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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926

No. 254

THE UNITED STATES OF AMERICA,
Appellant,

vs.

INTERNATIONAL HARVESTER COMPANY, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA.

BRIEF AND ARGUMENT FOR APPELLEES.

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VICTOR A. REMY,
Solicitors for Appellees.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

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October Term, 1926

No. 843

THE UNITED STATES OF AMERICA,
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INTERNATIONAL HARVESTER COMPANY, et al.,
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF AND ARGUMENT FOR APPELLEES.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT.

It is not possible without unduly lengthening our brief to give the long history of this case or to refer to all of the evidence which may be helpful to the Court in considering some or all of the issues discussed. A separate Appendix is therefore filed, containing additional quotations, tabulations, etc., and will be referred to from time to time in this brief.

The Government's appeal is from the order of the District Court dismissing its supplemental petition to open up and review the final decree of partial dissolution and settlement entered in this cause on November 2, 1918. The Government's petition, as appears on its face, was filed as the result of a certain report of the Federal Trade Commission in which the opinion was expressed that this decree would not prove effective. It was not filed to remove any restraint of trade of which competitors, who ought to know, were aware. Many competitors were called as witnesses by the Government, but not one complained of or testified to any unfair trade practice or restraint of trade by the Harvester Company.

To understand the purpose and intent of the 1918 decree, the Court should have in mind the conditions at that time and the changes in the implement industry since the organization of the International Harvester Company and particularly since the filing of the Government's original petition in 1912.

The period between the organization of the Harvester Company in 1902 and the entry of the 1918 decree for its partial dissolution, saw many changes in the implement industry, including (1) the rise and growth of new and strong competitors in harvesting machinery, (2) a substantial diminution in the Harvester Company's percentage of such trade, (3) important changes in methods of distribution, and (4) the transformation of the Harvester Company and its principal competitors into long-line, year-round implement companies.

The "long-line," sometimes called "full-line," development is referred to so often in the record that its nature is here briefly explained at the outset. In 1902 the industry was divided along seasonal lines, each company's trade being mainly confined to the seasonal goods or specialties with which its business originated. Harvesting machines were sold by one set of companies, plows by another set and so with seeders, threshers, etc. The Harvester Company, organized in 1902, was a consolidation of six of the companies making harvester machines. Shortly after 1902 the movement to lengthen the line of implements sold, begun by Deere & Co., became more general. It was a natural and economic change leading to cheaper production and distribution. By handling spring, summer and fall goods, each company's manufacturing facilities could be used to greater advantage and its sales organization employed for longer periods or throughout the entire year. (See *infra*, p. 129, 130.)

The Federal Trade Commission in the portion of its report attached to the Government's petition, says:

> "A full line is one of the most striking developments of the implement business and one that is apparently bound to be an even more conspicuous feature in the future. It represents opportunities for greater advantages in the sale of goods, greater security in the risk element, and better facilities for securing the best retail dealers. Expansion of business in the direction of the full line, whether by growth of a single concern or the consolidation of several concerns, when confined to normally related lines, does not present the objectionable and monopolistic features of a combination of competing producers. Expansion of business in this direction does not have a tendency to destroy competition, but rather to increase it." (R. 56.)

In addition to economies in manufacture, transportation and sale, the long-line development also created important inter-relations in the sale of the different machines composing the long line. The harvesting machines of the Harvester Company and all of its principal competitors are now merged into long lines of implements of which they are not the most important part, and are thereby subjected to many competitive conditions affecting the long line. (See *infra*, p. 123.) The Harvester Company's volume of trade in the old line harvesting machines is now only 20 per cent of its total volume of trade in all lines. (R. 594.)

It is significant that in the present proceeding the Government does not charge any restraint of trade in the implement industry generally, or in any line of implements except harvesting machines, and the Government objected to any evidence relating to competition in other implements on the ground that it had alleged no unlawful control over such other implements. (R. 144, 331; Gov. Br. 122.)

At one time the Government feared, and in its original petition filed in 1912 it charged, that the long-line development was rapidly leading to a monopoly by the Harvester Company of all kinds of farm implements. The evidence, however, shows that after twenty-two years of expansion and effort, the trade which the Harvester Company had been able to build up in other implements is only 25 per cent of the total trade of the country in said implements. During the same period its percentage of the country's trade in harvesting machines had diminished at least 23 per cent (from 85 per cent in 1902 to 61.7 per cent in 1923 figured by number of machines sold and to 56.1 per cent figured by volume of trade in dollars—*infra*, pp. 179, 181). The Government, therefore confines its present attack to the harvesting machine business, a factor of diminishing importance in the long-line competitive field.

The Department of Justice, with knowledge of the changed conditions, due to new competition, the long-line development and the Harvester Company's diminished percentage of trade, framed a decree in 1918 designed to make such further changes as seemed necessary in its judgment to insure ample actual competition and the permanence of competitive conditions. This decree required the sale by the Harvester Company of three (Champion, Osborne and Milwaukee) of its five harvesting lines to responsible manufacturers of agricultural implements, and prohibited the Harvester Company from selling its remaining harvesting machines (McCormick and Deering) or other agricultural implements to more than one dealer in a town. (R. 387.) The theory was to enable these manufacturers of implements to complete their long lines by acquiring fully developed harvester lines with established good will and permanently insure to these new competitors and all old ones adequate retail outlets for their products.

These were radical changes seriously affecting the Harvester Company's business, presumably decided upon after consultation with competitors and certainly viewed by them as important. One of the Harvester Company's principal competitors testified (R. 263):

> "whoever made the provision that the Harvester Company should confine its operations to one dealer in a town struck the crux of the whole situation."

With the exception of mail order houses, all agricultural implement manufacturers sell their products to country merchants, who in turn sell to farmers. In some instances the manufacturers sell part of their products to jobbers but this is the exception, not the rule. The dealers are thus at once the manufacturers' customers and the avenues through which agricultural implements are distributed to farmers. Inasmuch as most agricultural implements are bought on time by farmers, who pay after their crops are harvested, the manufacturer in turn must grant liberal credits to dealers. This, coupled with the fact, that the dealers set up and repair machines for farmers, and that usually, where the trouble is serious manufacturers send experts to assist the dealers, renders the relationship between manufacturer and dealer closer than in most trades. It further renders the ability to obtain an adequate number of experienced dealers, with a local good will among farmers, of great importance to manufacturers.

We shall later discuss at length the effect of the single dealer provision of the decree in the light of these facts. (*Infra*, pp. 63-65.) Here it seems to us, desirable to bring sharply to the Court's attention the fact that the single dealer provision forever subjects the Harvester Company to an extraordinary and serious handicap from which all of its competitors are free. The Harvester Company alone of all companies competing in the implement field is required by law to do all of its business on all implement lines with one dealer in a town. All of its competitors may place their goods with several dealers or part with one dealer and part with another.

For reasons stated in its answer (R. 61) and proved by the testimony of its President, the Harvester Company dismissed its appeal pending in the Supreme Court and consented to the entry of the decree of November 2, 1918, and it has since fully complied therewith.

The purpose of the 1918 decree as stated therein was to establish competitive conditions. It is evident that it was intended to be a final disposition of the case, subject only to the right reserved to the Government to apply for further relief *"in the event that such competitive conditions shall not have been established at the expiration of eighteen months after the existing war."* (R. 14.)

The Government's right to further relief is depeudent upon it proving an absence of "*competitive conditions.*" This is a question of fact; all of the issues raised by the supplemental petition and pleadings now before the Court are issues of *fact;* 2,352 typewritten pages of testimony were taken and many more of exhibits, all on the question of fact of competitive conditions, and the District Court has disposed of the case with a finding of fact that competitive conditions exist. (*United States* v. *International Harvester Company,* 10 Fed. (2nd.) 827; see also, R. 369.)

There is little, if any, conflict of evidence on any point deemed material by either side. It is all a question of reasonable conclusions from the evidence.

The Harvester Company asks the fullest consideration of the record in the belief that this Court can come to no other conclusion than that arrived at by the Court below. We believe that not a single material allegation of fact in the supplemental petition has been proved.

The Government, in recognition of this situation, devotes a considerable part of its brief to questions of law and advances a number of novel propositions calculated to restrict the Court in its consideration of the facts as to competitive conditions and to force it to certain arbitrary conclusions. These propositions of law (enumerated later in this statement) will be discussed in the latter part of this brief (*infra,* p. 185). The issues of fact are considered first in the belief that the Court should know at the outset how completely the Government has failed to prove the specific charges in its supplemental petition. Doubtless the Court will also prefer to visualize actual business conditions in the industry and draw its own untrammeled conclusions before considering the merits of any artificial tests of competitive conditions.

COMPLIANCE WITH THE DECREE.

At the outset the Government in its brief raises an issue (not mentioned or relied upon in its petition) that the 1918 decree was not fully and in good faith complied with, because the Harvester Company failed to sell, to the purchasers of the Osborne and Champion lines (Emerson-Brantingham Co. and Avery & Sons), the plants at which these lines had theretofore been manufactured by the Harvester Company (Auburn and Springfield plants). The Government states (Gov. Br. 11) that "this was a distinct departure from the decree agreed upon." The 1918 decree required the sale of the "lines" including trade names, patterns, special equipment, etc., used in their manufacture. With respect to the plants the decree only provided that the Harvester Company should offer and endeavor to sell the plants in connection with the lines and stand ready to accept a fair and reasonable price from the purchasers of such lines. The decree contained no provision that the plants should be sold unless the purchasers of the lines desired to buy them (R. 387). The purchasing companies did not desire to purchase the Harvester plants as they had their own plants more advantageously located to which they preferred to remove the manufacture of the purchased lines and fit them in with their manufacture of other implements and utilize their existing organizations. That the Harvester Company's sale of the lines was not "a distinct departure from the decree agreed upon," as counsel allege, but was in accordance therewith is settled by the order of the District Court, entered on May 28, 1920, interpreting its own decree to that effect, and this order expressly recites "*the United States of America consenting thereto*" (R. 388, 389). The order recited that the lines in question had already been "duly sold" and expressly interpreted the decree as not requiring the sale of the plants.

The statement, that it was not until 1920 that the Government was apprised of these transactions (Br. 12), has no support in the record, and the inference from the record is that the Government itself approved the contracts of sale. The decree provides that the Harvester Company must accept a reasonable price

> "from any purchaser approved by the United States for any of said lines."

The order of May 28, 1920, to whose entry the Government consented, finds that the Harvester Company has

> "*duly* sold, pursuant to the provisions of said decree,"

the Osborne and Champion lines. In any case the fact of which the Government alleges ignorance was the fact of *compliance* with, not of "*departure*" from, the decree.

The removal of two prospective purchasers from the market by the sale to them of the Osborne and Champion lines followed by the farm depression, made the sale of the Milwaukee line more difficult. The Harvester Company was unable to sell this line until March 5, 1924, when it was sold to the Moline Plow Company under a contract providing that it should not be operative until approved by the District Court or by the Attorney General of the United States (R. 631). The contract was immediately put in evidence in this proceeding accompanied by testimony of the president of the Moline Plow Company that it desired to purchase the line because it believed it could make valuable use thereof and increase its business. The Government made no objection to the transaction and the Court approved the sale by the finding in its opinion that the decree for the sale of the three lines had been fully complied with (R. 370).

The provision of the 1918 decree requiring the Harvester Company to sell its agricultural implements to only one dealer in a town has been fully complied with and the Government makes no contention to the contrary. In fact the Government significantly neglects and subordinates this important provision of the decree. In its Statement of the Case (pp. 13-15) reciting the allegations of its original petition, the Government omits to recite that one of the principal allegations was that the Harvester Company was preventing competitors from obtaining adequate retail outlets for their machines by its practice of placing its several harvester lines with separate dealers in the same town. The Government made much of this contention in the former proceeding (R. 190). In its present brief the Government devotes two lines of its opening statement (Br. 9) to this provision of the decree and when it comes to its discussion on page 113 states that the purpose of this provision was "merely to remove incidental barriers to competitive effort." The significance of the Government's desire to treat as incidental what competitors called the crux of the whole situation will be evident from the further discussion showing the important effects of this part of the decree (*infra*, p. 59).

THE ISSUES OF FACT.

1. The supplemental petition is built around one specific charge of a wrongful and malicious trade practice—selling harvesting machines at cost for the purpose of eliminating competition. (R. 22, 23.) The evidence shows that this charge was directed against the Harvester Company's prices in 1921 and 1922. While the Harvester Company admitted it made no money on implements sold in the United States in 1921 and 1922, the

uncontroverted evidence showed that this condition was not confined to harvesting machines, but extended to all agricultural implements and to all implement companies generally, and that all price reductions, both by the Harvester Company and others, were brought about and amply justified by the unusual business conditions growing out of the extreme farm depression of 1921 and 1922. (See Part II, p. 45, *infra.*) The Government investigators wholly failed to appreciate the business conditions brought about by this depression. There was no evidence whatever of malicious price-cutting by the Harvester Company. In fact the lowest price levels on harvesting machines were initiated by one of its competitors. We believe the Government no longer presses this charge of intentional wrong-doing.

2. The supplemental petition charges that three old and important competitors of the Harvester Company were contemplating retiring from business because of inability to compete. (R. 23.) This charge also is based upon misinformation. Officers of the three companies testified that nothing of the kind was contemplated. (Part I, pp. 33-35, *infra.*)

3. The petition charges (R. 22) that the number of manufacturers of harvesting machinery is steadily diminishing because of inability to compete with the Harvester Company's alleged lower costs and alleged policy of selling at cost. The evidence shows no decrease in the number of manufacturers of harvesting machinery since 1911 and a very substantial increase in their strength; that all retiring companies have been more than replaced by other stronger companies which obviously must have entered the field in the belief that it was open and not subject to restraints preventing successful competition—a belief confirmed by results. (Part I, p. 37-44, *infra.*)

4. The petition charges, impliedly, that all companies which have discontinued the manufacture of harvesting machines since 1911 were eliminated by reason of inability to compete with the Harvester Company. (R. 23.) Officers of all of these companies were called by the Government as witnesses, but not one supported this charge or complained of any past or present act or practice of the Harvester Company. In every case the reasons for retirement were given and indicated nothing unusual in competitive conditions. The number of concerns retiring from the harvester business was no greater proportionately than the number discontinuing the manufacture of various other kinds of agricultural implements during the same period. (Part I, pp. 38, 39, *infra*.)

5. The Government contends that the provision of the 1918 decree limiting the Harvester Company to doing business with only one dealer in a town can have little effect on competitive conditions. The evidence shows that competitors, who ought to know, take a very different view of the situation. Throughout the many earlier years of this litigation the Government's position was exactly opposite to its present contention. One of the main charges of the original bill in 1912, and one strongly pressed, was that competitors were prevented from obtaining adequate retail outlets by the Harvester Company's practice of selling its different harvester lines through separate dealers in one town. (Part III, p. 59, *infra*.) The single-dealer rule has also had an indirect result of great consequence. One of the principal criticisms of the 1918 decree made by the Federal Trade Commission was that it left the Harvester Company all of the advantages of the two best-known harvester lines—the McCormick and Deering. (R. 35.) In practice, the placing of the Deering line with the old

McCormick dealers, or *vice versa*, made necessary by the single-dealer requirement, developed many difficulties. After several years' experience, it became evident that the two lines could not be successfully marketed in this way and that the best alternative, which was adopted, was to discontinue the existing McCormick and Deering types of machines and develop and manufacture a new single line differing in design from both of the old ones. (*Infra*, p. 66.)

6. The petition, adopting the prophecy of the Federal Trade Commission, alleges that the sale by the Harvester Company of the Champion, Osborne and Milwaukee lines has had and can have little effect on competitive conditions. (R. 24.) The sale of these brands to B. F. Avery & Sons, Emerson-Brantingham Co., and Moline Co. enabled each of these long-line companies (the two last named admitted by the Federal Trade Commission itself to be old, strong and established companies (R. 58) to complete its lines by adding a well-known and established brand of harvesting machines. The purchase of these lines of itself indicated the belief of the purchasers that the competitive field was open. The evidence as to the success of the purchasers to date and their prospects for the future, clearly shows that this portion of the decree has had a substantial effect on competitive conditions and will doubtless have a still greater effect. An advantageous sales relationship was created between the old plow and tillage lines of each of these companies and the newly-acquired harvester line, each helping to sell the other. The opinion of the Federal Trade Commission that the sale of the Champion, Osborne and Milwaukee lines could have little effect, which was adopted by the Government in its supplemental petition, is based largely on the fact that

the sales in these lines during the years in which they were owned by the Harvester Company, diminished in comparison with the sales of the McCormick and Deering lines. But the conditions which caused this falling off in sales—the concentration of sales pressure by salesmen and dealers on certain lines and neglect of others (see *infra*, pp. 93, 94)—are the very conditions which have been removed and are no longer operative now that these lines are sold by different companies to separate dealers. Officers of each of the purchasing mannfacturers testified to the good will and good quality of the lines purchased and to their satisfaction with them. (Part IV, pp. 82, 83, *infra.*)

7. One of the Government's chief points is that the greatest decline in the Harvester Company's percentage of trade took place prior to the 1918 decree with no marked change up to and including 1923 as a result of the single-dealer restriction and the sale of the Champion, Osborne and Milwaukee lines. The record is incomplete as to the sales of harvesting machines by the Harvester Company's competitors during the period 1918 to 1923, and no exact percentages can be compnted from the evidence. From the discussion of the evidence (*infra*, p. 174) it will appear that the actual gain by competitors has been substantially greater than the Government contends. It also appears that the trade of competitors is possessed by stronger companies with better prospects of increasing their business in more normal times. The years of the farm depression, 1921, 1922 and 1923, were not years in which to expect any greater shifts in trade than actually occurred. The evidence shows the stagnation of the whole implement trade. It was no time to expand or to spend money in developing new business in new channels. The single-

dealer rule became effective December 31st, 1919, only one year before the depression. Avery & Sons and the Emerson-Brantingham Company had substantial success with the Champion and Osborne lines in 1919 and 1920. Important competitors testified that they were confident of increasing their business with the return of more normal conditions (*infra*, pp. 86, 87, 89, 106).

8. Though the petition charges an absence of competitive conditions, the Government introduced no testimony as to the character of present competition and none as to the existence of any restraint of trade. To inform the Court as to actual conditions, the Harvester Company called numerous competitors, retail dealers, officers of dealers' associations, farmers and officers of farmers' organizations. All of this evidence, which stands uncontradicted, convincing and mutually corroborative (Part V "Competitive Conditions," *infra*, p. 103) shows:

(a) That the competition in harvesting machines is active, keen, widespread and in all substantial respects the same as in other implements as to which no lack of competitive conditions is claimed.

(b) That the demand for the kinds of harvesting machines, as to which the Government complains of the Harvester Company's large portion of the trade [binders, mowers and sulky hay rakes, which were made by the companies consolidating in 1902 and are referred to herein as the "old line" harvesting machines] has greatly diminished since the Harvester Company was formed and is still diminishing, due to a number of causes. With the filling up of the western grain-growing territories, the period of initial equipment closed and the demand for harvesting machinery was restricted mainly to replacements. The growing tendency towards diversification of crops, the increased durability and life of the machines, the increased efficiency when drawn by tractors at higher speed and the substitution of newer types of machines, tractor mower attachments and harvester-threshers, are all factors further operating to reduce the demand. These changes and developments have naturally diminished the importance of the old line harvesting machines as leaders in the long line.

(c) That the different machines in a long line help to sell each other and that in this respect a well-known plow line is as good a leader as a harvester line and in some respects better, as it brings the salesman in contact with his customer earlier in the season. The Harvester Company is not the leader in the plow trade.

(d) That the tractor in recent years has also become a leader around which a considerable amount of implement trade is now centering and that many competitors of the Harvester Company have found a new avenue of distribution of growing importance through the 9,000 Ford dealers who handle the Fordson tractor and sell therewith many agricultural implements. The single-dealer provision of the 1918 decree renders it impracticable for the Harvester Company to avail itself of this new retail outlet. The evidence shows that the Ford Company does about 80 per cent of the tractor business.

(e) That there is a close price relationship between the implements in a long line sold to the same dealers. Trade custom has led dealers to expect substantially similar price treatment of the different machines in the long line and they are in a position to demand such treatment. Only 20 per cent of the line of goods which the Harvester Company solicits the local dealers to buy consists of old line harvesting machines. It must deal fairly with them on these machines or risk the loss of trade on all its lines.

9. The petition charges that other manufacturers cannot successfully compete with the Harvester Company, because its great resources enable it to manufacture more cheaply. (R. 22, 23.) But the evidence shows that no competitor has been eliminated by reason of any inability to compete with the Harvester Company and that competition, instead of diminishing, has greatly increased. These facts which show ability to compete, would seem to make unnecessary any investigation of comparative costs. In any case, the Government did not call on either competitors or the Harvester Company to disclose their costs, and no competent or probative evidence as to costs appears in the record.* But the testimony of competitors as to their ability to manufacture and sell on a competitive basis, which is the ultimate and more important question, does appear. The record further shows the equalizing effect of the long line in the matter of costs, which is another of its advantages. For a great variety of reasons costs and margins between costs and selling prices vary on different machines with the same manufacturer and of course as between different manufacturers. One manufacturer makes his best profit on one kind of machine and one on another kind. Many factors besides quantity production enter into the question of costs and many factors besides cost into the question of ability to compete. For example, the carrying of a machine in the long line on which there is a small profit may help to increase the sales and profit on the entire line.

10. The petition charges and the Government con-

*The Federal Trade Commission's figures were third-hand hearsay relating to a remote period five to ten years before the filing of this supplemental petition. While clearly inadmissible, they are discussed and analyzed in our "*Appendix to Brief*" where it is shown they do not warrant the conclusions drawn.

tends that the Harvester Company has an illegal advantage constituting restraint of trade in its so-called "profitable side lines," steel, lumber and coal. (R. 22, 23, 53-56.) The lumber and coal have shown very little profit and the steel no more than is commensurate with the large additional investment in a highly competitive industry. We believe the Government mistakes the law in supposing that any economies or profits growing out of the ownership of these raw material properties can affect the question at issue. (Part X, p. 199, *infra.*)

11. The Government also contends that the large profits and capital of the Company are evidence of dominance and illegality. (Br. 48) But on the Government's own figures (Br. 168, 169) the Company, over a period of twenty years, has made an average profit of only 6.75 per cent annually on the capital invested in the business. Of this 6.75 per cent, 4.05 per cent has been distributed as dividends; the balance, 2.70 per cent, has been reinvested in the business and accounts for the increase in capital and surplus from $120,000,000 in 1902 to $210,343,976 in 1923. Of this total investment approximately $74,000,000 is devoted to the Harvester Company's foreign trade; $32,000,000 to its steel business; and the balance to its domestic implement, motor truck and twine businesses (R. 567).

In considering the contentions that the Harvester Company's resources constitute a dangerous power, the evidence shows:

(a) That the greater part of these resources are invested in the manufacture and distribution of many kinds of implements and other goods and could not be devoted to an effort to eliminate competition in harvesting machines;

(b) That no price war in harvesting machines could eliminate competition, as competitors, by reason of their smaller percentage of the trade in the harvester lines, would suffer the least and could maintain themselves by their greater business in other lines;

(c) That no price war between long-line companies could be confined to harvesting machines. Competitors could retaliate by price cuts on other lines which constitute the greater part of their business and 80 per cent of the Harvester Company's business.

Any company with resources can so act as to injure itself and others; but no power is a menace which can only be exercised to the disadvantage of the possessor. (See *infra,* pp. 195, 196.)

12. The Government claims that the dominance of the Harvester Company is shown by control over prices. (Br. 91.) The District Court, after considering all of the evidence in this case found

> "that powerful and successful independent competitors of the Harvester Company contest the field with it, and that in their presence it cannot and does not control or dictate the prices of the harvesting machines and their appurtenances which it and its competitors make and sell." (R. 371.)
>
> *United States* v. *International Harvester Co.* 10 Fed. (2nd) 827, 829.

The Government's argument that the Harvester Company controls prices is based largely on the fact of substantial uniformity. The decision in *Cement Manufacturers Assoc.* v. *United States* (268 U. S., 588, 605) disposes of the fallacy that uniformity of prices alone is evidence of restraint of trade or of any lack of competitive conditions. As the Court says, prompt adjustments of prices to meet those of competitors are to be expected. (Part VII, p. 159, *infra.*)

THE ISSUES OF LAW.

1. The Government contends that it was the purpose of the 1918 decree to restore, as nearly as possible, the competitive conditions existing in 1902 before the Harvester Company was formed, and that this is the proper construction to place upon the term "competitive conditions." (Br. 20.) No such restrictive definition appears in the decree and we submit that it cannot be implied. On the contrary the decree does not disturb the Harvester Company's integrated long-line business, but provides for the creation of additional long-line companies; that is, by forcing the sale of three harvester brands to three existing and responsible manufacturers of implements. It thus recognizes that competition now is and will be mainly between long-line companies, whereas in 1902 it was between the companies making only harvesting machines. (Part IX, pp. 190, 191.)

The contention that 1902 conditions must be restored is evidently an after thought, for the Government in its petition does not ask for such reproduction. On the contrary, it asks for the creation of additional long-line companies (R. 25, 26). Moreover, with respect to the comparative resources of competitors, it is apparent that the Court which entered the 1918 decree had no intention of reproducing 1902 conditions. The decree contained no provision for diminishing the Harvester Company's resources, and the Court and Attorney General knew that there were no other implement companies with as large resources.

2. The Government contends (Br. 22) that the 1918 decree intended to measure competitive conditions by a "quantitative rather than qualitative admeasurement,"

referring thereby to the number of competitors and the percentages of their trade to that of the Harvester Company. There is nothing in the 1918 decree to indicate that the Court intended to set up any such test of competitive conditions. In any case, the evidence shows a substantial decline in the Harvester Company's percentage of trade since 1918, sufficient, as we contend, to comply with the Government's own test (Part VIII *infra*, pp. 179, 181). We further contend that the continuous and still greater decline in the Harvester Company's percentage of trade since the original hearing in 1913 was new matter coming before the Court in this proceeding for the first time and properly to be considered in the application of any quantitative test. The 1918 decree simply reinstated the 1914 decree without the taking of further evidence. We further contend that the circumstances surrounding the entry of the 1918 decree clearly show an intent to consider all factors material to competitive conditions, including the important qualitative factors of the strength, extent and keenness of actual competition, the absence of artificial barriers to trade and the special opportunities given to competitors further to extend their business (Part IX, p. 191, *infra*) by reason of the provision of the decree restricting the Harvester Company to a single dealer. The percentage of trade held by competitors was not only greater than in 1918, but held by stronger companies of greater actual and potential importance in the trade. On the Government's theory no consideration is given to the fact that the Harvester Company's higher percentage of trade is only with respect to a few machines in a long line of related implements sold to the same customers and subject, as a whole, to the same competitive conditions, or that such percentage has been worn down continuously for twenty years and that competitors confidently expect to wear it down still further.

3. The Government contends that the Court, in determining whether competitive conditions now exist, is prevented from applying any interpretation of the law made since the 1918 decree was entered. We, on the other hand, contend that every interpretation of the Sherman Act by this Court, which relates to what constitutes competitive conditions, whether the interpretation was made before or subsequent to the 1918 decree, is pertinent; that the opinion of the District Court in the former proceeding (*United States* v. *International Harvester Company,* 214 Fed. 987, 999) is neither controlling nor pertinent. In that proceeding all that the District Court held was that the consolidation of 1902, resulting in the formation of the Harvester Company, was illegal on the ground that if the companies consolidating could not agree as to prices, they could not legally unite. This opinion manifestly lays down no rule by which the question of whether competitive conditions now exist can be tested.

Further, where, as here, the party in whose favor the decree has been entered, re-enters a court of equity for further relief, it thereby reopens the decree for determination by the Court according to the correct and most recently announced principles of law applicable thereto.

4. Having failed to prove its charge of malicious selling at cost, the Government contends that the mere possession of large resources and efficiency in manufacture constitute an illegal dominance and restraint of trade. This contention involves *first* the question of fact as to whether any power to restrain trade exists, and, *sec-*

ond, assuming its existence, the question of law as to whether such a power, unexercised for twenty-two years, affords any ground for the further relief herein sought.

The question of fact is discussed above in paragraphs 10 and 11, *supra*, pp. 17, 18. As there stated, the record does not show the alleged great advantages in costs and large profits, and, what is more important the record *does* show that whatever power the Harvester Company might have through its capital resources, could not, because of the long-line development, be exercised to its advantage or with success in any attempt to eliminate competition in harvesting machines. Therefore we contend that no question of unexercised power is here involved.

If, however, the Court should deem it material to consider that question, we have these answers as a matter of law to the Government's contention:

First, the law (as announced in the *Steel case*) "does not make mere size an offense or the existence of unexercised power an offense";

Second, the Harvester Company's advantages of which the Government principally complains—the good name and quality of its harvester line, efficiency in cost and profitable side lines—are legal in their origin. Power derived from such sources and never applied to a wrongful purpose, cannot constitute restraint of trade.

Third, whatever might have been the decision if the Government had sought relief promptly after the formation of the Company, the law does not require and should not permit, under the circumstances here presented, a company to be dissolved because of an alleged power to restrain trade which has neither been manifested nor exercised for over twenty-two years and the existence of which is mere speculation;

Fourth, that the 1918 decree finally determined the case except for the reservation in the decree and that the right reserved to the Government is not a right to review the question of unexercised power, but only a right to examine "competitive conditions." At this stage the origin of the Harvester Company's power is not material. If similar resources, profits, efficiency and percentage of trade posseseed by one company and acquired without consolidation, would not, in the light of the other evidence in the record, show an absence of competitive conditions, neither should their possession by the Harvester Company.

THE BACKGROUND OF THIS PROCEEDING.

This case has a background of almost a quarter of a century which may well be considered in appraising the present and forecasting the future of competition in harvesting machinery.

The Harvester Company was formed by a consolidation of companies in 1902. The decision of the District Court made twelve years later (a decision never passed upon by this Court) that the Company was illegal in its inception, was not based upon any finding of an intent to monopolize. Nor in all of the subsequent years has any such intent been manifest.

During this long period the Government has dreaded many things, different things at different times, which have not come to pass, and charged many things which have not been true.

Its original petition for dissolution filed in 1912 was replete with charges of wrongful trade practices of various kinds adopted for the purpose of monopoly. None of these were proved. Concerning them Judge HOOK of the 1914 District Court said in his opinion that

> "specific charges of misconduct were made in the Government's petition which found no warrant whatever in the proof. They were of such a character and there was so much of them apparently without foundation that the case is exceptional in that particular."
>
> *U. S.* v. *International Harvester Co.* 214 Fed. 987, 1002.

Similarly, the supplemental petition now charges intentional misconduct by selling at cost to eliminate competitors, a charge wholly unwarranted and completely disproved.

The 1912 petition charged that

> "the agencies for distribution, the retail implement dealers and others are rapidly coming under their [the defendants] undisputed control." (O. R. Vol. I, 22.*)

The present record shows that during the next six years, 1913-18, competitors, unaided, took five thousand dealers away from the Harvester Company. Subsequently the single dealer provision of the 1918 decree deprived the Harvester Company of almost five thousand more dealers.

The 1912 petition charged that

> "The opportunities for any new competitors are constantly being closed by defendants *in all lines of agricultural implements.*" (O. R. Vol. I. 22.)

The Government does not now deny that competitive conditions exist as to all lines except harvester machines and the present record shows the entry and success of new and more powerful competitors in harvesting ma-

*The abbreviation O. R. ("Old Record") is used throughout this brief to refer to the Supreme Court record in the former proceeding.

chines, who have taken away a substantial portion of the Harvester Company's 1911 percentage of trade.

The 1912 petition charged that the Harvester Company, by its alleged monopoly of the harvesting machine business and the various alleged wrongful practices, was extending its operations into all lines of implements and that

> "unless prevented and restrained, their complete unchallenged dominion of every branch of trade and commerce in agricultural implements *of all kinds* may be confidently expected *at an early date.*" (O. R. Vol. I. 22.)

Twenty-two years of extension into the long line has not yet seen the arrival of this "early date," and it no longer appears imminent even to the Government. The fears of the Government as to the effect of the harvester business on the long line have at last been allayed, but it is not yet awake to the more important effect of the long line on the harvester business.

The 1912 petition charged that:

> "Defendants have been enabled to advance and have advanced the prices of harvesting implements in interstate commerce to the grave injury of the farmer and the general public." (O. R. Vol. I. 22.)

The present petition charges that the Harvester Company is enabled to manufacture and sell and does sell too cheaply, to the injury of competitors.

To complete the picture the Government adopts and annexes a portion of the Report of the Federal Trade Commission in which it asserts that it is not alone low production costs which give the Harvester Company its alleged illegal advantage, but the good name and reputation in the trade which it has maintained for its McCormick and Deering brands of machines. (R. 31, 32.)

After many years of unfounded charges and unfulfilled prophecies, the Government is now before this Court with the astonishing proposition that the International Harvester Company should be dismembered because it is selling an excellent product too cheap. True, competition has not disappeared; true it appears to be stronger than ever before; but the Government still prophesies disaster. In the face of the former unfulfilled and discredited prophecies of the Government, we submit that its present prognostications should have no weight as against the continual growth of competition shown in the record and the opinions of competitors as to their own ability to compete.

In the opinion of this Court in the Standard Oil case (221 U. S. 1, 52, 57, 58) *enhancement of prices* and *deterioration of product* are mentioned as among the principal evils of monopoly, and the dread of these evils has been responsible for most of the legislation on this subject. Conversely, the goal of competition may rightly be described as *low prices* and *high quality of product.* The Government's own admissions together with the proofs in this record, make it clear that this goal has been reached, and not alone by the Harvester Company but also by its competitors who continue to compete and grow upon this high plane of accomplishment. The competition of each has stimulated the others to improvement in product and economies in production and sale. The economies of the Harvester Company, the economies of its large and small competitors and the inventive skill of all are in the picture and, since the evidence shows the profits have been reasonable, the purchasing public has obtained its full share of the benefits.

This case is unique in that no competitors of the Harvester Company, no dealer in agricultural implements, and no farmer, complained of competitive conditions or gave any evidence indicating an absence of them. On the contrary, competitors, dealers and farmers testified to the existence of such conditions.

THE ADDITIONAL RELIEF ASKED BY THE GOVERNMENT.

While the evidence clearly shows no ground for opening up the 1918 decree, this statement would not be complete without reference to the nature of the additional relief asked by the Government.

