Office - Supreme Court, U.S.
FILED
OCT 19 1956
JOHN T. FEY, Clerk

No. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Appellant*,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEE E. I. DU PONT DE NEMOURS AND COMPANY

JOHN LORD O'BRIAN
HUGH B. COX
CHARLES A. HORSKY
DANIEL M. GRIBBON
701 Union Trust Building
Washington 5, D. C.
Attorneys for Appellee
E. I. du Pont de Nemours and Company

Of Counsel:
COVINGTON & BURLING

INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 3

UNITED STATES OF AMERICA, *Appellant*,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEE E. I. DU PONT DE NEMOURS AND COMPANY

OPINION BELOW

The opinion of the District Court dismissing the complaint (R. 289-466), is reported at 126 F. Supp. 235.

JURISDICTION

This action was brought under Section 4 of the Act of July 2, 1890 (26 Stat. 209), as amended (U. S. C., Title 15, Sec. 4), and Section 15 of the Act of October 15, 1914 (38 Stat. 730), as amended (U. S. C., Title 15, Sec. 25). The judgment of the District Court (R. 466-467) was

entered on December 9, 1954, and notice of appeal was filed on February 4, 1955 (R. 467-474). Probable jurisdiction was noted on October 10, 1955 (R. 474). Jurisdiction of this Court to review the judgment below on direct appeal is invoked under Section 2 of the Act of February 11, 1903 (32 Stat. 823) as amended (U. S. C., Title 15, Sec. 29).

STATUTES INVOLVED

The pertinent provisions of Sections 1 and 2 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209, U. S. C., Title 15, Sec. 1, 2) are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * * .
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * ."

The pertinent provisions of Section 7 of the Clayton Act as it read at the date of the filing of the complaint (Act of October 15, 1914, 38 Stat. 730, U. S. C., (1946 ed.), Title 15, Sec. 18) are as follows:

> "Sec. 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the

acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

* * * * * * * * *

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about the substantial lessening of competition."

QUESTIONS PRESENTED

The District Court, after a full trial, found that du Pont does not enjoy a non-competitive, preferential position in General Motors' trade; it found that such purchases as General Motors has made from du Pont have been made on a competitive basis and were not dominated, dictated, controlled or influenced by du Pont's stock interest in General Motors; and it found that the arrangements made by General Motors with du Pont for the production of tetraethyl lead and the refrigerant "Freon" were made by General Motors in the free exercise of its own business judgment and were not dominated, dictated, controlled or influenced by du Pont's stock ownership.

The questions presented on this appeal are whether these findings of fact are supported by the evidence and whether there has been any violation of Sections 1 or 2 of the Sherman Act or Section 7 of the Clayton Act.

STATEMENT

The Proceedings in the District Court

This suit was brought in June 1949 by the United States in the United States District Court for the Northern District of Illinois under Section 4 of the Sherman Act and Section 15 of the Clayton Act. The Amended Complaint upon

which trial was had below[1] charged that beginning in 1915 three individuals—Pierre, Irenee and Lammot du Pont—combined and conspired to cause three manufacturing corporations—du Pont, General Motors and U. S. Rubber—to become parties to an agreement, the essential terms of which required each of these corporations to purchase from the other two "substantially all" of its requirements of products which the other two produced or might produce, and which required each to refrain from encroaching upon the product areas of the others (Amended Complaint, Par. 30(b), (c), R. 220-222). The Amended Complaint further charged that pursuant to the alleged conspiracy du Pont acquired in 1917, and continues to hold, sufficient of the common stock of General Motors to control it (*id.*, Par. 30(a)(3), R. 220). A number of other defendants, including Christiana Securities Company and Delaware Realty and Investment Company, numerous members of the du Pont family, and the Wilmington Trust Company, were named as instrumentalities through which the three individuals dominated the manufacturing defendants and secured their adherence to the aforesaid agreement (*id.*, Par. 30(a), R. 220). This alleged conspiracy was asserted to violate Sections 1 and 2 of the Sherman Act, and du Pont's acquisition of stock of General Motors was asserted to violate Section 7 of the Clayton Act (*id.*, Par. 29, R. 219-220).

Trial of these issues before Judge Walter J. LaBuy began on November 18, 1952, and continued for approximately seven months. The court heard 52 witnesses and received 1087 Government and 1058 defendants' exhibits. The transcript of record below ran to 8283 pages. The evidence covered in minute and intimate detail the facts bear-

---

[1]The complaint as originally filed in June 1949 was amended several times both before and during the trial. The nature of the several amendments and their dates are noted in the record at R. 189 as a preface to the Amended Complaint (R. 191-262).

ing on the relationships among the defendant manufacturing corporations, and the relationship between each of them and the numerous other defendants. At the close of the evidence, full briefs and proposed findings were filed by all parties and the case was fully argued.

The Decision of the District Court and the Scope of This Appeal

On December 3, 1954, the District Court handed down an opinion and decision dismissing the complaint in its entirety. Judgment was entered on the decision on December 9, 1954. Notice of appeal was filed on February 4, 1955, and the Court noted probable jurisdiction on October 10, 1955.

On the appeal the Government has abandoned the charges against U. S. Rubber, the Wilmington Trust Company, all of the individual defendants, and the members of the du Pont family. The only defendants below which remain as appellees here are E. I. du Pont de Nemours and Company (du Pont), General Motors Corporation (General Motors), Christiana Securities Company, and Delaware Realty and Investment Company. The latter two companies appear to have been named as appellees only in connection with the Government's prayers for relief (Gov't Br., p. 149, n. 51). The only issues remaining in the case are those raised by the Government's charge that du Pont, by reason of its ownership of stock in General Motors, enjoys a non-competitive, preferential position in General Motors' trade.

The Findings of Fact Made by the District Court

The trial court's opinion, which covers 177 pages of the printed record, contains its findings of fact and conclusions of law. The findings of fact are voluminous, detailed and

particular. They cover all aspects of the Government's contention that trade has been restrained because of du Pont's stock interest in General Motors. They deal with the Government's argument that General Motors' purchasing freedom has been restricted and that it has bought from du Pont on a non-competitive basis, and with the charge that General Motors was coerced or influenced by the stock interest to surrender to du Pont two chemical discoveries, tetraethyl lead and "Freon" refrigerants.

The District Court made the following finding with respect to the substance of the Government's charge (R. 465):

> "The essence of the conspiracy and restraint which the Government finally charged and sought to prove in this case is the alleged limitation upon General Motors' ability to deal as it pleased with competitors of du Pont and United States Rubber. In various ways and subject to various limitations, the Government has alleged that General Motors either itself agreed to such a limitation, or was forced to it by du Pont. But the evidence of record fails to support the Government's charges. In preceding portions of this opinion there has been shown, by detailed analysis of the evidence, the extent to which General Motors enjoyed complete freedom of action with respect to specific products manufactured by du Pont and United States Rubber, and with respect to its discoveries and developments of new products. When read as a whole the record supports a finding, and the Court so finds, that there has not been, nor is there at present, a conspiracy to restrain or to monopolize trade and no limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont and United States Rubber, no limitation or restraint upon the freedom of General Motors to deal with its chemical discoveries, no restraint or monopolization of the General Motors market, and no restaint or monopolization of the trade and commerce between du Pont and United States Rubber."

This finding, as the District Court stated, rests upon a "detailed analysis of the evidence" and upon more specific and detailed findings with respect to all of the charges made by the Government in support of its case.

Findings on General Motors' Purchases from du Pont and its Competitors (R. 342-405, 435-447)

The trial court dealt in detail with the great variety of evidence adduced at the trial bearing upon General Motors' purchases from du Pont and from competitors of du Pont.

Fourteen pages of the findings (R. 382-396) discuss the evidence relating to finishes (paint), particularly "Duco", a nitrocellulose lacquer which accounts for a substantial portion of du Pont's paint sales to General Motors (R. 395). The court found that "Duco" was invented and patented by du Pont, that it made a substantial contribution to the art of automobile finishing and was one of the factors that made possible mass production of automobiles (R. 395). It further found that "Duco" answered a long-felt demand in the automobile industry, that "soon after the advent of Duco du Pont sold this finish to a considerable number of other automobile companies" (R. 389), and that it made its way solely on its merits. The court rejected as "wholly without foundation any contention that Duco was forced upon General Motors by reason of du Pont influence or domination" (R. 396). It found that du Pont's success in selling General Motors a substantial portion of its requirements of lacquer is to be attributed to the superior quality of "Duco", to du Pont's pre-eminence as the developer of "Duco", and to du Pont's continuing research and outstanding service (R. 395), and that (R. 396):

> "* * * du Pont's position was at all times a matter of sales effort and keeping General Motors satisfied. There is no evidence that General Motors or any Division of General Motors was ever prevented by

> du Pont from using a finish manufactured by one of du Pont's competitors; nor is there any evidence that General Motors has suffered competitively from its substantial use of Duco."

There are also detailed findings (R. 389-392) on the purchase by several General Motors non-automotive divisions, notably Frigidaire, of other du Pont finish products, particularly "Dulux", a synthetic enamel developed by du Pont and widely used by many manufacturers on refrigerators and similar home equipment. Finally the court found (R. 396):

> "In view of all the evidence of record, the only reasonable conclusion is that du Pont has continued to sell Duco in substantial quantities to General Motors only because General Motors believes such purchases best fit its needs.
>
> "The evidence with respect to Dulux presents a similar picture. * * * There is no evidence that General Motors purchased from du Pont for any reason other than those that prompted its competitors to buy Dulux from du Pont—excellence of product, fair price and continuing quality of service."

The court dealt in similar detail (R. 396-405) with the evidence relating to du Pont's sales to General Motors of fabrics—now principally top material used on convertibles and various treated fabrics used for interior trim on automobiles. After setting out the successes and failures of du Pont, since 1917 and even earlier, in selling these and other fabrics to the several divisions of General Motors, the court found (R. 405):

> "The Court further finds that such purchases of fabrics as the General Motors' divisions have made from du Pont from time to time were based upon each division's exercise of its business judgment and are not the result of du Pont domination. Du Pont,

> the record shows, has maintained its position as the principal fabric supplier to General Motors through its early leadership in the field and by concentrating upon satisfactorily meeting General Motors' changing requirements as to quality, service and delivery."

The court also made findings (R. 435-437) on the purchases of antifreeze by the automobile divisions of General Motors (R. 437):

> "* * * The Court finds this proof convincing that General Motors was not limited by agreement or by du Pont domination in its purchases of antifreeze and bought from du Pont only because it believed du Pont best served its needs."

The trial court made findings as to a number of other products upon which evidence was tendered by the defendants—products which General Motors uses in substantial volume, but as to which du Pont had been largely unsuccessful in its efforts over the years to sell to General Motors. There are findings with respect to General Motors' purchases of electroplating chemicals (R. 437-439), case hardening chemicals (R. 439-442), rubber chemicals and synthetic rubber (R. 442-444), plastics (R. 444-445), brake fluid (R. 445), and safety glass (R. 446). The trial court found (R. 447):

> "All of the evidence bearing upon du Pont's efforts to sell these various miscellaneous products to General Motors supports a finding that the latter bought or refused to buy solely in accordance with the dictates of its own purchasing judgment There is no evidence that General Motors was constrained to favor, or buy, a product solely because it was offered by du Pont. On the other hand, the record discloses numerous instances in which General Motors rejected du Pont's products in favor of those of one of its competitors. The variety of situ-

ations and circumstances in which such rejections occurred satisfies the Court that there was no limitation whatsoever upon General Motors' freedom to buy or to refuse to buy from du Pont as it pleased."

Findings on du Pont Sales to Fisher Body (R. 372-382)

The trial court also considered the evidence which is set forth at pages 64-68 and 141-142 of the Government's brief in this Court, bearing on the Government's contention that du Pont was required to sell to Fisher Body on a competitive basis as long as that company was independent of General Motors but was able to gain a non-competitive advantage after Fisher Body was absorbed by General Motors. The court after a detailed review of the evidence (R. 372-381) found that the facts did not support the Government's contention. On the contrary, the court found that (R. 381-382):

> "* * *, the extent to which Fisher Body has purchased over the years from competitors of du Pont in substantial quantities cannot be squared with the charge that Fisher is a captive market for du Pont. The record is clear, for example, that Fisher immediately encouraged competitors of du Pont to produce a lacquer comparable to Duco, and has consistently over the years bought substantial amounts of topcoats from two or three of du Pont's competitors, and practically all of its undercoats are purchased from a single competitor of du Pont.

On the basis of all the evidence the court found (R. 381) that Fisher Body:

> "at all times conducted its purchasing with respect to finishes, fabrics and all other products in accordance with its own best judgment. The Court finds the testimony of Lawrence Fisher particularly persuasive in this respect. His competence and

knowledge of this matter cannot be questioned. He was in active charge of the Fisher Company for many years and subsequently served in high executive capacities with General Motors. It is highly unlikely, if not impossible, that Fisher Body's purchasing practices could have been influenced by an agreement with du Pont or by the latter's position in General Motors without his knowledge. His forthright testimony and general demeanor on both direct and cross-examination are most convincing that Fisher Body was neither party to an agreement with du Pont nor the victim of du Pont domination."

Findings on Tetraethyl Lead and "Freon" Refrigerants (R. 405-432, 434-435)

The trial court considered at length the charges that the Government made in the court below with respect to tetraethyl lead and the refrigerant "Freon". There the Government argued that the evidence with respect to these commodities established that there was an agreement between du Pont and General Motors whereby the latter was obligated to surrender its chemical discoveries to du Pont. In this Court the Government has abandoned that charge, but it continues to urge that the evidence with respect to these commodities demonstrates that du Pont's stock interest in General Motors enabled du Pont to restrain trade by controlling or influencing the use which General Motors made of these two chemical discoveries. The findings of the District Court plainly cover the Government's present contention as well as the contention that it made below. The trial court, after a detailed review of the evidence (R. 405-426, 426-432, 434-435) found in substance that the arrangements that General Motors made with du Pont with respect to tetraethyl lead and "Freon" were made by General Motors in the free exercise of its own judgment and were not controlled or influenced by du Pont's stock interest.

Specifically the trial court found as to tetraethyl lead (R. 426):

> "* * * The record, rather, establishes that the services of du Pont as a manufacturer were secured by General Motors in the unrestrained exercise of its own judgment. Kettering appears to have been largely responsible for this decision, and neither the alleged pre-existing agreement nor du Pont's stockholdings in General Motors was the basis of the decision. It is clear that General Motors' lack of experience in chemical manufacture and du Pont's superior competence and wide experience were the reasons for the decision.
>
> "Similarly, du Pont retained its position as the manufacturer of TEL by reason of the continued high quality of its performance. The Court finds that General Motors and Ethyl Corporation were at all times free to turn elsewhere and were not coerced in any way to continue purchasing from du Pont."

In connection with this finding the court considered the efforts of Ethyl Corporation (a company jointly organized and owned by General Motors and Standard Oil Company of New Jersey) to interest American Research Laboratories and Dow Chemical Company in the manufacture of tetraethyl lead. The court found (R. 422) that American Research Laboratories, after noting the difficulties, realized that "'it would be rather foolish for them to venture into anything of this kind.'" and themselves "suggested cancellation of the contract", and that "Dow continued as a prospective manufacturer until late in 1926 when it informed Webb it was unwilling to undertake the manufacture of TEL by any process because of the hazard factor."

In considering the evidence relating to "Freon" the trial court set forth in its findings contemporaneous documents which show that General Motors invited the du Pont Com-

pany to join with it in the organization of Kinetic Chemicals, Inc. to manufacture "Freon" because of General Motors' confidence in the superior skill and competence of the du Pont Company in the manufacture of chemicals (R. 428, 429). On the basis of this and other evidence, including oral testimony, the court specifically found that (R. 434):

> "The evidence relating to the formation and operation of Kinetic Chemicals * * * does not establish that General Motors had agreed to surrender or was bound to surrender to du Pont its chemical discoveries; * * *"

and that (R. 435) General Motors made its decision with respect to Kinetic:

> "because those responsible in General Motors believed that Freon could best be manufactured by du Pont rather than by General Motors itself or by some other chemical company."

The court further found (R. 428) that General Motors' decision was vindicated by the fact that although General Motors' original process was "so expensive as to be commercially prohibitive", du Pont promptly "succeeded in developing a feasible commercial manufacture which reduced the costs" and in addition invented and patented for Kinetic a process which enabled Kinetic to make for itself an essential raw material—anhydrous hydrofluoric acid—which was not otherwise available in sufficient quantities.

Findings on du Pont's Alleged Intent to Restrict General Motors' Freedom to Purchase on a Competitive Basis (R. 297-302, 348-361)

The court made findings with respect to the evidence alleged by the Government to establish that du Pont intended to restrain or monopolize trade by restricting the purchasing freedom of General Motors. Thus the court considered

Raskob's 1917 report which covers in detail the investment aspects of du Pont's original purchase of General Motors stock, and in which he stated that purchase of General Motors' stock "will undoubtedly secure for us the entire Fabrikoid, Pyralin, paint and varnish business of those companies, which is a substantial factor" (R. 300). On the basis of an examination of the whole of Raskob's report, other relevant contemporaneous documents, and testimony, the court found (R. 302):

> "* * * Raskob, for one, thought that du Pont would ultimately get all that business, but there is no evidence that Raskob expected to secure General Motors trade by imposing any limitation upon its freedom to buy from suppliers of its choice. Other documents also establish du Pont's continued interest in selling to General Motors—even to the extent of the latter's entire requirements—but they similarly make no suggestion that the desired result was to be achieved by limiting General Motors purchasing freedom. On the contrary, a number of them explicitly recognized that General Motors trade could only be secured on a competitive basis."

The District Court also considered other evidence which the Government asserted established an intent on the part of du Pont to use its stockholdings to restrict the purchasing freedom of General Motors (R. 348-361). The evidence considered in this connection by the trial court comprises substantially the same body of evidence that is set forth by the Government at pages 29 to 48 and pages 115 to 122 of its brief in this Court. This evidence includes certain documents and incidents involving J. A. Haskell and J. L. Pratt (ex-du Pont employees who became officers of General Motors), efforts by du Pont in the early 1920's to sell "Fabrikoid" and paint to General Motors and correspondence between du Pont and General Motors in 1924-25 re-

lating to the use of alcohol as an antifreeze. After reviewing all of this evidence in detail the court found (R. 361):

> "The evidence relating to the exchange of data, figures, and information on suppliers by certain officers and employees of du Pont and General Motors, viewed as a whole, establishes that the du Pont Company was interested in selling its products to General Motors and made efforts to do so; a fact which is not denied by the defendants. The evidence, both oral and documentary, does not establish, however, that there was any agreement between the two companies that required General Motors to buy all or any part of its requirements from du Pont. Nor does the evidence establish that du Pont dictated or controlled the purchasing policies and practices of General Motors or sought to dictate or control those policies and practices. In fact, the evidence shows that General Motors exercised complete freedom in determining where it would purchase its requirements of products of the kind that du Pont manufactured."

Findings on du Pont's Alleged Control of General Motors (R. 293-323)

After detailed findings on the circumstances under which du Pont originally acquired its approximately 23 percent interest in the stock of General Motors in 1917-1918 (R. 297-302), the court found (R. 301, 302):

> "* * * the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business.
>
> * * * * *
>
> "* * * du Pont did not invest in General Motors with the purpose of restricting that company's freedom to purchase in accordance with its own best interests.

> Du Pont, the record shows, never intended to preclude General Motors from dealing with suppliers of its choice, never made any effort so to preclude General Motors, and did not limit General Motors' purchasing freedom."

The court then examined several other aspects of the relationships which have existed between du Pont and General Motors over the period from the original acquisition of General Motors stock by du Pont in 1917 to the date of the trial, each of which had been urged by the Government as evidence that du Pont controlled General Motors' purchasing policies. There are findings (R. 303-304) on the events of 1920, when a crisis in General Motors' affairs resulting from the financial collapse of its founder and first president, W. C. Durant, made it necessary for du Pont to take over Durant's obligations and much of his stock holdings in General Motors, and for Pierre du Pont, who had retired from the presidency of du Pont, to become General Motors' temporary president and Chief Executive Officer. There are findings (R. 304-307) on the events of Pierre du Pont's three-year incumbency, which ended in 1923 when he resigned and Alfred P. Sloan, Jr., was elected president.

The court made a detailed analysis of the number of du Pont nominees on the General Motors Board of Directors over the years, and found that such nominees never approached a majority (R. 302, 308); on the contrary, the court found, the majority of directors "have always been the nominees of management" (R. 310), selected without any consultation with du Pont and thereupon automatically elected to the Board. Because of the emphasis placed upon the matter by the Government at the trial, the opinion also reviewed in detail (R. 308-310) the extent to which the du Pont nominees on the Board participated in the consideration, initiated by Sloan, of proposed directors who

were neither management representatives nor du Pont nominees.

The trial court made elaborate findings (R. 311-316) on the organization and membership of the principal committees of the General Motors Board of Directors. The findings recite that originally, in accordance with an understanding with Durant that du Pont should assume primary responsibility for General Motors' financial affairs, the Finance Committee was composed almost entirely of du Pont nominees (R. 302), but that as competent people developed within General Motors, the number of du Pont nominees on this Committee declined. They have not constituted a majority since 1924, and are now but three of a committee whose total membership in recent years has been nine or ten (R. 312-313, 315). The findings show that there was originally only one du Pont nominee on the Executive Committee (R. 303); that except for the years 1921 and 1922 du Pont never had a majority of the members of that Committee and that there were considerable intervals of time between 1923 and 1937 (when the Committee was abolished) when du Pont had only one nominee or no nominee at all on the Committee. On the basis of this detailed analysis of the evidence the District Court found (R. 316):

> "* * * in all these matters Sloan has clearly been the leader and the dominating influence and has largely determined the results. * * * Sloan's testimony and the record as a whole are convincing that at all times he acted independently and steadfastly in the best interests of General Motors.
>
> * * * * *
>
> "* * * Accordingly, the Court finds, based on all the evidence, that du Pont's participation in the selection of General Motors directors and management does not establish that it controlled General Motors or that it sought through such participation to place people in General Motors who would fur-

> ther du Pont's interests as a supplier or as a chemical manufacturer."

The opinion likewise contains detailed findings (R. 316-321) on General Motors' supplemental compensation and bonus plans—particularly the Managers Securities Plan of 1923-1929—which were alleged by the Government to be devices through which General Motors personnel were influenced in favor of du Pont. Again, after thorough examination of the facts, the court made the following finding (R. 320):

> "The Court finds no evidence that any action taken by du Pont representatives with respect to the compensation of General Motors executives was intended to influence those executives to deal with du Pont or to refrain from dealing with du Pont's competitors. Nor is there evidence of any instance in which a General Motors executive favored du Pont out of consideration for the latter's sale of stock to Managers Securities Company or out of deference to the position of du Pont representatives on the General Motors board."

The court further found (R. 321) that "Sloan, Kettering, Pratt, Lawrence Fisher, Lynah, and Wilson [all of whom testified at the trial] are among those who would have been 'influenced', if the Government's contention is correct. These men, the record shows, acted at all times solely in the best interest of General Motors."

The trial court considered (R. 322-323) the Government's evidence showing that on occasion du Pont's 23 percent of General Motors stock had represented a majority of all the stock voted at the stockholders' meetings. The court, however, found reasonable and persuasive Sloan's testimony that the situation would have been radically different had there been a contest, and that in any contest it

would be necessary to know what the issues were before one could estimate whether enough other stockholders would join with du Pont to permit its views to prevail. The opinion states (R. 323) that "It is entirely conjectural whether or not du Pont by its stock ownership could control if there had been a contest."

After this full review of all the factors which had been relied on by the Government, the court added a number of findings on the extent and the direction of the change in the du Pont-General Motors relationship during the more than a quarter century since 1917. It stated (R. 321-322):

> "After the dramatic collapse of Durant and the ensuing financial crisis when du Pont representatives were thrust into positions of responsibility in General Motors, and after General Motors had been rescued from that crisis, du Pont's influence and position in General Motors declined radically. During the twenties, a force of considerable strength arose in General Motors that was important in determining any question of control. This force was the management headed by such a forceful and resolute character as Sloan and including such positive personalities as Kettering, the Fisher brothers, Knudsen, Pratt, Brown and Wilson.
>
> "More than a quarter of a century has passed since the twenties, and the strength and standing of the management have continued to increase and improve. The du Pont representatives who had originally been interested in General Motors have died or retired. These developments are reflected in the contemporaneous documents, the changes in the membership of the board, and the various committees of the board, and in the testimony of Sloan and other witnesses.
>
> "Irrespective of what its position may have been before and during the Durant crisis, since the 1920's du Pont has not had, and does not today have, prac-

tical or working control of General Motors. On the basis of all of the evidence the Court finds as a fact that du Pont did not and could not conduct itself, for the past 25 years, as though it were the owner of a majority of the General Motors stock."

On the basis of the findings of fact that have been summarized or quoted in the preceding pages, and other and even more detailed findings of fact which are to be found in its opinion, the District Court concluded that the Government had failed to establish any violation of the antitrust laws (R. 465). The court's legal conclusion was not confined to the charge of conspiracy. The court specifically held that there was no limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont and no limitation or restraint upon the freedom of General Motors to deal with its chemical discoveries (R. 465). It also concluded that there was no restraint of the General Motors market (R. 465).

The court specifically considered the application of the Clayton Act. It recognized that a violation of the Clayton Act may be established in the absence of an actual restraint of trade if it is demonstrated that there is a reasonable probability that a restraint will result from the acquisition of stock. It found as a fact, however, that there had been no restraint of trade in the thirty-odd years during which du Pont had owned stock in General Motors and concluded "there is not now nor has there been any basis for a finding that there is or has been any reasonable probability of a restraint within the meaning of the Clayton Act" (R. 466).

SUMMARY OF ARGUMENT

I

The trial court found as a fact that du Pont's stock interest in General Motors has not given du Pont a non-competitive, preferential advantage in its commercial dealings with General Motors.

The trial court found that General Motors does not buy paints, fabrics and other commodities from du Pont because of the stock interest, but that such purchases as General Motors makes are made in the free exercise of independent judgment and on the competitive merits. It found that the arrangements that General Motors made with du Pont for the manufacture of tetraethyl lead were made by General Motors on the merits and not because of the stock interest. It found that General Motors' decision in 1930 to ask du Pont to join with it in the manufacture of refrigerants was made on the merits and was not caused or influenced by du Pont's stock interest.

The trial court further found that du Pont does not have practical or working control of General Motors or the power to direct the business policies of General Motors so as to gain for itself an economic advantage over its competitors. It found that du Pont has not intended or sought through its stock to gain for itself a non-competitive advantage in the trade of General Motors.

The Government cannot prevail unless these findings of fact are overturned. The Government's charge that there has been an unlawful combination in violation of Sections 1 and 2 of the Sherman Act requires this Court to find that in fact du Pont has obtained through its stock ownership, and now enjoys, a non-competitive, preferential advantage in its commercial dealings with General Motors.

The Government's charge under Section 7 of the Clayton Act also depends upon proof that du Pont has obtained

and now enjoys such a non-competitive, preferential advantage. Du Pont's investment in the stock of General Motors was made more than thirty years ago, and if no restraint has occurred during this period there is no present probability of a restraint of trade. The Government recognizes this and rests its Section 7 argument on the assertion that du Pont's stock interest in General Motors "has been used to channel General Motors' purchases to du Pont" (Br., p. 144).

The findings of fact of the trial court are detailed and specific. They were made on a record which contains voluminous evidence both oral and documentary. They represent the considered views of a trial judge who carefully reviewed the evidence and who heard the witnesses and appraised their credibility at first hand.

The findings of fact are fully supported by the evidence. They are supported by contemporaneous documents written in the ordinary course of business, years before this litigation was started or suggested and which cannot be impugned on the ground that they are colored by ulterior motives or by self-interest. The findings are also supported by the testimony of witnesses who participated in the transactions or made the decisions involved. The witnesses include purchasing agents, salesmen and others engaged in the day-to-day operations of the two companies as well as executives of higher rank. The testimony of the witnesses was tested by cross-examination and was not contradicted or impeached.

The facts as established by the evidence are:

General Motors buys some commodities from du Pont but declines to buy others, despite du Pont's sales efforts. Some Divisions of General Motors buy particular commodities from du Pont while other Divisions buy their requirements of those commodities from du Pont's competitors. General Motors' purchases of particular commodities from du Pont have been greater at some times than at

others. General Motors makes substantial purchases from du Pont's competitors even though du Pont is in a position to supply the commodities involved and has tried to secure the business.

The commodities which General Motors has bought from du Pont in the greatest volume are paints and fabrics. Du Pont sells all of these commodities in substantial quantities to other customers. General Motors buys these commodities from du Pont on the merits and not because of the stock interest. General Motors buys paint from du Pont on the basis of quality, service and price and because it believes that du Pont paint best satisfies its needs. Du Pont's success as a supplier of paint to General Motors is in large part the result of du Pont's preeminence as the inventor and developer of new and superior paints, including "Duco" and "Dulux" and the continuing excellence of its research and service. Such purchases of fabrics as General Motors makes from du Pont are likewise made for reasons of price, quality and service and not because of the stock interest.

General Motors did not ask du Pont to manufacture tetraethyl lead because of du Pont's influence or stock interest. The decision was made by Kettering and approved by Sloan because of their belief that General Motors lacked competence to manufacture dangerous chemicals and because of their belief that du Pont had competence in that field. Their confidence in du Pont was vindicated and their fears of incompetence and inexperience justified. When arrangements were made with Standard Oil of New Jersey to manufacture tetraethyl lead, that company failed to observe safety precautions in the operation of its plant; the staff engaged in the operation contracted lead poisoning and several deaths resulted. The public furor following this disaster caused the temporary cessation of the entire enterprise. It was resumed only after du Pont was able to con-

vince the Surgeon General of the United States that tetraethyl lead could be manufactured safely. Later Ethyl Corporation sought an alternative manufacturing source but was unable to find anyone that would undertake the responsibility. Both Dow Chemical and American Research Laboratories, Inc., declined to attempt the manufacture of tetraethyl lead because of the difficulties and hazards involved. Both Ethyl Corporation and du Pont are now engaged in manufacturing tetraethyl lead and selling it in competition with one another and the Government makes no claim that there is in this respect any present restraint of trade.

In 1930 when General Motors developed a new refrigerant it decided in its own interests that it would not enter into the field of chemical manufacturing. It wished, however, to retain an interest in the manufacture of the refrigerants it had developed. Accordingly it joined with du Pont in the organization of Kinetic Chemicals, Inc., to manufacture refrigerants. This decision was made on the merits and because of du Pont's competence in the field of chemical manufacture and not by reason of du Pont's stock interest or through du Pont influence or control. Trade was not restrained by du Pont's interest in Kinetic Chemicals, Inc. During the pendency of this suit du Pont acquired General Motors' stock interest in Kinetic and the Government made no objection.

Du Pont does not have practical or working control of General Motors and does not have the power to dictate or to influence General Motors' commercial policies. Since the resignation of Pierre du Pont as president of General Motors in 1923 General Motors has developed a strong and successful management which is independent of the du Pont Company. Nominees of du Pont have continued to serve on the board of General Motors and on its committees, but no member of the du Pont family and no execu-

tive of the du Pont Company has been an officer or executive of General Motors for the past twenty-five years. Nominees of du Pont have never constituted a majority of the Board of General Motors and the number of du Pont nominees on the Board and on the committees of the Board has steadily decreased. A majority of the members of the Board have been the nominees of management. The management of General Motors has selected the management Directors on the Board and has possessed and exercised complete control of the operations of the company. For the past twenty-five years the limited participation of du Pont nominees on the Board of Directors of General Motors and its committees has been confined to financial affairs and has not related to purchases or to other commercial operations. The actions and policies of the management of General Motors throughout the past twenty-five years show that it consists of forceful and resolute men who have acted at all times solely for the best interests of General Motors, who have not hesitated to disagree with du Pont and to reject its suggestions, and who have not been subservient to or controlled by du Pont.

II

The Government attacks the trial court's findings, as it must if it is to succeed on this appeal. The Government suggests that its attack is confined to a few "conclusory" findings. This suggestion cannot be accepted. What the Government describes as "conclusory" findings are numerous and are interwoven with and are supported by even more numerous and detailed evidentiary findings which the Government's argument either ignores or denies. The Government's argument requires review of all of these findings and of the evidence on which they rest. Nor is it correct to suggest, as the Government does, that there is no

dispute over basic facts. On the contrary, on the crucial issues of the case the facts are in dispute and the disputes can be resolved only on the basis of all of the underlying evidence.

The Government's attack on the findings is not supported by the evidence. For the most part the Government does not attempt to support its arguments by direct evidence but relies upon inferences and conclusions which it seeks to draw from fragments of the evidence that are both collateral and remote. Thus, the Government attacks the trial court's findings that General Motors has purchased from du Pont on the merits. Those findings are supported by substantial documentary and oral evidence. The Government points to no direct evidence that justifies its attack.

There is, for example, no evidence that General Motors buys paint or fabrics from du Pont on a preferential and non-competitive basis. There is substantial evidence to the contrary. The Government tries to justify rejection of the evidence by resorting to inference. From the fact that du Pont sells more paint and fabrics to General Motors than it sells to other automobile manufacturers, the Government seeks to draw the inference that du Pont's paint and fabrics lack competitive merit. That argument disregards the fact that du Pont has sold both paint and fabrics in substantial amounts to other automobile manufacturers, including Ford and Chrysler who with General Motors account for 85 percent of the automobile production. The argument also disregards the evidence which shows that the reasons Ford and Chrysler do not buy in greater quantity from du Pont are reasons that do not reflect upon the quality of du Pont's products or upon its prices or service. The basis of the Government's inference is therefore refuted by the record.

The Government's attack on the findings relating to tetraethyl lead and refrigerants is likewise without support in the evidence. Here the Government asks the Court to

reject sworn testimony of the men who made the relevant decisions. That testimony is corroborated in substantial particulars by contemporaneous documents and is not otherwise contradicted. The Government's argument is a direct and unjustified attack on the integrity of Alfred P. Sloan, Jr., Charles F. Kettering and John L. Pratt. The Government points to no proof which would justify rejection of their testimony that they made the decisions independently and solely in the interest of General Motors and without regard to du Pont's stock or influence. There is no evidence to provide even a collateral basis from which to attack their testimony. It cannot be disputed that General Motors was inexperienced in the manufacture of dangerous chemicals or that du Pont's reputation and competence in that field were established beyond question. Nor is there any evidence that du Pont influenced or attempted to influence the decisions.

What has been said in the preceding paragraphs is true of the other instances in which the Government attacks the trial court's findings of fact that du Pont has not had and does not enjoy a non-competitive and preferential advantage in the trade of General Motors. The Government's attempt to prove the existence of the alleged preference relies heavily upon conclusory concepts which assume guilt and which are designed to eliminate the necessity for, and to explain the absence of, evidence, either direct or circumstantial. Its brief abounds with assertions that the alleged restraint is "inevitable" (Br., pp. 72, 77, 78, 79, 110, 112, 128); it asserts that the restraint is "inherent" (*e.g.* Br., pp. 73, 127), and that it must exist because of "human nature" (*e.g.* Br., pp. 79, 127). These assertions cannot serve as a substitute for facts, much less can they overcome the affirmative proof of facts on which the trial court's findings rest.

Nor does the evidence support the Government's attack on the trial court's findings that du Pont does not control

General Motors. In substance, if not in form, the Government argues that a conclusive and irrebutable presumption of control should arise because du Pont owns 23 percent of the stock of General Motors, the balance of the stock is widely dispersed, and du Pont is represented on the Board of Directors of General Motors and its committees. Facts that are inconsistent with its presumption the Government either ignores or denies. It ignores the undoubted fact that the role of du Pont in the affairs of General Motors has steadily declined. It ignores the emergence of a strong management in General Motors. It asserts that the management of General Motors is selected by du Pont, controlled by du Pont, and is subservient to du Pont. The evidence is to the contrary. Here, as in other parts of its argument, the Government attacks the integrity of the executives of General Motors. It asserts that the trial court was clearly wrong in its judgment of their character and veracity, even though that court heard them testify on both direct and cross-examination, and reviewed their testimony in the light of the contemporaneous documents. The Government makes no attempt to reconcile its argument with the fact that over the years the management of General Motors has shown its independence by purchasing substantial quantities of its supplies from competitors of du Pont, making other decisions adverse to the economic interests of du Pont, and by rejecting, in significant instances, suggestions made by du Pont with respect to the affairs of General Motors.

The Government contends that because the District Court's findings on control are wrong its findings that du Pont does not have a non-competitive, preferential advantage in the trade of General Motors must also be wrong. The premise of this argument is unsound; the control findings are fully supported by the evidence. And, in addition, the District Court's findings on the commercial relations between du Pont and General Motors are supported by

substantial evidence which is not impaired in any way by the facts on which the Government relies to assert control.

In any event, the Government misreads and misinterprets the trial court's findings. It criticizes the trial court for approaching the commercial dealings between General Motors and du Pont "as though they took place between strangers." Nothing in the trial court's opinion or findings justifies this criticism. The opinion and findings show that the trial court considered the Government's case as a whole and that it did not approach any part of the case with any preconceptions based on any other part of the case. The trial court fully considered the non-commercial relations between the two companies for any light they might throw on the charge that in matters of trade du Pont enjoyed a non-competitive, preferential advantage. The Government's real grievance is that the trial court decided the issue on the facts disclosed by the record instead of accepting the Government's assumptions and preconceptions.

III

Because of the nature of the issues in this case, the principle embodied in Rule 52(a) of the Rules of Civil Procedure applies with particular force to the trial court's findings of fact. The motives and reasons for men's actions are in question and the issue of credibility is therefore of great importance. The trial court had the opportunity to observe the demeanor of the witnesses and to judge their credibility at first hand. The Government cannot avoid the effect of Rule 52(a) by relying upon the decision in *United States* v. *Gypsum Co.*, 333 U. S. 364. To the extent that the findings in this case rest upon oral testimony, that testimony is not contradicted by contemporaneous documents. On the contrary, in substantial part the oral testimony is corroborated and confirmed by contemporaneous documents.

There is no substance in the Government's contentions that the District Court's findings on control are vitiated by the application of an erroneous legal standard. The Government's assertion that the trial court required it to prove the equivalent of a 51 percent stock interest is incorrect. The trial court accepted the principle that a minority stock interest may in certain circumstances confer "practical" or "working" control. The trial court recognized and applied the other criteria laid down in the cases cited by the Government. It considered all of the relevant criteria and did not disregard any of the facts relied upon by the Government.

The decisions cited by the Government under Sections 1 and 2 of the Sherman Act have no application here. The Government's charge of restraint and monopolization depends upon proof that in fact du Pont has enjoyed and now enjoys a non-competitive, preferential advantage in the trade of General Motors. The facts establish that du Pont has not had and does not have such an advantage. It follows that no question of law arises under the Sherman Act. Even on the Government's version of the facts there are serious doubts as to the applicability of the decisions on which it relies. The Government's description of its own case suggests that the Government has not proved the kind of economic consequences, the kind of restraint, or the kind of monopoly power required by the decisions cited in its brief. These questions, however, need not be considered or resolved, for the Government has failed on the facts to prove its basic charge that du Pont enjoys a non-competitive, preferential advantage in the trade of General Motors.

For the same reason, the Government's charge under Section 7 of the Clayton Act must fail. Du Pont invested in the stock of General Motors more than thirty years ago. The trial court found as a fact that throughout this period the stock has not conferred upon du Pont any non-competi-

tive, preferential advantage in the trade of General Motors. Since no restraint or monopolization of trade has occurred for thirty years, and since the Government has not shown or attempted to show that there has been any recent change in conditions which threatens restraint or monopolization, there is no basis for a finding that there is now a reasonable probability of a restraint of trade.

ARGUMENT

Here, as in the court below, the essence of the Government's charge is that du Pont's stock interest in General Motors has restrained and monopolized trade, first, by limiting General Motors' purchasing freedom and causing it to buy from du Pont on a non-competitive basis, and second, by causing General Motors to permit du Pont to participate in the commercial development of tetraethyl lead and the refrigerant "Freon".

The District Court dismissed this charge on wholly factual grounds. On the basis of the evidence it found as a fact that the purchasing freedom of General Motors had not been restrained or influenced and that such purchases as General Motors has made from du Pont have been made by General Motors in the free exercise of its own independent judgment. It also found that the arrangements between du Pont and General Motors with respect to tetraethyl lead and "Freon" were not brought about by the stock relationship but were the result of General Motors' independent business decisions.

The Government cannot prevail unless it can establish that these findings of fact are erroneous and must be rejected. The Government itself recognizes this and attacks the findings. The Government does so, however, in terms which obscure both the extent of its attack and the nature of the issues which the attack raises. The Government

suggests that it objects to only a few of the findings of the District Court which the Government characterizes as "ultimate" or "conclusory". It also suggests that there is no real dispute between the parties over the "primary" facts (Br., p. 128). The combined effect of these two suggestions is to leave the impression that acceptance of the Government's arguments requires no extensive review either of the findings or of the evidence on which the findings rest.

This impression is incorrect.

The Government's attack is not and cannot be confined to a few "ultimate" findings. The findings that the Government describes as "ultimate" are numerous and they are interwoven with and supported by even more numerous and detailed evidentiary findings which cannot be reconciled with the Government's contentions. Those contentions require the Court to reject the evidentiary as well as the ultimate findings. The characterization of the findings as "ultimate" is also ineffective to dispense with the necessity for a review of the evidence. The validity of the findings depends upon the facts, and the Government cannot avoid either the controlling effect of the facts or the necessity for a detailed review of the facts by characterizing the findings in one way rather than another.

The Government is also incorrect when it says that there is no dispute over the facts. On the contrary, there are serious disputes over crucial questions of fact. These disputes are not confined to matters of inference or conclusion. They arise because appellees believe that in some instances the Government is mistaken on basic questions of fact and that in others the Government's treatment of the evidence is so incomplete, episodic and fragmentary as to leave a wholly erroneous impression. Consequently appellees reject as inaccurate substantial portions of the assertions of fact found in the Government's brief.

The nature of the issues of fact has not been altered by the two changes which the Government has made in its legal theory in this Court. The first of these changes relates to the label which the Government uses to describe the alleged offense. In the court below the Government sought to prove that the defendants had engaged in a continuing conspiracy and agreement to restrain trade. It has now abandoned the charge of conspiracy (Br., p. 113), and instead asserts that the defendants are parties to an unlawful "combination". The change in label involves no change in the essential nature of the Government's case. The arguments and inferences now relied upon by the Government to establish the existence of the alleged combination are the same arguments and inferences that it relied upon in the lower court to support the charge of conspiracy. All of those arguments and inferences were considered and passed upon by the District Court.

Nor has this change in theory impaired the effect of the trial court's findings of fact. The Government itself concedes that its charge of combination must fail unless in fact a restraint of trade has been imposed. It defines combination by saying "we mean a restraint imposed by force of the relationship rather than one arising from express agreement" (Br., p. 113). It follows from this definition that if there is no restraint there is no combination. On the Government's own terms, therefore, the findings that there is no restraint are decisive against the charge of combination just as they are decisive against the charge of conspiracy.

The second change made by the Government in its legal theory relates to the means by which the alleged restraint is said to have been accomplished. In the court below the Government asserted that the restraint had been achieved because du Pont had practical or working control of General Motors. It now introduces, as an alternative to "control", the concept of a degree of power less than control which it

describes as "influence", and it asserts that this alleged "influence" entitles the Government to relief even though the findings of fact on control are sustained.

Apart from the change in terminology there is little that is new in this argument. It rests upon the same asserted inferences and conclusions which the Government urged below and which the District Court rejected. The Government in effect concedes that proof of the existence of the alleged "influence" depends upon proof of its limiting effect on the competitive freedom of General Motors. If there was no such limiting effect resulting in trade preference over du Pont's competitors, that fact is fatal to the Government's theory of "influence". The trial court found as a fact that the stock had no limiting influence on the freedom of General Motors. For example, it found that there was "no limitation or restraint upon General Motors freedom to deal freely and fully with competitors of du Pont" (R. 465). That and numerous other findings to the same effect must be rejected if the Government's argument on influence is to prevail.

