenced in the minute reports of what they had done and in their expressed purposes as to what they intended to do." (p. 411.)

In the case at bar there was no tacit understanding as to prices or production. There was no single interpreter. Furthermore, the reports in the case at bar showed that each member did just as he pleased. Therefore, all *a priori* reasoning as to the purpose of the defendants or as to the probable effect of their plan for the collection and distribution of statistics, is beside the case. There is an abundance of undisputed proof that in the case at bar interstate trade or commerce was *not* restrained at all.

Another important distinction between the *American Column* case and the case at bar was stated by the court as follows:

"In the presence of this record it is futile to argue that the purpose of the 'Plan' was simply to furnish those engaged in this industry with widely scattered units, the equivalent of such information as is contained in the newspaper and government publications with respect to the market for commodities sold on boards of trade or stock exchanges. *One distinguishing and sufficient difference is that the published reports go to both seller and buyer, but these reports go to the seller only; and another is that there is no skilled interpreter of the published reports, such as we have in this case, to insistently recommend harmony of action likely to prove profitable in proportion as it is unitedly pursued.*" (p. 411.)

In the case at bar **UNINTERPRETED** reports go to both **BUYER** and seller. (pp. 310-316, *supra*.)

In the last paragraph of the majority opinion the Court rested the decision not upon the ground that the collec-

tion and distribution of statistics are unlawful *per se*, but upon the purpose and effect of the "Plan" in that case. (pp. 411-412.)

American Linseed Oil Co. et al. v. United States,
262 U. S. 371.

In that case certain linseed crushers agreed with the Armstrong Bureau of Related Industries as follows:

1. That each crusher would
 "promptly make, have made, forward, and have sent in and to said bureau, as and in the form required by this agreement, full, accurate, complete, signed, and certified reports of all said sales, quotations, and offerings or other information required by the bureau and full, correct replies or answers to any and all inquiries concerning the same or seeking any information in regard thereto."
2. That all vouchers, books of account, correspondence, etc., were subject to inspection by the Bureau's auditor.
3. "That 'if any subscriber considers that it has good cause to question the report made by any other subscriber then it may request an investigation or audit to be made by the bureau and, if considered proper by the bureau, it will be so made,' the incident expense to be paid by the party found in error."
4. "That it will deposit with the Bureau not less than one thousand nor more than ten thousand dollars of Liberty Bonds, according to its milling capacity."
5. "That 'should the undersigned subscriber fail, in any manner whatsoever, to comply with any of the terms of this agreement or with any and all reasonable requirements of said bureau, then it shall and does hereby forfeit to said bureau, at its election, all money paid for services and all further benefits and rights under this agreement; which forfeiture, for just cause, may be declared by said bureau, evi-

denced by written notice thereof mailed to said offender by U. S. registered mail, and such subscriber shall thereby forfeit all further right, title, or interest in and to said bonds (so on deposit) in whole or in part,' subject to the right of appeal to a council, of three subscribers, which shall have power to review the entire matter, reinstate the offender or take such other final action as seems proper. No fine shall exceed the deposit with the Bureau."

6. "That it will (a) 'immediately, and when and as hereafter issued, deposit with the bureau *all public price lists* of the undersigned covering raw and boiled linseed oil, cake and meal; (b) also to report to the bureau by prepaid telegraph, and further confirm by mail, duplicate of all quotations made at variance with above price lists, giving better terms to the contemplated purchaser than those quoted; (c) with all reports made in compliance with the above paragraph 'b' of quotations which amount to one carload or more of oil, cake or meal there shall also be reported at the same time and in the same manner the prospective buyer's name, address, and f. o. b. point of shipment; (d) in so far as the above reports 'a,' 'b' and 'c' do not disclose the following, the undersigned 'subscriber' agrees to give the following information in connection therewith, that is: the exact prices, terms, and discounts—and whether made to the jobber, dealer, or consumer—and in what quantities, carload or less than carload, and warehouse or mill prices; (e) also to promptly report all changes in and alterations or withdrawals of the above, of every kind whatsoever, that may be made; (f) also to promptly report by prepaid telegraph, and further confirm by mail, all orders received by the undersigned subscriber in response to special quotations made as above provided in paragraph 'c,' designating the quotation which is the basis of such order and any variance therefrom.' "

7. "That 'directly at the close of each day's business each subscriber shall mail by special delivery to the bureau a complete report of all its carload

sales for that day of oil, cake or meal, not covered by its previous daily sales reports, which report shall disclose the quantity and kind, price and terms, and whether for immediate or future delivery, and if no sale has been so made, this fact shall be likewise reported.' "

8. That for the purpose of compiling a weekly sales report 'a map of the United States shall be divided into zones as agreed upon by all of the subscribers to this service, and each subscriber at the conclusion of the week shall send to the bureau by special delivery, not later than the following Monday night, a compiled report of all its sales of oil, cake or meal into each zone made during the period covered by such report and not previously so reported, specifically setting forth the following: (a-a) Total gallons of oil sold into each zone, also showing the total gallons and price per gallon received for such oil sold; (b-b) Total tonnage of cake and meal sold into each zone, also showing total weight and price received per ton for such cake or meal sold; (c-c) Sales reports on both oil, cake and meal shall differentiate spot and future delivery, giving period of such futures.' "

9. "That all information received from the Bureau or any meeting of subscribers will be treated as confidential."