A plan for additional relief devised and proposed by the Federal Trade Commission is adopted by the Government and specifically prayed for in its petition. (R. 26.) If this plan would not better present competitive conditions, the record stands with no suggestion from the Government for their improvement. A brief analysis of the plan will demonstrate its unfitness to accomplish any public benefit and, by contrast, the more satisfactory nature of present competitive conditions.

The plan first proposes to take away the steel properties (ore mines, coal mines and steel mill) of the Harvester Company and segregate them into a separate company with separate stockholders. (R. 50, 55.) This is for the express purpose of depriving the Harvester Company of what is said to be a source of low costs. This proposal could not benefit the public and could only assist competitors if it enabled them to increase their prices. Yet competitors have not complained, have not asked for this or any other additional relief, are actively competing and testified to their ability to increase their trade.

The plan then proposes to divide the remaining properties and business of the Harvester Company, having a book value of about $182,000,000, between two other new companies with separate stockholders. $74,000,000 of this investment is devoted to foreign trade, which was expressly exempted from the decree as not being in restraint of trade (R. 381, 382); and 80 per cent of the remaining investment of $108,000,000 is devoted to the domestic business in lines of implements and other goods in which no restraint of trade is alleged (R. 567, 594). But because of the alleged danger inhering in the Harvester Company's domestic harvesting machine business (less than 14 per cent of the Company's total domestic and foreign business—R. 561)—all of its properties and business are to be divided. The primary purpose of all this is to separate the McCormick and Deering harvester lines and thus deprive the Company of the advantages of these two lines, a purpose which the single-dealer rule has already in part effected by forcing the Company to a single line of machines.

The division of the balance of the Harvester Company's properties and business is alleged to be for the purpose of preserving to each of the new companies and to the public the benefits and economies of a long line. The Government's petition (p. 25) contains a list of the Harvester Company's plants showing how it is proposed to divide them between the two new proposed companies, Implement Company A and Implement Company B. The petition (R. 16) shows the products which were being manufactured at each of these plants. The patterns, designs, good will and business in each of the various machines manufactured would, of course, be allocated to the company receiving the plant at which manufactured. Examination of the Government's plan will show that

Company *A* is given the chilled plow line made at Chattanooga, a line adapted for use in sandy soils and sold mainly in the South. Company *B* is given the steel plow line made at Canton, Illinois, a line adapted for use in heavy soils, which does not compete with chilled plows and is sold mainly in the North and West. (R. 270.) Company *A* is given tillage implements, corn shellers, harrows, threshers and manure spreaders. Company *B* gets none of these but is compensated by the motor truck line and wagon line. Company *A* gets a wagon plant in Canada and Company *B* a harvester plant in Canada. The remainder of the foreign investment and business, developed as a unit for many years, is divided in as arbitrary a manner as the domestic. (R. 205.)

This is called a plan to give each company the benefit and economics of a long line, yet each is left deprived of half of the essentials of a well-rounded, economical long line, and without plant, equipment, designs, business or good will in the missing machines from which to make a start in rebuilding a long line. (R. 205.)

If the purpose of the plan is to injure the Harvester Company, including its foreign trade and domestic business in other lines than harvesting machines, it would doubtless be effective. But the *Standard Oil case* states that a plan of dissolution should be so framed as to protect property rights as far as possible and at the same time accomplish the fundamental object of the statute, the protection of the public interests. (221 U. S. 1, 78.)

From the standpoint of the public, it would seem that the only certain result would be to deprive it of the benefit of the competition of an efficient competitor in many kinds of implements.

Even from the standpoint of competitors, the results of this plan may be doubted. Competitors have testified to the great advantage to them of the single-dealer rule, *yet it is part of the Federal Trade Commission plan to discard this feature of the* 1918 *decree* (R. 55) and of course it would have to be discarded if the Harvester Company were now divided into two companies. The three new competitors who have purchased the Champion, Osborne and Milwaukee lines under the 1918 decree and in reliance on the opportunities created by the single-dealer rule, would have just cause for complaint.

The destruction of an efficient manufacturer is not the remedy for restraints of trade, such as selling at cost, which do not now exist or appear to be imminent. Against the possibility of any unfair trade practices in the future, competitors are protected by the Clayton Act.

The Federal Trade Commission plan was conceived and published without a hearing (R. 200). The interest of the public, the interests of competitors and the lawful property interests of the stockholders appear to have been carefully considered and properly guarded by the Department of Justice which framed the 1918 decree. The Court which entered that decree has found no reason to modify it. We submit its decision was correct and should not be disturbed.

ARGUMENT.

PART I.

THE GOVERNMENT'S CHARGE THAT THE NUMBER OF COMPETITORS IN HARVESTING MACHINERY IS STEADILY DIMINISHING DUE TO INABILITY TO COMPETE WITH THE INTERNATIONAL HARVESTER COMPANY WAS AFFIRMATIVELY DISPROVED—COMPARISON OF COMPANIES COMPETING IN 1911 AND 1923.—NO DECREASE IN NUMBERS AND MARKED INCREASE IN STRENGTH OF COMPETITORS.

The gist of the supplemental petition is contained in the following paragraphs (R. 22-23):

> "Moreover, the number of independent manufacturers of harvesting machines is steadily shrinking, due to the inability of those companies to compete with the International Harvester Company. The latter, with its enormous capital, credit, and resources, its profitable side lines and lumber, steel, and coal subsidiaries, is enabled, particularly in times of depression, to sell its harvesting machines at cost, which cost is generally lower than that of its competitors, and thus effectively eliminate competition and monopolize the business.
>
> "Upon information and belief, petitioner alleges that since the institution of this suit, and particularly since the entry of the decree of November 2, 1918, the International Harvester Company has used its great power in the manner jnst alleged for the purpose and with the effect of restraining interstate trade and commerce in harvesting machines and monopolizing the same by compelling its competitors to cease and desist from the manufacture and sale of harvesting machines.
>
> "As shown by a comparison of the 1911 table with the table for 1921, a number of the International Harvester Company's competitors abandoned the field during the intervening years. * * *
>
> "Because of the falling off in their harvesting ma-

> chine business, due to their inability to compete with the International Harvester Company, the Moline Plow Company, Moline, Illinois, Thomas Manufacturing Company, Springfield, Ohio, and Massey-Harris Company, Batavia, New York, are contemplating the discontinuance of their harvesting lines."

The alleged superior advantages of the Harvester Company which the Government claims prevent effective competition are considered in Part VI of this brief (*infra*, p. 134).

The specific charge of selling at cost for the purpose and with the effect of eliminating competition is considered in Part II (*infra*, p. 45), which gives the reasons for the Harvester Company's price reductions and the causes for the discontinuance of the harvester line by each company which has abandoned that field since 1911.

In this Part I are considered in the following order:

1. The charge that certain companies now in business contemplate discontinuing their harvester lines because of inability to compete.
2. The charge that the number of competing companies has steadily diminished since 1911. With the comparison of the number of companies competing in 1911 and 1923, a brief outline of the business and history of the principal competing companies is given so that the court may have at the outset a general description of the competing companies. In Part V, "Present Competitive Conditions," (*infra*, p. 103) the character and extent of the competition between the competing companies are considered.

1. THE CHARGE THAT THE MASSEY-HARRIS COMPANY, MOLINE COMPANY AND THOMAS MANUFACTURING COMPANY CONTEMPLATE DISCONTINUING THEIR HARVESTER LINES WAS WHOLLY UNFOUNDED.

The Massey-Harris Harvester Company of Batavia, New York, which the petition charges is about to abandon its harvesting machine business, is a subsidiary of the Massey-Harris Company of Canada, having its principal plants in Canada and doing a world-wide business. The Canadian company has been in business since 1847, has a capital and surplus of $31,700,000, and has manufactured harvesting machines in Canada for many years. (R. 256.) It entered the American field by purchasing 82 per cent of the stock of the Johnston Harvester Company of Batavia (whose name was subsequently changed to Massey-Harris Harvester Company—R. 85) shortly before the filing of the original petition in this suit in 1912, but had not then become a large factor in the trade. (R. 285, 215.) Its harvesting machines (binders, mowers, rakes, harvester-threshers, etc., a complete line) are now offered for sale throughout the grain-growing districts by more than 1,800 dealers and by a number of jobbers who sell to local implement dealers. (R. 85, 86, 256.) *Thomas Bradshaw,* manager of the parent company, testified (R. 257):

> "I know of no obstruction to the free competition in the United States in the sale of agricultural implements. We have no intention of abandoning the manufacture and sale of harvesting machines in the United States."

The Moline Company, the second company said to be contemplating discontinuing its harvester line, is also an old established implement concern whose leading lines are plows and tillage implements. It entered the harvester business in 1913, after the filing of the original bill in this suit, as a step toward developing a long line and year-round business. For this purpose it bought the old Adriance-Platt harvester plant at Poughkeepsie, New York. (O. R. Vol. II, 1160, 1161.) This plant, while not advantageously located for the western domestic trade, maintained itself with a substantial foreign trade. Its foreign trade was lost during the war and in 1920 the company bought a plant at Plano, Illinois, with the idea of manufacturing a harvester line for its western trade. (R. 107.) The business slump at the end of 1920 affecting the implement industry in general, together with the financial difficulties of the Willys-Overland Automobile Company, its then principal stockholder, affecting the Moline Company in particular (R. 109), led to abandonment of this plan and to the sale of the Poughkeepsie factory. They did not, however, lead to an abandonment of the belief that the harvester business was a desirable and open competitive field. The company was planning to move the equipment for manufacturing harvester machines from its Poughkeepsie plant to its plant at Stoughton, Wisconsin, when the proposal to purchase the Milwaukee line equipment from the Harvester Company came up for consideration and this purchase was finally consummated as a more desirable alternative, (R. 108). Mr. Peek, President of the Moline Company, testified that he considered the position of the Moline Company with the Milwaukee line stronger than it had been theretofore with the Poughkeepsie line (R. 265, 266).

Thomas Manufacturing Co. Wallace S. Thomas, Vice President of this company, called as a witness by the Government, testified, (R. 115):

> "The Thomas Manufacturing Company is not contemplating going out of business nor discontinuing any of the lines which appear in these books."

2. THE NUMBER OF COMPETING COMPANIES HAS NOT STEADILY DIMINISHED SINCE 1911 AS CHARGED. THE EVIDENCE SHOWS NO CHANGE IN NUMBER OF COMPETITORS. THE RISE OF NEW COMPANIES AND DECLINE OF OTHERS INDICATE NOTHING BUT THE USUAL OPERATION OF COMPETITION.

The Harvester Company, as before stated, was a consolidation of companies manufacturing grain and hay harvesting machinery. For the purposes of this suit the term "harvesting machinery" or "harvester line" should be understood as limited to this class of implements. It does not include bean and pea harvesters, cotton pickers, and other machines not manufactured by the Harvester Company, classified in the U. S. Census as harvesting machinery. On the other hand, it does include the newer types of grain and hay machines which are competing with and partially displacing the old 1902 types made by the consolidating companies; that is, it includes harvester-threshers which compete with binders and headers; tractor mower attachments competing with the old mowers; and side-delivery rakes, sweep rakes and combination rakes and tedders competing with the old sulky rakes. We believe there is no disagreement with the Government as to what is included in the term "harvesting machinery" and this definition is inserted only for clarity and as a preliminary to making up a list of competing companies.*

* Reapers cut small grains—wheat, oats, rye, etc.—and rake the straw into bundles; they do not bind and have been practically obsolete in this country for years (O. R. I. 354). According to the Government's figures (Br. 155) only 695 were sold in this country in 1923.

Grain binders cut and bind small grain crops and throw them off in bundles; (O. R. I. 353)

Headers, as their name implies, cut off the heads of small grain crops and throw the grain into a wagon box, leaving the straw standing. They are sold in a very limited portion of the country where the grain is dry; (O. R. I. 353)

Push binders are large grain binders which derive their name from the fact that they are pushed instead of pulled by horses; (O. R. I. 353)

Harvester threshers are combined reapers and threshers. They are relatively new machines. The Holt Company first made them for use

THE FOLLOWING IS A TABULATION OF COMPANIES COMPETING IN HARVESTING MACHINES WITH THE HARVESTER COMPANY IN 1911 AND 1923 ARRANGED TO SHOW THE COMPANIES WHICH HAVE REMAINED IN BUSINESS, THOSE WHICH HAVE RETIRED AND THE NEW COMPANIES WHICH HAVE ENTERED THE FIELD.

Companies in Business in 1911 and Ever Since.

1—Deere & Co.
2—Emerson-Brantingham Co.
3—Minnesota State Prison
4—Thomas Mfg. Co.
5—Allen & Co.
6—Messinger & Co.
7—Sears, Roebuck & Co.
8—Montgomery Ward & Co.
9—Holt Co.
10—Ohio Rake Co.
11—Fleming Co.
12—Jenkins Rake Co.
13—Collins Plow Co.

Companies in Business in 1911 and Since Discontinued.	*Companies Entering Field Since 1911 and Now in Business.*
1—Johnston Harvester Co.	1—Massey-Harris Co.
2—Adriance Platt Co.	2—Moline Co.
3—Acme Co.	3—B. F. Avery & Sons
4—Walter A. Wood & Co.	4—Rock Island Plow Co.
5—Independent Harvester Co.	5—Dempster Mfg. Co.
6—Richardson Mfg. Co.	6—Superior Mfg. Co.
7—Bateman Mfg. Co.	7 -Roderick Lean Co.
8—Belcher & Taylor Co.	8—Detroit Harvester Co.
9—Sieberling-Miller Co.	9—Case Threshing Machine Co.
10—Eureka Mower Co.	10 Advance Rumely Co.
11—Plattner Implement Co.	11—Harris Mfg. Co.

The Government's tables of competing companies is incomplete, both with respect to its 1911 and 1922 lists. (R. 20, 22.) Four rake companies (Ohio Rake Co., Flem-

on the Pacific Coast about 1910. They are now used in large areas of the country where a dry climate prevails; (R. 174)

Corn binders cut corn stalks and bind them. They are used only where it is desired to preserve the stalks, usually for silo filling. (O. R. I. 353)

Mowers are used to cut grass and alfalfa and other forage crops; (O. R. I. 354)

Sulky or dump rakes rake up the hay and dump it in windrows; (O. R. I. 354)

Side delivery rakes answer the same purpose as sulky hay rakes but roll the hay into a windrow at the side; (O. R. I. 354)

Sweep rakes push hay in front of them into the stack; (O. R. I. 354)

Tedders kick the hay over in the swaths that the mower leaves and thus facilitate drying; (O. R. I. 354)

Combined rakes and tedders are what the name implies. (R. 174) ing Co., Collins Co., Jenkins Rake Co.) and one harvester-thresher company (Holt Co.) were omitted from its 1911 list; and from its 1922 list it omits three rake companies (Rock Island Plow Co., Dempster Co. and Superior Mfg. Co.), two tractor mower companies (Roderick Lean Co. and Detroit Harvester Co.) and the large mail order house of Montgomery Ward & Co. (See App. pp. 2-4.)

Some of these omitted companies are not large or important factors in the trade, but this is also true of a number of those companies which have discontinued business since 1911. It is not the Harvester Company but the Government which argues the importance of the number of competitors. If the retirement during twelve years of a number of small companies is significant, it seems equally significant that a number of small companies have continued to compete throughout the whole period and more significant that other new companies have entered the field. We say *more* significant because many concerns are constantly retiring from many competitive fields for various reasons other than restraint of trade, but new concerns do not voluntarily enter a field which they believe to be closed against them or from which they have seen others eliminated because of impossible competitive conditions.

The significance of the retirement of certain companies from the harvester business should be considered in the light of what happened during the same period in the agricultural implement business generally. A careful checking of the most reliable and accepted business trade lists for 1911 and 1923 shows that of 304 concerns in the implement business in 1911, 148 or 48.6 per cent were no longer in business in 1923. (Defts'. Ex. (S) 30, R. 619; Odell, R. 248; Legge, R. 205.) The retirement of

11 out of 24 companies in the harvesting machine business (46 per cent) considered alone would indicate usual rather than unusual competitive conditions. This conclusion is fully confirmed by the evidence as to the specific reasons for the discontinuance of each company (*infra*, pp. 57, 58; App. 10-17).

It is common knowledge that the decline of some competitors and rise of others is an ordinary incident of competitive industry, reflecting changed conditions in management, financing, manufacturing methods, location with respect to markets and many fortuitous circumstances. Such changes indicate normal competition; that the industry is on a reasonably efficient plane. The Government has wholly failed to show anything untoward in the history of competition in the harvester field during the last twelve years. The attempt to charge the Harvester Company with the mortality among competitors is entirely unwarranted. (See App. p. 10, 11.)

3. THE COMPANIES COMPETING IN 1923 ARE LARGER AND STRONGER THAN THOSE COMPETING IN 1911. COMPARISON OF COMPANIES COMPETING IN 1911 AND 1923.

The strength, geographical extent, permanence and potentialities of competition are surely of more significance than the number of competitors. In this respect, as well as in number, the Government has failed to show diminishing competition or inability to compete. On the contrary, the evidence clearly shows increased and growing competition by stronger and more solidly founded companies.

The Government attaches to and makes a part of its supplemental petition the last chapter (Chap. X) of the Federal Trade Commission's Report (Pet's. Ex. (S)

90). In this chapter appears the following passage bearing on the strength and character of competition:

> "The competitors of the International Harvester Co. vary greatly in size and also in respect to the extent in which they are engaged in the manufacture of different lines of implements. There are, however, several large concerns, each of which is engaged in the production of a great variety of implements; such, for example, are *Deere & Co., the Emerson-Brantingham Co.,* the *Moline Plow Co.,* and the *Rock Island Plow Co., besides others which are already important or in the process of extending their operations.*" (R. 58).

How can the Government claim that competition is decreasing in the face of these admissions, and if competition has increased, how does the Government prove inability to compete?

The four most important competitors in 1911, in harvesting machines, were the Acme Co., Johnston Harvester Co., Adriance Platt Co., Walter A. Wood Co. Compare these with the four largest companies competing in 1923—Deere & Co., Massey-Harris Co., Moline Co. and Emerson-Brantingham Co.:

(1) The four 1911 companies were all short-line harvester companies. The fonr 1923 companies are all long-line companies with established businesses in other lines than harvesting machinery. Some of the advantages of the long line are mentioned by the Federal Trade Commission in the passage quoted *supra,* p. 3. The significance of this development is discussed more fully elsewhere (*infra,* p. 129.)

(2) All four 1923 competitors have dealer organizations covering much larger territories than the four 1911 competitors. Generally speaking, their lines are offered throughout the United States wherever such implements are used. (R. 207.)

(3) A comparison of the capital stock of the companies in question shows the following (Defts'. Ex. 120, O. R. Vol. II 1382; R. 463, 256, 455, 406):

1911		1923	
Acme	$3,500,000	Deere	$52,904,400
Johnston	1,900,000	Massey-Harris	24,800,000
Adriance Platt	1,000,000	Moline	20,925,000
Wood	1,500,000	Emerson-Brantingham	21,217,000

(4) During the same period (1911-1919) in which Acme's binder sales declined from 7,829 to 994, Deere & Co.'s rose from 10 to 17,222. The following table compares the binder, mower and sulky rake sales of the four largest competitors in 1911 and of the four new competitors in 1919 and 1923.* These two years, 1919 and 1923, are taken in order to show one good and one bad year in the industry.

BINDER SALES.

	1911		1919	1923
Harvester Co.	97335	Harvester Co.	98077	30161
Acme	7829	Deere	17222	5245
Johnston	3027	Massey-Harris	3986	1944
Adriance Platt	1056	Moline	5306	1308
Wood	1043	Emerson-B. Co.	3522	991
	12,955		30096	9488

MOWER SALES.

	1911		1919	1923
Harvester Co.	141,330		83,219	70,341
Acme	6,092	Deere & Co.	13,353	14,327
Johnston	7,028	Massey-Harris Co.	2,893	4,657
Adriance-Platt Co.	4,763	Moline Co.	5,521	4,698
W. A. Wood Co.	6,612	Emerson-B. Co.	10,888	6,861
	24,493		32,657	30,543

SULKY RAKE SALES.

	1911		1919	1923
Harvester Co.	89,912		34,326	27,627
Acme	8,888	Deere & Co.	7,273	6,569
Johnston	5,200	Massey-Harris Co.	1,338	2,195
Adriance-Platt	1,792	Moline Co.	3,460	2,860
W. A. Wood Co.	5,173	Emerson-B. Co.	5,119	3,532
	21,053		17,190	15,156

* For references supporting said tabulations see R. 20, 397, 398, 462, 421, 453, 405.

From 1911 to 1919 the Harvester Company's percentage of U. S. binder trade declined from 87.2 to 72.7 and the total percentage of competitors' trade more than doubled. Yet the Government claims that the competition has diminished during this period.

In addition to the four long-line companies above mentioned, (Deere, Massey-Harris, Moline and Emerson-Brantingham) B. F. Avery & Sons entered the field in the fall of 1919 by purchase from the Harvester Company of the Champion line required to be sold under the 1918 decree. (R. 270.) This company also is a long-line company, and has filled out its line by adding harvester machines. (R. 88, 89, 269, 270.) It is an old established company, a leader in plow and tillage lines for many years. (R. 269.) Its issued capital is $5,404,000; assets, per balance sheet, $9,974,000 (R. 430). The company's principal business is in the south and southwest with a jobbing trade in the middle and northwest (R. 88, 89, 195, 196).

The importance of the Minnesota State Prison as a factor in the binder trade has considerably increased, not diminished, since 1911. Its binder sales were 685 in 1911 compared to 4,420 in 1919. (See App. p. 5.)

Harvester-threshers are a new type of machine competing with and destined to replace the old binders and headers in large portions of the country. The importance of this new development is discussed later (*infra*, p. 119). At this point attention is called only to the fact that the business is in its infancy and is being competed for by the Harvester Company and a number of strong companies, most of which entered the harvester-thresher business about the same time. The 1923 sales of harvester-threshers were as follows (R. 528):

International Harvester Company	430
Holt Co.	279
Massey-Harris Co.	125
Case Threshing Machine Co.	295
Advance Rumely Co.	12
Harris Co.	130

The Holt Co., the first to perfect a machine, was in business prior to 1911 and has an established trade on the Pacific Coast and in the other sections where these harvester machines are sold (R. 256, 257, 280). The Harvester, Massey-Harris and Case Companies are newcomers. The Advance Rumely Co. entered the field with an experimental machine in 1923 (R. 282). The Case Co. and Advance Rumely Co. are the two largest threshing machine companies in the United States with established selling organizations throughout the grain-growing territories (R. 282). The extension of their thresher lines to include harvester-threshers is a natural and advantageous one (R. 281). The Case Co. has a capital and surplus of $27,000,000 (R. 280). The capital of the Advance Rumely Co. does not appear in the record.

In the mower trade all of the five long-line companies above mentioned (Deere, Massey-Harris, Moline, Emerson-Brantingham and Avery & Sons) are now competing and in addition the following: Thomas Mfg. Co., Sears-Roebuck, Montgomery Ward, Messinger Co., Detroit Harvester Co. and Roderick Lean & Co. The first four companies have continued in business since prior to 1911. (See App. p. 3.)

The Detroit Harvester Co. and Roderick Lean Co. are new competitors since 1911, making mower attachments to be used with Fordson tractors. This significant development is discussed elsewhere (*infra*, pp. 119, 120). Machines of this type directly compete with the old horse drawn mowers which must be priced on a competitive basis. It seems probable that tractor mower attachments will replace horse mowers to a large and growing extent. (R. 278).

The rake business is competed for by all of the five long-line companies above mentioned, and in addition there are now, as in 1911, a number of small rake companies making sulky rakes, side-delivery rakes and sweep rakes. Rakes are used more extensively than binders and the equipment for manufacture is less expensive; hence there have always been a number of small companies competing in limited territories. The Government introduced no evidence as to the business or resources of a number of these companies, so no detailed comparison of 1911 and 1923 competition in the rake trade is possible (*supra*, pp. 37-38). One of the omitted companies, Dempster Mfg. Co., was described by the Vice President and Sales Manager of Deere & Co. as their principal competitor in sweep rakes (R. 260).

Additional facts regarding competing companies, lines handled, etc., will be found in our Appendix (p. 2-5). See also "Present Competitive Conditions" (Part V, *infra*, pp. 103-110).

PART II.

THE CHARGE THAT THE INTERNATIONAL HARVESTER COMPANY HAS SOLD AT COST FOR THE PURPOSE AND WITH THE EFFECT OF ELIMINATING COMPETITION WAS AFFIRMATIVELY DISPROVED. THE PRICE REDUCTIONS COMPLAINED OF WERE NECESSITATED BY THE EXTREME FARM DEPRESSION AND COMPETITIVE PRICES. THEY WERE NOT THE CAUSE OF ANY COMPETITOR'S RETIREMENT. THE CAUSES OF RETIREMENT OF CERTAIN COMPETITORS CONSIDERED.

Selling too cheap for the purpose and with the effect of eliminating competition is the only wrongful and illegal practice charged in the supplemental petition. Whatever position the Government may now take, it is evident that when the petition was filed, this allegation was considered the principal basis for asking further relief.

The petition alleges (R. 22, 23):

> "The latter [Harvester Company] with its enormous capital, credit, and resources, its profitable side lines and lumber, steel, and coal subsidiaries, is enabled, particularly in times of depression, to sell its harvesting machines at cost, which cost is generally lower than that of its competitors, and thus effectively eliminate competition and monopolizes the business."
>
> "Upon information and belief, petitioner alleges that since the institution of this suit, and particularly since the entry of the decree of November 2, 1918, the International Harvester Company has used its great power in the manner just alleged (selling at cost) for the purpose and with the effect of restraining interstate trade and commerce in harvesting machines and monopolizing the same by compelling its competitors to cease and desist from the manufacture and sale of harvesting machines." (R. 23.)

Harvester Company's Price Reductions. After the break in the prices in farm products and general business depression, beginning in the fall of 1920, the Harvester Company made two price reductions on harvesting machines: (1) a reduction of 10 per cent on April 13, 1921, applicable to machines purchased for the 1921 season, and (2) a further reduction of 10 to 20 per cent on September 28, 1921, applicable to the 1922 season. The charge that the Company has sold at cost "particularly since November 2, 1918," coupled with its statements on page 96 of its brief, raises the question whether these two price reductions were made for proper business reasons, or maliciously to eliminate competition.

The Government's evidence, in support of this charge, consisted only of proof that the Harvester Company lost money in 1921 and 1922 on its domestic implement business (R. 565, 566), a fact admitted and published by the Company in its annual reports. The 1921 Annual Report (filed as part of record by stipulation, R. 378) states (p. 13):

> "The year 1921 was the worst in the history of the agricultural implement business. The rapid and severe decline during that period in the price of practically all farm products greatly diminished the purchasing power of the farmer and had a depressing effect upon the implement business, which is dependent for its success upon the prosperity of its ultimate customer—the farmer. * * * The net profit for 1921 was $4,149,900, compared with $16,655,300 for 1920. The business done in the United States during 1921 produced no profit, the profits shown having been derived from the Company's foreign trade."

In its 1922 Annual Report the Company says:

> "Sales of farm machinery in the United States do not show any profit."

The Government also proved that various competitors lost money during 1921 and 1922 and the Harvester Company showed that the same was true generally in the industry and particularly with the Oliver Chilled Plow Works, which does not sell harvesting machinery, but is one of the oldest, largest and generally most prosperous plow and tillage companies (R. 251), a company that had never previously closed a year with loss in seventy years (R. 250).

1. THE CHARGE THAT THE HARVESTER COMPANY HAS SOLD AT COST TO ELIMINATE COMPETITION WAS DISPROVED—THE ECONOMIC CONDITIONS REQUIRING PRICE REDUCTIONS—THE FARM DEPRESSION AND THE PRICE REDUCTIONS OF OTHERS.

The price policies and actions of the Harvester Company and its competitors during the period in question primarily reflected the trade conditions resulting from the farm depression. It is important that the Court should understand these conditions, not only in order to judge of the propriety of the Harvester Company's price reductions, but also because of their bearing on other branches of this case. Without this knowledge, competitive conditions since 1920 cannot be properly understood.

For this purpose the Harvester Company introduced the testimony of a number of witnesses—farmers, bankers, dealers, competitors, etc. There was no contradiction in the evidence on this subject.

The following is a chronological summary of the evidence regarding the inception, development and far-reaching effect of the farm depression, the Harvester Company's price reductions being mentioned and explained as they occurred.

(a) *Condition of Farmers and Industry Preceding the Price Slump.*

For a number of years prior to the fall of 1920, the prices of farm products had steadily increased as had the value of farm lands (R. 334). After the war the farmers in the grain-growing states had in many instances borrowed money for the purchase of additional lands, buildings, automobiles, etc., and at the beginning of 1920 were already heavily in debt (R. 362). Stimulated by the high prices for all products, the crops planted and raised in 1920 were unusually large and were financed to a large extent by borrowed money (R. 361). It was the most expensive crop ever raised by the American farmers, not only with respect to labor but other elements of cost and marketing, including freight rates (R. 336, 339, 341, 361, 362). Manufacturers of all kinds had difficulty in keeping up with the demand and vied with each other in bidding for materials and labor to increase production for the next year's business. The implement companies in particular had booked for 1921 the largest advance orders in their history, and when the slump came had unusually large, high-cost inventories of machines and materials accumulated to meet the expected demand (R. 173; App. 8).

(b) *The Price Slump in Agricultural Products.*

When the Government price of $2.25 per bushel for wheat was removed in June, 1920, wheat advanced to $2.63 in July (R. 178, 336). Later in the year agricultural prices generally began to break, at first slightly, then more rapidly. Wheat dropped from about $2.63 per bushel in 1920 to 93 cents in 1921; corn from about $2.00 per bushel to 37 cents and other products in like proportion. (R. 334-336, 339, 344, 359.) The evidence fully supports the following description of what took place as found and described by the Joint Senate and House Committee in its report (Dec. 9, 1921) on "The Agricultural Crisis and Its Causes" (Part I, p. 17):

> "In the United States the decline of prices began with live stock and ran the course of farm products. Prices of clothing, metals and metal products, lumber, shoes, steel, fuel, house-furnishing goods, copper, gasoline, and commodities of all descriptions followed in the train of the prices of agricultural products, but the prices of these commodities did not decline to the same degree or at the same time or with the same rapidity as the prices of agricultural products. Some of them declined only very slightly as compared with agricultural products. All of this served to diminish the purchasing power of farm products during the period and to intensify the farmers' difficulties. As the failing purchasing power of the world began to make itself felt in the lessening of export demand for farm products, the prices of agricultural products began to decline. As prices of agricultural products declined, the purchasing power of the agricultural population, representing nearly 40 per cent of the total purchasing power of the country, began to diminish. As the purchasing power of the American farmer diminished, the production of industries that produced the commodities of commerce began to decline and unemployment, resulting in diminishing consumption gave further impulse to the avalanche of prices. Influential and important as these economic forces are in their effect upon prices of commodities, the psychology and attitude of 100,000,000 people, once directed either by optimism and the influences of expansion or by pessimism and the influences of depression, must not be overlooked."

(c) *Stagnation of Business—Buyers' Strike.*

On the one hand stood the farmers with unusually heavy debts to meet, the usual credit with local banks and merchants cut off, bank deposits depleted (see App. 6), land values collapsed, foreclosures numerous—purchasing power reduced to little or nothing—and on top of this a growing feeling of resentment against the relatively higher prices of manufactured products. This feeling, fostered by farmers' organizations, grew and spread into an organized buyers' strike. The implement companies bore the brunt of the feeling, although their level of prices was no higher relatively than other manufactured products. Farmers pledged each other to buy no new implements, and loaned and exchanged implements with neighbors. Meetings were held and "Repair and Fix Up Week" campaigns were organized.* By January, 1921, the Harvester Company had received cancellations of goods ordered by dealers for 1921 to the amount of $46,768,919 and other manufacturers testified to similar unheard-of cancellations. (See App. p. 8.)

On the other hand stood the manufacturers of implements, loaded with high-cost inventories of unsalable machines, with no current business to carry the factory overhead and with heavy banking obligations requiring early liquidation.

The situation was well described from the standpoint of the farmers by J. R. Howard, President from 1919 to 1923 of the American Farm Bureau, the well-known country-wide farmers' organization with over a million and a quarter members. *Mr. Howard* testified (R. 335):

> "The buying power of the farmer was practically suspended and is not yet fully restored. Within my memory there has never been as critical a situation as existed during these years. Early in 1921 there was a reduction in manufactured products. The

*The evidence shows that the Harvester Company co-operated in the Repair Week movement and made special arrangements to meet the farmers' repair requirements. (R. 202, 203.)

farmers were very much incensed by the spread between producers' prices and costs, and gave expression to their feelings at every opportunity and in farm bureau meetings. There was great complaint at farm implement prices; many resolutions were passed; the feeling was that implement prices should recede with the farmers' prices. I quit buying implements and that was a pretty general condition over the country—the buying was limited to tools and repairs which were absolutely necessary.

"Our organization looked carefully into the subject and conferred with the National Association of Farm Equipment Manufacturers, and as a result advised our farmers should keep their old implements. We found that steel costing $25 a ton prior to the war cost $50 a ton at the time farm prices went down and that the labor cost of the implement manufacturers had gone up materially, so we told our people the conditions and that we would use every influence with those manufacturers toward lowering prices, but we were convinced they could not be much less without being below replacement costs. We did urge the manufacturer in every case to make every possible reduction. Following this some reductions were made.

"The manufacturers' volume of sales depended upon their making reductions; the reductions made resulted in a larger buying than would otherwise have occurred; had further reductions been possible the farmer would have bought correspondingly larger amounts of implements. The farmers felt that they had taken their medicine, a bitter dose of depreciation, and the other fellow should take the same dose."

(d) *Price Reductions in Implement Industry in the Winter and Spring of* 1921.

The conditions above described were of necessity met by general price reductions in all manufacturing industries. *The history of the price adjustments in the implement business is set out in Defts.' Ex.* (*S*) 32, *R.* 632, *showing all price reductions by all companies during 1921.* On January 10, 1921, the Oliver Chilled Plow Works, the leading manufacturer of chilled plows and, next to Deere and Company, the largest manufacturer of steel plows, and the maker of a long line of tillage tools, cut its prices on practically its entire line from 10 to 20%. Mr. Oliver, the President of said company, who the Government truly says "was admirably qualified to testify" (Br. p. 132), was called by the Harvester Company and detailed the reasons which induced him to make this reduction (See App. 9). Following the Oliver cut over twenty companies reduced prices, these reductions including plows, tillage tools, hay loaders, tedders, rakes, seeding machinery, tractors and cream separators. The Ford Company on January 27th cut the price of its tractors $165 or 21% (Defts.' Ex. (S) 32.)