Notwithstanding the changes in legal theory, therefore, the Government's attack on the findings raises the same crucial issues of fact that were tried in the court below. And despite the Government's suggestions to the contrary, the decision on those issues requires review of all of the detailed and voluminous evidence which bears on the disputed questions of fact. Accordingly the greater part of this brief will be devoted to a discussion of the evidence.

Part One of the Argument (*infra*, pp. 35-186) will review the findings of the trial court on the issues which are now presented here, and will demonstrate that the findings are solidly grounded on the evidence. Part Two of the Argument (*infra*, pp. 187-267) will deal directly and specifically with the very limited portion of the evidence to which reference is made in the Government's brief, and

will demonstrate that it provides no basis for challenge to the findings or to the decision of the trial court. Part Three (*infra,* pp. 268-285), will discuss the legal issues which the Government has argued, and show that there is no principle of law that can serve to overcome the Government's failure of proof.

PART ONE

THE EVIDENCE SUPPORTS THE FINDINGS OF THE TRIAL COURT THAT DU PONT'S OWNERSHIP OF STOCK IN GENERAL MOTORS HAS NOT RESULTED IN A RESTRAINT OF TRADE IN VIOLATION OF THE SHERMAN ACT AND HAS NOT VIOLATED THE CLAYTON ACT

I

The Findings by the Trial Court That du Pont's Stock Ownership Has Not Restrained or Influenced General Motors' Purchasing Policies Are Supported by the Evidence

Understanding of the findings with respect to General Motors' purchases requires an explanation of the manner in which General Motors is organized, with particular reference to where, and by whom, the decisions are made as to what to purchase and from whom.

Each of the 30-odd Divisions into which General Motors is organized has final authority to make, and does make, its own purchasing decisions. Since 1920, General Motors has operated under a plan of organization prepared by Alfred P. Sloan, Jr. (Sloan, R. 973-974, 984-985, GM 1, R. 975, 6532). Sloan's plan strongly emphasized decentralization. Its cardinal principle was to vest in the General Managers of the Divisions the greatest possible amount of authority, and in turn to impose on them the maximum pos-

sible responsibility for the results which the Division achieved. The first principle of the plan states (GM 1, R. 975, 6532):

> "1. The responsibility attached to the chief executive of each operation shall in no way be limited. Each such organization headed by its chief executive shall be complete in every necessary function and enable to exercise its full initiative and logical development."

This principle is still basic in General Motors today (Sloan, R. 984).

Under this decentralized system, each operating Division of General Motors may be truly considered as an independent corporation. As Sloan himself put it (R. 992):

> "In our management technique, the general manager of an operating division has complete authority over that particular operation. He has authority and responsibility which, I think, might be said to be perhaps even greater or certainly as great as the chief executive of an independent corporation.
>
> "He lays down his own program of production. He buys his own materials. He hires his own people. He works out his own organization. He has complete charge of the distribution of his product. * * * All the functional activities of the operations are under the complete jurisdiction of the general managers of the divisions."

Moreover, the same principle applies within each Division—assign an executive full authority in his particular field, and hold him fully responsible for results. To quote Sloan again (R. 993):

> "* * * the general manager in turn delegates his responsibilities to his particular executives that are concerned with that operation, and our philosophy is that they must also be given a broad responsibility and the authority to carry out that responsibility."

To speak of "selling to General Motors," therefore, is misleading. A prospective supplier, instead of selling to General Motors, sells to the Chevrolet, or Frigidaire, or Ternstedt, or Delco Light Divisions, as Divisions. Indeed, when there are several plants within a Division each plant may and frequently does have its own purchasing agent and hence may present a separate and independent selling job (K'Burg, R. 2539).[2]

A. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS THAT GENERAL MOTORS' PURCHASES OF FINISHES (PAINT) FROM DU PONT WERE NOT RESTRAINED OR INFLUENCED BY DU PONT'S STOCK OWNERSHIP

Du Pont, for many years, has had marked success in the manufacture and sale of finishes (*i.e.*, all types of paints, varnishes, lacquers and related products), and has accounted for between 8 and 10 percent of the total dollar value of all finishes produced in the United States (DP 444, R. 2688, 6435). Over the 10 years preceding the filing of the complaint, approximately three-quarters of du Pont's total sales to General Motors have consisted of finishes (DP 445, R. 2688, 6436). General Motors has been du Pont's largest single customer for finishes, and du Pont has been General Motors' principal supplier of finish products. On the other hand, du Pont's finish sales to General Motors are less than 20 percent of its total sales of finishes, and only 3 percent of its total sales (R. 393; DP 445, R. 2688, 6436).* The individual products accounting for the great bulk of these sales are "Duco", a nitrocellulose lacquer invented and patented by du Pont, which is largely used on automobiles,

---

[2]From 1922 to 1931 a General Purchasing Committee made centralized arrangements for the purchase of certain commodities, but the Divisions were not required to purchase under these general contracts. The operations of this Committee are discussed, *infra*, at pages 103-109.

*Throughout this brief references preceding a semicolon are to the findings, and references following a semicolon are to the evidence.

and "Dulux", a synthetic enamel developed by du Pont, which is used on refrigerators.[3]

The evidence establishes that du Pont's sales to General Motors have not resulted from any control or influence, as is charged by the Government, and the District Court so found (R. 396). With respect to "Duco", the principal finish product in terms of dollar volume, the District Court stated (R. 396) that it "rejects as wholly without foundation any contention that Duco was forced upon General Motors by reason of du Pont influence or domination." With respect to "Dulux", the next most important finish item purchased by General Motors from du Pont, the District Court was equally emphatic (R. 396): "There is no evidence that General Motors purchased from du Pont for any reason other than those that prompted its competitors to buy Dulux from du Pont—excellence of product, fair price and continuing quality of service."

Although the Government directly challenges these findings (Br., p. 140), it ignores the detailed and voluminous body of evidence which shows that the trial court was correct in its appraisal of the facts. We shall deal with this evidence in two categories: (1) the evidence that shows that the various Divisions of General Motors have followed no uniform or consistent policy with respect to purchasing finishes from du Pont; this absence of any consistent pattern of purchases is inconsistent with the Government's charge that General Motors' purchases have been restrained or influenced by du Pont's stock ownership; and (2) the evidence which shows that General Motors has purchased finishes from du Pont solely on a competitive

---

[3]In 1947 General Motors' total purchases of all products from du Pont were $26,628,274, of which $18,938,229 (71 percent) represented purchases from du Pont's Finishes Division (DP 445, R. 2688, 6436). Of this latter amount, purchases of "Duco" and the thinner used to apply "Duco" totaled $12,224,798 (65 percent), and "Dulux" purchases totaled $3,179,225 (17 percent) (DP 445, 195, GTX 1344, R. 2688, 1987, 2846, 6436, 6068, 5326).

basis and in the exercise of its own independent commercial judgment and without regard to du Pont's stock ownership.

1. The Evidence Shows that the Various Divisions of General Motors Have Followed No Uniform or Consistent Policy with Respect to Purchasing Finishes from du Pont

The various Divisions of General Motors in their purchases of finishes have followed no uniform or consistent policy with respect to du Pont's products. Some Divisions buy certain finishes exclusively from du Pont; other Divisions buy their entire requirements of these same finishes from competitors of du Pont; some Divisions divide their purchases. The distinct absence of consistency among the various Divisions, whether considered product by product or Division by Division, is inconsistent with the Government's charge that General Motors' purchases have been restrained or influenced by du Pont's stock ownership.

a. Automotive finishes

The automobile industry uses many finishing products in the production of an automobile. On the car body, the finishing process begins with a primer and a surfacer, which are applied by spraying, or a primer-surfacer, recently pioneered by du Pont, which combines the properties of the two products and eliminates separate spraying operations. On fenders and hoods (sheet metal parts) the industry generally uses as an undercoat only a primer, applied by dipping. For the final finish, or topcoat, the industry uses, on both body and non-body parts, two types of finishes—a nitrocellulose (pyroxylin) lacquer, or a synthetic enamel, each with appropriate solvents or thinners. In addition, complete finishing requires rubbing compounds (a mixture of fillers and mild abrasives used to burnish the topcoat to bring out the lustre), and chassis, motor, interior and miscellaneous lacquers and enamels which are quite different

than the topcoats or undercoats. All of these are offered for sale by du Pont (DP 176, R. 1940, 6012; Williams, R. 1940-1944, 1976-1979).

Automotive topcoats.—The largest single finish item which du Pont sells to General Motors is a low-viscosity nitrocellulose lacquer, discovered and patented by du Pont and for which its trademark is "Duco". In recent years "Duco" and the thinner or solvents used in its mixing or application constituted over two-thirds of General Motors' total purchases of finishes from du Pont (R. 394, 395; DP 195, 199, R. 1987, 2027, 6068, 6076). This does not, however, represent all of General Motors' topcoat business. The Oldsmobile Division buys the lacquer which it uses as a topcoat exclusively from a competitor of du Pont—Rinshed Mason—and has done so since 1927 (R. 389; Wirshing, R. 1924-1925, 1933, 1936-1937). Cadillac Division has likewise purchased substantially all of its lacquer requirements from Rinshed-Mason, rather than from du Pont, since the late 1920's (R. 389; Wirshing, R. 1926, 1937). Fisher Body Division, which is a large user of lacquers, has for many years divided its purchases of lacquers for topcoats among three principal sources—du Pont, Rinshed-Mason and Forbes Varnish Company (R. 389; Wirshing, R. 1923, 1932-1933, Fisher, R. 593). At Buick, Pontiac and Chevrolet, du Pont is the principal supplier of topcoats (R. 389; Wirshing, R. 1923-1924, 1926, 1933).

Automotive undercoats.—The lacquers used as topcoats are the most difficult to manufacture of all automobile finishes, not only because they represent a very delicately balanced composition, but also because they are needed in an almost infinite range of colors (Williams, R. 1987, Wirshing, R. 1934-1935). Undercoats (primers and surfacers) do not require such paramount technical skills and know-how. The findings and evidence show that du Pont has had less success at General Motors with undercoats

than with topcoats. Fisher Body Division, which for years has been the largest consumer of undercoats among the General Motors Divisions, purchases undercoats principally from Rinshed-Mason (R. 389); du Pont supplies them, in fact, at only one of Fisher Body's fourteen plants (Williams, R. 1985, Wirshing, R. 1923).

Undercoats applied to the body of an automobile, which Fisher Body produces, must be sprayed on. Undercoats used on fenders, hoods, and the like, which the automobile Divisions produce themselves, are applied by dipping. In the mid-1930's du Pont pioneered a successful dip primer, and became its principal supplier to the automobile industry as a whole (Williams, R. 1976-1978, DP 191, R. 1150, 7228). Among General Motors' Divisions, however, only Chevrolet, Buick and Pontiac now purchase their dip primer requirements from du Pont. Oldsmobile buys its undercoats from Forbes Varnish Company, and Cadillac has used a number of different companies, including Rinshed-Mason and Ferbert-Schorndorfer (R. 389; Wirshing, R. 1924-1927, 1933-1934, Williams, R. 1976).

Rubbing compounds.—These compounds are used in large quantities in finishing the lacquer topcoat on an automobile. When "Duco" was adopted by automobile manufacturers, du Pont began to manufacture rubbing compounds and sold them along with the "Duco" itself. At General Motors, du Pont has now lost most of this business. The Divisions now purchase most of their requirements from du Pont's competitors (Williams, R. 1985, 1987, GTX 1344, R. 2846, 5340).

Chassis enamel and *motor enamel.*—These enamels were likewise, at one time, sold to General Motors Divisions by du Pont with marked success. In recent years, however, it has succeeded in selling the Divisions only insignificant amounts of chassis enamel, and has been wholly unsuccessful in selling motor enamel at Chevrolet, Pontiac, Cadillac

and Oldsmobile. On the other hand, it has succeeded in selling substantial amounts of motor enamel to the Buick Division (Williams, R. 1985-1986).

Interior enamel.—Enamels of various kinds are used to finish the various wood, metal and plastic fittings in the interior of an automobile, such as instrument panels, glove compartments, ash trays and door handles. These finishes do not need the durability of exterior finishes, but they do require special formulation to permit their application in production under a variety of conditions (Williams, R. 1943, 1996). The Terndstedt Division of General Motors makes such parts for General Motors automobile Divisions, but du Pont's success at Ternstedt has been indifferent. Until the 1930's Ternstedt did not use lacquers at all, preferring a Black Japan finish purchased from a du Pont competitor (Williams, R. 2001-2002). When color and special effects became necessary, Ternstedt shifted to lacquers. It purchased from du Pont for a number of years, but later switched almost entirely to du Pont's competitors (R. 391; Williams, R. 1986, 2001). Recently, when Ternstedt opened a new plant equipped with electrostatic spraying equipment, a du Pont competitor succeeded in being the first to adapt its material to the new process, and has since retained practically all of the business at that plant (Williams, R. 1986-1987, 2002).

b. Synthetic resin enamels

The findings show that the finish product, other than "Duco", which du Pont sells to General Motors in greatest volume is a synthetic resin enamel, also developed by du Pont, for which its trade-mark is "Dulux" (R. 395; GTX 1344, R. 2846, 5340, Knight, R. 2384-2385). "Dulux" is an ideal refrigerator finish (R. 396) combining at once toughness, hardness, flexibility, adhesion, and stain and moisture resistance (O'Donnell, R. 2404). Since du Pont

developed "Dulux" in the 1930's it has sold it in large amounts to Frigidaire for the exterior finish of refrigerators.

Prior to the development of "Dulux", Frigidaire and many other domestic refrigerator manufacturers, finished the exterior of their refrigators with "Duco". In 1927, however, Frigidaire abandoned the use of "Duco", despite the efforts of du Pont to persuade it to continue, and invested over $1,000,000 to convert to porcelain for the finishing of over 80 percent of its refrigerators (R. 389-390; O'Donnell, R. 2397-2399, 2413-2414, GTX 1324, R. 2496, 5281). Since then, among appliance manufacturers, Frigidaire has been the greatest exponent of porcelain. Even since the development of "Dulux", and despite its proved value as an exterior finish, Frigidaire has continued to finish about a quarter of its refrigerators with porcelain—the *only* manufacturer of refrigerators in the United States which does so (R. 390; Knight, R. 2388-2389, 2392, O'Donnell, R. 2406, DP 351, R. 2408, 6307).

As an *interior* finish for refrigerators, "Dulux" is demonstrably less expensive than porcelain and has been adopted by several smaller companies (Norberg, R. 2478-2479, Kreuer, R. 2421-2423, 2430, DP 345, 349, R. 2420, 2424, 6300, 6304). Yet since 1940 du Pont has sought, without success, to persuade Frigidaire to use "Dulux" (R. 390); indeed du Pont has been advised that only the fear of Frigidaire competition, so long as it retains a porcelain interior, prevents the other major manufacturers from changing to "Dulux" for interiors. Were they all to change it would increase du Pont's sales by an amount which one witness put at $2,500,000 a year (Kreuer, R. 2425, 2427-2428, Norberg, R. 2479, DP 345, 346, 348, 349, R. 2418, 2420, 2424, 2426, 6300-6304).

Frigidaire has manufactured washing machines since 1946, but from the beginning, despite du Pont's best selling

efforts, has finished *all* of them with porcelain. It is the *only* washing machine manufacturer which does so (O'Donnell, R. 2407-2408, DP 352, R. 2408, 6308). Again, before 1952, Frigidaire sold clothes dryers made by another company, which finished them with "Dulux". Since then, Frigidaire has made its own, and despite du Pont's efforts to hold the business, has finished *all* of them with porcelain. Again, it is the *only* manufacturer of dryers which does so (O'Donnell, R. 2410).

c. Other industrial finishes

The findings likewise disclose all shades of du Pont success and lack of success in connection with sales of finishes to the non-automotive units. Each Division, in other words, purchases from du Pont or from one or more of du Pont's competitors in accordance with that Division's own judgment on relative price, quality and service (R. 390-392; Williams, R. 1995-2003). Frigidaire Division uses large quantities of black finishing varnish and finishes for machine parts, but has since 1926 rejected du Pont's offerings of these products (O'Donnell, R. 2401-2404). At AC Spark Plug Division, located in Flint, Michigan, where du Pont has a finishes plant, du Pont has been consistently successful in selling a substantial volume of the finishes used by that Division (R. 390; Williams, R. 1996-1997). Delco-Remy Division, however, purchases the substantial volume of insulating varnish which it uses from du Pont's competitors (R. 390; Williams, R. 1997-1998). As to insulating varnish the Electro-Motive Division does the same, although it purchases mostly "Duco" for the exterior of its locomotives, using Rinshed-Mason finishes for their interiors (R. 391; Wm. Fisher, R. 2434-2436, 2452-2453). At Guide Lamp Division du Pont developed, and still supplies, a finish for the inside of headlight reflectors, but a competitor developed and has kept that Division's

substantial primer business (R. 391; Williams, R. 2000-2001). Likewise, at the Inland Division, which produces steering wheels, du Pont apparently had some of the business at one time, but has been completely supplanted by a competitor because it could offer what General Motors regarded as better service (R. 390-391; Williams, R. 1999).

One further finding in this area is particularly inconsistent with the Government's charges. The Packard Electric Division of General Motors uses large quantities of two types of cable lacquer—high and low tension. Until 1932 Packard Electric was a separate company, wholly unrelated to General Motors. During that period du Pont was one of its principal suppliers; on one item, black high tension lacquer, it was the sole supplier (Wm. Fisher, R. 2438-2441, DP 333, R. 2439, 6279). Now, however, as a Division of General Motors, Packard Electric purchases its entire requirements of high tension lacquer from du Pont competitors, and produces its own low tension lacquer from film scrap bought from du Pont competitors (R. 391-392; Wm. Fisher, R. 2437, 2446-2450, DP 336, R. 2450, 6284).

2. The Evidence Shows That General Motors Has Purchased Finishes from du Pont Solely on a Competitive Basis in the Exercise of Its Own Independent Commercial Judgment and without Regard to du Pont's Stock Ownership

The findings and evidence heretofore discussed show a pattern of sales of finishes to the several Divisions of General Motors which alone could serve as adequate support for the District Court's findings that the Divisions purchased finishes in the exercise of their own independent commercial judgment. Yet, neither the evidence nor the findings stop there. There is also abundant evidence with respect to the reasons for General Motors' purchases of finishes from du Pont. This evidence, which was the subject of findings by the trial court, shows that the General Motors

Divisions purchase finishes on a competitive basis and in the exercise of their own judgment with respect to the merits of the products, service, and price involved and that du Pont enjoys no non-competitive preferential advantage.

a. "Duco"

The facts with respect to the invention and development of "Duco" provide substantial confirmation of the trial court's findings that General Motors purchases finishes from du Pont on an independent competitive basis and not because of the stock relationship. The Government ignores the significance of this matter, and would leave the Court with the impression that "Duco" has been forced upon General Motors by du Pont not on the basis of the merits of the product but by virtue of the stock relationship. The evidence establishes that this contention is without foundation.

The invention and development of "Duco" represented a truly significant advance in the art of paint making and in the production of automobiles; without "Duco" mass production of automobiles would not have been possible.

By the early 1920's the need for better finishing materials for automobiles had become urgent (R. 395). The varnish method then used in finishing automobiles was described in detail at the trial by automobile pioneers (Sloan, R. 1285-1286, Kettering, R. 1586-1587, Lawrence Fisher, R. 585-588). Finishing an automobile with varnish required an intolerably long time—up to 3 or 4 weeks—to apply the numerous coats needed. When the finish was complete, its longest life expectancy was less than a year, and often it began to peel off before the car was delivered. The trend toward closed bodies, which began early in the 1920's (Kettering, R. 1586), made the problem worse. Sloan testified that during this period he made field trips throughout the country talking to dealers, and said (R. 1285):

> "In those days, the most important problem we faced, from the standpoint of the quality of the car, from the consumer's point of view was the finish of the car."

And Lawrence Fisher, one of the Fisher brothers, commenting on the virtual impossibility of present automobile production volume with the old type varnish finish, summed it up by stating that to provide the dust- and insect-free space necessary to store the present volume of cars during the varnishing operation "we would have had to put a roof on Michigan" (R. 588).

General Motors made every effort to find a solution. It established, upon the recommendation of Walter P. Chrysler (then employed by General Motors) and Herman L. Weckler of Buick,[4] a Paint and Enamel Committee, to exhaust every means of obtaining quicker drying and more durable automobile finishes. Clements, of General Motors Research Division, was Chairman (R. 382; Weckler, R. 2136-2138, GM 104, 105, DP 202, 211, R. 1287, 2034, 2042, 6083, 6866, 6869, 6096). This Committee studied the finishes in each of the automobile Divisions, contacted a number of paint manufacturers, and tested every available material (R. 382; Sloan, R. 1290, Weckler, R. 2138, Kettering, R. 1586-1587, L. Fisher, R. 588-589, GM 110, 111, 113, 116, 117, DP 200, 202-209, R. 1294, 1296, 1301, 2031, 2035-2038, 6081, 6876, 6877, 6880, 6899, 6908, 6083-6093).

On the du Pont side, the story begins much earlier. Du Pont was a pioneer producer of nitrocellulose lacquers, having entered that business in 1903 (R. 382; Irenee du Pont, R. 772, 944). By 1920 it had a small, varied line of lacquers, which were quick-drying and durable, but which were of limited utility because they could not carry

---

[4]Weckler, who was a witness for appellees, was Vice President and General Manager of the Chrysler Corporation at the time he testified (Weckler, R. 2143-2144).

much film-forming and color material (solids), and when such solids were added they became too viscous to work (R. 382; Flaherty, R. 2018-2021, DP 198, R. 2022, 6073, 6074). In that year, however, Edmund L. Flaherty, who was employed by du Pont, invented a lacquer which retained the quick-drying and durability features, but which could also contain a large amount of film-forming material (R. 383). The material, shortly named "Duco", was patented by du Pont (DP 199, R. 2027, 6076), and in due course the patent was held valid in a court test. *E. I. du Pont de Nemours & Co.* v. *Glidden Co.*, 67 F. 2d 392 (2d Cir. 1933). Du Pont granted licenses under the patent to everyone who applied for one—some 250 or 300 in all (Flaherty, R. 2028). The patent expired in 1944.

During the course of the efforts by the General Motors Paint and Enamel Committee to interest paint and varnish manufacturers in providing something which would help in the automobile finishing problem, Harry Mougey, a member of Kettering's General Motors Research Group, called on du Pont early in 1922. Flaherty, to whom he was referred, told him of du Pont's new lacquer, and agreed to send samples of it to General Motors so that it would be tested along with the other materials under observation by the Committee (R. 383; Flaherty, R. 2030-2031, Williams, R. 1945, DP 200, R. 2031, 6081).

The tests made Kettering and Mougey enthusiastic (R. 383; Kettering, R. 1589-1591, GM 113, 267, DP 177, 178, 202, R. 1296, 1589, 1950, 2034, 6880, 7402, 6013, 6016, 6083)—far more enthusiastic, in fact, than were the people in du Pont (Weckler, R. 2146-2147, GM 267, p. 3, R. 1589, 7402 at p. 7404). The lacquer was, to be sure, not perfect; it lacked the high gloss of varnish, and it would not adhere to the traditional undercoats used on metal (Kettering, R. 1590; Weckler, R. 2138-2139; Williams, R. 1965-1966, DP 202; R. 2034, 6083). Both companies went to work on

the problem of improving the lacquer and adapting it to the demands of the production line (R. 383; Weckler, R. 2138-2139, 2148-2149, Williams, R. 1947-1951, DP 177-185, R. 1950, 6013-6042). During this period the Paint and Enamel Committee continued its search for other possible finishes, and checked every conceivable new material against "Duco" (Weckler, R. 2138, DP 202-209, GM 111, 113, 114, 116, pp. 8-9, 122, R. 2034-2038, 1294, 1296, 1298, 1301, 1310, 6083-6093, 6877, 6880, 6891, 6899 at pp. 6906-6907, 6930).

Both the contemporaneous documents, and the testimony of all of the witnesses who covered this period at the trial, show that "Duco" made its own way on its own merits at the General Motors Divisions, as it did elsewhere. "Duco" was far superior to any other product or any other method of finishing automobiles then available (Fisher, R. 588, 591-592, Weckler, R. 2138-2139, 2148-2149, Sloan, R. 1311, GM 111, 113, p. 4, 114, 267, GTX 381, p. 2, DP 198, pp. 2-3, R. 1294, 1296, 1298, 1589, 523, 2022, 6877, 6880 at p. 6883, 6891, 7402, 3926 at p. 3927, 6073 at pp. 6074-6075). It was adopted by the General Motors Divisions only after the most time-consuming tests—tests far more rigorous and thorough than those made by other automobile companies (Williams, R. 1962-1963).

The findings and evidence also show that each Division of General Motors adopted "Duco" independently, and only when the Division had become satisfied that "Duco" best served its interests. Oakland (now Pontiac) Division was first. Its paint superintendent developed a burnishing process which brought up the lustre, and in the spring of 1923 the Division decided to use "Duco" on its 1924 open car (R. 384-385; Williams, R. 1951-1953, L. Fisher, R. 591-592, Wirshing, R. 1926, DP 186, 187, R. 1953, 6047, 6049). The open cars with "Duco" finish were an immense success; indeed there was immediate demand that

the closed models (the bodies for which were made by Fisher Body) be also finished the same way (R. 385). A contemporaneous report stated (DP 188, R. 1954, 6050):

> "There has been an almost unanimous demand on the part of Oakland distributors for 'Duco' on the closed jobs, because they say they are in an illogical position when they attempt to explain to a prospective Oakland purchaser why the Oakland Company uses a better finish on the cheaper open cars than on the more expensive closed models."

Fisher Body, which was building the Oakland closed bodies, accordingly decided to use "Duco" on the closed bodies as well (R. 385; Sloan, R. 1309, L. Fisher, R. 592, Williams, R. 1953-1956, DP 184, p. 2, DP 185, p. 2, DP 214, 215, GM 121, 122, R. 1950, 2048, 2049, 1309, 1310, 6039 at p. 6040, 6042 at p. 6043, 6103, 6106, 6928, 6930).

Weckler, at Buick, also recommended "Duco" in 1923 for the 1924 model, but Bassett, the General Manager, decided to await the results at Oakland (R. 385, Weckler, R. 2139-2140, 2150-2151, 2155). In 1924, on the continued recommendation of Weckler, Bassett decided to use "Duco" on the 1925 model (R. 385; Weckler, R. 2140, 2150-2152, GM 120, 120A, DP 189, R. 1307, 1308, 1989, 6197, 6919, 6058). At Cadillac, the decision was taken even more slowly, the General Manager expressing his desire first to have "Duco" "tried out in every conceivable fashion" (R. 385; GTX 384, R. 523, 3938). Cadillac offered it only as an optional finish for about two years, and did not make it standard until 1926 (R. 385; Sloan, R. 1296-1297, Williams, R. 1962; Flaherty, R. 2045, GTX 386-388, R. 524, 3942-3945). The other Divisions, and Fisher Body, one by one abandoned varnish and shifted to "Duco" during the summer of 1924, making the decision independently and on the merits (Sloan, R. 1296-1298, 1310-1311. Weckler, R. 2144-2152, Williams, R. 1956-1962, L. Fisher, R. 592).

The change was slow, because it was revolutionary (R. 385; Weckler, R. 2149). Oakland, with a lagging reputation and a need for a new selling point, was more inclined to move rapidly; Buick and Cadillac, then the more successful automobile Divisions of General Motors, producing a quality product in large volume at a profit, were more inclined to be cautious, since they had far more to lose if the new finish went bad (R. 385-386; Sloan, R. 970-971, L. Fisher, R. 591, Weckler, R. 2139, 2151-2152). A number of persons in General Motors—Clements of General Motors Research, Weckler of Buick, L. P. Fisher of Fisher Body and Sloan—were doing all that they could to encourage the Divisions to take advantage of "Duco"; the General Managers were, on their part, cautious and conservative (R. p. 385-386; Sloan, R. 1296-1298, L. Fisher, R. 594, Weckler, R. 2149-2151, GTX 384, 1228, GM 114, R. 523, 1298, 3938, 5180, 6891). The important thing is that each Division made its decision for itself.

The findings and evidence also reveal other facts in connection with General Motors' use of "Duco" which are inconsistent with the Government's charge that General Motors preferred du Pont or bought from it on a non-competitive basis because of du Pont's stock ownership. Beginning as early as 1924, both the Paint and Enamel Committee and the General Purchasing Committee made vigorous efforts to develop competition for "Duco". In July, 1924, after "Duco" had been adopted by several automobile Divisions in General Motors, the General Purchasing Committee began the development of a general contract covering it. After Lynah, the Executive Secretary of the Committee, had ascertained that no competitive lacquer had been approved by General Motors Research (GM 168-169, R. 1131, 7162, 7163) a contract was authorized in December, 1924, under which General Motors was to buy its entire requirements of pyroxylin finishes from du Pont for the first six months of 1925 (R. 386; GM 166, 167, R.

1128, 7156, 7159). Within a month, however, Lynah was urging that "a field of competition for 'Duco' should be developed" and suggesting that General Motors Research begin tests on other pyroxylin finishes (R. 386; GM 172, R. 1133, 7166). In February, 1925, Lynah, for the General Purchasing Committee, requested Research to test the offerings of seven enamel companies which he named (R. 386; GM 173, R. 1135, 7168).

When this first "Duco" contract came up for renewal, Lynah again prodded Research, and received a long report from Mougey of the Research group. The report refused to approve any competitive lacquer, but it did recommend that test cars be finished with several competing lacquers for more complete testing, so that General Motors would be in a position by 1926 to utilize some of them (R. 387-388; GM 175, 176; R. 1137, 7170, 7171). This was done, and by the end of 1926 General Motors Research was able to approve a number of competitive products (R. 388-389; Lynah, R. 1140-1142, Wirshing, R. 1922-1923, 1934, GM 178, 180-183, R. 1137, 1140, 7180, 7186-7189). The contract with du Pont was meanwhile extended for the last half of 1925, and then for 1926, but each time only after Lynah was advised that there were still no competitive lacquers which General Motors Research had approved (R. 388; Lynah, R. 1138-1141, GM 180-184, R. 1140-1141, 7186-7190).

After 1926 the General Purchasing Committee entered into no further requirements contracts with du Pont. Thereafter the only arrangements were in the form of a discount and pricing contract (a so-called "requirements of seller's make" contract) under which the Divisions could buy "Duco" if they wished to use du Pont pyroxylin lacquer in preference to that of some other manufacturer (R. 388; Lynah, R. 1093, 1142, 1178, Flaherty, R. 2055-2056, GM 186-190, GTX 467, 468, DP 558, R. 1142-1144, 540, 541, 2997, 7207-7224, 4121, 4122, 6475).

These efforts to encourage competition with "Duco", as the trial court found, worked a real change in the du Pont position at several of the Divisions. Cadillac, which is near a Rinshed-Mason plant, began to use Rinshed-Mason materials, secured good service, and has continued with them (R. 389; Wirshing, R. 1926, Williams, R. 2010, Flaherty, R. 2056). Oldsmobile began purchasing its lacquer requirements from Rinshed-Mason because that company was willing to make a line of colors which Oldsmobile wanted and which it preferred, even though the colors were less durable than those offered by du Pont. That Division has continued with Rinshed-Mason ever since (R. 389; Wirshing, R. 1924-1925, Williams, R. 2010, Flaherty, R. 2053). Fisher Body, which had been using some Forbes black lacquer since 1925, even before Research approved it, greatly increased its purchases of lacquer from du Pont's competitors (R. 387, 389; L. Fisher, R. 593, Wirshing, R. 1923, Williams, R. 2010, Flaherty, R. 2053, GTX 453, R. 536, 4082).

Other Divisions have elected, for various reasons, to stay with du Pont. At Buick Division, there is evidence that Buick could not find any competing product which was equally satisfactory with "Duco", and that the location of a du Pont plant close by, with obvious service advantages, was an important factor (R. 389; Wirshing, R. 1926-1927, Weckler, R. 2142, 2161). The Pontiac Division's decision likewise appears to be based partly on the proximity of the du Pont plant in nearby Flint, and partly because Oakland, Pontiac's predecessor, had achieved an outstanding success as the first major automobile manufacturer to use "Duco" in production (R. 384-385, 389; Wirshing, R. 1925-1926). Chevrolet has continued to buy from du Pont (Flaherty, R. 2058-2059, GTX 502, 503, R. 597, 598, 4169, 4171) because du Pont has given highly satisfactory service, including the meeting of heavy production schedules,

and Chevrolet has never found any lacquer superior to "Duco" despite repeated research tests (R. 389; Wirshing R. 1923-1924, 1927-1931, 1934-1935).

Finally it should be added that, contrary to the Government's contention (Br., pp. 83, 140-141), the success of "Duco" was not confined to the General Motors automobile Divisions. In the trial court the Government admitted that soon after the advent of "Duco" du Pont sold it to a considerable number of other automobile companies (R. 389; see Williams, R. 1991-1992, Flaherty, R. 2048, DP 184, 215, R. 1950, 2049, 6039, 6106). It no longer sells to a number of them because they no longer exist; no inference of inferiority of du Pont finishes can be made because they are no longer used on the Franklin, Marmon, Moon, Cleveland, Chalmers, Morris, Lexington, Paige, Hupmobile, Gardner, etc. See DP 184, 215, R. 1950, 2049, 6039, 6106, Williams, R. 1991-1992. Among the smaller companies which have survived, the most important are Nash, Studebaker, Hudson, Packard and Willys. Du Pont has sold those companies continuously since the middle 1920's (Williams, R. 1991-1992). Apart from the major producers, therefore, du Pont has enjoyed a large measure of success— indeed in recent years its position at four of the companies—Nash, Studebaker, Willys and Hudson—has substantially improved (GTX 1378, 1381, 1382, R. 2824, 2825, 5409, 5414, 5415).

Nor is there room for an inference, in du Pont's record of sales to Chrysler and Ford, that "Duco" is unable to make its way in the automobile industry on its merits. At Chrysler, du Pont enjoyed a very large measure of early success (Williams, R. 1994). In the early 1930's, however, when Chrysler had become a large factor in the industry, it decided that it wanted a supplier to whom it would be the most important customer (Williams, R. 1994-1995; see pp. 198-199, *infra*). The record shows that in recent years Pitts-

burgh Plate Glass Company has enjoyed by far the major share of Chrysler's finish requirements (DP 559-561; R. 2999, 6479-6481). Even so, du Pont still sells Chrysler a substantial dollar volume of finishes, and has made "important gains" there since the war (GTX 1382, R. 2825, 5415).

Ford chose to make a large part of its own requirements. It was, it is true, never an important user of "Duco". During the 1920's, when it was losing its leadership in the low priced field to Chevrolet, it continued to finish its cars in Black Japan. Mr. Ford said, "Paint them any color, as long as they are black" (Fisher, R. 578). In the late 1920's Ford commenced to make some lacquer but in the early 1930's switched to a synthetic enamel finish. During that period du Pont sold Ford a substantial quantity of both undercoats and topcoats (Williams, R. 1992-1993). During the same period Ford began to make an increasingly large proportion of its finish requirements. In 1935, it was making half, and buying half from du Pont; by 1937 the figures were three-quarters and one-quarter—du Pont's sales being $834,000 (GTX 1376, 1377, 1379, R. 2824, 2825, 5407, 5408, 5411). From 1938 until Henry Ford II became active in Ford management, purchases practically ceased. Since then, Ford has again bought finish materials from du Pont. It has continued to manufacture for itself a large portion of its requirements, but it purchases from du Pont in "very substantial quantities" (Williams, R. 1993, DP 196, R. 1993, 6069), and has done so even more since the war (GTX 1382, R. 2825, 5415).

The only fair conclusion, on all of this evidence, is that reached by the District Court—that du Pont has maintained its position as a lacquer supplier to General Motors because each Division which purchases from du Pont has decided independently that such purchases best fit its needs (R. 396). The sworn testimony of witnesses who had direct, intimate,

personal knowledge of du Pont's sales of finishes to General Motors negatives the Government's assertions that those sales were made on a non-competitive basis, or were the result of control or influence arising from the stock relationship.

b. "Dulux"

In the early 1930's du Pont developed "Dulux" synthetic enamel as a finish for refrigerators and other household appliances. The finish was offered by du Pont first to General Electric, which was using "Duco", rather than to Frigidaire, which was largely using porcelain. The technical personnel of du Pont and General Electric worked closely together in adapting "Dulux" to General Electric's manufacturing processes, just as the technical people in General Motors and du Pont had done in adapting "Duco" to automotive finishing (R. 390; Knight, R. 2383-2384, O'Donnell, R. 2405). General Electric, as a result, was the first refrigerator manufacturer to use "Dulux". Westinghouse was second. Frigidaire followed later (R. 390; Knight, R. 2383, Van Derau, R. 2484, O'Donnell, R. 2405, 2415).

Since that time all three companies—General Electric, Westinghouse and Frigidaire—as well as Crosley, the other major competitor, and many smaller companies, have continued to purchase practically 100 percent of their refrigerator finishes from du Pont—except, of course, for the portion of Frigidaire production which continues to be finished in porcelain (R. 390). The preference for du Pont was explained at the trial by representatives of each of Frigidaire's major competitors—witnesses whose credibility the Government does not attack (Knight, R. 2383-2385, Norberg, R. 2475-2476, Van Derau, R. 2483-2492). Their testimony alone goes far to show that the basis for du Pont's success as a finish supplier is superior performance and not control or influence. Each of the companies continuously

tests competitive finishes but continues with du Pont (Knight, R. 2385-2387, Norberg, R. 2475, Van Derau, R. 2484, 2485). One reason, in addition to quality, was explained by Van Derau, of Westinghouse (R. 2488-2489):

> "We have had a very, very happy relationship over those years.
>
> "Now, another factor—and I think I can say this without it being harmful to any other suppliers—du Pont has the finest technical group at their beck and call, at the beck and call of the users of the materials, of anybody in the business and we have had several times, when we have had a little problem, and I am thinking of one in particular where we were going to find it very difficult to keep in production until the trouble would be overcome, which I called from Pittsburgh to the Chicago office, and the next morning one of the men of du Pont was on the job, and within a very few hours they had materials coming in from their Toledo plant that kept us in production.
>
> "You cannot laugh off that kind of service. They have been simply excellent, and I don't know how you could say, any better."
>
> "You can be sure with du Pont, on that kind of service."

There is every reason to accept, and no reason to doubt, the findings of the District Court that Frigidaire's purchases of "Dulux" are bottomed on the same reason: a judgment that in this way Frigidaire gets the most in quality, service and price (R. 396).

c. Finishes other than "Duco" and "Dulux"

Du Pont's efforts to sell finish products other than "Duco" and "Dulux" to the General Motors Divisions have, as we have already noted (pp. 40-42, 44-45, *supra*) met with considerably less success.

At the automobile Divisions, du Pont has been most successful in its sales of other finish products at Chevrolet and Buick. It sells each of these Divisions substantial quantities of undercoats because it has offered superior service, and because those Divisions have proceeded on the theory that use of one company's products from the metal out leaves no room for argument as to whose fault causes any trouble (R. 389; Wirshing, R. 1924, 1926-1927, 1933, Williams, R. 2007-2008, Flaherty, R. 2058-2059, Weckler, R. 2142, 2161). The principal purchaser of undercoats at General Motors, however, is Fisher Body Division, and du Pont has never been able, despite continued sales efforts, to change Fisher Body's preference for another undercoat supplier. As a result, it supplies undercoats for only one of Fisher Body's 14 plants (R. 389; Williams, R. 1985, Wirshing, R. 1923).

The findings (R. 389) refer to one particularly intensive—and wholly unsuccessful—effort which du Pont made in 1926 to secure Fisher Body's undercoat business. Shortly after "Duco" had been generally adopted by automobile manufacturers, du Pont offered an undercoat made from the same sort of nitrocellulose base as a substitute for the oil-based undercoats then in use. The new product met with success at other companies such as Chrysler, Nash and Marmon because of its quicker drying and better surfacing qualities (R. 389; Williams, R. 1981-1983, DP 193, 194, p. 2, R. 1982, 1984, 6065, 6066 at p. 6067). Yet du Pont, despite selling efforts (GTX 470-472, 476, 479, R. 539, 540, 4124-4126, 4128, 4132) never succeeded in persuading Fisher Body, or any General Motors automobile Division in the United States, to adopt it (R. 389; Williams, R. 1983, 1989, DP 194, p. 2, R. 1984, 6066 at p. 6067).

At the non-automotive Divisions (other than Frigidaire already discussed, pp. 56-57), the reasons for du Pont's successes and lack of successes are essentially the same as those already discussed: where du Pont could

persuade the purchasing agents of the merits of its product on quality, service and price, it succeeded. Where it couldn't, the business went to its competitors. Du Pont's service brought it a good share of the black lacquer business of AC Spark Plug Division (R. 390; Williams, R. 1996, 1997); its high quality secured the reflector finish business at Guide Lamp Division (R. 391; Williams, R. 2000-2001).

Competitors of du Pont, however, have also been able to obtain business on the same basis. Service secured the finish business of Inland Division for a competitor (R. 390-391; Williams, R. 1999-2000), and quality enabled a competitor to sell Guide Lamp its primers (R. 391; Williams, R. 2000). Price, in addition to quality, led Ternstedt Division to change from du Pont to a competitor (R. 391; Williams, R. 2001-2002). Electromotive Division prefers a competitive lacquer for the interior finish of its locomotives, but uses "Duco" on the exterior because the railroads, most of which use "Duco" for the exterior finish of the balance of the train, specify that finish (R. 391; Wm. Fisher, R. 2434-2435).

3. The Period before "Duco"

What has been said above demonstrates that "Duco" ushered in a new era of automobile finishing. Accordingly *du Pont's success in selling "Duco" to General Motors* cannot be explained by reference to any paint sales that du Pont may have made to General Motors prior to the invention of "Duco". There is, however, evidence in the record with respect to du Pont's prior sales which shows that even in that early period du Pont did not enjoy any preferential advantage and that General Motors' purchasing policies were not controlled or influenced by du Pont.

In 1918 du Pont acquired a majority of the stock of the Flint Varnish & Color Works of Flint, Michigan (R. 344;

GTX 277, R. 499, 3680). *Before* du Pont acquired any interest in Flint Varnish that company was supplying all of the finishes required by Chevrolet (not then a General Motors Division), and by all of the automobile Divisions of General Motors except Cadillac (R. 382; Weckler, R. 2142, GTX 277, pp. 20, 25, R. 499, 3680 at pp. 3699, 3704). *After* du Pont purchased a majority stock interest in Flint Varnish there were significant losses in the latter's General Motors business. By 1921 Flint had lost half of the Oakland business, and by 1923 it had lost all of the General Motors finishing varnish business (at Buick, Oakland and Oldsmobile; Chevrolet did not use it) (R. 382, GTX 420, DP 220, R. 528, 2693, 4010, 6122).

B. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS THAT GENERAL MOTORS' PURCHASES OF FABRICS FROM DU PONT WERE NOT RESTRAINED OR INFLUENCED BY DU PONT'S STOCK OWNERSHIP

Next to finishes the products which du Pont sells to General Motors in the largest dollar volume are fabrics, which are sold by du Pont's Fabrics Division and which include coated fabrics, uncoated combined fabrics, plastic and rubber sheeting, and related products. These fabric products are used in automobile manufacture for interior trim, for top material on convertibles and to some extent in upholstering trucks and buses. The du Pont materials, however, are not ordinarily used in upholstering modern passenger automobiles.[5]

The total sales of the Fabrics Division represent but a small part of du Pont's total sales. In 1948, for example, Fabrics Division sales were just over 2 percent of the total (R. 403; DP 445, R. 2688, 6436). Of these Fabrics Divi-

---

[5]The types of fabrics sold by du Pont constitute approximately 6 percent of the total upholstering and trim in an automobile. Fabrics and Fibers for Passenger Cars, United States Department of Agriculture, Bureau of Agricultural Economics, Bulletin No. 45, October, 1951, page 12.

sion sales, about 80 percent have been sales to non-automotive customers (R. 403; Nickowitz, R. 2070). Purchases by all General Motors Divisions of $3,700,000 of fabrics in 1948 represent the Fabrics Division's largest account, but are nevertheless only about 18 percent of the sales of the Fabrics Division and less than four-tenths of one percent of du Pont's total sales in that year (R. 403; DP 445, R. 2688, 6436).