The Bureau agreed to promptly relay to the crushers all the information called for by the foregoing provisions, and to perform other services. It was also agreed by all parties:

1. "That 'monthly meetings' will be held of all subscribers hereto at some convenient center, with a representative of the Bureau, as Secretary, who shall present the matters pertaining to the industry to be therein openly discussed. Subscribers may send in notice of matters and topics for discussion and if they accord with the agreement and object of the service the Bureau shall cause the same to be docketed and presented. All subscribers shall

2. That 'any subscriber who has made offerings or quotations to a prospective buyer and is advised by such buyer that it is not to be awarded such business shall have the right to immediately advise the bureau of such unsuccessful offering or quotation giving all details of such bid or offering, and may then request the bureau to bulletin all of its subscribers asking specific information regarding any quotation or sale to such prospective buyer by any of the other subscribers and the bureau, on receipt of such request, will immediately bulletin all subscribers asking therefor and on receipt of replies will send out a compilation report thereof to all subscribers, together with the details of sale, if such a sale has been reported, so that all subscribers, including the original inquirer, will have a complete report of this transaction. On receipt of a request for such specific information from the bureau, the undersigned subscribers will immediately reply to same giving full information as to any quotation or sale which it may have made to such a buyer and, if it has made none, so report.' "

3. "That each subscriber will furnish the Bureau, upon request, information pertaining to any buyer of linseed oil, cake and meal and may request the Bureau to secure like information from all other subscribers, whenever it shall have an order or an account with, or an inquiry from, the buyer; and this information will be promptly relayed to all interested subscribers."

After the organization of the combination—

"The United States were divided into eight zones for *price quoting*; and it was stipulated that each member should quote a basic price for zone number one and should add thereto one, two, four, six, seven, eight and eleven cents, respectively for the others. At subscribers' meetings regularly held 'matters pertaining to the industry' were discussed; members were 'put on the carpet' and subjected to searching inquiry concerning their transactions. A meeting held October 29, 1919, adopted the following rule: 'In order to provide that the daily market information as relayed by the bureau shall at all times contain the fullest measure of news value, it is agreed that hereafter no council member shall dispatch changes in his prices as last filed with the bureau to more than one buyer without instantly thereafter telegraphing such full and complete information to the bureau as, and in the form, required by the service contract.' Another meeting 'resolved that it now be recorded that the recommended terms of this council for the sale of oil be 1% discount for cash settlement in 10 days, or 30 days net trade acceptance from date of shipment, and in order that a specific list of the terms of sale of all the council members may now be compiled and distributed, it is further resolved that all council members shall send to the bureau, not later than January 27th, a full explanation of the terms of sale as quoted by them to their trade.'

The Bureau displayed great industry in making inquiries, collecting information, investigating the smallest derelictions and giving immediate advice to subscribers. Hundreds of so-called 'market letters,' relating to divers transactions, were sent to subscribers. A sale of two barrels of oil below schedule was deemed worthy of special attention. Also from time to time it gave counsel concerning 'unfair merchandising' and the necessity for establishing sound policy by constructive cooperation."

There is hardly a provision in the entire plan that has a parallel in the defendants' plan. The two plans differ

so markedly in all essential provisions that the Linseed Oil case is clearly not in point.

The Court also pointed out that as a *result* of the operation of the plan "*the prices of oil became more stable.*" (There is no such proof in the case at bar.)

Also that the agreement in the *Linseed Oil* case destroyed "freedom of action by requiring each" crusher "to reveal all the intimate details of its affairs."

"All subjected themselves to an autocratic Bureau, which became organizer and general manager, paid it large fees and deposited funds to insure their obedience. *Each subscriber agreed to furnish a schedule of prices and terms and adhere thereto—unless more onerous ones were obtained—until prepared to give immediate notice of departure therefrom for relay by the Bureau.* Each also agreed, under penalty of fine, to attend a monthly meeting and report upon matters of interest to be there discussed; to comply with all reasonable requirements of the Bureau; and to divulge no secrets."

With intimate knowledge of the affairs of other producers and obligated as stated, but proclaiming themselves competitors, the subscribers went forth to deal with *widely separate and unorganized customers necessarily ignorant of the true conditions.* Obviously they were not bona fide competitors; their claim in that regard is at war with common experience and hardly compatible with fair dealing."

In the case at bar the undisputed proof shows that the defendants deal with expert and well-informed buyers. Pages 45-46, 316, *supra.*)

The Court also stated:

"We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs."

