

Syllabus

IN THE MATTER OF
KIRSCHMANN HARDWOOD COMPANY¹

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 1323. Complaint, June 2, 1925—Decision, Aug. 16, 1927

Where the wood mahogany had long had a merited and enduring reputation associated with the word, was usually sold to lumber dealers and manufacturers under such names indicating origin as "Honduras Mahogany", "Mexican Mahogany", etc., and was usually dealt in in the retail furniture trade without such prefixes, and furniture and other articles were customarily bought, dealt in, and purchased by furniture buyers for large retail stores, by retail dealers, and by the public in reliance upon representations by the manufacturers and dealers respectively as to the composition thereof, and whether or not mahogany; and thereafter a corporation engaged in the sale of hardwood lumber and hardwood products to wholesale and retail lumber dealers, manufacturers of furniture, and others,

Represented certain Philippine hardwoods as "Philippine Mahogany" and induced others so to represent the same and products thereof, and so sold the same to furniture manufacturers, dealers and others, by whom such hardwoods or the products manufactured therefrom were resold to retailers and others as "Mahogany", "Genuine Mahogany" or "Solid Mahogany", and were in turn by them resold to the public as and for such products, the fact being that the aforesaid woods (1) were not mahogany, either botanically or otherwise, (2) lacked many of the characteristics and virtues possessed by mahogany and were thereby unsuited for a variety of uses employed for mahogany, (3) were sold to the manufacturer for about two-thirds of the price of genuine mahogany, and were by the latter resold as manufactured products, to dealers, at the same prices prevailing for mahogany products, (4) had long been known and traded in in the Philippines and in the United States under their native and trade names, "lauan" and "tanguile," and also under other native names such as "red lauan," "bataan," etc., (5) were imported under such names as to the greater proportion thereof imported, (6) were so dealt in in the United States by many of the importers and a substantial number of the lumber dealers, (7) were not what dealers, manufacturers, and ultimate purchasers had in mind when they wanted mahogany, or what they believed to be mahogany, (8) were named and sold as Philippine Mahogany in the face of official disapproval and practice, and without the sanction of local custom, and (9) that approximately 60 per cent of the retail lumber dealers in the United States, and ultimate purchasers of furniture and other products, with rare exceptions, had never heard the term, believing it in such instances to mean mahogany, and not a substitute;

¹ See footnote to *Powee case*, p. 248.

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With the effect of (1) causing manufacturers, dealers in furniture and other products, and consumers to purchase, sell, or deal in said woods, and products made therefrom, as mahogany, (2) placing in the hands of its immediate customers an unlawful instrument enabling them to increase their profits by reselling the lumber so misnamed, either as such, or in the manufactured form, thereby lessening the market for true mahogany and for the honestly named Philippine hardwoods, (3) diverting business from and otherwise prejudicing competitors dealing in and able to supply lumber and other wood products, consisting of mahogany, rightfully and truthfully so represented by them, and competitors dealing in lauan, tanguile, and other Philippine hardwoods and the products manufactured therefrom, under appropriate or trade names, which did not import or imply that they were mahogany, and (4) of deceiving a substantial portion of the trade, and the purchasing public in substantial numbers, and inducing the ordinary purchaser of products made from such woods to purchase the same as and for mahogany, in whole or in part, to the injury and prejudice of the purchasing public and of honest competitors:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. M. Markham Flannery and *Mr. Stephen C. Van Fleet* for the Commission.

Forbes & Daniels, of Washington, D. C., for respondent.

Major F. G. Munson, Judge Advocate, United States Army, of Washington, D. C., for Philippine Government, intervenor.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a California corporation engaged in the sale of hardwood lumber and other hardwood products to dealers in lumber and manufacturers of furniture, cabinetwork, and allied products in the various States, and with principal office and place of business in San Francisco, with misrepresenting or naming products misleadingly, and advertising falsely or misleadingly in violation of the provision of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce, in that, for about four years preceding the complaint, respondent sold certain hardwood lumber and other hardwood products not mahogany, under the name and designation "Philippine Mahogany" at wholesale and retail, to dealers and manufacturers as aforesaid, and in advertisements, circular letters and other correspondence with purchasers and prospective purchasers, and on letterheads, invoices, price lists and other trade literature represented, named and designated said lumber and other products as "Philippine Mahogany"; with the capacity and tendency to cause and with the effect of causing, many

dealers and manufacturers as aforesaid to purchase said lumber and products as and for mahogany and to manufacture therefrom and sell to wholesale and retail dealers furniture, cabinetwork and allied commodities as mahogany, and of causing said dealers and eventually the consuming public to purchase such various articles and products as mahogany, and of thereby diverting trade from and otherwise prejudicing competitors, many of whom deal in and sell hardwood lumber and other hardwood products, including mahogany, and do not include any other kind of hardwood than mahogany in their advertisements or representations of mahogany, and otherwise properly and truthfully represent the hardwood lumber and products dealt in by them; all to the prejudice of the public and respondent's competitors.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served its complaint upon the respondent, Kirschmann Hardwood Co., a corporation, charging it with unfair methods of competition in commerce in violation of said act.