The Harvester Company reduced its chilled plow line 20% on January 18, 1921. Other lines (drills, seeders, tractors, wagons, etc.) were reduced 10 to 15% on March 7, and *on April 13th* 1921 *it reduced the balance of its lines* 10% *(including steel plows, cultivators, and harvesting machines, binders, mowers, rakes, etc.)* This reduction applying to machines which were predominantly steel, was made the day after the price of steel was cut by the U. S. Steel Corporation 10 to 17%.

The evidence shows clearly that it would have been impossible for the Harvester Company to have done any business in 1921 without this price reduction. Numerous dealers, farm organization officials and others testified that this price reduction in April, 1921, and a further one in September, 1921, were essential if any business was to be done at all and trade connections maintained. (R. 291, 292, 348, 350, 353, 342, 335, 202.) After the price cuts by Oliver and others in January, February and March, 1921, mainly on spring goods, dealers naturally held off ordering the later seasonal goods (harvesting machines) expecting similar reductions, and when the price of the principal material, steel, was cut, the question was settled. This affected replacement costs and it was hopeless to attempt to sell the inventories except on a replacement cost basis. Similar price reductions on harvesters and other steel machines were made by all principal competitors within four days after the price of steel was reduced. (Defts.' Ex. (S) 32, R. 633.)

(e) *Further Price Reductions.*

The lower price levels on implements established by competitive price reductions in the winter and spring of 1921, as outlined above, were not sufficient to start buying under the existing conditions. (R. 201.) The lack of purchasing power and feeling of resentment on the part of the farmers continued; 1921 was the worst year ever experienced by the Harvester Company and doubtless by all of its competitors. The volume of its business in the United States in 1921 was $51,191,216 as compared with $115,253,165 in 1920 (Defts.' Ex. (S) 15; R. 594). Its sales of binders shrank from 69,780 in 1920 to 20,336 in 1921. (R. 597.) During the summer of 1921 there were further and frequent price reductions by various implement concerns and others selling their products to the farmers. (Defts.' Ex. (S) 32, R. 634.)

The ordinary trade custom is to write annual contracts with dealers in the fall and announce prices at that time for the ensuing year. Following this custom, Avery & Sons, purchaser of the Champion line, announced its 1922 prices on September 20, 1921, making further reductions on various machines, including a cut of 10% to 15% on their harvester line. *The Harvester Company followed with an announcement on September 28th, 1921 making similar reductions on harvesting machinery and other implements generally.* All other harvester manufacturers also brought their prices to the new level established by Avery & Sons. (Defts.' Ex. (S) 32, R. 634.) These prices remained in effect until the 1923 season. (R. 202.)

(f) *No Reductions Below Estimated Replacement Cost.*

While the Harvester Company was forced by the special conditions in 1921 and 1922 to sell its implements at a price less than the actual cost of production and distribution, it never produced implements for the purpose of selling at a loss and never fixed its prices below the estimated cost of replacement. (R. 202.) In 1921, and to a large extent in 1922, it was a case of liquidating excessive inventories produced (ill-advisedly as it turned out) under high cost conditions and with no possibility of disposing of them except at a loss. And this was the general situation of all implement companies at that time. (App. p. 8.) With respect to additional goods manufactured for 1922, the prices of pig iron, steel and other materials were substantially decreased (R. 202) and sweeping reductions of wages and salaries were made by the Harvester Company (R. 201) during 1921. The Harvester Company's prices announced for the 1922 season were in excess of the replacement or manufacturing cost as then estimated. (R. 202.)

(g) *Price Relationship Between Different Implements in Long Line.*

Before leaving this history of price competition it is pertinent to point out that it not only fails to prove a special price policy by the Harvester Company with reference to its harvesting machines, but rather tends to show the opposite—inability to adopt any special policy. The long line development had created a close relationship in the marketing of all implements in the line, tending to protect purchasers against unduly high prices and competitors against unduly low prices. As *E. P. Armknecht*, former president of the National Federation of Retail Implement Dealers' Associations and a director of this Federation for eighteen years, testified:

> "It has been the custom to advance prices generally or reduce them generally throughout the entire line. If the price of one article is reduced, the customer expects a reduction on others and holds off buying, waiting for it to come. Hence the situation in our territory in the beginning of 1921, and I might speak of the country generally, because my knowledge existed over the entire country that our association covered." (R. 299.)

Against high prices on particular machines, purchasers can retaliate by buying all implements from competitors. Against low prices on particular machines, competitors can retaliate either by cuts on similar machines or on any other in the long line (*infra*, p. 133).

2. NO COMPETITOR WAS ELIMINATED BY THE HARVESTER COMPANY'S REDUCTION OF PRICES ON HARVESTING MACHINES IN 1921 OR 1922 OR BY REASON OF ANY OTHER ACT OF THE HARVESTER COMPANY OR BY REASON OF ANY IMPOSSIBLE OR UNUSUAL COMPETITIVE CONDITIONS CREATED BY THE HARVESTER COMPANY.

There is no question but that all implement companies suffered greatly as a result of the 1921-2-3 farm depression. But to suggest that the Harvester Company caused the difficulties of its competitors ignores these facts:

(1) As Mr. Oliver testified, the situation necessitating price reductions and resulting in losses was not con-

fined to the harvester business and would have been just the same if the Harvester Company had not been in existence. (R. 256.)

(2) As already stated, the second and largest price reduction bringing harvesting machine prices to their lowest level was not initiated by the Harvester Company but by one of its competitors, Avery & Sons. (Defts.' Ex. (S)32, R. 634.)

(3) The price reductions made by the Harvester Company on its harvester lines were no greater than on its other lines of implements as to which no restraint of trade is charged. See Defts.' Ex. (S)20, (R. 601), comparing changes in prices on harvesting machines and other agricultural implements.

(4) Last but not least the evidence shows that all but one of the 1911 competitors, for whose discontinuance the Government blames the Harvester Company, were out of the harvester business, or practically so, prior to the time the price reductions were made. (See App. 10, 11.)

The Acme Company. Between 1911 and 1920 this company's binder sales fell off from 7,829 to 38. (R. 20, 467.) This inclnded the war time period during which the Federal Trade Commission in its report attached to the Government's petition (R. 27) said that prices were too high and when other implement companies generally were prosperous. During the same period Deere & Co. increased its binder sales from 10 to 16,399. (R. 20, 462.) William L. Jacoby who managed the Acme Co. as representative of its creditors, after it got into difficulties and prior to its liquidation, was called as a witness by the Government. He attributed the company's troubles to unwise management and lack of proper financing. The company made an unfortunate venture into the tractor business and had large losses on credits. He testified that in his opinion the failure was not due to "any impossible conditions in the competitive field which could not be met by any company reasonably financed and operated." (R. 100.) The decision to liquidate the Acme was reached in 1919, long before the Harvester Company made the price reductions complained of. (R. 99.)

The Walter A. Wood Co. This company, located at Hoosick Falls, N. Y., was not favorably situated for the domestic trade. Sixty-five per cent of its trade in 1913 and 1914 was in the foreign field. This trade was lost as a result of the war and in addition it sustained large capital losses in Russia and Germany. (R. 93.) As a result of shortage of capital and the freight handicap in competing in the West, the company's domestic binder sales fell from 1,043 in 1911 to 226 in 1920. (R. 93, 20, 444.) In 1920 and 1921 it had a serious and prolonged strike at its factory. (R. 93.)

Adriance Platt Co. This company sold out in 1913 to the Moline Company, a larger and stronger concern which wished to make itself a long-line company with a year round business. (*Supra,* p. 34.)

Johnston Harvester Co. This company sold out in 1912 to the Massey-Harris Company of Canada, a larger concern which desired to compete and is now competing in the American trade. (*Supra,* p. 33.)

The circumstances leading to the retirement of the other seven smaller companies discontinuing their harvesting machine business since 1911 are stated in our Appendix, page 10.

In passing it should be noted that the Government's position as to small companies which it claims have been forced out of business by the Harvester Company (Br.,

p. 43) is wholly inconsistent with its contention appearing on pages 47 and 48 of its brief. In stating alleged percentages it claims that it was not necessary to include the output of small one-line concerns, since they could have no appreciable effect on competitive conditions. It includes in the "many well-established companies" which it alleges retired from the harvester business during the test period at least seven of these small companies, out of the eleven referred to in brief, p. 43. But to the charge that it omitted many small companies in arriving at its percentages, it replies that these one-line concerns could have no appreciable effect upon competitive conditions and that, because of the increased distributing expenses, they were doomed in any event. If this be true, how can any inference be drawn that similar companies retired during the test period because of anything done by the Harvester Company?

It is significant that the Government called as a witness some officer or representative of every concern discontinuing its harvester business but that not one of these witnesses complained of any restraint of trade or any act of the Harvester Company or claimed that the Harvester Company's competition had forced their retirement.

PART III.

THE EFFECT OF THE SINGLE-DEALER PROVISION OF THE 1918 DECREE—THE IMPORTANCE OF THE RETAIL DEALERS—THEIR CONTROL OF LOCAL TRADE—CHANGES IN DEALER REPRESENTATION SINCE 1913.

The 1918 decree contained two main provisions, the first of which reads as follows:

> "The defendants, International Harvester Company and International Harvester Company of America, their officers, directors, and agents, are hereby prohibited and enjoined, from and after December 31, 1919, from having more than one representative or agent in any city or town in the United States for the sale of their harvesting machines and other agricultural implements." (R. 387).

The second provision requiring the sale of the Champion, Osborne and Milwaukee lines, is considered later.

The Harvester Company's policy of giving to each dealer the agency for a different brand of harvesting machinery and the effect thereof was one of the causes of complaint most strongly relied on in the original petition, and when the evidence in that proceeding was taken it developed that this practice was the only one of which there was any real complaint. The original petition charged that:

> "In towns where there is more than one implement dealer defendants have adopted and are now carrying out the policy of giving to each dealer the exclusive agency for a certain well-known machine, such as the 'McCormick' or 'Deering' grain binder or mower, instead of giving to one dealer an agency for all defendants' lines, intending thereby to obtain for themselves the services of all responsible implement dealers, and by means of the contracts heretofore described, to monopolize all trade and commerce in harvesting and agricultural implements." (O. R. Vol. I, 11, 12.)

The Harvester Company's answer to the former petition admitted this practice but denied any attempt to monopolize. The continuance of the retail connections of the several companies whose properties were acquired by the Harvester Company was the natural business policy to follow. Concentration of all the business with one dealer would have thrown away the valuable good will of connections established for many years and could only have resulted in substantial loss. The proof showed that exclusive agency contracts were not used after 1905, and that competitors did in fact secure retail representation to such an extent that competition was increasing. A large loss of business due to marketing the several harvester lines through one dealer was in fact sustained by the Harvester Company between the filing of the original petition in 1912 and the entry of the 1918 decree. During this period competitors (Deere & Co., Massey-Harris, Moline and others) without any Governmental assistance took away about 5,000 dealers from the Harvester Company, making it necessary to bunch the Champion, Osborne and Milwaukee lines quite generally with the McCormick and Deering dealers and resulting in a substantial loss of business in these lines. (App. 23, R. 211, 184).

As matters stood in 1918, the McCormick and Deering lines were still quite uniformly in the hands of separate dealers and the purpose of the one-dealer requirement in the decree was to release one of these well established dealers to competitors and protect forever competitors against any unusual difficulty in getting dealer representation. Now that the Harvester Company's policy of selling through several dealers has been discarded in pursuance of the 1918 decree, this provision of the decree is treated by the Government as a negligible matter so far as concerns the question whether competitive conditions now exist.

At the time the evidence was taken under the supplemental petition the single-dealer rule had been in effect only four years and the last three of these had been years of unusual stagnation and depression. The prohibition against selling to more than one dealer will operate perpetually to the benefit of competitors and its full effect can hardly be apparent as yet. However, enough has happened to indicate that it has had and will have far-reaching effects on competitive conditions.

1. LOSS OF DEALERS.

The immediate effect of the decree was to force the Harvester Company to discontinue business, prior to December 31, 1919, with 4,778 dealers throughout the United States to whom it had sold goods during the last year of business to the amount of $17,400,000. (R. 176.) The loss of these valuable trade connections is not a single year's loss, but recurrent. For all future years in which these dealers are in business, their annual trade requirements will be purchased elsewhere. The Harvester Company can recover only so much of this trade as can be shifted to the other dealers it is doing business with in the same localities, with the advantage strongly in favor of the discontinued dealers being able to retain and supply their old customers. The evidence shows that the local trade is mainly controlled by the good will and standing of the local dealer, which count more with the farmers than do the good will and trade names of a manufacturer. The local trade cannot be switched by a manufacturer from one dealer to another, hence the vigorous competition for the best local dealers. (R. 190, 191, 266, 271, 302, 294, 310, 311, 287.)

Forty-one discontinued dealers from various states testified to their success in marketing other harvester lines and their ability to retain their customers with whom personal relations had been established over years. (R. 286, 287, 288; Gov. Br. 119.)

From the testimony of the implement dealers we quote the following:

E. P. Armknecht of Donnelson, Iowa, former president of the National Federation of Implement Dealers' Associations, said:

> "I absolutely believe that a dealer is the main influence in the sale of his goods." (R. 302.)

Thomas N. Witten, president of the National Federation of Implement Dealers' Association, said:

> "An implement dealer most assuredly builds up, if he carries on his business successfully and efficiently, a local good will." (R. 294.)

Walter Chatten, of Quincy, Illinois, said:

> "The standing and good will of the McCormick and Deering lines alone is not sufficient to sell goods in the face of competition. The most important element on which the sales of a number of machines of different lines would depend in any community is the activity of the dealer." (R. 310, 311.)

Charles McCarthy of Emporia, Kansas, an old McCormick line dealer who was discontinued by the Harvester Company on account of the single dealer rule and took on the Champion and Osborne lines after their sale to Avery & Sons and Emerson-Brantingham, testified:

> "I have been able to sell Osborne and Champion machines to old customers of mine and have held my local trade and good will. Neither the Osborne nor Champion had been sold in Emporia in recent years before I began selling them. I think, considering the crop conditions and the financial condition of the farmer, I have had reasonable success in selling them. I know of no reason why a capable dealer

> cannot market those lines in competition with a dealer selling McCormick, Deering, or Deere machines. I do not think there is any good reason." (R. 314.)

There was no difference of opinion on this subject. *Mr. Black*, president of Avery and Sons, testified:

> "The local dealer is a very important factor in the successful sale of agricultural implements and the success of the company. In my experience there is more difference between the local dealers than between several of the best lines of farm machinery. When you go into any locality and find that one line predominates, you will usually find that that line is handled by the most efficient dealer in that community." (R. 271.)

(See also Peek, R. 266; Legge, R. 190; App. p. 17, 18.)

2. TESTIMONY OF COMPETITORS AND OTHERS AS TO EFFECT OF SINGLE-DEALER RESTRICTIONS.

Not only has the single-dealer rule forced the Harvester Company to discontinue established relations with many dealers and thereby give to competitors the opportunity for new and advantageous connections, but it has also created an unusual competitive condition affording competitors an opportunity to oust the Harvester Company from its long-standing relations with the single dealer with which the Company has continued to do business.

For example, a dealer handling the Harvester Company's harvester line and the Deere plow line would be urged to take on the Deere harvesters. If he refused the Deere harvesters would naturally be placed with some other competing dealer in the town who had formerly handled one of the Harvester Company's harvesting lines but who had been discontinued and had no harvester line. On the other hand, when the Harvester

Company's salesman urged its single retained dealer to take on its plows, the dealer could refuse this request without fearing that the Harvester plows would be placed with another competing dealer as the single-dealer rule prevents this. In other words, Deere & Co., or any other competitor in a similar situation, has a distinct advantage in bidding for more business from the single dealer with whom the Harvester Company has continued to do business.

The advantageous effects of the single-dealer rule to competitors and the fact that these effects are continuing and have not yet been fully realized, are evident from the following quotations from the testimony of competitors.

Mr. Silloway, Vice President of Deere & Co. in charge of sales, testified:

> "Prior to 1918 a good many of the agents who sold plows and other products made by the John Deere Company were selling harvesters made by the International Harvester Company. After the decree by which the Harvester Company was prevented from having more than one dealer in a town, a great many dealers who had formerly sold Deere plows and McCormick or Deering harvesters and to whom we had been unable to sell our harvester line took on the John Deere harvester line." (R. 119.)

He further said:

> "We expect our percentage of the business in the harvester line to increase in the future, provided the Harvester Company is obliged to operate with one dealer in a town—if it has more I am not so sure." (R. 260).
>
> " * * * *my idea is that whoever made the provision that the Harvester Company should confine its operations to one dealer in a town struck the crux of the whole situation.*" (R. 263.)
>
> "I don't think that the Harvester Company lines are so much more favorably known that if that provision were abrogated there would be a real danger

of their displacing the Deere Company with dealers now handling the Deere line, but we know positively that with the Harvester Company confined to one dealer in a town we can compete with them. We prefer the certain to the uncertain." (R. 263).

Mr. Black, President of B. F. Avery & Sons, purchaser of the Champion harvester line sold under the 1918 decree, testified:

> "In my judgment the decree in this case limiting the Harvester Company to one dealer in a town has helped B. F. Avery & Sons in securing dealers for handling harvesting machines. I do not think there is any question but what we will increase our business on Champion line in the future. * * *" (R. 272.)

Mr. Peek, President of the Moline Company, purchaser of the Milwaukee harvester line, sold under the decree, testified:

> "Speaking of competitive conditions, when the Harvester Company was selling to every dealer in a town and did not have their tillage implements, of course the situation was very different competitively than it has been since 1918 when they went to one dealer in a town. That left the door of the other dealer more open to competitors. With that decree limiting the Harvester Company, I think the door of opportunity for competitors in the harvester trade is substantially the same as in other lines of implements generally." (R. 266).

Mr. Witten, President of the National Federation of Implement Dealers' Associations, testified:

> "The provision in the decree confining the Harvester Company to selling its goods to one dealer in a town has had a big result on competitive conditions because many towns had two and sometimes three good dealers, and it has made an opening for other concerns to get in and do business with dealers that the Harvester Company formerly had." (R. 294.)

See also Appendix, p. 19-21.

3. HARVESTER COMPANY FORCED TO A SINGLE LINE.

The requirement that the McCormick and Deering lines (which were the only harvesting machine brands remaining to the Harvester Company after the sale of the Champion, Osborne and Milwaukee lines) must be placed with one dealer in a town, has had a secondary effect which may, or may not, have been foreseen by the Attorney General and his advisers when they framed the 1918 decree. If not foreseen the decree has changed competitive conditions to the advantage of competitors even more than was deemed necessary.

The Harvester Company has been forced to go to a single line of implements and to give up manufacturing and selling the distinct types of harvesting machinery (and also other implements) favorably known to the trade for years as the McCormick and Deering lines. It did not wish to do this and made every effort to avoid it, but two years of experimentation under the 1918 decree made it clear that the change was necessary and the lesser of two evils. (R. 191, 212; App. 22-25).

This resulted from the following conditions: The many prior years of competition between the dealer in each town handling the McCormick line and the dealer handling the Deering line created an embarrassing situation. When one of these dealers was discontinued and both lines sold through a single dealer, the Deering line was placed with the dealer who for years had sold the McCormick and had argued its merits over those of the Deering, or vice versa. Each dealer was a poor salesman for one or the other of the lines.

Further, the dealer objected to carrying the larger stocks of machines; that is, machines of both lines, and, more particularly, duplicate stocks of repairs. This considerably increased his investment in inventory and required more store space and rental expense (R. 246, App. 24). The dealer could not see that it mattered to the Company which line was sold, and tended to concentrate his sales activities on the line he favored, with the result that the trade connections and good will in the other line were not being followed up and preserved as they had been before the single-dealer requirement went into effect. (R. 246.)

The situation was quite different from the one frequently occurring of a dealer handling similar lines of implements of two competing manufacturers. While each manufacturer would prefer to have the dealer handle his line only, the dealer was often quite willing to handle both and to exert sufficient sales activity to keep the representation for both. Handling two lines gave him the benefit of the advertising of *both manufacturers* and prevented any competing local dealer getting the representation for one of the lines. (R. 246.)

The marketing of the Deering and McCormick machines under the 1918 decree was a different story. Only one company advertised and pushed the sale of both. Further, the machine neglected by the Company's single dealer could not be taken away from him and given to a competing dealer, as the 1918 decree tied the Company's hands in this respect (a fact well known to the dealer). From the standpoint of the dealer, none of the benefits of handling the lines of two manufacturers existed, but the burden of duplicate stocks remained.

The change to a single line must work to the advantage of competitors. The *separate* good will of the two lines, McCormick and Deering, built up over many years, was necessarily based upon their *differences* rather than upon their similarities, and these differences had been emphasized by the separate dealers for years, resulting in strong advocates of each line among the farmers. No single line, although equally good from an engineering standpoint, can combine the differences or retain all of the old good will. Competitors may now urge the merit of their machines on customers who can no longer obtain the old McCormick or Deering machines they preferred. Although the change to one line was recent and not entirely completed at the time the evidence was taken, its results were already felt. *Silloway*, Vice President of Deere & Co., testified:

> "our situation has been improved by the fact that the Harvester Company was obliged to go to one line." (R. 263.)

The Federal Trade Commission in its report attached to the Government's supplemental petition mentions the "reputation in the trade" of the McCormick and Deering harvester lines as one of the main sources of the alleged dominance of the Harvester Company. (R. 31, 32.) The separate good will of the two lines, so long extolled by their separate dealers, has been lost forever. The single new line in the hands of one dealer in a town can only inherit a part of such good will.

The Government's only comment on this point is that the consolidation of the McCormick and Deering lines affords no defense to the supplemental petition's prayer for their separation, as the Harvester Company's own witnesses admitted that it was physically practicable to resume manufacture of the two old types of machines. (Gov. Br., 125.)

This wholly misses the point. One of the grounds for the Government's demand for dividing the Harvester Company into two separate implement companies was the great advantage over competitors, which the Harvester Company was alleged to possess, in having two brands of such standing and good will. The serious difficulties which have compelled the Harvester Company to give up the manufacture of the two brands certainly indicate that their retention by the Harvester Company has left it no such advantage as the Government claimed.

The equipment for manufacture of the McCormick and Deering types of machines has been preserved for use in their manufacture for the foreign trade, and the Harvester Company has made no claim of inability to resume manufacture or to comply with any decree requiring the revival and separation of the two lines. But the fact that the lines *can* be revived and separated is not (as the Government seems to think) a reason why they should be. The disappearance of the two separate brands from the domestic trade removes one of the Government's criticisms of present competitive conditions, and no evidence was offered to show that the revival and sale of the two lines to separate companies would better these conditions. On the contrary, the evidence indicates that additional competitors are not needed to cover the field and secure to the public the benefit of effective competition (R. 195).

4. THE GOVERNMENT'S CONTENTIONS ANSWERED.

(1) As proof of the ineffectiveness of the single-dealer provision of the 1918 decree and also of the sale of the Champion, Osborne and Milwaukee lines, the Government relies mainly on the fact that the Harvester Company's percentage of trade did not greatly decrease between 1919 and 1923. The Government's percentage figures are inaccurate, as we will later demonstrate (*infra*, pp. 176-178), and therefore the inferences sought

to be drawn from them are invalid. At this point we will only state

(a) That the years of the farm depression, 1921, 1922 and 1923, when trade was at a standstill, dealers working off their inventories and living from hand to mouth to obtain farmers' orders, did not afford a favorable time for either manufacturers or dealers to push any active campaigns for expansion into new lines or new territories. (R. 188.)

(b) That the competitors, whose testimony has already been referred to, take a different view from the Government as to what expansion in their trade may reasonably be expected under more normal conditions.

(c) That there was unquestionably a close connection between the Harvester Company's large loss of dealers to competitors between 1913 and 1918 and the decline in its percentage of trade from around 77 per cent to 66 per cent; also a close relationship between the increase in the number of Deere dealers selling binders from 100 in 1912 to over 7,000 in 1919, and the increase in Deere binder sales during the same period from 931 to 17,222. (O. R. Vol. II, 1167; R. 462, 120.) Yet the Government would have the court conclude that the additional, substantial and permanent loss of dealer representation through the single dealer requirement can have little effect.

(2) The Government makes the further point that the single-dealer restriction simply helped the Harvester Company in the direction in which it was voluntarily headed for purely business reasons; that through a process of discarding dealers (over 10,000 between 1913 and 1918) it was shifting to a single-dealer basis and at the same time intentionally smothering the Champion, Osborne and Milwaukee lines. (Gov. Br., 114.)

The evidence shows and there was no intention to smother these lines (*infra*, p. 93) and that 5,000 of these 10,000 dealers were not discarded but were taken away from the Harvester Company by the growing competition of Deere & Co., Massey-Harris Co., Moline Co., and others. (R. 184, 211.)

The loss of the other five thousand dealers resulted from the general trend of the trade (not confined to the Harvester Company) from the old commission basis, where the dealer held the goods as the company's agent, to an outright sales basis. The increased nse of automobiles, better roads and other conditions were centering the trade more in the larger towns, and the dealers in those towns, having a more stable and larger volume of trade and special credit facilities under the Federal Reserve Act of 1913, were better able to do business on a sales basis. Many cross-roads agencies of the Harvester Company and of other companies were naturally eliminated as no longer needed, and other weak dealers were dropped because of the additional risk involved in selling outright. (R. 184.)

The Government's argument is a strange one—apparently the more dealers lost to a company, the more it can afford to lose. The contrary is self-evident. The Harvester Company dealers in 1918 of which a large number were taken away by the decree, were the pick and cream of its dealers, the better half remainiug after the winnowing processes above mentioned, strong financially, experienced and with established businesses and good will. (R. 190.)

To us it seems one of the most remarkable features of this case that the Government, after years of contention that, aside from consolidation itself, the restraint of trade was mainly at the retail outlet (a view taken by competitors) and after securing a decree limiting the Harvester Company to one dealer in a town, should now practically disregard this feature and call it a mere incidental barrier. (Gov. Br., 113). It was no mere incident to the Harvester Company, compelling separations from many of its best and oldest retail connections and the abandonment of the McCormick and Deering machines as separate lines, while to competitors it came as a thing much to be desired, a great and more than equal opportunity to establish retail outlets not only for their harvesting machines but for all their other implements.

(3) The Government's change of position grew out of its adoption of the Federal Trade Commission's discovery, made in advance of the beginning of the test period, that the 1918 decree could be of little effect because the real difficulty was that there were not enough competitors and the Harvester Company could manufacture too cheaply.

The question of the number of competitors as affecting competition is considered here as it has a close relation to the available dealer representation.

The Government endeavored to prove that there was more competition in plows because there were more plow companies (R. 263). The evidence showed that there were 35 or 40 companies manufacturing steel plows, as compared with 18 manufacturing rakes, 13 mowers and 7 binders (R. 263). But it also showed that most of these plow companies were small and did only a local business and that the number of important plow companies doing a general plow trade was no more than the number of important companies in the harvester business (R. 263).

Mr. Peek, President of the Moline Plow Company, attributed the existence of a larger number of small plow companies to the fact that plows are much simpler to manufacture than binders and require less plant investment (R. 266); to which should be added the fact that plows are used everywhere for all crops, while binders are used only in the grain territories, the plow business thus furnishing a wider field and greater volume of trade. The United States trade in plows amounted to $11,215,000 in 1922 as compared with $6,-851,000 for grain and corn binders and headers. (U. S. census figures, Defts.' Ex. (S)34, following page 636 of Record).

The evidence further shows that the number of plow lines offered to the farmers in any one locality was not much greater than the number of harvesting lines (Peek, R. 266) and that the competition was not different (Silloway, R. 260). The reason for this is, that the trade in any territory will support only a limited number of dealers, and a limited number of dealers can and will actively represent only a limited number of lines. This was explained by *Mr. Legge* as follows:

> "In my experience and years on the road I have seldom, if ever, known a locality where there were more than four or five lines of implements, harvesting machinery, plows, or anything else offered for sale in that one town. We met with different competition in different places, but the supply was more or less sporadic. It would be this manufacturer in this one county and some other manufacturer perhaps in an adjoining county, but [as to] the avenues of retail distribution, the business, was not of sufficient volume to support more than four or five in any one locality." (R. 195).

All of which seems to bring the matter of competition back to the dealer representation and emphasize the importance of the single-dealer provision. A large number of small local manufacturers gives no assurance of more efficient competition, particularly when the whole tendency of the trade in all lines is towards larger long-line companies, which the Federal Trade Commission says are more economic and increase competition. (*Supra*, p. 3.)

5. STATISTICS AS TO DEALER REPRESENTATION IN 1913 AND 1923.

The record shows that the Harvester Company had 29,500 dealers handling its harvesting machines in 1913, 17,007 in 1918 and 12,861 in 1923. (O. R. Vol. II 1364; R. 393, 395). The record does not show the total number of dealers throughout the United States handling competitors' goods at either date. The Government's brief (p. 155) contains a table purporting to show all dealers handling harvesting machines in the years 1919-1923, but this is very incomplete. It does not include the large number of dealers of the Moline Company nor the dealers buying from jobbers of the Massey-Harris and B. F. Avery companies, nor does it include the dealers of the Case Co., Holt Co., Advance Rumley, Jenkins Rake Co., Collins Plow Co., Harris Co., Rock Island Plow Co., Detroit Harvester Co., Roderick Lean Co. or Fleming Co.

The record however, does contain the figures for a comparison of dealer representation in the grain-growing territory between the Alleghenies and Rocky Mountain States in which 75 per cent of the harvesting machinery is sold (R. 171). For the original hearing the defendant took a census of all dealers in this territory which was admitted in evidence (O. R. Vol. II, 1351, 1352).* For purposes of comparison a similar census covering exactly the same territory was taken in 1923, and intro-

* The territory covered was the following: Kansas, Oklahoma (except the southeastern part), Missouri (except the southeastern part), Nebraska (except the northwestern part), South Dakota (east of the Missouri River), North Dakota (east and north of the Missouri River), Minnesota (except the northeastern part), Wisconsin (except the extreme northern part), Iowa, Illinois (except the extreme southern portion), Indiana, the southern part of Michigan, Ohio, the western part of New York, and a few of the northwest counties of Pennsylvania. (R. 171.)

duced as Defts.' Ex. (S)6, R. 573. (See also Defts.' Exs. (S) 7, 9, 10, 11, 12). The careful and accurate manner in which this census was taken appears from the testimony of McKinstry (R. 171). Defendants' Ex. (S) 35 (R. 636) compares the census of 1913 and 1923. The following is a summary of the facts shown:

COMPARISON OF DEALERS HANDLING BINDERS, MOWERS AND RAKES IN 1913 AND 1923 IN THE CENTRAL GRAIN-GROWING DISTRICT.

	1913 Census	%	1923 Census	%
Dealers handling I. H. C. machines exclusively	9,822	(59.13)	3,847	(28.05)
Dealers handling competitors' machines exclusively	2,717	(16.35)	6,871	(50.09)
Dealers handling both I. H. C. and competitors' machines	4,072	(24.52)	2,999	(21.86)
Total	16,611		13,717	

These figures show great changes in ten years. The number of dealers in this territory handling the Harvester Company's machines decreased about 50 per cent from 13,894 to 6,846. The number of dealers handling competitors machines increased about 45 per cent from 6,789 to 9,870. The 7,048 decrease in the Harvester Company's representation in the central grain-growing district reflects the combined effect of the inroads of competitors prior and subsequent to 1918, of the change from commission agencies to sales contracts and of the single-dealer requirement of the 1918 decree. Out of these 7,048 dealers in the census territory, competitors have established connections with 3,081 dealers, presumably the best.

It should be remembered that the single-dealer restriction applies, not only to harvesting machines, but to all agricultural implements sold by the Harvester Company. Competitors continue to sell their implements to the single dealer handling the Harvester Company's line, but the Harvester Company is debarred from selling anything to the many other dealers to whom competitors also sell. The marked effect of the single-dealer rule and all other changes in competitive conditions between 1913 and 1923 is reflected by the following figures taken from Deft.'s Ex. (S)35 (R. 636) comparing the 1913 and 1923 censuses:

In 1913 out of a total of 18,434 dealers in the census territory, 21.27% (3,920) handled competitors' goods exclusively and 73.47% (13,544) the goods of both the Harvester Company and competitors.

In 1923 the situation was reversed. Out of a total of 19,557 dealers in the census territory, 63.70% (12,459) handled competitors' goods only and 32.19% (6,295) the goods of both the Harvester Company and competitors.

In both periods the number of dealers handling the Harvester Company's goods exclusively was very small; 5.26% in 1913 and 4.11% in 1923.

The Government has no comment to make on these changes in dealer representation except to state that

> "it is evident upon consideration that such a summary is not an accurate reflection of competitive conditions. It in nowise discriminates between dealers in the amonnt of goods handled and sold. * * * By dividing into the number of dealers handling the harvesting machines of each company, as shown, the number of machines sold by each company, as shown by the tables printed in Appendix B, (pp. 146-156), the misleading effect of the dealer census is fully exposed. Thus in 1920 the International Company sold on an average to each dealer 19.6 machines, while Deere & Company, its largest competitor, sold an average of only 7.7 machines. In 1923 the average for the International was 12.3 while the average for Deere & Company was only 4.3." (Gov. Br., 118, 119.)

On the contrary, we submit, the Government's analysis drives home the very point we are making. The Government confuses the question of present percentages of trade with the question of the existence of competition and the opportunities therefor. The dealer census was introduced only to show, and we submit that it does show, the absence of restraint in the channels of trade and the freedom and opportunities for competition—the opportunities of farmers to buy competing machines if they prefer them and the opportunities of competitors to urge the merit of their goods through widespread and established distributing agencies.

The large number of Deere & Company's dealers, 7,370, indicates strength, not weakness,—an established organization active in a large field of large potentialities. The evidence shows that Deere & Company competes actively with the Harvester Company in every county of the United States (R. 215, 305, 309.) If Deere had sold an equal quantity of goods through a smaller number of dealers, the Government would have been the first to reverse its argument and point out that this indicated localized trade and lack of competition in other fields.

PART IV.

