

Syllabus

IN THE MATTER OF
FALL RIVER WHOLESALE GROCERS' ASSOCIATION
ET AL.

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

Docket 2677. Complaint, Jan. 4, 1936—Decision, Dec. 9, 1936.

Where a wholesale grocers association, and the members thereof, serving a trade area in certain States contiguous to a Massachusetts city; in pursuance of a policy, agreed upon and adopted by such members, of refusing to deal with manufacturers of grocery products who had sold, or sold, their products to retailers in the region in question—

- (a) Informed manufacturers of policy of such association and its members, and threatened to refuse, and refused, to purchase from such manufacturers as failed or refused to comply with their wishes that they do not distribute their products to retailers thereof;
- (b) Placed on the unfair list of the association, for selling to large retailers in region in question, name of a large milk product manufacturer, and warned its members to cease handling products thereof under penalty of forfeiting their association deposits, and advised manufacturer of such action and that association members would no longer be allowed to do business with it;
- (c) Issued and distributed a letter announcing that its members had "decided definitely to cooperate only with those producers, packers, or manufacturers who will confine themselves to selling their merchandise to wholesale grocers," and requested that the recipients thereof advise as to whether or not they would cooperate in the matter;
- (d) Reached an agreement between their said wholesalers' association and that of the retail grocers in the region in question, working to the prevention and restraint of purchases by retailers direct from manufacturers, and threatened to suspend any wholesaler member who refused to sign and subscribe thereto; and
- (e) Took, at different times, course of action similar to that hereinabove indicated against large sugar and coffee manufacturers;

With result that manufacturers were coerced into refusing to sell their products direct to retailers, including large retailer competitors of association members, sales and distribution by manufacturers to retailers in region in question were restrained and prevented, and interstate commerce in groceries was unduly restrained and hindered, and there was an undue tendency to substantially lessen, restrict, and suppress competition in interstate sale of such products therein:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. John J. Keenan*, trial examiner.

Mr. Daniel J. Murphy for the Commission.

Mr. Isador S. Levin, of Fall River, Mass., for respondents.

Complaint

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COMPLAINT

Pursuant to 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," the Federal Trade Commission, having reason to believe that each and all of the parties named in the caption hereof have been and now are using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges in that respect as follows:

PARAGRAPH 1. Respondent Fall River Wholesale Grocers' Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, for the asserted purpose of furthering harmonious relations between the wholesale and the retail grocery dealers of Fall River in said State, and has its principal place of business at said Fall River. Said respondent had and has as its particular avowed purpose to cooperate with the independent retail grocery stores in said Fall River and contiguous region in offering special sales and inducements to customers in an effort to meet the competition of the chain grocery stores. For brevity and convenience this respondent will be hereinafter designated as the "Wholesalers' Association."

Each of the respondents American Wholesale Grocery Company, Allen Slade & Company, Chabot Brothers, and Portuguese Wholesale Grocery Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts.

Respondents Abraham I. Yamins and Samuel Levin are copartners doing business in the name of New England Wholesale Grocery Company; and respondents Murray S. Olinick and George Feinberg are copartners doing business in the name of Economy Wholesale Grocery Company.

Respondent Morris Horovitz is an individual trading as Fall River Paper & Supply Company; respondent Joseph Horovitz is an individual trading as Joseph Horovitz & Company; and respondent Philip J. Roy is an individual trading as Roy Paper Company.

Each of said respondents has its, their and his principal place of business in said city of Fall River, State of Massachusetts, and each of them except the Wholesalers' Association is engaged in the business of selling and distributing food and grocery products at wholesale in the region of said Fall River. Said Fall River region comprises not only said city of Fall River but also the trade area contiguous to it in the State of Massachusetts and also in the State of Rhode Island.