Of course, in that case *all* the affairs of the crushers were subject to the scrutiny—even the approval—of the Bureau. In the case at bar members were not subject to any such supervision. They agreed to make certain reports, that is all. These reports were few in number, and gave no such details as were required in the Linseed Oil case. *Of course, the Court did not hold that a mere agreement to give certain information in consideration of obtaining like information from others destroys freedom of action so far as the conduct of one's business is concerned.* Certain information concerning past transactions may be divulged by a manufacturer without in any wise restricting his discretion as to *production, prices, etc.*

The Court also pointed out that

“The situation here questioned is wholly unlike an exchange where dealers assemble and buy and sell openly; and the ordinary practice of reporting statistics to collectors stops far short of the *practice* which defendants adopted. Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties.”

The Court then specifically held as follows:

“The *challenged* plan is unlawful”

The plan could be held *unlawful* upon no ground other than that the *proof* showed that in its operation the challenged plan *unreasonably restrained interstate trade and commerce*. There is no such proof with respect to the plan in the case at bar.

The paramount importance of an accurate interpretation and a just application of the Sherman Act impels us to criticize—deferentially, but plainly—certain state-

ments that appear in the opinion in the *Linseed Oil* case. In that case the following assertion is made:

"In *American Column & Lumber Company v. United States*, 257 U. S. 377, we considered a combination of manufacturers got up to effectuate this new conception of confidence and competition and held it within the inhibition of the Sherman Act because of inevitable *tendency* to destroy real competition, as long understood, and thereby restrain trade. Our conclusion there cannot be reconciled with the somewhat earlier opinion and judgment of the court below. They are in direct conflict."

1. We respectfully submit that in the *American Column* case the court did not hold that the "Plan" there considered was obnoxious to the Sherman Act because of its "tendency" to (unreasonably) restrain interstate trade or commerce.⁶⁷ We believe that we have demonstrated by means of excerpts from the court's opinion in that case (pp. 410-412, *supra*) that the said combination was declared unlawful because the proof showed an *existing* unreasonable *restraint* of interstate trade and commerce. The decision turned *not* upon the *tendency*, but upon the *effect* of the combination. The court found that the *purpose* of the combination was *to limit production and to increase prices regardless of cost*, and *expressly held* that such *purpose* had been *consummated*.

2. The Sherman Act declares, not that every contract, combination, or conspiracy which *tends* to restrain,

⁶⁷There is a vital distinction, of course, between restraint of competition and restraint of trade. Competition may be restrained in one or more particulars, or, in certain cases, even eliminated, without thereby effecting an unreasonable restraint of trade, as defined by a long line of decisions. (*U. S. v. Du Pont de Nemours*; 188 Fed. 150.)

or which *tends* to be in restraint of, interstate trade or commerce, is illegal, but that

“every contract, combination * * * or conspiracy *in restraint* of trade, or commerce among the several States * * * is hereby declared to be illegal.”

The title of the Act reads “An Act to *protect trade and commerce* against unlawful *restraints* and monopolies.”

Pursuant to Section 4 of the Sherman Act the Government might petition a District Court to restrain the enforcement of a contract or the carrying out of a combination or conspiracy, recently made or formed, which provided for future action. In such a case the question would be, Is the contract, combination, or conspiracy *in restraint* of interstate trade or commerce? Is it of such a nature that its execution would (unreasonably) *restrain* interstate trade or commerce? If its execution would not (*unreasonably*) *restrain* interstate trade *at* commerce, would it be rational to hold that such contract, combination or conspiracy was “in restraint” of interstate trade or commerce?

The chancery powers of a District Court are usually invoked in anti-trust cases only after a contract, combination or conspiracy, alleged to be in restraint of interstate trade or commerce, has been operative for some time. The Sherman Act authorizes civil proceedings only for the purpose of restraining *future violations* of said Act. And where the alleged contract, combination, or conspiracy has been in operation a reasonable length of time, the Government must prove (1) the contract, etc., as alleged and (2) that as a *result* of it interstate trade or commerce has been (unreasonably) *restrained*. If proof is made that an (unreasonable) restraint of interstate trade or commerce presently exists, then it would

be reasonable to conclude (in the absence of proof to the contrary) that the continued existence of such contract, etc., would necessarily result in a *future violation* of the Sherman Act, namely, an unreasonable *restraint* of interstate trade or commerce; or, in the language of the Act, that such contract, etc., was "*in restraint*" of interstate trade or commerce. The same conclusion would also be reached if the proof showed that the contract, etc., *in force when the petition was filed* had caused (unreasonable) restraints of such trade or commerce in the past, *provided there were no proof that since the filing of the petition the said contract, etc., had been so modified that its future execution would not result in an (unreasonable) restraint of interstate trade or commerce.*

If, on the other hand, the proof showed that the alleged contract, etc., after a fair trial had not (unreasonably) restrained interstate trade or commerce, then the practical administration of justice would require a holding that the alleged contract, etc., was not "*in restraint*" of interstate trade or commerce. Such a case would necessitate the employment of the pragmatic method.⁶³ It was used by this court in the *Standard Oil* case, the *Steel Corporation* case, the *American Column* case and in several others.