Respondent having entered its appearance by its attorney and having filed its answer herein, and the Philippine Government, intervenor, having entered its appearance by its attorney and having filed special answer herein, and a stipulation between respondent and the Commission concurred in by the intervenor having been made and entered of record whereby respondent agreed that the record of the evidence taken in complaints, dockets numbered 1281, 1316, and 1332, shall be taken as and in lieu of testimony in support of the charges stated in the complaint in this proceeding, or in opposition thereto, and shall constitute the evidence upon which the Commission may proceed to make its report in this proceeding, and state its findings as to the facts and enter its order disposing of said proceeding; thereupon this proceeding came on for decision, and the Commission having duly considered the record, and being fully advised in the premises, makes this its findings as to the facts and its conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized under the laws of California, with its principal office and place of business in the city of San Francisco. It is engaged in the sale of hardwood

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lumber and hardwood products to wholesale and retail lumber dealers, manufacturers of furniture, and others located at various points in the several States of the United States. It causes said commodities, when so sold, to be transported from its said place of business in San Francisco, Calif., and from the point of origin of such commodities into and through other States of the United States to purchasers at their respective points of location in States other than California and other than the points of location of such shipments.

PAR. 2. There are other individuals, partnerships and corporations situated in the various States of the United States also engaged in the sale of hardwood lumber and hardwood products, who cause said commodities when sold to be transported from their respective places of business into and through other States of the United States to purchasers located in States other than the State of origin, and into States into which respondent ships its hardwood products, with whom respondent was during the time mentioned in the complaint and now is competing in interstate commerce.

PAR. 3. A large and important part of the hardwood and hardwood products sold and transported by respondent in interstate commerce is called by respondent "Philippine mahogany," and is grown in and imported from the Philippine Islands. This wood has been known and traded in for years prior to the filing of the complaint herein both in the Philippines and in the United States under the names Lauan and Tanguile. Other trade names employed for these woods are red Lauan, white Lauan, Bataan, Lamao, Almon, Apitong, Orion, Batang, Bagaac, Batak and Balachcan.

PAR. 4. About 85 per cent of the Philippine woods sold as "Philippine mahogany" imported through the Pacific coast ports is imported under the trade names set out in paragraph 3 above. Some importers sell these woods to lumber dealers, furniture manufacturers, and others under their native or trade names. Respondent and other importers sell it to furniture manufacturers, dealers and others as "Philippine mahogany." After sale by the importers last referred to, the manufactured products are sold by the said furniture manufacturers to retail furniture dealers and others as "mahogany", "genuine mahogany", or "solid mahogany". Such products are resold by retail furniture dealers to the public as and for products made of "mahogany", "genuine mahogany", or "solid mahogany".

PAR. 5. Many of the importers and a substantial number of lumber dealers in this country use and deal in woods of the type sold by respondent as "Philippine mahogany", but under the native or trade names in paragraph 3 set forth.

PAR. 6. The Lauan and Tanguile sold by respondent as "Philippine mahogany" are the product of the tree family scientifically known as Dipterocarpaceæ. This tree family is not scientifically or botanically related to the tree family Meliaceæ, the product of which constitutes true mahogany.

PAR. 7. The Philippine hardwoods sold by respondent and others, as hereinabove described, are the only woods derived from a tree family other than Meliaceæ, to which the term mahogany has been applied. Of the genera of this family, only one "Swietenia" produces true mahogany. There are five known species of Swietenia.

PAR. 8. The term "African mahogany" has been applied commercially to the product of "Khaya" of the genera of Meliaceæ, of which there are about four known species.

PAR. 9. Trees of the Swietenia group producing true mahogany grow principally in the West Indies, Southern Florida, Southern Mexico, Central America, Venezuela, and Peru. No species of the genus Swietenia of this tree family grows in the Philippine Islands, except as specially planted for decorative or experimental purposes.

PAR. 10. The Spanish words "Caoba des Filipinos," meaning "Philippine mahogany," are occasionally used in the Philippine Islands to designate native woods resembling mahogany in grain, texture, and color. This term was known in the Philippines, but not used in connection with the sale of lumber. It does not appear that this expression was used prior to the American occupation. Prior to 1916 the Philippine Government, as represented by its Director of Forestry, opposed the practice of American importers in selling Philippine hardwoods as Philippine mahogany.

PAR. 11. When Philippine hardwoods leave the Philippine Islands for the United States, they are shipped under the native names, Lauan, Tanguile, etc. The invoices, on which the taxes are levied are made out under the native names, this being by agreement with the Bureau of Customs, as well as the railroad companies, so that the shipping invoices will conform to the manifest on which the Government charge has been paid.

PAR. 12. Active opposition on the part of officials of the Philippine Government to the practice of selling Philippine hardwoods as "Philippine mahogany" abated about 1916, but a few months prior to the institution of the Federal Trade Commission's investigation of this matter a statement by the Forester of the Philippine Government, published in a trade journal known as the Hardwood Record, deplored the selling of Philippine wood as true mahogany "a practice which always will be opposed by the Bureau of Forestry of the Philippine Government, both because of the false pretenses and be-

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cause of the fact that the Philippine woods have sufficient good qualities to stand on their own merits."

PAR. 13. The various kinds of woods are distinguished from one another by botanical properties or characteristics. Many woods of widely different kinds have some properties and characteristics in common, but it is the difference in such properties and characteristics, be they great or small, that distinguishes one wood from another. The ultimate test consists in a comparison or contrast of such properties and characteristics.

PAR. 14. In commerce when a question arises as to whether wood is of one kind or another, the matter is submitted to a wood technologist for determination. A wood technologist authoritatively identifies wood according to the species, genus, tribe, and family of the tree, as classified, established, and agreed upon by botanists.

PAR. 15. The United States Department of Agriculture, in its Forest Products Laboratory at Madison, Wis., is regularly engaged in officially determining for those engaged in commerce the question whether wood is of one kind or another. Many samples of Philippine hardwood, such as sold by respondent, were identified by Mr. Arthur Koehler, wood technologist of said laboratory, as shorea—one of the genera of dipterocarpaceæ.