THE CHAMPION, OSBORNE AND MILWAUKEE HARVESTING LINES—THEIR SALE AND EFFECT ON COMPETITIVE CONDITION.

The Champion and Osborne lines were sold the latter part of 1918, in time to enable the purchasers, Avery & Sons and the Emerson-Brantingham Company, to enter the 1919 trade. The sale of the Milwaukee line was more difficult as the prior sale of the other two lines had removed two prospective purchasers. Negotiations were had with several companies which bore promise of success (R. 219; App. 26). But these were interrupted by the farm depression with its disastrous effect on the farm implement industry. The line was finally sold in March, 1924, to the Moline Plow Company, which, for the reasons already mentioned, (*supra*, p. 35) had determined to close its Poughkeepsie harvester plant, and to obtain a new harvester line which would enable it to continue in the business on a more favorable basis.

The decree provided that "each purchaser must be a responsible manufacturer of agricultural implements in the United States". With this requirement of the decree the Harvester Company has complied. The contracts for the sale of the three lines are in evidence (Pet. Ex. (S) 14, R. 407, Pet. Ex. (S) 27, R. 431, Deft.'s Ex. (S) 31, R. 624). If the Government had looked the field over, and made its own selection, it may be doubted whether it could have selected three companies in better position to make advantageous use of the lines with a view to developing the trade therein and insuring effective competition. All three were old established and well known companies, and among the largest implement companies in the United States with extended dealers' organizations and business throughout large territories. (Appendix, p. 27-31.)

B. F. Avery & Sons, of Louisville. Business established in 1825 (R. 88). Total assets, per balance sheet, $9,974,407 (Pet. Exh. (S) 26, R. 429).

Emerson-Brantingham Co. Business established in 1852 (R. 83). Total assets, as per balance sheet $26,478,654 (Pet. Ex. (S) 12, R. 405).

Moline Plow Co. Total assets, as per balance sheet, $37,231,620 (Pet. Ex. (S) 40, R. 453).

Emerson-Brantingham Co. and Moline Co. are characterized as large and important concerns in the Federal Trade Commission Report attached to the Government's petition (R. 58 quoted, *supra*, p. 40).

The evidence relating particularly to this portion of the decree and its effect is discussed under the following headings:

(1) Some of the advantages of a full line which influenced the above named companies to add harvester machines to their other lines.
(2) The established good will and efficiency of the Champion, Osborne and Milwaukee and the advantages of purchasing these lines over developing new harvester lines.
(3) The success to date and prospects of the purchaser of each of the three lines.
(4) The unsound basis of the Government's contention that these lines cannot be sold in competition with the Harvester Company.
(5) The unsound basis of the Government's contention that these lines sold cannot be manufactured at a competitive cost.
(6) Various other contentions of the Government answered.

1.—THE ADVANTAGES TO THE PURCHASERS IN FILLING OUT THEIR LINES.

The evidence shows advantages and economies resulting from the full line development in a number of ways. As these affect all long-line competitors, as well as the three companies here involved, they are enumerated and discussed (*infra,* p. 129) under "Present Competitive Conditions." A few quotations are here given showing recognition of these advantages by the purchasers of the Champion, Osborne and Milwaukee lines and their dealers.

Mr. Black, President of Avery & Sons, said:

> "The reason various machines were added to the original line of B. F. Avery was to give a more complete line of farm machinery, the advantage of which lay in the ability to make up a great number of carload orders and also to give our entire organization employment during the greater portion of the year, and therefore cut down expenses." (R. 270.)

Mr. Taylor, Vice President of Avery & Sons, testified:

> "Before the acquisition of the Champion line we did not have a complete line of agricultural implements, the chief deficiency consisting of harvesting machinery. The trend of business at that time and for some time before was toward carrying a complete line. I would say the Champion line of harvesting implements which we acquired was complete. * * * With the acquisition of the Champion line our company had a fairly complete line of agricultural implements." (R. 89.)

Mr. Beck, a successful Champion dealer in Knoxville, Tennessee, testified:

> "The Avery line has been made very much more attractive to a dealer by the addition of the Champion harvester line. The Avery plow and tillage line is well known and popular in our section. The fact that the Avery line is now a full line is of great advantage to the dealer." (R. 329.)

Mr. Legge testified:

"There is an advantage to an agricultural implement concern in taking on a harvester line. It saves the expense of distribution of goods, enabling them to book carload orders by including some harvesting machinery where they might not have sufficient tonnage on other lines. It gives them a marked advantage in distributing expense, permitting them to use their salesmen continuously throughout the year and by that reason to attract and retain the services of a better class of salesmen than can be attracted to a short line proposition with intermittent employment (R. 186)."

Mr. Peek, President of the Moline Company, testified:

"In my opinion there is a very great advantage with respect to selling and distribution in having a long line, including a harvester line, with our plow and tillage and other implements. The dealer can not make a living selling one line such as tillage goods, which is distinctly seasonal, and then not have any business for a number of months to carry his expense (R. 264)." * * *

"With respect to manufacture, there is an advantage in keeping your factories running twelve months in the year, or as near that period as possible. It distributes the manufacturing over a longer period and keeps your skilled men at work.

"The Moline Plow Company's plow and tillage line is a well-known line which has been on the market for a great many years. In approaching our dealers early in the year for orders on that tillage line, the tillage line helps us in a way to get orders for the harvester line. The various goods in a full line help sell each other, assuming of course that each has substantially the same merits as competing lines" (R. 265).

Mr. Black testified that Avery's tillage line had helped to sell the Champion harvester line (R. 270), and, *vice versa,* that the good will of the Champion line assisted the business generally (R. 272).

2.—THE ESTABLISHED GOOD WILL AND EFFICIENCY OF THE CHAMPION, OSBORNE AND MILWAUKEE LINES AND THE ADVANTAGES OF PURCHASING THESE LINES OVER DEVELOPING NEW HARVESTER LINES.

Mr. Armknecht, a dealer at Donnelson, Iowa, and a former President of the National Federation of Implement Dealers, testified:

> "I considered the Osborne, Champion and Milwaukee lines when I handled them equal to any other machines. After the Harvester Company was formed I had my choice of all the machines it made, and I handled the Milwaukee because I preferred that. They gave good satisfaction and are in use yet. All of the three lines mentioned could be sold to-day in our community and have just as much prestige as they ever had" (R. 300).

Other dealers testified to like effect as to the good reputation and efficiency of these lines. (Jenner, R. 311, French, R. 316, Stoudenmire, R. 326, McCarthy, R. 314, Beck, R. 328, Gustafson, R. 348, Hyde, R. 355, Sellers, R. 296, Nuss, R. 306.)

Mr. Black, President of Avery & Sons, (R. 272), Mr. Brantingham, President of Emerson-Brantingham Co., (R. 81), and Mr. Peek, President of Moline Co., (R. 265) and other witnesses testified to the established and favorable good will attaching to the lines sold (see App. p. 32).

The evidence showed that the Champion, Osborne and Milwaukee Harvester lines had all been improved in design and kept up to date during their ownership by the Harvester Company in the same manner as the McCormick and Deering lines (R. 185, 186, App. 31, 32).

The great expense and many years of tribulations usually required to perfect a new type of machine is well known to manufacturers. And this is not all, as still further time is required to secure general recognition for the perfected machine and a reputation in the trade. (Black, R. 270, Silloway, R. 263, Oliver, R. 254, Legge, R. 187; Appendix, 34, 35).

The opportunity at moderate expense and without delay to fill in their established spring and fall plow and tillage trade with fully developed and favorably known summer goods (harvesting machines) could not have come to Emerson-Brantingham, Avery & Sons, or Moline, but for the decree compelling the Harvester Company to sell these lines. It was an opportunity which these competitors clearly recognized.

Mr. Brantingham testified:

> "We bought the Osborne line because we had the opportunity to do so * * * The Osborne line was a well known line of harvesting implements in our territory before we acquired it." (R. 81)

Mr. Taylor, Vice President of Avery & Sons, testified:

> "I advised such purchase. There was no other line of harvesting machinery for sale which was as favorably known as the Champion line (R. 89)."

Mr. Peek of the Moline Plow Company testified:

> "The principal reason that influenced me in recommending this contract was that it eliminated the question of a year's interruption in supplying our trade, such as would occur in the removal of equipment to one of our plants and manufacturing the old line ourselves. * * * Our company had a considerable volume of trade and existing connections and outlets for harvesting machinery which might be lost if there was such an interruption." (R. 264.)

3. SUCCESS TO DATE AND PROSPECTS OF THE PURCHASERS OF THE CHAMPION, OSBORNE AND MILWAUKEE LINES.

As the Milwaukee line was not purchased by the Moline Co. until March, 1924, no sales of Milwaukee machines by the Moline Co. had been made at the time the proofs closed in the case. The Moline Co. however, had had many years of experience with the old Adriance Platt harvester line. Mr. Peek knew the value of a harvester line to its other business, and understood competitive conditions and business possibilities. Before purchasing the Milwaukee line, he made an extended investigation of its standing in the trade and how the Moline dealers would view it, and of its engineering features, affecting efficiency, design and cost. (R. 265.) He testified:

> "In my opinion we will be able to switch our established trade to the Milwaukee line. There may be exceptions. On the other hand, we will gain many new customers, particularly in the Middle West." (R. 264.)
>
> "Taking all the elements of the situation together, the company's former position in the harvester trade with its Ponghkeepsie line, the possibilities of switching that trade to the Milwaukee line, the standing of the Milwaukee line itself, the possibilities of extending the trade into territory where that line was better known than the other, the western shipping point, and any other elements you might consider, I consider the position of the Moline Company in the harvester trade is stronger than it had been heretofore with its Poughkeespie line.
>
> "I would think we have an opportunity to increase the sale of the Milwaukee line over that enjoyed by the International Harvester Company for the past few years, for the reason that the Milwaukee line has not been aggressively pushed by the International Harvester Company in recent years, was sold by the same salesmen selling the McCormick and Deering, both of which were better known of recent years,

> but more especially, perhaps, because our whole plan of selling must attract the best dealers, because the poor dealers can not buy under our plan, and the best dealers are going to be attracted by the additional margin of profit offered them under our plan. By the better class of dealers, I mean the dealers who are able to finance themselves and obtain the cash discounts and perform their own service." (R. 265, 266)

Mr. Peek had previously explained a special selling plan (midway between the Branch House plan and mail order plan) with which the Moline Co. had had considerable success (See App. 33; Rec. 109, 110). He also testified:

> "We would not enter upon the manufacture of harvesting lines unless we thought we could sell them. We think there is a prospect of successful competition in that line as well as the others with existing competition. The prospect of trade at this time I refer to is of goods ordinarily pushed at this season—tillage goods. The harvester trade does not come until next summer. We can not tell what may develop by that time." (R. 113)

The Moline Company's expectations of successfully marketing the Milwaukee line seem justified and confirmed by the results of the respective experiences of the purchasers of the Champion and Osborne lines. The evidence on this branch of the case will enable the Court to judge of the present and prospective effect of the sale of these lines on competitive conditions from a number of different angles:

(a) The success in obtaining dealer representation for the lines.

(b) The actual sales to dealers.

(c) The expectations of the owners.

(d) The success of the dealers in selling to the farmers.

Adequate representation in the retail trade is the first step in marketing farm implements and the success in securing such representation may well be considered a better indication of future prospects than the immediate sales, particularly in a time of depression. The evidence shows that of the 80 territories specifically described in the dealer testimony the harvesting machines of the Emerson-Brantingham Company were sold in 33 of them and the harvesting machines of Avery & Sons were sold in 22. (R. 283-285.)

Mr. Brantingham testified that, while the Emerson-Brantingham Company was not in as many towns as the Harvester Company,

> "we have, I think, more than one dealer in a town handling different parts of our extensive lines. Some handle our tillage and not our harvester line; some both but not our threshers. * * * We have dealers all over the territory—some good and some not so good. * * * In 1919, 1920, 1921 and 1922, we were placing binders and Osborne machines with dealers who had not handled those machines before and with Osborne dealers whom we had taken over." (R. 81)

Mr. Taylor testified:

> "Since we acquired the Champion line we have not sold them to every one of our old dealers. We have sold them to a great many new dealers. We have had no more difficulty in getting an adequate supply of dealers to handle our harvesting lines than other lines except that in the new territory which we had never covered before it is more difficult for us to get dealers not only on the harvesting machinery but on our regular line, our old line. * * *
>
> "We have been successful in persuading the dealers who formerly handled the tillage, cultivating and seeding implements of the Avery line to take on the Champion harvesting line, except that we have not sold every dealer the Champion line. * * * We have had a great many repeat orders from dealers, indicating that they have sold the Champion machines previously purchased from us, and we are constantly obtaining new dealers to handle the Champion machines." (R. 90, 91)

Mr. Black said:

> "We have added to our list of dealers steadily since we first took the Champion line, with the possible exception of 1921, when all kinds of business dropped off." (R. 270, 271.)

Coming now to the actual sales made, the evidence shows that the number of Champion binders, mowers and sulky rakes sold by the Harvester Company in 1918, the last year in which it handled this line, was 1790 or 1% of the total McCormick and Deering sales in that year of similar machines. In 1923 Avery & Sons sold 6,846 such Champion machines, equivalent to 5.3% of the Harvester Company's sales of binders, mowers and rakes in 1923. (App. 36.) These figures show substantial progress.

In the case of the Osborne line a similar comparison of all harvesting machines is not significant, as the Osborne mower and rake in the hands of Emerson-Brantingham Co. had to share the trade with the Standard mower and Emerson rake already manufactured by that company. As an indication of the merits of the Osborne line, however, it should be noted that the company was planning in 1923 to discontinue the Emerson rake in favor of the Osborne, the trade having shown a preference that way (R. 81, 83).

The Osborne binder sales were 1374 in 1918, the last year handled by the Harvester Company. (R. 397.) In the hands of the Emerson-Brantingham Co. the sales during the first two years, 1919 and 1920, increased to 3522 and 4983. In 1921-1923, during the farm depression, the Osborne binder sales fell off greatly, but the same is true of the Harvester Company's binder sales. (R. 405.) The Osborne binder sales in 1923 were 3.3% of the McCormick-Deering sales in that year as compared with only 2.2% in 1918. (App. 37.)

Considering the fact that 1920 was the only good year since the single dealer rule went into effect and that the three subsequent years were abnormally bad, these figures are significant. They show the possibilities of the Champion and Osborne lines and justify the expectations for greater progress in more normal times. *Mr. Brantingham* stated that the falling off in sales in 1921-1922 (R. 84) was not caused by competition of the Harvester Company, but by the farm depression.

He further stated that while the total volume of trade of his company in all lines was less in 1922 than in 1921, the business in the harvester lines was slightly better in 1922 than in 1921 (R. 83). Further the table of Emerson-Brantingham sales, Pet.'s Ex. (S)10 (R. 405) shows an increase in harvester sales in 1923 over 1922.

Mr. Brantingham described the beginning of the farm depression and its effect as follows:

> "In 1921 the price of farm products slumped violently while the prices of other things held up, and the farmer only purchased such farm machinery as he was absolutely obliged to do; we found all through our territory that farmers repaired their old machines, bought second-hand machines at auction sales, *with the result that there was a tremendous slump in the sale of all farm machinery, which was not peculiar to our company or to the harvester line but was experienced by all companies in all lines.*" (R. 83)

The Government attaches little importance to the progress of the Champion and Osborne line in 1919 and 1920, because these were good years. At the same time, it would ask the Court to consider the small sales made during a period of extreme farm depression (1921-1923) as proof that no progress may be expected in the future and as indicating restraint of trade.

We believe the Government's position is unreasonable on its face. Certainly it is not shared by the purchasers of the lines or by any witness in this case, and there were many, both manufacturers and dealers, whose experience qualified them to express an opinion.

Mr. Black, President of Avery & Sons, testified:

> "Avery & Sons intend to push their Champion line in the future to the same extent that we push our tillage line. In selling the Champion line we have found it to be an advantage that we have a well-known tillage line." (R. 270) * * *
>
> "I do not think there is any question but what we will increase our business on Champion line in the future, because since taking on that line we have had three bad years, and with normal conditions we will have better opportunities to increase our number of agencies, and the agents already established will sell more harvesting machinery than they have in the past few years. We have found the Champion line to be well known in our territory, and the good will which we found in the Champion line has assisted our business generally." (R. 272)

On the question of ability to sell the Champion and Osborne lines as distinguished from ability to manufacture (considered later), the opinion of dealers on the firing line seems most pertinent. Many dealers from different parts of the country testified that they were successfully competing in the sale of these lines with the Harvester Company. (App. 38, 39.) A few quotations are here given.*

Peter Glasrud of Northwood, North Dakota, sold 30 Deering binders in 1918. Having been discontinued under the single requirement, he took on the Emerson-Brantingham Osborne line in 1919 and sold 28 Osborne machines. He testified:

> "Our harvesting-machine business has been about

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* By agreement of counsel most of the testimony of the 81 dealers called by the Harvester Company was reduced to tabulated form (R. 282-292). The testimony of 25 dealers follows and "is abstracted as representative of the testimony of all." (R. 293.)

> even with the International since the change. Some years I have done a little more; one or two years they probably beat me with one or two binders. We have had no trouble getting Osborne machines, and they have given satisfaction to our customers. There has been no difference in our competition in harvesting machines from any other line of implements." (R. 321)

J. C. Beck of Knoxville, Tennessee handled the McCormick line in 1919 and sold 77 mowers. Having been discontinued by the Harvester Company, he took on Avery & Sons Champion line in 1920 and made sales as follows: 1920, 70 mowers; 1923, 40 mowers. He testified:

> "Considering the condition of the farmers during this period, we feel we have had reasonable success in marketing the Champion harvester line, and the machines have given satisfaction. Since we have gotten the Champion line we have sold to the same customers to whom we formerly sold." (R. 328)

Charles McCarthy of Emporia, Kansas, a Harvester Company dealer, discontinued under the 1918 decree, sold 40 Osborne binders in 1919 as compared to 42 McCormick binders in 1918. (See quotation from his testimony, *supra*, p. 62, R. 314, 315.)

The Government has only one answer to the foregoing testimony and to that of the many other dealers who testified to the existence of competitive conditions in the retail marketing of harvesting machines. It says (Br. 119-120) that not enough dealers were called by the defense, that only 47 of the dealers discontinued by the Harvester Company under the single-dealer requirement testified to their subsequent success in handling competing harvester lines. The Government says that these dealers cannot be typical because if all competing dealers had had equal success, this would be reflected by a larger percentage of trade for competitors in its tabulations of the total country's trade.

The Government misinterprets the purpose and significance of the dealer testimony. It is not claimed that the instances cited and others in the record are typical of the progress of the Champion and Osborne lines *everywhere*. The retail contacts for these lines had not yet been fully developed. But what a large number of dealers in different parts of the country have actually done with the Champion and Osborne lines does certainly indicate what other dealers can do in other places. It clearly demonstrates the merits of the lines and at the same time the importance of the dealer in directing the trade to different manufacturers.

It is noteworthy that the Government did not call a single dealer to testify that it was impossible successfully to sell the Champion and Osborne lines or any of the other competing harvester lines, or to any lack of merit or good will on the part of these competing lines, or to any special difficulties in the way of successful competition, or that the efficiency and standing of the dealer is not as important an element of success as the testimony indicates.

The Government is asking for additional relief and as a ground therefor asserts that the Champion and Osborne and other competing lines cannot be successfully sold in competition with the Harvester Company. The burden of proof was on the Government. By its own admission, 47 dealers out of the total of 4,778 (R. 172) discontinued by the Harvester Company as a result of the single-dealer requirement, have testified against the Government's contention. The Government makes no effort to assume the burden of proving its own case, but asks the Court to disregard all of this testimony. In the

Steel case, (251 U. S. 417, 448) the ~~Government~~ Defendant called two hundred witnesses out of some 40,000 customers, and this Court said:

> "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?"

With their well-known and efficient plow and tillage lines now supplemented by good harvester lines, with the effect of the single dealer restriction on local trade control tested out and its advantages to competitors proved, the reasons for the optimism of the new owners of the Champion, Osborne and Milwaukee lines seem clear and well founded. The reasons for the Government's pessimism are neither clear nor well founded.

4.—THE UNSOUND BASIS FOR THE GOVERNMENT'S CONTENTION THAT THE CHAMPION, OSBORNE AND MILWAUKEE LINES CANNOT BE SOLD IN COMPETITION WITH THE HARVESTER COMPANY.

The Federal Trade Commission's prophecy that the sale of the Champion, Osborne and Milwaukee lines could have little effect, was based on two reasons, (1) the decreasing sales of these lines from 1911 to 1918 and (2) their higher cost of manufacture compared to the McCormick and Deering lines. These reasons the Government adopts in its petition (R. 24) and argues in its brief (32, 33). But for the belief in their soundness, the present proceeding might never have been brought. The argument based on diminishing sales is discussed here and the alleged higher costs under the next heading (p. 95).

In another part of its petition (R. 17), the Government makes the charge that the falling off in the sales of the Champion, Osborne and Milwaukee lines was due to an intentional sales policy to suppress them in favor of the McCormick and Deering. The Government's arguments are inconsistent. If the small sales were the result of intentional suppression, they are no measure of the success to be attained by different companies energetically pushing the sale of each of these lines.

It is conceded that the trade in the Champion, Osborne and Milwaukee lines diminished during their ownership by the Harvester Company. The evidence, however, shows that this was not the result of intention, but that it happened because of conditions beyond the control of the Company and in spite of their being equally advertised (R. 183) and greatly improved (R. 182-186; App. 31, 41-44) and in spite of the efforts of the management to keep up their trade.

The Harvester Company was trying to market the McCormick, Deering, Champion, Osborne and Milwaukee lines through the same salesmen. One man went out to sell the five lines and his sales efforts were not equally divided. As described by Mr. Legge:

> "Our salesman would naturally follow the line of least resistance; and if he was assured of a contract in a town, the first one he would give the choice of what he wanted and the second one would take the second choice; and if any line did not happen to have very much of a trade or following in that community it seemed to be beyond his ability to place it satisfactorily. The arrangements with the local dealers throughout the country were made by these traveling salesmen, with an occasional exception when the branch-house manager might make a contract." (R. 183)

A second difficulty of a similar nature arose later when competitors between 1910 and 1918 took away from the Harvester Company more than 5,000 of its retail dealers and about an equal number were dropped in the transition from the agency to sale contract basis of business. This resulted in bunching several of the Harvester lines with one dealer. *Mr. Legge* says:

> "The effect of this on the distribution of the Champion, Osborne, and Milwaukee lines was relatively more severe than on the McCormick and Deering. Generally speaking, McCormick and Deering lines were placed with stronger dealers who were satisfied with their situation than were the smaller lines of the Harvester Company." (R. 212. See also Appendix, p. 23.)

The Government's case seems to be founded on the assumption that all divisions of trade are static, and reflect a lasting division of public opinion as to the merits of the goods—taking no account whatever of salesmanship or of the local dealers' personal good will. Nothing could be farther from the truth. Competing machines often have a comparable good will and recognition of their mechanical merits, but only salesmanship energizes good will. The line sold is the line pushed. The evidence of many dealers proves this rather self-evident fact beyond question.

It thus appears that the sale difficulties from which the Champion, Osborne and Milwaukee lines suffered in the Harvester Company organization are the very difficulties which have been removed by the sales of these lines to other companies. Salesmen of different companies now go out to sell these machines to separate dealers as part of a long line of attractive goods. And they have done it with success. Yet the Government still contends that the Harvester Company's experience under different and adverse conditions shows it cannot be done.

5.—THE UNSOUND BASIS FOR THE GOVERNMENT'S CONTENTION THAT THE CHAMPION, OSBORNE AND MILWAUKEE LINES CANNOT BE MANUFACTURED AT COMPETITIVE COST.

The question of the ability of competitors generally to manufacture on a comparable and competitive basis is discussed later (Part VI, *infra*, p. 147, 148). We here consider the special charge in the Government's petition that the sale of the Champion, Osborne and Milwaukee lines can have little effect on competitive conditions because the Harvester Company's own cost records show "the large and increasing factory costs of the two or three brands surrendered as compared with the factory costs of the two brands retained"—McCormick and Deering. (R. 24) This charge is adopted from the report of the Federal Trade Commission attached to the petition, which contains some cost tables purporting to compare the factory costs of the different lines in 1910 and 1918 and showing a considerable increase in the relative cost of the Champion and Osborne line in 1918 over 1910. (R. 47, 48).

The Federal Trade Commission's own figures show that the Milwaukee's costs were very close to the McCormick and Deering.

With respect to the Champion and Osborne costs, the Government offered no evidence except the Federal Trade Commission's report. While denying the admissibility of this report, the Harvester Company conceded that the Champion and Osborne costs had been higher than the McCormick and Deering and introduced evidence showing that these higher costs were mainly due to (1) differences in weight and design which were subsequently changed and (2) lack of sufficient production of harvesting machines and other implements in relation to the capacity of the Auburn (Osborne) plant and Springfield (Champion) plant, resulting in excessive overhead. Testimony giving the history of the manufacture of the Osborne and Champion machines, the changes in design, etc., is printed in our Appendix (p. 41-43).

At the time the lines were turned over to the purchasers there was nothing inherent in the designs which would make them more costly than the McCormick and Deering, and they were in every respect comparable (R. 185, 186).

In the last year (1920) of manufacture of the Osborne machines at Auburn, the factory costs were as low, and, on some machines, lower than the McCormick costs on corresponding machines, even though the quantity produced was considerably less. This was the transition year when the Harvester Company manufactured the machines for the Emerson-Brantingham Company. The weight and design of the machines had been lightened at Mr. Brantingham's request and the increased volume of harvester trade developed by the Emerson-Brantingham Co. together with better business in the other machines manufactured at Auburn, enabled the plant to operate at 75 per cent of its capacity and obtain a reasonable overhead (App. 42). Assuming a reasonable quantity production sufficient to permit of the best labor-saving equipment, the relation of production to the capacity and layout of the plant, is one of the most important elements in costs, more important than total quantity production (*infra*, pp. 147, 148).

The Federal Trade Commission drew its sweeping conclusions that lower costs on the Champion and Osborne machines could not be obtained, without according any hearing to the Harvester Company and without any investigation as to whether the causes of the higher costs were of a permanent or temporary nature. (R. 199, 200, 617)

In attaching importance to the "increasing costs" of the Champion and Osborne machines between 1910 and 1918, the Commission strangely overlooks one of the obvious and principal causes disclosed in its own report, namely, the decreased volume of sales and consequent small production. Its own tables show that the number of Champion binders, mowers and rakes manufactured in 1918 was only 2,880 as compared with 23,927 in 1910, and the number of Osborne machines 12,869 in 1918 compared with 49,984 in 1910 (R. 43, 44). It was this very condition resulting in excessive overhead which led to the Harvester Company's efforts to fill in the production program at the Auburn and Springfield plants with other implements (App. 42, 43). And, conversely, the filling in of the production at Avery's Louisville plant and Emerson-Brantingham's Rockford plant, was one of the desirable results of adding a harvester line to their other lines.

The Harvester Company's evidence, previously referred to, stands uncontradicted. If the Government had any doubt as to whether the causes of the high costs of the Champion and Osborne lines in 1918 were of a permanent or temporary nature, it had the opportunity of proving the actual costs obtained by Avery & Sons and Emerson-Brantingham since they have taken over the lines and manufactured them. Mr. Brantingham and Mr. Taylor, Vice President of Avery & Sons, were called by the Government as witnesses. By them the Government proved the fact that they were manufacturing the Osborne and Champion lines at Rockford and Louisville respectively, but it pressed its investigation no further (R. 82, 88). In spite of this record, the Government still contends in its brief that the purchasers of these lines cannot manufacture them on a competitive basis because the Harvester Company in certain prior years had higher costs on these machines.

6.—VARIOUS CONTENTIONS OF THE GOVERNMENT ANSWERED.

In support of its contention that the sale of the Champion and Osborne lines can be of little effect, the Government makes a number of minor points which are here discussed.

(1) On page 39 of its Brief, the Government objects that the Osborne line contained no headers or push binders and "consequently the Emerson-Brantingham Company entered upon its career minus those important machines." The record shows these machines are of small and diminishing importance. In 1923 the Harvester Company's sales of push binders and headers were only 1,040 as compared with 30,161 grain binders.

(2) On page 41 of its Brief, the Government asserts that Avery & Sons were only assembling, not manufacturing, the Champion line, citing the fact of buying certain malleable castings and rake teeth from the Harvester Company. This evidence falls far short of supporting the statement that the machines are merely being assembled. Many manufacturers buy malleables or other parts. Mr. Black testified (R. 270), "We added to our plant at Louisville for the manufacture of the Champion binders, mowers, and rakes, and commenced manufacturing that line in 1921." What Mr. Taylor, Vice President, said was that "These machines are not made *entirely* from parts manufactured by Avery & Sons." (R. 88.) Mr. Brantingham testified, "We are now making the Osborne line practically in its entirety. We may

pick up some parts from other suppliers—very few from the Harvester Company." (R. 82.)

(3) The Government asserts (Br. 39) that the Champion line "was transplanted from an already unfavorable situation at Springfield to a still more unfavorable location at Louisville," and implies that the same was true of the Osborne line. Mr. Black, President of Avery & Sons, testified (R. 270) that Louisville was where their other lines were manufactured and "an advantageous point on account of favorable freight rates into the consuming territory" and that they had added various lines to their original line in order to make mixed carload shipments and "give our entire organization employment during the greater portion of the year." The evidence shows (R. 187) that the reason Mr. Brantingham did not wish to buy the Auburn plant was because the transfer of equipment to his factory at Rockford would bring his source of production to the heart of the grain-growing territory for the domestic trade and was a "far better point to manufacture" as he did not expect to push the Osborne line in the foreign field.

(4) Following up its complaint that the failure to sell the Auburn and Springfield plants was "a distinct departure from the decree" (*supra,* 8) the Government complains (Br. 36) that if these plants had been sold as intended by the decree "the purchasers might have launched at once into the manufacture of harvesting machines as competitors." The reasons why the purchasers of the two lines preferred to remove the manufacture to Rockford and Louisville, respectively, where their other implements were being manufactured, are apparent from the evidence just referred to. The economic wisdom of transferring the lines is evident. The very thing which the Government complains of as making the decree

ineffective, is helping to make it effective and create lasting and efficient competition.

(5) The Government complains that the greater part of the Osborne and Champion machines sold by the purchasers were manufactured by the Harvester Company. This was a necessary step in making the sales and enabling the purchasers to transfer manufacture to more desirable points. If the Harvester Company, on finding that the Emerson-Brantingham Company and Avery & Sons did not wish to purchase the Auburn and Springfield plants, had refused to manufacture the machines during the transition period, the result would have been that these lines would have been dropped out of the trade for one or two years. What the Harvester Company did was in furtherance of the decree. It was trying in good faith to preserve the value of the lines and assist the purchasers in taking them over and entering the field under favorable conditions. If it had taken the opposite course, it is safe to say that the Government would have criticized its action even more severely and with some justice.

The Government states (Br. 37) that the Harvester Company furnished Emerson-Brantingham with Osborne machines for the years 1919, 1920, 1921 and 1922, and implies that the Harvester Company continued to manufacture their requirements for four years. The exhibit referred to (Pet. Ex. (S) 15, R. 420) shows on its face that it does not purport to show the year of manufacture. Petitioner's own exhibit (S) 66, (R. 476) shows that only a small quantity of machines were furnished by the Harvester Company after 1920 and most of these for the foreign trade. Only 129 harvesting machines of all kinds were furnished for the domestic trade. There is nothing to rebut the most reasonable inference that these small and final shipments were of machines previously manufactured, the shipments being delayed because the farm depression was delaying Emerson-Brantingham's disposition of the same.

(6) The Government comments (Br. 41) on the fact that the Emerson-Brantingham Company owed the Harvester Company substantial amounts at the time the evidence was taken. The evidence shows that the equipment purchased had been fully paid for (R. 83) and that this indebtedness was the unpaid balance of the purchase price of machines manufactured by the Harvester Company during the transition period. The delay in paying these amounts was also a result of the unexpected and sudden farm depression. Mr. Brantingham testified (R. 83) "the only financial relations between our company and the Harvester Company is that we owe them some money from buying of them in 1920, and our collections being held up we were unable to clear it up as we should have done." The freezing of assets and inability to meet payments when due were one of the common and most obvious features of the business collapse. Here again the Harvester Company is being criticized for acting in good faith in furtherance of the purpose of the decree. If it had taken the opposite course and embarrassed the purchaser of the Osborne line by insisting on immediate payment, it would now be criticized by the Government ever more severely.

(7) The Government argues that the manufacture of machines for the purchasers during the transition period followed by the delay in paying for the same, created a relationship of agency and that the purchasers of the lines were "mere sales agents" for the Harvester Company (Br. 40). The transactions were bona fide sales and there is nothing whatever in the record to justify the Government's characterization. The Government would

have the Court believe that the two large implement companies which have purchased the Osborne and Champion lines have been conspiring against their own interests to spend large sums in constructing buildings and securing a trade for the benefit of the Harvester Company.

(8) The Government complains (Br. 42) that the Osborne machinery and equipment purchased by the Emerson-Brantingham Company only amounted to $150,159.10 and that the Champion machinery and equipment purchased by Avery & Sons only amounted to $95,711, and it calls attention to the fact that these amounts were less than one-tenth of 1% of the invested capital of the Harvester Company. The purchasers already had their own plants and general equipment, all of which could be used in the manufacture of harvesting machines as well as their existing lines. All that they needed to purchase and did purchase was the patterns, dies and special equipment. From the standpoint of the purchasers, the less money they spent in equipping themselves, the less the tax on their resources and the greater their ability to compete. From the standpoint of the Harvester Company, the purchase of a larger amount of equipment would not have diminished its assets or resources, but would only have changed their form from property to dollars. It was not the purpose of the decree to deprive the Harvester Company's stockholders of their property without due compensation. The decree provided for a sale at a fair price to be agreed upon, or in case of failure to agree, to be fixed by the Court (R. 387).

PART V.

PRESENT COMPETITIVE CONDITIONS.

The consideration of present competitive conditions is divided into two sections which are here first outlined and later discussed. Under Section A is considered the character and extent of actual competition throughout the country as described by (a) competitors, (b) officers of farm organizations and (c) local dealers.