The conclusion of the District Court, upon all the evidence with respect to these fabric purchases, was as follows (R. 405):

> "The Court further finds that such purchases of fabrics as the General Motors divisions have made from du Pont from time to time were based upon each division's exercise of its business judgment and are not the result of du Pont domination. Du Pont, the record shows, has maintained its position as the principal fabric supplier to General Motors through its early leadership in the field and by concentrating upon satisfactorily meeting General Motors' changing requirements as to quality, service and delivery."

This section of the brief will discuss the evidence that supports these findings. For the purpose of the discussion the evidence will be treated in two categories: (1) that relating to the purchases of fabrics made by the General Motors Divisions in recent years and (2) that relating to fabrics used by the General Motors Divisions two or three decades ago before the closed car made obsolete the fabric products used for tops and upholstery on open cars. The evidence falling into both categories shows that the Divisions of General Motors have at all times purchased fabrics from du Pont only on the basis of quality, service and price and that du Pont has enjoyed no preferential advantage by reason of its stock ownership.

1. The Evidence Relating to Purchases of Fabrics by the General Motors Divisions in Recent Years

a. Fisher Body Division

Fisher Body Division uses three principal products which are offered by du Pont's Fabrics Division—combined uncoated materials for convertible tops (the du Pont product is known as "Teal"), coated fabrics for interior trim, and adhesives for affixing weather-stripping. The findings as to each demonstrate the lack of foundation for the Government's charges that the purchases from du Pont were based on control or influence.

Combined uncoated fabrics. Fisher Body Division began to use uncoated combined fabrics for convertible tops in 1926, purchasing about half of its requirements from du Pont and half from du Pont's competitors (R. 380, 400; Brown, R. 2255). This proportion continued until 1931, when Fisher Body demanded of its suppliers a two-year guarantee that cleaning materials would not damage the fabric. Although du Pont tests showed that its "Teal" would withstand cleaning materials as well as competitive fabrics, du Pont felt that its experience with "Teal" was inadequate to warrant giving such a guarantee, and refused to make it. A competitor, Haartz Auto Fabric Company, was willing to give the guarantee, and in consequence in 1932 became Fisher Body's sole supplier of this material (R. 380, 400; Brown, R. 2253, 2255, DP 286, 297-298, R. 2256, 2266, 6216, 6231, 6232). A year later, in 1933, du Pont had so improved its combining cement that it agreed to make the guarantee Fisher Body demanded, but the offer was unavailing. Du Pont continued its efforts to sell its product to Fisher Body, but it secured none of this business for fifteen years—until fabric shortages and fading and shrinking difficulties with the Haartz material forced Fisher Body to come to du Pont for help (R. 380, 400; Brown, R. 2253, 2255-2259, 2263, Nickowitz, R. 2121, DP

288-293, 295, 296, R. 2257-2261, 2263, 2264, 6220-6225, 6227, 6228). Within a short time du Pont demonstrated to Fisher Body that the du Pont fabric would eliminate both the fading and shrinking difficulties, and from 1948 to 1951 du Pont received about half of Fisher Body's business in this material. In 1951 du Pont's share was reduced to about a third (R. 380, 400; Brown, R. 2263, 2265-2266, DP 294, 296-298, R. 2262, 2264, 2266, 6226, 6228-6232).

Coated fabrics. There is likewise no room for doubt that du Pont's present position at Fisher Body Division on coated fabrics has been achieved solely on the merits of its products. Coated fabrics for tops (or "decks") of cars were eliminated in 1936 by the adoption by Fisher Body of the all-steel top. A few years later, in 1939, Fisher Body began styling closed bodies to use coated fabric for interior trim where durability and abrasion resistance were desirable (R. 400; Brown, R. 2253). These were precisely the qualities in which du Pont's handbag and baggage materials were pre-eminent, and it secured the major share of Fisher Body's requirements for those materials in 1940 and 1941. During a period of shortage immediately following the war Fisher Body purchased all the coated fabrics du Pont would sell, but since 1947 du Pont's share of this business has declined. It is now one of Fisher Body's five major suppliers of this material (R. 401; Brown, R. 2253-2255, Nalle, R. 2893, 2897, DP 277, 279, 283-284, GTX 1315, R. 2243, 2249, 2165, 6203, 6206, 6212, 6213, 5267).

Adhesives. Fisher Body Division also purchases each year about $1,000,000 worth of a rubber cement which is used to affix weather-stripping to automobile bodies. Since 1945, the Fabrics Division of du Pont has sought to persuade Fisher Body to purchase its cement (the du Pont product is known as "Fairprene" 5115). Du Pont has convinced some Fisher Body plant managers that "Fairprene" 5115 is better than the products which they buy from du

Pont's competitors, and no Fisher Body official has indicated that the du Pont product is inferior, but only since 1951 has du Pont sold any "Fairprene" 5115 at Fisher Body. Since 1951, du Pont has secured about 3 percent of Fisher Body's requirements (R. 401, 443-444; Nickowitz, R. 2095-2098).

b. Chevrolet Commercial Body Division

In 1930 General Motors purchased the plant of the Martin-Parry Corporation, which became the Chevrolet Commercial Body Division of General Motors. Prior to the acquisition Martin-Parry had been purchasing exclusively from du Pont its requirements of coated fabrics for upholstery and trim in its light trucks and commercial vehicles (R. 401; Brown, R. 2276-2277, DP 247, R. 2277, 6158). After the plant became a Division of General Motors, it continued, until 1937, to purchase only du Pont pyroxylin coated materials. In that year, however, it changed to rubber coated materials, partly purchased from du Pont, and partly from U. S. Rubber. In 1940 du Pont's share of this business again declined, and in 1948 declined still further, until du Pont now supplies less than a third of the Division's $2,000,000 annual purchases of coated fabrics (R. 401; Brown, R. 2277-2279, 2281-2282, Nickowitz, R. 2098-2101, DP 310-312, 557, R. 2280, 2281, 2905, 6249-6252, 6473). Du Pont has maintained competitive quality, service and price but Chevrolet Commercial has adopted a policy of purchasing its coated fabrics from several sources (Nickowitz, R. 2098-2102).

c. GMC Truck & Coach Division

From before 1917 until 1925 du Pont sold fabrics to General Motors Truck Company, as well as to Yellow Cab Manufacturing Company, which was not then affiliated with General Motors (Brown, 2229-2230, 2268-2270, MacShane, R. 2351-2352). When the two companies merged into Yellow Truck and Coach Manufacturing Company, in which General Motors had a majority stock interest, du

Pont retained only about a third of that company's fabric requirements (Brown, R. 2268-2270). In 1943 the company became the GMC Truck & Coach Division of General Motors. Since then du Pont's position has deteriorated further. It has retained about a third of the Division's business on coated fabrics for medium and light truck upholstery (R. 401; Nickowitz, R. 2102), but on heavy truck upholstery and on seats for buses (manufactured by seating companies to GMC Truck & Coach specifications), du Pont has been almost completely unsuccessful. Until after the war GMC Truck & Coach used natural leather in preference to fabrics for both of these uses. When it shifted to a vinyl coated fabric for its heavy truck upholstery, materials were short. U. S. Rubber had a greater supply, met the color requirements of GMC Truck & Coach faster than du Pont, and got all the business, which it still has (R. 401; Nickowitz, R. 2102-2103, 2681-2682, Brown, R. 2275-2276, Nalle, R. 2889, GTX 1356, R. 2890, 5374). For bus seats the same shortage of vinyl plastic was first overcome by B. F. Goodrich Company, and it got and has retained all of that business. Only recently has du Pont succeeded even in persuading GMC Truck & Coach to specify the du Pont as an alternative to the Goodrich fabric in its bus seat specifications (R. 401; Nickowitz, R. 2104).

d. Cadillac

Only one automobile Division—Cadillac—makes quantity purchases of fabrics at the present time. That Division purchases annually about $75,000 of vinyl coated fabrics for seat covers. Du Pont has actively solicited the business, but has never shared any portion of it (Nickowitz, R. 2110-2111).

e. Other General Motors Divisions

Many non-automobile Divisions of General Motors have become large fabrics users in recent years. The find-

ings and evidence which show du Pont's limited successes in selling to those Divisions, coupled in many instances with its far greater success in supplying the same materials to General Motors' competitors, are flatly at odds with the Government's contentions.

AC Spark Plug Division, for example, uses the equivalent of about $2,000,000 annually of coated fabrics for fuel pump diaphragms. Since 1939 du Pont has sought to supply this material to AC Spark Plug, and has been successful in supplying the competitors of that Division with all, or a substantial part of, their fabrics, but AC Spark Plug has continued to use material which it produces for itself. AC Spark Plug does, however, use du Pont fabric for the diaphragms which it makes for Chevrolet automatic transmissions, because Chevrolet found the AC Spark Plug material unsatisfactory, requested that du Pont engineer a suitable material, and then required AC Spark Plug to use it (R. 401; Nickowitz, R. 2107-2110).

Du Pont supplies the principal competitor of the Electromotive Division of General Motors with its entire requirements of synthetic rubber coated material for batten strips, and with rubber coated fabrics for insulating materials, yet it has never succeeded in securing any of Electromotive's substantial requirements of these products (R. 401-402; Nickowitz, R. 2110).

At the Delco Appliance and Packard Electric Divisions of General Motors du Pont has been similarly unsuccessful in supplying any of the large requirements of synthetic rubber coated fabrics or vinyl coated insulating tape. At the latter Division du Pont does supply about half of the glass fabric coated with "Teflon" for insulating aircraft ignition wire, but has been unable to secure more of this business because Packard Electric prefers several sources of supply (R. 402; Nickowitz, R. 2111-2112). At the Overseas Division of General Motors, du Pont, which

formerly supplied about half of the Division's substantial requirements for coated fabrics, has lost out entirely since the war (R. 402; Nickowitz, R. 2111).

2. The Evidence Relating to Purchases of Fabrics by the General Motors Divisions in the Era of the Open Car

Du Pont entered the manufacture of coated fabrics in 1910, when it purchased the Fabrikoid Company of Newburg, New York (R. 342-343, 396; Irenee du Pont, R. 761-762, DP 72, GTX 106, R. 764, 476, 5730, 3062). "Artificial leather", as it was then known, was of poor quality and had very limited areas of acceptance. As du Pont succeeded in improving both its quality and appearance, its use rapidly broadened. By mid-1913 du Pont "Fabrikoid"—a pyroxylin-coated fabric—had been accepted by the automobile industry for upholstery and interior trim. Three years later, in 1916, almost every automobile company was a purchaser of "Fabrikoid", and a contemporary du Pont estimate in that year stated that 60 percent of the cars produced in the United States would be equipped with "Fabrikoid" (R. 396-397; Irenee du Pont, R. 762-764; Nickowitz; R. 2071-2072, Brown, R. 2185, 2222, 2226, MacShane, R. 2332, DP 230, 231, 233, 239, 243, GTX 300, R. 2073, 2075, 2082, 2188, 503, 6132, 6133, 6135, 6145, 6149, 3798). In that same year du Pont rounded out its line of fabric materials by acquiring the Fairfield Rubber Company, a manufacturer of rubber-coated fabrics (R. 343; Nickowitz, R. 2083-2084, GTX 106, at p. 6, R. 476, 3062 at p. 3067).

Du Pont had thus achieved, before it purchased its General Motors stock, a leading position in the automotive fabric field. The findings and evidence show that it was supplying, before 1917, substantially all of the coated fabrics requirements at Chevrolet and Oldsmobile, about half of the requirements at Buick, and about a third of the require-

ments at Oakland. At the Cadillac Division, du Pont supplied all of the coated fabrics for interior trim, but none of the top material (R. 397; Brown, R. 2185, 2188, 2205-2206, 2220, 2222, 2226, 2287, Nickowitz, R. 2081, DP 235, GTX 107, at p. 3, 2076, 476, 6138, 3079, at p. 3082). Of equal significance, however, the findings reveal that in 1918, after the stock purchase there was no improvement in du Pont's position. So far as concerns "Fabrikoid", du Pont simply continued to hold the business it already had (Brown, R. 2185). So far as concerns top materials, the effect was substantially the same. Although du Pont developed a new and better material—"Pontop"—and sold it to many major automobile companies, this did not materially affect du Pont's share of the fabric business at General Motors, since "Pontop" largely replaced materials which du Pont had already been supplying (R. 397-398; Brown, R. 2186, 2189-2190, MacShane, R. 2339-2341, DP 244, 245, R. 2190, 2191, 6152, 6153).

By 1921, such was the success of "Pontop" at the General Motors Divisions that du Pont considered the possibility of consolidating its position on a long-term basis by means of a contract with General Motors to supply its entire fabrics requirements (GTX 417, 403, R. 526, 3992, 3958).[6] The suggestion to the du Pont Executive Committee (GTX 417) and that made to Pierre du Pont by R. R. M. Carpenter in October 1921 (GTX 403) are both referred to by the Government (pp. 32, 36, 118), which does not,

---

[6]The report of the du Pont Cellulose Products Department to the du Pont Executive Committee (GTX 417) stated (R. 3999): "In general, our reports are that our products are considered by the several General Motors units as equal or superior to those of competitors, and in addition we have at some slight increase in cost to ourselves, sent out our product in a form somewhat better adapted to the factory practices of the General Motors plants than have some of our competitors. Therefore the time appears to have arrived when we might capitalize this condition by some arrangement insuring to us all the General Motors' purchases which we can handle."

however, note the trial court's finding that no such arrangement was ever made (R. 351). Moreover, when a similar proposal was made by du Pont in 1923 (GTX 413, R. 528, 3987), it was rejected (R. 351-352)—both by Sloan (GTX 415, R. 1161, 3989) and by the General Purchasing Committee (GM 155, at p. 3, R. 1100, 7077 at p. 7079).

In 1922, du Pont substantially improved its position as a fabrics supplier to the General Motors Divisions, but the findings and evidence make it clear that control or influence had nothing to do with General Motors purchases in that year. They show that the "recession" of 1920-1921 had caused a sharp drop in automobile sales, and had left automobile manufacturers, including the General Motors Divisions, with large supplies of coated fabrics on hand, and outstanding commitments for additional supplies. The Divisions had requested du Pont to cancel these supply contracts, and du Pont, which had made its own commitments for raw materials, had refused to do so. Further negotiations, however, had resulted in agreements with the Buick, Oakland and Oldsmobile Divisions that the existing contracts would be cancelled in return for a commitment on the part of those Divisions to buy their entire requirements of coated materials from du Pont for 1922. When that commitment expired in 1923, these Divisions resumed substantial purchases from du Pont's competitors (R. 399; Brown, R. 2186-2187, 2294, DP 253, 264, GTX 309-310, 2211, 2227, 506, 6165, 6176, 3818-3820). As the District Court found, all of this reflected normal buyer-seller relationships (R. 405); certainly on the Government's view of the trade relationship between the two companies, the whole negotiation, which was conducted at the highest levels in both companies and which was by no means free of acrimony, would have been pointless, and the prior and subsequent conduct of the Divisions in purchasing substantial quantities of their needs from du Pont competitors, inexplicable.

The findings and evidence reveal not only these general facts, but the details of du Pont's success, and lack of success, at each of the automobile Divisions during this period, and show convincingly the wide gap which exists between the facts and the Government's contention. A brief summary of each will suffice.

a. Fisher Body

In 1917, Fisher Body was building closed bodies for General Motors, and was purchasing the coated fabrics for the tops from a du Pont competitor, Textileather. Both before and after 1917 du Pont tried to secure a part of this business (MacShane, R. 2353). In 1923 it secured trial orders of its materials (GTX 452, R. 536, 4081), but it was not until 1925 that it succeeded in making any substantial sales (R. 374, 400; DP 269, R. 2234, 6182). In that year three events occurred which established du Pont as a substantial supplier of fabrics at Fisher Body: (a) Fisher Body decided to change from a pyroxylin to a rubber-coated fabric, which Textileather did not manufacture; (b) du Pont introduced an improved rubber-coated fabric—"Glazed Pontop"; and (c) du Pont employed in Detroit a new fabric sales representative who was recommended by the Fisher management. This last event resulted in a large order for the balance of 1925 (R. 374; Brown, R. 2231-2238, MacShane, R. 2353-2355, DP 266-274, 276, 297, 298, R. 2232-2237, 2242, 2266, 6178-6199, 6202, 6231-6232). Then, in early 1926, du Pont introduced an even better rubber-coated fabric—"Everbright"—which was widely adopted in the automobile industry. Fisher Body, after testing it, immediately began to purchase it, and in 1926 du Pont supplied Fisher Body with considerably more than half of its requirements (R. 374; Brown, R. 2236, 2239, MacShane, R. 2355, DP 272, 275, R. 2236, 2239, 6192, 6202). In 1927, however, Fisher Body went

back to pyroxylin-coated materials and bought only about half of its top materials from du Pont, and by 1929 du Pont's share had fallen to about one-third, at which level it continued until 1935, when the introduction of the all-steel top eliminated the need for those fabrics (R. 378-379, 400; Brown, R. 2241-2244, MacShane, R. 2356, DP 276-279, 283, 284, R. 2242-2243, 2249, 6202-6206, 6212, 6213).

b. Chevrolet

Du Pont had been a substantial supplier to Chevrolet of fabrics for upholstery and trim in its open car bodies for several years before 1917, and continued to have that business thereafter until 1930 (R. 397-398; Brown, R. 2187, 2196, DP 243, p. 1, 250, 323, R. 2188, 2204, 2205, 6149, 6161, 6269). On top material, however, du Pont's experience was quite different. In mid-1917 du Pont sought to persuade Chevrolet to change from one du Pont fabric to another which du Pont believed to be better, only to find that Chevrolet began to purchase from a competitor. The Chevrolet business was not regained until 1919, when du Pont's "Pontop" gave it a substantial quality advantage over its competitors (R. 398; Brown, R. 2188-2189, 2192-2193; DP 246, p. 2, GTX 297, R. 2192, 503, 6154 at p. 6155, 3791).

On rubber-coated top materials, du Pont maintained its pre-1917 position as Chevrolet's source of supply until 1924, when for two six-months periods Chevrolet purchased its total requirements from a competitor. Quality and delivery difficulties with the competitor's material led to du Pont's regaining the business in the latter half of 1925 (R. 398; Brown, R. 2196-2199, MacShane, R. 2322-2326, 2328-2330, DP 248, 250, 323, GTX 454, p. 9, R. 2198, 2204, 2205, 537, 6159, 6161, 6269, 4084, at p. 4092). Starting in the 1920's Chevrolet began the use of a more expensive top material of combined uncoated fabrics, which it bought

from Haartz, a competitor of du Pont, despite du Pont efforts to sell Chevrolet "Teal", du Pont's comparable product. Chevrolet continued to use Haartz material almost exclusively until 1930, when it abandoned rubber-coated top materials entirely, and awarded du Pont about half of its combined uncoated fabrics business, which du Pont thereafter supplied in diminishing quantities until Chevrolet ceased making open bodies in 1933 or 1934 (R. 398; Brown, R. 2199-2200, 2203-2204, MacShane, R. 2334, DP 250, 323, R. 2204, 2205, 6161, 6269).

The findings also reveal other experiences which du Pont has had in supplying Chevrolet with fabrics which cannot be reconciled with the Government's charges. In 1920, at Chevrolet's request, du Pont developed a coated panel board and sold it to Chevrolet at about half the price which Chevrolet had been paying to du Pont's competitors. Within a year, the competitors met du Pont's price, and regained and kept all of that business (R. 398; Brown, R. 2195-2196). Similarly, for many years during the 1920's and 1930's, Chevrolet bought large quantities of coated fabrics for "winterfronts" for radiators. All of it, except in one year, 1936, was bought from du Pont's competitors (R. 398; Brown, R. 2200, DP 249, R. 2200, 6160).

c. Buick

Buick likewise after 1917 continued to buy as it had before 1917, purchasing about half of its coated fabrics requirements from du Pont. In 1919 Buick stated that "not only were [du Pont's] deliveries 100% efficient, and it was not true of many of [du Pont's] competitors, but also that the quality of the material that they were receiving was the best they had ever had from anyone" (GTX 303, R. 504, 3805 at p. 3808). In 1922 as a result of the settlement of the 1921 contracts referred to above (p. 69), it bought all of its coated fabrics requirements from

du Pont, but even in that year it substantially reduced its purchases of this material by shifting to combined uncoated fabrics which du Pont did not then manufacture. When du Pont began to produce its combined uncoated fabric "Teal" in 1923, it actively sought to sell to Buick, but was successful only in 1927 and 1928. In all of the other years until Buick ceased making open cars in the early 1930's Buick bought this material almost entirely from du Pont's competitors (R. 399; Brown, R. 2187, 2211-2215, MacShane, R. 2332-2337, DP 254-256, 259, R. 2213, 2214, 2216, 6165A-6167, 6170).

d. Cadillac

Cadillac ceased making open bodies early in 1924. During the time it was so engaged, both before and after 1917, it bought all of its requirements of artificial leather for interior trim from du Pont except for half of 1924, when all of its business in this material went to a competitor (R. 398; Brown, R. 2185, 2220-2221, MacShane, R. 2338). On top materials it likewise followed until 1920 its pre-1917 pattern, purchasing its entire requirements from a du Pont competitor. In 1920, however, its tests satisfied it of the superiority of du Pont's "Pontop", and it continued thereafter to use it until it ceased manufacture of open bodies (R. 398; Brown, R. 2220-2221, MacShane, 2339-2340, GTX 297-298, R. 503, 3791-3795).

e. Oldsmobile

Oldsmobile made open bodies until 1929. Prior to 1917, Oldsmobile purchased substantially all of its coated fabrics from du Pont; after 1917, du Pont was far less successful. The findings show that the reasons were unrelated to the stock purchase, and that normal, expectable, competitive factors were the sole measure of du Pont's success or failure. In late 1917 du Pont had trouble with color uni-

formity because of dye shortages. The Oldsmobile Division, dissatisfied with the du Pont product, shifted to competitive materials. Although the dye problem was soon solved, du Pont did not succeed in regaining even a part of this Oldsmobile business until 1918-1919, and never thereafter, except in 1922 when the settlement of the 1921 contracts temporarily improved du Pont's position (see p. 69, *supra*), did du Pont secure more than half of this business (R. 397-398, 399; MacShane, R. 2341-2343, Brown, R. 2222-2224, 2226, DP 237, 261-262, GTX 296, R. 2080, 2222, 2223, 502, 6140, 6172, 6173, 3790).

For top material Oldsmobile also followed its pre-1917 pattern. It adopted du Pont's "Pontop" when it was introduced and continued to use it until 1923, when du Pont lost half of the business to a competitor. In 1924 Oldsmobile shifted to combined uncoated fabrics, and purchased a substantial amount from du Pont through 1926. Thereafter it bought exclusively from du Pont's competitors (R. 397, 399; Brown, R. 2224-2225, MacShane, R. 2342-2344, DP 263, R. 2224, 6175).

f. Oakland

For several years before 1917, and generally thereafter until it ceased to produce open car bodies in 1933, Oakland purchased about one-third of its coated fabrics requirements from du Pont. This pattern varied during the latter part of 1917 and all of 1918, when the dye trouble which du Pont experienced resulted, as it did at Oldsmobile, in the loss of all of Oakland's business, and during 1922, when for the reasons already noted (p. 69, *supra*), Oakland purchased its entire requirements from du Pont (R. 398-399, Brown, R. 2226-2229, MacShane, R. 2345-2346, DP 237, GTX 300, R. 2080, 503, 6140, 3798). In 1926, however, Oakland changed to combined uncoated fabrics for top material, and consistently thereafter purchased its entire requirements from du Pont's competitors

(R. 399; Brown, R. 2228, MacShane, R. 2348-2349, DP 265, 324, R. 2228, 2229, 6177, 6270).[7]

3. The General Motors Divisions Have at All Times Bought Fabrics from du Pont on a Competitive Basis

Du Pont has generally maintained over the years its pre-1917 position as one of the principal suppliers of fabrics to the General Motors Divisions. Its participation in General Motors business, however, as shown by the findings as to each Division noted above, has been far from constant. A trade survey made in 1930 showed that du Pont was then obtaining only about 31.5 percent of General Motors' total requirements for coated and combined fabrics (R. 400; DP 280-282, R. 2245, 2248, 6208-6211).[8] In the more current years, 1946 and 1947, du Pont's share of General Motors' fabric purchases was 40-50 percent (R. 404),[9] the balance being bought from du Pont's competitors.

---

[7]General Motors had two other automobile Divisions—Sheridan and Scripps-Booth—both of which were liquidated in 1924. From 1917 until their demise du Pont was wholly unsuccessful in selling fabrics to either of them (Brown, R. 2187, MacShane, R. 2349-2350, GTX 297, 420, R. 503, 528, 3791, 4010).

[8]The Government figure of 89 percent in 1926 (Br. pp. 60, 139) reflects the same type of "construction" of statistics condemned by the trial court in the Government's earlier efforts (see R. 403-404). While purporting to speak of "total General Motors purchases" the calculation fails to include the figures for Fisher Body Division (DP 297, R. 2266, 6231), which would make the percentage not 89, but 55.5. The figure for total dollar sales on p. 139 of the brief ($11,623,000) is also a patent error; it should be $1,623,000, as it is stated on p. 60.

[9]Appellees figures for these years—52 and 38 percent (DP 569, R. 3007, 6527)—were found by the trial court to be a correct reflection of the basic data (R. 404).

The Government's suggestion that in 1948 the percentage had become 63.8 percent (Br., p. 61) is based upon exhibits which did not purport to include all of General Motors purchases from competitors of du Pont, which were expressed in yards rather than dollars, although prices per yard varied widely, and which were in any event

This share of General Motors fabrics business was achieved by du Pont, as the District Court found (R. 405):

> ". . . through its early leadership in the field and by concentrating upon satisfactorily meeting General Motors' changing requirements as to quality, service and delivery."

The record reveals the several competitive factors that are summarized in that sentence. For example, since du Pont first acquired the Fabrikoid Company in 1910, it has maintained research and development staffs far larger than those of its competitors (Nickowitz, R. 2122-2123). Both before and since 1917 this research program has enabled du Pont to be a leader in developing new and superior products, for automobile as well as other uses (Nickowitz, R. 2123-2125). It has also enabled du Pont to maintain a high degree of success in meeting standards of quality and uniformity. On the occasions when it has not succeeded in this respect —as in the case of its war-time trouble with dyes noted above in connection with Oldsmobile and Oakland—its sales have suffered. That such instances have been rare, and that du Pont's reputation for success in quality and uniformity standards is high, has been a powerful sales advantage (Brown, R. 2290-2291, MacShane, R. 2357, 2373-2374, Nickowitz, R. 2118-2120), and the same can be said for its high quality technical service (Nickowitz, R. 2120-2123). Finally, du Pont's reputation is unexcelled as to its ability to maintain a production schedule to which it has agreed, and even to meet emergency demands, arising

---

a salesman's estimate based on what information he could piece together, which later turned out in many cases to have been considerably wide of the mark (GTX 1351, 1354, 1357, R. 2890, 5358, 5368, 5378. See Nalle, R. 2862-2864, 2877-2878, 2893-2896). The trial court made no findings beyond the last year for which basic data were available—1947.

from competitive failures or otherwise, which it has been frequently called upon to do (Brown, R. 2291, MacShane, R. 2325-2326, 2329-2330, 2357, Nickowitz, R. 2094, 2100, 2126-2128, 2175).

In recent years a substantial portion of du Pont's sales to auto manufacturers has been made to General Motors, but this fact provides no basis for an inference that du Pont's fabrics are inferior or that General Motors has purchased from du Pont on a non-competitive basis. At Chrysler, du Pont had considerable early success (Brown, R. 2288-2290, DP 286, 321, R. 2256, 2289, 6216, 6267), but in the early 1930's, when Chrysler had become an important factor in the industry, du Pont sales fell off. The du Pont salesman, Nickowitz, stated the reasons given by Chrysler's body engineers (R. 2117):

> "* * * the essence of what they said was, 'Well, you fellows, you are a major source of supply for General Motors'—and at that time we were, too, for Ford—'we would prefer to deal with somebody who was going to be exclusively our major source of supply because we think they would be more apt to take care of us than you will.'
>
> * * *
>
> "* * * We just haven't been able to become an important source since then to Chrysler."

Currently, Textileather supplies the majority of Chrysler's fabrics (R. 402; GTX 1381, R. 2825, 5414). Ford, as in the case of finishes, has elected to produce for itself most of its own needs (Nickowitz, R. 2113, Brown, R. 2292).

Normal competitive factors, therefore, account for the proportion of du Pont sales of fabrics which have been made to General Motors. There is, moreover, additional evidence that du Pont's fabrics can and have made their way

on the merits. Prior to the early 1920's, du Pont was the principal supplier of coated fabrics to all three of the then major producers—Ford, Willys-Overland and General Motors (Brown, R. 2291, MacShane, R. 2320). After Ford and Willys began to produce their own coated fabrics they still turned to du Pont for much of what they could not produce (Brown, R. 2287-2288, MacShane, R. 2361-2364). Du Pont has continued to be Ford's largest supplier for the material which it does not manufacture for itself; indeed, during the late 1920's Ford purchased du Pont's "Everbright Pontop" for all of its top requirements over several years (Nickowitz, R. 2113-2114, Brown, R. 2285-2287, 2290-2291, MacShane, R. 2356, 2361-2363). Du Pont has likewise supplied, over the years, a considerable part of the coated and combined fabrics of most of the smaller automobile manufacturers (Nickowitz, R. 2115-2116, Brown, R. 2290, MacShane, R. 2366-2368).

C. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS THAT FISHER BODY'S PURCHASES FROM DU PONT WERE NOT RESTRAINED OR INFLUENCED BY DU PONT'S STOCK OWNERSHIP

It is the Government's position that Fisher Body has been a "special problem" because it was "insulated from du Pont control" until June 1926, when all of its stock was acquired by General Motors and it became a General Motors Division (Br., pp. 64, 141). It is the contention of the Government that until Fisher Body became a Division of General Motors it purchased from du Pont on a competitive basis but that thereafter Fisher Body bought on a non-competitive, preferential basis. This contention was also made below, and was rejected by the trial court in findings which are fully supported by the evidence.

The trial court found that "The record also shows that Fisher Body at all times conducted its purchasing with respect to finishes, fabrics and all other products in accord-

ance with its own best judgment", and that "the extent to which Fisher Body has purchased over the years from competitors of du Pont in substantial quantities cannot be squared with the charge that Fisher is a captive market for du Pont" (R. 381).

The detailed findings and evidence show that in 1919, Durant, the President of General Motors, recognizing the coming importance of the closed body in automobiles, the need of General Motors for an assured supply, and the preeminence of the Fishers as closed body builders, sent Walter P. Chrysler, then a General Motors Vice President, to try to hire the four younger Fisher brothers for General Motors. That failed, but in the same year, Durant negotiated an arrangement with F. J. Fisher under which General Motors acquired 60 per cent of the stock of Fisher Body, and which in substance provided that General Motors would supply the funds, and the Fishers the personnel, to expand Fisher Body's operations, with the six brothers agreeing to remain with and direct the operations of the company for five years. The brothers were secured in their control of the operations of Fisher Body, and General Motors was secured in its financial responsibility, by a voting trust in which the voting power was equally divided, and which was set to expire coterminously with the employment contracts (R. 372; L. Fisher, R. 548-553, 557, 561, 567-569, 571-572, GTX 138, 139, p. 12, 425-430, R. 480, 530, 531, 3288, 3291 at p. 3300. 4017-4048). The agreement created, in effect, a "trial marriage" between the Fishers and General Motors, at the end of which the brothers would be free to withdraw (L. Fisher, R. 574).

Before the five years expired, the Fishers became increasingly satisfied. In 1922 they expressed a wish for closer association with General Motors, and F. J. Fisher, already a General Motors director, was added to the General Motors Executive Committee (R. 574, GTX 435, R.

532, 4056). In 1924, when the voting trust and the Fisher brothers' employment contracts were about to expire, Sloan wanted the relationship to be made permanent, and to have the Fishers' help in the broader problems of General Motors (Sloan, R. 1231-1232). After protracted negotiation it was agreed that three of the brothers would devote virtually full time to General Motors with the remaining three operating Fisher Body; that all six would take allotments in the Managers Securities Plan (see pp. 176-184, *infra*) in lieu of the compensation provided in the employment contracts; and that the voting trust would be permitted to expire as scheduled (R. 372-373; L. Fisher, R. 553, 574-575, Sloan, R. 1231, GM 32, R. 1232, 6657). In 1926, it was again Sloan who recognized that the rights of certain minority stockholders in Fisher Body made it impossible for the latter to make the price reductions to which General Motors was entitled as a matter of economics, and to expand its plant capacity and reserve its entire production for General Motors. Consequently, he took the initiative in the negotiations which culminated in that year in the acquisition by General Motors of the Fisher Body remaining 40 percent minority interest (R. 373; Sloan, R. 1233-1234, GM 34, GTX 505, 507, R. 1234, 598, 6661, 4173, 4176).

The findings and the evidence show that in the conduct of its purchasing policy, both before and after it became a Division of General Motors, Fisher has never bought from du Pont on a preferential, non-competitive basis. While it has purchased, from time to time, portions of its requirements from du Pont it has done so solely on the merits, and has always followed a policy of insisting upon two or three established reliable sources for every product which it purchases in volume (R. 380; L. Fisher, R. 585, 593, Wirshing, R. 1923, Nickowitz, R. 2095, GTX 1315, R. 2165, 5267).

The evidence as to finishes shows du Pont's first significant success—with "Duco"—was in 1923-1924 *before* the 1926 minority acquisition by which Fisher Body became a Division of General Motors, and even before the voting trust expired (Williams, R. 1954-1956, DP 183-185, R. 1950, 6034, 6042). Coercion or influence had nothing to do with it. Lawrence Fisher, who "handled the 'Duco' situation from the first can of it we got" (R. 585) testified that he made the decision to use it on bodies painted by Fisher because "it would stand up and we would stand back of it" and that he even undertook to help "sell" the car Divisions on its use (R. 592).

As soon as competitors of du Pont began to offer acceptable nitrocellulose lacquers, Fisher Body put into effect its policy of several sources of supply, and in 1925 began to buy part of its requirements from two du Pont competitors (R. 387; L. Fisher, R. 593, see pp. 50, 53, *supra*). This loss of finish business by du Pont was *after* some of the Fishers had come into General Motors in executive positions, *after* the voting trust expired, and *after* the Fishers had received allotments in Managers Securities.

The findings and evidence as to fabrics are equally inconsistent with the Government's assertion. They show that du Pont's first success came in 1925, when a Fisher Body decision to change from a pyroxylin to a rubber-coated material, a new and improved du Pont product, and a new du Pont salesman with an entree at Fisher Body combined to give du Pont a position as a major supplier. See pp. 70-71, *supra*. This, of course, was *before* Fisher Body allegedly lost its "independence" by becoming a Division of General Motors, and *before* the sliding scale discount discussed below. Once established, du Pont retained its position as one of Fisher Body's major fabric suppliers, though as already stated (pp. 62-64, 70-71), its success varied widely from year to year, depending on Fisher Body's

assessment of du Pont's offerings as compared with those of its other major suppliers.

The Government's argument is also at odds with the findings and evidence relating to the sliding scale discount, which du Pont accorded to General Motors from 1926 to 1932. Although this is described by the Government as "pressure" (Br., p. 67), it was in fact no more than a reduction in price which du Pont agreed to in the hope of getting more General Motors business—a normal competitive practice. There was nothing unique about the arrangement; General Motors secured similar price concessions from many of its suppliers.[10] It appears that du Pont hoped to secure, by lower prices, some of the large volume of purchases which Fisher Body Division was making from du Pont's competitors (GTX 454, p. 4, 492, p. 4, R. 537, 541, 4084, 4087, 4145, 4148). The trial court was clearly correct in finding that it did "not establish that du Pont's sales to Fisher resulted from its stockholding in General Motors or

---

[10]Contrary to the Government's statement (p. 142) the discount was not a scheme worked out by du Pont. The idea of a sliding scale discount as a device to save money for General Motors had been developed by the General Purchasing Committee early in 1924. Under these discount contracts, a supplier would fix his base price upon the volume of business he had previously enjoyed, but would grant an additional discount for increased volume.

In the normal course of business in July, 1926, the General Purchasing Committee invited W. P. Allen of du Pont to present a proposal for a sliding scale discount contract to be applied on General Motors' purchases from du Pont—not just fabrics and finishes, but *all* purchases. At the same meeting the Committee extended a similar invitation to Standard Oil (R. 375, GM 164, p. 1, R. 1119, 7147). The contract with du Pont was ultimately negotiated, and with some changes, remained in effect until 1932 (R. 375-376, 379; Lynah, R. 1120, 1123-1125, GM 165, GTX 464, R. 1123, 538, 7155, 4117). The General Purchasing Committee, during the nine years of its existence, was successful in negotiating over a hundred sliding scale discount contracts with various suppliers, of which at least 18 were of the multiple-item sliding scale discount type which were made with du Pont (R. 374, 375, Lynah, R. 1112-1114, GM 162-164, R. 1116-1119, 7120-7147).

its alleged control of General Motors" (R. 381). During the life of the discount contract, and despite savings to General Motors which would have resulted from larger purchases, Fisher Body Division never bought all or substantially all of its requirements from du Pont.

The Government in making its contention with respect to Fisher Body's purchases from du Pont asserts that by 1947 and 1948 Fisher was buying 65 to 68 percent of its requirements of fabrics from du Pont (Br., pp. 68, 142). The evidence shows that these figures are incorrect and that in fact Fisher was purchasing a significantly smaller percentage of its fabrics requirements from du Pont in these years. The Government's figures arbitrarily exclude from consideration Fisher's substantial purchases of convertible top material from a competitor of du Pont (GTX 1350-1351, R. 2890, 5356-5358, Nalle, R. 2893-2896). As we have shown, du Pont sold this product to Fisher in the 1920's but lost the business in 1932. Its sales efforts continued, however, and it regained a portion of the business in 1948 (p. 63, *supra*). The trial court found that the Government was wholly unjustified in regarding convertible top material as a product not manufactured by du Pont (R. 404).[11] In 1947 and 1948, therefore, Fisher purchased from du Pont not 65 to 68 percent of its fabrics requirements, as the Government asserts, but approximately 40 percent (Nalle, R. 2881, 2893-2897).

Purchases by Fisher Body, both before and after it became a Division of General Motors may be regarded in the same light as purchases by any other General Motors Division. Du Pont, and its competitors, succeeded or failed as they were successful or unsuccessful in persuading

---

[11]The finding is fully supported by the evidence and particularly by the contemporaneous documents which show du Pont's sales efforts (DP 287-295, R. 2256-2263, 6219-6227; DP 565, p. 26, R. 3000, 6485 at p. 6510).

Fisher Body of the quality, service and price advantages of their products—subject to the consistent and overriding Fisher body policy of having several suppliers for each major product wherever that was possible.

D. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT NO RESTRAINT OF TRADE IN ANTIFREEZE HAS RESULTED FROM DU PONT'S STOCK OWNERSHIP

The evidence on antifreeze relates to two different periods of time and to two different subjects. A part of the evidence has to do with General Motors' purchases of antifreeze from du Pont and others since 1930. The other part of the evidence has to do with an incident that occurred in 1925 and 1926, when a question arose whether the instruction books given to purchasers of cars by General Motors should recommend the use of ethyl alcohol or glycerine as an antifreeze. This early incident had nothing to do with any purchases of antifreeze by General Motors.

In the trial court the Government sought to support its case by reference both to General Motors' purchases of antifreeze from du Pont and the early glycerine-ethyl alcohol incident. Indeed, General Motors' purchases of antifreeze from du Pont were one of the three major items of purchases relied upon by the Government in the court below to establish the alleged restraint of trade, the other two being fabrics and finishes. In its brief in this Court the Government makes no mention of General Motors' purchases of antifreeze from du Pont, although it continues to rely upon the early incident involving glycerine. Even though the Government apparently no longer bases any argument upon General Motors' purchases of antifreeze, the evidence with respect to the purchases is highly significant because it provides substantial confirmation, both with respect to antifreeze and more generally, for the trial court's findings that General Motors' purchases from du Pont have been made on a competitive basis and have not

been the result of control or influence arising from the stock relationship.

1. General Motors' Purchases of Antifreeze from du Pont

Sales by du Pont to General Motors of antifreeze in 1946 and 1947 represented more than 97 percent of General Motors' total antifreeze requirements. In the court below the Government relied entirely on that one statistic, as the court specifically noted (R. 437). The court below declined to regard that statistic as conclusive, and after reviewing all of the facts as to antifreeze, rejected the Government's contention. It found (R. 437):

> "General Motors was not limited by agreement or by du Pont domination in its purchases of antifreeze and bought from du Pont only because it believed that du Pont best served its needs."

The evidence fully supports that finding.

Du Pont's present position as a substantial producer of antifreeze begins in 1930. In that year it began a campaign to create an outlet in the antifreeze market for its methanol (a synthetic methyl alcohol) which it produced in large quantities. In the course of that campaign du Pont made several attempts, all unsuccessful, to sell methanol for this purpose to the automobile Divisions of General Motors for production line use.[12] Thereafter, in 1934, du Pont began to market a methanol antifreeze for the retail trade, selling it as "Zerone". By the end of 1935 du Pont had developed a large market for methanol antifreeze and had never sold a gallon to General Motors (R. 435-436; Schumacher, R. 2967-2971, 2988-2989, DP 556, R. 2969, 6472).

---

[12] *I.e.*, for original installation in a car which comes off the production line during freezing weather.

The General Motors Divisions meanwhile, beginning in 1933, had been buying an antifreeze for resale to their dealers, who in turn sold to the public. Although du Pont made efforts to obtain this business, the Divisions bought glycerine exclusively, purchasing it from the Glycerine Producers Association. In 1935, however, the Association advised General Motors that shortages would make glycerine unavailable for antifreeze purposes. Even then the Divisions did not turn to du Pont; instead they approached Union Carbide, and sought to purchase ethylene glycol, which Union Carbide was selling as "Prestone". Only when Union Carbide was unwilling to agree to furnish materials under the General Motors brand name, which du Pont, reluctantly, agreed to do, did General Motors purchase antifreeze for the first time from du Pont (R. 435-436; Thompson, R. 2946-2948, Schumacher, R. 2970-2971, 2974-2977, 2988-2989, Hufford, R. 2994-2996, DP 556, R. 2969, 6472). Before it did so General Motors thoroughly canvassed every other possible supplier, and came to the conclusion that du Pont, which offered both quality and a fair price, was the only company which could supply methanol in the quantities needed by the General Motors Divisions (R. 436; Thompson, R. 2947). Every year thereafter until the war, before purchasing from du Pont General Motors solicited bids from all known suppliers (R. 436; Thompson, R. 2948-2949, 2955, Schumacher, R. 2985).

In 1939, du Pont developed a new process for making ethylene glycol, and began to distribute it as an antifreeze known as "Zerex". In 1940 the General Motors Divisions began also to purchase ethylene glycol from du Pont, packaged like the methanol antifreeze under a General Motors brand name (R. 436-437; Schumacher, R. 2976-2977, Thompson, R. 2948-2949). From 1940 until the war General Motors was unable to purchase ethylene glycol from

any source other than du Pont which would supply it under General Motors brand name in the quantities and quality which General Motors required. Following the war-time allocation period, there was an acute shortage which again made du Pont the only available source of supply (R. 437; Thompson, R. 2949-2950, Hufford, R. 2996).