PAR. 16. The United States Department of Agriculture on September 28, 1926, issued the following official statement:

The name "Philippine mahogany" as applied to Tanguile, Lauan, and other Philippine woods, has never been indorsed by the United States Department of Agriculture. Its use runs counter to the principles followed by the Forest Service in attempting to give to native American trees and woods standard names that do not deceive or mislead the public, according to a statement by Chief Forester W. B. Greeley, in connection with recently published statements growing out of the Federal Trade Commission decision against the use of the name "Philippine mahogany."

The Forest Service has been quoted as having indorsed the name "Philippine mahogany" in a letter written in 1914. This letter, however, according to the Forest Service statement, did not attempt to decide the specific question at issue, and was limited to stating the principles that should be followed in the nomenclature of woods.

In the opinion of the Forest Service the name mahogany should be confined to the true mahoganies, which belong to the botanical genus *Swietenia*.

PAR. 17. Unschooled persons such as laborers in a lumberyard who readily distinguish between the different kinds of lumber by such criteria as grain, pore, scent, weight, or other identifying characteristics are guided by botanical properties and differences inherent in the wood as formed in the tree, and these characteristics correspond with like characteristics placed by nature in trees of the same species. Wood technologists by reason of their expert knowl-

edge compare these and many other qualities and characteristics with such precise results as to satisfy the requirements of both science and commerce, and according to such identifications neither lauan nor tanguile are mahogany botanically or otherwise.

PAR. 18. In addition to the scientific and botanical distinctions used by wood technologists, many of the characteristics and virtues possessed by mahogany are lacking in the Philippine hardwoods sold by the respondent as mahogany under the name Philippine mahogany. The absence of such characteristics and virtues prevents such hardwoods from serving certain uses for which mahogany is particularly adapted. While there is conflict in the evidence, the weight is to the effect that Philippine hardwoods are not suitable for the following uses, and the Commission so finds:

(a) Such woods are not suitable for cabinet-making because of the great prevalence of wormholes which constitute serious defects in all Philippine woods.

(b) They are not suitable for the construction of lamps because they do not take a proper finish.

(c) They are too soft to be suitable for flooring.

(d) They are not susceptible to the finish required by piano manufacturers on the exposed surfaces of pianos.

(e) They are not suitable for carving.

(f) When used in furniture it is necessary to fill the wormholes before the wood is stained or varnished and polished. The filling at times sinks into these holes, destroying the even appearance of the surface.

(g) They do not retain the subsurface lustre peculiar to mahogany, and unlike mahogany they do not beautify with age.

PAR. 19. Mahogany has a merited and enduring reputation, and is familiar to the average person, and the association of such reputation with the household word "mahogany" finds its origin in recollections of and association with objects of furniture and the like familiar to him since childhood, often handed down from generation to generation; and when such person is offered products made of so-called "Philippine mahogany" as and for mahogany, he is deceived by receiving furniture, interior trim for his house, boats, caskets, and the like, made of lauan or tanguile which is not mahogany.

PAR. 20. Ultimate purchasers of furniture and other products mentioned in paragraph 19, with rare exceptions, never heard the term "Philippine mahogany"; but even when the term was mentioned such purchasers were led into the belief that it meant mahogany, not a substitute.

PAR. 21. In buying furniture the public usually depends upon representations made to them by the retail dealers from whom they

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purchase as to whether the furniture offered for sale is or is not made of mahogany wood.

PAR. 22. Persons engaged in buying furniture for large retail furniture stores in practically every city of the United States commonly depend on representations made to them by manufacturers as to the kind of wood entering into the furniture they purchase. Furniture purchased by retail dealers is ordered largely from photographs and catalogues, and at times from samples. If furniture is represented by the manufacturer to be made of mahogany wood and is invoiced as mahogany furniture, retail dealers in practically every city of the United States sell such furniture to ultimate purchasers as mahogany furniture. Furniture is rarely represented to retail dealers as made of "Philippine mahogany", or sold by them under that description. Prefixes such as "Honduras", "San Domingo", and "Cuban", used by manufacturers and importers, are seldom if ever used in the retail furniture trade. But the purchasing public, having in mind the reputation which mahogany has borne for hundreds of years, depend on retail furniture dealers to supply mahogany if that is the kind of furniture asked for. Such buyers have seldom heard the term "Philippine Mahogany."

PAR. 23. Many retail dealers of the class referred to in paragraph 22 hereof do buy furniture from such manufacturers as described in said paragraph, which furniture is made of Lauan, Tanguile, or other Philippine hardwoods, and is sold by said retail dealers to the public as and for mahogany. Among others, the proprietor of a retail furniture store at Cleveland, Ohio, in the regular course of business, purchases furniture from various manufacturing concerns, among which is a company located at Jamestown, N. Y. From the catalogue of this company he has in the past and does now purchase tables which are described therein as having "solid mahogany tops." From such catalogue he has, under the conditions just related, bought items of furniture, depending on the representations and descriptions shown in said catalogue in connection with each piece, and so relying thereon has sold said tables to customers as and for tables having tops of solid mahogany wood. Such table tops were not made of mahogany, but were made of Tanguile or Lauan.

PAR. 24. Another customer of the said manufacturer at Jamestown, a retail dealer at Boston, ordered from a catalog circulated by said manufacturer a table therein advertised as a "solid mahogany sewing table." The retail dealer at Boston expected to receive "what is called mahogany; what the manufacturers list as mahogany," and which is "supposed to be the best mahogany wood used in the manufacture of better lines of furniture, and also cabinet work." Samples were sawed from this table, submitted to the United States Products

Laboratory, and there identified as belonging to the genus *Shorea*, which grows in the Philippine Islands and is not mahogany.