The beneficial results, to obtain which the law seeks to maintain competition, are ordinarily realized when a number of manufacturers are actually covering the field, seeking the trade of the same customers, offering inducements therefor and enabling customers to choose with whom they deal. The Government's testimony did not go into this ultimate and most important phase of competition. Believing that the court would not wish to pass upon the question of "competitive conditions" without evidence of actual competition on the field, the Harvester Company introduced extensive testimony covering this matter from all angles. It stands uncontradicted and convincing. It shows:

(1) That active and keen competition for the trade of the local dealer and farmer in harvesting machinery exists throughout the country.

(2) That neither competitors, local dealers nor farmers have observed any difference between the competition in harvesting machinery and that in other kinds of implements.

(3) That competitors and others consider the Harvester Company's competition to be fair and free from any objectionable trade practices. No evidence was introduced to the contrary.

In Section B are considered some of the principal changes which have come about in the evolution of the implement industry since the Harvester Company was organized in 1902 and mainly since the original proceeding to dissolve the company was filed in 1912—changes which are having and must continue to have important effects on competitive conditions:

(1) New methods of distribution, both wholesale and retail.

(2) The declining importance of the old types of harvesting machinery due to the diminishing field brought about by the causes mentioned hereafter.

(3) The increasing importance of plow and tillage lines as leaders in the long line.

(4) The entry of the tractor as a leader and the important new retail outlets opened to competitors by the sale of agricultural implements by the Ford agencies handling the Fordson tractor.

(5) The effect of the merger of the harvesting machine business into the full line implement business.

SECTION A. CHARACTER AND EXTENT OF PRESENT COMPETITION IN HARVESTING MACHINES.

1.—COMPETITION AS DESCRIBED BY COMPETITORS.

The Government called no competitors to testify either as to the character of competitive conditions generally, or as to the existence of any restraint of trade or unfair practice. The Harvester Company, on the other hand, called many competitors who testified that the Harvester Company's competition was fair, that active and keen competition existed and that they were able to compete successfully under existing competitive conditions.

Testimony of this character, coming from witnesses in the best position to know the facts, is most cogent. Judge Buffington in *United States v. United States Steel Corporation*, 223 Fed. 55, 64 said:

> "Now as trade is a contest for it between different persons, and the gain of that trade by one means the loss of it to another, it follows that the person who best knows whether the man who gained it, gained it fairly, is the man who lost it. If there is monopoly, if unfair business methods exist, if the course of trade and fair trading is throttled, we can find proof of it from business competitors. Trade competitors are the first to feel the pinch of unequal, unfair, and undue restraint of the natural and normal course of trade. Being the first to suffer, they are the keenest to condemn."

Mr. Bradshaw, General Manager of Massey-Harris Company, testified:

> "The competition of the Harvester Company is keen in the lines in which we compete with it in the United States. We have regarded it as fair. Business these days is hard to get, and every concern must compete keenly for it. We have competition not merely from the International Harvester Company, but from all the other implement companies in the States, but I would not say that the competition is any more severe with one than the other." (R. 257)
>
> "Competition in the harvester line in the United States is about the same as in the other lines of agricultural implements we make and sell. I know of no obstruction to the free competition in the United States in the sale of agricultural implements. We have no intention of abandoning the manufacture and sale of harvesting machines in the United States." (R. 257)

On cross-examination he testified:

> "By 'severe' competition I mean that all implement companies are seeking business keenly, one as much as the other. We find other companies besides the International are pretty well over the

territory where we are. Avery Company would not sell as many machines as the International, but they would be just as keen in the districts where we encountered them." (R. 258)

Mr. Silloway, Vice President of Deere and Company, testified:

"We expect our percentage of the business in the harvester line to increase in the future, providing the Harvester Company is obliged to operate with one dealer in a town—if it has more I am not so sure. There is active competition on all lines of agricultural implements. I know of no difference in the character of competition in the harvester line from that on the other agricultural implements we make. There are some localities where we feel the competition in the harvester line of companies other than the Harvester Company more than we feel its competition." (R. 260)*

On cross-examination he said:

"I don't think that the Harvester Company lines are so much more favorably known that if that provision were abrogated there would be a real danger of their displacing the Deere Company with dealers now handling the Deere line, but we know positively that with the Harvester Company confined to one dealer in a town we can compete with them. We prefer the certain to the uncertain." (R. 263.)

Mr. Black, President of Avery & Sons, testified:

"We meet with competition in the sale of agricultural implements which extends to every line we handle. We have fewer competitors in the harvester line than in the tillage lines, but there is no difference in the character of the competition. Many of the tillage companies do merely a local business." (R. 271)

Mr. Peek, President of the Moline Company, has already been quoted to the effect that since the single-dealer restriction of the 1918 decree went into effect,

*See Appendix (p. 45) for testimony of dealers showing that it is a common occurrence for different makes of harvesting machines to have the lead in different localities.

the door of opportunity for competitors in the harvester trade is substantially the same as in other lines of implements generally (*supra*, p. 65, R. 266).

Called as a witness by the Government he further testified on cross-examination as follows:

> "We have goods to sell and we think we are making a good line, as good as anybody in the trade. Relatively I do not know of anybody who has any better prospect than we have now." (R. 109)
>
> "With this new financing and plan of operation I have no doubt of our ability to manufacture successfully in competition with existing competitors under present conditions or conditions which are likely to arise.
>
> "Deere & Co. are one of our larger competitors. They manufacture a full line. Some of their plants are in the same town as we are. I was once connected with that company and understand its business fairly well. What I have said with regard to our ability to compete successfully applies to the International Harvester Company as well as to Deere & Co." (R. 111)

He also said:

> "In my opinion we will be able to switch our established trade to the Milwaukee line. There may be exceptions. On the other hand, we will gain many new customers, particularly in the Middle West." (R. 264)

Mr. Brantingham, President of Emerson-Brantingham Company, testified:

> "We have found the competition of the Harvester Company fair." (R. 84)
>
> "We have found very active competition in all lines we make. We have dealers all over the territory—some good and some not so good." (R. 84)
>
> "The lessening of our trade in 1921 and 1922 was not caused by any unfair competition by the Harvester Company, but by the reasons I have given.
>
> "I know of no obstruction to the full and free play of competition in the harvesting machine business or any other branch of the agricultural implement business." (R. 84)

> "In 1919, 1920, 1921, and 1922 we were placing binders and Osborne machines with dealers who had not handled those machines before and with Osborne dealers whom we had taken over.
>
> "The active competition was furnished by the competitors I have mentioned." (R. 84)

Thomas K. Nelson, a part owner of the Fleming Company, a small company making sweep rakes, stackers, hay balers, etc., testified to certain advantages of a small concern and as to competition said:

> "We have not found competitive conditions in the rake and harvester line any more difficult for a concern like ours to meet than they are in the plow and tillage line. I meet more competition outside of the International Harvester Company, some small companies making sweep rakes, such as the Jenkins Manufacturing Company, Chillicothe, Missouri; the Superior Manufacturing Company at Linneus, Missouri; and Collins Plow Company at Quincy, Illinois." (R. 273)

Harding Allen, of the C. G. Allen Company, an old concern manufacturing sulky rakes, machine tools, etc., at Barre, Massachusetts, called by the Government, testified that after discontinuing their rake line because of factory congestion in 1921 (R. 128), they resumed its manufacture in 1922 at the earnest request of customers. He said:

> "Since the Harvester Company was organized in 1902 we have been in constant competition with them, excepting in 1921, and have found that competition absolutely fair. Our decision not to manufacture rakes in 1921 was not based on any unfair competitive methods of the International Harvester Company, nor upon our inability to compete with that company. I know of no reason why a small manufacturer of rakes of good quality in my locality cannot compete successfully with the International Harvester Company." (R. 129)

The replacement of grain binders by harvester threshers is discussed later (*infra*, pp. 118, 119) as one of the important new developments in the industry. At this point we consider only the character of the competition. *Mr. Gittins,* Vice President of J. I. Case Threshing Machine Company, one of the largest and strongest competitors in this new field, testified:

> "There is good, strong competition in the sale of harvester threshers; very much the same as we meet in other implements. We have found it possible to sell our machines in competition with the Harvester Company's harvester machines. There are a few spots where we got considerably more trade than they. In places we have felt the competition of Massey-Harris and Holt more than the Harvester Company. We look for considerable expansion and increase of the business of our company in these new machines.
>
> "We have been competing for years with the International Harvester Company in threshers and some other machines. We regard the Harvester Company as good, hard competition, but clean and honorable and fair competition in every way. We think the standing and good will of the Case threshing machines give our company a good advantage in entering this new field. The good standing of our company in the thresher business gives us as favorable an entry to the harvester-thresher field as the good standing of the Harvester Company in the harvester business." (R. 280-281)
>
> "The field for sale of these machines has not yet been filled to any great extent. They are still using the old separate threshers, headers, and binders. As the machines now in use wear out and the farmers are financially able to buy new equipment, I think the trade in this dry territory will very largely run to the harvester-thresher type of machines." (R. 280)

The conditions which are described by these eight competitors as those of active, keen and stimulating competition, the Government would have this Court characterize as absence of competitive conditions.

Mr. Legge, President of the Harvester Company, with 33 years of experience in the implement business, testified that, taking account of the centering of the harvester trade in a number of substantial long-time companies and other changed conditions, he considered competition on a sounder and more secure basis than it had ever been in his lifetime; that the competition prior to the organization of the Harvester Company in 1902 was sporadic, certain companies competing in one territory and others in another but with no more lines being offered to the farmers in any one locality than at present. (R. 195, 196, Appendix 45, 46)

This testimony, as to the actual competition of a number of harvester companies at all points throughout the country, is corroborated by the testimony of eighty-one dealers from sixteen grain-growing states. These dealers told of the competition in their own and surrounding towns. (R. 282-285)

2.—COMPETITION AS DESCRIBED BY OFFICERS OF FARM ORGANIZATIONS.

The farmer's own observations as to competition for his business are important.

J. R. Howard, a farmer of Clemons, Iowa, was President of the Iowa Farm Bureau in 1917 and President of the American Farm Bureau from 1919 to 1923. The national organization had a membership of over a million farmers. The state organizations are unit members of the national organization, electing its executive committee. (R. 334) If any restraint of trade or unfair trade practices existed in the implement industry so vital to all farmers, it is reasonable to assume they would have come to the attention of this executive committee and have been a proper subject for consideration and complaint. The committee interested itself actively in urging implement manufacturers to meet the farm crisis with lower prices. (R. 335, *supra*, pp. 50, 51.) *Mr. Howard* testified:

> "In my experience as a farmer or from my wide acquaintance and association with farmers of the United States or from my investigation of the recent and still continuing conditions of the farm industry I do not know of any injury or damage to the farmers that is attributable in any way to the International Harvester Company." (R. 335-336)

C. H. Gustafson, of Lincoln, Nebraska, a former President of the Farmers' Union in Nebraska, member of the State Board of Agriculture, chairman of the Farm Machinery Committee of the State Legislature, and at the time of the trial marketing director of the Farm Bureau, testified:

> "My experience as a farmer for many years and as president of the Farmers' Union States Exchange brought me in touch with implement dealers and their competitive conditions. I am familiar with the machinery generally offered for sale in Nebraska. Among the lines sold are the International, John Deere, Lean, B. F. Avery, Emerson-Brantingham, Minnesota State Prison, and Madison. Also there are a number of branch houses at Lincoln handling tractors and threshing machines. It is my observation that any make of these machines is available to any farmers in the State." (R. 347)
>
> "I would say that competition in the harvesting business is as keen as ever, although it is probably true that the number of companies engaged in it has declined. I think the competition between International, Deere, Massey-Harris, and Emerson-Brantingham is as keen as ever, if not more so." (R. 348-349)

For testimony on this point of other officers of farm organizations see Appendix, p. 47, 48.

3.—COMPETITION AS DESCRIBED BY RETAIL DEALERS.

Eighty-one retail dealers were called by the defendant. They were from all of the principal grain growing states and handled various lines of harvesting machinery. The testimony of only twenty-five of these dealers is included in the record together with a stipulation that they are representative of all (R. 293), and twelve tables tabulating the testimony of all eighty-one were by agreement of counsel included in the record as a correct summary of their testimony on the points covered by the headings to the tables. (R. 282-292) For description of these tables see Appendix, p. 49, 50.

The testimony showed that:

1. Three to five of the principal harvester lines were being sold in almost every locality and in some localities more than five lines. (Table I, R. 283)
2. Competition was active and similar to that in other agricultural implements. (Table II, R. 285)
3. The good will of the local dealer is important as is his ability to shift his trade from one line to another. (Table 3, R. 286)
4. A very general opinion prevails that any of the principal and well known harvester lines can be and are being sold successfully in competition with the Harvester Company lines. (Table 4, R. 287)

Reference has already been made to dealers who took up and successfully handled the Champion and Osborne lines. (*Supra*, pp. 89, 90.) A few quotations are here given from dealers handling the Deere, Minnesota, Massey-Harris and Moline harvesting machine lines.

E. I. Polson, a dealer of Terre Haute, Indiana, President of the Indiana Implement Dealers Association in 1922, handled the McCormick line prior to 1919 and since then the Deere. He testified:

> "I could have continued the International if I had wanted to, but I preferred the Deere. I had sold the Deere tillage line for a good many years. I con-

sider the tillage line more important than the harvester line in the implement business, and I think the Deere tillage line is the most popular in my part of the country." (R. 304-305)

"Since I changed from the International line to the Deere I have sold binders and mowers to people who formerly used the International. I have kept my customers. I had no trouble in obtaining binders, mowers, and rakes to supply my trade and have been able to give service to my customers.

"In my town Penticost & Craft were selling the International. The Massey-Harris line was sold by Reis. A mile west the Molines were sold. I think in selling harvesting machines we get our share of the trade. There is no difference between the competition in the harvesting machine line and that in tillage lines." (R. 305)

"In the implement dealers' conventions I became acquainted with all of the different dealers who had been discontinued as Harvester Company dealers. Throughout the State of Indiana you will find in almost every town dealers selling the Deere line of harvester. The Massey-Harris and Moline are not sold so generally as the Deere." (R. 305)

Mr. R. G. Nuss of Madison, Wisconsin, testified:

"I am secretary of the Wisconsin Implement Dealers' Association, and have been for six years. My work has brought me into contact with implement dealers from all parts of the State. * * *

"We have handled the Minnesota State Prison harvester line one year. That is a new machine in our territory, and I have met with fair success in its introduction. I see no reason why an experienced implement dealer can not sell the harvesting goods of other companies in competition with a dealer handling International Harvester Company's harvesting machines. We have done it and other dealers are doing it. The field is absolutely open for selling harvesting machines of other companies in competition with harvesting machines of the International Company." (R. 306) * * *

A. J. Kleinjan of Durant, Iowa, a McCormick dealer, iscontinued under the 1918 decree, took up the Massey-

Harris line and for four years competed with the McCormick dealer handling the McCormick and Deering lines. He testified:

> "In 1919, the last year I sold the Deering machine, I sold twelve Deering binders. In 1920 I sold ten Massey-Harris. I do not remember the number of mowers or rakes, but I think the sales were in the same proportion. My sales of binders in 1920 were just about the same as those of my competitor. Since 1920 I have sold more binders and mowers than he did." * * *
>
> "I sell Massey-Harris machinery, binders, and mowers to customers who formerly bought the International.
>
> "I have been able to get enough binders and mowers from the Massey-Harris Company to supply my trade, and they have given satisfaction, and I have been able to give proper service." (R. 313)

G. P. Josselyn of Rochester, Minnesota, a discontinued Deering line dealer, handles the Moline and Minnesota harvesting machines. He testified:

> "Since 1920 we have met with very good success in selling our harvesting machines, except that the crops have been light and there has been a decrease in the quantity of business with all of us. Our sales have compared favorably with those of the dealer handling the International line of harvesting machines.
>
> "Based on my experience, I think any capable dealer can sell any well-made line of harvesting machines successfully in competition with the International Harvester Company.
>
> "I could sell the Milwaukee line of harvesting machines successfully in competition with a dealer handling the International harvester line.
>
> "We handled and sold the Milwaukee corn binder some years ago and found it a good binder." (R. 317)

For testimony of other witnesses as to competitive conditions, see Appendix, p. 45-52.

SECTION B. IMPORTANT CHANGES IN THE EVOLUTION OF THE IMPLEMENT INDUSTRY WHICH HAVE AFFECTED COMPETITION IN HARVESTING MACHINES AND WILL CONTINUE TO DO SO.

1.—CHANGED METHODS OF DISTRIBUTION.

In 1911 practically all implements were marketed through dealers acting as commission agents who sold to the farmers for the account of the manufacturers. By 1917 practically all implements were sold to the local dealers. This development of the local dealer into an independent merchant was brought about by a number of causes, improved roads and transportation centering the trade in the more important towns and away from the cross-road agencies, improved credit facilities for the local dealers through the Federal Reserve Act, etc. As one of the results, the dealers have been stronger and able to carry better stocks, particularly repair stocks. This has lightened the burden of the branch house service of the manufacturers so that a large number of branch houses is less of an advantage than formerly. (R. 193) The Government has pointed to the larger number of branches of the Harvester Company as an advantage preventing free competition. There is no evidence that competitors have insufficient branches. The evidence is all the other way. (R. 271, 193, 259) It further appears that the Harvester Company is burdened with a number of branch houses it might well do without but for the local feeling against their abandonment. (R. 193)

The conditions above noted have made possible a new selling plan—the partial service plan—which has been followed for several years by a number of implement companies: Moline Plow Co., Minnesota State Prison, Case Plow Company, Oliver Company, Janesville Company. (R. 110, 192, 193, 299, 308)

The differences between the so-called "partial service plan" of distribution and the plan of distribution used by the Harvester Company and most of its principal competitors are as follows:

Under the latter plan the machines are usually shipped from the factory to branch houses and from there distributed to the dealers in the branch-house territory. The manufacturer furnishes the dealer with expert help in setting up and repairing the machines. Due to the fact that the branch house is usually not very remote from the dealer's place of business, the dealer need not keep as large repair stocks on hand as he would if he were depending upon the factory to furnish him repairs. The theory of this method, as *Mr. Legge* said,

> "is to bring the source of supply nearer the consumer and give better service so he can obtain repairs more quickly and expert assistance in case of difficulty." (R. 192)

Under the partial service plan, machines are usually shipped to the dealer directly from the factory and are sold for cash instead of on time. The dealer affords the farmer most of the necessary service and expert help in repairing machines, etc., and therefore must keep on hand a larger stock of repairs than is necessary in the case of the other plan of distribution. In return for this the dealer is charged a less price for the goods. The theory of this plan is

> "that the local dealers should supply the service rather than the manufacturer, in consideration of which he is given a lower price as compared with competitive goods sold through the branch-house system." (R. 193)

The evidence shows that the partial service plan appeals to a considerable number of good dealers (R. 266, 293, 307) and that it is impracticable for the same company to employ more than one of these plans in marketing its products. It must choose the one or the other (R. 269).

2—DECLINING IMPORTANCE OF THE OLD LINE OF HARVESTING MACHINES.

The types of harvesting machines manufactured by the five companies whose properties were acquired by the Harvester Company in 1902 were grain binders, headers and push binders, corn binders, mowers, sulky hay rakes and reapers. The restraint of trade alleged to exist by the Government is with respect to these lines and principally grain binders.

New developments in the industry and changes in agriculture have lessened and are lessening the total trade in these lines and their relative importance as a part of the full line. If restraint of trade were proved to exist, the diminished importance of the articles would not excuse it. But when the issue is whether competition is restrained or likely to be restrained in a few machines forming a part of a long line, the matter of their diminishing importance is most relevant. At different places in this brief several declining trends are mentioned which are here distinguished for clarity:

a. The Harvester Company's declining percentages of trade in the above mentioned old line harvesting machines—reflecting the growth of competition.

b. The declining total trade in those machines, reducing their importance to dealers and the trade generally as leaders.

c. The declining percentage which the Harvester Company's business in the old harvester lines bears to its total implement business, reflecting its development into a full line company, and also its diminishing trade in the old lines for the reasons last mentioned. The old harvester line was 92% of the company's implement business in 1903. In 1923 it was only 20.3%. (Defts. Ex. (S) 15, R. 591-594). Obviously sales policies as to the harvester line must be subservient to the success of the full line.

It is the second point, the diminished and still diminishing total trade in the old line harvesting machines which is here discussed and the reasons therefor noted.

Grain Binders and Headers. The use of grain binders and headers is diminishing for these reasons:

(1) This business has come more and more to a replacement basis as the new areas of the country coming under cultivation have been exhausted. Practically the entire country is now on a replacement basis. (R. 203, 289)

(2) The increasing diversification of crops. The first crops raised on land brought under cultivation are small grains. As diversification follows, the use of the binder diminishes, and as there is a strong tendency throughout the country in that direction the field for binders and headers necessarily becomes more restricted. (R. 203, 289)

(3) The evidence shows that the improvements in machines and the better care taken of them has greatly increased their durability, the rate of replacement being thereby diminished. (R. 174, 293, 295)

(4) The evidence shows that grain binders of wider swath are drawn by tractors and that, when so drawn, they move considerably faster, with the result that one tractor-drawn binder will cut an area twice as large as a horse-drawn binder in the same time; and that such use of tractors is increasing. (R. 175, 295)

(5) The harvester-thresher is a new machine combining in one operation the cutting and threshing of the grain and performing these two operations in much less time and with much less expense. The Harvester Company, although one of the first in the field, had only 33.8% of the harvester-thresher trade in 1923 (Gov. Br. 154) and there is no question

as to the strength of the companies competing for the business. (R. 279-282, 257)

As to the importance of this new machine, all witnesses agreed that it would supersede the binders and headers in the dry grain territory—all of the United States west of a line drawn through central Texas, Kansas and Nebraska to the Canadian border. (Gittins R. 280, Legge R. 203, Bradshaw R. 256, 257) About one-third of the country's grain crop was grown in this territory when the testimony was taken. (R. 203.)

It is natural to expect a westward shift in grain growing to take advantage of the low costs of production brought about by the harvester-thresher.

Mowers and Rakes. The total United States demand for mowers and rakes of all kinds has been reduced by several of the same causes affecting the binder, namely, increased durability, increased efficiency when operated with a tractor, diversification of crops, and also no doubt by the decreased use of horses following the rise of the automobile.

The following United States census figures show the total United States manufacture (including exported goods) of mowers and rakes for the five year census periods.*

	Mowers	Rakes
1904	273,385	236,297
1909	359,264	266,260
1914	274,521	183,082
1919	151,133	93,933
1922	80,484	48,225

The cutter bar mower attachments for tractors are a new development within the last three years. Three companies—Roderick Lean & Co., Thomas Mfg. Co. and Detroit Harvester Co.—are new in the field with attachments of this type and are making substantial

*Based on Defts.' Exh. (S) 33 and (S) 34 (R. opposite p. 636).

progress. (R. 277, Appendix 55-57) As the large majority of tractors now in use are Fordsons there is undoubtedly a big field for these mower attachments. Increased use of tractor mower attachments necessarily means decreased use of the old types of mowers.

The sales of sulky rakes have been materially diminished through the preference of the trade for side-delivery rakes and sweep rakes, which perform the same function. (R. 290, 174) The Harvester Company is not a large factor in side-delivery rakes or sweep rakes (R. 597). Mr. Silloway, of Deere & Company, testified that the Dempster Manufacturing Co. was Deere's principal competitor in sweep rakes (R. 260).

The following table reflects the combined effect of the reduction of total United States trade in the old line harvester machines and the reduction in the Harvester Company's percentage thereof.

AVERAGE ANNUAL SALES OF THE HARVESTER COMPANY IN THE UNITED STATES.†

†Table based on Defts.' Exh. (S) 17, R. 595.

Five-Year Average	Grain Binders	Corn Binders	Reapers	Push Binders and Headers	Mowers	Sulky Hay Rakes	Totals
1903-1908	87,820	14,400	3,590	4,432	177,017	120,644	407,903
1909-1913	90,895	28,890	2,345	5,248	158,639	98,549	390,506
1914-1918	84,260	26,050	1,654	5,701	128,824	64,190	310,679
1919-1923	49,800	13,263	737	3,087	71,884	29,047	167,818

(See Appendix 52-57 for a fuller discussion of the testimony of both manufacturers and dealers as to the various causes for diminished trade in the old harvester machines.)

On pages 121 to 125 of its brief, the Government sets forth a number of figures and tables purporting to answer a contention imputed to the Harvester Company that the harvester line is no longer an important part of its business. The Harvester Company has made no such contention and the Government's figures in no way answer the two points which the Harvester Company has made, namely: (a) that the total trade of the country in harvesting machines is diminishing, both absolutely and also in relation to the remainder of the implement business; and (b) that the small percentage of the Harvester Company's business in the harvester lines, compared to its total business in *all implement* lines, subjects the harvester business to the general competitive conditions applicable to the entire implement business.

As proof that the harvester business has not diminished in importance, the Government relies on exhibits showing that the Harvester Company's total business in harvesting machines in 1903 was $25,276,325 as compared with $29,788,561 in 1920. The Government does not mention that the same table shows that the 1923 sales were only $14,929,349 (Pet. Ex. (S) 135; R. 561). Any comparison in dollars between 1903 and the post-war period fails to reflect the important factor of prices, the whole post-war price level for implements and all other manufactured products being much higher as a matter of common knowledge. The table above given showing in quantities the average number of harvesting machines sold during five year periods, eliminates the price element and other temporary fluctuations and clearly substantiates the point made that the Harvester Company's business in harvesting machines is decreasing greatly in quantity.

Defendants' Exhibit (S) 15 (R. 591) showing that the Harvester Company's business in the harvester lines has decreased from 92 per cent to 20.3 per cent* of its

*The Government's percentage figures (Br. 123) are confused and irrelevant because the total business on which they were based includes the Company's business in steel, lumber, fiber, twine, etc., which are not implements. Defendants' Exhibit (S) 15, R. 591, on the contrary compares the harvester line sales to its total *implement* business.

total *implement* business reflects the combined effect of two changes—the diminished business in harvesting machines last noted and the increased business in new lines. This combined result has been referred to by the Harvester Company, not as showing the unimportance of its harvester business, either to itself or its customers, but its interrelation of the whole implement business and the relatively small part which the harvester business plays in the whole.

One of the obvious effects on competitive conditions which the above changes have brought about, is to make the harvester line a much smaller part of the dealer's business and deprive the Harvester Company of the advantage it might have had in obtaining the best dealers through being able to offer to them a more important leader. Representative dealers testified that the harvester business was now only 10 to 15 per cent of their total implement business and that the relative importance of the plow and tillage lines had greatly increased. (R. 293, 294, 295, 289, 290.) Manufacturers testified to like effect. (R. 203, 271.)

3.—THE INCREASING IMPORTANCE OF THE PLOW AND TILLAGE TOOLS AS LEADERS IN THE LONG-LINE.

The decline in the total volume of manufacturers' and dealers' trade in harvesting machines has increased the relative importance of the plow and tillage tools in the full line implement trade. But this is not the whole story. During the same period the development of the art of farming has led to more attention to tillage and cultivation and an increased number of tools for this purpose. (R. 271, 304, 331)

The following United States Census figures for sales in the United States during 1920-21-22 show the greater value of the plow and tillage trade over the harvesting machine trade. (Defts.' Exh. (S) 34, page 3 thereof)

	Plow and Tillage	Harvesting Machines
1920	$75,631,000	$50,293,000
1921	23,104,000	15,753,000
1922	22,258,000	20,073,000
	$120,993,000	$86,119,000

Aside from the larger volume, the plow and tillage line has advantages as a leader in a long line of machines, both for the manufacturers and dealers.

Mr. Black, President of Avery & Sons, said:

> "I do not think that the harvester line is as important a line of agricultural implements now as it was twenty years ago. There are not so many harvester machines sold. More implements of the tillage lines are sold now than twenty years ago." (R. 271.)

Mr. Sullivan, an implement dealer of Richwood, Ohio, testified:

> "Tillage tools are more important as a nucleus for an implement dealer's business than the harvester line. * * *
>
> "By nucleus, I mean center of your implement business. You use a binder about five days a year. You use a plow in the spring and fall. Disc harrows come in when getting a seed bed ready, etc. Early solicitations establish the business for the season to a certain extent. If a man is in the market for a plow, he may be in the market for a binder, and if he is, the chances are that it is more important to sell him his tillage tools than the harvester line." (R. 322, 324.)

Other witnesses testified to the same effect, (see Tabulation R. 289; App. 58, 59.)

Most of the Harvester Company's long-line competitors (Deere, Moline, Brantingham, Avery) have an established business in the plow and tillage line antedating the Harvester Company's by many years. Its large percentage of trade in the harvester lines will not help it to increase its plow and tillage sales as much as the larger percentage of its competitors' sales in their lines will help them to increase their harvester sales.

The evidence shows that the Harvester Company has a relatively small proportion of the plow and tillage trade. In 1922 the Harvester Company's proportion of the United States trade, according to census figures, was 18.6%.

As to chilled plows Mr. Black said that the Oliver Company did 60% of the business in the United States and formerly did more (R. 270), and Mr. Oliver himself said that its business is many times greater than any five of its competitors (R. 250).

As to steel plows Mr. Silloway testified that Deere & Company had the largest production in the world, the Oliver Company next, the Moline Company third and the Harvester Company fourth (R. 261, 262).

The Government says (p. 121):

> "Its business [the Harvester Company's] in the new lines developed rapidly and in many it has become the leader. Thus it has become the leading manufacturer of cultivators and harrows, two important tillage implements." (Silloway, R. 260.)

Mr. Silloway did not so testify. What he said was this:

> "Our leading competitor in chilled plows is the Oliver Company; in sweep rakes and stackers, the Dempster Company; in gasoline engines, Fairbanks Morse; in corn shellers, the Sandwich Company and King & Hamilton; in manure spreaders, the New Idea Company; in tractors, Ford; in steel southern walking plows and in cotton planters, B. F. Avery; in cultivators generally the Harvester Company, but in five-tooth cultivators the Planet Company of Philadelphia; and in two-row cultivators west of the Mississippi River, the Dempster Company." (R. 260)

Thus Mr. Silloway does not mention *harrows* at all and as to cultivators he says, not that the Harvester Company is the *leading manufacturer*, but Deere & Co.'s *leading competitor*, an entirely different matter.

As to tillage tools generally, Mr. Peek, the President of the Moline Company, said that Deere & Company led (R. 113), and the testimony of the dealers strongly corroborated him (R. 304, 305, 309, 317).

Moreover, nine dealers discontinued under the decree of 1918, who had previously handled the Harvester Company's harvesting machines, testified that the Harvester Company had desired to have them continue as its dealers in their respective towns, but that they were already handling Deere plows and tillage tools and did not wish to handle in addition the Harvester Company's plows and tillage implements, and they preferred to give up the harvesting machines of the Harvester Company rather than the Deere plow and tillage line (R. 292). This evidence we submit is very cogent. Here, were dealers who handled the harvesting machines of the Harvester Company and the plows and tillage tools of Deere & Company. They were confronted with the necessity of making an important decision which would have a vital effect on their future business careers. In effect they had to choose between handling the Deere or the Harvester Company's line. The plows and tillage implements of the former were more popular than those of the latter; in the case of harvesting machines the contrary was the case. They chose the Deere line.

So, too, *Peter Glasrud*, a dealer from North Dakota, testified as follows:

> "After we changed from the Deering line we sold Osborne machines to people who formerly used the Deering. We could have retained the International line, but we did not do so because they wanted me to

> handle their complete line, and I preferred some other lines, such as Fairbanks engines, DeLaval separators, Emerson tillage goods and Stoughton wagons. We changed by reason of the decree, and the International gave me all the chance I wanted, and after about a month's time we decided we did not want it. The International representative was there two or three times." (R. 321.)

With the growing preference of dealers to buy more implements from the same manufacturers, further competition will doubtless result in a leveling process. For example, a dealer now buying the Deere tillage line and International harvester line, will take on the Deere harvester lines and vice versa.

4.—NUMEROUS FORD DEALERS HAVE RECENTLY ENTERED THE AGRICULTURAL IMPLEMENT BUSINESS IN CONNECTION WITH THE SALE OF FORDSON TRACTORS AND THESE NEW AVENUES OF RETAIL DISTRIBUTION WHICH ARE NOT AVAILABLE TO THE HARVESTER COMPANY ARE BEING USED BY ITS COMPETITORS.

Many companies, including the International Harvester Company, Deere, Moline, Emerson-Brantingham, Rock Island Plow, J. I. Case, Rumely and others were making tractors for a nnmber of years prior to 1918. (R. 204.) The earlier machines, however, were heavy and expensive. About 1918 the Ford Company placed upon the market a lighter tractor which it sold at a price materially less than any other tractor on the market. (R. 204, 277, 112.) A very marked increase in sales and swing towards tractor farming have since taken place.

The Department of Commerce's Census of Farm Implement Manufacture and Sale for 1922 (Defts.' Ex. (S) 34) shows the number of tractors sold in the United States from 1916 to 1922 as follows:

1916	27,819
1917	49,504
1918	96,470
1919	136,162
1920	162,988
1922	101,192

By far the greater number of these tractors are Fordsons. A witness making mower attachments for Fordsons and with excellent opportunities for information, estimated the Fordson percentage at over 80% (R. 277).

The Fordson tractors are sold by the same dealers who handle the Ford cars.

The important bearing of all this on the rest of the implement industry is that tractors are used to pull or furnish power for many kinds of agricultural implements, and that specially adapted implements to suit the power of the tractor or the form of hitch or the power take-off devices are necessary or more desirable than implements designed for use with horses. This is particularly true of the Fordson tractors which are so light as to require many special implements, and the sale of these has led the Fordson dealers into the general implement business. (R. 111, 112, 252, 253, 290, Table 9.) Fordson dealers and manufacturers of implements were not slow to seize this opportunity.

The evidence shows that there were 9,000 *Ford dealers in the entire country* (R. 277) *and the census of implement dealers covering the central grain-growing district (15 states alone) shows* 3,578 *Fordson dealers handling implements.* (Defts.' Ex. (S) 6, R. 573.)

A Ford Dealer Equipment Directory (p. 176) shows 123 concerns manufacturing specially designed implements or attachments for Fordsons (Defts.' Ex. (S) 8), including Avery & Sons, Deere, Emerson-Brantingham and

Moline, and there was testimony to like effect. (R. 111, 112.)

The business is not confined to special Fordson equipment as the dealer's opportunity is favorable for supplying all of the farmer's needs. Ford dealers are handling all kinds of implements, including harvesting machines, and their business is increasing. (R. 294, 304, 298, 312, 332, 311, 337, 338, 340, 345.)