3. The theory that contracts which *tend* to restrain trade are void, never formed a part of the common law doctrine with respect to contracts "*in restraint*" of trade. The relation between the common law and the Sherman Act needs no explanation in this court.

⁶³"The attitude of looking away from first things, principles, 'categories,' supposed necessities; and of looking towards last things, fruits, consequences, facts." (*Pragmatism*, by William James, pp. 54-55.)

4. *A tendency is too subtle and uncertain to serve as a legal test.*

It is certain that a mere tendency to restrain interstate trade or commerce would not be a valid test of a contract, combination or conspiracy alleged to be in violation of the Sherman Act. Only a tendency to *unreasonably* restrain interstate trade or commerce could be employed as such a test with even a semblance of logic. Aside from the considerations heretofore mentioned, the use of such test would result in the greatest confusion and uncertainty. Despite the long line of English decisions and later decisions by courts in the United States, both Federal and State, it is often exceedingly difficult, if not impossible, to determine with certitude whether a given contract or combination is "in restraint" of trade. Not only eminent lawyers, but members of this court have often been unable to agree whether certain contracts or combinations had unreasonably restrained, or if carried out or permitted to exist would unreasonably restrain, interstate trade or commerce. The introduction into the Sherman Act of the word *tendency* would open up a wide field for metaphysical speculation. What is a tendency? How many kinds are there? May tendencies be classified as *nascent, hyperkinetic, hypokinetic, conditioned, shifting, springing, contingent*? It is certain that they cannot logically be called *reasonable or unreasonable*, any more than can the odor of a rose. In order to be obnoxious to the Sherman Act, how *strong* must a tendency be? If numerous and conflicting tendencies coexist by virtue of a contract or combination, how shall they be reconciled? Do the books contain formulas for ascertaining the prepotency of conflicting tendencies? By means of what calculus can the *net* tendency of all of them be determined?

5. *There is too little assurance of harmful results to make a mere tendency, the gravamen of an offense subject to drastic penalties. This perhaps accounts for the silence of the books on the subject of tendencies.*

The penalty for violation of Section 1 of the Sherman Act is a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both.

Civil proceedings "to prevent and restrain" future violations of the Act are authorized by Section 4.

The seizure, condemnation and forfeiture of any "property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in transportation from one state to another, or to a foreign country" are provided for by Section 6.

The recovery of threefold damages and costs of suit, including a reasonable attorney's fee, by any person "who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act" is authorized by Section 7.

In both the number and kinds of proceedings authorized, as well as in the severity of the punishment which may be visited upon laymen so unfortunate as not to construe aright an act that has caused endless disputes among lawyers and judges, the Sherman Act is unusual.

There is such a lack of proportion between the drastic penalties above mentioned and mere *tendencies* which may *never* result in any *actual injury* to interstate trade or commerce that the construction that such tendencies are inhibited by Section 1 is *unreasonable*, and should be rejected.

In the first place, to say that a contract, combination, or conspiracy has a *tendency* to (unreasonably) restrain interstate trade or commerce is to make use of a metaphor. And while metaphors are flowers of literature they are by no means conducive to clear thinking and accurate conclusions.

Tendency means *movement*, or *inclination* to move, in some particular direction or toward some *end* or *purpose*; *leaning*; *inclination*. In one sense, tendency is an *objective* motion and not a subjective state. It also means *possibility* of movement in the absence of restraint. Lack of completion is an *essential* part of its connotation. In this respect it is like an attempt, i. e., an act or series of acts pointing to another act or series of acts. An attempt to commit a crime is in itself *complete*, otherwise it would not be punishable. It consists in an attempt to commit the crime, performance of some act towards the commission of the crime and failure to consummate its commission. But a *tendency* is not punishable, because it is merely descriptive of a motion (actual, or potential under favorable circumstances). In itself, a tendency is not a thing—an object—it is simply the motion or the inclination of an object.

The term may be used metaphorically to describe a state of mind; for example, *John Smith's mind has a tendency to crime*. But even persons with criminal "tendencies" are not punished unless such tendencies result in crimes or misdemeanors. Such persons are then punished for their *crimes*, not because of their susceptibility to certain temptations. Such tendencies may always exist without resulting in infringement of the law.

G. H. Lewes defined a *tendency* as "the *ideal summation of statical conditions which tend to a dynamical result.*" But the dynamical *result* may never happen! All things terrestrial *tend* toward the center of the earth. The earth *tends* to plunge into the sun; it also *tends* to fly off at a tangent. As a matter of fact it does neither. A tendency may continue forever without reaching the goal. The dynamical result may always remain merely a *possibility*. On the other hand, a tendency may always exist without an actual or appreciable advance toward the objective. It may be blocked absolutely by counter-balancing tendencies or objects or forces; it may be slowed down or even overcome, and the object may be carried away towards another goal, or entirely different results may be produced despite the continuous adverse pressure or resistance of such tendency.