Each of said corporations, partnerships, and individuals was at all the times hereinafter mentioned and is a member of said Fall River Wholesale Grocers' Association for the purpose of promoting and protecting its, their and his common interests and business affairs, and said respondents will for brevity and convenience be hereinafter designated as "member respondents" when differentiation of them from respondent Wholesalers' Association is necessary. Said member respondents purchased and purchase in interstate commerce the food and grocery products sold and distributed by them in the said Fall River region from manufacturers and producers in other States than the State of Massachusetts and which products so purchased were and are shipped from such other States into the State of Massachusetts to said member respondents and were and are there sold and distributed by each of said member respondents to retailers in the States of Massachusetts and Rhode Island.

Respondent Wholesalers' Association is an organization which has provided and does provide a means or channel for its members acting in concert and in the name of said association to further their common interests in their businesses mentioned above, and each of the member respondents utilizes it for its, their or his private purposes. The acts of said association, therefore, have represented and do represent and have been and now are the acts of such members resulting from agreements, express or implied, between and among, and concerted action and conspiracy of all of, said respondents in their said common interests and in the furtherance of their said private purposes.

PAR. 2. In the course and conduct of the business and activities of respondent Wholesalers' Association and of the concerted action and conspiracy above stated of all the respondents, and at various times during the past three years, respondent Wholesalers' Association in behalf of itself and of each and all of said member respondents, and in pursuance of a policy agreed upon and adopted by said member respondents of refusing to deal with manufacturers of food and grocery products who have sold or sell such products to retailers thereof in the said Fall River region, or to wholesalers of such products in said region who are not members of respondent Wholesalers' Association, by the use of unlawful threats, intimidations, and boycotts has restrained and prevented and does restrain and prevent various manufacturers of such products selling and distributing the same in interstate commerce from making sales and distributions thereof in said Fall River region to any individual, partnership, or corporation in said region engaged in the sale and distribution of such products other than the member respondents above named, and specifically has by such unlawful means restrained and pre-

vented and does restrain and prevent and has sought and does seek to restrain and prevent all such sales and distributions in said Fall River region by such manufacturers to retailers of such products and to wholesalers thereof who are not members of respondent Wholesalers' Association; and solely as a result of such unlawful threats, intimidations, and boycotts, various manufacturers of such products selling and distributing same in interstate commerce who have been ready, willing, and able to make sales and distributions thereof in said Fall River region to retailers of such products and to wholesalers thereof who are not members of respondent Wholesalers' Association, have been and are restrained and prevented from making any sales and distributions in interstate commerce of such products to certain of said retailers and to certain of said wholesalers who are not members of respondent Wholesalers' Association, and in some instances where some restricted sales and distributions in interstate commerce have been made to certain other of said retailers and of said wholesalers who are not members of respondent Wholesalers' Association by certain manufacturers, the member respondents have by agreement and concerted action among themselves and with respondent Wholesalers' Association discontinued making purchases in interstate commerce from such manufacturers of such products theretofore purchased in interstate commerce by them from such manufacturers and have thereupon and thereafter declined and refused to make any purchases whatever of such products from such manufacturers while and so long as such manufacturers continued to make sales and distributions in said Fall River region of such products to such retailers or to such wholesalers who are not members of respondent Wholesalers' Association.

In the course and conduct of the business and activities of respondent Wholesalers' Association and of the concerted action and conspiracy above stated of all the respondents, certain manufacturers of food and grocery products sold and distributed in interstate commerce have been compelled by respondents to accept pooled orders for such products for shipment in carload lots in order that the member respondents might obtain the advantage of the lower freight rate and incidental expenses applicable to carload shipments when the total of such pooled orders has been less than a carload lot, have been compelled in connection with such shipments to carry for their own account the unsold residuum of such carload shipments, but have been restrained and prevented in such instances from selling any part of such residuum in said Fall River region to retailers of such products or to wholesalers thereof who are not members of respondent Wholesalers' Association and instead have been required and com-

pelled by boycotts and threats of boycott and other unlawful means to store said residuum in the custody of some one of the member respondents until such residuum has been purchased and absorbed by the member respondents in the due course of their businesses. In consequence of such action on the part of respondent Wholesalers' Association and of the member respondents, such manufacturers were obliged to and did actually discontinue selling their said products to such wholesalers who were not members of respondent Wholesalers' Association when and although said non-member wholesalers were ready, willing, and able to purchase said products.