Nine thousand Fordson dealers are available to competitors as new retail outlets with the opportunities for increase of business most favorable. (R. 277, 253)

The Harvester Company, being limited to one dealer in a town and having its own tractor to sell in competition with the Fordson, is in no position to do business with the Ford dealers.

Several companies — Detroit Harvester Company, Roderick Lean Company and Thomas Manufacturing Company—are making special mower attachments for Fordsons. (*Supra*, p. 119.) Mr. Hoover of the Detroit Harvester Company testified to the success of their device, substantial sales to date (2,000 mowers), and expectation of a greatly increased business. (R. 278) He also testified to knowledge of experiments going on and progress being made in designing a binder to take its power from a Fordson tractor instead of from the ground wheels as in the case of a horse-drawn binder (R. 278).

On this point of the increasing importance of the tractor and the Fordson dealer competition see also Appendix p. 59-61.

5.—SUMMARY OF THE PRINCIPAL EFFECTS OF THE LONG-LINE DEVELOPMENT ON COMPETITIVE CONDITIONS.

All of the principal competitors of the Harvester Company (Deere, Massey-Harris, Emerson-Brantingham, Moline, Avery and Case) are now long-line companies. (R. 195.)

In appraising the present and forecasting the future of competitive conditions, we believe this Court will wish to give careful consideration to the many effects of this new development which has put all competition on an entirely different basis from that existing in 1902. It has a bearing on (1) the strength and permanence of competitors, (2) their growth in the past, (3) their prospects for the future, and (4) the ability of the Harvester Company to eliminate competition, or the likelihood of its attempting to do so in view of the fact that it would thereby injure itself more than its competitors.

Reference has already been made (*supra*, p. 3) to the report of the Federal Trade Commission attached to the petition, in which the long-line development is characterized as a striking and desirable development bringing advantages and economies and tending to increase competition. Some of the principal effects of the long-line development as shown by the evidence and which are material to this suit are here enumerated.

1. The long-line brings economies by enabling one salesman to sell many lines to the same customers; and, by giving all year around employment in selling the different seasonal goods, it enables the implement companies to obtain a better class of salesmen. (R. 260, 261, 264, 265, 270, 186, 195.)

2. The long line brings economies of a similar nature in manufacture. The skilled factory labor can be re-

tained by giving all year around employment in manufacturing the different seasonal lines. The buildings and general equipment can be used to manufacture many instead of one class of implements and the fixed overhead expenses, such as management, taxes, insurance and depreciation, spread over a larger production. (R. 265.)

3. There is a substantial freight saving by shipment of mixed carloads of machines to one dealer who would not buy a carload of one kind of machines. (R. 108, 270, 195.) This saving goes to the dealer and accounts for his growing preference for placing orders with one manufacturer for all of such dealer's requirements so far as may be practicable.

4. The long line enables a company to protect itself against many contingencies by averaging the profits. The margin of profit on different machines may vary for many reasons affecting either the cost, or the selling prices or the volume of sales, and, whatever may be the cause for a low margin of profit on any one machine in a particular year, this low margin may be offset and averaged by a better margin of profit on other machines. The total volume of trade of long-line companies enables them to sell their goods economically in larger territories and this gives them the advantage of larger quantity production and minimizes the fluctuations due to local crop failures. (R. 260, 261, 271, 272, 199.)

5. One kind of implement helps sell another. (R. 270-272, 187, 329.) The leadership of well-known and efficient machines of one kind sold by an established company is influential in bringing contracts and establishing relations with dealers for their other requirements. The harvester line has been useful in this respect, but not more so than the plow and tillage line,

and the history of the past ten years indicates clearly that so far as the present and future are concerned the decided advantage as leaders, in this respect, is with the plow and tillage lines. (See *supra*, pp. 122-126.)

6. The preference of the dealers for purchasing more of their requirements from one company, together with their ability to control and switch their clientele and the influence of one kind of machine in helping to sell another, are all forces which have had, and will continue to have, a tendency to decrease rather than increase the Harvester Company's percentage of trade in harvesting machines. These forces have been operating in this way ever since Deere & Co. entered the harvester field in 1911 and are largely responsible for its rapid progress.

It is important to bear in mind that a considerable portion of the Harvester Company's trade in harvesting machines is with dealers who buy their requirements of plows, tillage tools and other implements from other manufacturers with whom they have equally satisfactory relations established before the existence of the Harvester Company or before it was a long-line company.* It is reasonable to suppose that more of these dealers from time to time will do what so many have already done, that is, purchase more of their requirements from one manufacturer and in the normal and desirable competitive strife the Harvester Company will make some gain in the plow and tillage trade [in which it has less than 19 per cent of the trade (App. p. 81).] and its competitors some gains in their harvester trade. This has been the history of competition during the last twelve years. And if competitors have gained in the

*The Harvester Company's higher percentage of trade in harvesting machines over its other lines indicates this. The 1923 census in the central grain-growing district showed 6,871 dealers handling its binders, mowers and rakes as compared with 4,546 handling its plows.

shifts of trade in the past, they have an even better chance in the future under the special competitive conditions created by the single-dealer restriction. As already explained (*supra*, pp. 63, 64) competitors now have a distinct advantage in bidding for more business from a dealer now handling one of their lines and the Harvester Company's line as well. Refusal to take on the competitor's harvester line may result in its being placed with some competing dealer in the same town. Refusal to take on the Harvester Company's plow and tillage line involves no such risk. It cannot divide its line and sell to two dealers.

7. The long-line development naturally has created a close relationship in the marketing of the different goods forming the line, and affected competitive conditions as to all of such goods. This effect has been increased by the single-dealer restriction which prevents the Harvester Company dividing its implement line between dealers. Of the goods it seeks to sell to its dealers only 20 per cent in value consists of the old harvester line, and grain binders, called by the Government (Br. 47) the "keystone implement," are less than 7 per cent. (Defts.' Ex. (S) 15, R. 594.) The Company must deal fairly with its single dealer in each town with respect to harvesting machines as well as other goods or lose his good will and business on part or all of its lines. (R. 206.)

8. There is a well recognized price relationship between the various implements of a long line. All are affected by similar economic conditions and custom has led the trade to expect similar price changes and dealers are in a position to demand them. The harvester line is yoked to the other lines the Harvester Company seeks to sell and subject to the same competitive conditions. This price relationship is well recognized. (R. 296, 299,

206, 323, 292.) The history of the Harvester Company's prices from 1913 to 1923 shows its truth. (Defts.' Ex. (S) 20; R. 601, 602.)

9. The alleged power of the Harvester Company to injure its competitors by unwarranted price reductions or otherwise, is nonexistent. The long-line development has effectually deprived it of any such power, if it ever existed.

Mr. Legge testified (R. 206-207):

> "The Harvester Company could not succeed in driving its competitors out of the field by offering its harvester lines to dealers at or below cost. It would obviously be injuring itself to a greater extent than it could possibly injure any competitor because of its larger percentage of trade in those lines. On account of the possession of long lines by the company's principal competitors, the harvester line is a smaller percentage of their total output and trade than with us, and the temporary loss of profit on that small percentage of their total business could not prove a serious embarrassment to their carrying on business.
>
> Mr. Myers: Petitioner objects particularly in view of the fact, as the record shows, that the companies which have gone out of business for the most part were not long-line companies. * * *
>
> The Harvester Company could not undertake a warfare against a single competitor in the harvester line anywhere without involving all the long-line competitors everywhere. It would not be possible to reduce prices on harvester implements in one locality for the purpose of affecting a competitor therein. Its competitors are long-line companies offering their goods generally for sale throughout the country. These circumstances would not permit of any such undertaking as local price cutting."

PART VI.

THE CHARGE THAT THE INTERNATIONAL HARVESTER COMPANY DOMINATES THE HARVESTER INDUSTRY AND RESTRAINS TRADE THROUGH (1) LOWER COSTS, (2) ENORMOUS PROFITS AND (3) PROFITABLE SIDE-LINES WAS NOT SUPPORTED BY ANY MATERIAL EVIDENCE AND WAS AFFIRMATIVELY DISPROVED.

Part IV of the Government's brief is devoted to an argument that the Harvester Company has such advantages as to be able to dominate the harvesting machine industry. The advantages which it is alleged give this dominance are large resources, "tremendous advantage in costs," "enormous profits" and profitable side-lines, and the dominance is alleged to be reflected in control of prices.

The resonrces of the Harvester Company compared with its competitors are considered in Part VIII *infra*, pp. 169-171, the alleged control of prices in Part VII *infra*, p. 158, and in Part X *infra*, p. 194, the legal question of whether advantages of the character mentioned under this heading—advantages which can only be achieved and maintained by efficiency—can in and of themselves constitute restraint of trade.

In this part of our brief we consider the evidence on the question of fact as to whether the Harvester Company has any such advantage in (1) costs, or (2) profits, or (3) profitable side-lines as to prevent successful competition by any competitor of reasonable efficiency.

In support of its charge of "tremendous advantage" in costs, the Government offered no evidence whatever except the Federal Trade Commission Report (Pet.'s Ex. (S) 90) which contains certain cost tables purporting to compare the costs of various competitors in harvesting machines and other implements in the years 1916 and 1918. This same report is also referred to extensively as proof of various figures relating to profits. This report we contend is incompetent and of no evidential value on the issues in this case. Its admissibility in evidence is therefore first discussed after which the competent evidence as to costs and profits is considered.

1.—THE FEDERAL TRADE COMMISSION REPORT (PET.'S EX. (S) 90) WAS INADMISSIBLE IN EVIDENCE. IT WAS INCOMPETENT BECAUSE HEARSAY AND IMMATERIAL BECAUSE OF REMOTENESS AND PATENT INACCURACIES MAKING IT OF NO PROBATIVE VALUE IN ANY ISSUE IN THIS CASE.

The Government's method of proof was undoubtedly expeditious and convenient, but it would seem that before the Harvester Company is condemned and dismembered for the crime of "dominance" it should have the usual right to cross-examine witnesses with first hand knowledge. We object to the Report on two grounds:

(1) Because it is hearsay evidence not coming within any recognized exception to the hearsay rule, and

(2) Because the testimony of its own compiler, Mr. Bennett, shows it has no probative value on the issues in the case and should therefore be excluded for immateriality.

The basis for both of these objections will appear from a few references to and quotations from the testimony of Mr. Bennett called as a Government witness to "prove" the Report before it was offered in evidence.

Mr. Bennett stated that he supervised and directed for the Federal Trade Commission all accounting work involved in the report of the Commission in reply to the Senate Resolution of May 13, 1918 calling for an investigation of the causes for the high price of agricultural implements (R. 131).

Questionnaires were prepared and sent out to all manufacturers of implements included in the examination calling for information as to costs, prices, profits, etc. The replies were not under oath (R. 152). A field force of investigators then visited the offices of the various companies to verify the statements and secure additional information. *Mr. Bennett* testified:

> "Not all of the men I used were certified public accountants. In the main, I had to rely on the information brought by these field forces (R. 152)."
>
> "I think it was generally understood that the information that was given as to costs, prices and profits should not be disclosed by the Commission." (R. 138)
>
> "Q. All the concerns that you were investigating knew, of course, that the higher their costs were found to be, the better the justification for the existing prices? (R. 152)
>
> "A. Naturally." (R. 153)

As to the reliability and comparability of the cost figures collected in this manner, the following, all from *Mr. Bennett's* testimony, is significant:

> "Several of the companies could not supply the information required because their cost records were in such condition that they themselves knew very little concerning their costs." (R. 135)
>
> "It was not possible for me to write up a set of correct cost accounts for all the implement companies in the key for two years and I made no pretense of attempting it." (R. 151)
>
> "The Harvester had the best cost system of any of them in my estimation." (R. 146)
>
> "To the best of my recollection, with the exception of the Harvester Company, practically all the companies I investigated never checked out their estimated costs at the end of the year and adjusted them to the actual costs when the inventory was taken and the year's accounts closed. That, also, was a variable element in these tables." (R. 152)

Not only was the comparison between *actual* checked out costs of the Harvester Company for 1916 and 1918 and *estimated* costs of other companies, but in these estimated costs there was a known inflation of material values due to general valuation at replacement rather than actual cost which the Commission did not attempt to remove. The Report itself says

> "that the total material costs as shown in this chapter are in *almost every instance inflated to a certain extent.*" (Rec. 148) (Pet's Ex. (S) 90, p. 131)

Mr. Bennett testified that the *Harvester Company was one of the exceptions,* that is its costs were not inflated. (R. 148) As to other manufacturers he said:

> "The reports of the manufacturers may have been inflated or understated, because, as I previously said, it was impossible to give correctly the manufacturing cost of all companies. The report in stating that they were found to be inflated generally, and were so left in my tables, is perfectly correct." (R. 157)

He further testified that

> "In comparing the Harvester Company costs with those of other competitors, there might be some inflation of their material costs as compared with the Harvester Company's costs on similar material." (R. 148)
>
> "The period of 1916 and 1918 was one of mounting material prices, during which there might have been considerable difference in the prices of identical materials in the hands of different manufacturers, due to the circumstance of whether they had been fortunate enough to lay in a large supply at a lower price or had to buy at a higher one." (R. 146)

It is significant, in view of the foregoing, that a number of instances were called to Mr. Bennett's attention and verified by him where *the entire difference in cost between the Harvester Company and a competitor was in* *the material item,* the productive labor and overhead costs of the competitor being no greater or less (R. 146, 150). Examination of the cost tables will show that as a general rule all of the large differences are in the material costs.

Mr. Bennett's attention was called to cases (R. 150) where the tables showed a particular company's relative rank as to costs compared to other companies costs on similar machines were not the same in the two years compared (1916 and 1918), also to other variable elements besides material costs which might be responsible for differences. It is not necessary to go into these details further than to quote his admission as follows:

> "The difference in material cost might be due to a number of nonpermanent and fluctuating elements such as the difference might be diminished or increased or reversed in some other year; but there are other elements entering into the cost sold other than the material cost which also would reflect something different in a subsequent year." (R. 150)

Mr. Bennett frankly admitted that if the subject of his investigation had been, the ability of certain manufacturers to compete over a period of years, instead of the subject assigned to him, the costs and profits for the years 1916 and 1918, he, as a public accountant would have made an investigation of a broader and different character (R. 153).

In justice to Mr. Bennett it should be stated that it was not he, but another man who wrote the supplemental Chapter X (R. 155) attacking the Harvester Company—who took the data so compiled and assuming the reality, accuracy and permanence of the apparent differences in costs on harvesting machines drew the sweeping conclusions that no competitor could snrvive against the superior costs of the Harvester Company, and thus started this proceeding.

To sum up the foregoing, the Government now offers as its sole evidence of the alleged permanent and insurmountable advantage of the Harvester Company in costs, certain data five to seven years old collected by numerous manufacturers none of whom are produced in court and vouched for only by the supervising accountant. He, himself, admits that the tables are not accurate due to the different cost systems and lack of systems; that the data was confidential, that the Harvester Company's costs were the only actual costs, the others being estimated; that the bias of the manufacturers in view of the purpose of the investigation was towards reporting higher costs; that the estimates in almost every instance are inflated with respect to material costs during a war period when prices were fluctuating violently; that other and nonpermanent elements enter to cause variation; and that he himself would have made an investigation of a different character, if the purpose had been to determine the question of permanent ability to compete.

We respectfully submit that such data has no proper place as evidence in the records of any court and should be excluded as of no probative value, incompetent, immaterial, admittedly inaccurate and not the best evidence.

The Government called many competitors of the Harvester Company as witnesses and could have secured first-hand testimony as to costs. Obviously it should have done so if it considered this a vital point in its case. The Harvester Company would then have had the opportunity on cross-examination to develop

(1) To what extent the difference in costs were due to different methods of accounting;

(2) To what extent the variable elements affecting costs in any one year would be averaged out by taking the costs over a period of years;

(3) To what extent the higher costs in one ma-

chine might be offset by lower costs in others in the same line; and

(4) Many other elements bearing on ability to compete.

Whether the Government failed to enter into this inquiry because of doubt as to what the testimony would show or out of regard for the natural disinclination of competitors to disclose their costs, does not appear. If the latter, it is difficult to explain its action in introducing the Federal Trade Commission's data which was secured under a promise that it would be treated as confidential; also its action in printing in the record the keys to the Federal Trade Commission's cost tables identifying particular costs as the costs of particular companies, which exhibits were introduced *in camera* (R. 493, 607).

In support of its contention that the Federal Trade Commission Report is admissible in evidence, the Government makes two points in its brief (p. 49). The first point is that Mr. Bennett, who is the author of the report, was cross-examined at length. If the argument be that this was a waiver of the objection of inadmissibility, it is obviously unsound, as the testimony was being taken before a Commissioner who could not pass upon questions of this character. If the argument be that this cross-examination of the compiler of the data removed the objection that it was all hearsay, this also is unsound. There was no opportunity in such an examination to develop the detailed facts as to the differences in the cost figures and make necessary adjustments to put them on a comparable basis. The cross-examination was merely a part of the preliminary proof as to whether the document was admissible and was designed to bring out, and did bring out clearly, the fact that it was inadmissible because not based on first-hand knowledge and because of its admitted inaccuracies and remoteness. The Harvester Company never had an opportunity to cross-examine the persons from whom Bennett obtained his information at second hand or to examine the original books of competitors or to call for any additional data to make necessary adjustments to put the cost figure of different manufacturers on a more comparable basis.

The Government's second point is that *Chicago Board of Trade* v. *Olsen* (262 U. S. 1) lays down a principle of evidence which would make the report admissible. This case is not in point. The Court considered various reports (pp. 13, 37), among them a report of the Federal Trade Commission made to Congress prior to the enactment of the legislation attacked as unconstitutional, in order to ascertain the evil aimed at by the legislation and whether that evil was one which was within the constitutional powers of Congress to remedy. The only similarity is that the present report was also made to a legislative body—the Senate—but no legislation based upon the report is now before the Court. The only action of the Senate was by resolution requesting the Department of Justice to consider the data.

As to the special objection that the report is hearsay, we add a brief discussion to show that the report does not come within any of the exceptions to the hearsay rule.

(1) The rule of evidence that in cases involving complicated accounts an expert accountant may testify to summaries taken from original books of account is inapplicable because: (a) Bennett had no first-hand knowledge that the summaries published in the Commission's report correctly showed facts recorded in the books of account of the numerous implement companies examined; and because (b) the books of account summarized were

not produced for examination by the Harvester Company's counsel and for use in cross-examination. In the words of the Court in *Phillips* v. *United States* (C. C. A., 8th Cir.), 201 Fed. 259, 269,

> "before such expert testimony may be given * * * sufficient evidence must first be given to admit the books or documents themselves in evidence."

(2) The rule admitting public documents containing statistical data collected and published under a requirement of law, such as census reports, does not permit such documents to be used as proof of specific facts. The scope of this rule is stated in *Wigmore on Evidence*, Vol. III, p. 2079 (1st ed.), as follows:

> "The *census* is an *inquisition of population*, manufactures, agriculture, wealth, and many other classes of sociological data, and is made under an express legislative warrant and authority; it is therefore admissible under the general principle already considered. But the authority is to report general classes of facts; the details as to individual persons, factories, farms, and the like, are noted only as a necessary basis for the general and anonymous summaries; *hence the census reports are not receivable to show the age of a particular person, or the product of a particular factory, or the area of a particular farm.*"

To the same effect see also

Hegler v. *Faulkner*, 153 U. S. 109, 117.
Malone v. *Alderdice*, 212 Fed. 668 (C. C. A., 8th Cir.).

(3) The Commission's investigation and report were made, primarily at least, in pursuance of a resolution adopted by the Senate of the United States May 13, 1918, directing the Federal Trade Commission to investigate and report the cause or causes for the high prices of farm implements and the facts relative to the existence of any

unfair methods of trade. There is nothing in the resolution providing that the report should be given evidentiary value.

(4) The Commission in its own report (p. 33) and the Government in its Supplemental Petition (R. 24) recognize that the portions of the report relating to this case were not made under the Senate resolution, but under Section 6, Paragraph (c) of the Act of September 26, 1914, empowering the Commission *"to make investigation upon its own initiative of the manner in which the decree has been or is being carried out and * * * transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation."* An investigation conducted by the staff of the Trade Commission to assist the Attorney General in determining what court proceedings were justified, would seem to have no higher value as evidence than if conducted by the Attorney General's own staff. The suggestion that a prosecutor can prove his case by third-hand hearsay reports of his own investigators is repulsive to our system of jurisprudence (see *Cook* v. *United States*, 138 U. S. 157, 184.)

(6) Assuming that a report as to the manner in which a decree has been and is being carried out might possibly have some evidential value, the present report does not fall within the statutory authority. There has never been any claim, *until the argument of the case in this court*, that the 1918 decree was not being faithfully carried out by the Harvester Company. There was not even an investigation as to the effect of the decree. There could not have been as the test period had just begun. The report was nothing but a tabulation of alleged data concerning the business of the Harvester Company and its *then* competitors, during the period

1913-1918, coupled with a prophecy that the 1918 decree would have but little effect.

(7) Counsel for the Government sought to invest the Commission's report with a judicial atmosphere by proof that the Harvester Company asked and was granted a hearing by the Commission prior to the issuance of its report. We solicit the Court's attention to the evidence on this point (R. 199, 200). The Harvester Company did ask for a hearing and opportunity to explain anything the Commission might consider as objectionable and subject to criticism, with a view to protecting itself and the Commission against making public any unwarranted charges. The Commission replied:

> "It is proper to say to you that the Commission is not conducting a trial of the matter, but as you know, is preparing a response to an inquiry of the United States Senate with the purpose of reporting the facts as found. If the facts adduced by the inquiry show a violation of any law with the enforcement of which the Commission is charged, *complaint of course would issue, and trial of the issue will follow with full hearings to parties at interest*" (Defts.' Ex. (S) 28; R. 617).

On the Harvester Company's insistence it was finally invited to appear and explain certain letters bearing on trade association activities. Nothing else was discussed at the hearing. *Mr. Legge* testified regarding the hearing:

> "At this hearing I was not shown any copy of their proposed report. I was not heard or questioned with respect to the costs of the Harvester Company or its competitors and this matter was not gone into at all in my presence. None of the figures that Mr. Bennett presents here were the subject of discussion on that occasion. I was not informed then or at any other time that the Commission was investigating the effectiveness of the decree of 1918 or of the oper-

> ations under that decree. None of the matters covered by Chapter 10 of the Commission's Report were the subject of discussion or referred to in any way on that occasion or at any other time while I was before the Commission. We first learned of Chapter 10 on the date the report was released for publication. The press dispatches sent out from Washington as emanating from the Commission referred almost wholly to Chapter 10. Before that time we had no information or intimation whatever that the Commission was proposing to deal at all with that subject." (R. 200)

There is nothing in this proceeding to suggest a judicial hearing. This proceeding is the first hearing accorded the Harvester Company on the charges launched by the Federal Trade Commission, and it asks that the usual rules of evidence, prescribed as the best means of determining the truth, be observed.

See *infra*, p. 147 and Appendix 62 where the Federal Trade Commission figures are analyzed and shown not to warrant the conclusions drawn, even if admissible.

2.—ALL MATERIAL EVIDENCE IN THE RECORD INDICATES THE ABILITY OF COMPETITORS TO MANUFACTURE ON A COMPETITIVE BASIS.

In the absence of any competent proof by the Government that competitors cannot manufacture on a competitive basis, it would seem sufficient to point to the proved fact that a number of the principal competitors of the Harvester Company have continued to compete and to grow over a long period of years, and that new competitors have entered the field. This necessarily implies ability to meet all conditions of competition, including the element of costs.

As the Government did not choose to ask competitors for actual detailed costs of specific machines, there was no occasion for the Harvester Company to do so, particularly as the disclosure of such confidential information would have been embarrassing to the witnesses.

There was, however, considerable evidence bearing in a general way on the question of costs which sufficiently explains the errors in the Government's reasoning. Aside from the Federal Trade Commission's figures, the Government's case rests on the assumption that the larger the quantity of machines produced, the lower the costs. To which the evidence discloses two answers.

(1) That the long-line development averages margins of profits.

(2) That quantity production beyond a certain point produces no corresponding savings.

(1) *The Effect of the Long-Line on Costs.*

Mr. Black, President of Avery & Sons, testified:

> "Costs vary from year to year. One factory might have an advantage one year by reason of lower material or labor costs. Another factory might have that advantage another year. It is my opinion that the ability of a factory to compete would be based on its costs on the full line, rather than on some particular items in that line." (R. 271-2).

Mr. Silloway, Vice President of Deere & Company, testified:

> "In our business we have always had more profits in some implements than in others. A company will not discard making an implement which has any great importance in the trade because it makes a relatively low profit thereon." (R. 260)
>
> See also *infra*, p. 164 in regard to Deere & Company's profits on harvesting machines.

Mr. Legge testified:

> "On the question of ability to compete, the matter of a little higher or lower cost on the particular implement is not determinative. Variation in cost as between manufacturers and as between different shops of any one manufacturer is rather common, and obviously it is for the manufacturer to improve his cost on the items in which either one of his own

factories or some other competitor may excel. In the meantime the fact that he has to take a small profit or no profit does not mean that he discontinues the line. I do not believe it is practicable for a manufacturer to bring his profit up to a level basis on all lines of production. It has never been done by us, at least. It is not practicable for a manufacturer to confine his production only to the articles in which he makes the most profit. By so doing he would lose all the advantages of the full-line business, which have been already covered in the testimony." (R. 199) See also Peek (R. 267)

(2) *The Many Factors Affecting Costs. The Harvester Company Has No Advantages.*

A number of factors were mentioned by witnesses as affecting costs and as causes of the variation in costs at the same plant in different years and different manufacturers in the same year.

1.—Efficiency, both of management and labor, was described as the difference between success and failure, a variable element not always remaining with one concern. (R. 268, 260, 257)

2.—Differences in design of machines often affect costs. (R. 268)

3.—Differences in material costs occur from year to year, dependent on material markets and the varying times of purchase. (R. 197, 267)

4.—Temporary or more or less permanent differences in wage scales occur between different places of manufacture. (R. 268)

5.—Differences in shop equipment are important and not all plants are changing to more improved labor-saving equipment at the same time. (R. 268)

6.—The relation of production to the planned capacity of the plant is one of the most important factors.

The last mentioned element was emphasized by a number of harvester manufacturers. (Black R. 271, Bradshaw R. 257, Peek R. 268, Silloway R. 259, Legge R. 196)

Mr. Bradshaw said:

> "To have a plant running at capacity is very essential. If a plant is running at fifty or sixty per cent, the cost of production runs up rapidly, and that is one of the main troubles to-day with the implement industry. If our plant, *which is a reasonably sized one, had full production, we would not be afraid of any competition practically,* and that is true of both our Canadian and American plants. Both our companies, we believe, are properly financed to keep our equipment up to date and install labor-saving devices." (R. 257)

The evidence showed that the same kind of shop equipment was open to all competitors (R. 199) and that the cost of the special equipment for harvesting machines was not prohibitive (R. 198, 199). We believe the Government lays undue emphasis on large quantities of a single type of machines. Production of quantities beyond a certain point is a matter of multiplication of similar unit machines or groups. Assuming production of related implements sufficient for a reasonable sized and properly equipped factory, no great advantage lies with the larger factory. The quantity which affects costs is not the absolute quantity but the relative quantity to the capacity of the plant as laid out.

Reference has already been made to the fact that the Auburn factory with a much smaller production of Osborne binders equaled the costs of the McCormick binder factory in the year 1920 when the Auburn plant was operating to 75% of its capacity. (*Supra,* p. 96.)

Mr. Black testified:

> "A small factory operating at full capacity will have more favorable costs than a large factory operating at seventy-five or eighty per cent of capacity." (R. 271)

As to the compensating advantages of a small plant due to the more direct control, better possibilities of savings and increased efficiency, see Nelson (R. 273); Legge (R. 196.)

Federal Trade Commission Cost Tables Analyzed.

As the Government tells the Court at length in its brief what it thinks this report shows, it seems proper for us to answer this argument without waiving the point of admissibility. We therefore go into this subject quite fully in our Appendix (p. 62). Internal examination and analysis of the report show some surprising facts which fully confirm the opinion of Mr. Bennett that for purposes of the present inquiry as to the ability of competitors to compete over a period of years, it has no value. The Federal Trade Commission report contains 22 cost tables which compare competitive costs, not only on harvesting machinery, but on all of the principal kinds of agricultural implements. Some of the things brought out by analysis are as follows:

> (1) The Harvester Company was not the lowest-cost producer of many of the articles in its long line;
> (2) Many of the companies which ranked as lowest in cost in 1916 lost this position and others came to the front in 1918, showing conclusively that some of the factors affecting costs were of a non-permanent nature—presumably the fluctuating material prices were one of the material factors;
> (3) Most surprising of all is the fact that the spread in costs between competitors in harvesting machinery is substantially no greater than the spread in costs on many other implements.

If the Federal Trade Commission was right in drawing its conclusion that this spread on harvesting machines was (1) actual and (2) permanent, it should have gone on and drawn the conclusion that all manufacturers of implements would be eliminated because of the marked advantage in costs of some other competitor. In view of the long competition in previous years and the continued competition since the war, the more reasonable conclusions would seem to be:

(1) That the differences in costs to a very large extent reflected the differences in cost systems and Mr. Bennett's difficulties in putting them on a comparable basis;

(2) That to a large extent they represented the exaggerated fluctuations in material costs during the war period;

(3) That there are many non-permanent factors creating differences in costs between competitors in any comparison of one year only, which would be reversed or averaged out by a comparison of their costs over a longer period of years.

(4) That all companies achieve better costs and margins of profit on some implements than on others, and that these differences offset each other and average out, so that the ability to compete can only be properly estimated by considering the ability to make a net profit on the whole line.

3.—THE PROFITS OF THE HARVESTER COMPANY HAVE NOT BEEN ENORMOUS BUT MODERATE.

Forty-three pages of the Government's brief (48 to 91) are devoted to a discussion of the profits of the International Harvester Company derived from its implement business, its steel business and its business as a whole. In these pages the Government sets out many tables from the Federal Trade Commission's report, and many new tables of its own. The greater part of this discussion is based on inadmissible evidence. We agree entirely with the Government in the statement on page 55 of its brief that:

"It may be questioned whether the values of the Commission's figures as showing the dominance of the International Harvester Company in 1918, when the decree was entered, was sufficient to justify the controversy that arose concerning the corrections of those figures and the propriety of the Commission's action in revising the figures submitted by the company."

We refuse to burden the Court by following the Government through this maze of figures, and take up the argument at the point where it emerges with the statement that (Brief, p. 63): *"the published reports of the company reflect conditions little less prosperous when considered as a whole."* The Government then refers to a statement of capital, profits, surplus and dividends compiled from the Company's books and its own exhibits and printed in its Appendix, pp. 168, 169. This statement, discussed on pages 63-65 of the Brief, is the Government's proof of "enormous profits."

The Government comments on the fact that the Company started in 1903 with an invested capital of $120,000,000; that on January 1, 1923, its invested capital had increased by $90,343,976, making a total of $210,343,976; and that during this same period of twenty years the Company had paid out as cash dividends $134,542,052.

There is nothing to this argument except the impressive size of the total figures due to the long period considered. Any individual might create for himself a momentary illusion of wealth by computing in a similar manner the aggregate of his own earnings for twenty years. But the rate of return is the test of the reasonableness of the earnings and of the potential power resident therein.

The Government's own figures as used in this computation show that the net return of the Company has averaged only 6.75% on the investment, including therein, of course, the original investment and the earnings left in the business. Of this return of 6.75 per cent the dividends represent a distribution of 4.05%. The other 2.70% of the earnings has been left in the business and accounts for the increase of capital.

In our Appendix (p. 74) the Federal Trade Commission's figures relating to comparative profits of the Harvester Company and other implement companies, are analyzed. This analysis will make it plain that some adjustments of the Commission's figures are necessary to put them on a comparative basis and that the conclusion is not warranted that the Harvester Company was making a much higher return on its investment than other companies. A number of companies made a higher return and the Harvester Company's return was only a little in excess of the average.

We also discuss in our Appendix (p. 67) the chief criticism of the Company's accounts made by the Government. We cannot leave these matters unanswered even though immaterial, as certain criticisms imply deceptive accounting. That these criticisms are based on a misapprehension of the facts can be easily shown and was pointed out to the Government in our brief below. We cannot account for the Government's repetition of these unfounded charges in this Court. Only one such instance is here mentioned. The Government brief says (Brief, p. 156):

> "In closing up its books for the years 1917, 1918, 1919, and 1920 for the purpose of computing profits the company omitted from its inventories a large quantity of machines and other physical units, and valued the property included in its inventory on an arbitrary basis, below cost or market, and in this way understated its earnings, as follows:"

This is accompanied with an implication (p. 158) that it might have been done for tax purposes.

The Government's counsel have wholly misunderstood the inventory method known as the "basic inventory method" used by the Company in the years 1917 to 1920 although it was clearly explained by the Government's own witness, Mr. Bennett, who compiled the Federal Trade Commission report, and also by Mr. Reay, the Company's Comptroller. The inventory method is explained in detail in our Appendix (pp. 68-73). In view of the implication of deceptive accounting the following facts, shown by the evidence and referred to in our Appendix, are here enumerated:

(1) No property whatever was omitted from the Harvester Company's inventory.

(2) The basic inventory plan was a well-known plan, recognized by accountants and business men as particularly appropriate to a period of inflation where deflation was sure to follow. The effect of the plan was substantially the same as the more common practice of setting up inventory reserves to meet an expected deflation. The necessity of some such plan was fully demonstrated when the deflation came.

(3) Mr. Bennett testified (R. 147) that the Harvester Company took its inventory both on the basic principle and the usual cost-or-market principle, that the figures necessary for adjustment for comparative purposes were at hand and that there was not the slightest attempt by the Company at concealment (R. 143).

(4) The annual reports of the Company have been filed as exhibits by stipulation. Quotations from these reports in our Appendix show that the use of the basic inventory plan was publicly announced with an explanation of how it differed from the cost-or-market plan and the purpose of its adoption. The 1921 Annual Report shows that the Company's income tax returns were made on the cost or market basis.

In the face of these facts the Government now repeats its charge that large quantities of machines were omitted from the inventories for an improper purpose.

4.—THE HARVESTER COMPANY'S STEEL PROPERTY AND ITS PROFITS.