When a tendency reaches the goal, or a dynamical result is produced, the tendency *ceases to exist*. In such a case a *tendency to restrain trade* would have become *restraint of trade*.

Let us assume that after an analysis of the *mere terms* of a written agreement, it could be affirmed that the agreement had a *tendency* to (unreasonably) restrain interstate trade or commerce. However, the agreement could not be viewed *apart from its relations*, or, in the phrase of Burke, "in all the nakedness and solitude of metaphysical abstraction." (pp. 301-2, *supra*.) "It must be executed in the real world; and the condition of the parties to it, their relation to the industry as a whole, their relation to buyers, outside competitors, lack of control of raw material, absence of protection by patents or tariff, numerous substitutes for the article manufactured, small amount of capital required to engage in the production of such article, etc., etc., (pp. 65-75, 27-33,

369-396, *supra*), or the fact that the statistics collected pursuant to the agreement were given to buyers and others, (pp. 310-316, *supra*), might *decisively counteract or nullify the tendency to (unreasonably) restrain interstate trade or commerce.* Such *tendency* might never achieve its *goal*. It might never produce a *dynamical result*. It might be effectively blocked. Under such circumstances a contract having such a tendency might be absolutely without *any practical effect* upon interstate trade or commerce, or such trade or commerce might be greatly stimulated and increased, to the benefit of the public.

A contract, or combination may *tend* to restrain trade in the sense that *it produces conditions which may afford an opportunity actually to restrain trade.* Casual meetings of competitors on a golf course would afford such an opportunity. However, the Sherman Act is not a law against temptations, or mere opportunities for anti-social conduct, however useful they may be to the Prince of Darkness. The law never undertakes to deal with acts innocent in themselves that may or even do create opportunities for wrongdoing.

The title of the Sherman Act reads "An Act to protect trade and commerce against unlawful *restraints* and monopolies." As heretofore pointed out, a mere *tendency* to restrain is not a *restraint* and may *never* become a restraint.

If, a *tendency* to (unreasonably) restrain interstate trade or commerce is condemned by the Act, then in a criminal prosecution, evidence *tending* to prove such *tendency* would be sufficient (if believed by the jury) to send citizens to prison, even though no *actual* restraint—*reasonable, or unreasonable*—had ever existed! In view of the cumulative and drastic penalties and remedies provided, what an anomaly!

There are, of course, ordinances (and even statutes) providing more or less nominal penalties for *disorderly conduct* "tending to a breach of the peace." But such conduct is *in itself* an *invasion of the rights of others*. It usually consists of an *assault, forcible entry and detainer, etc.* The law also provides a penalty for libel,—a *malicious* publication that *tends* to blacken the memory of one dead, or the reputation of one who is alive and expose him to public hatred, contempt or ridicule. The *nature* of one's *reputation* differs *essentially from trade and commerce*. The former may be *irrevocably* ruined by *false* accusations, or even subtle insinuations. Unless trade or commerce is *actually and unreasonably* restrained no *injury* can be sustained by either of them, or by the public or any member of it. Criminal codes also provide that in prosecutions for seduction no conviction shall be had upon the testimony of the woman unless the same is corroborated by other evidence *tending* to connect the defendant with the offense charged. There are also similar statutes respecting the evidence of an accomplice. Such provisions relate merely to the evidence sufficient to convict one, not of a *tendency*, but of a *positive wrong*. All proper evidence *tends* to prove or disprove the *factum probandum*.

That the Sherman Act does not inhibit a mere *tendency* is supported by the provisions of Section 7, that any person "*injured* in his business or property * * * by reason of anything forbidden or declared to be unlawful by this act * * * shall recover threefold the *damages* by him sustained." Surely, no one could sustain an action under the Sherman Act by means of proof that a contract, combination or conspiracy *tended* to cause him economic loss. No one could possibly be

injured in his business or property by a mere tendency to (unreasonably) restrain interstate trade or commerce. He might very easily be so injured by an unreasonable restraint of such trade or commerce.

6. Section 2 of the Sherman Act denounces both monopolies and *attempts* to monopolize. An attempt to monopolize, even if unsuccessful, might unreasonably restrain interstate trade or commerce to the injury of the general public. For instance, an attempt to corner cotton or wheat would undoubtedly increase the prices of such commodities, which would affect not only the prices of flour and cotton goods, but prices in other lines of industry. In other words, an *attempt to monopolize* would undoubtedly result in an *unreasonable restraint of trade*.