In the course and conduct of the business and activities of the respondent American Wholesale Grocery Company and in furtherance of the concerted action and conspiracy above stated of all the respondents, said respondent threatened to boycott a certain manufacturer by refusal to continue handling its product if said manufacturer delivered to a public warehouse in Fall River the unsold residuum of its shipment in pooled cars.

In the course and conduct of the business and activities of respondent Wholesalers' Association and of the concerted action and conspiracy above stated of all the respondents, the member respondents in their status as members of the Wholesalers' Association frequently held and hold general and special meetings for the interchange of information concerning the furtherance of their efforts to prevent and restrain sales by manufacturers to retailers and to wholesalers who are not members of the respondent Wholesalers' Association, concerning any sales of such character that are made by manufacturers, and concerning the action necessary to be taken to prevent and restrain further sales of such character and to effectuate their policy of preventing and restraining such transactions; and thereupon all of said respondents have concerted and agreed and do concert and agree upon a course of common action to that end, consisting of bringing pressure to bear upon any such manufacturer to cease making such sales and of attempting by personal intimidation, threats of boycott and actual boycott to coerce such manufacturer to refrain thereafter from making any such sales and from supplying retail dealers with such products direct and from supplying wholesale dealers who are not members of the Wholesalers' Association with such products out of pooled car shipments. Respondents used and use other concerted and coercive means to effectuate their said conspiracy to restrain and prevent such sales.

In the course and conduct of the business and activities of the respondent Wholesalers' Association and of the concerted action and conspiracy above stated of all the respondents, an agreement was

reached between respondent Wholesalers' Association and the association of retail grocers in the Fall River region looking to the prevention and restraint of purchases by retailers direct from manufacturers, and the respondent Wholesalers' Association threatened to suspend or expel any member refusing to sign and subscribe to such agreement.

In the course and conduct of the business and activities of respondent Wholesalers' Association and of the concerted action and conspiracy above stated of all the respondents, respondent Wholesalers' Association actually placed upon its "unfair list" for boycott a particular manufacturer who had not conformed to the demands and requirements of the respondent Wholesalers' Association above alleged and obliged all of its members to cease handling the products of said manufacturer on penalty of forfeiture of deposits of said members held by respondent Wholesalers' Association as a guaranty of their conformity to its requirements, and said manufacturer was notified by said respondent Wholesalers' Association that it had been placed on said respondent's "unfair list" and that Association members would discontinue handling the merchandise of said manufacturer "because of unfair and unethical business methods" and respondent Wholesalers' Association also at the same time voted that similar action would be taken in respect of certain other manufacturers if said manufacturers did not cease selling their products direct to retailers. Solely in consequence of such action of respondent Wholesalers' Association, the manufacturer first above referred to discontinued selling its products direct to large retailers in the Fall River region and continued under such restraint for a considerable period of time. Solely in consequence of such action by respondent Wholesalers' Association all of the member respondents except the New England Wholesale Grocery Company ceased making purchases from one of the other manufacturers above referred to.

PAR. 3. The above alleged acts and things done by respondents, including specifically among them the blacklisting and boycotting of manufacturers, the threatening of boycott and the conspiracy to do those acts and things, have tended and do tend and will continue to tend unduly and unreasonably to restrain trade and commerce between and among the several States of the United States, in that they have tended and do tend to close certain of the outlets within the States of Massachusetts and Rhode Island for the direct and immediate sale by manufacturers and producers in other States of products shipped by them into said State of Massachusetts, to deprive manufacturers and producers in other States of the right and opportunity freely to trade with and make sales to all wholesalers and