In 1951 du Pont advised the General Motors Divisions that it was no longer willing, because of the extra costs to it of doing so, to package either type of antifreeze under General Motors' private brand name. The Divisions strongly objected, and in 1953, when additional sources became available, most of the Divisions turned to competitors who would meet their private brand desires and du Pont sold only to Oldsmobile (R. 437, Schumacher, R. 2984, Thompson, R. 2950, 2962).

In contradiction of this evidence, as the District Court found (R. 437): "The only evidence offered by the Government in support of its contention as regards antifreeze is that in recent years General Motors has purchased practically all of its requirements from du Pont." As in the case of finishes and fabrics, purchases by the General Motors Divisions of a substantial proportion of their requirements of a product from du Pont were urged upon the trial court by the Government as conclusive evidence of control or influence. The court, however, found that when du Pont has sold antifreeze to General Motors it has been because, in the opinion of the various General Motors Divisions, du Pont has had more to offer than its competitors.

2. The Ethyl Alcohol-Glycerine Incident, 1925-1926

This incident, which has no relation to General Motors' later purchases of antifreeze from du Pont, is elaborately discussed in the Government's brief as an example of an alleged "restraint of trade" (Br., pp. 40-47, 81, 129-

130). It arose out of a controversy over whether General Motors should recommend that automobile purchasers use glycerine or ethyl alcohol as an antifreeze. The Government's treatment of this subject, which makes no reference to the fact that the incident is covered by the findings of the trial court (R. 356-357, 360-361), asserts a view of the facts which cannot be reconciled with the evidence.

Du Pont began to produce ethyl alcohol in 1926 (DP 438, GTX 328, R. 2700, 509, 6430, 3845), shortly after alcohol came into use as an antifreeze and invaded an area of use previously enjoyed almost exclusively by glycerine. Initially there was considerable uncertainty relative to the merits of alcohol and glycerine as antifreezes, but by 1926 most automobile manufacturers were recommending alcohol, a few glycerine, and some a mixture of the two (GTX 334, R. 510, 3859). Opinions within General Motors itself were divided (GTX 336, R. 511, 3861). The producers of both glycerine and alcohol were naturally anxious that their products be recommended by automobile manufacturers in the instructions issued to owners.

In 1925, H. Fletcher Brown, of du Pont, wrote Sloan that du Pont was planning to go into the production of alcohol, and asked whether General Motors was favoring glycerine (GTX 319, R. 507, 3832). Sloan replied that General Motors "must be guided by the facts" (GTX 320,

During the next few months the findings and evidence show that du Pont protested that the recommendations of the various automobile Divisions discriminated against alcohol, and Armour & Company similarly protested that General Motors was discriminating against glycerine (R. 356-357; GTX 322, 326, 330, 332, 333, R. 508-510, 3836, 3842, 3847, 3851, 3853). General Motors Research Laboratories tested both glycerine and alcohol in 1925 and 1926. Its final conclusion was, aside from considerations of price and volatility, that while alcohol, if spilled, would damage

the "Duco" finish, glycerine would cause the operating parts of a motor to corrode and decompose unless the system were airtight, and might clog the radiator (GTX 336, R. 511, 3861). The glycerine producers, which were "large and varied" had been given an opportunity to review, and had concurred in, the findings of General Motors Research Laboratories (GTX 336, R. 511, 3861). In view of these findings, the General Motors Technical Committee issued instructions to the automobile Divisions to express no preferences—"to state the facts as we found them"—and so to let the car owner decide for himself (R. 357; GTX 336-337, R. 511, 3862, 3863).

Moreover, there is one other fact which is relevant to this charge of control or influence, but which is not referred to in the Government's brief. The findings show that in each of the three years 1926-1928 the General Motors Purchasing Committee rejected du Pont's proposals that it make a contract to purchase ethyl alcohol from du Pont, even though in 1927 du Pont quoted a "special" price (R. 357, 435; DP 436, 437, 439, GM 155, pp. 11, 13, GTX 328, R. 2700, 1100, 509, 6428, 6429, 6431, 7077 at pp. 7087, 7089, 3845), and in 1933-1935, as noted above (p. 86), General Motors purchased glycerine for all its antifreeze requirements.

All of the evidence bearing on this incident shows that the issue was raised on the merits and decided on the merits. Control and influence played no part.

E. THE EVIDENCE WITH RESPECT TO OTHER PRODUCTS SUPPORTS THE FINDINGS OF THE TRIAL COURT THAT GENERAL MOTORS' PURCHASES HAVE NOT BEEN RESTRAINED OR INFLUENCED BY DU PONT'S STOCK OWNERSHIP

The Government contends that "whenever a business judgment was required in a situation in which du Pont was in competition with other suppliers, the stock interest cut across normal competition and resulted in a preference

being given to du Pont" (Br., p. 72). Furthermore, the Government asserts that this preference is "the inevitable result" of the stock relationship and is necessarily "inherent" in the relationship (Br., p. 127). On its own terms and logic this argument must take into account all of the commercial relations between the two companies and not simply those selected by the Government. Yet in making this contention the Government totally disregards a substantial body of evidence which shows that du Pont attempted to sell to the General Motors Divisions a wide range of products in addition to paint, fabrics and antifreeze, but that it has succeeded in doing so only when the General Motors Divisions, in the exercise of their own independent business judgment, have decided on the basis of quality, service and price that their economic interests would best be served by purchasing from du Pont.

The evidence as to all these products was considered in detail by the trial court and it made the following finding (R. 447):

> "All of the evidence bearing upon du Pont's efforts to sell these various miscellaneous products to General Motors supports a finding that the latter bought or refused to buy solely in accordance with the dictates of its own purchasing judgment. There is no evidence that General Motors was constrained to favor, or buy, a product solely because it was offered by du Pont. On the other hand, the record discloses numerous instances in which General Motors rejected du Pont's products in favor of those of one of its competitors. The variety of situations and circumstances in which such rejections occurred satisfies the Court that there was no limitation whatsoever upon General Motors' freedom to buy or to refuse to buy from du Pont as it pleased."

1. Plastics

The findings of the District Court with respect to plastics (R. 444-445) began with the story of cellulose acetate in the year 1930. There is, however, evidence in the record of an earlier plastic, cellulose nitrate, or "Pyralin."

In 1915, more than two years before du Pont acquired its General Motors stock, it acquired the Arlington Company, one of the two largest cellulose nitrate producers in the United States (Irenee du Pont, R. 765-766, GTX 110, R. 476, 3120). Among the many uses for this product at that time was its use in thin, transparent sheets as "windows" in the side curtains of open automobiles. Indeed, when du Pont acquired Arlington the latter numbered among its customers practically all of the major automobile companies of that day, except Willys (DP 426, GTX 110, R. 2696, 476, 6399, 3120).

After du Pont acquired Arlington, it retained most of Arlington's customers. After 1917, however, contrary to what would be expected in the light of the Government's charges, du Pont's success with the General Motors units did not increase, but actually declined. At Buick, sales were $70,000 in 1917 and only $14 in 1918; in May of 1918 Buick placed an order with a du Pont competitor for 100,000 sheets (DP 421, GTX 294, R. 2695, 502, 6389, 3787). At Chevrolet, sales were $80,000 in 1917, only $30,000 in 1918, and zero in 1919 (DP 421, R. 2695, 6389). This was not due to product deficiency, for total du Pont sales to all customers almost doubled during these years (DP 421, R. 2695, 6389).

As in other product areas, however, du Pont's ability to improve its product enabled it to regain most of what it had lost. Early sheeting was subject to rapid discoloration—yellowing—and quickly became brittle and cracked. Before 1921 du Pont had improved "Pyralin" sheeting to a

point where it would outlast competitive sheeting several times over (Irenee du Pont, R. 954-955), and by 1921 the du Pont "Pyralin" sales organization believed that it had regained all of the business of the General Motors Divisions (GTX 419, DP 421, R. 528, 2695, 4009, 6389). The same product improvement also brought du Pont, in the early 1920's, large orders from Ford, and all of the requirements of the producers of Nash, Studebaker, Chrysler, Maxwell, Reo and White automobiles for various periods (DP 430-435, R. 2698, 6413-6426).

All of this is ancient, to be sure; "Pyralin" for "windows" in side curtains has long since ceased to be important. The facts simply demonstrate that although "Pyralin" was one of the products mentioned in Raskob's Point 5 (see pp. 143-145, 235-240, *infra*), and in the Amended Complaint (R. 232), du Pont's experience in selling it to General Motors, both before and after 1917, is directly at odds with the Government charges that du Pont enjoyed a non-competitive, preferential advantage.

The same is true of the facts as to du Pont's much later efforts to sell two other plastics to the General Motors Divisions—cellulose acetate or "Plastacele", and acrylic resin or "Lucite".

"Plastacele" was first produced by du Pont in 1930, and was first used by the Inland Division of General Motors in 1937, in the manufacture of steering wheels for automobiles. From the outset, du Pont made a concentrated effort to secure this business (R. 444; Gillie, R. 2595-2597, 2601, DP 402, 403, R. 2602, 6385, 6386). Its success was never substantial. In 1937, Inland divided almost all of its business between two competitors of du Pont, purchasing only $1,241 of du Pont's material. In 1938 du Pont's share rose to almost $40,000, and in 1939 to $157,000, which was about a quarter of Inland's total purchases. In 1940, du Pont's share dropped to $100,000—about 15 percent of Inland's needs. Thereafter Inland purchased nothing from du Pont,

obtaining all of its requirements, which, in 1941, totaled $510,000, from a du Pont competitor, Tennessee Eastman Company. Du Pont's quality and price were equal to those of Tennessee Eastman, and du Pont made large sales of its products to other users (R. 444; Gillie, R. 2598-2601, DP 329, 330, 400, R. 2775, 2597, 6276, 6277, 6382).

"Lucite", the other plastic, was first produced by du Pont in the form of a molding powder in 1937, and was immediately promoted by it for many automobile parts, such as tail lamp and other lenses, knobs, radio grilles and hardware trim. About two years after "Lucite" appeared, Rohm & Haas Company began to offer the same acrylic resin under the name of "Plexiglas" (R. 444; Gillie, R. 2603-2605). It is still the only other producer.

The findings and the evidence on the sales of "Lucite" to General Motors are also at odds with the Government's charges. Du Pont's first sales of "Lucite" for automobile use were not to a General Motors Division, but were for use on the Dodge, a Chrysler product. Indeed it was ten years, 1946, before du Pont could make any substantial sales to any General Motors Division. Since then three General Motors Divisions—Guide Lamp, Inland, and AC Spark Plug—have made purchases. At each of these Divisions, du Pont and Rohm & Haas have competed nip and tuck, with sometimes one and sometimes the other having the larger share (R. 444-445; Gillie, R. 2605-2608).

2. Brake Fluid

The findings and evidence with respect to brake fluid afford another illustration that General Motors commercial policies were not influenced by du Pont's stock ownership. In this product area, du Pont was completely unsuccessful in a very important item; in the six years ending in 1951 the General Motors automobile Divisions purchased more than $11,500,000 of brake fluid from another Gen-

eral Motors Division, instead of from du Pont (DP 399, R. 2702, 6381).

Du Pont began the manufacture of brake fluid in 1934, about the time hydraulic brakes were becoming standard equipment on automobiles. The findings show efforts to sell the du Pont fluid to General Motors beginning in that year. Although tests showed the du Pont fluid to be better, as well as cheaper, than the fluid which the Divisions were then purchasing from a du Pont competitor, Wagner Electric Company, du Pont's efforts were wholly unsuccessful (R. 445; Weber, R. 2618-2620).

In 1935 Delco Products Division (now Moraine Division) of General Motors began to manufacture and to sell to the automobile Divisions a fluid which it called "Delco No. 5". By that time du Pont had developed an improved propylene glycol type of fluid, and again, over a period of several years, made vigorous efforts to sell it to the automobile Divisions. Tests showed this new du Pont fluid to be superior to "Delco No. 5"; it was cheaper; representatives of the various Divisions on occasion conceded the superiority of the du Pont fluid; and it was actually approved for production use by both Oldsmobile and Pontiac, but du Pont never succeeded in making a sale to any General Motors Division (R. 445; Weber, R. 2620-2625, Walker, R. 2638-2645, DP 383-388, 390, 392-395, R. 2625, 2641, 2650, 2702, 2645, 6355-6363, 6365, 6367-6373). With other automobile companies, on the other hand, this propylene glycol fluid was a great success, and as "Lockheed No. 21" it was sold in large volume for many years (R. 445; Walker, R. 2647, DP 447, R. 2702, 6437). Only later did du Pont learn that the engineers at the General Motors automobile Divisions had agreed to buy from Delco to help it write off the investment it had made in equipment (R. 445; Walker, R. 2645, DP 395, 396, R. 2645, 2650, 6373, 6376).

In 1938 or early 1939 Delco brought out a new fluid—"Delco No. 9", which it thereafter sold to the automobile Divisions. This fluid, which was also more expensive than the du Pont fluid, was the result of a joint development project of Delco and Union Carbide. Moreover, the chemical ingredients for "Delco No. 9" were also purchased, not from du Pont, but from du Pont's competitor, Carbide and Carbon Chemicals Corporation, a unit of Union Carbide (R. 445; Walker, R. 2642, DP 398, R. 2702, 6379).

The significance of these findings, of course, does not lie in the relative merits of the different fluids, nor in the advantages or disadvantages to General Motors in producing a fluid of its own. Rather, they reveal simply that General Motors had complete independence of action, to buy brake fluid and its ingredients, where it pleased, and to make its own when it so desired. That to do so was of very substantial disadvantage to du Pont was immaterial to General Motors.

3. Casehardening Materials

The findings and evidence as to the purchases by the General Motors Divisions of various products for case (or surface) hardening of various steel parts, such as gears, furnish yet another illustration of the absence of the control or influence alleged by the Government. The General Motors Divisions, like du Pont's other automobile and appliance customers, have selected, from among the competing processes and materials for this purpose, those which their engineers and purchasing agents have determined to be best suited to their needs. And, though the needs of all of du Pont's customers, in this area, are substantially similar, the findings show that other automotive customers purchase a larger share of their requirements from du Pont than do the General Motors Divisions (R. 339-341, 440;

DP 362, R. 2538, 6330, K'Burg, R. 2531-2532, 2539, 2540).

The findings in this area also show the effect of the acquisition of a company by du Pont on the sales by that company to the General Motors Divisions. In 1930 du Pont acquired the Roessler & Hasslacher Chemical Company (R&H Company hereinafter) which had for many years been selling a variety of industrial chemicals, including casehardening and electroplating materials, to the General Motors Divisions (R. 439; K'Burg, R. 2529, 2532). R. B. K'Burg, who had known of the sales to the automobile industry for R&H Company before 1930, and who has since been a salesman to that industry for du Pont, testified that the acquisition had no effect on the sales, or on the selling methods at the General Motors Divisions, and that no one had ever told him that it should (K'Burg, R. 2530, 2532-2533).

In 1930, the casehardening method most widely used was the immersion of the metal part to be hardened in a bath of molten sodium cyanide. Sodium cyanide had been supplied by the R&H Company, and after 1930 by du Pont, to automobile manufacturers, including several General Motors Divisions (R. 439; K'Burg, R. 2533-2536). Beginning in 1930, however, new methods were developed which departed from the sodium cyanide process. The first of these competitive processes was "Aerocase", developed by American Cyanamid Company, and its first major user among automobile companies was the Buick Division of General Motors, which manufactured transmission gears for Pontiac and Oldsmobile as well as for itself (K'Burg, R. 2536, DP 368, R. 2551, 6336). Du Pont's new case-hardening process, "Ducase", on the other hand, was first offered to and tested by a Ford supplier (R. 439, 442; K'Burg, R. 2537, 2578, DP 365-367, R. 2550-2551, 6333-6335).

By the mid-1930's these numerous competing processes, as well as a gas carburizing process which produces a "case" without chemicals, combined with the fact that "Ducase" was not the complete answer for all types of customers, resulted in substantial decreases in du Pont's sales. To determine what steps du Pont should take to meet this situation, it made a comprehensive survey of the quality and type of casehardening materials then being used by all consumers in the Chicago territory, including Michigan. The results are quite at odds with the Government's charges: manufacturers other than General Motors Divisions were buying 88 percent of their casehardening materials from du Pont; the General Motors Divisions were buying only 47 percent of their requirements from du Pont. Among the Divisions themselves there was also wide disparity: of the four Divisions which were major users of casehardening products, two bought from du Pont less than 5 percent of their needs, while the other two bought over 90 percent. Ford alone was buying more casehardening materials from du Pont than all the General Motors Divisions combined, and a far larger percentage of its needs (R. 440; DP 362, R. 2538, 6330, K'Burg, R. 2539-2540). Seven years operation by du Pont following its acquisition of the R&H Company had resulted, in other words, in the loss by du Pont of a substantial share of General Motors business, and the retention of most of the business of other automobile manufacturers.

Since 1937, gas carburizing has further decreased du Pont's share of the casehardening materials business, both in and out of General Motors. Du Pont continues to supply to automotive customers other than General Motors a greater portion of their requirements than it does to the General Motors Divisions (K'Burg, R. 2540).

Moreover, as is true in all of the other product areas, the findings show that the General Motors Divisions them-

selves display wide variations in their preferences for competing products and processes. Cadillac, which purchased from the R&H Company before 1930, continued to purchase from du Pont until 1935. It then shifted for twelve years entirely to du Pont's competitors. Since 1947 Cadillac has shifted largely to gas carburizing, but purchases the liquid hardening materials it needs partly from du Pont and partly from du Pont's competitors (R. 440; DP 363, R. 2551, 6331, K'Burg, R. 2542-2543). Buick, which has largely shifted to the gas process, had never purchased from the R&H Company (DP 363, R. 2551, 6331). After that company's acquisition by du Pont, Buick continued to purchase from du Pont's competitors until 1946, when it began to buy from du Pont a minor share of its liquid materials used for casehardening (R. 440; DP 363, R. 2551, 6331, K'Burg, R. 2543-2544). Chevrolet, which likewise uses the gas process for most purposes, purchases part of its liquid requirements from du Pont and part from its competitors. At one Chevrolet plant, however—Chevrolet Gear and Axle—which bought from du Pont competitors until 1938, du Pont sells substantial quantities of a special and less expensive casehardening material which it developed at that time especially for that plant's needs (R. 440-441; DP 363, 364, R. 2551, 2546, 6331, 6332, K'Burg, R. 2545-2547). At Pontiac, the R&H Company and later du Pont supplied a portion of the needs until 1938; since then du Pont has supplied almost none (R. 441; DP 363. R. 2551, 6331). Oldsmobile, on the contrary, purchased no du Pont materials until 1937. It then gave a portion of its business to du Pont until 1946. when it again shifted entirely to du Pont's competitors (R. 441; DP 363, R. 2551, 6331). Frigidaire, which has shifted less to gas than the other Divisions, purchased from the R&H Company before 1930, but shortly thereafter shifted entirely to competitive materials, and only since 1946 has it again purchased some of

its needs from du Pont (R. 441; DP 363, R. 2551, 6331, K'Burg, R. 2549-2550).

The findings and proof as to the other Divisions (R. 441-442; DP 362, 363, 369, R. 2538, 2551, 2550, 6330, 6331, 6337, K'Burg, R. 2547-2550) are equally diverse, and taken as a whole reveal a substantial difference of opinion on the value of du Pont's materials and processes, as compared with competing ones, from time to time. What happened is precisely what would be expected when competition is the determinant. That du Pont had a competitive product is evident from the successes it has had, particularly at automobile companies other than General Motors; that it had no artificial advantage at General Motors by reason of its stock ownership is shown by its more limited scale of success among the Divisions of that company.

4. Electroplating Materials

Du Pont also acquired, by way of the R&H Company, a business in materials used in copper, zinc, cadmium and tin electroplating, including sodium, copper and zinc cyanides, anodes, additive agents, and brighteners (R. 438). Electroplating, like casehardening, is a technical field in which metallurgists differ on the value of various processes (R. 437-438; K'Burg, R. 2592). In 1934, however, du Pont developed the first improved copper plating process—"High Speed Copper". Development work proceeded for four years—at companies not connected with General Motors (K'Burg, R. 2555-2556). When "High Speed Copper" was finally offered to the trade in 1938 it was widely adopted by electroplaters who do the bulk of that work for Chrysler, Studebaker and Nash (R. 438, K'Burg, R. 2557-2559, DP 371, R. 2556, 6340).

Competing processes promptly appeared, including an acid copper process developed by General Motors Research (R. 438; K'Burg, R. 2560-2561, DP 372, R. 2573, 6341).

Each Division of General Motors has gone its own way in testing and using these competitive systems. Cadillac, on the one hand, has used the du Pont process exclusively since it was first introduced (R. 438; K'Burg, R. 2561-2563, DP 372, 373, R. 2573, 2563, 6341, 6342). Chevrolet on the other, which does the largest amount of electroplating of any Division of General Motors, and Buick, which does very little, have never used it, except for a two-month period in 1939 at Chevrolet (R. 438; K'Burg, R. 2561, 2564-2566, DP 372, 377-378, R. 2573, 2572, 6341, 6347, 6349). In between are Oldsmobile, which used the du Pont process from 1941 to 1949, and Pontiac, which used the du Pont process for part of its work between 1940 and 1950 (R. 438; DP 372, 379-380, R. 2573, 2572, 6341, 6350, 6352). The findings (R. 438-439) and the evidence (DP 372, R. 2573, 6341, K'Burg, R. 2566-2568) reflect the same diversity among the other Divisions. Each Division has used that process and those materials which it believes to be best adapted to its own requirements.

The same pattern exists in other aspects of this trade area. In zinc plating, du Pont's processes have been accepted in the major portion of the field, but Chevrolet, which does the major portion of this work in General Motors, has never used the du Pont process, though it purchases a portion of the material needed for its operation from du Pont (R. 439; K'Burg, R. 2570). On the other hand, Delco-Remy Division uses the du Pont process (R. 439; K'Burg, R. 2571). Cadillac, after tests, preferred du Pont anodes, and bought them for a time, though the other Divisions largely bought from du Pont competitors. In more recent years, du Pont has had almost no anode business at any General Motors Division (K'Burg, R. 2561-2562, 2569-2570, DP 375-376, 379-381, 571, R. 2571, 2572, 2573, 3008, 6345, 6346, 6350, 6352, 6354, 6529).

5. Safety Glass

Safety glass is composed of two layers of thin plate glass cemented together with a filler, which prevents shattering. Introduced in the 1920's, its use has been constantly increasing, and it is today one of the major materials purchased by automobile companies. At the very beginning of the use of safety glass, du Pont made a determined—and expensive—effort to become established in this field. It failed. Had there existed the control or influence alleged by the Government, du Pont would certainly have become and remained an important supplier of safety glass to General Motors.

The findings and evidence show that in 1927 du Pont, which was producing the cement filler, and Pittsburgh Plate Glass Company, which produced thin plate glass, joined to form Duplate Corporation, which had as its sole object the production and sale of safety glass to automobile manufacturers. Duplate had substantial success in selling manufacturers other than General Motors, and for a few years had moderate success at the General Motors Divisions, though they were somewhat slower than other automobile manufacturers to adopt safety glass for general automobile use (R. 446; Harrington, R. 1836-1837, 1839, DP 160, 165, 168, 171, 172, 174, R. 1839, 1846, 1848, 5984, 5991, 5995, 5999, 6001, 6009).

As soon as the General Motors Divisions' purchases of safety glass became substantial, however, General Motors itself began to produce it. Duplate's sales to General Motors of more than $1,000,000 annually in 1928 and 1929, shrank to $67,000 in 1930 and $37,000 in 1931. In that year du Pont sold out its interest in Duplate, its loss on the venture amounting to $825,000. Still later General Motors sold its safety glass plant and business to Libbey-Owens-Ford Glass Company (R. 446, Harrington, R. 1846-1848, DP 163, 165,

168-173, 449, R. 1839, 1846, 2703, 5988, 5991, 5995-6008, 6444) to which it has since given all of its business.

Were the Government allegations of control and influence true, General Motors would not have commenced to manufacture a product which would so adversely have affected du Pont's sales.

6. Neoprene and Rubber Chemicals

Neoprene, the first synthetic rubber produced on a commercial scale in the United States, and one of du Pont's outstanding research achievements, has many uses in industry, including the manufacture of automobiles. It competes, of course, with natural rubber, and with other synthetic rubbers, some of which are cheaper (R. 442; Bridgwater, R. 2505-2507, 2522).

The findings and evidence with respect to the timing and the extent of the use of neoprene by the General Motors automobile Divisions demonstrate again the unreality of the Government's charges of control or influence. At General Motors, although some trucks are equipped with neoprene radiator hose, the automobile Divisions (except for Buick for a short time) have used a cheaper butyl rubber hose. Both Chrysler and Ford, however, have for years equipped their cars with neoprene radiator hose, believing that its advantages offset its higher cost (R. 442-443; Bridgwater, R. 2507, 2509, 2522-2524, DP 354, R. 2509, 6310).

The converse situation is presented in the case of a synthetic rubber adhesive. Here Chrysler worked with du Pont to develop an adhesive based on neoprene to attach brake linings to the brake shoe, in place of the old brass rivets. General Motors, however, despite vigorous sales efforts by du Pont, prefers an adhesive based on a *more* expensive Buna-N synthetic rubber, because in this instance the General Motors Divisions believe that the higher cost is other-

wise compensated (R. 443; Bridgwater, R. 2510, 2526, DP 355-356, R. 2510, 2511, 6312, 6313).

In addition, the findings show that Chrysler and Ford use neoprene for a host of other uses—cover for electric wires, seals, gaskets, and the like—to a far greater extent than do any of the General Motors Divisions (R. 443; Bridgwater, R. 2511-2518, DP 357-359, GTX 1325, 1326, R. 2513-2516, 2521, 2522, 6314-6321, 5283, 5284). The Chrysler "New Yorker", for example, contains 123 parts made of neoprene (Bridgwater, R. 2518). Moreover, du Pont has been far more successful at Chrysler than at any General Motors Division in securing specifications to sub-assembly fabricators which permit or require neoprene to be used (R. 443; Bridgwater, R. 2515-2516, DP 358-360, R. 2514-2516, 6316-6323).

As to rubber chemicals, du Pont sells some 65 items to almost 1,000 domestic customers, including the Inland and Packard Electric Divisions of General Motors. A competitor of du Pont, however, is the principal supplier of those items to each of those Divisions; du Pont, despite efforts to do better, gets only about a quarter of the business (R. 442; Bridgwater, R. 2504-2505, 2519-2520).

F. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS WITH RESPECT TO THE GENERAL PURCHASING COMMITTEE, AND SHOWS THAT THE COMMITTEE DEALT WITH DU PONT AT ALL TIMES ON A COMPETITIVE, NON-PREFERENTIAL BASIS

The Amended Complaint alleged that the General Purchasing Committee was established "In order to secure more effective liaison among these divisional purchasing agents and to insure that du Pont Company wishes would be promptly communicated to them and fully complied with" (R. 233). The Committee, the paragraph continues, "was an effective instrumentality in carrying out the du Pont-General Motors intercompany sales arrangements hereinbefore and hereinafter described" (R. 234).

The accuracy of these allegations was elaborately explored at the trial, and the District Court made extensive findings on all aspects of the Committee and its operations which completely rejected the Government's allegations. The court found (R. 371-372):

> "The Committee, the record shows, was created, operated and ultimately terminated in 1931 to serve General Motors interests—not du Pont. Relations with du Pont were but a minor aspect of its activities, and it dealt with du Pont only in the same manner as it did with other suppliers. All of its work is now ancient history and the evidence with respect to its activities has but limited probative value. But to the extent it deserves consideration it supports the position of the defense rather than the Government."

None of this appears in the Government's brief. What *does* appear is the allegation—now asserted, however, as a fact—that a membership on the Committee was one of the "subtle methods" used to make effective the alleged du Pont control of General Motors purchasing policy (Br., p. 103).

The detailed findings show that the General Purchasing Committee was established in 1922, at the suggestion of Sloan, who sought to take advantage of the purchasing economies which Ford had achieved, and which would be available to General Motors through aggregating and coordinating the purchasing power of the several General Motors Divisions (R. 361; Sloan, R. 1031-1035, GM 35, 36, R. 1034, 6663-6664). He was not willing, however, that Divisional autonomy be sacrificed in the process. He rejected completely one early suggestion made to him by the Director of General Motors' Purchase Section (GM 47, R. 1045, 6690) that all divisional purchasing departments be eliminated, and a single central one be established in their place (GM 48, R. 1047, 6701). That, he testified

(R. 1046-1047), "was contrary to the fundamental philosophy of the General Motors that the divisional executives should have complete charge of all the component parts of their particular operation."

As finally set up, the Committee was composed principally of purchasing agents from the important Divisions of General Motors (GM 63, R. 1055, 6744). James Lynah was made secretary. Lynah presumably is the "ex-du Pont employee" to whom the Government refers (p. 103). The Government does not, however, note that Lynah had left du Pont in 1919, several years before he was employed by General Motors, and after a controversy which led Lynah to assert that he could not have at du Pont "the hope and expectation of fair and considerate treatment" (Lynah, R. 1069-1073, GM 142, R. 1072, 6958).

The full details of the Committee's operations were disclosed at the trial. Lynah, who was its executive secretary from the beginning until 1930, the year before the Committee was abolished, and who had not been employed by General Motors since 1930, testified (R. 1067-1179), and the Committee's complete minutes were available (R. 1089-1090). The findings show that Lynah's first task, as soon as the Committee was created, was to make a study to determine what substantial items might be common to two or more Divisions. The result was a list of 32 items (R. 361; Lynah, R. 1085, GM 151, R. 1085, 6986) of which only 3 were made by du Pont: imitation leather, top fabrics and paints (R. 361; Lynah, R. 1086, GM 151, R. 1085, 6986). Of these 3, the first items manufactured by du Pont to be reached for consideration by the General Purchasing Committee were "Fabrikoid", or imitation leather, and top fabrics. No contract for the purchase of either of these items was ever made by the Committee (R. 365; Lynah R. 1151, GM 154, R. 1092, 7023). On the contrary, when Lynah discovered that the Divisions were independently purchasing "the larger portion" of their requirements of

these products from du Pont, he recommended, and the Committee adopted, a rule requiring a second source of supply for at least 20 percent (R. 362-363; Lynah, R. 1151-1153, GTX 412, R. 528, 3986). Somewhat later, du Pont made an effort to secure a cost-plus contract for these materials from the Committee, but it was also rejected (Lynah, R. 1146, GM 155 at p. 3, R. 1100, 7077 at p. 7079).

In the court below the Government contended that the adoption of this two-sources-of-supply policy meant that there was an agreement between du Pont and General Motors that du Pont should always have 75 or 80 percent of the fabrics business on a non-competitive basis. The Government now appears to renew this contention (Br., p. 122), even though it has formally abandoned the charge of conspiracy and agreement (Br., p. 113).[13] The trial court rejected the Government's contention in findings (R. 362-363) that are fully supported by the relevant evidence, including the contemporaneous minutes of the General Purchasing Committee (GTX 412, 413, R. 528, 3986-3988) the testimony of Lynah (R. 1153) and the proof with respect to the subsequent experience of du Pont in its efforts to sell fabrics to the General Motors Divisions (see pp. 62-75, *supra*).

The evidence and findings show that the two-sources-of-supply policy was no more than one of the general principles

---

[13]The Government's contention that the resolution of the General Purchasing Committee constituted an agreement that du Pont should supply 75 or 80 percent of General Motors' fabric requirements on a non-competitive basis is a distortion of the words of the resolution (GTX 412, R. 528, 3986), which assured du Pont of nothing.

The Government does not attempt to reconcile its charge that there was an agreement to give du Pont 80 percent of General Motors' fabrics business on a non-competitive basis with the Government's concession that it no longer urges that there was any agreement between the two companies.

which were applied by the General Purchasing Committee. As early as 1923 some General Motors Divisions adopted a policy that no supplier should have more than 80 percent of that Division's requirements of any single item (R. 361-362, 372; GTX 406, p. 13, R. 527, 3966 at p. 3978).[14] In the same year the General Purchasing Committee itself had begun to put a two-sources-of-supply purchasing policy into effect whenever it found that all the Divisions were buying their requirements from the same supplier, and in January 1924 the Committee adopted a formal rule to that effect (R. 362; GM 158, 159, R. 1106, 1107, 7106, 7108). The reasons, as explained by Lynah, the secretary of the Committee, were business reasons which had nothing to do with du Pont, and which related alike to all suppliers: General Motors wanted a constant check on price, quality and service, and an anchor to windward when a supplier failed in any respect (R. Lynah, 1104, Sloan, R. 1066). Du Pont was told of the policy, not consulted about it (GTX 412, R. 528, 3986, Lynah, R. 1153), and when it was applied to du Pont's detriment high du Pont executives expressed their dislike of it (R. 362-363; GTX 407, 408, 410, R. 527, 528, 3982, 3983, 3984).

It was not until almost two years after the Committee had been established that it considered the subject of paints, and then only to refer the matter to a subcommittee—the Paint and Enamel Committee—because there were no standards established for that material (R. 365; Lynah, R. 1126, GM 166, R. 1128, 7156). Until the discovery of "Duco" no contract was ever made by the Committee covering the purchase of paints and varnishes, although du Pont had requested such a contract (R. 365; Lynah, R.

---

[14]This operated to du Pont's immediate detriment in the area of fabrics, since in 1922, by virtue of an agreement to cancel some earlier orders, du Pont had obtained from several automobile Divisions 100 percent of their fabrics orders for that year (see pp. 69, 72, 74, *supra*).

1147, GM 154, R. 1092, 7023).[15] Only after the discovery of "Duco" and its general acceptance by the automobile Divisions did the General Purchasing Committee authorize *any* contract with du Pont—some two years, and 147 contracts, after the Committee had begun its operations (R. 364; Lynah, R. 1094-1095, GM 154 at p. 13, R. 1092, 7023 at p. 7035). Even this contract was negotiated only after the Committee had been unsucessful in finding any product competitive with "Duco" (see *supra*, pp. 51-52).

During its nine years, the Committee negotiated 709 contracts, of which 14 were with du Pont, and 30 with du Pont competitors. It rejected a total of 342 contracts, of which 13 were proposed by du Pont or were for material which du Pont was in a position to sell to General Motors (R. 364; Lynah, R. 1100, 1103, GM 154, 155, R. 1092, 1100, 7023, 7077). Anyone in General Motors could suggest an item as a contract possibility. If the Committee considered it worthwhile, a questionnaire would be sent to the Divisions asking for their annual consumption of the item, the specifications under which they purchased, the prices they were paying, and their source of supply. When the replies were received, the Committee, if the item still looked like a contract possibility, would so notify the Divisions and ask for their suggestions as to prospective bidders. After bids were received, the Committee would decide whether to make a contract and with whom. If a contract were negotiated, the Divisions were notified (R. 364; Lynah, R. 1078-1079, GM 149, R. 1079, 6969). The Divisions were then required to purchase under it unless they were specifically exempted, but even then the ultimate freedom of the Divisions was preserved by granting a specific

---

[15]Somewhat later, in 1926, the Committee had a contract with du Pont for two years covering paints other than "Duco" but only for "requirements of seller's make" (ROSM) which, as explained by Lynah (R. 1093) required no purchases (R. 365; GM 154, R. 1092, 7023 at p. 7043), and see pp. 193-194, *infra*.

exemption to any Division whose objections to the contract could not be "ironed out" (R. 364; Lynah, R. 1081, 1107).

The Committee followed certain general rules: (1) no contract would be made unless the item was used by more than one Division, since there would be no price advantage unless there were increased volume; (2) no contract would be made unless there would be substantial savings; (3) where possible, there should be more than one source of supply; and (4) contract prices were kept confidential to protect sellers. These rules were adopted long before any contract was made with du Pont (R. 365; Lynah, R. 1103-1105, 1109), and the record is replete with instances in which they were applied to du Pont both in the awarding and rejecting of contracts. Contracts were rejected with du Pont because of lack of volume on photographic supplies, maintenance paint, machinery enamels, and aluminum spar mixing liquid (R. 365; Lynah, R. 1145-1146, GM 155, R. 1100, 7077). Contracts were rejected with du Pont because of lack of savings on "Pyralin", leather substitute and rubber-coated fabrics, denatured alcohol "antifreeze material", "antifreeze methanol", and varnish and oil-type materials (Lynah, R. 365; 1146-1147, GM 155, R. 1100, 7077). The two source of supply rule was applied to du Pont, the reduction of its business in leather substitute and rubber-coated fabrics being one example already noted above, and the successful effort made to find a second source of supply for "Duco" discussed *supra*, pp. 51-53, being another. The du Pont prices were kept confidential (Lynah, R. 1153-1154, GTX 462-465, R. 537, 538, 4111-4119) just as were those of other suppliers (Lynah, R. 1109-1110, 1154, GM 160, R. 1100, 7112). In sum, the Committee dealt with du Pont only as it dealt with others (R. 372).

The General Purchasing Committee was terminated in 1931, and there has been no successor to its functions (R. 371).

II

The Evidence Supports the Findings of the Trial Court that du Pont's Stock Ownership Has Not Restrained or Influenced Trade With Respect to Tetraethyl Lead or "Freon"

In the Amended Complaint and at the trial the Government contended that the evidence with respect to tetraethyl lead and "Freon" refrigerants showed that there was a "division of fields" (R. 234-240) *i.e.*, an agreement that General Motors would refrain from chemical manufacture and would accord du Pont exclusive exploitation rights in any chemical discoveries which it made (Par. 64, *et seq.*, R. 234-240). The Government has now abandoned its charge of conspiracy and agreement. Instead it asserts as to both tetrathyl lead and "Freon" that "du Pont's inside influence with General Motors secured this business without any regard whatsoever for its abilities in comparison with its competitors" (Br., p. 131). This new assertion, no less than the old charge of conspiracy and agreement, requires the Government to prove that the arrangements that General Motors made with du Pont with respect to tetraethyl lead and "Freon" were not made on the merits, but were the result of du Pont control or influence.

The District Court, after examining the voluminous evidence on these issues found to the contrary (R. 406-435). As to tetraethyl lead, the court found (R. 426):

> "* * * The record, rather, establishes that the services of du Pont as a manufacturer were secured by General Motors in the unrestrained exercise of its own judgment. Kettering appears to have been largely responsible for this decision, and neither the alleged pre-existing agreement nor du Pont's stockholdings in General Motors was the basis of the decision. It is clear that General Motors' lack of

experience in chemical manufacture and du Pont's superior competence and wide experience were the reasons for the decision.

"Similarly, du Pont retained its position as the manufacturer of TEL by reason of the continued high quality of its performance. The Court finds that General Motors and Ethyl Corporation were at all times free to turn elsewhere and were not coerced in any way to continue purchasing from du Pont."

And as to the contract setting up Kinetic Chemicals, Inc., to produce "Freon" refrigerants, the trial judge similarly found (R. 435):

"* * * On the basis of the evidence of record, particularly the testimony of Sloan and Pratt, the Court finds that General Motors entered into the contract because those responsible in General Motors believed that Freon could best be manufactured by du Pont rather than by General Motors itself or by some other chemical company."

The Government directly challenges these findings and ignores subsidiary findings which support them (Gov't Br., pp. 131-137). Accordingly we shall now summarize the evidence which we believe supports the findings and shows that the trial court was clearly correct in rejecting the Government's contentions.

A. THE EVIDENCE SHOWS THAT GENERAL MOTORS' DECISIONS WITH RESPECT TO TETRAETHYL LEAD WERE NOT THE RESULT OF DU PONT INFLUENCE OR CONTROL

Tetraethyl lead is a material which, when added to gasoline in small quantities, reduces "knocking" and makes possible the operation of the modern-day high compression automobile and airplane engines.

The basic question which was presented to the trial court below with respect to tetraethyl lead, and review of which

is now sought in this Court, is this: Was General Motors' decision to select du Pont as the manufacturer of tetraethyl lead a normal business decision, or was it the result of control or influence by du Pont? On that issue there is, fortunately, testimony by the man responsible for the decision, Charles F. Kettering. His character and career are matters of public knowledge. Even prior to his association with General Motors he was one of America's outstanding inventors, and he remained so after he joined the General Motors organization as Director of Research, and shortly thereafter as a vice president and a member of the Board of Directors (R. 405; Kettering, R. 1515, 1527-1529, GTX 177, R. 492, 3397). One of the greatest of his contributions to General Motors was to lay the foundation for high-octane gasoline. Until the problem of "knocking" could be solved, the range of engine improvement was seriously limited (R. 405-406; Sloan, R. 1236, 1239). This, for Kettering as well as for General Motors, was the importance of tetraethyl lead (R. 405-406, 416; Sloan, R. 1236, 1239, Kettering, R. 1514-1515, 1527, 1543, 1581, DP 93, GM 241, pp. 1-2, 5, R. 881, 1524, 5859, 7308 at pp. 7308-7309, 7312). As Kettering himself testified (R. 1515), "You see, we weren't in the fuel business. We were in the engine business, and we were trying to get anybody that would help us on the fuel end of it to get whatever help we could."

Kettering testified that he was the man who made the decision to ask du Pont to undertake the manufacture of tetraethyl lead (R. 1550, 1584). Two contemporaneous documents corroborate his statement (GTX 610, DP 65, R. 612, 1242, 4302, 5717), and the court so found (R. 411). As to the basis for his decision, Kettering stated that he called in du Pont to manufacture tetraethyl lead, not because of du Pont control or influence, but simply because "they were the best chemists that we knew of in the country" (R. 1584). Sloan concurred in it because, as he testified,

he recognized that General Motors had no competence in chemical manufacture—research and manufacture being quite different; that the manufacture, which had never before been undertaken in the United States, involved danger; that du Pont, through its war work, had demonstrated its ability to manufacture dangerous materials; and that "their well organized Research offered the best opportunity for us to produce tetraethyl lead and to put it on the market" (R. 411; Sloan, R. 1249).

This testimony was not impeached on cross-examination or impaired by any contemporaneous document, and it was accepted by the trial court as true (R. 425-426). Moreover, contrary to the Government's contention, the testimony is fully corroborated by the voluminous evidence on the whole story of tetraethyl lead.

1. Discovery and Early Development of Tetraethyl Lead

Kettering had since 1912 or 1913 been interested in improving engine efficiency by eliminating engine "knock" (R. 405; Kettering, R. 1514). His research was in charge of Thomas Midgley, and was originally under the auspices of Kettering's Delco Company, which manufactured starting and ignition equipment and was a part of United Motors (R. 406; Kettering, R. 1515-1516, 1527-1529). In 1916 or 1917 the antiknock research project was transferred from Delco to another of Kettering's corporations, Dayton Metal Products Company. That company was not affiliated with either United Motors or General Motors, and Kettering financed the research work there out of his own pocket (Kettering, R. 1599). In 1918, United Motors, and Delco, became affiliated with General Motors; Dayton Metal Products Company did not do so until the end of 1919 (R. 406; Kettering, R. 1527-1529, 1598-1599, GM 244, 267A, R. 1528, 2942, 7322, 7405).

During this early research period Kettering, by papers, speeches and letters, invited help from all sources in his efforts to eliminate knocking. For present purposes, the significant fact is that *before* there was any relationship between the antiknock project and General Motors, and *before* the investment by du Pont in General Motors stock, Kettering and his staff were already accustomed to turn to du Pont for assistance in technical matters related to their antiknock research. Kettering was in correspondence with du Pont personnel in relation to this problem as early as 1916, and said then that "any time we get anything of interest we will be glad to give you the benefit of it." (R. 406; DP 93, R. 881, 5859). During World War I, Kettering met du Pont chemists at American Chemical Society meetings, and later invited them to visit his laboratories to see what he was doing. In August, 1919, before the antiknock research program became any part of General Motors, Kettering's laboratory sent to du Pont a long description of the tests which had been made up to that time, with a request for additional materials which it was hoped du Pont could supply or help them compound. The letter closed with the statement that "we are anxious to cooperate with you in every possible way" (R. 406; Kettering, R. 1525-1527, 1584-1585, Harrington, R. 1728, GM 243, R. 1525, 7317).