The Government's petition in the case at bar is not based upon Section 2 of the Act, or any part thereof. Laying aside the attempt to monopolize, we think that the most that the parties to a contract, combination or conspiracy that neither had (unreasonably) restrained, nor could (unreasonably) restrain interstate trade or commerce, but which *tended* to do so, could be guilty of, would be an *attempt* to (unreasonably) restrain such trade or commerce. But the Sherman Act denounces only attempts to monopolize. And other than *such attempts*, it does not inhibit mere attempts to (unreasonably) restrain interstate trade or commerce.

The title reads, "An Act to protect trade and commerce against unlawful restraints and monopolies." *Unlawful restraints* are *unreasonable* restraints. And attempts to monopolize are either not included in the title, or else are included. We think they are included be-

cause common experience has proved that attempts to monopolize ordinarily result in unreasonable restraints.

There is a vital difference between an attempt to (unreasonably) restrain interstate trade or commerce by means of an attempt to *monopolize*, and an attempt by other means. For unless the other means were *effective* an *unreasonable restraint* would *not result*. An attempt to *monopolize* is broader in scope; it requires greater capital; it may *fail*, and yet result in an unreasonable restraint of trade. Its achievement may produce suffering and misery. Mere contracts, combinations or conspiracies to restrain trade—if not attempts to monopolize—produce harmful results only if consummated. Even then they are not so potent for evil as a monopoly. They are subject to too many disruptive forces, both internal and external, if not based on monopoly, control of raw material, actual or potential, etc., etc.

It should be observed that, whereas, the Act expressly condemns monopolies and attempts to monopolize, it is not only silent as to attempts to unreasonably restrain by other means, but inhibits only *unreasonable restraints*.

Also that only persons who *make* contracts in restraint of interstate trade or commerce, or engage in combination or conspiracies in restraint of such trade or commerce, are subject to fine or imprisonment. No penalty is provided for an *attempt* to make such contracts, or an *attempt* to engage in such combinations or conspiracies.

Furthermore, *there is no law of civil attempts*.

Whether an injunction will issue in a suit brought to restrain future violations of the Sherman Act must be

determined according to the rules and principles that govern ordinary suits in equity. The civil, as distinguished from the criminal, law takes no notice of mere *attempts*.

For instance, if A shoots at B intending to kill him, but misses him, the act is a criminal attempt, and is punishable. However, the civil law gives B no action for damages in the premises. For the suppression of crime and the repose of society, the criminal law condemns and punishes wrongful motives in action, even though (in some cases) it is *certain* that no actual harm could result. In *criminal law*

“* * * an *apparent possibility* is all that is required; if there is an apparent possibility to commit the crime in the way attempted, the attempt is indictable, although, unknown to the person making the attempt, the crime cannot be committed because the means employed are in fact unsuitable, or because of extrinsic facts, such as the nonexistence of some essential object. This principle has been applied, for example, to attempts to commit larceny or robbery, where it turned out that, unknown to the accused, there was nothing to be stolen, as in the case of an attempt to pick an empty pocket, etc.; to attempts to commit murder, where because of an impediment unknown to the accused the murder could not be accomplished * * * and to an attempt to commit abortion where, unknown to the accused, the woman was not pregnant, or the drug administered was harmless.” (16 Corpus Juris, p. 117.)

There is *no law of civil attempt*, so far as an attempt that *could not* result in damage, or an attempt that has failed to result in any injury, actual or legal, is concerned. Imagine a person's bringing an action for damages against another on the ground that the latter had attempted to commit a negligent act, or had attempted to libel the complainant, but that the attempt had failed.

The civil law does not allow the recovery of damages unless the attempt is *consummated*, and causes either actual harm, or results which the law presumes to be harmful, and for which it allows the recovery of nominal damages, or unless during the attempt some other legal wrong or actual injury is done. In none of the instances above mentioned are damages allowed for an *attempt*, but for an *actual* (or legal) *injury* flowing from a *completed* and *wrongful* act.

A (permanent) mandatory injunction merely restores the *status quo ante*. But in order to *restore* it, the *attempt* must have been *consummated*, or *some other wrongful act* must have been *perpetrated*. Would a mandatory injunction issue upon proof that the attempt to commit a harmful act had failed?

The same principles would apply to cases where a prohibitory injunction is asked. Certainly no such injunction would issue upon proof of merely a past attempt that had failed, for whatever reasons, or however *malicious* the motives of the intending wrongdoer.

Properly speaking, we think that there is *no law of civil attempt*.

In criminal law an *attempt* is *complete*, and is *always* something that *has happened*. The eye of the criminal law is fixed upon the *past*. The civil law takes no notice of aborted attempts. It scoros mere duds. The eye of equity sweeps the *future*, but equity takes no cognizance of attempts as such. If it did it would restrain conduct or remedy conditions where there was merely an apparent *possibility* of harmful results; or where, unknown to the respondent, *injury could not result*.