PAR. 25. Another manufacturing company of Jamestown, N. Y., manufactured mahogany furniture for 50 years, and built up a reputation on the sale of mahogany. It began to use so-called "Philippine mahogany" about 10 years ago. It sells products which it manufactures therefrom as products made of "solid mahogany."

PAR. 26. A number of manufacturers engaged for the last few years in manufacturing furniture of lauan or tanguile, called "Philippine mahogany", have built up their reputation during periods of 18 to 40 years by manufacturing and selling to retail dealers furniture made of mahogany wood. This so-called "Philippine mahogany" is at times represented to manufacturers as mahogany which comes from the Philippine Islands. Some manufacturers who have over long periods of years built up a reputation by manufacturing furniture made of mahogany wood are now substituting lauan and tanguile therefor in the manufacture of such furniture. The manufacturing company at Jamestown, N. Y., referred to in paragraph 23, is engaged in manufacturing tables exclusively of so-called "Philippine mahogany", which it has been using since 1919. These tables it advertises and sells as "solid mahogany." This company has been in business for 15 years, during 13 of which it built up a reputation by manufacturing furniture out of mahogany wood. So-called "Philippine mahogany" is regarded by this company to be as good as mahogany in so far as looks are concerned. The ordinary dealer to whom it sells furniture made of so-called "Philippine mahogany" is not aware that he is receiving a substitute for mahogany, and does not know the difference after it is stained and finished.

PAR. 27. An ultimate purchaser located at Portland, Oreg., was acquainted with the reputation of mahogany and the fact that it takes a high polish and increases in beauty with age; said purchaser ordered mahogany lumber from a lumber dealer and expected to receive the mahogany with which he was acquainted; said purchaser was sold and received lumber which was not mahogany, since it was not of the *Meliaceæ* or mahogany family, but was *Shorea*, and was wood of the type sold by respondent as "Philippine mahogany", and of the type represented by it to be mahogany.

PAR. 28. A furniture manufacturer of Belleville, Ill., made inquiry on or about May 1, 1925, for the purchase of mahogany lumber from a lumber company dealing in hardwoods in Kansas City, Mo.; said company agreed to sell said customer mahogany lumber and subsequently sold and delivered to said customer lumber which it designated "3-Star Philippine Mahogany"; said customer purchased and

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received said lumber, believing that he was purchasing and receiving the mahogany wood which he has known for over 25 years to be the wood with a reputation as a fine cabinet wood, which reputation has been maintained by mahogany for hundreds of years; thereafter said lumber warped and twisted contrary to said customer's former experience with mahogany wood. Said lumber was not mahogany since it was not of the Meliaceæ family but was Shorea, and was of the same type of wood sold by respondent as "Philippine Mahogany" and represented by it to be mahogany.

PAR. 29. Approximately 60 per cent of the retail lumber dealers in the United States had not heard the term "Philippine Mahogany" prior to the institution of this proceeding.

PAR. 30. Throughout the period covered in the complaint respondent has sold and is now selling lauan and tanguile to wholesale and retail dealers in lumber, manufacturers of furniture and others under the name and designation of Philippine Mahogany and causes said woods when so sold to be transported from its said place of business in San Francisco, Calif., to customers in other States of the United States.

PAR. 31. Lauan, tanguile and other Philippine hardwoods sold by respondent under the name Philippine mahogany are not what dealers, manufacturers and ultimate purchasers have in mind when they want mahogany, or what they believe is mahogany.

PAR. 32. The aforesaid representations made by respondent have had and now have the capacity and tendency to, and did and do, cause many dealers in furniture and allied commodities to purchase said wood products in the belief that the same are mahogany wood and to sell to retail dealers articles of furniture and allied commodities as and for articles of mahogany wood, and thus to cause said dealers and eventually the consuming public to purchase furniture and other articles made of said lumber and wood products in the belief that the articles so purchased are made of mahogany wood.

PAR. 33. Respondent has represented its woods as being mahogany and has induced others to represent respondent's woods and woods of the type sold by respondent and the products thereof as being mahogany. Respondent's representations have resulted in causing dealers, manufacturers and consumers to purchase respondent's woods and products made therefrom in the belief that such woods and such products were mahogany.

PAR. 34. Mahogany usually is sold to dealers in lumber and to manufacturers under names indicating origin, such as "Honduras Mahogany," "Mexican Mahogany," "Cuban Mahogany," etc. These prefixes in the form of geographical names are understood by the

trade and by the public to mean that the particular mahogany so designated comes from the country thus prefixed. Likewise, the term "Philippine Mahogany," in cases where the geographical prefix is retained, indicates to the average purchaser that the wood is mahogany grown in the Philippine Islands.

PAR. 35. Lauan and Tanguile, the woods sold by respondent as Philippine Mahogany, are sold for about two-thirds of the price at which mahogany is sold. Products made from lauan and tanguile, and sold as Mahogany, Genuine Mahogany, or Solid Mahogany are sold to retail dealers at the same or approximately the same prices as similar products made of mahogany.

PAR. 36. In thus selling its lauan, tanguile, etc., as Philippine Mahogany respondent not only practices deception on its immediate customers but places in their hands an unlawful instrument which enables them to increase their profits by reselling the misnamed lumber either as lumber or in manufactured products, thereby lessening the market for true mahogany and for honestly named Philippine hardwoods.

PAR. 37. There are among the competitors of respondent in interstate commerce many who deal in and sell lumber and other wood products consisting of mahogany who rightfully and truthfully represent their said lumber and wood products to be composed of mahogany wood, and who are in position to supply the demand for mahogany. The above-described acts and practices of the respondent tend to and do divert business from and otherwise prejudice said competitors.