After Kettering joined General Motors there was no change in his relationship to du Pont; he continued to call on du Pont for assistance (R. 406). In January 1920 Kettering was urging du Pont to push its work for him on aromatic amines, and during that year both he and Midgley came to Wilmington seeking to persuade du Pont to undertake the manufacture of aniline, one of the aromatic amines which they then believed to be the solution of the knock problem (DP 94-95, GTX 601, R. 883, 612, 5860-5864, 4298). By early 1921 Kettering's research had led to better

antiknock materials, and du Pont was asked to suspend research in this field (Kettering, R. 1538, Harrington, R. 1729, 1732, DP 97, R. 884, 5867). Again in November 1921, however, Midgley was back with another antiknock research project for du Pont (DP 109-110, R. 1733, 1734, 5890, 5891). Finally, however, when tetraethyl lead was discovered, in December 1921, both du Pont and Standard Oil of New Jersey, which had also worked with Kettering, were told that due to new developments which could not be disclosed their research efforts should be suspended (R. 409; DP 111-112, R. 1735, 1736, 5893, 5894).

It was wholly logical, therefore, that Kettering, for reasons having no relation to du Pont's stock ownership, should turn to du Pont for the production of tetraethyl lead.[16] The manner in which he did so likewise supports the truth of his testimony that there was no control or influence involved. Contrary to the assertion of the Government that "It was immediately assumed that du Pont would perform the manufacturing" (Br., p. 50), what actually happened was that Kettering told P. S. du Pont several months after the discovery that he wished to take up the question of manufacture with du Pont representatives (GTX 610, R. 612, 4302). Du Pont was informed of this by a memo from Pierre du Pont to Irenee du Pont in March 1922 (R. 411; Pierre du Pont, R. 863-864, GTX 610, R. 612, 4302). Du Pont's reaction was wholly at odds with any "assumption": it waited for word from Kettering himself (Irenee du Pont, R. 885, Harrington, R. 1737-1738). In June 1922

---

[16]Du Pont was then generally regarded as one of the top manufacturers of organic chemicals, and had had wide experience with dangerous substances, as tetraethyl lead was already known to be (GM 261, pp. 17-18, R. 1578, 7360 at pp. 7374-7375). The results of du Pont's initial efforts in producing tetraethyl lead were immediately recognized by Kettering's staff as highly satisfactory (GM 73, R. 1245, 6757).

Kettering invited Irenee du Pont to Dayton to discuss the problem (R. 411; Irenee du Pont, R. 885, Kettering, R. 1546-1547). This meeting led to further meetings in Wilmington with Kettering and his associates. Again, the evidence is at odds with the Government's alleged "assumption" that du Pont would be the manufacturer. A contemporaneous memorandum advising the du Pont chemical staff of Kettering's impending visit makes it clear that Irenee du Pont, even after his visit to Dayton, had no assurance that du Pont would be selected as the manufacturer; he wrote that he was "very anxious that we 'sell' our ability to help them on the tetraethyl lead proposition" (R. 411; GTX 612-613, R. 612, 4306, 4307). It was only after these conferences in Wilmington in late July 1922, and after Kettering had inspected du Pont's facilities, that du Pont was asked to undertake manufacture (Irenee du Pont, R. 887-890, Kettering, R. 1549, Harrington, R. 1739-1740). Kettering's choice was quickly vindicated; within two or three weeks du Pont was in production, and making shipments to Dayton (Harrington, R. 1741-1742, GM 247-249, R. 1550-1551, 7332-7334).

The conclusion of the District Court that Kettering's decision was based entirely on his business judgment, uninfluenced by du Pont's stock ownership, is further supported by Kettering's refusal to yield to du Pont's requests upon another matter which arose at about the same time—the du Pont idea for a general arrangement covering chemical research. The findings of fact tell the full story (R. 406-412).

Lammot du Pont had prepared, in mid-1920, a proposed general research agreement, to provide for the financial and patent aspects of such research work as General Motors might from time to time request that du Pont undertake (R. 407; GTX 580, R. 609, 4265). The pro-

posal was discussed with Kettering who saw practical difficulties (R. 408; Kettering, R. 1601-1602). Although the du Pont Executive Committee had formally approved the agreement, and although Lammot du Pont sought for over two years to have Kettering sign it, it was never signed by Kettering, or anyone else in General Motors (R. 408-410, GTX 581, 583, 589, 591, 593, GM 246, R. 609-611, 1536, 4272, 4276, 4280, 4283, 4290, 7328).

2. Early Production Arrangements—Formation of Ethyl Corporation

As already noted (*supra,* pp. 110-111) the trial court found not only that the initial choice of du Pont as the manufacturer of tetraethyl lead was solely for practical business reasons, but also that "du Pont retained its position as the manufacturer of TEL by reason of the high quality of its performance," and that General Motors and Ethyl Corporation (as to which see below) "were at all times free to turn elsewhere" (R. 426). This finding is likewise challenged by the Government, but again, the detailed findings and evidence on the later events fully bear out the trial court.

When Kettering became satisfied with du Pont's initial progress he recommended, and Sloan agreed, that a contract should be made with du Pont. A draft contract was thereupon prepared by General Motors. Kettering met and conferred on it with representatives of du Pont, and on October 6, 1922, a contract was signed (R. 411-412; Sloan, R. 1245, Kettering, R. 1553-1554, GTX 618, R. 613, 4312).

The contract of October 6, 1922 (GTX 618, R. 613, 4312) provided that du Pont was to build, upon four months' notice, a plant to produce tetraethyl lead at the rate of 100 gallons per day at a price of $26 per gallon ($2.00 per pound) (R. 412). Midgley and Kettering were highly gratified with the contract terms because they made tetra-

ethyl lead economically feasible and solved the production phase of the program (GM 252, R. 1556, 7339).

A series of events, however, shortly brought the Ethyl Gasoline Corporation (hereinafter "Ethyl") and Standard Oil Company of New Jersey into the picture. Commercial distribution of tetraethyl lead began in 1923—initially through independent filling stations in Ohio, and later through exclusive territorial distribution contracts with several major oil companies (R. 412, GM 75-80, R. 1250-1251, 6760-6800). In April 1923, Howard, of Standard Oil of New Jersey (hereinafter "Standard Oil"), one of the distributing companies, met with Midgley and told him of the discovery and patenting by Standard Oil of a method for producing tetraethyl lead by what is known as the "ethyl chloride" process, as distinguished from the "ethyl bromide" process developed by Kettering and Midgley. The new process could not only reduce production costs, but by eliminating most of the need for bromine could eliminate the bottleneck which appeared to exist due to the limited existing supply of that material (R. 412; Sloan, R. 1253, Kettering, R. 1571-1574, GM 256, 256A, 274, pp. 2-6, R. 1558, 1559, 1633, 7346, 7351, 7421 at pp. 7422-7426). Production by Standard Oil under its process patent would have been futile without a license under General Motors' basic use patent, but General Motors in turn needed a license from Standard Oil if substantial commercial development of tetraethyl lead were not to be cut short by the shortage of bromine.

The Government asserts (Br., pp. 52, 133-134), as it did in the court below, that it was agreed at this time between du Pont and General Motors that they would resist any effort by Standard Oil to share in the manufacture of tetraethyl lead. The evidence lends no support to this charge, and it was rejected by the findings of the District Court.

The negotiations between General Motors and Standard Oil leading to the formation of Ethyl begin with the meet-

ing in April 1923 when Howard, of Standard Oil, told Midgley, of General Motors, that Standard had discovered the ethyl chloride process. Far from resisting manufacture by Standard Oil, Midgley's immediate reaction was an invitation to Standard Oil to manufacture tetraethyl lead and sell it to General Motors; he offered to "sign with them a similar contract to the one now in force with the du Pont Company." Standard Oil was reluctant; Howard's reply was that Standard Oil was not a chemical manufacturer, and that there should be a meeting to develop a working agreement between General Motors and Standard Oil (R. 412-413; GM 256, R. 1558, 7346).

Although Kettering and Midgley continued, in early 1924, to urge Standard Oil to manufacture tetraethyl lead by their ethyl chloride process (Kettering, R. 1565-1566, GTX 622, R. 614, 4337), Sloan was apprehensive, not for du Pont, but for General Motors. The new enterprise was going well with du Pont as the manufacturer, and he stated both at the time and on the witness stand that to bring in a novice would introduce new problems during the development stage, and that he had doubts as to the wisdom of a major oil distributor becoming a manufacturer under a process which promised to become of controlling importance (R. 413; Sloan, R. 1358-1361, GTX 622, R. 614, 4337). On the other hand, when Irenee du Pont suggested that General Motors tell Standard Oil that du Pont would negotiate with it for manufacturing rights under the ethyl chloride patent, Sloan did precisely the opposite, and told Standard Oil that negotiations relative to its patent would be conducted by General Motors (R. 413-414; Irenee du Pont, R. 949, Sloan, R. 1361-1362, GTX 623-624, R. 614, 4340-4342). Negotiations did go forward between General Motors and Standard Oil, but with no one from du Pont in attendance (GM 258-259, R. 1570, 7356, 7358). Du Pont, in fact, did not even know of the nego-

tiations until an agreement had been reached (Irenee, du Pont, R. 895, Sloan, R. 1255, Harrington, R. 1757, 1852-1853).

The results of the General Motors-Standard Oil negotiations also reveal the absence of any purpose or agreement to deny Standard Oil manufacturing rights. The formal contract between the companies, dated August 1, 1924 (GTX 668, R. 618, 4383) created Ethyl Gasoline Corporation (subsequently changed to Ethyl Corporation) in which each party would have half of the stock and half of the directors, and to which would be assigned licenses under all General Motors and Standard Oil tetraethyl lead patents. Paragraph 8 recognized that others than du Pont, and specifically Standard Oil, might manufacture tetraethyl lead for Ethyl since it provided (R. 415-416; GTX 668, p. 5, R. 618, 4383 at p. 4387), that Ethyl would purchase its tetraethyl lead—

> "* * * in the open market at the lowest price at which it is offered and, to permit competitive bidding, shall offer to instruct and license any bona fide probable supplier, including the STANDARD COMPANY."

The only proviso was that purchases should continue to be made from du Pont until its existing contract expired, which was expected to occur in about four months (R. 416, GTX 673, R. 618, 4434).

Proof of the absence of an agreement or plan to exclude Standard Oil from manufacture does not end, however, with the specific contractual recognition of Standard Oil as a potential manufacturer. As the District Court found, Standard Oil did in fact embark on manufacture, and itself abandoned the project only when its unskillful efforts brought about a catastrophe that almost destroyed the whole Ethyl venture.

The events of this period are elaborately set forth in the record, and the findings of the District Court are quite

detailed (R. 414-421). In brief, following the oral agreement between General Motors and Standard Oil in June 1924 on the formation of Ethyl Corporation, there were several conferences between those two companies on the matter of manufacture of tetraethyl lead by Standard Oil (R. 414-415; Sloan, R. 1256-1259, GM 274, R. 1633, 7421). Standard Oil proposed to erect a 100 gallon-a-day plant at its Bayway, New Jersey, refinery for the purpose of affording an experimental basis for future construction of ethyl chloride plants (R. 414; GM 274, R. 1633, 7421). Sloan acquiesced, partly because of the possibility that something of value might be learned from the experimental program, and partly because Standard Oil, now a partner in the enterprise, wanted to do it (R. 414, 416; Sloan, R. 1256-1258). At the same time, he arranged for the appointment of a medical committee to recommend a program for minimizing the health hazards of tetraethyl lead (R. 416; Sloan, R. 1260, GM 82, R. 1260, 6817). Meanwhile, upon the recommendation of Standard Oil representatives on Ethyl's Board, General Motors and Standard Oil had authorized du Pont to continue the production of tetraethyl lead at its existing ethyl bromide plant, and to erect a larger ethyl chloride plant at the same site (Sloan, R. 1262-1263, GM 87, R. 1263, 6826).

During the summer of 1924 differences of opinion developed between the engineers of du Pont and Standard Oil with respect to the manufacturing equipment to be used in those new ethyl chloride plants. Du Pont advocated a completely closed system which would prevent any contact with the material at any time; Standard Oil felt that economy could be achieved by permitting the workers to handle the lead residue directly (R. 416-417; Harrington, R. 1761-1763). When du Pont advised Ethyl that it considered the Standard Oil process too dangerous, it received permission to use its own design; Standard Oil proceeded with its own plans (R. 417; Harrington, R. 1763-1764).

The Standard Oil plant at Bayway had operated for about four weeks when disaster struck. On October 25, 1924, a wave of simultaneous lead poisonings occurred affecting the entire working force, and five deaths followed in quick succession. The Standard Oil plant was immediately closed, and New Jersey authorities supervised its dismantling. The public uproar was so great that in a few months Ethyl itself was forced to suspend sales, with no certainty that they would ever be resumed (R. 417; Sloan, R. 1267, Webb, R. 1624, 1641, Harrington, R. 1765, GM 89-90, R. 1267, 6832-6833).

Thus, within six months from the time Standard Oil became a manufacturer the whole industry had come to a standstill. It was during this period that Sloan wrote to Irenee du Pont, asking him to take a place on the Ethyl Board of Directors, and said that he was sure du Pont "will always be the manufacturing agent of Ethyl" (R. 417; GTX 710, R. 625, 4530).

The Bayway story not only underscores the wisdom of Sloan's reluctance to add additional problems to a new venture, but it is the final answer to the charge that General Motors and du Pont conspired to prevent Standard Oil from manufacturing tetraethyl lead. Standard Oil *did* manufacture, and it stopped because its effort was a spectacular failure; indeed, but for the encouragement of Irenee du Pont, Standard Oil might have abandoned the whole Ethyl venture (Irenee du Pont, R. 899; DP 99B, R. 901, 5873). The infant industry was saved by the forceful—and accurate—prediction of the du Pont engineers at hearings conducted by the United States Surgeon General that du Pont could and would manufacture tetraethyl lead safely (R. 421; Harrington, R. 1770-1775, GM 92, 261-262, R. 1272, 1578-1579, 6836, 7360-7376).

The trial court also made findings on two disputes between du Pont and Ethyl which arose out of the Bayway dis-

aster (R. 417-421). With no reference to those findings, the Government claims that, with Sloan's help, du Pont achieved an unduly favorable settlement (pp. 54, 134). On the contrary, the evidence reveals that Sloan took no action to favor du Pont. Indeed the evidence reveals the full participation of Standard Oil in Ethyl's affairs—and there is no charge that Standard Oil was dominated or coerced by du Pont, or unable to look out for its own interests. It also reveals the vigor and independence which were displayed by Webb, Ethyl's president. The results were arm's-length, normal dealings between Ethyl and du Pont.

The findings and the evidence show that in January 1925 du Pont was producing tetraethyl lead in its bromide process plant, and was constructing a chloride process plant which was to come into production in the spring. As a result of the Bayway disaster, sales of ethylized gasoline were falling, and Ethyl requested du Pont to withhold certain deliveries from its bromide process plant, which du Pont did (R. 417; Harrington, R. 1766, GTX 677, 679, R. 618, 619, 4447, 4456). Later in 1925, although du Pont's chloride plant was then supposed to be in production, du Pont was unable for technical reasons to make the deliveries needed by Ethyl from that plant, and made them instead from the bromide plant. The question immediately arose whether the substituted deliveries should be paid for as bromide process tetraethyl lead which was, by the current contract, priced to Ethyl at $1.66, or paid for as chloride process tetraethyl lead which had a contract price of $1.17 (R. 417-419). Du Pont took the position that since it had voluntarily withheld the earlier deliveries, it was entitled to treat the later deliveries as merely deferred ones and to be paid at the higher price. When the dispute was referred to Midgley, and Howard of Standard Oil, to settle with du Pont, Howard gave his opinion that du Pont had "no clearly enforceable legal claim for an adjustment" (GTX 677, R.

618, 4447). In reply, Irenee du Pont admitted that "from a law point of view" Ethyl might maintain its position, but that fairness required more equitable dealing among the parties (GTX 679, R. 619, 4456), a position with which Sloan agreed (GTX 680, R. 619, 4459). In early April the dispute was still the subject of correspondence between Midgley and Irenee du Pont (GTX 648, R. 616, 4358), but the record does not show how it was resolved.

The other dispute did not arise until May 4, 1925, when Ethyl finally suspended sales (Webb, R. 1624), and concerned the settlement to be made on the cancellation of the du Pont-Ethyl contract (R. 419). There was no controversy as to the validity of du Pont's claim, which included no profit but did include the cost of the chloride process plant, full amortization of which was to have taken place over the term of the contract (R. 419-420; Harrington, R. 1777-1778, GTX 683, R. 620, 4465). Analogous settlements were negotiated at the same time with other suppliers of Ethyl whose contracts had been cancelled (Webb, R. 1625, GTX 681, R. 619, 4460). There was controversy as to the exact amount due to du Pont, and considerable negotiation ensued between Webb of Ethyl and Howard of Standard Oil, on the one hand, and representatives of du Pont on the other. The principal item of dispute was the value and disposition of the du Pont chloride process plant, which depended in turn on whether the manufacture of tetraethyl lead would ever be resumed. At Ethyl's suggestion, but over Irenee du Pont's protest, the solution was delayed until it became clear that the plant could continue to be used for tetraethyl lead production, and then the matter was easily and promptly resolved (R. 420-421; Harrington, R. 1778-1779, GTX 685, 686, 688, 691-693, DP 116, R. 620-622, 1778, 4470, 4475, 4480, 4487-4491, 5900). Sloan took no part in the negotiations, preferring to have them carried on by Webb and the representatives of Standard Oil (R. 421; Sloan, R. 1273-1274).

3. From Resumption of Manufacture in 1926 to Expiration of the Basic Patents in 1948

In 1926, when a favorable report from the Surgeon General finally permitted a resumption of the manufacture and sale of tetraethyl lead under rigid safeguards, du Pont again became the manufacturer for Ethyl, and continued as such until 1948. The Government professes to see in this period further evidence of du Pont domination of Ethyl. The facts, however, do not support the assertion.

The principal personality during this period was Earl W. Webb, Ethyl's president. He had been appointed in 1925, when Sloan and Teagle (of Standard Oil) concluded that the administration of Ethyl's affairs had been too long in the hands of men such as Kettering and Midgley, whose interests and qualifications were primarily technical (R. 421; Sloan, R. 1264-1265, 1371-1372, GTX 678, R. 619, 4452). Webb, then a member of General Motors' legal staff, made a survey of Ethyl's operations as a preliminary test of his qualifications. His report was satisfactory, and he was promptly appointed (R. 421; Sloan, R. 1266, Webb, R. 1623-1624, 1665-1668, GTX 678, GM 88, R. 619, 1267, 4452, 6831).

A clear demonstration that du Pont's continued manufacture for Ethyl was wholly based on business reasons, and unrelated to any conspiratorial plan, is found in Webb's prompt efforts to secure for Ethyl a second source of supply. Shortly after Webb became president of Ethyl he opened discussions with Dow Chemical Company, in an attempt to persuade that company to become a manufacturer of tetraethyl lead. Dow chemists had developed a process for producing tetraethyl lead using magnesium, which Dow produced in quantity, rather than sodium (R. 422; Webb, R. 1640-1642; Britton, R. 1701, GM 279-281, R. 1701, 1703, 1706, 7437-7464). Dow however was not willing, because of the danger involved, to undertake manufacture (R. 422;

Webb, R. 1632, Britton, R. 1703-1706, Bennett, R. 1716-1723, GM 284, R. 7473).

In April 1926, while discussions with Dow were in progress, Webb came in contact with another company, American Research Laboratories, which also claimed to have developed a magnesium process, and which offered to undertake manufacture. Webb promptly made a contract looking toward production for Ethyl by the American Research Laboratories, and arranged to bring representatives of Dow and American Research Laboratories together. The latter, whose previous experience had been confined to the production of a serum for hog cholera (Webb, R. 1627) realized upon visiting the Dow plant that their venture would be "rather foolish" and suggested cancellation of their contract and an arrangement whereby manufacture under their process would be conducted by Dow (R. 422; Webb, R. 1629-1630, 1658-1659, 1663-1664, GM 270-271, 283, R. 1631, 1717, 7412, 7415, 7471). Irenee du Pont, as a director of Ethyl, expressed his disapproval of the American Research Laboratories contract, pointing out that if another disaster were to follow on the heels of Bayway, nothing could explain why the directors had "encouraged novices to undertake such a dangerous operation" (R. 422; GTX 711, R. 625, 4532). Ultimately the matter resolved itself when Dow refused to manufacture under any process.

The complete freedom of Ethyl, and of Webb, its president, from domination or coercion by du Pont is also illustrated by the bromine story. Bromine is added in large quantities to tetraethyl lead in order to prevent damage to the engine. Prior to Webb's presidency the purchasing of bromine in quantity had been a troublesome problem because of the limited supply available. General Motors and Ethyl had undertaken to develop additional sources, aided on occasion by du Pont, and at other times by Dow Chem-

ical Company, which was its principal supplier of bromine from salt water wells in Michigan (Sloan, R. 1280-1281, Kettering, R. 1571-1574). At the time Webb became president of Ethyl a chemical plant had been installed by du Pont in a ship which shortly thereafter put to sea in a successful attempt to extract bromine from the ocean (Irenee du Pont, R. 906-909).

Upon hearing of du Pont's seawater experimentation, Dow carried the research further and developed a different extraction process (Bennett, R. 1710-1712). Dow so informed Ethyl, the two companies joined in building a pilot plant to test the process, and in 1933 formed a joint company, Ethyl-Dow Company, to undertake large-scale extraction of bromine from the ocean (Bennett, R. 1712-1714). Since then, Ethyl-Dow has continuously produced for Ethyl (Bennett, R. 1713-1714). The extent of du Pont control or influence may be measured by the fact that no one in du Pont knew anything of the steps in the project; Irenee du Pont learned of the formation of Ethyl-Dow by reading of it in a newspaper (Irenee du Pont, R. 909, Sloan, R. 1281, DP 106, R. 910, 5885).

The same arm's-length relationship was evident in the contractual relationships between Ethyl and du Pont after production was resumed. Webb, following the failure of his effort to find anyone other than du Pont who would risk the hazards of production, negotiated between 1926 and 1937 a series of short-term contracts with du Pont, at steadily decreasing prices (R. 422-423; Webb, R. 1634, GTX 706, 745, 747, 752-754, DP 118, GTX 757-759, R. 624, 628-629, 1782, 630, 4512, 4559, 4570, 4588-4602, 5911, 4621-4636).

Beginning in 1929, however, Ethyl began to give consideration to the situation which would exist when its patents expired. Du Pont would then be free to sell if it

wished, but Ethyl, with no manufacturing experience or facilities, would find it difficult to compete (R. 423). Webb and du Pont had agreed in 1926, in order to encourage research by du Pont into improved production processes, that du Pont could retain title to the patents on whatever process improvements du Pont's research might develop (R. 422-423; Irenee du Pont, R. 903-904, Harrington, R. 1780, GTX 702, 706, R. 623, 624, 4502, 4512).

There were two possible solutions to Ethyl's problem—to obtain an agreement from du Pont that it would confine its output to Ethyl after the patents expired, or to devise some arrangements by which Ethyl could be prepared to manufacture for itself. The first alternative was rejected for legal reasons (GTX 749, R. 629, 4579). The second, however, Webb insisted upon and, with support from Sloan, and despite the opposition of du Pont (R. 424; GTX 748, R. 628, 4577, Sloan, R. 1278) ultimately succeeded in having included in the du Pont-Ethyl 1930 contract. By that agreement, if Ethyl purchased at least 50 percent of its annual requirements of tetraethyl lead from du Pont until January 1, 1938, du Pont would on that date disclose all its technical information on manufacture to Ethyl and would license it under all of its patents (R. 423; GTX 752, R. 629, 4588).

From 1930 to 1938 Webb negotiated with du Pont as to the precise manner in which these disclosures and licensing provisions were to be implemented. Ultimately, a solution was reached. In 1936, du Pont agreed to build a tetraethyl lead plant for Ethyl at Baton Rouge, Louisiana (a site selected by Ethyl), and the following year agreed to construct a second such plant (R. 423; Webb, R. 1634-1636, 3665-3666, Harrington, R. 1789, 1792, GTX 785, 790, R. 633, 634, 4788, 4803). The final agreement on how to operate these and the other plants was embodied in a contract known as the Manufacturing Service Agree-

ment of January 1, 1938 (GTX 798-801, 803-804, R. 635, 636, 4830-4900). Under this agreement du Pont agreed to lease its own plant to Ethyl, and to operate both it and the new plants at Baton Rouge as agent for Ethyl for a specified share of the proceeds of Ethyl's operations. Du Pont further agreed to advance certain funds to Ethyl and to build, during the terms of the agreement, such additional tetraethyl lead and raw materials plants as Ethyl might request. Several were requested and built at Baton Rouge pursuant to this agreement. Du Pont operated all the Baton Rouge facilities for Ethyl until 1945, when Ethyl took over operation for itself. When the patents, and the Manufacturing Service Agreement, expired on January 1, 1948, Ethyl was a fully integrated company (R. 423-424; Sloan, R. 1279, Webb, R. 1638-1639, 1694-1695, Harrington, R. 1795-1798, GTX 806-807, 810, GM 278, R. 636, 637, 1796, 4903, 4909, 4914, 7436).

The Government appears to imply that the return to du Pont was in excess of a fair return for its manufacturing efforts (Br., p. 57). Apart from the fact that the independence of both Standard Oil and of Webb cannot be and is not challenged, the findings on actual profits show that the argument is wide of the mark. During the pre-1938 period du Pont fixed its prices to Ethyl at a level which would give it a manufacturing profit almost equal to one-third of the total manufacturing and selling profits, the other two-thirds being equally divided, in the form of dividends, between General Motors and Standard Oil, after deducting the royalty on General Motors' patents (R. 424; Webb, R. 1676-1678, DP 122, R. 1795, 5916). Under the Manufacturing Service Agreement du Pont received as compensation for its manufacturing efforts one-third of the profits from sales of tetraethyl lead by Ethyl up to a specified amount per year, and one-tenth of such profits thereafter (GTX 799, p. 22, R. 635, 4838 at pp. 4859-4860).

Since production always far exceeded the specified amount, the average percentage of profits which du Pont received under this formula for the decade in which the agreement was in force was only 18 percent (R. 425; DP 122, R. 1795, 5916). There is no evidence that the return which du Pont received for its manufacturing efforts was regarded as exorbitant at the time, and no basis upon which it can be challenged now.

4. From the Expiration of the Patents in 1948 to the Present

The final evidence of the arm's-length nature of the relations between General Motors and du Pont in respect to tetraethyl lead is to be found in the situation which now exists. On December 31, 1947, eighteen months before the complaint was filed in this case, the basic tetraethyl lead patents expired, the Manufacturing Service Agreement came to an end, and du Pont and Ethyl went their separate ways (R. 425). Since that time, du Pont and Ethyl have each manufactured and sold tetraethyl lead.

Du Pont, in anticipation of its coming freedom from Ethyl's patents, began as early as 1945 to expand its petroleum products staff. In 1947 it organized a petroleum laboratory, and visited and solicited orders for its tetraethyl lead from every oil company in the United States (R. 425; Sabina, R. 1859-1867). The planning was good, the salesmanship effective, and du Pont was successfully in the tetraethyl lead business in 1948 (Sabina, R. 1867). Its customers, for the most part, were of course won from Ethyl, which until then had been the exclusive supplier. In 1948, the production capacity of du Pont was about four-fifths that of Ethyl (R. 425; Webb, R. 1696, Daley, R. 1909-1910), and both companies have since continued to expand in proportion to their needs and future expectations (Webb, R. 1639, Daley, R. 1902-1903, 1910). The "Ethyl" trade-

mark, which could not of course be used by an oil company on its retail pumps when it used du Pont's tetraethyl lead, was a substantial obstacle to du Pont's selling efforts, but notwithstanding, du Pont won additional customers from Ethyl, as well as losing some to Ethyl, in the years following 1948 (R. 425; Webb, R. 1639-1640, Daley, R. 1886-1887, 1898, 1901). The Government has abandoned the charge it made below that du Pont and Ethyl are not in competition (Br., p. 82).

B. THE EVIDENCE SHOWS THAT GENERAL MOTORS' DECISIONS WITH RESPECT TO "FREON" WERE NOT THE RESULT OF DU PONT INFLUENCE OR CONTROL

The basic question raised by the Government in respect to "Freon" refrigerants, both in the Amended Complaint and in this Court (Br., pp. 136-138), is the same as that which is presented in respect to tetraethyl lead: Was General Motors' decision to enlist du Pont's aid in manufacture a normal business decision, or was it the result of control or influence by du Pont? Again, as in tetraethyl lead, the trial judge saw and heard the men who made the decision, Sloan and Pratt, and accepted their testimony that control or influence played no part in their thinking (R. 434). The trial court's finding is fully supported by the subsidiary findings and the evidence, including contemporaneous documents which corroborate the testimony of Sloan and Pratt.

In 1928 Midgley, who had been assigned by General Motors Laboratories to find a new and better refrigerant for the domestic refrigerators produced by Frigidaire Division of General Motors, discovered that dichloro-difluoromethane, an obscure gas described in early chemical literature, was an almost ideal refrigerant (R. 426; DP 128, 131, GTX 883, R. 1803, 1808, 647, 5922, 5929, 5062). This compound, commonly known by its trade-mark "F-12",

was one of numerous family of gases sold under the trademark "Freon". It met the objectives which had been sought: a suitable boiling point, non-flammability, non-toxicity, and a distinct but not unpleasant odor, although its two principal constituents, chlorine and fluorine, are each dangerous and toxic (R. 426; Pratt, R. 1483, Harrington, R. 1802, GTX 883 at pp. 7-8, R. 647, 5062 at pp. 5068-5069). Use patents were obtained by Frigidaire (R. 426; Harrington, R. 1824).

During 1929 and 1930 Midgley continued to work on "F-12". In August 1929, on the recommendation of E. G. Biechler, Manager of Frigidaire, Pratt approved a small plant to produce "F-12" for experimental purposes, and a few months later Frigidaire erected a semi-commercial plant (R. 426; Pratt, R. 1484-1485, GM 233, 234, R. 492, 7295, 7296). In March 1930, when preparation and testing had arrived at a point where Frigidaire was faced with the problem of commercial production, Biechler recommended to Pratt, who was then the Group Executive in General Motors for the Accessories Divisions, the group of Divisions which included Frigidaire, that Frigidaire or some other General Motors Division undertake it (GTX 838, R. 638, 4975). Pratt replied that he would consult with Sloan, but expressed his own doubts, stating (GTX 839, R. 639, 4976):

> "It is quite a fundamental step for us to start General Motors in chemical manufacture. Up to this time we have more or less elected to confine ourselves to the mechanical side of manufacture and I do not want to depart from this until very thorough consideration has been given to all of the factors involved."

When Sloan's opinion was sought, he agreed with Pratt that General Motors should not undertake the full-scale commercial production of the new refrigerant (R. 427;

Sloan, R. 1350-1351, 1352-1353, Pratt, R. 1487-1489, GTX 883 at p. 10, R. 647, 5062 at p. 5071). Sloan testified (R. 1351):

> "That was the position I took on the basis of lack of competence. Further, more than that, the manufacture of this particular material involved certain questions of danger in manufacture, somewhat analogous to tetraethyl lead, perhaps not so much, and I thought it was something we should not engage in. I told Mr. Pratt that."

Sloan left it to Pratt to investigate and develop suitable manufacturing arrangements (R. 427; Pratt, R. 1488). Shortly thereafter—but some two years after Midgley's original discovery—Pratt approached du Pont with the suggestion that it join General Motors in the formation of a joint company—ultimately named Kinetic Chemicals, Inc.—to produce and sell "F-12" and other "Freon" refrigerants (R. 427; Pratt, R. 1489, Harrington, R. 1802). Pratt testified that he decided to approach du Pont because of its experience in handling dangerous chemicals, and because he had confidence in the du Pont people (R. 427; Pratt, R. 1488-1489, 1491, Harrington, R. 1802). Kettering, it should be added, concurred in Sloan's and Pratt's decisions (Kettering, R. 1596).

Both Sloan and Pratt testified that their decisions were made in what they regarded as the best interests of General Motors, and categorically denied that coercion, control, or any other influence by du Pont, or any understanding or agreement between General Motors and du Pont, had any part in the decision they made (Sloan, R. 1326-1327, 1385-1386, Pratt, R. 1489, 1502). The record, moreover, contains considerable evidence illustrating the sound business basis for their decision. In the first place, the issue was not simply whether General Motors would manufacture for its own needs, but whether it would become manu-

facturer for the whole refrigerator industry. The elimination of health and fire hazards which could be achieved through the use of "F-12" in domestic refrigerators was so important that from the outset General Motors had resolved not to assert its patent monopoly (Pratt, R. 1498, GTX 883 at p. 10, R. 647, 5062 at p. 5071) and in fact "F-12" always was available to anyone who wished to buy it (R. 430; Pratt, R. 1495-1496, 1498, Harrington, R. 1821, GTX 857, DP 134 at p. 3, 135, 136, GM 239, R. 642, 1820, 1822, 1498, 5020, 5948 at p. 5950, 5958, 5960, 7304).

Moreover, General Motors lacked experience, a consideration which, as Sloan pointed out, was of particular importance when dangerous chemicals were involved. While no doubt General Motors could have surmounted the problem in time, everyone recognized that it was important to produce "F-12" as quickly as possible (R. 427; GTX 838, 840, GM 233, R. 638, 639, 1484, 4975, 4977, 7295). Again, as events turned out, it became apparent immediately that Frigidaire's semi-works production process was not commercially feasible, and that full-scale production required a complex supplementary manufacturing process for an essential raw material, anhydrous hydrofluoric acid (Harrington, R. 1802-1803, 1805-1806, DP 128, 131, R. 1803, 1808, 5922, 5929). Du Pont promptly developed a new commercial production process, and in a short time invented and patented for Kinetic a manufacturing process for anhydrous hydrofluoric acid (*ibid*). Finally, du Pont was soon called on to utilize its chemical experience in overcoming the objections initially raised to "Freon" by building code authorities in several large cities (R. 429; Pratt, R. 1497-1498, Harrington, R. 1821-1822, DP 135, GTX 883 at pp. 14-15, R. 1822, 647, 5958, 5062 at pp. 5075-5076). Even Biechler, who had originally recommended manufacture by General Motors, very soon expressed his pleasure

that du Pont had assumed the manufacturing responsibilities (DP 129, 130, R. 1806, 1807, 5925, 5926).

The organization of Kinetic Chemicals, Inc. to manufacture and sell "Freon" was in large part worked out by Pratt, for General Motors, and Harrington, for du Pont (R. 427-428). Pratt initiated the discussions, and proposed the basic terms of the final agreement (R. 427-428; Pratt, R. 1489-1492). Pratt suggested, and du Pont accepted, the idea that du Pont should take 51 percent, and General Motors 49 percent, of the stock in Kinetic, because Pratt believed that the company which had the responsibility for manufacturing and selling "Freon" should have the responsibility for controlling the operation of the company (R. 427-428; Pratt, R. 1491, Harrington, R. 1810, 1853). Du Pont received a management fee; General Motors received a royalty on its patents (R. 428; GTX 850, 883 at p. 11, R. 647, 641, 4992, 5062 at p. 5072).

Pratt also suggested, and du Pont accepted, a provision on which considerable emphasis is laid in the Government's brief (pp. 58-59, 136-137)—that future chemicals developed by General Motors should first be offered to Kinetic (R. 428; Pratt, R. 1491-1492, Carpenter, R. 2740; GTX 842, R. 639, 4979). In truth, the Pratt suggestion, as finally embodied in the Kinetic Agreement (GTX 850, R. 641, 4992) simply complemented the decision that the new refrigerants should be manufactured by Kinetic. In the event that General Motors developed any other chemical products, its interests were fully protected, since a prerequisite to any manufacture by Kinetic was a prior agreement on terms—the offer to Kinetic of any General Motors discovery was to be "on such terms as may be mutually agreed upon." If General Motors did not choose to agree on the terms of an offer within six months, it had no further obligation (R. 428; GTX 850, R. 641, 4992).

In effect, therefore, the clause left General Motors free to transfer any discovery to Kinetic, or not, as it saw fit. As Pratt himself explained a few months later (R. 429; GTX 899, R. 652, 5129), if General Motors could arrive at a mutually satisfactory agreement with Kinetic, its chemical discovery would be in the hands of "an organization in which [General Motors] have confidence from the standpoint of their ability to carry on chemical manufacturing processes." As it turned out, nothing was ever offered to Kinetic by General Motors under this article (R. 429; Sloan, R. 1384, Pratt, R. 1492, Harrington, R. 1813).

In any event, in 1945—four years before the complaint was filed—the clause was removed from the Kinetic agreement the same way it had come in—at General Motors' request, based on General Motors' decision that the clause was unenforceable (R. 429-430; Pratt, R. 1492, Harrington, R. 1814, DP 133, GTX 883 at p. 12, R. 1814, 647, 5945, 5062 at p. 5073).

The Government makes no reference in its brief to one other significant fact appearing in the findings—its own specific approval of the purchase by du Pont of General Motors' minority stock interest in Kinetic, and its specific waiver of its prayer for relief (R. 259) seeking divestiture of Kinetic from du Pont. The purchase grew out of negotiations which began in 1948, and consumed almost all of 1949 as well (R. 431). There can be no doubt that they were at arm's length (see Daley, R. 1903-1906). On January 1, 1950, General Motors' stock was acquired by du Pont for approximately $10,000,000 (R. 431; Harrington, R. 1834). Since the complaint in this case had already been filed, the Department of Justice had been consulted, and had assured du Pont, in writing, that it did not oppose the purchase and, while it reserved the right to present

evidence relating to the matter, would drop its prayer for relief concerning Kinetic (R. 432; Harrington, R. 1833-1834; DP 145; R. 1833; 5975).

* * *

The tetraethyl lead and Kinetic stories, when all the findings and evidence are considered, thus lend no support to the Government's charges. The detailed findings are fully supported by the testimony of participants in the events, as well as by contemporaneous documents. The decisions by General Motors to call upon du Pont's manufacturing skill and chemical experience, rather than itself to embark upon chemical manufacture, were based, as the court found, not on control or influence, but on the business interests of General Motors as General Motors independently evaluated them.

III

The Evidence Supports the Trial Court's Findings that du Pont Does Not Control General Motors

Although the Government cannot prevail merely by proof that du Pont controls General Motors (as the Government itself concedes), that proof is the foundation of the Government's entire case.[17] It is in this alleged control that the Government finds both the element of combination and the sole means by which the illegal restraint is said to have been achieved. If the alleged control does not exist the premise that supports the Government's case disappears.

---

[17]The Government concedes that control of one corporation by another does not violate the antitrust laws unless it results in a restraint of trade (Br., p. 71). Since the facts here establish that General Motors has never bought from du Pont on a non-competitive, preferential basis and that du Pont has never had a non-competitive advantage in the trade of General Motors, there has been no restraint of trade (see pp. 35-137, *supra*), and the Government's case must fail without regard to the proof on the question of control.

The record shows that du Pont has not and does not control General Motors.[18] The trial court so found (R. 322), and we shall show that its findings are supported by the evidence. Here, as in the case of the ultimate issue of restraint of trade, the facts are fatal to the Government's contentions.

The question of control is a question of fact; on this point we agree with the Government (Br., p. 75). We also agree with the Government that the particular kind of control which is relevant in this case is, as defined by the Government, "a power in du Pont to direct the business policies of General Motors so as to gain for itself an economic advantage over its competitors" (Br., p. 88). Whether such a power exists, however, is a question to be decided on the basis of all the relevant facts, and not merely by reference to fragments of the facts or to assumptions or inferences said to be justified by those fragments. Accordingly, in this section of the brief we shall discuss in some detail all of the relevant facts that relate to the issue of control, reserving for a later section of the brief (pp. 257-261) our discussion of the Government's argument that the trial court applied improper legal criteria in its consideration of the issue.

The facts taken in their entirety show that du Pont's activities as a stockholder in General Motors were the normal and proper activities of an investor, that they were unrelated to the trade relations between the two companies, and they affirmatively establish that du Pont has not

---

[18]Throughout this brief we use the term control in the same sense in which it is defined in the Government's brief: "* * * it is here used as a shorthand designation of a relationship by which one corporation influences the free action of another so as to result in an unlawful restraint of trade. Specifically we are concerned here with a power in du Pont to direct the business policies of General Motors so as to gain for itself an economic advantage over its competitors" (Br., p. 88). The same definition cast in somewhat different form appears on pages 77-78 of the Government brief.

had and does not now have the power to influence or to direct the business policies of General Motors so as to gain for du Pont an economic advantage over its competitors.

A. THE EVIDENCE SHOWS THAT DU PONT DID NOT INVEST IN GENERAL MOTORS FOR THE PURPOSE OF CONTROLLING GENERAL MOTORS' COMMERCIAL RELATIONS

In the court below the Government urged that the initial acquisition of General Motors stock by du Pont in 1917-1918 was a step in a conspiracy to secure, in General Motors, a "closed market" for du Pont. Appellees, on the contrary, urged that it was an investment.

The District Court, noting specifically that it was taking into account the testimony which it had heard, as well as the documents, found (R. 301):

> ". . . on the basis of all of the evidence of record that no agreement was made in connection with du Pont's investment in General Motors, or subsequent thereto, which bound the latter to buy any portion of its requirements from du Pont."

It also found (R. 302):

> "The Court also finds based on all of the evidence of record that du Pont did not invest in General Motors with the purpose of restricting that company's freedom to purchase in accordance with its own best interests."

Only the second of these findings is now challenged; the Government no longer seeks to prove conspiracy or agreement and, as we note below (pp. 232-233), the question of intent would now seem to be immaterial. The second finding, however, like the first, is fully supported by the subsidiary findings and the evidence relating to the investment.

The background of the du Pont investment is covered in some detail in the findings (R. 342-344), but can be stated very briefly. At the turn of the century du Pont

was primarily a producer of military and commercial explosives. In 1908 the du Pont Executive Committee, believing that new Government owned and constructed powder plants foreshadowed the end of du Pont's smokeless powder business, began an investigation of new outlets for its nitrocellulose, or guncotton, the principal constituent of smokeless power (R. 342; Irenee du Pont, R. 758-760). Celluloid and artificial leather were found particularly suitable. Du Pont entered the artificial leather business in 1910 by the purchase of the Fabrikoid Company, and into the manufacture of celluloid (called "Pyralin" by du Pont) through the purchase of the Arlington Company in 1915 (R. 342-343; Irenee du Pont, R. 760-768, GTX 106, 110, R. 476, 3062, 3120).

Midway in this expansion program World War I intervened. In the fall of 1914 du Pont began to receive substantial orders for military explosives from the Allies, and all of its executives devoted their full energies to the task of fulfilling what appeared to be impossible commitments. Du Pont's explosives capacity was increased from 700,000 to 37,000,000 pounds per month, at a cost exceeding $200,000,000 (Irenee du Pont, R. 774-780, DP 74, pp. 4, 10, R. 777, 5740 at pp. 5743, 5749). By the middle of 1915 initial construction of facilities had been successfully carried out, powder was being delivered in huge quantities, and it became evident that the substantial risks which had been involved would result in extraordinary earnings (R. 343; Irenee du Pont, R. 780).

The du Pont management early concluded to retain in the business a substantial portion of those earnings, and to invest them in new industries which would utilize, after the war, as much as possible of the newly-acquired skills and facilities of the company (R. 343; Irenee du Pont, R. 780-782, DP 74, 76, R. 777, 782, 5740, 5778). Chemical industries were decided upon, and by the end of 1917 du

Pont had already embarked on three which were particularly suitable—dyestuffs and organic chemicals, heavy chemicals and paints and varnishes (R. 343-344; Irenee du Pont, R. 778-779, 782-783, 785-794, DP 74-84, 87-88, R. 777, 781-785, 788, 5730-5820, 5828-5843). Despite these various acquisitions, however, in 1917 du Pont was still principally producing powder and explosives (R. 344).