The Harvester Company's steel properties, consisting of steel plant, coke plant, coal and iron mines, were built up from a single unit without any combination. They now represent an investment of $32,000,000; about one-half of the product is used in the Company's manufacture of implements and motor trucks and the other half sold to other users. The steel used in the Company's own manufacture is billed to the implement works at the same current market prices at which sold to outsiders. (Rec., 136.) The profit attributed to the steel plant is thereby segregated and the implement plants take the steel into their costs in the same manner as if purchased from other sources. Only in this way can the costs be put upon a proper and comparative basis.

These steel properties the Government's petition asks to have segregated into a separate company in its plan of dissolution. This plan is adopted from the report of the Federal Trade Commission which criticizes the 1918 decree as follows:

> "The final decree did not touch upon one of the strongest elements in the competitive power of the International Harvester Co. This is the profit which that company derives through its ownership of the Wisconsin Steel Co. property. In fact, the large profits derived from this property further reduce the already low costs of the International's implements so that other companies are at greater disadvantage than appears in Table 171. That the ownership of the steel plants is not necessary to the implement business is indicated by the fact that no other implement manufacturer owns any. Indeed a steel plant which embraces, as this one does, ore

mines, ore vessels, coal mines, coke ovens, and blast furnaces, in addition to the steel works and rolling mills, in order to be efficient requires such a large output that no farm implement manufacturer could use its entire product." (Rec., 50, 51.)

It will be seen from this quotation that the proposal to segregate the steel properties is not based on any theory that the Harvester Company controls a natural resource of limited supply or that competitors have any difficulty in purchasing their steel in the open market. The Commission itself says ownership of a steel plant is not essential to an implement manufacturer, and there was testimony to the same effect. (Rec., 253.)

The demand that the steel properties be taken away from the Harvester Company and its stockholders is based on two grounds:

(1) They are an undue advantage in securing low costs on harvesting machines;

(2) They are a source of large outside profits which, though acquired in a legal way, might conceivably be mobilized in a trade war in the implement industry.

In fact these two points are one. The Government talks of the concealed profit in the costs of harvesting machines due to the taking up of steel at market prices and suggests that the costs are really lower and competitors at greater disadvantage than the Trade Commission costs table purport to show. But the Government neglects to point out that it has taken an investment of $32,000,000 to secure this advantage. Competitors have saved this investment. If the profits of the steel business are assigned to the implement factories and used to reduce implement costs, the investment of $32,000,000 is left without a return. In pointing to the large profits of the steel business and the lower implement costs which would result if steel were billed at cost, the Government is simply talking of the same thing in two different ways and giving the impression of a double advantage.

A further magnification or duplication is found in the Government's computation of the steel profit per machine. Following its theory that the steel investment should be left without a return and the profits applied in furnishing steel to the harvester works at cost, the Government attempts to compute (Brief, p. 82) how much the cost per machine would be reduced. The steel profit in a binder in 1918, it says, was \$3.95. On page 87 of its Brief, it discusses the former trade practice of billing steel on a Pittsburgh plus basis which resulted in steel plants shipping from a nearer point receiving a portion of the profit in the basic price item and a portion in the freight item. This profit in freight the Government computes at \$1.96 in 1918. But this is included in and not an addition to the Government's figures of \$3.95. The profit in freight was already in the total net profit which is the starting point for the computation of the profit per ton of steel and per binder. The Government itself says (Brief, p. 86):

> "The profits made by the International Harvester Company by virtue of the Pittsburgh Plus system are reflected in the profits of the Wisconsin Steel Company."

The Government devotes ten pages of its brief to the so-called "Pittsburgh Plus" practice of billing steel which prevailed in the industry for many years. It is common knowledge that this practice has been discontinued for a number of years. The Government's brief refers (Brief, p. 83) to the issuance of a "cease and desist" order against it by the Federal Trade Commission. The Harvester Company began billing on a Chicago base where its steel plant is located in 1921 before the practice of the industry had changed generally. (Rec., 167.)

We are unable to see the relevance of this Pittsburgh Plus discussion to the Government's case. In fact it seems to be arguing against its own contention.

If in the view of the Federal Trade Commission and the Government, the large profits of the Wisconsin Steel Works were one of the chief sources of the Harvester Company's "dominance" and if these profits resulted in large part from the Pittsburgh Plus practice which has since been discontinued by the whole industry under order of the Federal Trade Commission, why is the Government now asking for further relief? And if competitors, while operating under the handicap of the Pittsburgh Plus practice were able to compete and advance, are they not in a better position to do so now that this handicap has ceased to exist?

This situation illustrates and supports our contention that the Clayton Act is adequate protection against the possibilities of unfair trade and that dissolution of an efficient manufacturer competing within the law, is not the remedy.

In our Appendix (p. 77) the profits of the steel properties are discussed in more detail. It there appears that the steel profit per machine has averaged considerably less than the Government figures which are for 1918 and 1919. It should be noted that the steel properties lost money in the years of depression, 1921 and 1922. This does not fit in with the Government's argument that the "profitable side-lines" are a source of power enabling the Harvester Company to sell at cost in times of depression.

PART VII.

THE HARVESTER COMPANY'S ALLEGED CONTROL OF PRICES.

The Government's argument on this point begins as follows (Br. 91):

> "It is inevitable that the International Harvester Company, controlling such a preponderating portion of the trade and commerce in harvesting machines and possessing the innumerable advantages over competitors which have been noted, should exert a dominating control over prices in the harvester industry."

This conclusion fails if the Government has failed to prove the alleged innumerable advantages. These have been discussed in the preceding section of our brief. As there shown, the profits of the Harvester Company, as proved by the Government itself, have not been "enormous" but moderate and no competent evidence whatever was introduced to prove the alleged "tremendous advantage in costs."

Proceeding with its argument the Government asserts that competitors on account of the alleged advantages "are unable to sell for less and in the nature of the case they cannot sell for more" (Br. 92), that they follow the prices of the International Harvester Company and that "such following leads to that uniformity which it is the policy of the law to prevent." (Br. 93.)

The evidence which is considered later, does not support the Government's contention that the Harvester Company dictates prices and competitors follow. It seems proper to consider first whether the Government's test of price control is correct. Does "uniformity" or the "inability to sell for more" or the following of competitors' prices afford any ground for an inference of price control? On this the recent case of *Cement Association v. United States*, 268 U. S. 588, 605, is directly in point. The Court says:

> "Any change in quotation of price to dealers, promptly becomes well known in the trade through reports of salesmen, agents and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in price, and uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices of competing sellers."

The Government refers to the *Cement Association* decision in the lower court (Gov. Br. 93) but it takes no notice of the Supreme Court decision reversing the District Court.

This case is entirely at variance with the Government's theory. It not only shows that uniformity is not in itself illegal, but it is not even evidence of illegality as it is equally consistent with and usually results from normal competitive conditions.* To prove its contention the Goverument must supplement its proof of uniformity with proof that such uniformity is the

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*In an address delivered before the National Association of Attorney Generals on July 7, 1924, the Hon. Jesse W. Barrett, Attorney General of Missouri, is reported to have said:

> "Further all of us are overwhelmed with complaints when in any given line of trade, prices are uniform and it is the general public impression that uniformity of price necessarily presupposes price agreement. The farmers of the nation, however, have no price agreement, yet the price of wheat on a given day and at a given place is invariably the same for all sellers. That is not due to restraint of competition. It is due to the fullest and freest competition.
>
> "As John Stuart Mill said in his Principles of Political Economy:
>
> "'It is axiomatic that there cannot be for the same article of the same quality two prices in the same market, assuming that both the buyer and the seller take pains to know what that price may be.' (p. 88.)
>
> "Competition is the great evener. Instead of the level price being prima facie evidence of control, the reverse is true. The level price is the regular order of the day where competition prevails."

result of restraint of trade. No speculations or presumptions can be made in its favor.

In the *Steel Case*, 251 U. S. 417, 448, the Government made a somewhat similar contention, that constant prices over a definite period indicated undue restraint of trade which this court disposed of as follows:

> "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."

The Government apparently considers that price control is proved by testimony of the following character given by George White, Vice President of Massey-Harris Company, called as its own witness:

> "We arrive at our prices by ascertaining costs and recognizing competitive conditions. Sometimes we follow the Harvester Company's prices. I always get a price list of the Harvester Company after it is printed, as I do of every other competitor." (R. 85, Quoted Gov. Br. 93, 100.)

Officers of each of the leading long-line competitors of the Harvester Company—Deere, Emerson-Brantingham, Moline, Avery and Massey-Harris—were called by the Government and asked how they arrived at their prices. Every one of them testified in substance that both *costs* and *competitive conditions* were taken into consideration, and not one testified that they always followed the Harvester Company prices. That they had followed or met the Harvester Company prices frequently in the course of many years of competition was not surprising.

Price changes in the implement trade are not as frequent as in other trades due to its seasonal character and the custom of quoting prices for a season. Mid-season changes create inequalities between dealers sometimes involving retroactive adjustments on goods previously purchased. To include enough price changes to draw conclusions as to who initiated them and who followed would require consideration of the history of price competition over a number of years. The Government introduced no proof of this character and the only two price changes, the details of which do appear in the record, do not support the Government's contention.

The Government does not refer in its argument on price control to the undisputed fact that the price reduction on harvesting machines in the fall of 1921 was initiated by Avery & Sons, the Harvester Company and others following. This reduction which has heretofore been discussed (*supra*, pp. 53, 54) was in the midst of the farm depression. It brought prices to their lowest level in recent years. This does not fit in either with the Government's theory of malicious price cutting or price control.

The Government does, however, have some comments to make on the preceding price reduction in April, 1921. As the evidence clearly showed (*supra*, pp. 45-52) that this reduction was necessary because of the farm depression and numerous reductions on other implements, the Government with reluctance relinquishes its charge of malicions price cutting and shifting to another position says:

"This (condition just mentioned) may or may not

> account for what happened in that year, but in any case the event demonstrates the power of the International Company over the very life of its competitors." (Br. 97.)

The argument seems to be that the Harvester Company's inability to keep up its prices in the face of economic conditions and competitors' reductions, proves its power over prices and its competitors.

The Government also implies that the April, 1921, price reduction involved concerted action because the Harvester Company and two of its competitors reduced prices on the same day. (Deft.'s Ex. (S) 32, 634). The reduction in the price of steel the day before, it argues, could not have accounted for this action because "steel is only one element of the cost" (Br. 97). Yet on a preceding page of its brief the Government says that "of all materials steel was conceded to be the most important" (Br. 80) and the Government is now asking that the Harvester Company be deprived of its steel properties for that very reason.

There is no evidence (or charge) of concerted price action in connection with the April 13, 1921, price reduction or any other price change, and if there were, it would weigh against the Government's argument of price control. Only two pages later (Br. 99) the Government itself is arguing that nonparticipation in joint action indicates power, and if so, the converse is true.*

Here again the Government passes by the natural and obvious explanation of the action in question. Prices are

* In a footnote to the Government's discussion of alleged price control (Br. 99) the Government asserts, outside of the record, that while the testimony in this case was being taken, the Federal Trade Commission brought a proceeding against certain trade associations and manufacturers, including the International Harvester Company. It is not apparent what materiality this fact could have, even if proved and in the record, but if material the Government should have also added the fact that the proceeding was subsequently dismissed on the Commission's own motion.

usually announced in the fall for the following season. By April, 1921, the price announcements on harvesting machines were several months overdue and the shipping season at hand. The prices on other implements had been reduced and the trade was waiting. The 10 per cent reduction in the price of steel on April 12th was only one factor. There was no use of further delay. It made definite and immediate the necessity for a reduction. All of the principal implement companies acted within a few days (*supra*, pp. 52, 53); (R. 201).

Not only has the Government failed to produce any evidence of price control, but the evidence (already considered shows that the price relationship between harvesting machines and other implements in the long line makes this impossible.

This conclusion is further supported by Defendant's Exhibit (S) 20 (R. 601) comparing the history of prices in the principal harvesting machines with the prices on other implements for the eleven years, 1913 to 1923. The 1913 prices are taken as 100 per cent and the changes expressed in percentage form. The Government criticizes this exhibit because it does not include all implements and notably excludes "harvester-threshers, potato diggers, tractors, engines and motor trucks." It therefore adds an exhibit of its own reflecting price changes on other implements, but it is unable to point out any different conclusion thereby arrived at. Examination of Defendant's Exhibit (S) 20 will show that typical implements of all lines have been included and the exhibit contains a note substantiated by the testimony explaining why harvester-threshers, tractors, engines and motor trucks were not included, as follows:

> "The weighted averages are based on all machines now made by the International Harvester Company except certain machines not made until after 1913,

> such as harvester threshers and potato diggers, also tractors and engines in which the changes of type during the period 1913 to 1923 were so radical as to destroy the value of price comparison, and motor trucks which were not considered agricultural implements."

The Government relies strongly (Br. 95) on the testimony of Mr. Graves, President of the Ohio Rake Company which it quotes as follows:

> "We have to follow the International Harvester Company prices in order to get any business at all."

That Mr. Graves was referring to the last three years of the farm depression is evident from this next sentence of his testimony:

> "We have been losing money in the last three years principally on disc harrows. Our loss was much greater on the tillage line than on the harvester line." (R. 114.)

Mr. Graves' greatest loss on harvesters resulted from following Avery & Sons to the lowest level and he was obliged to follow competitors in tillage lines to an even lower level compared with his own costs.

How this could happen and why the Ohio Rake Company had better comparative costs in harvesting machines, where the Harvester Company's low costs are alleged to constitute a restraint, than in the tillage tools, where trade is unrestrained, the Government does not say. It must concede the pertinence of the inquiry for it quotes (Br. 96) Mr. Silloway, Vice President of Deere & Co., to the effect that the profits realized by Deere & Co. on the harvester line were not as great as on other lines. It is clear Mr. Silloway meant *some* other lines for he also testified:

> "I wish to modify the answer I made when last on the stand as to the relative profits in manure spreaders and the harvester line. During the last three years the harvester line has been the more

> profitable, but over a period of years the manure spreader has.
>
> "During the last three years the harvester line has been more profitable than gasoline engines, hand corn shellers, or farm trucks. It is about as profitable as wagons; it is considerably less profitable than some of our tillage tools, and considerably more profitable than other of our tillage tools." (R. 259, 260.)

We submit that the evidence wholly fails to show any control of prices other than the control created by competitive conditions, which all competitors help to impose and to which all are subject. Such control is one of the very purposes of competition. The Government's evidence proves nothing except the existence of the competitive conditions it denies.

PART VIII.

THE SIZE OF THE HARVESTER COMPANY AND ITS PROPORTION OF TRADE AS AFFECTING COMPETITIVE CONDITIONS. THE GOVERNMENT'S CONTENTIONS ANSWERED.

From the foregoing review of the evidence in Parts I to VI of this brief it is clear, we submit, that the Government has wholly failed to prove:

1.—Its charge of selling at cost to eliminate competition.

2.—Its charge that competitors are diminishing in numbers or strength.

3.—Its charge that certain competitors have retired because of the Harvester Company's restraint of trade, and their inability to compete with it.

4.—Its charge that three other competitors contemplate retirement for the same reasons.

5.—Its charge that the single dealer restriction can have little effect on competitive conditions.

6.—Its charge that the competition of the Champion, Osborne and Milwaukee lines in the hands of their new owners is negligible.

7.—Its charge that the Harvester Company has any advantage in costs of manufacture or otherwise such as to prevent effective competition.

8.—Its charge that the Harvester Company has made "extraordinary" and "enormous profits".

9.—Its charge that the Harvester Company controls the price of harvesting machines.

Not only has the Government failed in its proof, but the record affirmatively shows the existence of active and strong competition throughout the country and confidence on the part of competitors of their ability not only to continue to compete, but to make further progress under the favorable conditions created by the single dealer restriction upon the Harvester Company.

In this situation, the Government's last point, and we believe it is its main reliance on this appeal, is that the *size* of the International Harvester Company and its *proportion of trade* in harvesting machines in and of themselves constitute a restraint of trade under the Sherman Act.

The language of this Court in the *Steel Case*, 251 U. S. 417, 451

> "No act in violation of law can be established against it except its existence be evidence of such an act"

is applicable here.

The Government in substance contends that the *existence* of the company or *existence* of a certain percentage of trade is a violation of the law without regard to causes, consequences or collateral circumstances.

The presumption of fact or law which the Government asks this Court to draw from the Harvester Company's *size* or *percentage of trade* is a violeut one. It must be taken to prove restraint of trade and absence of competitive conditions against the record of over twenty years during which the *relative size* and *relative percentage* of trade of competitors have continually and substantially increased, during which none of the usual manifestations or results of restraint of trade have appeared and neither competitors nor dealers have been aware of the alleged restraint.

1.—THE GOVERNMENT'S CONTENTION THAT THE STEEL CASE IS DISTINGUISHABLE IN THAT THE STEEL CORPORATION'S COMPETITORS HAD GREATER RELATIVE POWER.

On pages 129-130 of its Brief, the Government attempts to distinguish the facts in the *Steel Case* as to the relative power of the Steel Corporation and its competitors, from the facts here as to the relative power of the Harvester Company and its competitors. As the Government in this case adopts comparative assets and comparative percentages of trade as tests of relative power, it seems proper to make certain comparisons between the facts shown in this case and in the *Steel Case* record in this Court.

A comparison has already been made of the size of the Harvester Company's four largest competitors in old line harvesting machines in 1911 and 1923. (See Table p. 41, *supra.*) The table shows an increase in combined capital (excluding surplus) from $8,400,000 in 1911 to $119,882,000 in 1923. During the same period, the Harvester Company's capital and surplus increased from $156,069,549 to $210,343,976 (Gov. Br., p. 168).

In many cases the courts have held that size was no offence. The latest case in which this Court considered the question was *United States v. United States Steel Corporation* (251 U. S. 417), where it was held that the Steel Corporation's size, as compared to its competitors', constituted no violation of the Sherman Act.

In the following table, we compare the ratio which the combined capital of the ten largest competitors of the Steel Corporation bore to the capital of the Steel Corporation in 1914 (the year for which this information appears in the record of the Steel case) with the ratio which the combined capital of the six largest competitors of the Harvester Company in harvesting machines bore to the capital of the Harvester Company in 1923.

COMPARISON OF CAPITAL OF PRINCIPAL COMPETITORS OF THE STEEL CORPORATION AND THE HARVESTER COMPANY.*

Ten Largest Competitors of the Steel Corporation	Capital
1. Jones & Laughlin Steel Co.	$ 93,579,000
2. Cambria Steel Co.	69,372,176
3. Bethlehem Steel Co.	55,515,017
4. Pennsylvania Steel Co.	66,715,375
5. Lackawanna Steel Co.	77,241,877
6. Republic Iron & Steel Co.	73,635,374
7. Inland Steel Co.	18,397,072
8. Youngstown Sheet & Tube Co.	29,300,080
9. Colorado Fuel & Iron Co.	81,006,956
10. LaBelle Iron Works	24,853,270
Total	$589,618,197
U. S. Steel Corporation	$1,647,479,406
Proportion of Capital of Competitors to Capital of Steel Corporation	35.8%

Six Largest Competitors of the Harvester Company in Harvesting Machines	Capital
Deere & Co. (R. 463, 464)	$ 71,105,808
Emerson-Brantingham Company (R. 406)	18,492,868
Massey-Harris Co. (R. 256)	31,700,000
Moline Plow Co. (R. 454)	32,715,313
B. F. Avery (R. 430)	6,558,516
Case Co. (R. 280)	27,000,000
Total	$187,572,505
International Harvester (Gov. Br., p. 168)	$210,343,976
Proportion of Capital of Competitors to Capital of Harvester Co.	89.2%

*The figures are taken from a tabulation in the Government's Brief in the Steel case filed in U. S. Supreme Court (Vol. II, pages 838-841) giving references to record in support thereof. This agrees substantially with the figures set forth in appellees' Statement of the Case in the Steel case (pp. 564-570) giving the same references.

Capital includes bonds and debentures outstanding and surplus, except in the case of the Massey-Harris Co. and Case Company which do not include bonded or debentured indebtedness—this information not being in evidence.

On pages 52 and 53 of the Government's Brief it reprints a tabulation from the Federal Trade Commission's report purporting to compare the invested capital of the International Harvester Company in the years 1915, 1916, 1917 and 1918 with a number of other implement companies (25 in 1915 and 21 in 1918). All of the Government's comparisons of the capital of the Harvester Company and its competitors are based on this tabulation or other figures of the Federal Trade Commission which are inadmissible in evidence.. Assuming for argument only that these figures as to capital investments have been proved, it is clear for a number of reasons that they are not comparative and do not warrant the conclusions drawn by the Government.

(1) In the first place, the Government refers to the fact that the Harvester Company's percentage of the total invested capital of all the companies shown in the Commission's tables had increased from 59.44% in 1915 to 61.83% in 1918. It regrets the figures for subsequent years are not in the record and infers from these figures that the Harvester Company is "steadily forging ahead" (Gov. Br. 54). But the Commission's tables on their face show the comparison was between 25 companies in 1915 and only 21 in 1918. Considering the fact it is a fair inference from the Commission's own tables that the Harvester Company's per cent of the total investment was decreasing and this is clearly confirmed by the above tabulation in our brief which shows that the Harvester Company's resources in 1923 did not greatly exceed those of its six largest competitors.

(2) The Government further argues (Br. 54) that the Commission's tabulation is too favorable to the Harvester Company, due to the fact that a large part of the capital of these competitors was invested in the tillage implement business and other lines than harvesting machinery. But this argument, which assumes that all of the Harvester Company's investment is in the domestic harvester business, is not supported by the evidence and suggests some obvious and radical adjustments which should be made in the Commission's figures to make them comparable. From the total investment of the Harvester Company (including borrowings) in 1918 shown in the Commission's tabulation as $238,903,066 (Gov. Br. 53)

should be deducted the Harvester Company's investment in the foreign trade in 1918 shown in Pet. Ex. (S) 139 as $75,000,000, and also its investment in its steel business shown in the same exhibit as $24,000,000 (R. 567). The Government itself admits the propriety of segregating the foreign investment and does so in a tabulation on page 57 of its brief where it shows the domestic capital of the Harvester Company (not including borrowings) employed in manufacture as only $118,640,527 including the steel investment. There are reasons for considering the capital invested in the long-line implement business of both the Harvester Company and its competitors as a unit, but what justification is there for inflating and almost doubling the Harvester Company's capital so employed by adding to it the investment in the steel business and foreign trade? With these adjustments made, it is evident that the capital of the Harvester Company devoted to its domestic implement business was substantially less, not greater, than the aggregate capital of the other companies with which the Federal Trade Commission compares it in 1918; and the same would be true if similar adjustments were made in the 1923 figures.

The Government is also incorrect in stating that no figures for the period subsequent to 1918 are available in this record. The above tabulation shows that in 1923 the Harvester Company's percentage of the combined capital of itself and its six largest competitors in harvesting machinery, was only 53 per cent. The conclusion seems clear either that competitors, not the Harvester Company, have "forged steadily ahead" during the test period, or that the Federal Trade Commission's figures were wholly wrong, or perhaps both.

The Government's Brief (pp. 146-155) purports to give the proportion of trade possessed by the Harvester Company and each of its competitors in the following machines for the years 1919 to 1923 inclusive: Grain binders, corn binders, mowers, reapers, headers and push binders, sulky rakes, side delivery rakes including sweep rakes, tedders including combined side rakes and tedders and harvester-threshers.

By the Government's own figures, the proportion of trade of the Harvester Company in 1923 on the principal machines composing the old harvester line, was less than the Steel Corporation possessed in 1912 (the last year that such figures appear the record of the *Steel Case*) on some of its principal products.

*Steel Corporation**		*Harvester Company*	
Hoops, Bands and Cotton Ties (Gov. Br. Vol. II, p. 818)	71.2%	Grain Binders (Gov. Br., p. 154)	71.2%
Bessemer Steel Ingots (Gov. Br. Vol. II, p. 793)	64.7%	Mowers (Gov. Br., p. 154)	62.4%
Bessemer Pig Iron (Gov. Br. Vol. II, p. 817)	64.2%	Sulky Rakes (Gov. Br., p. 154)	55.4%
Wire Rods (Gov. Br. Vol. II, p. 818)	63.2%		
Bessemer Rails (Gov. Br. Vol. II, p. 794)	60.5%		

*The figures relate to production. The Government's Brief in the Steel case gives references to record in support of these percentage figures.

Further, the Steel Corporation's percentage of the entire steel trade was over 40 per cent (*United States v. Steel Corporation*, 253 U. S. 417, see note on p. 439) whereas the Harvester Company's percentage of the agricultural implements its manufactures, including harvesting machines, is less than 30 per cent. (See, *infra*, p. 184.)

Similarly the five principal competitors of the Harvester Company, possess a larger share of the harvester trade than did the five largest competitors in the steel trade in 1911, taking again the Government's own figures.

Jones & Laughlin	
Steel Ingots	5.5%
Steel Rails	0.1%
Structural Shapes	11.2%
Plates and Sheets	2.6%
Wire Rods	5.2%
All finished steel products	4.4%

Cambria Steel	
Steel Ingots	4.9%
Steel Rails	3.5%
Structural Shapes	8.8%
Plates and Sheets	2.7%
Wire Rods	1.0%
All finished steel products	4.2%

Lackawanna Steel	
Steel Ingots	4.2%
Steel Rails	8.7%
Structural Shapes	5.8%
Plates and Sheets	1.5%
All finished steel products	2.8%

Bethlehem Steel	
Steel Ingots	2.4%
Steel Rails	6.1%
Structural Shapes	10.1%
All finished products	2.0%

Colorado Fuel & Iron	
Steel Ingots	1.7%
Steel Rails	9.8%
Wire Rods	2.1%
All finished steel products	2.1%

Deere & Co.	
Grain Binders	12.4%
Corn Binders	14.3%
Mowers	12.9%
Sulky Rakes	13.2%
Side Delivery and Sweep Rakes	26.8%
All harvesting machines	12.9%

Massey-Harris Harvester Co.	
Grain Binders	4.6%
Corn Binders	9.5%
Mowers	4.2%
Sulky Rakes	4.4%
Side Delivery and Sweep Rakes	13.0%
All harvesting machines	5.1%

Emerson-Brantingham Co.	
Grain Binders	2.3%
Corn Binders	2.6%
Mowers	6.2%
Sulky Rakes	7.1%
Side Delivery Rakes	6.4%
All harvesting machines	5.1%

Moline Company	
Grain Binders	3.1%
Mowers	4.2%
Sulky Rakes	5.7%
All harvesting machines	3.8%

Avery & Sons	
Grain Binders	1.1%
Mowers	3.4%
Sulky Rakes	4.8%
All harvesting machines	2.9%

The foregoing figures in the case of the Steel Corporation's competitors are taken from pages 152 and 153 of Vol. I the Government's brief in the *Steel Case* where references are given to the record in support of these figures; in the case of the Harvester Company's competitors they are based upon p. 154, of the Government's brief in this proceeding. In the case of the Steel Corporation's competitors the percentages relate to production. In the case of the Harvester Company's competitors they relate to sales.

In *United States* v. *United States Steel Corporation*, 223 Fed. 55, 68, the court said that

"the real test of monopoly is not the size of that

> which is acquired, but the trade power of that which is not acquired."

The above table shows that the comparative trade power and resources of the Harvester Company's competitors are greater than those of the competitors of the Steel Corporation.

2. THE PROPORTION OF THE HARVESTER COMPANY'S TRADE IN HARVESTING MACHINES.

The Government's Percentage of Trade Figures When Analyzed and Corrected Do Not Support Its Conclusions.

The Government says (Br. 22) speaking of the purpose of the 1918 decree:

> "The result intended to be accomplished was to increase the amount of competition and the number of competitors. Thus to the expression 'competitive conditions' was applied a *quantitative* rather than *qualitative* admeasurement."

In other words, the number of competitors and percentage of trade figures are alleged to be the controlling test of the existence of "competitive conditions". It is our contention that there are many other factors to be considered of equal or greater importance—the *qualitative* character of the strength, extent and keenness of actual competition, the absence of artificial barriers to trade and the special opportunities given competitors to extend their business under the single-dealer requirement of the decree.

It is difficult to believe that the Court which entered the 1918 decree intended to give any such limited and special definition to competitive conditions as the Government claims. This question is discussed later (*infra* p. 185.) At this point we consider whether the Government has proved its case on its own theory. Outside of the Federal Trade Commission report, practically all of the Government's evidence related to the "quantitative measurement" theory; that is, the number of competitors with little regard for their strength and the percentage of trade figures here considered.

The results of this evidence are embodied in five tables (Gov. Br. Appendix B 146-155) giving the sales of the Harvester Company and a number of its competitors in all kinds of harvesting machinery for the years 1919 to 1923. On the basis of these tables the Government says, (Br. 46)

> "Not only has the decree not created any substantial new competition, but competition has actually declined, and the International Harvester Company has increased substantially its percentage of the total harvesting machine business."

This statement conflicts with the Government's tables as they show a decline in the Harvester Company's percentage from 66.6% in 1919 to 64.1% in 1923. The Government, however, by assuming that the Harvester Company's percentage was 64% in 1918, arrives at an increase of 1/10 of 1%. We call this an assumption because the Government did not prove the division of the trade in 1918 when the decree was entered. Certainly the 1919 figure of 66.6% affords no basis for an inference that the 1918 figure was 64%. Quite the contrary, for the year 1919 reflects the initial results of the 1918 decree. The Champion and Osborne lines had been sold in 1918 and the machines of these lines marketed by the new owners in 1919 amounted to over 3% of the year's trade of all companies shown in the Government's tables. (See App. p. 37 for computation.) Whatever the correct percentage for 1919 may be, it seems clear that the

Harvester Company's percentage of trade in 1918 must have been considerably more.*

Not only is the Government wrong in assuming that the Harvester Company's percentage of trade in 1918 was as low as 64%, but it is wrong in asserting that the 1923 percentage was as high as 64.1%. In fact the 1923 percentage was much lower. The Government's percentage tables are incomplete and inaccurate as can be easily shown.

1. *Mowers:* The record in this and the former proceeding shows that, in addition to the companies listed by the Government, the following companies make and sell mowers—Montgomery Ward & Company, The Detroit Harvester Company, Roderick Lean & Company (see App. 3).

2. *Rakes:* The Government includes in one column sulky rakes and in another column side delivery and sweep rakes. This division is unsound for all these rakes compete with each other.

The evidence in the former proceeding showed that Montgomery Ward & Company made and sold a sulky hay rake (App. 3). Its sales are not included in this record. Consequently the Government's figures on sulky hay rakes are erroneous.

The evidence shows that Avery & Sons, the Moline

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*The Government's petition alleged that the Harvester Company's percentage of trade in 1918 was "approximately 64 per cent" (R. 20). The Harvester Company in its Answer replied "that by 1918 the proportion of the International Harvester Company's domestic trade in the machines listed on page 34 of the supplemental petition had declined, exactly how much defendants *do not know*, but they believe to at least 64 per cent." (R. 66.) As the record stands the Government is making one of its most important contentions on the assumption that the 1918 percentage was exactly 64 per cent, when it only alleged the figure as approximate, when the Harvester Company stated it did not know and the 1919 figures in evidence indicated that the 64 per cent estimate was too low. If the Government wished to make its present argument, clearly it should have proved the Harvester Company's exact percentage of trade before the 1918 decree began to operate as well as at the end of the test period.

Plow Co., the Rock Island Plow Company and the Thomas Mfg. Co. make and sell side delivery rakes (R. 88, 444, 494, 633, 333; Pet. Exh. (S) 49—R. 460-462). The sales of none of these companies on side delivery rakes are in the record or included in the Government's percentage tables.

The record shows that Deere & Co., the Dempster Co., the Jenkins Co., the Fleming Co., the Collins Co., and the Superior Mfg. Co. make and sell sweep rakes. (R. 260, 272, 273.) The sweep rake sales of none of these companies are in the record or included in the Government's percentage figures. In view of the fact that the Vice-President of Deere & Company in charge of sales regarded the Dempster Mfg. Co. as his leading competitor in sweep rakes (R. 260), it is evident that these omissions are not trivial.

3. *Tedders and Combined Rakes and Tedders:* The Government's percentage tables (Br. 146-155) contain a column headed "Tedders including combined side rakes and tedders." In this column the Government included the Harvester Company's sales of both tedders and combined rakes and tedders (compare tables with Pet. Exh. (S) 4, R. 398, 399). In the same column the Government purports to give the sales of the competitors of the Harvester Company in tedders and combined rakes and tedders. A comparison of the figures in the percentage figures with the record of the sales introduced in the cases of the Emerson-Brantingham, Massey-Harris, Avery and Ohio Rake Companies (Pet. Exh. (S) 16, 21, 128; R. 421, 428, 525) shows that the Government's percentage figures as to these companies includes only the sales of their tedders and does not include their sales of combined rakes and tedders. All of these companies made not only tedders but combined rakes and

tedders. (R. 81, Pet. Exhs. (S) 20, 25, 46; R. 427, 429, 458). Further, the evidence showed that Deere & Co. made combined rakes and tedders (Pet. Exh. 53; R. 466), but the Government's percentage table includes no sales of Deere's combined rakes and tedders (see Br., pp. 146-153).

The Government apparently concedes the incompleteness of its tables, but it continues to ask for relief because of what the tables show and justifies this action by saying (Br. 47) that if it rested its case on an inadequate canvass of competitors, it was clearly the duty of the Harvester Company to call such neglected manufacturers. That is to say, if the Government fails to prove its case, the defendant must supply the omissions. It is the Government, not the Harvester Company, which attaches great weight to percentage of trade figures, which insists that the 1918 decree contemplated a "quantitative measurement" of competitive conditions. If the Government asks for additional relief on any such theory, it should at least prove the facts material to its case. The evidence in the record disclosed to the Government the existence of the omitted competitors.

Revision of the Government's Percentage of Trade Figures.

Reference to the U. S. census figures confirms the fact shown above, that there are very substantial omissions in the Government's percentage tables. The 1922 census of manufacture and sales of farm equipment was introduced as Defendant's Exhibit (S) 34 (R. 636) is referred to later *infra*, p. 184. A similar census was taken for 1923 but the results were not published until after the evidence was closed in this case. As these figures relate to a period covered by the evidence and are contained in a public statistical document, it seems proper to refer to them.