PAR. 38. There are among the competitors of respondent in interstate commerce also several who deal in and sell lauan, tanguile and other Philippine hardwoods, and the manufactured products thereof, under appropriate native or trade names which do not import or imply that such commodities are mahogany or the products of mahogany. The above-described acts and practices of the respondent likewise tend to and do divert business from and otherwise prejudice said competitors.

PAR. 39. The sale of lauan, tanguile and other Philippine hardwoods by respondent to its customers, and by them to the purchasing public, under the name "Philippine Mahogany" or mahogany as hereinbefore described, has the tendency and capacity to and does deceive a substantial portion of the trade and the purchasing public in substantial numbers and induces the ordinary purchaser of products made from such woods to purchase said products as and for products made of mahogany wood, or in part of mahogany wood, to the injury and prejudice of the purchasing public and of honest competitors.

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CONCLUSION

The practices of said respondent, under the circumstances and conditions described in the foregoing findings, are unfair methods of competition in commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, and testimony and evidence submitted, in accordance with the stipulation in this proceeding, the trial examiner's report upon the facts and exceptions thereto, and briefs and oral argument, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

Now, therefore, it is ordered, That the respondent, Kirschmann Hardwood Co., its officers, directors, agents, employees, and successors, do cease and desist from advertising, describing or otherwise designating or selling or offering for sale under the term "Mahogany", "Philippine Mahogany", or any other term of similar import, woods known under the common or trade names, "red lauan", "white lauan", "tanguile", "narra", "apitong", "bataan", "lamao", "almon", "orion", "batang", "bagaac", "batak" and "balachacan", or any other wood, lumber or wood products, unless such wood or lumber or the wood from which such products are made, is derived from the trees of the Mahogany or Meliaceæ family.

It is further ordered, That the respondent, Kirschmann Hardwood Co., shall within 60 days after the service upon it of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

Memorandum by Chairman Hunt and Commissioners Myers and Nugent

Commissioner Humphrey before leaving on his vacation in June asked that his vote be recorded against findings and orders in these cases, and that should findings and orders be voted by the majority the same be accompanied by the same dissenting opinion which he

published when the original findings and orders were issued in July, 1926.

The findings now made differ in important particulars from those issued a year ago; hence the majority deem it appropriate to point out that certain observations in the dissenting opinion have little or no bearing on the present findings.

An apparent inconsistency in certain statements issued by the Forest Service of the Department of Agriculture, the only Government agency which undertakes to pass on such questions, supported in a measure the claim of the dissenting opinion when first issued that "Government authorities have ruled that the term 'Philippine Mahogany' is correct." Since then the Forest Service has declared unequivocally that it has not indorsed the name "Philippine Mahogany" and that "in the opinion of the Forest Service the name mahogany should be confined to the true mahoganies, which belong to the botanical genus 'Swietenia'". (Findings, par. 16.)

The ruling of the Interstate Commerce Commission mentioned in the dissent merely was to group these Philippine hardwoods with certain other woods for rate-making purpose, and was not an authoritative decision on wood nomenclature. The dissenting opinion takes no account of the really significant feature of the proceeding before the Interstate Commerce Commission, namely, the lengthy and detailed testimony of the president of one of these respondents that so-called "Philippine Mahogany" is in no sense comparable with true mahogany. Ample support for the Federal Trade Commission's findings as to difference between "Philippine Mahogany" and true mahogany in the uses to which they can be put, may be found in that testimony.

Discussion of the distinctions between mahogany and so-called "Philippine Mahogany" drawn by wood technologists and botanists lends animation to the dissenting opinion. These, however, are the controlling distinctions in commercial practice when there is a dispute as to whether wood supplied under contract is of the variety ordered. In so far as the dissenting opinion implies that under the orders of the Commission the Philippine woods must hereafter be called by their botanical names, it goes too far. With the unlimited opportunities of the alphabet at their disposal respondents could have adopted or coined names for their wood which did not trade on the reputation of another and different wood high in public favor. The fact is that competitors of these respondents have adopted and successfully employed names for these Philippine hardwoods which do not import or imply that their woods are mahogany.

It may be that the term mahogany has expanded somewhat since the first tree of that genus was discovered; it may even be that woods other than the Philippine hardwoods are being sold unfairly under that name. The woods sold by respondents, unlike the "African Mahogany" mentioned by the dissenting commissioner, are not even of the same tree family as mahogany; and it would seem that if a line is ever to be drawn this is the outside limit at which to draw it. If respondents may call lauan and tanguile mahogany, there is no reason why birch, which can be finished in excellent imitation of mahogany, may not also be marketed as mahogany.

Dissenting opinion of Commissioner Humphrey

I agree with the majority that the word "mahogany" should not be applied to the woods of that species from the Philippine Islands without the prefix "Philippine." This would be in accordance with the common usage, as in the trade it is customary to say "African Mahogany", "Honduras Mahogany", "Mexican Mahogany", "Cuban Mahogany", etc.

If the majority is consistent, it appears to me that it will at once proceed against the Mahogany Association for using the term "African Mahogany", as this wood, like the Philippine product, is not mahogany botanically.