retailers and prospective purchasers in said State of Massachusetts and to deprive certain wholesalers and retailers and prospective purchasers in said State of Massachusetts of the right and opportunity freely to trade with and make purchases and obtain shipments from manufacturers and producers in other States, and to deprive such last mentioned wholesalers and retailers and prospective purchasers in said State of Massachusetts of the right and opportunity and advantage secured and exercised and enjoyed by respondents in respect of the lower freight rates and incidental expenses on shipments from manufacturers in other States in carload lots or pooled cars and thereby depriving such last mentioned wholesalers and retailers in the State of Massachusetts from passing on to the purchasing and consuming public in said Fall River region the advantages and savings of such lower freight rates and incidental expenses and other competitive benefits flowing from such lower freight rates; and have also tended and do tend by such limitation and restriction of the total number of wholesalers and retailers in the Fall River region securing and exercising and enjoying such advantage of lower freight rates to limit and restrict the benefits to said purchasing and consuming public flowing therefrom. Such acts and things substantially and unduly and unreasonably lessen, restrain, and suppress free and open competition in the sale and distribution in interstate commerce of said food and grocery products in the said Fall River region, obstruct the free and natural flow of interstate commerce in said region and deny to consumers of said products in said Fall River region the advantages in price and otherwise which they would obtain from the free and natural flow of commerce in said products under conditions of free and unobstructed competition. Consequently said acts have been and are and will continue to be to the prejudice and injury of the public and of the competitors of respondents and of the manufacturers and producers both those who do and particularly those who do not, comply with and adhere to the limitations of trade and commerce imposed by the respondents above mentioned.

PAR. 4. There were and are among the competitors of respondent in the said Fall River region other wholesalers who are not members of respondent Wholesalers' Association who would freely purchase from manufacturers in other states similar and substantially identical products to the products hereinabove mentioned as being purchased by respondents, as well as retailers who would also freely make such purchases, and to which said other wholesalers and said retailers said manufacturers would freely sell such similar and substantially identical products and to whom said manufacturers would freely make shipments in pooled cars as had been and are made to the member

Findings

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respondents, were it not for the aforesaid acts and restraints of respondents above mentioned. Such acts and things done by respondents substantially and unduly and unreasonably lessen, restrain and suppress free and open competition in the sale and distribution in interstate commerce of said food and grocery products in said Fall River region, obstruct the free and natural flow of interstate commerce in said region and deny to said other wholesalers, to said retailers and to the public in said Fall River region the advantages in price and otherwise which they would obtain from the free and natural flow of commerce in said products under conditions of free and unobstructed competition and have diverted and do divert and have tended and do tend to divert business from said other wholesalers. Consequently said acts have been and are and will continue to be to the prejudice and injury of said competitors of respondents. The member respondents would also, except for the acts and things done by them in pursuance of their concerted action and agreements and conspiracy as hereinabove stated, be naturally and normally in competition with each other in price and otherwise; and consequently said acts have been and are and will continue to be to the prejudice and injury of said member respondents as competitors each with the others.

PAR. 5. The above acts and things done and caused to be done by the respondents were and are each and all to the prejudice of the public and of respondents' competitors and constitute unfair methods of competition in commerce within the meaning and intent of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to 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," the Federal Trade Commission on January 4, 1936, issued and served its complaint in this proceeding upon the respondents, Fall River Wholesale Grocers' Assn. et al., charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer, the Commission, by order entered herein, granted respondents' motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true with certain reservation stated therein, to wit: the respondents would not admit that they interfered with the

sources of supply of wholesale grocers as alleged in the complaint, and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, briefs and oral arguments of counsel having been waived, and the Commission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Fall River Wholesale Grocers' Association, is a voluntary association with its principal place of business located at Fall River, Mass. Said respondent association membership consists of the following respondent corporations, copartnerships, and individuals:

Allen Slade and Company, a corporation organized under the laws of the Commonwealth of Massachusetts;

American Wholesale Grocery Company, a corporation organized under the laws of the Commonwealth of Massachusetts;

Chabot Brothers, a corporation organized under the laws of the Commonwealth of Massachusetts;

Fall River Economy Wholesale Grocery Company, a corporation organized under the laws of the Commonwealth of Massachusetts;

Fall River Paper and Supply Company, a corporation organized under the laws of the Commonwealth of Massachusetts;

Joseph Horvitz, an individual trading under the name and style of Joseph Horvitz and Company;

Abraham I. Yamins and Samuel Levin, copartners trading under the firm name and style of New England Wholesale Grocery Company;

Portuguez Wholesale Grocery Company, a corporation organized under the laws of the Commonwealth of Massachusetts;

Philip J. Roy, an individual trading under the name and style of Roy Paper Company.