The following table compares the census figures for 1923 on side-delivery rakes, sweep rakes and tedders and combined rakes and tedders with the Government tables:

Census.		*Government Table.*	
Side-delivery rakes	16,079	Sweep Rakes, Side-delivery rakes	11,089
Sweep Rakes	13,637	Tedders and combination rakes and tedders	11,151
Tedders	1,985		
	31,701		22,240
Number of machines omitted from Governments table			9,461
			31,701

The Government's classifications cross with those of the Census Bureau as the Government's includes combined side-delivery rakes and tedders with tedders, while the Census Bureau has evidently included them with side-delivery rakes.

It is evident that the Government figures for sales of the four types of machines, side-delivery rakes, sweep rakes, tedders and combined rakes and tedders, are short by 9,461 machines. By adding these 9,461 omitted machines to the Government's total figures (247,774 Gov. Br. 154) for all harvesting machines sold during 1923, a revised total of 257,235 is obtained, of which the Harvester Company's sales, 158,830 were only 61.75%, not 64.1% as the Government claims.

It thus appears that the Harvester Company's percentage of the harvester trade has declined substantially since the entry of the 1918 decree. *The 1923 percentage was at least as low as 61.7% and if other omissions were supplied, would be lower; and the 1918 percentage was at least as high as the Government assumes, 64%, and probably higher.*

The Government, however, says (Br. 47) that no fault was found with its figures on grain binders, the "keystone of the harvester line." This is true but heretofore the Government has put forward the combined percentage for all harvesting machines as the best quantitative measurement. Surely the figures have not lost their significance because when corrected they fail to support the Government's argument. Furthermore, the Government's binder figures do not show an increasing per cent but a decline from 72.7% in 1919 to 71.2% in 1923.

The decline of 1.5% between 1919 and 1923, which period included three years of the farm depression, was as great as could be expected. Certainly it does not become the Government to call this decline of no consequence when it has itself called substantial a supposed increase from 64% in 1918, to 64.1% in 1923. And, as shown above, the 1918 percentage was no doubt higher than the 1919, so that the decline since 1918 is greater than 1.5%.

It is important to note that the fact of the Harvester Company's percentage of trade in binding machines was 71.2% in 1923 as compared with 61.7% in all harvesting machines, affords no ground for an inference that its trade in binders has declined less than in other machines. In fact it has declined in the same ratio, the only difference being that the Harvester Company started with a higher per cent. The Government's original petition alleged that the Harvester Company had at least (R. 8) 90% of the binder business and over 85% of the business in all harvesting machines. (R. 2.) When the evidence was taken in the former proceeding, it appeared that in 1904 the Harvester Company's percentage of binder trade was 94.6% (see App. 80). When combined percentages for all harvesting machines are being considered, the comparison should be between 85% at or around the date of organization, and 61.7% in 1923; and when binders alone are considered the comparison should be between 94.6% and 71.2%.

A more usual method of computing percentages of business in articles of varying types and value is to compare the volume of trade in dollars as distinguished from the number of machines. Comparison on this basis gives to the sales of binders, mowers, rakes, etc., a relative value corresponding to their sales prices.

The census figures which give the total U. S. sales in dollars (as well as in number of machines) together with the figures in this record as to the Harvester Company's sales in dollars, make such a comparison possible for 1922. The figures necessary for a comparison with the 1923 census are not in the record. *Computed on this basis the Harvester Company's percentage of trade in harvesting machines in 1922 was 56.1%.* (See table *infra* p. 184). As the Harvester Company's percentage of trade in 1923, computed in number of machines sold, was less than in 1922, presumably the same would be true if a computation could be made based on volume of trade in dollars.

We submit that this computation which shows that the Harvester Company's percentage of trade in 1923 was at least as low as 56.1%, is much more nearly correct and more significant than the Government's tables showing the percentage as 64.1%.

In passing it should be noted that the Government has abandoned the claim made in its petition (R. 21, 22) that significance should be attached to the apparent increase in the Harvester Company's percentage of trade (as incompletely shown in its tables) from 59.07% in 1921 to 66.57% in 1922. The evidence fully substantiated the statement in the Harvester Company's Answer that this was a temporary fluctuation affecting the allocation of business between the two years and not a shift of trade between competitors. An average of the two years more correctly reflects conditions. (See explanation in Answer, R. 67 and R. 85, 88, 218.)

The True Significance of the Percentage of Trade Figures.

The division of the trade between the Harvester Company and its competitors at the close of the test period is of course one of the factors properly to be considered in determining the existence of competitive conditions. Our only contention is that it has no such importance as the Government would give it and that its significance can only be determined by considering it in connection with the surrounding circumstances and other tests of competitive conditions. Important among these are

(1) The origin of the Harvester Company's high percentage of trade.

(2) The trend of the perceutage up or down and the reasons therefor.

(3) The strength of competitors who have the remainder of the trade.

(4) The relation of the machines in which the high percentage exists, to other machines manufactured and marketed as part of the manufacturer's whole line of implements and the influence of each class of machines on the intermingled competitive conditions.

As to the ***origin and trend*** of the Harvester Company's percentage of trade in harvesting machines, it should he remembered that this trade was purchased from six companies. No power of the Harvester Company ever overwhelmed competition to build up this percentage. On the contrary, the power of competition has diminished the percentage continuously for over 21 years, "over 85 per cent" in 1902 (Supp. Pet. R. 2) to less than 61.7 per cent in 1923. A much higher percentage of the tractor trade is now held by one company. An increasing per cent of trade built up by the present owner surely indicates more present power than a diminishing per cent acquired by purchase from several former owners. And if the greater power does not prevent competitive conditions, how can the less?

As to the *strength* of the competitors who hold the remainder of the trade, an important change has taken place which the Government wholly overlooks. Three harvester companies—Acme, Wood and Independent—(for reasons not connected with the Harvester Company and heretofore discussed, *supra*, p. 57; App. II, 12) were liquidated and went out of business between 1919 and 1923 (Gov. Br. 44, R. 97). In 1919 these three companies sold 14,809 harvesting machines (Gov. Br. 146) or 3.8% of the total U. S. trade in that year. In 1923 the Acme and Independent companies sold none and the Wood Company only 614 (Gov. Br. 154). It is significant that it was not the Harvester Company but its competitors which profited by this released trade. All of this trade or its equivalent was gained by other competitors, and in addition the percentage of trade which the Harvester Company held in 1919 was substantially reduced. Surely the transfer of this trade from liquidating companies to stronger companies has strengthened competitive conditions. It means that the stronger competitors who are now contesting and will contest the field in the future have increased their percentage of trade by the Harvester Company's loss (the difference between more than 64% and less than 61.7%) plus 3.8% or a total of at least 6.1%.

The importance of the interrelation between harvesting machines and the other implements in the Harvester Company's long line, has been heretofore discussed. The percentages of trade heretofore referred to in this connection are discussed and substantiated by the figures given under the following heading.

3.—THE HARVESTER COMPANY'S PROPORTION OF TRADE IN ALL KINDS OF AGRICULTURAL IMPLEMENTS WHICH IT SELLS.

The following tabulation based on Government census figures, Defts.' Ex. (S) 19—R. 600 supports our statement that the Harvester Company's percentage of the total United States trade in all agricultural implements in which it competes, was about 29%; that its percentage of the total trade in all lines other than harvesting machines was about 25%, and its percentage of the total plow and tillage trade about 18%.

This table in substantially the same form was printed in our District Court brief, so the Government has had ample opportunity to check the computations which are somewhat complicated due to the necessity of eliminating from the census figures various implements not sold by the Harvester Company. The Appendix (p. 81) explains the computation in detail.

	All Manufacturers	International Harvester Company	Percentage Harvester Company to all Manufacturers
Planting Machinery......	$ 4,567,000	$ 1,149,000	25.2%
Plows and Tillage Implements	19,290,000	3,587,000	18.6
Harvesting Machinery...	17,913,000	10,056,000	56.1
Machines for Preparing Crops for Market or Use	14,877,000	2,094,000	14.1
Gas and Steam Tractors	41,838,000	9,262,000	22.1
Miscellaneous	49,938,000	16,974,000	34.0
Total	$148,423,000	$43,122,000	29. %*

The International Harvester Company sales in new lines (that is, all lines except Harvesting Machinery) is $33,066,000 out of a total of $130,510,000 or 25.3%.

*The "Miscellaneous" item includes all machines made by the Harvester Company which are grouped in the Census classification as "Miscellaneous," such as Cream Separators, Manure Spreaders, Engines, etc., and also includes wagons, as well as Repairs, Attachments and Parts for all machines in all of the Census classifications.

PART IX.

THE INTERPRETATION AND INTENT OF THE 1918 DECREE—THE TEST OF COMPETITIVE CONDITIONS.

While both parties agree that the main issue in this suit—the existence of competitive conditions—involves questions of fact, they disagree as to the rule for weighing the facts. The Government contends:

(1) That the 1918 decree intended and the law requires substantial reproduction of competitive conditions in 1902 when the Harvester Company was organized, and that the existence of competitive conditions cannot be determined by any "different view of the law from that under which the decree was entered." (Br. 129.)

(2) That the decree intended to apply a quantitative test of competitive conditions under which the most important factor to be considered is the change in the Harvester Company's percentage of trade since 1918.

The Harvester Company, on the other hand, contends:

(1) That the language of the decree and also the surrounding circumstances show that the Court had no intention of reproducing 1902 conditions and that the law does not require their reproduction. Whether competitive conditions now exist should be determined in the light of this Court's decisions defining competitive conditions and restraint of trade, whether decided before or after the entry of the 1918 decree.

(2) That there is no basis for the Government's claim that a quantitative test should control. Further, that if any such test is applied, the decline in the Harvester Company's percentage of trade from 1918 to 1923 fulfills the test. Further, that the Court intended to review and reconsider not only changes subsequent to the 1918 decree, but all material changes, including the decline in the percentage of trade, since the closing of the evidence on the original hearing.

1. REPRODUCTION OF CONDITIONS IN 1902 NOT REQUIRED —COMPETITIVE CONDITIONS TO BE DETERMINED IN LIGHT OF CORRECT PRINCIPLES OF LAW.

Our position is that the words "competitive conditions," as used in the decree of 1918, must be given their usual meaning—the absence of undue restraint of trade "a situation in harmony with the law." In determining whether the conditions now existing are competitive, we believe that this Court should apply the same test it would use in any other case—the rule announced by this Court defining competitive conditions.

The Government, on the other hand, would preclude the Court from applying its own test in determining whether competitive conditions now exist. It says:

> "The only test which can be applied, therefore, is whether the decree of 1918 has had the effect actually to restore in the harvesting machine industry the competitive conditions which obtained prior to 1902." (Br. 23.)

And this language or its equivalent is repeated several times. (Br. 21, 136.)

Further, the Government contends that for this Court to apply its latest ruling, involving industrial consolidations, to the determination of the issue here would overturn the existing decree and defeat its effect. It says:

> "Clearly, therefore, the decision in the *Steel case*, rendered subsequent to the decree in this case, can have no bearing upon the present proceeding, which has for its sole purpose the giving effect to said decree, which stands unmodified and unreversed. Any other view would imply that parties against whom a decree has been taken are relieved of all compulsion to observe the decree in case the court entering it, or some superior court, shall later express a different view of the law from that under which the decree was entered." (Br. 129)

The Harvester Company is not asking any modification or reversal of the decree, but is observing it. The Government is asking modification thereof under a reservation in the decree which gives it the right to further relief, if at the end of the test period competitive conditions have not been restored and a situation brought about in harmony with the law (R. 14). By the first prayer of the present petition the Government asks the Court to decree

> "That the defendant, the International Harvester Company, *still is* a combination in restraint of interstate trade and commerce in harvesting machinery, and still is monopolizing and attempting to monopolize said trade and commerce, in violation of the act of Congress approved July 2, 1890, commonly called the Sherman Act, and contrary to the several opinions, orders, and decrees of this court." (R. 25.)

The issue thus presented by the Government was whether a combination in restraint of trade, and an alleged monopoly or attempt at monopoly, existed at the time of the filing of the present petition in 1923. Obviously in determination of that question every interpretation of the Sherman Act up to the decision of the case presented by the petition, would be pertinent. In effect the Government asks this Court to say:

> True, under the decision in the *Steel case* the Harvester Company is not violating the Sherman Act, but in view of the fact that the *Steel case* was decided after the decree of 1918, it cannot be given any weight in determining whether a situation in harmony with the law exists in 1923.

The argument of the Government proceeds upon the theory that by the decree of 1918 it was intended that conditions must be restored to those that existed prior to 1902. There is no suggestion of this intention in the language of the decree. The Government made the same contention in the brief below and the District Court, which should know the meaning of its own decree, has indicated that it had no such intention by denying the Government's petition for further relief. The sole requirements were that competitive conditions must be restored, and that a situation in harmony with the law be brought about. We contend that these requirements have been complied with and that every decision of this Court, regardless of when it was rendered, interpreting the Act in respect to the points in controversy, is to be considered.

We submit that the issue here is whether competitive conditions *now* exist, and that this cannot be ascertained by an opinion holding that it was illegal for certain companies to consolidate in 1902.

The Government's attempt to prevent the application of the rule laid down in the *Steel case* to this present record amounts to a contention that the District Court's opinion of 1914 is "the law of the case." There are four answers to this:

(1) The Government does not point to any proposition of law in the 1914 opinion of the District Court which it desires to have taken as the law of the case. The only proposition of law referred to in its brief is that quoted on page 6 from the District Court's opinion to the effect that if companies cannot legally contract as to prices, neither can they unite. This is inapplicable.

(2) The doctrine of the law of the case only applies to Appellate Court decisions and to their effect on subsequent proceedings in the same case. No Appellate Court is restricted by principles of law announced by a trial court.

(3) The doctrine of the law of the case is only a rule of convenience, not a limitation on the Court's power, and frequently is departed from where necessary to do justice between the parties. [*Messenger* v. *Anderson,* 225 U. S. 436; *Chase* v. *United States,* 261 Fed. 833, 840 (C. C. A., 8th Cir.); *St. Louis Ry. Co.* v. *Quinette,* 251 Fed. 773, 776 (C. C. A., 8th Cir.)].

> (4) The doctrine of the law of the case has no application where a party in whose favor a decision has been rendered, returns to a court of equity for further relief. The Court will grant or withhold such relief as it may deem equitable unrestricted by any principle of *res adjudicata* or "the law of the case." The decisions are clear that no further relief will be granted in such case if it appears that this would be inequitable on account of changed circumstances or because the original decree was erroneous or unjust. (*Lawrence Mfg. Co.* v. *Janesville Mills*, 138 U. S. 552, 561; *O'Brien* v. *Wheelock*, 184 U. S. 450, 483; *Lewers* v. *Atcherly*, 222 U. S. 285, 293; *Gay* v. *Parpart*, 106 U. S. 679.)

It is clear under the above decisions that a court of equity which

> "nothing can call forth into activity but conscience, good faith and diligence,*

will award or withhold relief in this case as justice and public interest demand. They do not demand the dissolution of a company which is not violating the law simply because 1902 conditions have not been reproduced.

The Government, however, contends that the language of the 1918 decree must be interpreted in the light of the decrees entered in other cases and that the *Tobacco case* establishes (Br. 25) "as a principle to be observed in the dissolution of combinations violative of the Sherman Law, that there should be a restoration of the competitive situation which obtained when the combination was formed by a complete segregation of the combined companies."

In the *Tobacco Case* (221 U. S. 106, 186) the Court said that it would be difficult, if not impossible, to restore the prior lawful conditions. The decree it entered, therefore, directed the parties to submit a plan for dissolving the combination and "recreating out of the elements now composing it a *new condition* which shall be honestly in harmony with and not repugnant to the law." (p. 187)

**Wagner, et al.* v. *Baird, et al.*, 7 How. 233, 258.

The other decisions relied upon by the Government all involved either the control by stock of one railroad by another, or the control by a railroad of a coal company, or the control of both a railroad and a coal company by a holding company. These cases are clearly differentiated by their facts. They all involved public utility companies and most of them involved also the control of natural resources of limited supply. The assets and business of the combinations were in almost identically the same condition at the date of dissolution as when the combination was formed. The obvious way to dissolve the combination was to separate the two railroads, or the railroad and coal properties involved. There is nothing in the cases cited to support the Government's proposition that reproduction of prior conditions is the only legal method of removing restraints of trade.

The situation with which the Court was dealing in the *Harvester case* was entirely different. It involved a consideration of private manufacturing companies which were under no duty to compete, and which were making articles that anyone could manufacture. The case, moreover, was unusual in that sixteen years had elapsed between the original consolidation and the entry of the decree of dissolution. During that period the Harvester Company and all its principal competitors had been following the economic trend and become integrated long-line implement companies. To segregate all of the Harvester Company's new lines and re-create a number of short-line harvester companies as in 1902, would have been useless and a step backward. To create several long-line companies out of the Harvester Company was impossible as the duplication was in the five harvester lines and the new-line factories and business could not be divided, so as to give to each of several new harvester companies a properly integrated long line. (See *supra* pp. 29, 30.)

The plan which seemed best to the Attorney General and which was approved by the Court was to enable other responsible implement companies to become long-line companies by requiring the sale to them of the Champion, Osborne and Milwaukee lines, and to assist these new competitors and all old competitors by restricting the Harvester Company to doing business with one dealer in a town. Judging the intent of the decree by its own provisions and the surrounding circumstances, it is clear that the Court did not intend to reproduce the 1902 conditions and that it did intend to adopt a plan to establish competitive conditions in a different and what it believed to be a better way.

2.—ANSWER TO GOVERNMENT'S CONTENTION THAT THE 1918 DECREE INTENDED TO SET UP A QUANTITATIVE TEST OF COMPETITIVE CONDITIONS.

(1) The first answer to this contention of the Government is that the decree does not expressly provide for any quantitative test. The presumption is, therefore, that the court intended that the existence of competitive conditions should be determined in the light of the many other relevant facts which have been heretofore mentioned throughout this brief.

(2) A second answer to this contention may be found in the Government's own brief (p. 46) where it states that the test period has been three years longer than was anticipated in 1918, due to the postponement of the formal treaty of peace with Germany. If this is true, then both the Court and the Government intended that the 1918 decree should be reviewed within one year after the going into effect of the single-dealer provision and within one year after the expiration of the time for sell-

ing the Champion, Osborne and Milwaukee lines. Obviously no marked changes in the division of trade could have been expected within such a short period. This argument of the Government suggests what seems most probable, that the Court intended to review the effect of the decree in opening the channels of distribution and whether the purchasers of the lines sold were "responsible implement companies" as the decree required.

(3) The Government's brief also furnishes another argument against its own theory. On page 132 it says:

> "When the provision for the test period was written into the decree it must have been known, at least experience should have taught that the close of a great war almost always is followed by a period of depression."

This statement is made in connection with an argument that the farm depression could not excuse the Harvester Company from re-establishing competitive conditions, particularly as it must have known such a depression would soon occur. If the Harvester Company must have known this fact, it must have been equally known to the Attorney General and the Court, and, if so, the Government imputes to the Court an intention to establish a quantitative test to a period when trade was at a standstill and when such test would be particularly inapplicable and of less relevance than many other factors.

(4) We further contend that if a quantitative test of competitive conditions should be applied, the decline in the Harvester Company's percentage of trade since 1918 which has been substantial in itself should be considered in connection with the decline since the filing of the Government's original petition in 1912. The Harvester Company's percentage of trade declined from 77% in 1911 (R. 19) to 61.75% in 1923, figuring the volume of trade in the number of machines, and to 56.1%,

figuring the volume in dollars (*supra*, p. 184). It is reasonable to suppose that the District Court in any review of the effects of its decree, intended to consider all substantial changes in competitive conditions which had taken place since the original hearing. Without this, its record would be incomplete. The 1918 decree simply reinstated the 1914 decree and provided a plan of dissolution. The Court in 1918 was doubtless informed in a general way of the entry of new competitors and their substantial progress since the filing of the original petition, and this had a bearing on the nature of the plan of dissolution and the *quantum* of relief. No evidence was taken, however, and all consideration of these changes and further changes resulting from the provisions of the 1918 decree, was postponed for subsequent review should the Government ask it.

PART X.

POSSESSION OF UNEXERCISED POWER OF THE CHARACTER DISCLOSED BY THE EVIDENCE IS NOT ILLEGAL—THE AUTHORITIES CONSIDERED.

In the foregoing pages of this brief we have reviewed the evidence as to all of the alleged advantages which the Government claims give to the Harvester Company such a dominance as to prevent competitive conditions and constitute a restraint of trade. From this review we believe it clearly appears:

(1) That the admitted good name and excellence of the Company's harvesting machines have not been such an advantage as to prevent marked progress by its competitors.

(2) That the alleged tremendous advantage in costs does not exist and if any advantage exists at all, it must result from efficiency.

(3) That the profits of the Company have been moderate—not "enormous."

(4) That the large resources of the Company, built up out of the moderate profits of twenty years of business are in greater part invested in enterprises other than the manufacture of harvesting machinery, and are not as large, compared with the resources of competitors, as in the case of the Steel Corporation.

(5) That the so-called profitable side-lines have returned no more than a moderate profit on the investment and give the Company no outstanding advantage.

(6) That the Company's percentage of trade in harvesting machines is substantially less and has declined substantially more than the Government contends.

The evidence further shows that none of these alleged advantages in so far as they exist, have been exercised in any attempt to sell at cost, dictate prices or otherwise restrain trade, and that the long-line development in the implement industry has minimized the significance of such advantages as a measure of potential power which might be available for monopolization of the harvester trade.

There remains to be considered the legal question whether any unexercised power resulting from advantages of the character and origin disclosed by the evidence in this case, can in and of itself constitute restraint of trade.

The Government in its argument in the former proceeding, in both the *Steel Case* and the *Harvester Case,* pressed the claim that the possession of power to suppress competition, arising as it claimed out of the preponderant position of the companies in their respective trades, constituted the gravamen of their offense under the Sherman Act. Mr. Justice McKenna in his opinion in the *Steel Case* said:

> "The Government, therefore, is reduced to the assertion that the size of the corporation, the power it may have, not the exertion of the power, is an abhorence to the law, or as the Government says, 'the combination embodied in the Corporation unduly restrains competition by its *necessary effect,* (the italics is the emphasis of the Government) and therefore is unlawful regardless of purpose.' 'A wrongful purpose,' the Government adds, is 'matter of aggravation.' The illegality is statical, purpose or movement of any kind only its emphasis." (251 U. S. 417, at p. 450.)

His immediate answer to this argument was as follows:

> "To assent to that, to what extremes would we be led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, which regards power rather than its use the determining

consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the Government's contention that competition must not only be free, but that it must not be pressed to the ascendency of a competitor for in ascendency there is the menace of monopoly.

"We have pointed out that there are several of the Government's contentions which are difficult to represent or measure, and, the one we are now considering, that is the power is 'unlawful regardless of purpose,' is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal because there is potency in it for mischief. The regression is extreme but short of the the Government cannot stop. The fallacy it conveys is manifest. * * *

"Shall we declare the law to be that size is an offense 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 offense or the existence of unexerted power an offense." (251 U. S. 417, 450, 451.)

The decision in the *Steel Case* upon the point in question was but the application of the rule stated in the *Standard Oil* and *Tobacco Cases* to the facts then before the Court. In both the *Standard Oil* and *Tobacco Cases* the defendants had both size and power to suppress competition. Yet in neither of those cases did this Court rest its decision on these circumstances alone; nor did it announce a rule which would justify so doing.

In the *Standard Oil Case* it was held that the power acquired from combining in the New Jersey corporation the control of so many other corporations aggregating so vast a capital, gave rise, in and of itself, *in the absence of countervailing circumstances*, to the *prima* *facie* presumption of *intent* to dominate and control the oil industry

> "with the purpose of excluding others from the trade and thus centralizing in the combination a perpetnal control over the movement of petroleum and its products in the channels of interstate commerce" (221 U. S., at p. 75).

And it was *held* that the *prima facie* presnmption of intent "to restrain trade, to monopolize and to bring about monopolization" *was made conclusive* by considering the *after conduct* of the parties, "as well as by weighing the modes in which the power vested in that corporation *has been exerted* and the results which have arisen from it" (221 U. S., p. 75).

In the *Tobacco Case* the combination was condemned *not* because of the vast amonnt of property aggregated by the combination, not becanse alone of the many corporations which were united, nor alone because of the dominion and control over the tobacco field which actually existed, but, to quote the language of the Court,

> "becanse we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established."

Allusion is then made to the circumstances surrounding the organization and the *after conduct of the company which showed,* the Court said, the purpose to restrain others and to monopolize and retain power in the hands of the few and to drive competitors from the field and erect perpetual barriers to the entry of others into the trade (221 U. S., at pp. 182, 183).

The present case differs from the *Steel Case* in the following respects:

(1) The Harvester Company's resources, as compared to those of its principal competitors, are much

smaller than the resources of the Steel Corporation as compared to its principal competitors (*supra*, p. 169).

(2) While the Harvester Company's proportion of trade in its harvester lines is about the same as the Steel Corporation's percentage in several of its important lines (*supra*, p. 172), the Harvester Company's percentage of trade in all lines of implements it manufactures is materially less than the Steel Corporation's proportion of the entire steel trade (*supra*, p. 172).

(3) Such power as the Steel Corporation possessed resulted directly through the combination.

On the other hand, the alleged advantages which it is claimed that the Harvester Company possesses over its competitors, upon which the Government lays the greatest stress, were not acquired as a result of combination.

These advantages are (a) the ownership of the Wisconsin Steel Company, (b) the Harvester Company's alleged low cost of manufacture, and (c) the reputation of its harvesting machines.

a. The Harvester Company's steel business did not result from any combination of competing steel plants. It is a single business built up mainly during the last twenty years (R. 203).

The Trade Commission's report says that the ownership of steel plants is not necessary to the implement business and the proof of this is that no implement manufacturer, except the Harvester Company, owns any steel plant (R. 51). It also says that the profit which the Harvester Company derived through ownership of the Wisconsin Steel Co. property is one of the strongest elements in the competitive power of the Harvester Company (R. 50).

These profits have not been as large as claimed (*supra*, pp. 154-157). But what if they had? Surely a corporation may engage in as many enterprises as its charter permits. If the so-called side-lines are so disconnected from the harvester and other implement lines that they do not form part of an integrated business (as the Commission implies), the profits derived from the steel business and other so-called side-lines, are wholly immaterial. As well might it be claimed that a profitable investment in bonds of a company's surplus could be an illegal source of power.

If on the other hand the steel and implement business together constitute an integrated whole, composed of related but noncompeting units, the integration is legal.

> *United States* v. *Winslow,* 227 U. S. 202, 217.
> *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32, 35.

Furthermore, as we have seen, eighty per cent of the Harvester Company's trade consists of lines of implements it has added to its harvester lines. For, with trifling exceptions, the Harvester Company acquired only harvester lines by the consolidation in 1902. (Gov. Br. 130) These new lines, like the steel business, constitute an investment as well as an effort to integrate the business. The acquisition of these new lines under the rule of the *Winslow Case, supra,* was perfectly lawful. It follows that any power the Harvester Company thereby acquired was one legally derived which could only be rendered unlawful by its illegal abuse.

b. It does not appear that the Harvester Company's costs of production are lower than its competitors' (*supra,* p. 147; App. 61-67) and the Government has not proven any permanent advantage of the Harvester Company which would make its costs lower. Therefore, the fair inference is, that if the Harvester Company has lower costs, they resnlt from efficiency. Surely the ability to mannfacture cheaply is not detrimental to the public interests. In *Patterson* v. *United States*, 222 Fed. 599, 619 (C. C. A., 6th Cir.) the Court said that

> "A monopolizing by efficiency in producing and marketing a better and cheaper article than any one else is not within it" (*i. e.*, 2nd Section of Sherman Act).

Judge *Wooley* in the *Steel Case*, 223 Fed. 55, 163, said:

> "As there can be no monopoly of efficiency and capacity, inquiry concerning the power of the corporation therefore leads mainly to its dominion over the raw materials and finished products of the industry."

c. The Government, adopting the Trade Commission's assertion (R. 55), claims that the reputation in the trade of the Harvester Company's harvesting machines gives illegal power.

It is true that the Harvester Company has used its best effort to maintain the reputation of its harvesting machines and other implements, and that its harvesting machines are the most widely known in the trade. But good reputation, maintained through many years by excellence of manufacture, has not hitherto been regarded as a source of danger to the public interest.

There is high authority for the proposition that "A good name is rather to be chosen than great riches;" but it seems, according to the Government, that in an anti-trust case there is fatality in the possession of either.

The Government seeks to prevent the application of the *Steel Case* to this record on various grounds:

> (1) It says (Br. 129) that this Court cannot apply to this record the opinion in the *Steel Case* because this opinion was handed down subsequent to

the entry of the 1918 decree. This contention has been answered *supra*, p. 185.

(2) It says (Br. 129) that the record in the *Steel Case* showed that "competitors had to be persuaded by pools," etc. to keep in line, while here the record shows that the Harvester Company dominates prices. This contention has been answered *supra*, p. 158.

(3) The Government says (Br. 130) that the *Steel Case* presented a record of the Steel Company's efforts to keep its competitors in line, while this case presents a story of the unsuccessful efforts of the competitors of the Harvester Company. This contention has been answered (*supra*, pp. 104-110) with the testimony of the Harvester Company's competitors themselves.

(4) It says (Br. 130) that the Court in the *Steel Case* laid much stress on the purpose to integrate the steel business.

In the *Steel case* 180 concerns were united whose production was 80% or 90% of the country's output (251 U. S. at p. 439). All competition between these concerns was eliminated and such integration of raw material properties as occurred directly aided the consolidated company in manufacturing its finished steel products—and to that extent increased its power.

In the *Harvester case* also the Company obtained its raw material properties and the beginning of its steel business, by the consolidation; for theretofore they had belonged to the Deering Company (R. 203). The record in the former proceeding shows that this, as well as the subsequent development of a long line of implements, was one of the purposes of its organizers. (O. R. Vol. II, p. 1318-1320, 1357). The sole distinctions in this respect between this and the *Steel Case* are as follows: The Steel Corporation obtained a large portion of the ore resources of the country and all the integration resulting from the consolidation increased its power in the steel trade. On the other hand, the Harvester Company obtained but a slight portion of any natural resources and its subsequent integration, by developing new lines of implements, did not increase but decreased its power in the harvesting machine trade by reason of the many interrelations previously discussed.

It is idle for counsel to contend that the *Steel case* is not in point because one of the many purposes of its organizers—the integration of the steel business—was lawful. The Court found in the *Steel case* (following the opinions of Judges Wooley and Hunt with which the Supreme Court said that in the main it concurred—251 U. S. 442) "that the organizers of the corporation and the preceding companies had illegal purpose from the very beginning" (see pp. 438, 439). Finding, however, that the corporation itself had been guilty of no unfair or illegal practices, the Court held that the illegal intent and unsuccessful attempt of its organizers to monopolize trade should not be attributed to it (p. 441) and the Court said:

> "Our present purpose is not retrospect for itself, however instructive, but practical decision upon existing conditions, that we may not by their disturbance produce, or even risk, consequences of a concern that cannot now be computed. In other words, our consideration should be of not what the Corporation had power to do or did, but what it has now power to do and is doing, and what judgment shall be now pronounced—whether its dissolution, as the Government prays, or the dismissal of the suit, as the Corporation insists?" (p. 444)

In *Maple Flooring Association* v. *United States*, 268 U. S. 563, 577, the Court said:

> "Whether, however, their general purpose was to become law-abiding members of the community or law breakers, it is not, we think, very material unless the court either can infer from this course of conduct a specific and continuing purpose or agree-

> ment or understanding on their part to do acts tending to effect an actual restraint of commerce (*United States* v. *United States Steel Corp'n.*, 251 U. S. 417), or unless, on the other hand, it is established that the combination entered into by the defendants in the organization of the defendant Association, and its activities as now carried on, must necessarily result in such restraint."

A fortiori, no illegality of purpose resulting in the organization of the Harvester Company can play any part here. For not only has the Harvester Company been guilty of no unfair practices, not only has it manifested no intention to monopolize, but the purpose of its organization is not in issue—the sole issue being whether competitive conditions *now* exist.

In another place in its brief (pp. 109, 110) the Government quotes a finding of the Supreme Court of Missouri in an opinion, handed down in 1911 and based upon evidence taken in 1909 and 1910, and says that this finding (which the Government seems to imply should be treated as evidence in this proceeding) "distinguishes the case from the *Steel Case*."

It is true that in the *Steel Case* the Court found that the Steel Corporation had not the power to suppress competition or to control prices, but that finding was only one of the two grounds upon which the decision was rested. As said in *Union Pacific Company* v. *Mason City Co.*, 199 U. S. 160, 166:

> "Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum."

As we have seen, the question as to whether unexercised power violated the law arose in the Steel Case, was distinctly decided and constituted one of the two grounds of the decision.

Consequently the real distinction between the *Missouri Case* and the *Steel Case* is that the former holds that unexercised power acquired by combination is illegal under the Missouri statute and the latter holds that the Sherman Act does not make such power an offense. And this proceeding arises under the Sherman Act, not the Missonri statute.

In the *Steel Case* the Government relied strongly upon *International Harvester Company* v. *Missouri*, 234 U. S. 199, from which the Government quotes (Br., 110, 111). Counsel for the Steel Corporation distinguished that decision on the ground that the Missouri statute prohibited all combinations "which tend to lessen full and free competition," while the Sherman Act condemns only combinations which unduly restrain trade (251 U. S., at p. 436). The Court, we believe, must have concluded that what was said in the *Missouri Case* (234 U. S. 199) did not apply to suits arising under the Sherman Act, for it did not mention the Missouri *Case* in its opinion.

This we think is an answer to the Government's contention that the *Missouri Case* is here in point; that a statute prohibiting combinations "which tend to lessen free and full competition" is the same as one that condemns only undue restraints of trade.*

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* The Government says (Br. 111):

> "What is expressed in the Missouri statute *necessarily* is implied in the Sherman Act."

When the Sherman Act was pending in Congress, Mr. Bland, a representative from Missouri, offered an amendment designed to embody therein substantially the language of the Missouri statute which was before the Supreme Court in *Missouri* v. *Harvester Company*, but Congress refused to adopt this amendment.

Walker's History of the Sherman Act, pp. 41, 42.

See also the *Du Pont Powder Case*, 188 Fed. 127, 155, where the Court distinguishes between restraint of competitors and restraint of trade.

We submit that the record on this appeal clearly shows the existence of competitive conditions in the manufacture and sale of harvesting machinery and other agricultural implements and a situation in harmony with the law, and that the decision of the District Court dismissing the Government's petition for further relief was correct.

Respectfully submitted,

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