GOVERNMENT AUTHORITIES HAVE RULED THAT THE TERM "PHILIPPINE MAHOGANY" IS CORRECT

The Hardwood Lumber Association, in 1916, classified the wood in controversy as "Philippine Mahogany". The Forest Service of the United States, when the matter was submitted to them in September, 1914, after a thorough consideration of it, indorsed the use of the term "Philippine Mahogany". The Department of Commerce has long used the term "Philippine Mahogany" in its reports. The Interstate Commerce Commission, in a controversy involving the question, after full hearing on the record and brief in the case of, *Indiana Quartered Oak Co. v. Atlantic City Ry. Co.*, approved the use of the term "Philippine Mahogany". The following quotations are from that decision:

The term "mahogany" applies to woods in two senses, the botanical sense and the commercial sense.

Mahogany in the commercial sense includes chiefly (a) Mexican and Cuban mahoganies, which are true mahoganies in the botanical sense and very valuable woods; (b) African mahogany, which is not a true mahogany in the botanical sense, but which grows large and clear, has a fine figure and is suit-

able for veneers; (c) baywood, which is a true mahogany in the botanical sense but, on account of its soft inferior quality, less valuable than other species; and (d) Philippine mahogany, which is not a true mahogany in the botanical sense. Philippine mahogany is classified by the United States Forestry Bureau as a commercial mahogany.

Apparently the majority is of the opinion that one of the chief functions of the Commission is to correct the opinions and rules of the other departments of the Government; more particularly to correct the errors made by the Agricultural Department, the Department of Justice, the Department of Commerce and the Interstate Commerce Commission. I am constrained to believe that Congress never intended the Federal Trade Commission to be a super court to reverse the rules of other departments, a power that the Supreme Court has decided neither it nor any other court possesses. This is expressly declared in many decisions. *Houston et al. v. St. Louis Independent Packing Co.*, 249 U. S. 479-487. *Brougham v. Blanton Mfg. Co.*, 249 U. S. 495-502.

NO PUBLIC INTEREST

No public interest appears in this case. The reason of complaint herein is not because the user does not know what he is buying, but because he does know. It is a controversy entirely between the Mahogany Association and the users of Philippine Mahogany. There is no substantial evidence in the record that any ultimate consumer of Philippine Mahogany has either been deceived or has complained that he has been defrauded.

The "milk in the coconut" in this controversy is that Philippine Mahogany, being a product of one of our insular possessions, is admitted into this country free of duty, and this fact together with the fact that it grows in considerable bodies instead of single trees, as other mahoganies, enables it to be sold in the United States at a lower price than the other mahoganies, and its qualities are so appealing that it is becoming a serious competitor of the Mahogany Association.

To prevent the use of the term "Philippine Mahogany" in this case will not protect the public, because it is not injured and has not complained. Only its competitor objects to its use. It will not be in the public interest because it will tend to give the Mahogany Association a monopoly of the American markets; will tend to increase the price of mahogany to the consumer, and would greatly injure the Philippine mahogany industry in this country, and more greatly injure it in the Philippine Islands.

There is another fact, that while it is not a legal reason, should have consideration as bearing upon the public interest, and that is, the Philippine mahogany industry both in this country and in the Philippines is conducted almost exclusively by Americans and is one of the chief products of the Philippine Islands, and one of the chief products making up the cargoes of American ships coming in from the Philippines to the United States.

WHAT IS MAHOGANY?

What is mahogany as applied to wood? Is it the wood from the tree botanically known as mahogany? It is. But to restrict it to such meaning is false and misleading. Mahogany wood or lumber, may or may not be produced from the tree botanically classified as mahogany. A tree is usually classified from its flower or seed botanically. A wood is classified according to its qualities—not from the botanical name of the tree from which it is produced. Botanically the wood in dispute is not mahogany—commercially it is. To apply its botanical classification to its commercial use is wholly misleading. Botanical classification has nothing whatever to do with the commercial classification of the wood in controversy. The botanical classification of this wood is not involved in the issues of this case, and the only result of discussing the botanical classification is to confuse and mislead. Below are cited some definitions as to what constitutes mahogany:

MAHOGANY

Botanically: A tropical American mellaceous tree (*Swietenia mahoganí*), with pinnate leaves and panicles of small greenish flowers.—Webster's Dictionary.

The valuable hardwood of this tree, used extensively for furniture and cabinet work.—Webster's Dictionary.

Commercially: Any of many trees related to, or resembling the mahogany; as in Australia, species of *Eucalyptus*; in India, various mellaceous trees of the general *Soymida*, *Chrkrassia*, and *Tona*; in Africa, *Khaya senegalensis*; in the United States, *Rhus integrifolia*, species of *Cercocarpus*, etc.—Webster's Dictionary (italics mine).

Applied chiefly with qualifications to various woods resembling mahogany and to the trees producing them.—New English Dictionary and History of 1903.

Mahogany, the popular name for timber of several unrelated trees, among which are various species of *Eucalyptus*.—Encyclopedia Americana, 1903 edition.

I would be unable to describe the wood without calling it mahogany, because it has the looks, the appearance, the grain, and all of the things that go to make up mahogany.—Witness Sands—Seattle, Rec. p. 15.

The furniture trade considers African, Mexican, Philippine, and Honduras all mahogany.—Witness, Rec. p. 284.

These authorities show the conclusive soundness of the rulings of the various departments of Government referred to herein.

DOES THE PHILIPPINE PRODUCT HAVE THE QUALITIES OF MAHOGANY?

Does the Philippine Mahogany, as Webster says, "resemble" mahogany? It seems to me that the Commission's attorneys are hardly in a position to deny that the Philippine Mahogany "resembles Mahogany", and has all its necessary qualities, in view of the fact that on page 17 of their brief, they refer to the testimony of several witnesses who were experts, that bought and sold Philippine Mahogany, thinking it was the mahogany of "our grandfathers", or as they term it, "the real mahogany". The examiner in paragraph 8 of his findings says:

The resemblance between the characteristics of genuine mahogany wood and the wood sold in interstate commerce as "Philippine Mahogany" are so close that it is difficult even for an expert wood technologist to distinguish between them without the aid of instruments usually employed by wood technologists in examining various wood specimens.