Each of the above named corporations, copartnerships, and individuals have been engaged for some time past, as wholesalers in groceries and in the sale and distribution of said products in the region of the city of Fall River, State of Massachusetts. Said Fall River region comprises not only said city of Fall River, but also the trade area contiguous to it in the State of Massachusetts, and also in

the State of Rhode Island. Said member respondents purchase said groceries sold and distributed by them in the said Fall River region from manufacturers and producers in other States than the State of Massachusetts, and which products so purchased are shipped from such other States into the State of Massachusetts to said member respondents, and are then sold and distributed by each of said member respondents to retailers in the States of Massachusetts and Rhode Island.

In the course and conduct of their respective businesses, said corporations, copartnerships, and individuals were and are in competition with other corporations, copartnerships, and individuals, who are not members of respondent Wholesalers Associations, but who were likewise engaged in the sale and distribution in interstate commerce of similar products in competition with such members.

The respondent Wholesalers Association and its members as a result of agreements, express or implied, have acted in concert and conspiracy between and among themselves for the advancement of their common interests and private purposes.

PAR. 2. In the course and conduct of the business and activities of respondent Wholesalers Association and of the concerted action and conspiracy above stated of all the respondents, and at various times during the past three years, respondent Wholesalers Association in behalf of itself and of each and all of said member respondents, and in pursuance of a policy agreed upon and adopted by said member respondents of refusing to deal with manufacturers of grocery products who have sold or sell such products to retailers thereof in the said Fall River region, informed various such manufacturers of the policy of the respondent association and its members that they should not distribute said grocery products to retailers of such products and threatened that such members would and they did refuse to purchase from manufacturers who failed or refused to comply with their wishes in that respect. Respondent association and its members by the use of such unlawful threats and boycotts have restrained and prevented sales and distributions in the said Fall River region by such manufacturers to retailers of such products. Carrying out such policy, said association wrote to a large manufacturer of milk products that surplus evaporated milk shipped in pool cars must not be delivered by it to a public warehouse and that, if this were done, its members would refuse to deal further in its products. The company addressed, in order to save itself from loss of business, was obliged to and did discontinue selling its products to two competitors of said members of said respondent Wholesalers Association, and to warehouse surplus milk with a member thereof.

On February 27, 1935, at a meeting of said respondent Wholesalers Association, the manufacturer referred to was placed on the association's unfair list on account of its selling to large retailers in the Fall River region and all members of the association were warned to cease handling said company's products on penalty of forfeiting their deposits made with said association for the purpose of securing their compliance with its rules. The association also informed the manufacturer of this action, and that its members would no longer be allowed to do any business with it. Said manufacturer was thereupon obliged to discontinue selling its products to several large retailers, who were competitors of the association's members, and said manufacturer requested that its name be removed from the association's unfair list. On May 26, 1936, the association issued and distributed a letter announcing that its members had "decided definitely to cooperate only with those producers, packers, or manufacturers who will confine themselves to selling their merchandise to wholesale grocers," and asked for replies showing whether the concerns so addressed would or would not cooperate in the matter.

In the course of the activities of the respondents as above stated, an agreement was reached between respondent Wholesalers Association and the Association of Retail Grocers in the Fall River region working to the prevention and restraint of purchases by retailers direct from manufacturers, and the respondent Wholesalers Association threatened to suspend any member refusing to sign and subscribe to such agreement.

At different times, similar course of action was taken against large manufacturers of sugar and of coffee with the result that manufacturers were coerced into refusing to sell their products direct to retailers, whereby interstate commerce in groceries was unduly restrained and hindered.

PAR. 3. The results of the acts of the said respondents, as herein before set out in paragraph 2, have been to unduly tend to substantially lessen, restrict, and suppress competition in the interstate sale of grocery products particularly in the above described Fall River region.