Equity is not concerned with *attempts*, but only with *actual harmful results* flowing from *completed acts*, which it rectifies by means of a mandatory injunction, or *imminent* wrongful acts, which in all *reasonable probability* will produce harmful results. These threatened acts it restrains. But whether such acts consist in threatened trespasses, or nuisances, or a multiplicity of suits, or what not, it must be *reasonably* probable (1) that if the injunction does not issue, the wrongful acts will be committed, and (2) that the harmful results will follow. (Pomeroy's Equitable Jurisprudence (2nd Ed.), Vol. V, Secs. 1915, 1937, pp. 4345, 4395; Vol. I, Sec. 251½, pp. 421-22.) Equity is therefore, unconcerned with mere attempts. Its prohibitive powers are exercised only when past, present or threatened acts will in all reasonable probability actually cause harmful results.

For instance, the criminal law would punish an attempt to monopolize even though the attempt had failed, or even where subsequent events had proved that it could not have succeeded. But equity would not interfere with an attempt to monopolize, if the proof showed that it *could not* be successful. And as heretofore shown, attempts to (unreasonably) restrain interstate trade or commerce by means other than an attempt to monopolize, are not inhibited by the Sherman Act. Equity would interfere with such (misnamed) attempts only where there was a *reasonable probability* that they would be consummated. The Sherman Act condemns only unlawful, *i. e.*, *unreasonable*, restraints; and District Courts are given jurisdiction merely to restrain *such restraints*.

A contract, combination or conspiracy that merely *tends* to restrain interstate trade or commerce, does not meet the requirements either of equity or of the Sherman Act.

7. In the case at bar the Government asks for an *injunction*. The petition is based solely upon Section 1 of the Sherman Act.

Is petitioner entitled to such relief in the absence of proof of an existing unreasonable restraint of interstate trade or commerce? If there is no such restraint, is there any proof of a *harmful result*?

Assume for the purposes of argument that the combination in the case at bar *tends* to (unreasonably) restrain interstate trade or commerce. *However, the proof shows that it has never done so, and that it cannot do so.* Is the Government entitled to injunctive relief in the premises. For the following reasons we do not think so:

1. *No harmful result* is present. As a general rule there is no civil liability in the absence of harmful result.⁶⁹ Negligence toward another, no matter how aggravated, is not actionable in the absence of damage. In some cases nominal damages are allowed for breach of duty in the absence of *actual* harmful result, for the reason that injury is presumed to flow from an infringement of a duty, as, for instance, a breach of contract.

To impose liability for a mere *tendency* to produce a harmful result is an anomaly.

2. There is no *reasonable probability* that a *harmful*

⁶⁹*Sanctions and Remedies*, University of Pennsylvania Law Review (January, 1924), p. 1 *et seq.*, by Professor Albert Kocourek, of Northwestern University Law School. Without in any way making Professor Kocourek responsible for the argument that *tendencies* are not condemned by the Sherman Act, we are glad to record our indebtedness to him for numerous invaluable suggestions and criticisms.

result will follow if the injunction does not issue. In 32 Corpus Juris, pp. 42 *et seq.*, it is said:

"It is not sufficient ground for an injunction that the injurious acts may *possibly* be committed or that injury may *possibly* result from the acts sought to be prevented; but there must be at least a *reasonable probability* that the injury will be done if no injunction is granted, and not a mere *fear* or *apprehension*. Injunctions will not be granted merely to allay the fears and apprehensions of individuals, which, it has been said, may exist without substantial reasons and be absolutely groundless. In these circumstances the mere fact that an injunction would not injure defendant will not authorize its issuance. *Especially is the principle applicable where the injury is not certain to occur if defendant is not enjoined, and on the other hand an injury would certainly occur if the injunction was granted. An injunction will not issue where it is shown that defendants are without power to accomplish that which it is alleged they are attempting to do.*"

In the *Linseed Oil* case the Court quoted from other decisions as follows:

"The statute did not forbid or restrain the power to make *normal* and *useful* contracts to further trade by resorting to all *normal* methods, whether by agreement or otherwise, to accomplish such purpose." * * *

The Court then continued thus:

"Certain it is that the defendants are associated in a *new* form of combination and are resorting to methods which are not *normal*."

We respectfully submit:

1. That there is no warrant in either the Sherman Act or the entire history of the common law for the use of such tests as *normality*, *newness* or *usefulness* in determining the *legality* of contracts, combinations or conspiracies. *Every* contract, com-

bination or conspiracy, *whether old or new, whether normal, abnormal or subnormal, whether useful or useless*, which unreasonably restrains, or which would unreasonably restrain, interstate trade or commerce, is denounced by the Sherman Act. As stated in the *Standard Oil* case the purpose of the Act was to protect such trade or commerce from such restraint by *any* "methods, whether old or new." (221 U. S. 1, 60.)