In the brief of the Commission, at page 10, it is said that the Horace E. Dodge Boat Works, at Detroit, Mich., represented their vessels made of the Philippine wood as constructed of the finest mahogany. These vessels were sold to their customers and there is no showing that any purchaser of these boats ever made any complaint or doubted the truth of these representations. In fact, there is no evidence, so far as any ultimate consumer is concerned, that when the seller represented his product as of the finest mahogany, that it was not strictly true.

It is useless to quote the evidence of various witnesses upon this proposition, for there is practically no dispute in the testimony of the witnesses on both sides of the controversy, that the statement in the examiner's findings above referred to is correct.

So it is practically admitted in this case that the wood in controversy has *every quality* necessary to justify it being classified *commercially as mahogany*. It might be added, as shown by the record, that some of the true mahogany, botanically, is soft and spongy and has little value commercially. If this wood was placed on the markets as mahogany, undoubtedly there would be a great protest both from the Mahogany Association and from the public, and justly so, because while such wood would be *mahogany botanically*, it would not be *mahogany commercially*, and its sale as such would be a fraud upon the public.

No witness has been produced that has testified or even intimated that he has ever bought furniture because he thought it was made of wood botanically mahogany. But the entire evidence is that all

purchasers bought what they thought contained the qualities of mahogany as defined commercially, and therefore were not deceived, and there is no showing in the record whatever *that any purchaser has complained that the respondents have deceived or defrauded them.*

The complaint is made that this wood sometimes contains wormholes, but this has nothing to do with the issue. This is a characteristic of all mahoganies in a more or less degree. Will it be contended that it is an unfair practice to call Hickory, or Oak, or Walnut, by their names because these woods sometime contain wormholes? This question is entirely a matter of grading the lumber and not of determining the kind. Certainly it can hardly be contended that a hole changes the character of the wood in which it is.

The exhibitions before the Commission of two selected doors, one of the so-called genuine Mahogany and the other of Philippine Mahogany, at least in so far as appearance is concerned, decisively confutes the evidence of all so-called experts as to the inferiority of the Philippine wood. In fact, the door of Philippine Mahogany was so much more beautifully figured and colored and in every appearance so much more desirable than the genuine, that most purchasers would prefer it. This exhibition conclusively demonstrated that the Philippine Mahogany possesses every desirable attribute that constitutes mahogany as defined by all the decisions and authorities.

THE NAME PHILIPPINE MAHOGANY NOT DECEPTIVE

The use of the words "Philippine Mahogany" is not deceptive. The trade and the people generally know exactly what they are buying when they buy Philippine Mahogany. This opposition to the use of the term comes, not because it is deceptive, but because it is not. We have again in this controversy the old story of the fight against the new. Much has been said about the mahogany of our fathers—more forceful than weighty. The revered mahoganies of to-day are the despised mahoganies of yesterday. The history of the controversy is that mahogany was at first limited to the lumber produced from one tree only. Then, as this supply grew less, a new mahogany appeared. It was rejected at first but gradually came to be recognized; and so, in the future, the Philippine Mahogany will become the adored wood of our "grandfathers", and probably in a fight to shut out some new contender for public favor.

It is impossible to describe the wood in controversy so that its qualities and value will be properly understood by the public, without

the use of the word mahogany. To insist that it should be called Dipterocarpaceae, in order that the general public might not be deceived, would be just as absurd as to insist that the present monarch of England should be called, George Frederick Ernest Albert Windsor, instead of King George, in order that the people of England might not be misled as to the person referred to.

CLASSIFICATION OF WOODS BOTANICALLY MISLEADING AND DANGEROUS

If we are to lay down the rule that it is false and misleading to describe woods commercially other than what they are botanically, we will injure, if not destroy, one of the greatest industries in this country.

One of the finest woods in the world, that furnishes perhaps more of the timbers used in construction to-day than any other is the Douglas Fir of the Pacific Northwest. It is known by this name throughout the world and by this name its qualities are well understood. Botanically this wood that enters so largely into the commercial life of a nation is a false hemlock. There is a widespread prejudice against hemlock, because of the qualities of that wood in the East. For the lumber producers of the Northwest to be compelled to mark their product under its botanical name—False Hemlock, would be to work incalculable injury to the industry. More than 85 per cent of the wood shingles in the United States are the Red Cedar Shingles of the Pacific Northwest. The quality is well known and understood by the trade and people generally by the term "red cedar." Botanically it is not cedar but juniper. It would cost millions of dollars to both the shingle industry and the Douglas Fir industry to educate the people to where they would know what was meant by the botanical terms of these woods. In the East, one of the great lumber trees of commerce is the poplar. Botanically it is tulip.

To use the terms, Philippine Mahogany, Douglas Fir, Red Cedar, and Poplar is to correctly define these woods commercially, and gives to the dealers and to the public generally the correct idea of their qualities and value. If you describe them botanically, it is safe to say that not 5,000 people in the United States would know what was meant. I can think of no proposition more absurd than to compel the use of the botanical names of these woods upon the theory that it will protect the public from false and misleading statements. Why should we use the restricted and scientific and highly technical name known by a few, and refuse to use the common, ordinary name, understood by all.

WHY THE PHILIPPINE MAHOGANY IS CHEAPER

The reason Philippine Mahogany is cheaper is not because it is less desirable, for it has all the qualities, and in its higher grades it is equal in beauty, if it does not surpass, the finest other mahogany woods.