CONCLUSION

The aforesaid acts and practices of the respondents, Fall River Wholesale Grocers' Assn. et al., are to the prejudice of the public and of respondents' competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer filed herein on November 10, 1936, by respondents admitting all the material allegations of the complaint to be true with a certain reservation stated therein, to wit: the respondents would not admit that they interfered with the sources of supply of wholesale grocers as alleged in the complaint, and waiving the taking of further evidence and all other intervening procedure, and the Commission having made its findings as to the facts and its conclusion that said respondents have 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."

It is ordered, That the respondents, Fall River Wholesale Grocers' Assn. and Allen Slade & Company, American Wholesale Grocery Co., Chabot Brothers, Fall River Economy Wholesale Grocery Co., Fall River Paper & Supply Co., Joseph Horvitz and Company, New England Wholesale Grocery Company, Portuguese Wholesale Grocery Company, and Roy Paper Company, their officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of grocery products in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

(1) Adopting, enforcing or attempting to put into effect any understanding, agreement, combination, or conspiracy among and between themselves to restrict, restrain, suppress, and eliminate competition in the sale and distribution of grocery products in interstate commerce, by interfering with the source of supply of retailers;

(2) Persuading, threatening or coercing manufacturers to distribute their products only through wholesalers, and to cease and refrain from dealing with retailers;

(3) Any other similar means or methods of coercing manufacturers into distributing their products through wholesalers exclusively.

It is further ordered, That within 60 days from the date of the service of this order upon said respondents that they file with the Commission a report in writing, setting forth in detail the manner and form in which this order has been complied with.

Syllabus

IN THE MATTER OF
GALION METALLIC VAULT COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914, AND OF SEC. 3 OF TITLE I OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933¹

Docket 2317. Complaint, Mar. 6, 1935—Decision, Dec. 11, 1936.

Where a corporation engaged in the manufacture of air seal and of mechanically sealed and closing burial vaults, made of one of the highest grade and quality of non-ferrous metals obtainable for such purpose and also of a non-ferrous metal which would corrode in some soils of the United States, and in the sale of said products to jobbers, funeral directors, and undertakers, in substantial competition with those engaged in the sale and distribution of metal, stone, concrete, and other burial vaults in and between the various States—

(a) Represented, in certificates of warranty and in advertising the same in periodicals of wide interstate circulation and in booklets, circulars, pamphlets, letters, and through photographs and testimonials, and in other advertising media, circulated among its customers and prospective customers in the several States, that its said air seal vaults were waterproof and airtight at time of interment and after, and that its said vaults, generally were made of rust resisting metal and would endure as waterproof under all conditions for fifty years, and afforded absolute protection against water and other external elements, buried, for twenty-five or fifty years or more, and that its said vaults gave insurance that the processes of change would be undefiled by the action of water, earth, or other foreign elements, gave permanent burial protection and greater resistance than the bronze of the ancients, and were practically indestructible and would not crush in; and

(b) Made use of certificates of warranty, in connection with the sale and offer of its said vaults, which guaranteed against damage to the contents thereof through water or other elements admitted because of the failure of the same due to rust or corrosion, and undertook, in such event, to replace such vaults without cost;

The facts being that, while its said vaults were made with great care by skilled workmen, and the ferrous metal of which made was one of the highest grades and quality obtainable for such purpose, impervious and impenetrable by air, moisture, and living organisms within the earth during the life of the metal, it was not rust or corrosion-proof to the extent that it would never rust or corrode after burial, and, once rusted or corroded to a certain extent during a period of years, it would, like all other material, crumble and disintegrate; non-ferrous metal, corrosive in some soils as aforesaid, was impervious to water only until penetration through corrosion or other causes; corrosive qualities, present in all soils, vary greatly, so that, while in many sections throughout the United States in which soil corrosion is not a problem a twelve-gauge metal vault, buried,

¹ Count Two of the complaint alleging violation of the National Industrial Recovery Act dismissed November 9, 1935.