2. That contracts cannot be reasonably condemned because they are *new*, nor upheld because they are *normal*, however, much weight was, consciously or unconsciously, attached to such considerations in the formation of the mores of primitive societies. Progress in law, science, ethics, philosophy, literature, art, has never wholly depended either upon holding fast to *normal* methods and *ancient* customs, or upon a Mongolic rejection of the neoterical. "Time makes ancient good uncouth."

3. That contracts and combinations among manufacturers and businessmen for the collation and dissemination of trade statistics are not *new*. As shown on pages 397, 232, 243, *supra*, even trade associations in the United States have been gathering and distributing among their members trade statistics for more than 60 years. Nearly 500 of them are now engaged in doing so. For hundreds of years before The Industrial Revolution organizations of persons engaged in the same line of business furnished their members with all available information concerning trade matters. (Unwin's *The Gilds and Companies of London*.)

XIII.

It is both the privilege and the duty of equity not only to prevent evil but to hold fast to that which is good. Its decrees are, therefore, infinitely various and flexible.

The decree entered by the District Court herein is as unselective as a hurricane or an earthquake. If unleashed it will convert into junk machinery of great pecuniary and social value.

It is undisputed:

1. That at great expense of time, labor and money the defendants have standarized maple, beech and birch flooring.

2. That in order to protect the quality of their product an expert Inspector of Mills was engaged; that he makes periodical visits to all Association mills, instructs graders, criticizes machine-work, etc.

3. That in order to protect both the public and Association members, an efficient and honest Inspection Service was established; that upon request of buyers experts are sent anywhere in the United States to re-inspect flooring sold by Association members.

4. That the standarization of maple, beech and birch flooring by the defendants has greatly improved the quality of such flooring; that architects and lumber dealers unanimously praise the work done by the Association, and that they prefer the flooring manufactured by Association members.

5. That the Inspection Service is honestly and efficiently conducted, and that it has minimized friction be-

tween buyers and Association members and eliminated litigation.

6. That the flooring manufactured by members bears the Association's trade-mark; that all the foregoing facts, and the expenditure of large sums of money in advertising the flooring manufactured by Association members, have built up a good-will of great value.

Must this valuable property right be destroyed? Is it necessary to scrap this efficient social machinery, and revert to a state of nature with all its evils and economic waste?

The proof is also undisputed:

7. That the manufacturing and marketing costs of members have been reduced by reason of the attention devoted to such matters by the Association; that the prices of the members are generally lower than the prices of nonmembers; that such prices are fair and reasonable; that uniformity of prices has never existed; that the average costs have not been used as minimum prices; that the elements contained in the manufacturing and marketing costs are proper, and that the Average costs are honestly and accurately ascertained.

Certainly, the defendant's plan for ascertaining average costs cannot be *wholly* evil. If there are objectionable features in it, may not *they* be modified or eliminated, and the good preserved? The public gains through even the *study* of costs by manufacturers, to say nothing of the reduction of costs. Must the Association be *destroyed* because it collects and distributes information with respect to average costs? It is undisputed that each member ascertains his own costs and determines for

himself his own prices. But is it necessary to *destroy* the Association merely in order to eliminate some features that might be thought to be improper?

Must the Association be destroyed because it distributes information with respect to freight rates?

Must it be destroyed because it collects and distributes fragmentary trade statistics? Is not the public adequately protected by the publication of the statistics in trade papers?—by sending the statistics to the Department of Commerce which includes them in its monthly Survey of Current Business?—by giving the statistics to anyone who asks for them?

If there are any objectionable features in the statistics, may not such features be eliminated or modified? May not *some* plan be worked out whereby the Association's undoubted public service may be preserved? Congress has provided that the Federal Trade Commission shall advise the Federal Courts concerning such matters. Let it be assumed that there are some features to which exceptions might be taken. Is all possibility for good to be foreclosed, simply because of the existence of a few matters which may easily be remedied?

If there is a doubt concerning the reformation of any defendants, may not a decree be entered restraining the resumption of practices, which the undisputed proof shows had been abandoned prior to the formation of the present Association? Shall the present Association be condemned on account of what antecedent associations did? The persistence of trade associations throughout the centuries is proof that they minister to substantial needs.

It is true that like all other human institutions they have all too often considered only their own selfish interests. Nevertheless they are an expression of the principle of free association, which has wrought so mightily for social progress in the past. They are agencies of considerable present and of inestimable potential value. Is it better that they should be blindly and ruthlessly destroyed, or controlled in the interests of society?

Must the law, must *equity* be purely destructive? Can it do *nothing* constructive? Does equity demand the *absolute*? Has it lost all initiative, or interest in experiments which promise much for society? Surely equity has not become so rigid and indiscriminating—so impotent for good—as to be unable to do anything but destroy the defendant Association.

Respectfully submitted,

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No. 342

October Term, 1924.

Maple Flooring Manufacturers
Association, W. D. Young and Co.,
Mitchell Bros. Co., et al.,
Appellants,

vs.

The United States of America.

For appendices to Appellants'
Brief see

Part 4 (Folio)