1. The Initial Investment

The origin of the opportunity for du Pont to make its investment in General Motors had no relation to du Pont's commercial activities, or, indeed, to any activity of the du Pont Company. The findings show that as early as 1914 Raskob began buying General Motors stock for his own account as an investment and his interest in the matter led Pierre du Pont to make a personal investment in the same year. Others in du Pont likewise made personal investments on Raskob's recommendation (R. 297; Pierre du Pont, R. 795-796, DP 37-38, GTX 114, 115, R. 796, 477, 5589, 5591, 3188, 3189). There has been no charge that these purchases were motivated by anything other than normal investment considerations.

At the end of 1915, however, Pierre du Pont and Raskob found themselves in the midst of a major controversy in General Motors. That company had been organized in 1908 by W. C. Durant through the acquisition of a number of independent automobile companies. By 1910 Durant had been forced to negotiate a large loan with a group of "Boston" banks, under a voting trust which made C. W. Nash president and gave the bankers control of the Board of Directors for five years (R. 297; Pierre du Pont, R. 797-798, GTX 124, pp. 4-6, R. 479, 3208 at pp. 3212-3213).

When the voting trust was about to expire, Pierre du Pont and Raskob were invited by a Mr. Kaufman, presi-

dent of a New York bank of which Pierre du Pont was a director, to attend a meeting in New York to discuss a new slate of directors for General Motors. Contrary to expectations, Durant and the bankers group deadlocked on the composition of the new board. After long discussion, both sides nominated an equal number of directors and agreed that Pierre du Pont should be Chairman of the Board, and should name three directors who would be neutral as between the two sides. He named Raskob, J. A. Haskell, then a vice president of du Pont, semi-retired and living in New York, and Lammot Belin, a brother-in-law (R. 297-298; Pierre du Pont, R. 798-799, GTX 116, 117, R. 478, 3190, 3192). The bankers' candidate, Nash, remained as president (GTX 117, R. 478, 3192).

By the spring of 1916 Durant, through the Chevrolet Company, had resolved the dispute with the bankers in his favor and had re-established himself as president of General Motors.[19] Increasingly thereafter he discussed with both Pierre du Pont and Raskob the financial affairs of the company. In August, 1917, Durant renewed an earlier invitation to each of them to become a member of the General Motors Finance Committee, and each accepted (R. 298; Pierre du Pont, R. 807-808, GTX 123, 124, p. 7, DP 42-43, 45, p. 2, R. 478, 479, 808, 809, 3205, 3208 at p. 3215-3216, 5595, 5600, 5603 at p. 5604).

After Pierre du Pont and Raskob became members of the Finance Committee, Durant talked freely to them about the operations and finances of General Motors, urged them to take greater responsibilities in General Motors' financial management, and likewise urged them, and others in du

---

[19]Durant, after 1910, had organized Chevrolet Motor Company to manufacture a low-priced car, and he utilized Chevrolet to purchase large amounts of the stock of General Motors; by 1916 Chevrolet owned more than 50 percent of the outstanding common stock (R. 297; Pierre du Pont, R. 803, GTX 124, p. 6, R. 479, 3208 at pp. 3214-3215).

Pont, substantially to increase their General Motors stock holdings (R. 298-299; Pierre du Pont, R. 809-810, GTX 124, p. 7, DP 45, p. 2, R. 479, 809, 3208 at pp. 3215-3216, 5603 at p. 5604). Raskob, however, in early December 1917 proposed to Pierre du Pont that the du Pont Company itself should make the substantial investment in General Motors which Durant was urging on the individuals (R. 299), his argument being that the du Pont Company needed an investment of good earning power, which he believed General Motors stock would be, to support the du Pont dividend after the war (Pierre du Pont, R. 810-811). When Pierre du Pont agreed, Raskob prepared a draft of a report in connection with the proposal which he reviewed with Pierre du Pont, and on December 19, 1917, he submitted, as Treasurer of du Pont, a formal report to the Finance Committee recommending the purchase of up to $25,000,000 of General Motors stock (R. 299, GTX 124, R. 479, 3208).

The report, after outlining briefly how the purchase should be financed (R. 3209-3211), begins by stating the "imperative" need for du Pont to find an investment for substantial sums of capital (R. 3211-3212). It points out (a) that in 1915 du Pont's capital had been increased, (b) that the increase committed du Pont to find postwar investments of at least $90,000,000, (c) that despite its best efforts to invest in new industries du Pont had thus far succeeded in investing only $40,000,000, and (d) that unless a profitable investment was found for the remaining $50,000,000, du Pont's postwar earnings would not support its dividend policy.

The report then summarizes (R. 3213-3215) the early relations of Pierre du Pont and Raskob with Durant, pointing out (R. 3215-3216) that Durant's association with them and other du Pont men "has been such as to result in the expression of the desire on his part to have us more substantially interested with him, thus enabling us to assist

him, particularly in an executive and financial way, in the direction of this huge business." The report then continues (R. 3216).

> "The evolution of the discussion of this problem is that an attractive investment is afforded in what I consider the most promising industry in the United States, a country which in my opinion holds greater possibilities for development in the immediate future than any country in the world; that rather than have a coterie of our directors taking advantage of this in a personal way, thus diverting their time and attention (to some degree at least) from our affairs, it would be far preferable for the Company to accept the opportunity afforded * * *."

Several pages of the report (R. 3218-3220) are then devoted to the details of the investment opportunity. The nature of the options secured with Durant's help, and the earnings and assets situation of both General Motors and Chevrolet are set forth at length. The report points out that the proposed investment would be on better than an asset basis; would return, on current dividends, 12.6 percent; and would share in General Motors' earnings which then were 42 percent.

At the conclusion of the report is the following "Summary" of the points in favor of the investment (R. 3221):

> "1. With Mr. Durant we will have joint control of the companies.
>
> "2. We are immediately to assume charge and be responsible for the financial operation of the Company. This involves the direction of cash balances which will aggregate upwards of $25,000,000.00 and the handling of annual gross receipts aggregating $350,000,000.00 to $400,000,000.00. From a financial standpoint, I feel that a consolidation of the financial divisions of the du Pont and General Motors

Companies will be of tremendous advantage to us as well as to the General Motors Company and is a thing to be sought and desired from our standpoint.

"3. The du Pont Company, if the Class A stock is sold to the stockholders, will share in the profits of the industry to an extent equal to 120% on our investment and will receive 14% in annual dividends thereon; or in the event of carrying Class A stock in our Treasury the dividend rate will be about 12.6% and will share in the earnings about 42% and this after paying $20,000,000.00 war taxes.

"4. Our purchase is on better than an asset basis.

"5. Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin, paint and varnish business of those companies, which is a substantial factor."

It is the last of these five points to which the Government refers as the principal basis for its challenge to the court's findings. And it is necessarily only this sentence, for the point is not mentioned, or even suggested, anywhere else in the twenty-page document.

Pierre and Irenee du Pont, both of whom had been members of the committees of the du Pont Board of Directors to which the report had been submitted, testified at the trial, and their testimony was relied upon by the court (R. 300, 301). Each testified that his vote as a du Pont director in favor of the investment was not influenced in any way by any prospect of increased sales by du Pont to General Motors (Pierre du Pont, R. 815-816, Irenee du Pont, R. 870). Nor could either of them recall that the point had been discussed at any of the lengthy meetings at which the report was finally approved with only three directors dissenting (Pierre du Pont, R. 815, Irenee du Pont, R. 870, DP 46, 47, GTX 126, R. 817, 479, 5614, 5616, 3229). What *was*

discussed, and at length, was whether the proposed investment in the automobile industry would prove sound, and whether it was wise for du Pont to invest in an industry in which it had no operating experience. The affirmative views, which finally prevailed, were to the effect that the automobile industry would expand rapidly and therefore should be a good long-term investment; that Durant and his organization were competent and would carry the operating responsibility; that du Pont could contribute to the success of the enterprise by undertaking the responsibility for the financial management; and that therefore it was an appropriate investment (Pierre du Pont, R. 811-812, 817-818, Irenee du Pont, R. 868-869).

None of the contemporary documents evidences any intent or purpose to require or influence General Motors to purchase from du Pont. The announcement to du Pont stockholders in the du Pont annual report for 1918 (GTX 125, R. 479, 3228) speaks of the "investment", and states that it "leaves the management and general conduct of the General Motors Corporation as heretofore, except that the responsibility for financial management is now shared by the officers of our company." The sole statement on any commercial relationship was no more than a statement of fact: "The consumption of paints, varnishes and fabrikoid in the manufacture of automobiles gives another common interest."[20]

Another contemporary document is particularly illuminating—Raskob's report to the du Pont Finance Committee in March 1918 (GTX 128, R. 481, 3234). There, three months after the original decision had been taken, he reported fully with respect to "the conditions surround-

---

[20]The 1917 Annual Report had already informed the stockholders that du Pont was selling to the automobile industry: "The motor companies are very large consumers of our Fabrikoid and Pyralin as well as paints and varnishes" (GTX 1409, R. 5511).

ing our acquisition of an interest in the General Motors Corporation and Chevrolet Motor Company, in accordance with authority granted" (R. 3234). Yet this report deals with the purchase as entirely an investment matter, and contains no reference whatever to commercial relations with General Motors. Had the pre-emption of General Motors trade—by agreement or otherwise—been an objective of the investment, it is most unlikely that this comprehensive report on the accomplishment of the investment would have made no reference to it, or the steps being taken to carry it out.

There is also another significant contemporaneous document. Lammot du Pont, who likewise was present at the meetings considering the investment and who was thought by the Government to be important enough in the alleged conspiracy to be named as a defendant,[21] had occasion within a short time after the investment to report on a possible need for increasing du Pont "Pyralin" capacity. Although this is one of the products to which Raskob had made specific reference, and although du Pont's existing business was utilizing its full capacity, Lammot du Pont recommended against an increase in du Pont's capacity; even more significantly, he commented that he saw no reason why a "Pyralin" sales department forecast made in 1916—before the investment idea was ever thought of—should not continue to be a valid basis for determining what capacity was needed (DP 429, R. 2697, 6410). There is not a word to suggest that the intervening investment in General Motors was of any significance whatever. Lammot du Pont, certainly, was giving no weight to Raskob's expectations.

That the purchase was an investment also finds support in the fact that du Pont's General Motors stock has been treated from the outset as a financial investment. Responsi-

---

[21]Lammot du Pont died before the trial (R. 186).

bility for it has always been lodged in the Finance Committee of the du Pont Board (Carpenter, R. 2713, GTX 198, 488, 3441). That Committee is charged solely with responsibility for du Pont's financial affairs. The Finance Committee, for example, selects the du Pont nominees for the General Motors Board of Directors, usually from its own membership—although it does not tell them how to vote or otherwise to discharge their duties on that Board (Carpenter, 2714-2716, DP 56, pp. 2-9, R. 836, 5654 at pp. 5655-5662). Du Pont owns stock in companies other than General Motors, but responsibility for those holdings is lodged in the Executive Committee, which is solely responsible for operating affairs, for the reason that in each of these other stock holdings, du Pont has certain operating responsibilities. The situation is summed up in the statement of W. S. Carpenter, Jr., president of du Pont from 1940 to 1948 and since then Chairman of the Board (R. 2174): "In the case of [the] General Motors investment we do not assume that there is any such responsibility as that, and also we regard it purely as a financial investment."

The trial court, after careful analysis of all the pertinent evidence, including the documents and testimony referred to in the foregoing paragraphs rejected the Government's contention that du Pont invested in General Motors with the purpose of controlling General Motors' commercial relations, and found (R. 302):

> "The Court also finds based on all of the evidence of record that du Pont did not invest in General Motors with the purpose of restricting that company's freedom to purchase in accordance with its own best interests. Du Pont, the record shows, never intended to preclude General Motors from dealing with suppliers of its choice, never made any effort to so preclude General Motors, and did not limit General Motors' purchasing freedom."

The court further found that du Pont's purchase of General Motors stock was essentially an investment (R. 300-301):

> "Raskob's report, the testimony of Pierre S. and Irenee du Pont and all the circumstances leading up to du Pont's acquisition of this substantial interest in General Motors, as shown by the record, establish that the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business."

2. Emergency du Pont Purchases of General Motors Stock in 1920-1921

By the fall of 1919 du Pont had invested approximately $49,000,000 in General Motors stock, the amount Raskob had said was available for investment, and had decided that no further investment would be made (R. 299; Pierre du Pont, R. 822, GTX 166, pp. 5-6, R. 483, 3375 at pp. 3379-3380). Within the next two years, however, two events compelled du Pont to make substantial temporary investments in General Motors—the breakdown of arrangements for placing a part of a new common stock issue, and Durant's personal financial crisis.

The findings show that the purchases by General Motors of new properties as well as the expansion of the production capacity of existing Divisions after World War I required new capital, amounting in fact to almost $400,000,000 (R. 303; Pierre du Pont, R. 667-673, 837-838, DP 57, pp. 6-8, GTX 134, R. 838, 480, 5671 at pp. 5675-5677, 3263). In 1920 General Motors made an offering of $64,000,000 of common stock. Neither Durant nor du Pont, who between them owned over 50 percent of the outstanding common stock, was willing to make the substantial further investment which the taking up of their pro rata shares in the common stock issue would require. Raskob,

however, persuaded the Nobel interests in England to take up all the Durant and du Pont pre-emptive rights and persuaded J. P. Morgan & Company to underwrite the issue and take a substantial block for itself (R. 303; GTX 140, 141, 142, 166, p. 7, R. 482, 483, 3308, 3311, 3317, 3375 at p. 3381). As it turned out, financial conditions in England made it impossible for Nobel to meet $15,000,000 of its commitment, and Raskob, to prevent the failure of the offering, was forced to seek du Pont cooperation in placing the $15,000,000, a part of which du Pont itself finally took up (R. 303; GTX 166, pp. 7, 13, R. 483, 3375 at pp. 3381, 3386).

Far more potentially serious for du Pont and General Motors was Durant's personal failure. The findings show that in November, 1920, Durant, through individual stock market operations apparently designed to support the price of General Motors stock, had become indebted to various banks and brokerage houses to the amount of about $27,000,000 for which he had pledged as collateral some 2,700,000 shares of General Motors stock (R. 303; DP 50, 52, R. 827, 5628, 5640). As the general "recession" deepened and the market continued to fall, there were demands for additional collateral which Durant was unable to meet. General Motors itself had bank loans outstanding of more than $80,000,000 (DP 51, R. 827, 5639) and alarm was felt as to the possible consequences if Durant should fail (R. 303-304). There was reason to fear that a personal failure by General Motors' president might result in its loans being called and its being thrown into receivership (Pierre du Pont, R. 823-825, Irenee du Pont, R. 871, DP 50, p. 8, R. 827, 5628 at p. 5635).

By the time Pierre du Pont and Raskob learned of Durant's serious situation, immediate action—the Government calls it "almost frenzied" (Br., p. 15)—was necessary. During the night of November 18-19, they and J. P. Morgan & Company worked out a plan by which a new

company (du Pont Securities Company) was organized with $7,000,000 in cash and some 1,375,000 shares of General Motors stock, most of it made available by du Pont, with which it was able to borrow $20,000,000. Durant's loans were taken over, his creditors paid off, and a substantial equity preserved for him. Ultimately du Pont was forced to a bond issue of its own—the first time the present du Pont Company had ever gone into debt—to finance the transaction and to remove the impediment to General Motors credit caused by the fact of a $20,000,000 outstanding loan secured only by General Motors stock (R. 304; Pierre du Pont, R. 825-826, Irenee du Pont, R. 871-872, DP 50, pp. 7-11, DP 52-54, GTX 153-155, 157, 166, pp. 8-9, 12-13, R. 827, 828, 832, 481, 483, 5628 at pp. 5633-5638, 5640-5644, 3328-3337, 3348, 3375 at pp. 3382-3383, 3386-3387).

There is no suggestion in the evidence, or in the Government's brief, that the foregoing transactions were motivated by any purpose on the part of du Pont to control General Motors' commercial relations. The net result was that in August 1921 du Pont owned directly, or through du Pont Securities, 7,562,540 shares of General Motors stock, or about 38 percent of the General Motors stock outstanding (R. 304; GTX 166, p. 15, R. 483, 3375 at p. 3389).

3. Du Pont's Present Holdings of General Motors Stock

Du Pont's present holdings of General Motors stock stem essentially from its original 1918-1920 investment. In 1923 du Pont sold the equivalent of 2,250,000 shares—substantially the amount acquired in the 1920-1921 transactions—to Managers Securities Company, a corporation organized for the purpose of providing additional incentive to principal General Motors executives (see pp. 176-184, *infra*). Du Pont began to surrender the voting rights on these shares in 1930, and by 1938, when the Managers

Securities plan was finally liquidated, du Pont gave up all rights in the stock. Since then du Pont has owned approximately 23 percent of the General Motors common stock—almost exactly the same percentage as that which it had originally acquired (R. 304; GTX 273-274, R. 499, 3640, 3643).

Although the Government concedes that control does not follow from any given percentage of stock ownership, it attaches significance to the fact that at some annual meetings of General Motors stockholders du Pont's stock holdings represented more than 50 percent of the total stock voted (Br., pp. 28, 74; GTX 1307, R. 664, 5230). The trial court considered this contention of the Government and refused to accept it as conclusive proof of du Pont control. The finding of the trial court was (R. 323):

> "There is a substantial failure of proof that du Pont controlled General Motors, even though it was voting at times 51% of the stock voted at a stockholders meeting. The testimony is that there was such satisfaction with the management and operation of General Motors that a large number of stockholders did not choose to vote their stock and made no protest with respect to the management of the company or the actions of the Board of Directors. It is entirely conjectural whether or not du Pont by its stock ownership could control if there had been a contest."

The finding is fully supported by the evidence, particularly the testimony of Sloan. On cross-examination Sloan had rejected the suggestion that the voting by du Pont of more than 50 percent of the stock at a stockholders meeting demonstrated du Pont control, and the trial judge found his testimony "both reasonable and persuasive" (R. 323). Sloan pointed out that voting at a stockholders meeting when there was no contest was no indication of what

would have happened at that meeting if there had been a contest. No one, he asserted, could tell how stockholders would vote in a contest, without knowing the nature of the contest, except that stockholders would be strongly influenced as to whether to support the management by the record of the corporation in respect to its competitive position, its earnings and its dividends (R. 1330-1333). He said, specifically (R. 1333):

> "In case of a conflict you immediately—the interest you arouse and all that, and the issues that are put before the stockholders, would mean that a much larger percentage of the stockholders would come into the meeting, and that would dilute in a way the du Pont interest.
>
> So I can't say just what would happen. It would depend, as I say, upon a lot of circumstances that I can't evaluate."

Certainly it is unlikely to the point of impossibility that in view of the past history of success by the General Motors management that du Pont could possibly prevail in a contest with that management on the issue to which the Government's contention is directed—that General Motors should be required to purchase du Pont products when in its judgment others are to be preferred.

B. THE EVIDENCE ESTABLISHES THAT THE DU PONT NOMINEES ON THE GENERAL MOTORS BOARD OF DIRECTORS HAVE NOT CONTROLLED OR ATTEMPTED TO CONTROL GENERAL MOTORS' COMMERCIAL RELATIONS

Shortly after du Pont's initial investment in General Motors several du Pont nominees took their places on the Board of General Motors, and there have been du Pont nominees on the Board ever since. The evidence with respect to the activities of these du Pont nominees shows that their activities were confined to normal and proper activities of directors, that their presence on the Board of General

Motors and on committees of the Board did not give du Pont control of General Motors and that they did not have the power to control or to influence General Motors' commercial relations with du Pont or competitors of du Pont.

The findings as to the activities of the du Pont nominees on the Board of General Motors can be best discussed in terms of the four major periods in General Motors history since 1917. The first is the period when Durant was Chief Executive Officer, ending at the end of 1920; the second is the short period when Pierre du Pont held that position, ending in May, 1923; the third is the long period—almost a quarter century—when Sloan was at the helm; and the last, from 1946 to the present, is the Wilson-Curtice period.[22]

1. The Durant Period (1917 to 1920)

Durant's invitation to du Pont to become a substantial stockholder in General Motors was made on the understanding that du Pont should assume primary responsibility for the financial affairs of General Motors—a field in which Durant recognized his own inadequacies—and that Durant, free of that burden, would take full responsibility for operational management (R. 303, 312; Pierre du Pont, R. 812, 818, 835, 925-926, Irenee du Pont, R. 947, GTX 124, pp. 7, 11, R. 479, 3208 at pp. 3216, 3221). New by-laws were adopted to implement this division of responsibility. The Executive Committee was vested with all of the powers of the Board of Directors during the intervals between the meetings of the Board, except for matters specifically assigned to the Finance Committee (R. 311).

---

[22]Accuracy requires the use of the term "Chief Executive Officer" to designate the head of General Motors, since the General Motors' by-laws have not always vested that authority in the president. Sloan, for example, was Chief Executive Officer while president from 1923 to 1937 and while Chairman of the Board from 1937 to 1946. Wilson, on the other hand, was president but not Chief Executive Officer from 1941 to 1946, and then both president and Chief Executive Officer from 1946 to 1952.

The latter was assigned the management of the financial affairs of the corporation, including supervision of its financial officers. It had no responsibility for operational matters except for the approval of recommendations transmitted to it by the Executive Committee involving new investments and acquisitions, and, if they were approved, the working out of the financial arrangements by which they were consummated (R. 312; Pierre du Pont, R. 835, 837-838, GTX 130, 131, R. 479, 3247, 3252).

During the Durant period, until 1920, du Pont and Durant together owned more than 50 percent of the outstanding common stock and jointly controlled General Motors. Du Pont assumed the responsibility for General Motors financial affairs contemplated by its arrangement with Durant (R. 303, 312). Six du Pont nominees were elected to the General Motors Board of twenty (DP 56, p. 2, R. 836, 5654 at p. 5655), and all six were named to the Finance Committee, of which Raskob became chairman. On the other hand, six members of the Executive Committee, of which Durant was chairman, were nominees of Durant, most of them managers of General Motors operating Divisions. The seventh member of each Committee—Durant on the Finance Committee and Haskell on the Executive Committee—served as liaison members to enable each Committee to function more effectively in relation to the other (R. 302-303;[23] Pierre du Pont, R. 665-666, 837-838, Sloan, R. 983, DP 56, pp. 11, 14, R. 836, 5654 at pp. 5663, 5666).

In 1920, as a consequence of the common stock issue already noted (pp. 149-150, *supra*), nine new directors were added to the Board. Three of them went on the Finance Committee, which was enlarged to ten members, the Execu-

---

[23]The changes were not all made simultaneously, and initially the du Pont nominees on the Finance Committee represented only five of the seven members (GTX 130, p. 5; R. 479, 3247 at p. 3251), which is the figure given by the trial court (R. 302).

tive Committee remaining unchanged. Four of the new directors were the nominees of the new large investors —J. P. Morgan & Company, Nobel, and Canadian Explosives. The other five were outstanding industrial leaders—George F. Baker and Seward Prosser, New York bankers; William H. Woodin, of American Car & Foundry Company (later Secretary of the Treasury); C. M. Wooley of American Radiator Company; and Owen D. Young of General Electric (R. 303; Pierre du Pont, R. 836, DP 56, p. 2, R. 836, 5654 at p. 5655). The court found that there was no evidence that any of these men were added at the suggestion of the du Pont nominees (R. 308) and there likewise is no evidence that they favored du Pont, or that they allied themselves, or considered themselves allied, in any way, with the du Pont nominees on the Board or on the Finance Committee.

2. The Pierre du Pont Period (1920-1923)

In the latter part of 1920, Durant's personal financial crisis made it necessary for him to resign as president, as he himself recognized (Pratt, R. 1411-1412, DP 50, pp. 4-5, R. 827, 5628 at pp. 5631-5632). The needs of General Motors urgently demanded a chief executive whose reputation for integrity, sound judgment and past success would restore General Motors to public and financial confidence. Prosser and other bankers, Sloan and others in the General Motors management, and the du Pont Finance Committee, urged Pierre du Pont to accept the place (R. 304-305; Sloan, R. 981-982, 1328, 1345-1346, Pierre du Pont, R. 838-839, DP 51, GTX 179, R. 827, 492, 5639, 3404). Pierre du Pont had resigned as head of du Pont almost two years earlier with no intention of resuming any active business affairs. He accepted the position as president and Chief Executive Officer of General Motors reluctantly, and on condition that his tenure would be temporary, pending the resolution of the crisis and selection of a suitable per-

manent president. He was elected president and Chief Executive Officer by the Board on November 30, 1920, and held office until May, 1923, when he was succeeded by Sloan (R. 304-305; Pierre du Pont, R. 738-739, 839, Sloan, R. 982, GTX 177, 182, 235, p. 2, R. 492, 485, 483, 3397, 3412, 3494 at p. 3496).

There is no dispute that during the thirty months that Pierre du Pont was the Chief Executive Officer of General Motors the du Pont nominees on the General Motors Board were thrust into positions of responsibility which went beyond the financial supervision that had been their earlier role (R. 307, 321). This was the direct result of the crisis which forced Pierre du Pont and the other du Pont nominees to assume for this brief period managerial functions in General Motors. During that brief period their authority and influence in General Motors arose not from du Pont's stock interest but rather from the fact that they were active in the day to day management of General Motors.

The significant fact, however, is not the responsibility which the du Pont nominees temporarily assumed, but the manner in which this responsibility was exercised. The Government, ignoring the findings and evidence, would have it that du Pont "consolidated its position" (Br., p. 73). On the contrary, the findings and evidence show that the du Pont nominees did not "consolidate their position" but rather strengthened the hand of the management. What they did during this emergency, transitional period, they did for General Motors, not for du Pont. The findings and evidence also show that when, in less than three years, the crisis had been satisfactorily met, they voluntarily renounced this broader responsibility and turned it over to General Motors men.

That the period was precisely the opposite of a "consolidation of position" by du Pont is evidenced by the new plan of organization which was adopted shortly after Pierre du Pont became President. Prepared by Sloan, it had been

submitted to Durant before his resignation (R. 305; Sloan, R. 973-974, 984-985, Pierre du Pont, R. 839-840, Pratt, R. 1408, 1416, GTX 178, GM 1, R. 484, 975, 3398, 6532). The true significance of the plan, however, is that it did *not* contemplate drawing more power into the Executive Committee or the central office, where du Pont nominees were in temporary positions of responsibility. Rather, it decentralized the large amount of authority which had been in the hands of the Chief Executive Officer during Durant's regime, and put ultimate authority on all matters of operation, including authority to purchase where and what they chose, into the hands of the managers of the operating Divisions (R. 305; Sloan, R. 973-974, 976, Pratt, R. 1422, GM 1, pp. 3, 9, 17-25, 27, R. 975, 6532 at pp. 6534, 6540, 6548-6556, 6558). The plan, which is wholly inconsistent with the Government's charges, represents a policy which has continued down to the present day (Sloan, R. 984-985. See pp. 35-37, *supra*).

No reference to this plan of organization is found in the Government's brief. The brief, rather, echoes an argument made by the Government in the court below—that the change in four of the five managers of the operating Divisions early in this period was part of the conspiratorial plan to coerce General Motors into purchasing from du Pont. Although the District Court rejected the argument (R. 305), the Government, ignoring this finding, makes frequent references to those changes (Br., pp. 18, 60, 119n.), with the inference that the changes were in some way related to purchases by General Motors of du Pont products. The evidence shows that the trial court correctly found that the changes "were unrelated to the use of du Pont products" (R. 305). Of the four who left, two resigned, one to take a position with Durant, and two were replaced because they had appropriated large sums which they claimed were due them under contracts they had made with Durant (R. 305; Sloan, R. 988-989, Pratt, R. 1417-

1418, Pierre du Pont, R. 859-860, DP 63, 64, R. 860, 861, 5710, 5713). Moreover, the findings and evidence show that the four managers who were appointed in their place were in each case recommended by Sloan, had been with General Motors for years, and had never had any connection with du Pont (R. 305; Pierre du Pont, R. 861-862, Sloan, R. 989-990, Pratt, 1417-1418).[24] The men who had knowledge of these events testified categorically that none of the changes had anything whatever to do with the attitudes of either the men who were replaced, or those who replaced them, toward the purchase by their Divisions of du Pont products (R. 305; Pierre du Pont, R. 860, 932-933, Sloan, R. 990, 1347, Pratt, R. 1418).

Indeed, it is significant that Pierre du Pont as Chief Executive Officer made no attempt whatever to fill responsible positions in General Motors with du Pont men. The only executive who came from du Pont during this period to a high executive post in General Motors was F. Donaldson Brown, an experienced financial man. He was recommended by Raskob to supply the expert financial assistance which General Motors sorely needed (GTX 180, R. 484, 3406). He became a member of the General Motors organization (Sloan, R. 1196-1197), and eventually succeeded Raskob as chairman of the General Motors Finance Committee (GTX 177, R. 492, 3397). Although Brown remained a director of du Pont and a member of its Finance Committee, the court found that there was no evidence that he was active in commercial relations between du Pont and General Motors, or that he ever did anything to encourage the use by General Motors of du Pont products (R. 305, 315; Sloan, R. 1029, 1196-1197).

---

[24]One of them, Rice, became manager of the Cadillac Division, which consistently refused to purchase the products of Flint, and which was the last of the automobile Divisions to adopt "Duco" (see p. 50, *supra*, 254-255, *infra*).

The emergency nature of the period is most clearly reflected in the membership of the Executive Committee. Under Durant, that Committee had been composed chiefly of managers of the several operating Divisions. Early in 1921, its membership was reduced to four—the president, the heads of the line Divisions (Haskell) and the staff Divisions (Sloan), and the chairman of the Finance Committee (Raskob) (R. 305; Sloan, R. 983, 1328-1330, DP 56, p. 14, R. 836, 5654 at p. 5666). As the trial court found, one of the reasons for the change in the Executive Committee was doubt as to the full loyalty *to General Motors*—not to du Pont—of some of its former members, in view of the fact that Durant, with whom they had been closely associated, was building up a competitive automobile company (R. 305; Sloan, R. 988, 1329, Pierre du Pont, R. 830). Another reason was the belief that broad planning and policy making was a fulltime job, which should be segregated from immediate operating problems. That policy has since been continued in General Motors; with rare exceptions, there have been no General Managers on the Executive Committee (Sloan, R. 997, 1329). As the emergency passed, this four-man Executive Committee was enlarged in 1922 by the addition of two General Motors executives—F. J. Fisher and C. S. Mott (R. 305; Pierre du Pont, R. 846, Sloan, R. 1231-1232, GM 32, 33, DP 56, p. 14, R. 1436, 836, 6657, 6660, 5654 at p. 5666).

The findings note several other constructive accomplishments *for General Motors* during this Pierre du Pont period. The General Purchasing Committee was established, again at the suggestion of Sloan (see pp. 103-109, *supra*). Plans for incentive compensation to the principal executives were expanded (see pp. 176-184, *infra*). Bank loans, which had been very high, were completely liquidated (Pierre du Pont, R. 842, DP 51, R. 827, 5639). Inventory controls, whose weaknesses under Durant had cost General Motors

more than $80,000,000 in write-offs during 1920-1921, were strengthened (Sloan, R. 972, 985-988, Pratt, R. 1404-1405, 1414-1415, Pierre du Pont, R. 841-842, DP 57, pp. 9-10, GM 196, R. 838, 1415, 5671 at pp. 5678-5679, 7237). Testing and engineering facilities, which had been so deficient under Durant that the quality of most General Motors automobiles had even ceased to be competitive, were installed and improved (Sloan, R. 970, 987, Pratt, R. 1406, 1415, Pierre du Pont, R. 843-844, DP 58, 59, GM 196, R. 842, 844, 1415, 5698, 5700, 7237). Operating Divisions which had not shown a profit were investigated and several were eliminated (Sloan, R. 987-988, Pratt, R. 1415-1417, Pierre du Pont, R. 845, DP 57, pp. 10-11, GM 196, p. 5, R. 838, 1415, 5671 at pp. 5679-5680, 7237 at p. 7241).

In short, this period was one of solid progress and improvement of General Motors. There is no evidence that Pierre du Pont as Chief Executive Officer, or any of the du Pont nominees on the Board, exercised the temporary operational as well as financial responsibility they had during this period in any way other than as they believed to be best for General Motors. The number of du Pont representatives on the General Motors Board did not change notwithstanding the substantial temporary increase in the proportion of du Pont stockholdings which resulted from the events of 1920. They remained at six out of a Board which varied between twenty-nine and thirty-one (DP 56, p. 3, R. 836, 5654 at p. 5656). The Finance Committee membership remained at seven, the only change being the filling of the Durant vacancy by F. Donaldson Brown (R. 305; DP 56, p. 11, R. 836, 5654 at p. 5663). The changes in the Executive Committee have already been noted.

3. The Alfred P. Sloan, Jr. Period (1923-1946)

One assumption which is basic to the Government's case is that Alfred P. Sloan, Jr., was subservient to du Pont.

This assumption lies at the basis of the attack on the findings as to the integrity of the General Motors Board of Directors and management, most of whom were selected by Sloan. It is at the heart of the attack on the findings relating to General Motors' bonus plans, for which Sloan, as president, had primary responsibility. It underlies, indeed, the attack on the findings by the trial court on the trade relations between General Motors and du Pont. As the earlier discussion shows, if Sloan is to be believed, there is no basis for challenge to the findings as to such matters as tetraethyl lead, "Freon" and "Duco".

Recognizing this, the Government asserts flatly, that Sloan "continued to represent du Pont throughout the years" (Br., p. 20). This statement is belied by all of the evidence as to what Sloan in fact did, including the contemporaneous documents which reflect his actions. Moreover, that statement by the Government should be contrasted with Sloan's testimony which the trial court found forthright and convincing. When asked, on cross-examination, whether du Pont's stock ownership in General Motors "necessarily affected the relationship between the two companies"—the contention which the Government now repeats in this Court—he replied (R. 1382):

> "I have been asked on direct examination, and by your good self many questions along the lines as to whether there was any influence that affected the operation of General Motors Corporation. I can say with complete conviction that every decision that has been made by General Motors Corporation by myself, and so far as I know the other executives concerned in its operation have been entirely in the interest of General Motors, and of the stockholders. I am as sure of that as I am of anything in life."

And a little later he added (R. 1385):

> "* * * I still maintain the strongest conviction that all transactions were at arm's length based upon

> the interest of all the stockholders in General Motors, and no other consideration entered into it so far as business judgment goes."

Sloan's credibility is, therefore, directly in issue in this Court, as it was at trial. He testified on direct examination for the best part of eight days, and was cross-examined for three more. The trial judge had ample opportunity to observe his appearance and demeanor on the witness stand. He believed him (R. 316):

> "* * * Sloan's testimony and the record as a whole are convincing that at all times he acted independently and steadfastly in the best interests of General Motors."

Indeed, he made special reference to Sloan's "forceful and resolute character" (R. 321), and to the "positive personalities" of the management which developed and worked with Sloan in General Motors during his tenure as Chief Executive Officer—Kettering, the Fisher brothers, Knudsen, Pratt, Brown, and C. E. Wilson. We need add that it stretches credulity beyond the breaking point to contend that Sloan and these other men could have led the double life of which they are accused by the Government, and could at the same time have guided General Motors to unparalleled industrial success.

The period when Sloan was guiding General Motors spans almost a quarter century—almost the entire modern history of General Motors. It will aid in considering the findings relating to the events of that period if they are broken down into several subordinate topics.

a. The Selection of Sloan as President

The Government now repeats by innuendo the contention that it made at the trial—that Sloan was not selected as president of General Motors on his merits, but rather be-

cause he would represent du Pont (Br., p. 20). The trial court rejected this contention, and there is no evidence which would support such a charge. There is a wealth of evidence to the contrary.

Sloan, before he had any connection whatever with General Motors, had already become an outstanding success in the Hyatt Roller Bearing Company, taking over when it was on the point of liquidation and making it into a flourishing and valuable concern which received, in addition to other automobile business, 100 percent of Ford's orders for friction bearings. Hyatt was one of the automobile accessory companies which Durant put together in 1916 to form United Motors Company. Durant was so impressed with Sloan that he offered him the presidency of United Motors itself, which Sloan accepted. In 1918, when United Motors was acquired by General Motors, Durant also offered, and Sloan accepted, a position on the Executive Committee of General Motors (R. 307; Sloan, R. 956-967, DP 56, p. 14, R. 836, 5654 at p. 5666). Within six months after Pierre du Pont became president, Sloan had become his principal assistant, and he assumed greater and greater responsibility as time went on. For almost two years before he became president he had been vice president in charge of all General Motors' operations as head of the General Advisory Staff (R. 307; Sloan, R. 967, 982).

In May, 1923, upon the recommendation of Pierre du Pont, Sloan was elected by the Board of Directors to be president and Chief Executive Officer (R. 307; Sloan, R. 967, 982, GTX 183, R. 486, 3414). That, as Pierre du Pont testified, was in accord with the basis upon which he had accepted the presidency, "that I was to take the presidency temporarily until a better man was found, that knew the job better, and he had been discovered, or at least I thought he had, and I recommended Mr. Sloan as my successor" (R. 865). Sloan, alone among the members of the

Board, was not consulted or advised by Pierre du Pont in advance of the recommendation, and he testified that he received *no instruction or advice from* Pierre du Pont, or any other du Pont nominee on the General Motors Board; "I didn't receive any instructions from anybody * * *. I was completely on my own from that point on" (*R. 990*).

If Sloan's accomplishments *before* he was elected are not enough, one need only refer to his accomplishments for General Motors during the next 23 years—only a part of which are reflected in the record in this case. They demonstrate that he was a General Motors man, first and last, and anything but the Government's picture of him as a covert, insincere front man for du Pont.

b. The Selection of General Motors Directors[25]

When Sloan became president in 1923, the General Motors Board of Directors had thirty-two members. It varied thereafter, during the next twenty-three years, from a high of thirty-five to a low of twenty-six. During that period the du Pont nominees on the Board never exceeded six (R. 308; DP 56, pp. 3-7, R. 836, 5654 at pp. 5656-5660, Sloan, R. 1339, Carpenter, R. 2725-2726, 2746).

To avoid the fact that the du Pont nominees were thus always in a small minority, the Government contended below that the remaining members were at all times subservient to du Pont. The findings were all the other way (R. 308-310). With no reference to these findings, the Government now repeats the same charge (Br., p. 20).

---

[25]The evidence shows that the directors of General Motors do not deal with questions concerning the purchase of materials by General Motors; such matters do not come to the Board or to any of the committees of the Board in any way (Sloan, R. 997). Not only is the Board unable to deal with details such as that in a corporation the size of General Motors, but the purchasing policies are the responsibilities of the managers of the several Divisions (*Ibid.*; see pp. 35-37, *supra*).

Of the thirty-two directors on the Board in 1923, sixteen were so-called management directors; thereafter they always formed a majority of the total membership of the Board (R. 308, 310; GM 10, R. 1031, 6572). These men, the Government asserts, included men "who were long associated with du Pont and introduced into the General Motors management by du Pont" (Br., pp. 74-75). Of the almost forty men who have, over the years since 1923, formed the management group on the Board (GM 10, R. 1031, 6572), the description cannot possibly apply to more than two—Pratt and Brown—and is not true even as to one of them. Pratt, although formerly employed by du Pont, was brought into General Motors management by Durant, not du Pont (Pratt, R. 1392-1402). He retired as an officer of General Motors in 1936. Brown, a financial man, left du Pont to join General Motors at the urging of Raskob, to meet a need in General Motors for expert financial experience, and became a member of General Motors' management (Sloan, R. 1196, GTX 180, R. 484, 3406; see R. 315, and p. 159, *supra*). After his retirement as a financial officer of General Motors in 1946, he was nominated for a place on the General Motors Board by du Pont to replace Lammot du Pont, who retired that year (GTX 224, R. 491, 3485). Thereafter he is listed as a du Pont nominee (GM 10, pp. 3-4, R. 1031, 6572 at pp. 6574, 6575).

The Government makes an even more sweeping assertion that the management directors were "selected by du Pont" (Br., p. 20).[26] The findings and evidence are precisely to the contrary—that du Pont had no connection whatever with their choice (R. 310).[27] These men became directors

[26]The Government adds the statement that these men were selected when du Pont "had a majority of seats on the Board of Directors" (Br., p. 20). This represents either a remarkable example of lifting one's self by one's bootstraps, or an unfortunate misreading of the record (R. 308; GM 10, R. 1031, 6572).

[27]The three exhibits cited by the Government in support of its assertion (GTX 181, 242, 1345, R. 483, 493, 2813, 3408, 3542, 5347) have nothing to do with the selection of directors.

when they had achieved, in the management hierarchy of the corporation, a position which entitled them to be, or required that they be, on one of the committees of the Board. Sloan always made the nominations, never discussed them in advance with anyone except the management group already on the Board, and after Sloan's recommendation their election by the Board was automatic. The court also found that no du Pont nominee had ever objected to whatever number of management directors Sloan wanted to have on the Board (R. 310; Sloan, R. 1020-1021, 1334, Carpenter, R. 2724).

The Board also contained a number of so-called "outside" directors—directors other than the management directors and the du Pont nominees. In 1923 there were ten such—five bankers, three American industrialists, and two foreign industrialists (GM 10, p. 1, R. 1031, 6572), most of whom had been added during Durant's regime in connection with the 1920 financing (see pp. 155-156, *supra*). As the trial court found, there is no evidence that they were added at the suggestion of the du Pont nominees (R. 308), and in view of who they were (see p. 156, *supra*), they were certainly not sitting on the General Motors Board to further du Pont's interests.

By 1942, however, the findings show that deaths or resignations had reduced the number of this group from ten to three (R. 308; Sloan, R. 1021-1022, 1027, GM 10, pp. 1, 2, DP 56, pp. 3-7, R. 1031, 836, 6572 at pp. 6572-6573, 5654 at pp. 5656-5660). Sloan, believing that directors of this type were a source of strength to General Motors, took the initiative in attempting to find qualified men who would be willing to serve, seeking suggestions from all Board members and discussing with all Board members the suggestions received (R. 308; 310; Sloan, R. 1022, 1180). For example, in 1945 when Pratt suggested that General Marshall be considered, Sloan wrote that he

was not very sympathetic to the idea (GTX 220, R. 490, 3480). Lammot du Pont, in reply, said he was in agreement with Sloan because of Marshall's age, his lack of stockholdings and his lack of experience in industrial and business affairs (GTX 221, R. 490, 3482). Marshall was not appointed (DP 56, pp. 7-8, R. 836, 5654 at pp. 5660-5661). A year earlier Lammot du Pont had written to Sloan, suggesting that Bernard Peyton might be considered as a director because of his business standing and his substantial stockholdings in du Pont (GTX 1236, R. 490, 5181). Sloan replied that Peyton appeared to be well qualified and that he would favor him (GTX 1237, R. 490, 5183, Sloan, R. 1185-1186). Peyton, however, never became a member of the Board (R. 309, DP 56, pp. 7-8, R. 836, 5654 at pp. 5660-5661). A number of other letters are referred to in the findings (R. 308-310).

The Government treats this participation by the du Pont nominees in Sloan's search for more "outside" directors as establishing the "loyalty to du Pont" of the men thus selected (Br., pp. 20-21). The trial court, however, rejected the same contention. It found (R. 316):

> "The Court finds it highly significant that in all of the correspondence regarding General Motors directors the attitude of the suggested nominee toward du Pont was in no instance a consideration in his approval or disapproval. Accordingly, the Court finds, based on all the evidence, that du Pont's participation in the selection of General Motors directors and management does not establish that it controlled General Motors or that it sought through such participation to place people in General Motors who would further du Pont's interests as a supplier or as a chemical manufacturer."

Perhaps it should also be added that there is no evidence that any candidate for the General Motors Board, when

elected, felt himself in any way obligated to yield to du Pont, or to participate with du Pont in any effort to control or influence General Motors' commercial relations with du Pont.

c. The Committee Organization of the General Motors Board

The court likewise made extensive findings on the changes which were made in the committee organization of the General Motors Board during Sloan's regime (R. 311-316). Although none of them is mentioned in the Government's brief, they furnish some noteworthy examples of the independence of Sloan, when his views differed from the views of the du Pont nominees on the General Motors Board as to what was best for General Motors.