Philippine Mahogany is not taking a large portion of the market from the other mahoganies because of any deception, but because of its merits. As already stated, the reason that it is cheaper is because it comes in duty free and because it is more easily logged than other mahoganies.

I must enter my protest against the decision of the majority in the overruling of the classification of the Hardwood Association, the decisions of the Department of Agriculture, the Department of Commerce and the Interstate Commerce Commission, and action, I believe, will result in the overturning of the common usage and reversing common understanding; that will disrupt a great industry; that will establish a precedent that if followed will paralyze the lumber industry of the country; that will increase the price of mahogany and create a monopoly in the mahogany trade; that will injure the public and benefit only the Mahogany Association. Such decision in my judgment can be based only on the technical and stilted opinions of schooled but unlearned self-styled experts, who would, if consistent, insist that potatoes must be sold only as tobacco, because botanically they are of the same family, lest some dear old college professor might buy a package of cigarettes instead of a bag of "spuds."

The contention of the majority here is that if any person of common understanding wishes to buy this Philippine wood, that has all the beauty and durability of mahogany—in fact, all the best characteristics of mahogany—that it can not be described to him so as to reach the common understanding, by calling it "Philippine Mahogany", but in order to keep him from being deceived and so that he may know exactly what he is getting, he must be told that it is either Lauan, Tanguile, Almon, Batan, Apitong, Lamao, Orion, Abatang, Bagaac, Batak, or Balachacan. This proposition, it seems to me, would be highly complimented by characterizing it as absurdly ludicrous.

The majority lay down the proposition that the buyer must be told the truth—a perfectly correct one and one that I indorse, but when you chase this common sense idea into the clouds of scientific nomenclature, until not one person in a million, without consulting an encyclopedia, a botanist, and a chemist, would know whether a word used to describe the wood in a kitchen chair is the name of a seasick

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remedy, a new planet, or a divorcee screen star, it seems to me that the proposition in some slight degree "recoils upon itself."

The sum of the Commission's case is that the purchaser of this wonderful and beautiful wood will be deceived and defrauded unless he is told that it is *Dipterocarpaceæ*, a proposition so plain that only the intelligent will dispute it.

MEMORANDUM

The Commission as of the same date, also made similar findings and orders, Commissioner Humphrey dissenting as above set forth, in the following cases (in which complaints issued on June 3, and on June 8, 1925, respectively):

HAMMOND LUMBER Co. (Docket 1324.)

Appearances: *Mr. M. Markham Flannery* and *Mr. Stephen C. Van Fleet* for the Commission.

Mr. R. L. Horton, of Los Angeles, Calif., and *Forbes & Daniels*, of Washington, D. C., for respondent.

Major F. G. Munson, Judge Advocate, United States Army, of Washington, D. C., for Philippine Government, intervenor.

THE ROBERT DOLLAR Co. (Docket 1325.)

Appearances: *Mr. M. Markham Flannery* and *Mr. Stephen C. Van Fleet* for the Commission.

Forbes & Daniels, of Washington, D. C., for respondent.

Major F. G. Munson, Judge Advocate, United States Army, of Washington, D. C., for Philippine Government, intervenor.

IN THE MATTER OF
JONES HARDWOOD COMPANY¹

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1332. Complaint, July 11, 1925—Decision, Aug. 16, 1927

Where the wood mahogany had long had a merited and enduring reputation associated with the word, was usually sold to lumber dealers and manufacturers under such names indicating origin as "Honduras Mahogany", "Mexican Mahogany", etc., and was usually dealt in in the retail furniture trade without such prefixes, and furniture and other articles were customarily bought, dealt in, and purchased by furniture buyers for large retail stores, by retail dealers, and by the public, in reliance upon representations by the manufacturers and dealers respectively as to the composition thereof, and whether or not mahogany; and thereafter a corporation engaged in the sale of hardwood lumber and hardwood products to wholesale and retail lumber dealers, manufacturers of furniture, and others,

Represented certain Philippine hardwoods as "Philippine Mahogany" and induced others so to represent the same and products thereof, and so sold the same to furniture manufacturers, dealers and others, by whom such hardwoods or the products manufactured therefrom were resold to retailers and others as "Mahogany", "Genuine Mahogany" or "Solid Mahogany", and were in turn by them resold to the public as and for such products, the fact being that the aforesaid woods (1) were not mahogany, either botanically or otherwise, (2) lacked many of the characteristics and virtues possessed by mahogany and were thereby unsuited for a variety of uses employed for mahogany, (3) were sold to the manufacturer for about two-thirds of the price of genuine mahogany, and were by the latter resold as manufactured products, to dealers, at the same prices prevailing for mahogany products, (4) had long been known and traded in in the Philippines and in the United States under their native and trade names, "lauan" and "tanguile", and also under other native names such as "red lauan", "bataan," etc., (5) were imported under such names as to the greater proportion thereof imported, (6) were so dealt in in the United States by many of the importers and a substantial number of the lumber dealers, (7) were not what dealers, manufacturers, and ultimate purchasers had in mind when they wanted mahogany, or what they believed to be mahogany, (8) were obtained by it, as to a part thereof, under contracts with importers under the native or trade names "lauan" and "tanguile", (9) were named and sold as Philippine mahogany in the face of official disapproval and practice, and without the sanction of local custom, and, (10), that approximately 60 per cent of the retail lumber dealers in the United States, and ultimate purchasers of furniture and other products, with rare exceptions, had never heard the term, believing it in such instances to mean mahogany, and not a substitute;

¹ See footnote to *Powé case*, p. 248.