From 1923 to 1937 the principal committees of the Board continued to be the Executive Committee, which dealt with operational management problems, and the Finance Committee, which dealt with financial management and financial policy. In 1937, the structure was changed; all matters of policy were delegated to a single Policy Committee, and an Administration Committee was created to handle operational matters (R. 313; DP 56, R. 836, 5654).

The trial court found that the change was made at the insistence of Sloan, after discussions with others on the Board, including the du Pont nominees (R. 313-314). The management nominees on the Board agreed with Sloan (Sloan, R. 1001). The du Pont nominees were against the plan, and urged an alternative plan, which was not adopted (R. 313; Sloan, R. 1001-1006, GTX 194-196, GM 7, p. 1, R. 484, 487, 488, 1015, 3428-3435, 6566). There is no evidence, and no suggestion in the contemporary correspondence, that the position of the du Pont nominees was motivated by any idea of benefit to du Pont (Sloan, R. 1002-1005, GTX 194, R. 484, 3428).

This committee structure was changed again, at the end of Sloan's term as Chief Executive Officer of General Motors, to the pattern which now exists. The single Policy Committee was replaced by two committees—the Operations Policy Committee and the Financial Policy Committee (R. 314). The former deals with major policy questions upon which it usually receives recommendations from the Administration Committee, which has been continued. The Financial Policy Committee deals with matters of financial policy only; it has no jurisdiction over, or connection with, operational matters (Sloan, R. 1019, Carpenter, R. 2733, GM 8, R. 1018, 6570).

The change had been discussed for some time; indeed from the outset there had been misgivings as to the efficiency of the single Policy Committee. The findings refer to the conversations Sloan had had on this subject with the management members of the Board, and to his correspondence on it with the du Pont nominees (R. 314). The findings also refer to the testimony by Sloan in which he explained why he became convinced that it should be changed (R. 314). The evidence shows that in 1942 some members of the Policy Committee, including the two du Pont nominees on it, urged a return to the two-committee system because they felt that a single Policy Committee required them to take positions on matters on which they did not have particular competence. The Committee was not changed, however, until the management nominees on the Board, particularly Sloan and Wilson, became convinced that the change would better enable General Motors to meet the problems of the postwar period (Sloan, R. 1009-1011, 1015-1019, GTX 200, 202, 203, GM 7, R. 484, 485, 1015, 3447, 3458, 3462, 6566).

d. The du Pont nominees on the several committees of the General Motors Board

There are also a number of significant findings as to the membership of these several committees. They reveal a rapid decline and ultimate elimination of du Pont nominees on the committees having to do with operational matters, and a more gradual but nonetheless unmistakable decrease in the number of du Pont nominees on the committees dealing with financial matters.

(1) The Executive Committee

The selection of members for the Executive Committee, Sloan testified, was solely a responsibility of management, and nominations to it were made by him as Chief Executive Officer, in most cases because a particular man in the management hierarchy had achieved a position which warranted or required his membership on that Committee (R. 311; Sloan, R. 1195-1196, GM 21, R. 1196, 6608). There is no evidence that any of Sloan's nominations was ever rejected by the Board.

When Sloan became president in 1923, the number of du Pont nominees on the Executive Committee of the General Motors Board still reflected the 1920 emergency which had forced du Pont nominees into positions of operational responsibility; three of the six members were du Pont nominees (R. 311; DP 56, p. 14, R. 836, 5654 at 5666). From 1923 on, however, both the number and the proportion went steadily and rapidly down. In 1924, the membership of the Committee was increased to ten, the new members being added at the request and suggestion of Sloan (R. 311; Sloan, R, 1195-1196, GM 21, DP 56, pp. 14-15, R. 1196, 836, 6608, 5654 at pp. 5666-5667). Moreover, when Haskell died in 1923, he was not replaced. Raskob left the committee in 1928, and Pierre du Pont early the following year, so that by 1929 no du Pont nominees remained

(DP 56, pp. 14-15, R. 836, 5654 at pp. 5666-5667). In 1930 Lammot du Pont became a member (R. 311), having been urged by Sloan to do so (Sloan, R. 1195), but he resigned in 1934 (R. 312), although Sloan urged him to stay (Sloan, R. 1014). Thereafter, no du Pont nominee served on that Committee (R. 312; Sloan, R. 1196, DP 56, pp. 14-15, R. 836, 5654 at pp. 5666-5667).[28]

(2) The Finance Committee

The Finance Committee reflected for a time the original understanding with Durant that in financial matters du Pont would assume the primary responsibility (R. 312; see pp. 143-145, 154-155, *supra*). Du Pont nominees on the Committee were in the majority at the beginning of Sloan's regime, but when Haskell died later in 1923 he was not replaced, and in 1924 the total membership of the Committee was raised. At that time the du Pont nominees ceased to be in the majority, and never were a majority thereafter (R. 312-313; DP 56, pp. 11-12, R. 836, 5654 at pp. 5663-5664).[29] Again, as in the case of the Executive Committee, Sloan made most of the nominations of the men who were added to the Committee (R. 313; Sloan, R. 1196-1198, GM 22, R. 1198, 6609).

The findings reflect another incident which is significant in evaluating the power of the management, headed by Sloan, even in matters dealing with du Pont's assigned area

---

[28]The statement in the Government brief that there were du Pont nominees on the Executive Committee continuously from 1923 to 1937 (p. 21) is apparently based on their contention, contrary to Sloan's testimony, that Brown was not a management director. See pp. 159, 166, *supra*.

[29]The statement by the Government (p. 23) that du Pont nominees "consistently held an absolute majority" on the Finance Committee apparently assumes that Sloan should be deemed a du Pont representative. That assumption needs no further discussion (see pp. 163-165, *supra*).

of financial responsibility. In 1928, Raskob, who had been chairman of the Finance Committee for ten years, became chairman of the Democratic National Committee. Sloan considered it unsound because it appeared to put General Motors in politics. Raskob, backed by Pierre, Irenee, and their cousin Coleman du Pont, differed. Because of the opposition of the General Motors management led by Sloan, Raskob resigned as chairman of the Finance Committee, and Pierre du Pont resigned as chairman of the General Motors Board (R. 310; Sloan, R. 1191-1193, GM 17, 19, R. 1193, 1194, 6602, 6604).

(3) The Policy Committee

The Policy Committee always consisted of nine members, of which two were du Pont nominees—or three, if Brown were to be added (see pp. 159, 166, *supra*) (R. 314, 315; DP 56, p. 17, R. 836, 5654 at p. 5668). The one person added to the Committee (as a result of Knudsen's resignation) was nominated by Sloan (R. 314; Sloan, R. 1198-1199, GM 23, GTX 205, 208, p. 2, 209, R. 1199, 488, 489, 6610, 3466, 3470 at p. 3471, 3472).[30] There were never any du Pont nominees on the much larger Administration Committee (Carpenter, R. 2735, GTX 177, R. 492, 3397).

---

[30]The Government suggests that du Pont had a veto on Policy Committee membership by quoting (p. 22) a letter in which Sloan suggested Kettering as a member—a recommendation with which Lammot du Pont disagreed (GTX 205, R. 488, 3466). Sloan's testimony, however, to which the Government makes no reference, belies the Government's assertion that Lammot du Pont's disagreement "was the end of the matter". Others felt the same way as Lammot du Pont, and after consulting with the whole group of directors, including those in the management, Sloan himself agreed that if Kettering came on the Committee "he would be telling us about all the wonderful things that were in the future, and we wouldn't have time to attend to the business of the corporation" (R. 1341-1342).

e. In General

The findings of the District Court relating to the Sloan period are quite detailed. After referring specifically not only to the documents cited in the Government's brief, but to many others, and to the extensive testimony of Sloan himself, the court rejected completely the argument made by the Government, and which is also made here—that the normal membership and activities of the du Pont nominees on the Board and its committees should serve as the basis for an inference that they were pursuing improper or coercive activities. The court said (R. 316):

> "The participation of the du Pont representatives in the selection of General Motors directors and in determining the organization of the board and the composition of its committees does not establish that du Pont has been the controlling force in the direction of General Motors affairs, or has been in a position to act as if it owned a majority of General Motors stock. The record shows consultation and conference, but not domination. Moreover, in all these matters Sloan has clearly been the leader and the dominating influence and has largely determined the results. With a minimum of consultation with du Pont representatives he has selected the management. In large part, though with somewhat more consultation with du Pont, he has suggested the names of directors and led the discussion in that respect. Sloan's testimony and the record as a whole are convincing that at all times he acted independently and steadfastly in the best interests of General Motors."

4. The Wilson-Curtice Period

In 1946, the by-laws of General Motors were changed to make the president the Chief Executive Officer, and C. E. Wilson, who had been president since 1941, became Chief Executive Officer, Sloan remaining as Chairman of

the Board. Wilson had been preceded by William S. Knudsen, who had been president from 1937 to 1940, and was in turn succeeded by H. H. Curtice in 1952 (R. 307-308, 313; Sloan, R. 1009, Wilson, R. 2777, GM 8, 285, GTX 177, R. 1018, 2778, 492, 6570, 7476, 3397). None of these men was a du Pont candidate—was nominated or recommended for president by any du Pont nominee, or ever had any prior connection with du Pont (Carpenter, R. 2727-2728, Wilson, R. 2776-2777).[31]

The new committee organization, which went into effect at the same time that Wilson became Chief Executive Officer, has already been described (p. 170, *supra*). Du Pont nominees have served on the Financial Policy Committee, although they have never numbered more than three out of a total which has varied between nine and eleven (R. 315; DP 56, p. 18, GM 25, R. 836, 1202, 5654 at p. 5669, 6612).[32] No du Pont nominee has ever served on the Operations Policy Committee (R. 315; Sloan, R. 1199; DP 56, p. 19, GM 24, R. 836, 1200, 5654 at p. 5670, 6611). On the Board itself, the number of du Pont nominees has remained at six (R. 308; DP 56, pp. 8-9, R. 836, 5654 at pp. 5661-5662).

---

[31]The Government asserts (Br., p. 75) that "Messrs. Knudsen and Wilson could not have held office without the approval of du Pont". This assertion, which is made without any support whatsoever in the record, assumes that du Pont was in a position to dictate or to veto the choice of the management. It is a minor example of the Government's tendency to assume the existence of the point which it is trying to prove.

[32]Brown, after he retired as an officer of General Motors in 1946, became a du Pont nominee on the Board in place of Lammot du Pont, who retired in that year (GTX 224, R. 491, 3485) and is hence included as one of the three. See p. 166, *supra*.

C. THE EVIDENCE SUPPORTS THE FINDING OF THE TRIAL COURT THAT GENERAL MOTORS PAYMENTS OF SUPPLEMENTAL COMPENSATION TO ITS EMPLOYEES WERE NOT INTENDED TO ENHANCE DU PONT'S COMMERCIAL POSITION AND DID NOT HAVE THAT EFFECT

The Government likewise renews, at many points in its brief, the charge made in the Amended Complaint (R. 230-231) that beginning in 1923 du Pont worked out a plan of extra financial incentive to General Motors executives with the intention of making them subservient to the wishes of du Pont (Br., pp. 6, 17, 24-28, 75, 102-103). This charge was fully explored at the trial, and the court below made extensive findings in relation to it (R. 316-321). The result was a finding—to which there is no reference in the Government's brief—that the charge was without foundation (R. 320):

> "The Court finds no evidence that any action taken by du Pont representatives with respect to the compensation of General Motors executives was intended to influence those executives to deal with du Pont or to refrain from dealing with du Pont competitors. Nor is there evidence of any instance in which a General Motors executive favored du Pont out of consideration for the latter's sale of stock to Managers Securities Company or out of deference to the position of du Pont representatives on the General Motors board."

The detailed findings and the evidence, which can be summarily stated, leave no doubt that the trial court was correct.

General Motors first adopted an incentive bonus plan in 1918 (R. 318; Pierre du Pont, R. 849, Sloan, R. 1214-1215, GM 26, 27, R. 1215, 6613, 6614). That plan provided, in effect, for the annual distribution of an amount—not to exceed 10 percent of General Motors earnings in excess of 7 percent of the invested capital—as compensation

to General Motors officers and employees who had contributed to the success of General Motors in special degree by exceptional service. The plan had been proposed to Durant by the du Pont nominees on the General Motors Board, based on their experience with a similar plan which had been in effect at du Pont since 1903 and which they believed to have been a significant factor in du Pont's own success (Pierre du Pont, R. 849-850, Irenee du Pont, R. 752, 876-877, Sloan, R. 1215, Carpenter, R. 2720, DP 57, p. 18, 60, 61, 74, pp. 24-25, 453, GTX 137, pp. 13-14, R. 838, 850, 777, 2705, 480, 5671 at p. 5687, 5704, 5707, 5740 at pp. 5763-5764, 6447, 3272 at pp. 3282-3283). With occasional modification in details, that plan still continues in General Motors (R. 320; Sloan, R. 1216).

The Government's challenge, however, and the court's findings relate principally to a supplemental incentive compensation plan—the so-called Managers Securities Plan—which was in effect from 1923 to 1929. The findings (R. 317) show that Pierre du Pont, shortly before his resignation as president, suggested that "the best manner in which to attain the greatest success possible in the conduct of the affairs of the General Motors Corporation is for that Corporation to interest its principal men in the corporation as substantial stockholders or partners" (GTX 235, p. 3, R. 483, 3494 at p. 3497). After much discussion, Raskob and Brown prepared the plan for Managers Securities Company (hereafter "Managers Securities") carrying out Pierre du Pont's suggestions (R. 316-317; Pierre du Pont, R. 851, 939-940, Irenee du Pont, R. 876-877, Carpenter, R. 2719-2720, 2747-2748, GTX 235, pp. 3-4, DP 60-61, R. 483, 850, 3494 at pp. 3497-3498, 5704, 5707).

The Managers Securities Plan, as finally worked out, permitted a number of General Motors executives to purchase substantial amounts of General Motors stock on a deferred payment basis, paying only about one-seventh of

the price in cash, and the remainder out of future bonus earnings and dividends on the stock so purchased (R. 318). This was accomplished by having General Motors organize a new corporation, Managers Securities, to which it paid $5,000,000 for all of its common stock and with which it made a contract to pay one-half of the future bonus funds accruing under the regular General Motors bonus plan. Managers Securities, in turn, purchased the equivalent of 2,250,000 shares of General Motors stock at $15 per share, paying for it $5,000,000 in cash and $29,000,000 in convertible preferred stock. General Motors, in turn, sold the common stock of Managers Securities to about eighty of the principal executives of General Motors for the $5,000,000 which it had paid for it. The payment from General Motors of half the bonus fund, and the dividends on the General Motors stock which Managers Securities had purchased, were expected to, and in fact did, permit the retirement of the preferred stock in eight years or less (R. 318-319, DP 455, R. 2706, 6451).

The Managers Securities Plan permitted any stockholder to supply stock for purchase by Managers Securities (DP 455, R. 2706, 6451), but in fact du Pont was the only stockholder to do so.[33] This, and the fact that the plan was suggested by Pierre du Pont and its structure worked out largely by the du Pont nominees on the General Motors Board, are the features on which the Government principally relies. It urges, contrary to the trial court's finding, that the plan was intended and designed to make the General Motors executives responsive to the wishes and desires of du Pont. What the Government ignores, however, is

---

[33]The purchase of the stock from du Pont was in no sense fundamental to the plan. In the succeeding extra incentive plan which General Motors established to permit participation by new top executives—the General Motors Management Plan—the stock required was bought by General Motors in the open market (R. 320).

the real incentive of the plan. The executives who participated were afforded an opportunity to pyramid, many times over, the value to themselves of increases in General Motors earnings—by appreciation in the value of the stock which they had purchased, by larger dividends on the stock, and by the resulting larger annual payments to Managers Securities of one-half of General Motors bonus earnings. On the other hand, there was no incentive whatever to any General Motors executive to increase du Pont's earnings; du Pont, quite literally, could have gone bankrupt with no adverse effect on them. The explanation of this by Walter S. Carpenter, Jr., Chairman of the Board of du Pont and a member of the Finance Committee of General Motors, warrants an extended quotation (R. 2721-2722):

> "Now that transaction was originally made on the basis of substantially the market values. It was a very serious undertaking for these managers. They subscribed to this stock and paid cash for it in what was for them a very substantial amount, so that it was a purely arm's length transaction between the two. But that plan was designed so that these managers, putting cash in to the extent of about one-seventh of the full purchase price of the stock, were in the position of having the benefit of all the benefits that would flow towards substantially seven times the amount of their own investment. They had the opportunity to benefit by the appreciation in investment in General Motors stock equal to about seven times their own initial investment; they had the opportunity of sharing the dividends on a comparable amount of investment in General Motors stock; and in addition to that as a result of the contract that was entered into between the General Motors Corporation and the Managers Securities Company, there flowed to the Managers Securities Company each year one-half of the total accruals under the General Motors Bonus Plan, so that you might say that they had this three-fold opportunity

of enjoying the benefit of any increase in earnings of General Motors Corporation—through the appreciation of the securities, through the dividends on those securities, and also through the transfer of these bonus earnings which were in turn dependent upon the earnings of the General Motors Corporation.

"So you had really—they had a sort of a three-fold pyramiding of the benefits flowing from the earnings of General Motors to themselves, and that operating, as I have referred to, on this seven-fold leverage which they gained over and above their initial cash subscription. All of that served as a powerful incentive to those men to interest themselves in the increase and the progress and the earnings of the General Motors Corporation.

"It had absolutely no association at all with the du Pont Company. The du Pont Company might have gone bankrupt in that period without having any effect upon what the results to them would have been, or might have prospered greatly without any reflection on the flow of benefit to these 80 managers."

There was no incentive, in other words, to purchase from du Pont. If General Motors prospered, as it did, the General Motors executives prospered with it. Du Pont, in turn, received the increase in value of its investment which it hoped for and expected when its nominees supported the plan—a benefit which was no less valuable to du Pont because it was shared equally by every other General Motors stockholder. Sloan, indeed, believed that the Managers Securities Plan, and the similar Management Corporation Plan adopted by General Motors in 1930, for which du Pont did not supply the stock (R. 320), were largely instrumental in producing the outstanding expansion of sales and earnings which General Motors has since enjoyed (Sloan, R. 1230).

The Government also suggests (Br., pp. 26-27) that the Managers Securities Plan, and indeed, General Motors' regular bonus plan, were so administered as to influence—bribe—the General Motors executives to purchase du Pont products. The same argument was made at the trial, and the findings (R. 320-321), to which no reference is made by the Government, reject the contention. When the Managers Securities Plan was set up, the Board of Directors of General Motors created, to make the initial allocation of the right to purchase Managers' stock, a three-man committee of directors who were not themselves General Motors employees and hence ineligible to participate in the Plan—Pierre du Pont, Seward Prosser of Bankers Trust Company of New York, and Arthur Bishop, president of a bank in Flint, Michigan (R. 318; Pierre du Pont, R. 851, GTX 250, R. 494, 3567).[34] Neither of the last had, then or later, any connection with du Pont (Pierre du Pont, R. 851-852). The committee's recommendations were submitted to Sloan as Chief Executive Officer, and all of his recommendations for changes were accepted by the committee (R. 318-319; Sloan, R. 1224-1226, Pierre du Pont, R. 852). Both Sloan and Pierre du Pont testified that in formulating their recommendations they gave no consideration whatever to the purchasing policies of any General Motors executive, or to the attitude of any executive toward du Pont (R. 320; Sloan, R. 1229-1230, Pierre du Pont, R. 852). Moreover, the Government's contention requires the conclusion that not only Pierre du Pont, but also Messrs. Prosser and Bishop participated or acquiesced in a gross perversion of the plan.

The findings and evidence likewise reject the Government's argument that the regular bonus plan was similarly

---

[34]GTX 250, R. 494, 3567 shows that the committee was given final authority in the matter. The statement by the Government that its decisions were subject to revision by the General Motors Finance Committee (p. 26) is simply wrong.

used to further du Pont's sales to General Motors. Regular bonus awards have been recommended by the Chief Executive Officer of General Motors, subject to the approval, until 1936, of the Finance Committee, and thereafter of a Bonus and Salary Committee of the Board (R. 319; Sloan, R. 1226, Carpenter, R. 2730-2731). Sloan recognized that an equitable allocation of awards was essential to the fulfillment of the incentive purpose of the bonus. Consequently, he set up a procedure under which the amounts available for awards are allocated by specified ratios to the several Divisions, subsidiaries and central office activities, and detailed recommendations are made to the Chief Executive Officer by the general manager of each such operation with respect to the distribution to particular individuals of the amounts so allocated (R. 319; Sloan, R. 1226-1228, 1380-1381, GM 31, pp. 1-3, R. 1227, 6639 at pp. 6641-6643). In reviewing these recommendations, largely for gross inequities between similar positions in different operations, Sloan stated emphatically that he had never considered the purchasing policies of any employee, or the attitude of any employee toward du Pont (R. 1229-1230).

The findings show that there were du Pont nominees on the Finance and Bonus and Salary Committees (R. 319-320; GTX 276, R. 496, 3679). The District Court rejected the inference that the Government sought to draw from this fact by stating (R. 321):

> "The record shows that some du Pont representatives did participate in the determination of the allotments under the Managers Securities plan and the bonus awards. There was opportunity, therefore, for them, in passing judgment on such matters, to attempt to further du Pont interests as a supplier of General Motors and as a chemical manufacturer. However, there is no evidence that any of them made any such attempt. The witnesses who testified and who would have been parties to such efforts vigor-

ously denied the Government's charges. The Court refers to Pierre S. du Pont, Irenee du Pont, and Carpenter. A number of other executives who were witnesses such as Sloan, Kettering, Pratt, Lawrence Fisher, Lynah, and Wilson are among those who would have been 'influenced,' if the Government's contention is correct. These men, the record shows, acted at all times solely in the best interest of General Motors."

This finding is supported by all of the evidence relating to the establishment of the various General Motors supplemental compensation plans and the manner in which those plans were administered. It is significant that the Government offered no evidence whatever, direct or circumstantial, designed to show that in any instance any employee of General Motors favored du Pont out of deference to du Pont's participation in the supplemental compensation plans, or that any employee ever felt any inclination to do so. The du Pont nominees on the Board who were concerned with the administration of the plans denied that in passing on recommendations for bonuses they attempted to further du Pont's interests (Pierre du Pont, R. 852, Carpenter, R. 2731, H. B. du Pont, R. 2667). Indeed, as the court found and as the evidence shows, Sloan's recommendations to the Finance Committee and later to the Bonus and Salary Committee were never changed (R. 319; Sloan, R. 1226-1227), and his recommendations were never influenced by the idea of favoring those who purchased from du Pont or punishing those who did not (R. 320; Sloan, R. 1229-1230). Indeed, review of recommendations by the Finance and the Bonus and Salary Committees, in view of the thousands of people who received awards each year, is necessarily limited to a review of the over-all fair and equitable administration of the bonus system (Sloan, R. 1381). The finding is also supported, as the District Court points out, by the evidence as a whole dealing with the conduct of

those whose actions were supposed to have been influenced as shown by the findings discussed in Point I, *supra*. Finally, to accept the Government's contention would require the literally impossible assumption, as does the similar argument relating to the allotments under the Managers Securities Plan, that the non-du Pont members of the Finance and Bonus and Salary Committees have been willing and silent participants in a thoroughly discreditable scheme.

We should add that this is not the first time that the participation of du Pont in the Managers Securities Plan has been reviewed by a court. Over a decade ago, in a suit brought by a stockholder challenging both the Managers Securities Plan and the participation by du Pont in its establishment, the court found in favor of du Pont and dismissed the suit as to it. *Winkelman* v. *General Motors Corporation, et al.*, 44 F. Supp. 960, 968 (S. D. N. Y. 1942) (Finding No. 35, filed April 10, 1942):

> "The General Motors Bonus Plans were consistently supported by the du Pont Company, the largest stockholder in General Motors, to promote the interests of the stockholders. Its attitude toward the plans and their administration was based solely on business judgment, gained in its own successful corporate experience, that such a compensation policy was an important factor for the success of General Motors and would benefit the stockholders. For this reason, the du Pont Company supplied the block of shares necessary for the Managers Securities Plan. Certain of its officers and directors, as directors of General Motors and themselves General Motors stockholders, approved the plans, for the same reasons and in the exercise of an honest business judgment that such plans were reasonable and for the best interests of General Motors."

D. THE EVIDENCE, CONSIDERED AS A WHOLE, SUPPORTS THE TRIAL COURT'S FINDINGS THAT DU PONT HAS NOT CONTROLLED AND DOES NOT CONTROL GENERAL MOTORS

In the preceding pages we have considered various categories of findings and evidence that bear on the Government's assertion that du Pont controls General Motors. These findings and the evidence have dealt with du Pont's initial investment in General Motors, with the activities of the du Pont nominees on the Board of General Motors and on its committees, with the attitude and activities of the General Motors management, with the corporate administration and management of General Motors, and with its supplemental compensation plans. Those findings and the evidence considered as an entirety, show that du Pont has not and does not now control General Motors and that the Government's argument to the contrary is not supported by the facts.

The decision of the District Court shows that it was on the basis of all of this evidence, and not merely on inferences drawn from fragments of it, that the trial court made its findings. The findings gain weight and persuasiveness because of the range of the matters that the trial court considered and the detail with which it reviewed the facts, and the weight of the findings is further increased by reason of the fact that the trial court viewed the question of control in historical perspective and took into account the undisputed changes in the relationship between the two corporations which affirmatively appear in the record.

Although the Government defers in the abstract to the importance of these historical facts (Br., pp. 76, 92), it ignores them in its discussion of the evidence and makes no reference to the trial court's findings on this aspect of the control issue. The trial court, after reviewing all of the evidence referred to above found a trend toward lesser

participation by du Pont nominees on the General Motors Board in any of General Motors affairs (R. 321-322):

> "After the dramatic collapse of Durant and the ensuing financial crisis when du Pont representatives were thrust into positions of responsibility in General Motors, and after General Motors had been rescued from that crisis, du Pont's influence and position in General Motors declined radically. During the twenties, a force of considerable strength arose in General Motors that was important in determining any question of control. This force was the management, headed by such a forceful and resolute character as Sloan and including such positive personalities as Kettering, the Fisher brothers, Knudsen, Pratt, Brown, and Wilson.
>
> "More than a quarter of a century has passed since the twenties, and the strength and standing of the management have continued to increase and improve. The du Pont representatives who had originally been interested in General Motors have died or retired. These developments are reflected in the contemporaneous documents, the changes in the membership of the board, the various committees of the board, and in the testimony of Sloan and other witnesses."

The evidence makes it clear that the change perceived by the trial court is not an "artificial" one based on a desire to create a screen against the possibility of criticism. It has been gradual change which began many years before the institution of this litigation, and it is the result of causes unrelated to the Government's charges. The result has been the emergence of General Motors as a firmly established enterprise in the hands of a management whose independence is guaranteed by its competence, its record of past success, and the complexity of the industrial tasks which it is called upon to perform.

PART TWO

THE GOVERNMENT'S ATTACK ON THE FINDINGS OF THE TRIAL COURT IS NOT SUPPORTED BY THE EVIDENCE

In Part One we have reviewed the record at some length to make clear that the facts provide complete support for the findings of the trial court. Although in the course of that review we have referred to various contentions of the Government, no attempt has been made to subject those contentions to analysis or to consider their relationship, or lack of relationship, to the facts. Part Two of this brief will be devoted to that task.

The Government's attack on the trial court's findings of fact is marked by two characteristics: (1) The Government relies heavily upon the device of extracting a fragment of evidence, sometimes words or phrases from a single document, sometimes one document from a group of related documents, sometimes one aspect of an incident, or sometimes one incident from a series of related incidents, and treating this fragment of evidence as if it were self-contained and established some totality of truth without regard to the whole of which the fragment is a part. (2) In attacking the findings the Government relies heavily upon inferences and conclusions instead of direct or circumstantial evidence; the inferences or conclusions in many cases being said to arise necessarily from some fragment of evidence which the Government has selected in accordance with the technique of argument that has been described in the preceding sentence.

The task of analysis, therefore, requires that the fragments of evidence used by the Government be restored to context so that they can be judged in relation to the whole of which they are a part. It also requires that the Government's asserted inferences and conclusions be tested by

reference to relevant facts which provide a standard for their validity, and that they be appraised in the light of ordinary considerations of logic and common sense. This task necessarily involves a detailed examination of incidents which have only a limited significance in the case, whether they be viewed in isolation or as a part of the record as a whole. It also involves to some extent inevitable repetition of material that has been discussed in Part One of the brief. It is believed, however, that as compensation for these burdens the analysis will disclose the basic infirmity of the Government's attack and the wide gulf that separates the Government's assertions from the facts.

I.

The Government's Contention that General Motors Purchases Paint from du Pont on a Non-competitive Basis is Not Supported by the Facts

The Government sought to establish at the trial that General Motors bought paint from du Pont on a non-competitive basis and that du Pont's sales of paint to General Motors were attributable to du Pont's stock interest and not to the merits of the paint or other normal commercial considerations. The trial court made detailed findings of fact which rejected the Government's contention and which, as we have shown, are fully supported by the evidence (*supra*, pp. 37-60). These findings and the evidence which supports them are particularly significant because they cover three-fourths of General Motors' purchases from du Pont, and because of the emphasis which the Government has always given to the paint sales. If the Government cannot establish a restraint of trade with respect to paint it seems clear that it cannot establish a restraint of trade with respect to any of the other commodities du Pont sells to General Motors.

The Government asserts broadly that "whenever a business judgment was required in a situation in which du Pont was in competition with other suppliers, the stock interest cut across normal competition and resulted in a preference being given to du Pont."[35] The Government also charges that General Motors did not buy "on the basis of competitive merit, or on the basis of what was to General Motors economic advantage" (Br., p. 72).

If these assertions are to be given their plain and ordinary meaning, they would appear to signify that the Government is contending that General Motors buys inferior paint from du Pont or pays du Pont higher prices than it would have to pay du Pont's competitors for comparable quality and service. There are, however, other passages in the Government's brief in which it states the nature of the alleged preference in terms not entirely consistent with those of the assertions quoted above. These other statements suggest that the Government may retreat to an alternative position that du Pont's product and service, if not inferior to those of its competitors, were no better than the product and service that General Motors could obtain from du Pont's competitors at comparable prices. Because of the vague and shifting terms in which the Government describes the alleged preference in different parts of its brief, it is not possible to determine which of these two positions the Government finally intends to adopt. For present purposes it is immaterial. In either event the Government asserts that General Motors bought paint from du Pont because of the latter's stock interest, and not because of

---

[35]The Government disregards the fact that General Motors buys substantial amounts of paint from competitors of du Pont. In 1947 General Motors' purchases of paint from competitors of du Pont amounted to $7,532,290 (GTX 1388, R. 2939, 5423). The circumstance that in that year General Motors bought the greater part of its requirements from du Pont does not change the fact that the dollar volume of its purchases from competitors was substantial and is inconsistent with the charge that General Motors was not free to buy on a competitive basis.

the quality of du Pont's product and service. To this extent the Government attacks the quality of du Pont's paint and service. In specific terms, for example, the Government must mean to assert that "Duco" was adopted and purchased from du Pont, not because it was superior to varnish (which required up to three weeks to dry and would not stand up in use) but because du Pont owned stock in General Motors; and that "Dulux" was used by Frigidaire, not for the same reason it was used by other major refrigerator manufacturers, but because du Pont held General Motors stock.

The Government makes these arguments without support in the record. There is no evidence that du Pont's paint or service is inferior to the paint or service of its competitors, or that its prices are higher, or that General Motors suffered any economic disadvantage by reason of its purchases of paint from du Pont, and it is significant that the Government points to no such evidence in its brief.

1. The Government ignores uncontradicted evidence which establishes the high quality of the paint bought by General Motors from du Pont, and the reasons for General Motors' purchases from du Pont. This evidence shows that the Divisions of General Motors that buy paint from du Pont do so because of the quality of the paint,[36] the excellence of

---

[36]Kettering related the intensive efforts made by General Motors to assure that its automobiles were finished with the best and most durable paint available and testified that in his opinion the paint on General Motors cars was one of the reasons for their higher resale value in the used-car market (R. 1591-1592). Although this testimony related to "Duco" generically (R. 1617-1618), in view of the substantial purchases of "Duco" from du Pont by General Motors its probative value on the quality of du Pont's product is beyond question. The General Motors witness Wirshing related instances in which du Pont has invented or developed superior finishes which were afterwards copied by its competitors (R. 1929). It is also significant that the record shows that when ordering locomotives from the Electromotive Division of General Motors the Class I railroads usually specify that du Pont "Duco" shall be used on the exterior of the locomotive. Du Pont sells Electromotive 70 to 75 percent of its requirements (W. P. Fisher, R. 2434-2435).

du Pont's service[37] and because on the basis of past experience they believe that du Pont will best satisfy their requirements.[38]

The evidence with respect to Buick's purchases from du Pont is important in this connection because of the fact that Buick buys the greater part of its paint requirements from du Pont, a fact that is twice noted by the Government (Br., pp. 61, 139). The record shows that Buick buys from du Pont because it finds the du Pont material superior (Weckler, R. 2143). Weckler, the executive of Buick who made the decision to continue to buy from du Pont rather than to purchase from competing companies, testified that he was not "motivated in any way by a feeling of duty to favor the du Pont Company" but that his decision was based solely on the quality of the du Pont product (R. 2143).[39]

Furthermore the Government's notion that General Motors is finishing a large part of its production with inferior paint or that it pays du Pont higher prices than it

---

[37]Thus the General Motors witness Wirshing, testifying about the reasons for Chevrolet's purchases of paint from du Pont, said: "They [du Pont] also had a very good service department which kept Chevrolet out of trouble. You always depend on your suppliers for service. They are a great help to you when you get into trouble and if they come quickly and help you in those problems you appreciate it" (R. 1924). The location of the paint plant in relation to the automobile plant is an important factor in relation to service. Wirshing testified that Cadillac bought Rinshed-Mason paints because "the Rinshed-Mason plant is practically in their back yard." (R. 1926) He also explained that a similar proximity of plants was another reason why Chevrolet preferred to buy from du Pont (R. 1924).

[38]Wirshing, speaking of Pontiac's early experience with "Duco" said: "* * * it did them so much good to come out with such a superior finish, that is, a finish so much better than they had been using, that that is another reason why they have continued to use the du Pont material over the years" (R. 1926). He also stated that Pontiac continued to buy from du Pont for service reasons (*Id.*).

[39]At the time of the trial Weckler was an executive of Chrysler Corporation. His testimony with respect to the high quality of the du Pont product was repeated on cross-examination (R. 2161) and is not inconsistent with any of the contemporaneous documents.

would have to pay competitors for comparable products, or that General Motors does not buy to its own economic advantage, cannot be reconciled with General Motors' competitive position in the motor car industry. It could hardly have successfully competed in the low-price car market, or have advanced to its present competitive position, with inferior products or with costs higher than those of its competitors.

2. The Government points to the fact that General Motors made requirements contracts with du Pont for automobile lacquer for the years 1925-1926, and also refers to subsequent contracts for lacquer covering the years 1927-1931 which it recognizes were not requirements contracts but which it asserts gave du Pont only "slightly less protection" (Br., pp. 61, 139). The Government appears to argue that these contracts support the inference that General Motors' purchases of paint from du Pont were not made on a competitive basis. But this argument ignores the evidence relating to these contracts and particularly the evidence contained in contemporaneous documents.

That evidence shows that General Motors made the requirements contracts because du Pont was the only manufacturer that was able satisfactorily to produce these new automobile lacquers. Months before the first contract was made, Lynah, Secretary of the General Purchasing Committee, began extensive efforts to find other manufacturers who could make a suitable product.[40] Within a month after the first contract with du Pont was made Lynah wrote to the Committee: "Certainly because of the proven

---

[40]He asked General Motors Research if a paint "suitable for our purposes" was "made by any other source than the du Pont Company" (GM 168, R. 1131, 7162). He directed specific inquiries to the same effect to Sherwin-Williams and the Valentine Varnish Company, two major competitors of du Pont (GM 170, 171, R. 1132, 7164-7165.

qualities of Duco it has no competition at the present time." At his recommendation the Committee requested General Motors Research to make durability tests on various competitive finishes (GM 172, 173, R. 1133, 1135, 7166-7168).

For two years General Motors Research, despite a vigorous and continuing examination of products offered by competitors of du Pont, was unable to find a paint that had the necessary qualities (GM 174-178, 180-183, R. 1135, 1137, 1140, 7169-7180, 7186-7189). The requirements contract with du Pont was twice renewed during the period 1925-1926 only because Research reported that it was not yet able to certify any competing lacquer as satisfactory (Lynah, R. 1141).[41]

The facts about the requirements contracts, therefore, instead of supporting the Government, provide additional evidence of the high quality of du Pont's paint and of the purchasing independence of General Motors.

The contracts which General Motors made with du Pont in the five years (1927-1931) following the expiration of the requirements contracts gave du Pont no "protection" whatsoever and the Government's contrary characterization ignores the plain terms of the agreements. The contracts did not call upon General Motors to purchase its requirements of lacquer from du Pont; they simply established a

---

[41]The thoroughness of the efforts made by General Motors Research to find a competitor from whom to purchase lacquer is evidenced by a comprehensive report submitted to the Purchasing Committee in 1925 (GM 176; R. 1137, 7171). After detailing the results of numerous tests made on lacquers produced by ten competitors of du Pont, the Research group reported that no company other than du Pont had yet "developed a full line of colors of high durability" and that, moreover, other lacquers had not yet been proven satisfactory with respect to "properties such as quality of the color, ease of spraying, covering power, polishing properties, and other working properties which must be determined by actual tests on cars under production conditions."

price at which General Motors could buy "Duco" from du Pont. Such price protection contracts were commonly employed by General Motors. They were not "requirements contracts" and did not bind General Motors to buy any quantity from a supplier; such a contract "made participation by the divisions optional, and was made because prices were favorable" (Lynah, R. 1142). A contemporaneous report made by the du Pont Paint Department recognized that the contracts imposed no obligation of any kind on General Motors (GTX 468; R. 541, 4122).[42]

3. The Government's position, in effect, now is that the Court should reject all of the direct evidence that General Motors bought paint from du Pont on a competitive basis, even though the Government itself offered no comparable evidence to the contrary. It attempts to justify this position by an inference which it tries to draw, not from any evidence relating to price, service or quality, but from two purely statistical aspects of du Pont's sales of paint to General Motors.

a. In the first place, the Government points to the fact, which has never been disputed, that du Pont sells General Motors a substantial percentage of its paint requirements, (in recent years approximately 70 percent) (Br., p. 61, 139-140). That fact, however, does not justify the conclusion that the sales are made on a preferential or a non-competitive basis. For a variety of normal and innocent business reasons purchasers often decide to buy the greater part of their requirements from one supplier, as the record here

---

[42]"On our 1927 contract with General Motors we are unable to get any definitely specified amount of business in the contract. * * * In the 1927 contract General Motors agreed only to purchase their requirements of our make of pyroxylin materials which, of course, may be as little or as great as they care to purchase from us."

shows.[43] For example, Chrysler for many years has bought substantially all of its paint from Pittsburgh Plate Glass Company and the record shows that it has done so pursuant to the deliberate policy of having one principal supplier (DP 559, 560, 561, R. 2999, 6479, 6480, 6481. See p. 54, *supra*, 198-199, *infra*).

It is no answer, moreover, for the Government to assert that although the percentage may be colorless standing alone, it justifies the asserted inference when considered in relation to du Pont's stock interest. The question in issue is whether it is the stock interest that causes or influences the purchases. To rely upon the stock interest to support the inference is to assume the conclusion that the inference is designed to prove. The fact is that the record leaves no room for the Government's inference. As we have pointed out at pp. 45-60, *supra*, the reasons why General Motors buys a large percentage of its paint requirements from du Pont are normal, competitive business reasons adopted in the free exercise of General Motors' own independent judgment, and not related to or influenced by the stock interest.

b. The Government's principal prop for its argument, however, is not du Pont's percentage of General Motors' requirements but a different statistical aspect of the sales. It asserts that because du Pont's sales to General Motors now constitute the greater portion of du Pont's sales of paint to all automobile manufacturers it follows that the General Motors sales are made on a non-competitive basis.

---

[43] Westinghouse, Crosley and General Electric for considerable periods of time have bought all of their requirements of refrigerator paint from du Pont (Knight, R. 2383-2385, Norberg, 2475-2476, Van Derau, 2483-2482). General Motors itself has followed the policy of buying all or a greater part of its requirements of many important production materials from a single supplier, *e.g.*, steel bars, coal, brass and copper sheets, screws, tubing, leather, car frames and tires (GM 154, R. 1092, 7023).

Stated in the Government's own terms the argument runs as follows: 80 percent or more of du Pont's sales of paint to automobile manufacturers is made to General Motors;[44] General Motors makes only 45 percent of the automobiles; this is an "indication" (to use the Government's own word) that the du Pont sales are not made on merit (Gov't Br., pp. 83, 141).

The fact that in recent years the greater portion of du Pont's sales to automobile manufacturers has been made to divisions of General Motors does not justify the inference which the Government seeks to draw. Whatever the percentage relationships may be, du Pont has sold, and sells, a substantial volume of paint to other automobile manufacturers. For example, in 1947 those sales amounted to $3,500,000 (GTX 1387; R. 2919, 5422). The record shows that du Pont sells paint to smaller manufacturers such as Nash, Studebaker, Hudson, Willys and Packard and that its competitive position at all but Packard has been improving (GTX 1378, 1381, 1382, R. 2824, 2825, 5409, 5414, 5415, Williams, R. 1991-1992.) It is not credible that these competitors of General Motors would accept inferior paint or poor service.

---

[44]The 80 percent figure is achieved by separating du Pont's sales of paint for original application to automobiles from du Pont's sales of paint to General Motors for all other purposes and comparing this figure with du Pont's sales of paint for original application to automobiles of all other manufacturers. Although the point is minor as compared with the other infirmities in the Government's argument, there is a serious question about the validity of this comparison even for the purpose of the Government's asserted inference. When du Pont's sales to General Motors of all kinds of paints are compared with du Pont's sales of the same paints to all other customers, it appears that the General Motors' purchases over the years have ranged from 14 percent to 26 percent of du Pont's sales to all customers. In 1948 du Pont's gross sales to purchasers other than General Motors of the same kinds of paint, varnish, etc., bought by General Motors, amounted to about $97,000,000; its sales to General Motors in the same year amounted to $21,000,000 (DP 445; R. 2688, 6436).

The Government's inference depends upon an assumption that is logically indefensible and commercially unrealistic. The fact that 80 percent of du Pont's sales to automobile manufacturers is made to General Motors although General Motors makes only 45 percent of the cars does not establish or even "indicate" that the sales are not made on merit but on a non-competitive basis. The comparison between the two percentages has nothing whatsoever to do with the merits of du Pont's products. In a free market a seller is not uniformly successful with all purchasers. And in a free market a purchaser does not normally divide his purchases among all possible suppliers and when he makes a division he is not likely to do so with reference to his own percentage position in the market in which he sells.

Even if the lack of reason or logic in its basic assumption were to be ignored, the Government's argument would suffer from a fatal infirmity. It ignores the facts. The evidence affirmatively shows that the alleged "disproportionate" percentage relationship of sales to General Motors has nothing to do with the merits of du Pont's paint. In recent years the production of automobiles has been highly concentrated; three companies—General Motors, Ford and Chrysler—account for approximately 85 percent of the total production.[45] The question posed by the Government's contention therefore is why a greater percentage of du Pont sales have not been made to Ford and Chrysler. The record contains evidence which answers that question and which shows that the reasons have nothing to do with du Pont's prices, quality or service. This evidence, on which the trial court made findings (R. 393), is never mentioned in the Government's brief.

Ford, the second largest producer of automobiles, has for many years manufactured a very substantial percentage of its own paint (GTX 1376, 1377, R. 2824, 5407, 5408).

---

[45]GTX 1204, R. 658, 5149.

At times it has manufactured approximately three-fourths of its own requirements; in 1950 Ford manufactured the equivalent of 15 per cent of all paint used by all manufacturers for original application on automobiles (GTX 1386, R. 2826, 5420). Since in recent years Ford has accounted for approximately 25 percent of the total automobile production (GTX 1204, R. 658, 5149) its policy of producing a substantial part of its own requirements, which has nothing to do with the merits of du Pont's paint, goes far to destroy the inference the Government would draw from the fact that du Pont does not sell a larger volume of paint to automobile manufacturers other than General Motors.

In the 1920s and until 1938 du Pont did sell substantial quantities of paint to Ford. Indeed, at times during that period it sold Ford 50 percent of all of its requirements of synthetic resin enamel (GTX 1377, R. 2824, 5408). In 1938 the Ford director of purchases told the du Pont sales representative that the late Mr. Henry Ford, Sr. had issued instructions that Ford was not to purchase any more materials of any kind from the du Pont Company (R. 1992-1993, GTX 1379, R. 2825, 5411). Du Pont was not informed of the reasons for Mr. Henry Ford, Sr.'s decision and the record does not disclose those reasons. It appears however, that they had nothing to do with the price or quality of du Pont's paint or with service because at the end of World War II when Mr. Henry Ford, II, became active in the management of the Ford Company he resumed purchases from the du Pont Company, and du Pont now sells Ford substantial quantities of paint (R. 1993).[46]

Prior to the early 1930's, du Pont sold a substantial quantity of paint to Chrysler. Sometime in the early 1930's Keller, Assistant General Manager in Charge of Purchases

---

[46]In placing an order with du Pont in July 1946 the Ford Company "expressed the hope that such action would mark the beginning of long and pleasant relations between Ford and du Pont" (DP 196, R. 1993, 6069).

for Chrysler, informed du Pont that Chrysler had determined to find a supplier who would look upon Chrysler as its principal customer, that they had found such a supplier and that purchases from du Pont would be decreased. Keller made no complaint about du Pont's materials or service and told the du Pont representative that du Pont's service and the performance of its products were "very satisfactory" (R. 1994-1995). This evidence is uncontradicted. The record shows that Chrysler now buys substantially all of its paint requirements from Pittsburgh Plate Glass Company (DP 559, 560, 561, R. 2999, 6479-6481).

In the late 1920's and early 1930's, before automobile production became so heavily concentrated in three companies, du Pont counted among its customers many companies that have since gone out of business such as Franklin, Cleveland, Hupmobile, Marmon, Chalmers, Gardner (Williams, R. 1991). During this period, although the evidence of record is fragmentary it indicates that du Pont's sales to other manufacturers were regularly substantial. As late as 1935, while it still enjoyed Ford business but after Chrysler had shifted to another supplier, du Pont's sales to automobile manufacturers other than General Motors amounted to $3,000,000 out of $8,000,000 total sales for the first eight months of that year (GTX 1372, R. 2821, 5403).

The Government in discussing General Motors' purchases of paint from du Pont makes the statement that "We are not reduced to the profitless field of using bare accusation against bare denial" (Gov't Br., p. 140). This statement is accurate, though perhaps not in the sense in which the Government intends. The statistical arguments upon which the Government principally relies are, it is true, little more than bare accusation. The evidence of record, however, as we have shown, is much more than a bare denial. It establishes, by direct and substantial proof

and not by inference or conclusion, that General Motors has purchased paint from du Pont on the merits only, and in such amounts and at such times as the Divisions of General Motors have decided to buy on a completely competitive basis in the free and unrestricted exercise of their business judgment.

II

The Government's Contention that General Motors Purchases Fabrics from du Pont on a Non-competitive Basis Is Not Supported by the Facts.

The contemporaneous documents and testimony establish in detail that the General Motors Divisions have at all times purchased fabrics on a competitive basis, whether from du Pont or from competitors of du Pont, and that du Pont has never enjoyed a preferential non-competitive advantage.[47] Four witnesses, whose cumulative experience spanned the period covered by the Government's charges, testified on every aspect of their experience in the sale of fabrics to General Motors. Their testimony covers 400 pages of the printed record. Well over 100 exhibits comprising sales correspondence and company reports written over the years were introduced to show the competitive basis on which General Motors purchased fabrics. The trial court considered this substantial body of evidence in

---

[47]The contemporaneous sales reports and correspondence, written years before this lawsuit, are particularly persuasive. They repeatedly record instances in which du Pont got business from Divisions of General Motors because of the superiority of its product or service. See, for example, DP 258, 262, 274, 275, 284, GTX 406, pp. 12-13, R. 2216, 2223, 2237, 2239, 2249, 527, 6169, 6173, 6199, 6200, 6213, 3966 at pp. 3977, 3978. See also Nickowitz, R. 2120. They also show many instances in which du Pont failed to sell the General Motors Divisions when the latter decided, on a competitive basis, to buy elsewhere. See pp. 203-205, *infra*.

the light of the same arguments which the Government makes here. The trial court's consideration was thorough and comprehensive. It noted the changing products and uses over the years; it catalogued the varieties of success and failure experienced by du Pont in its efforts to sell the General Motors Divisions (R. 396-405). It found (R. 405):

> "The Court further finds that such purchases of fabrics as the General Motors Divisions have made from du Pont from time to time were based upon each division's exercise of its business judgment and are not the result of du Pont domination. Du Pont, the record shows, has maintained its position as the principal fabric supplier to General Motors through its early leadership in the field and by concentrating upon satisfactorily meeting General Motors' changing requirements as to quality, service and delivery."

The most noteworthy aspect of the Government's fabrics argument is the deliberate manner in which it ignores all of this evidence as well as the findings of the trial court. Its contention, which is essentially the same statistical argument that it makes on paints, can be simply stated. Because the proportion of du Pont's sales of fabrics to all auto manufacturers that has been sold to General Motors is greater than General Motors' share of the automobile market, the Government contends that General Motors has purchased from du Pont because of its stockholdings rather than because of the merits of its products.

This argument suffers from the same infirmities when applied to fabrics as it does when applied to paints. A comparison of the volume of fabrics that du Pont sells to General Motors and the volume that it sells to others customers does not resolve the question that is critical to the Government's contention. If du Pont succeeded with General Motors on a competitive basis the volume of its sales is im-

material, as is the volume of its sales to others. We will not repeat the logical and economic fallacies in this argument, but will refer the Court to our discussion of the same argument as applied to paint, *supra*, pp. 195-200.

As in the case of paint, the explanation of why other motor manufacturers have not purchased fabrics from du Pont in as great a volume as General Motors does not reflect upon the merits of du Pont's products and does not support the Government's inference that General Motors bought from du Pont on a non-competitive basis. Du Pont formerly sold substantial quantities of fabrics to both Chrysler and Ford (DP 286, 321, R. 2256, 2289, 6216, 6267). It lost out at Chrysler not because of any complaint as to quality, service or price but simply because it was told by Chrysler "we would prefer to deal with somebody who was going to be exclusively our major source of supply" (Nickowitz, R. 2117). Since then Textileather, a competitor of du Pont, has been supplying the bulk of Chrysler's fabrics (GTX 1381, R. 2825, 5414). Ford, the other major factor in the automobile market, has elected to produce a large portion of its own fabrics requirements (Nickowitz, R. 2113, Brown, R. 2292), but du Pont has been the principal supplier of such materials to the extent that Ford has not manufactured them for itself.[48]

---

[48]Du Pont's experience in selling Ford was described as follows (Nickowitz, R, 2113):

> "Of the fabrics that we supply—you see, Ford Motor Company manufactures most of their own requirements. They have been doing that since 1920 on pyroxylin and since the early 1930's on rubber. So when they come into the industry for requirements, it is either to supplement their own manufacture to take advantage of bulges or their own shortcomings, or to supply a need which they were unable to supply themselves, and currently we are supplying selected constructions exclusively for—that is, we are taking care of 100 per cent of their needs of these particular patterns in our elastic 'Fabrilite' for Lincoln and Mercury, and I would say about 35 to 40 per cent on Ford."

The Government's contention also ignores the evidence as to du Pont's success in the sale of fabric products to non-automotive users. The record shows that the fabrics used in the automobile industry are the same fabrics as those used by furniture manufacturers, bookbinders and other trades (DP 228, R. 2065, 6130; Nickowitz, R. 2065). General Fireproofing Company, the largest manufacturer of office furniture, buys 100 percent of its fabrics from du Pont; American Seating Company, the largest maker of theater seats, also buys exclusively from du Pont; West Publishing Company buys its bookbinding fabrics 100 percent from du Pont; Crowell-Collier, Johnson & Johnson and Sears Roebuck are other substantial users of du Pont's fabrics (Nickowitz, R. 2086-2090).

The complete failure of proof on the Government's part is exposed by reducing its major contention to its lowest terms. It contends, in effect, that Chrysler's choice of a competitive supplier and Ford's election to make most of its own fabrics requirements establish that General Motors must have bought from du Pont on a non-competitive, preferential basis. These actions by Ford and Chrysler are relevant at all only if they will support an inference that du Pont's fabrics were not suitable for automotive use. Clearly, Ford's action will not, since what it did buy on the outside it bought from du Pont. Chrysler's action similarly does not bear on the quality of du Pont products. Moreover, the Government could have called witnesses from Chrysler and Ford and ascertained why the one did not buy from du Pont and why the other manufactured most of its own fabrics. It failed to do so, and the Court should not now permit the Government to infer what it deliberately failed to try to prove.

The Government's argument that General Motors purchased fabrics from du Pont on a non-competitive basis deserves these further comments. Not only does the Government ignore the evidence which shows the competitive

reasons why General Motors bought from du Pont, but in addition the Government ignores the numerous instances in which General Motors refused to buy from du Pont and instead bought substantial quantities of fabrics from du Pont's competitors. The Government apparently takes the view that the bare fact that General Motors buys from du Pont in substantial quantities in itself proves that the purchases are made on a non-competitive basis. But the crucial question is not how much or what percentage General Motors bought from du Pont but why it made those purchases. The Government's inferences and conclusions cannot stand against the evidence which shows that whether General Motors bought from du Pont or bought from competitors of du Pont, General Motors acted at all times on a competitive basis and without regard to du Pont's stock ownership.[40]

If du Pont enjoyed a preferential position with General Motors, (1) Chevrolet in 1921 would have continued to buy from du Pont coated panel boards which du Pont had developed; instead it bought exclusively from competitors of du Pont as soon as they met the latter's price (R. 398; Brown, R. 2195-2196); (2) Chevrolet and Buick would not have purchased their entire requirements of combined fabrics for top material from 1923 to 1927 from a com-

---

[40]Tucked away in a footnote in the Government's brief (p. 60) is the observation that it was unnecessary for du Pont to compete pricewise to get General Motors trade. If this charge were true it would obviously deserve several pages of discussion instead of two lines in a footnote. The exhibits cited show that for the first half of 1927 two Divisions of General Motors bought from du Pont notwithstanding lower quotations received from a competitor of du Pont. The evidence shows that the competitor could not "be relied upon to meet Buick's requirements". (MacShane, R. 2374-2375) The record is filled with evidence that the automobile companies regard the ability of the supplier to make delivery as of equal if not greater importance than price (Sloan, R. 1299, 1300). The record also shows that du Pont had to compete on a price basis for General Motors' fabrics business. See for example, GTX 492, p. 6, GTX 490, p. 7, DP 277, 284, R. 541, 596, 2243, 2249, 4145 at p. 4150, 4133 at p. 4139, 6203, 6213.

petitor of du Pont (Brown, R. 2199, 2212); (3) Fisher Body would hardly have purchased its entire requirements, which were substantial, of convertible top material from a competitor of du Pont from 1933 to 1946 (DP 286, 288, 298, R. 2256, 2257, 2266, 6216, 6220, 6232); (4) When Chevrolet Truck purchased the Martin-Parry Corp. as an independent body maker, it would have continued the latter company's policy of purchasing exclusively from du Pont (DP 247, R. 2276-2277, 6158); instead Chevrolet Truck began, and has continued, to buy a substantial portion of its requirements at the former Martin-Parry plant from competitors of du Pont (DP 557, R. 2905, 6473, Brown, R. 2278-2281); (5) When Fisher Body needed substantial quantities of an adhesive for affixing weather-stripping in the years following the end of the war it would not have rejected du Pont's product and purchased the product sold by a competitor of du Pont (Nickowitz, R. 2095-2096); (6) General Motors Truck would not have specified B. F. Goodrich upholstery material for all bus seats manufactured to General Motors' specifications (Nickowitz, R. 2103, DP 240-241, R. 2105, 2106, 6146-6147).

The foregoing paragraph cites but some of the instances shown in the record in which General Motors demonstrated in the clearest practical way that it had no policy of preferring du Pont on fabrics purchases; that it bought at all times strictly on merit, whether du Pont got the business or lost it.

III

The Government's Contention That du Pont Was Able to Sell to Fisher Body Only on the Basis of Control and Not on the Basis of Merit Is Not Supported by the Facts

The Government would have the Court believe that prior to June, 1926, when Fisher Body became a Division

of General Motors, du Pont was unable to make substantial sales to Fisher Body because Fisher Body bought on a competitive basis, but that thereafter Fisher Body bought from du Pont on a preferential, non-competitive basis (Br., pp. 64-68, 141-142).[50] There is neither direct nor circumstantial evidence that supports the Government's contention. The evidence, as we have shown (pp. 78-84, *supra*) establishes that Fisher purchased from du Pont both before and after June, 1926; that it has never purchased exclusively from du Pont; and, what is more important, that when Fisher became a Division of General Motors there was no change whatsoever in its purchasing attitude with respect to du Pont and competitors of du Pont.

1. The Government's argument overlooks the persuasive and uncontradicted testimony of Lawrence Fisher, who was called as a Government witness and stayed to testify for the defense (R. 542-596). He made it clear that he and his brothers ran Fisher Body both before it became a Division of General Motors and afterwards (R. 580, 581). It was he who made the decision that Fisher Body would test and begin using du Pont's fabrics in 1923, and it was he who decided that Fisher Body would use "Duco" in 1924 (R. 585, 592).[51] The trial court found Lawrence Fisher's "competence and knowledge" of Fisher Body's purchasing practices "unquestioned" (R. 381). Du Pont's initial success in selling Fisher Body was thus achieved at a time when the Government concedes that du Pont was selling to Fisher

---

[50]The Government is surely aware that du Pont made substantial sales to Fisher Body prior to 1926. The Government's argument, however, is put in a form which seems calculated to leave the impression that du Pont was unable to make any substantial sales to Fisher before that date (see particularly Br., pp. 64-68).

[51]In fact Lawrence Fisher was so satisfied with "Duco" that he personally undertook to "sell" it to the Car Divisions (R. 592). This was in 1923-24, when the Government concedes Fisher was completely "insulated" from du Pont influence (Br., p. 64).

Body "on merit, in competition with other manufacturers" (Br., p. 141). Fisher Body's purchases from du Pont in 1925, made on a concededly competitive basis, totaled $2,272,000 (DP 222, 297, R. 2046, 2266, 6124, 6231). The Government fails to make any rational explanation of why the Fisher brothers, whom the Government describes as independent before 1926, should have changed and become subservient to du Pont after that date. The truth of the matter is that they behaved in the same way after Fisher Body was a Division of General Motors as they did before.

2. Neither at the time Fisher Body became a General Motors Division nor thereafter was there any change in Fisher Body's purchasing practices. Fisher Body commenced buying lacquer from competitors of du Pont as soon as such competitors had suitable products (L. Fisher, R. 593).[52] *It has continued down to the present to buy* lacquer from du Pont and from two competitors, Rinshed-Mason and Forbes; it used the product of a third competitor for a period but dropped it because the lacquer which it was buying from du Pont and others "was considerably better" (Wirshing, R. 1923).

Fisher Body has continued to purchase fabrics products from du Pont in varying quantities since 1923, but du Pont has merely been one of its three to five major suppliers (GTX 1349, 1350, 1351, R. 2890, 5354, 5356, 5358, Nickowitz, R. 2095).[53] Contemporaneous documents make it clear

---

[52]The Government implies that, in contrast to the automobile Divisions, Fisher Body was not using "Duco" until 1926, when it became a Division of General Motors (Br., p. 142). The evidence shows that Fisher Body purchased "Duco" in substantial quantities in 1924 and 1925. In the latter year, its "Duco" purchases totaled $1,969,482 (DP 222; R. 2046; 6124).

[53]The Government should know that Fisher Body did not buy 65 to 68 percent of its fabric requirement from du Pont in 1947, and in 1948. Its repeated assertions to the contrary are plainly contrary to the evidence (Br. 68, 142). The proper figure, for whatever it

that after Fisher Body became a General Motors Division competitive considerations continued to influence its purchasing decisions with respect to fabrics: in 1928, the Fabrikoid Division of du Pont "encountered a severe setback" when Textileather secured a major part of Fisher Body's business formerly enjoyed by du Pont (GTX 490, p. 7, R. 596, 4133 at p. 4139); in 1929, du Pont lost some of Fisher Body's rubber deck materials business to Haartz Auto Fabric Company (DP 279, R. 2243, 6206); in 1931, Fisher Body was reported as buying from Textileather "material for Oakland, Pontiac, (which we previously enjoyed), and Oldsmobile" (DP 283, R. 2249, 6212).

The Government takes the position (Br., p. 67) that the special discount arrangement which du Pont made with General Motors in an effort to secure a larger volume of its business was particularly directed at Fisher Body. But this arrangement was made shortly after Fisher Body lost its alleged independence and at a time when, according to the Government's contention, Fisher Body was subject to du Pont's control or influence. If that contention is right du Pont did not have to compete for the Fisher Body business. The discount arrangement is therefore flatly inconsistent with the Government's contention because it shows that even after Fisher Body had become a Division of General Motors, du Pont's sales efforts were based on a most ancient and reliable sales technique—substantial price competition.

Finally, the Government's contention is definitely disproven by the substantial body of evidence that shows the complete purchasing independence which Fisher Body exer-

---

is worth, is approximately 40 percent (see p. 83, *supra*). The Government's figure is contrived by eliminating almost $1,500,000 of top material purchased by Fisher Body from a competitor of du Pont. See pp. 62-63, 75, 83, *supra*. This elimination is incomprehensible, particularly since the Government includes du Pont's sales of top material to General Motors when it finds the inclusion convenient for the purpose of other computations (see Br., p. 63).

cised after it became a Division of General Motors. A number of examples of this independence have been noted at pp. 41, 62-64, 70-71, 80-82, *supra*. Two additional instances deserve comment here.

(1) Toward the end of 1926, when Fisher should have been most conscious of the alleged restriction upon its purchasing freedom, it refused to adopt a nitrocellulose base surfacer which du Pont had developed and was selling to the trade (GTX 476, R. 540, 4128). Du Pont considered this development to be of such significance that Lammot du Pont personally brought it to the attention of Sloan and Pratt, and the latter brought it to the attention of Ed. Fisher (GTX 470-479, R. 539, 540, 4124, 4125, 4126, 4127, 4128, 4130, 4131, 4132).[54] Fisher Body's decision not to adopt the surfacer is recorded in a contemporaneous du Pont sales report which discloses that the decision was made solely on competitive considerations and without regard to du Pont's stock ownership (DP 194, p. 2, R. 1984, 6066 at 6067). Lammot du Pont's final word to Pratt was, "I am convinced that G. M. is making a mistake" (GTX 479, R. 540, 4132). Down through the date of trial Fisher continued to purchase the bulk of its requirements of undercoats, which the surfacer was designed to replace, from Rinshed-Mason, a competitor of du Pont; du Pont supplies undercoats to only one of the fourteen Fisher Body plants (Wirshing, R. 1923, Williams, R. 1985).

(2) In 1932 Fisher Body dropped du Pont as one of its suppliers of fabrics for convertible top material and until 1947 bought exclusively from the Haartz Auto Fabric Company (DP 286, R. 2256, 6216 at 6218, Brown 2253). By 1947, the volume of business represented by

---

[54]The advantage of the product was speed in application. Other auto manufacturers adopted the surfacer and it is still used today in refinishing automobiles (DP 193, R. 1982, 6065, Williams, R, 1981, 1983).

this single fabrics item was $1,400,000 a year (GTX 1343A, p. 9, R. 2846, 3037 at 3045, Nalle, R. 2895).[55]

The foregoing examples of the manner in which Fisher Body conducted its purchasing do not reflect the actions of a purchaser whose independence has been crushed by the influence of du Pont's stock ownership in General Motors. These instances—and the record shows others of similar import—establish that, after as well as before 1926, when du Pont tried to sell Fisher Body, du Pont secured business on a competitive basis or not at all.

IV

The Government's Contention that Trade Was Restrained in Tetraethyl Lead, "Freon," and Anti-Freeze Is Not Supported By the Facts

The Government contends that General Motors' handling of its discoveries of tetraethyl lead and "Freon" and the instructions which General Motors gave to automobile purchasers concerning the relative merits of ethyl alcohol and glycerine as antifreeze mixtures constitute "specific instances" in which du Pont's stock ownership has resulted in the "imposition of restraints on trade" (Br., p. 129).

---

[55]The Government's quotation of a 1924 letter from Pratt to Harrington of du Pont at page 66 of its brief illustrates the lengths to which the Government has gone to seek evidence that appears to support its Fisher contention: (1) The letter deals not with fabrics, but with dyes, which Fisher Body does not purchase; (2) Harrington found the upholstery in his car fading, and suggested that Fisher could use some technical assistance on dyes; (3) The matter was a "delicate subject", as Harrington realized, because he was being critical of a Fisher product; (4) Harrington made a similar request to Pratt with respect to dyes in 1929, at which time a contemporaneous document shows that, even though he was allegedly under du Pont's influence at this time, Ed Fisher's reply was, "I cannot see where their suggestion would be of very much help to us." (GTX 455, 544, GM 212; R. 537, 606, 1454, 4094, 4241, 7264).

Even when viewed as matters of history these "instances" do not support the Government's contentions. But on any view of their past meaning they are clearly devoid of all present significance. Ethyl, in which General Motors owns a half interest, is now the larger producer of tetraethyl lead, competing successfully with du Pont in its manufacture and sale. Du Pont now, with the express approval of the Government, has taken over General Motors' stock interest in Kinetic, the original producer of "Freon," and the Government has formally abandoned all claims to relief in connection with that product. The alcohol-glycerine controversy has been of no significance for over twenty-five years.

Since these "instances" have no present economic importance we assume that the Government has included them in its argument on the theory that if it can persuade the Court that there was some kind of a restraint of trade in the past, that restraint, even though no longer in existence, will in some measure justify the Government's prayer for injunctive relief. Without pausing to consider whether injunctive relief for the future can on any basis be justified by the invocation of past transactions whose economic consequences have been dissipated, we shall now show the Court that the Government's contentions with respect to these instances are unfounded and that in fact no restraint of trade occurred.

A. TETRAETHYL LEAD

1. The Government asserts that General Motors' decision to have du Pont manufacture tetraethyl lead was due to "du Pont's inside influence" (Br., p. 131), a contention which it admits is contrary to the findings of the trial court that (R. 426): "The record, rather, establishes that the services of du Pont as a manufacturer were secured by General Motors in the unrestrained exercise of its own judgment."

The evidence fully supports that finding. Kettering was the man principally responsible for the decision. This is shown by two contemporaneous documents (GTX 610, DP 65, R. 612, 1242, 4302, 5717), Kettering so testified (R. 1550, 1584), and the court so found (R. 426). Kettering testified that the reason for his decision to ask du Pont to manufacture tetraethyl lead was simply that "they were the best chemists that we knew of in the country", and denied that du Pont's stock in General Motors was in any way a factor in his decision (R. 1584).[56]

Certainly General Motors' decision not itself to undertake the manufacture of tetraethyl lead does not constitute a restraint on trade, as the Government seems to suggest (Br., p. 136). Sloan, who concurred in Kettering's decision, testified that General Motors had no competence in the field of chemical manufacture, and there is no proof to the contrary (R. 1248-1249). Nor does the Government suggest any chemical manufacturer to which Kettering could more reasonably have turned. Du Pont was then regarded as one of the top manufacturers of organic chemicals (Harrington, R. 1731-1732) and had, during the war, shown that it could handle dangerous materials. Moreover, contemporary documents, as well as Kettering's own testimony (R. 1524-1526), reveal that Kettering and his staff had been accustomed to turn to du Pont for assistance in chemical matters relating to antiknock problems before either du Pont or Kettering had any relation to General Motors (DP 93, R. 881, 5859).

Disregarding all of this evidence—and indeed disregarding entirely throughout its discussion of the events relating to tetraethyl lead the extensive testimony of the persons principally involved, Sloan, Kettering, Irenee du Pont and Harrington—the Government challenges the findings of the

---

[56]It is significant that the Government does not at any point in its brief challenge Mr. Kettering's stature or independence—although by its present contention it directly challenges his veracity.

trial court by quoting from a few selected documents. It quotes (Br., p. 48) from a letter in which one of Durant's assistants stated to du Pont in 1919 that "It is presumed that the marketing of this chemical will be a matter of interest to the du Pont organization, and that the expense of developing it will be borne by your research department" (GTX 599, R. 612, 4296). The word "presumed" is equated with du Pont's "inside influence". The balance of the letter, however, shows that the writer was not speaking of a chemical discovery which General Motors might make, but of a proposal that du Pont undertake its own research program at its own expense; it was, logically enough, "presumed" that if du Pont made any marketable discovery it would be interested in marketing it. The proposal was, in fact, rejected (GTX 558, R. 608, 4252).

The Government next quotes (Br., p. 49) from a letter in August 1920 from Midgley to du Pont in which he confirmed his understanding of the results of a conference in Wilmington: "I understand that the Du Pont Company will cooperate with our company in placing aniline on the market" (GTX 601, R. 612, 4298). "Understand" is again what attracts the Government. In context, of course, it has no reference to stock ownership or "inside influence"; it was simply Midgley's interpretation of the results of a trip made to Wilmington by him and Kettering to try to get du Pont to manufacture aniline. In fact, it was an inaccurate interpretation; du Pont had not been persuaded that the proposal was commercially sound (GTX 602, R. 612, 4300).

The Government also emphasizes that du Pont's first information about the discovery of tetraethyl lead—not "immediately" as the Government asserts (p. 132) but several months after the discovery—was by a memorandum from Pierre du Pont, then president of General Motors, to Irenee du Pont (GTX 610, R. 612, 4302). The Government ignores the fact, which is stated in the memorandum itself,

that Kettering had already expressed his desire to talk to du Pont: "Kettering would like to take up the question of manufacture with the du Pont representatives at an early date." It ignores the fact that the memorandum, in March 1922, was not followed by action by du Pont; rather Irenee du Pont, to whom it was addressed, waited to hear from Kettering, which he did about three months later in the form of an invitation to visit Dayton to discuss the problem (Irenee du Pont, R. 885; Kettering, R. 1546-1547). Finally, it ignores the further evidence that it was not until Kettering later visited Wilmington and inspected and approved du Pont's facilities and plans that du Pont was asked by Kettering to undertake manufacture (Irenee du Pont, R. 887-891; Kettering, R. 1549; Harrington, R. 1739-1740).[57]

2. The Government also contends (Br., pp. 132-133) that the same alleged "inside influence" prevented manufacture by Standard Oil of New Jersey or by any other company and thus maintained du Pont as the sole supplier of tetraethyl lead. The findings (R. 426) and the evidence contradict this contention.

After Standard Oil invented a cheaper method of producing tetraethyl lead, General Motors offered, and Standard Oil refused, a "similar contract to the one now in force with the du Pont Company" (GM 256, R. 1558, 7346). Thereafter Standard Oil changed its mind, and with the agreement of General Motors undertook to produce tetraethyl lead. Because of Standard Oil's lack of experience in dangerous chemical processes it failed to take adequate precautions and its producing operation at Bayway ended with a disaster in which the entire working

---

[57]The Government twice refers (Br., pp. 50, 132) to the fact that du Pont was informed of the discovery three weeks before the application for a patent was made. Kettering was questioned about the significance of that at the trial and testified that when dealing with reputable manufacturers "I have done that quite often" (R. 1605).

force was poisoned and a number of employees lost their lives. The public clamor that followed endangered the whole enterprise; the production, distribution and use of tetraethyl lead as a fuel additive were temporarily discontinued and it was not until du Pont persuaded the Surgeon General of the United States that tetraethyl lead could be manufactured safely that the enterprise was resumed. See pp. 120-122, *supra.* The Government conducts its argument as if the Bayway disaster had never occurred, yet it was that disaster which ended the manufacturing operations of Standard Oil, and gave a powerful demonstration to those engaged in the Ethyl enterprise of the importance of competence and experience in the manufacturing process.

The Government ignores the fact that after the enterprise was again in operation Ethyl attempted to develop competent alternative sources of supply, and that its efforts failed, not because of the influence of du Pont, but because those to whom Ethyl turned were well aware of the difficulties and dangers in the process, and (doubtless because of the lessons taught by the Bayway disaster) declined to engage in the enterprise. Thus, Ethyl attempted to interest Dow Chemical Company in manufacturing tetraethyl lead, but that company declined to do so because of the hazards and dangers involved (see pages 125-126, *supra*). Similarly, Ethyl made a contract with American Research Laboratories looking toward production of tetraethyl lead, but that company, after considering the difficulties involved, asked to have the contract cancelled because it did not care to assume the manufacturing responsibility (see p. 126, *supra*).

The Government does, indeed, refer to the latter episode, but does so in terms calculated to convey the impression that the contract was cancelled at the behest of Irenee du Pont. This is not the fact, as the record shows; the contract was cancelled because American Research Labora-

tories became convinced of the dangers involved and of its own lack of experience and competence to deal with those dangers (see p. 126, *supra*).[58]

The facts which have been recited above are enough to dispose of the Government's contention that it was du Pont's influence or control that prevented others from manufacturing tetraethyl lead. That argument, moreover, is not even supported by the documents and excerpts from documents to which the Government refers in its brief (pp. 133-135).

The first group of documents cited by the Government relates to the events immediately prior to the formation of Ethyl (GTX 621-624, R. 613-614, 4333-4342). The documents do not support the Government's contention. They do show that Kettering and Midgley continued to urge Standard to become a manufacturer (GTX 622, R. 614, 4337, Kettering, R. 1566). Sloan was apprehensive, not because of du Pont's interests, but because he had doubts both about Standard's technical competence and about the wisdom of permitting a major oil and tetraethyl lead distributor to become also a manufacturer under a process which promised to become of controlling importance; "I do not say that I fear we will not get a square deal, but that

---

[58]The prior experience of American Research Laboratories had been in the manufacture of a serum for hog cholera. The record shows that they were not careful in their manner of dealing with tetraethyl lead (Webb, R. 1627-1632, 1642-1644). Irenee du Pont's letter shows that his objection, which was made after the contract was signed, was based on the sound ground that another Bayway disaster might be permanently fatal to the enterprise. Irenee du Pont said: "If another disaster happens in Colorado no amount of explaining will excuse our directors for having encouraged novices to undertake such a dangerous operation." (GTX 711, R. 625, 4532).

Neither Irenee du Pont nor anyone else in the du Pont Company made any objection to Webb's attempt to interest Dow in the manufacture of tetraethyl lead, or to the arrangements made by Ethyl to have bromine produced for Ethyl by Ethyl-Dow Company, which was formed jointly by Ethyl and Dow for that purpose (Irenee du Pont, R. 909-910, DP 106, R. 910, 5885; see pp. 126-127, *supra*).

naturally comes into my mind" (GTX 622, R. 614, 4337, Sloan, R. 1360).

The Government simply refuses to acknowledge what this document says, or to believe Sloan's testimony that he was not motivated by a desire to benefit du Pont (R. 1360). The additional documents are proof, however, not of Sloan's duplicity, but of his veracity. In GTX 623 (R. 614, 4340) Irenee du Pont wrote to Sloan suggesting that Standard Oil be referred by General Motors to du Pont to see if du Pont were interested in Standard's patent. Sloan did not accept the suggestion. He did precisely the opposite of what Irenee du Pont had suggested, and told Standard Oil that the negotiations relative to its patent would be conducted by General Motors (GTX 624, R. 614, 4342, Irenee du Pont, R. 949, Sloan, R. 1257-1258).

When Standard Oil and General Motors did meet and negotiate, Standard Oil was expressly recognized as a possible manufacturer for Ethyl (GTX 668, p. 5, R. 618, 4383 at p. 4387). It is not true that "du Pont suggested that Standard limit its production to a 100-gallon plant" (Gov't Br., p. 52). If the Government would recognize that there is more in the record than in its own selected documents, it would perceive, as the trial court did (R. 414), that a contemporary document (GM 87, p. 3, R. 1263, 6826 at p. 6829) shows that Standard Oil, not du Pont, proposed that its plant be of a 100-gallon per day capacity, and that the letter to which the Government refers as authority for its statement of du Pont's "suggestion" (GTX 660, R. 616, 4363) is no more than Irenee du Pont's recommendation to General Motors that the Standard Oil plan be approved. Sloan did approve (GTX 661, R. 616, 4365, Sloan, R. 1256, 1258). Nor was it Sloan, as the Government contends (p. 133) who was urging that du Pont greatly expand its production; the same contemporaneous document (GM 87, p. 3, R. 1263, 6826 at p. 6829) shows

that this was also a Standard Oil recommendation, in which he simply concurred.

The Government also relies upon statements extracted from two letters written by Sloan in which he expressed the view that du Pont should be retained as the sole manufacturer of tetraethyl lead (GTX 710, 751, R. 625, 629, 4530, 4585). The first of these letters (GTX 710, R. 625, 4530) was written on December 12, 1924, a little more than a month after the Bayway disaster, and when the whole enterprise was hanging in the balance because of Standard Oil's failure and the public alarm that it had caused. The letter is evidence of Sloan's recognition of the dangers of incompetence and inexperience, and not proof of du Pont's influence or control. The second letter to which the Government refers (GTX 751, R. 629, 4585) and which it quotes in part in its brief (pp. 134–135) was written by Sloan in 1930. Even the portions of that letter which are quoted by the Government show that Sloan's remarks about confining manufacture to one source of supply were prompted by the interests of General Motors and Ethyl, not the interests of du Pont, when the Ethyl patents expired. The Government fails to include in its quotation a paragraph in which Sloan urged Lammot du Pont to facilitate the negotiations for an exchange of know-how and to broaden the basis upon which know-how and technical information were to be given to Ethyl. The negotiations to which he referred culminated in the arrangements which made it possible for Ethyl to engage independently in the production of tetraethyl lead after the expiration of the patents.[59]

---

[59]The documentary evidence shows that Sloan had learned from a conversation with Lammot du Pont that du Pont had developed patents and methods in the manufacturing of tetraethyl lead which would make it difficult for anyone else to manufacture, and immediately wrote Webb, the president of Ethyl, that he should concern himself about the situation Ethyl would be in when its use patent expired (GTX 748, R. 628, 4577). Webb replied that he had been concerned, and was currently engaged in trying to negotiate with du

3. The Government also makes the charge (Br., p. 134) that Sloan "sided with" du Pont or "worked in harmony" with du Pont in negotiations over the price of tetraethyl lead. When the letters cited by the Government (GTX 664, 704, R. 617, 624, 4371, 4505) are read in their entirety they disclose only that Sloan on occasion recognized that there was some merit in the positions that du Pont had taken in its arm's-length bargaining with General Motors and Ethyl.[60] Neither the letters themselves nor any evidence outside the letters supports the Government's innuendo that Sloan behaved improperly. The truth is that Sloan kept out of the negotiations which were conducted by Webb of Ethyl and Howard of Standard Oil (R. 421; Sloan, R. 1273-1275, GTX 680, R. 619, 4459). The direct answer to

---

Pont a contract under which Ethyl would get du Pont's patents and know-how as of January 1, 1938, in exchange for Ethyl's agreeing to buy 50 percent of its tetraethyl lead requirements from du Pont (GTX 749, R. 629, 4579). Sloan replied that he was not opposed to giving du Pont 50 percent of Ethyl's business, but that he felt strongly that Ethyl was entitled to any of du Pont's improvements resulting from manufacture under Ethyl's patents (GTX 750, R. 629, 4582). It was then that Sloan wrote the letter from which the Government quotes. They do not quote the significant sentence in which Sloan urges Lammot, in connection with this know-how and patent clause "to facilitate this and broaden the base upon which it is developed." After the arrangements had been negotiated, Sloan supported the arrangements which were required in order that Ethyl might become a manufacturer (GTX 797, R. 635, 4815), although Lammot du Pont felt that Ethyl did not have the background to undertake the manufacture of a dangerous chemical (GTX 781, R. 633, 4771).

[60]The first of Sloan's letters (GTX 664, R. 617, 4371) which to the Government shows that "Sloan seemed more interested in protecting du Pont than in bringing down the price of tetraethyl lead" (p. 134), is no more than a suggestion that the amortization of du Pont's plant be provided by a joint guarantee of General Motors and Standard Oil, in order to reduce the immediate price of the product. The other letter which the Government cites to show Sloan's bias toward du Pont on price matters (GTX 704, R. 624, 4505), asserts simply that he believed it unnecessary to discuss with du Pont its costs of production, because he was "satisfied to base our commercial program on such price as you might name, knowing that it is to your interest as well as ours to get the price down as low as is consistent."

this particular innuendo of the Government is supplied by the fact that du Pont's prices to Ethyl were consistently reduced in the decade from 1926-1937, and fell during that period from $1.433 per pound to $ .264 (DP 119, R. 1783, 5914), the reductions being made in many cases at times when du Pont by contract was entitled to a specific and higher price (DP 123-125, R. 1785, 5918-5920, Harrington, R. 1783-1787).

B. "FREON" REFRIGERANTS—KINETIC CHEMICALS

The Government's contention with respect to "Freon" (Br., pp. 82-83, 136-138) rests upon the assertion that du Pont became a joint owner of Kinetic Chemicals, Inc., because of its stock ownership in General Motors rather than on the basis of an independent business judgment by General Motors. The Government specifically asks the Court to reject the findings of the trial court that (R. 435):

> "* * * On the basis of the evidence of record, particularly the testimony of Sloan and Pratt, the Court finds that General Motors entered into the contract because those responsible in General Motors believed that Freon could best be manufactured by du Pont rather than by General Motors itself or by some other chemical company."

The Government's argument does not even mention the testimony of Sloan and Pratt to which the trial court referred, although that evidence is not contradicted by other proof. On the contrary, it is confirmed in important respects by the contemporaneous documents.

The Government relies primarily upon the fact that when the question of manufacturing "Freon" was under consideration Sloan and Pratt stated that they did not think it wise for General Motors to enter directly into the chemical business and to undertake a new process of manufacture which involved the handling of difficult and dangerous chemicals. The fact that Sloan and Pratt held that

belief does not prove that they were controlled or influenced by du Pont, or that they were prompted by any desire to favor du Pont. The decisive question is whether they entertained that opinion because of du Pont's stock ownership, or because of their honest judgment with respect to the interests of General Motors.

The contemporaneous documents and the oral testimony leave no doubt that the decision was made in the interests of General Motors and not in the interests of du Pont or because of any du Pont influence or control. When the head of Frigidaire suggested that General Motors should undertake the manufacture of "Freon", Pratt stated that he would take the matter up with Sloan, saying (GTX 839, R. 639, 4976): "It is quite a fundamental step for us to start General Motors in chemical manufacture. Up to this time we have more or less elected to confine ourselves to the mechanical side of manufacture and I do not want to depart from this until very thorough consideration has been given to all of the factors involved." Sloan, when Pratt did speak to him, agreed that General Motors should not undertake manufacture. He testified (R. 1351):

> "That was the position I took on the basis of lack of competence. Further, more than that, the manufacture of this particular material involved certain questions of danger in manufacture, somewhat analogous to tetraethyl lead, perhaps not so much, and I thought it was something we should not engage in. I told Mr. Pratt that."

The fact that Pratt made his decision on the basis of the interests of General Motors and not those of du Pont is corroborated by the letter he wrote in 1931 (GTX 899, R. 652, 5129), commenting on Article 7 of the agreement between General Motors and du Pont creating Kinetic. That article provided, in substance, that future chemical developments originating in the laboratories of General Motors

should be offered by General Motors to Kinetic "on such terms as may be mutually agreed upon" and that if no agreement was reached in six months General Motors should be free to dispose of the developments elsewhere. The article was included in the contract at Pratt's suggestion and not the suggestion of du Pont (Pratt, R. 1491-1492, GTX 842, R. 639, 4979). In his 1931 letter, in commenting on the article, Pratt said (GTX 899, R. 652, 5130):

> "This clause was placed in the Kinetic agreement because we wanted to remove from some of our organization the temptation of attempting to build up within General Motors an independent chemical manufacturing activity, and to place any developments along chemical lines in an organization in which we have confidence from the standpoint of their ability to carry on chemical manufacturing processes."

This statement, it should be noted, is cast entirely in terms of the interests of General Motors and the last clause of the sentence, with its emphasis on ability, reflects the doubts which both Pratt and Sloan entertained about the competence of General Motors to manufacture chemicals. This document, therefore, instead of supporting the Government's contention, in fact confirms the testimony of Pratt and Sloan.

The Government's characterization of Pratt's letter as an "explicit expression of the General Motors understanding of the perquisites of du Pont" (Br., p. 137) is in no way supported by the text of the letter or by any other contemporaneous document, and is flatly contradicted by the testimony of Pratt and Sloan. Indeed, the terms of Article 7 itself make the characterization of the Government inadmissible. That article placed no binding and permanent obligation upon General Motors except to give Kinetic six months in which to decide whether it would accept the terms

on which General Motors might care to have a discovery developed.[61]

In an effort to support its attack on the trial court's findings the Government also attributes some sinister significance to the fact that "the inventor and his associates and the President of Frigidaire (the General Motors Corporation which was chiefly interested) wanted to manufacture the new product themselves" (Br., pp. 136, 58).[62] The fact that Biechler, manager of the Frigidaire Division, wanted General Motors to manufacture "Freon" does not establish that General Motors, in rejecting his recommendation, was influenced or controlled by du Pont or that Sloan and Pratt made their decision in the interests of du Pont. At most, it proves that Biechler did not agree with Sloan and Pratt that

---

[61] Article 7 has no present significance. It merely reflected General Motors' decision not to enter into chemical manufacture directly, and gave General Motors an option to have future chemical discoveries developed by a competent chemical organization in which it had a 49 percent interest. Moreover, the article was never operative in that no discovery was offered to Kinetic pursuant to its terms, and was cancelled at General Motors' request and after General Motors concluded that it was unenforceable, and without objection from du Pont, four years before the complaint was filed in this case (R. 429-430; Carpenter R. 2740, DP 133, 1814, 5945).

[62] The Government overstates the facts. GM 233 (R. 1484, 7295), which it cites as authority for its statement, was a recommendation in July 1929 by Biechler, the manager of Frigidaire, that Frigidaire undertake small scale production for test purposes, a recommendation which he says is concurred in by Midgley and his associates. This recommendation, however, was *approved* by Pratt (R. 426; GM 234, R. 1484, 7296, Pratt, R. 1485). The letter from Biechler to Pratt the following year, recommending that General Motors undertake full scale commercial production (GTX 838, R. 638, 4975), does not state that Midgley or anyone else agreed with the recommendation. Another exhibit, however, shows that Biechler's assistant, Williams, did not share Beichler's view (DP 130, R. 1807, 5926), and Kettering testified that he concurred in the decision to invite du Pont to undertake manufacture (R. 1596). It may be added that in less than two months Biechler himself wrote du Pont: "Everybody here in Dayton is happy you will send an operator to take over our present semi-works plant. The sooner the better, and I will be happy to know who the man is and when he will be here, because we will receive him with open arms" (DP 129, R. 1806, 5925).

it would be unwise for General Motors to become a chemical manufacturing company. The wisdom of the view taken by Sloan and Pratt was amply demonstrated by events.[63]

C. THE ETHYL ALCOHOL-GLYCERINE ANTIFREEZE INCIDENT (1926)

This is the third of the "specific instances" which the Government asserts "demonstrate the imposition of restraints of trade." No purchases by General Motors from du Pont were involved, but the Government asserts that the incident proves "that du Pont did not deal at arm's length" (Br., p. 129).[64] The incident involved the question whether the instruction books prepared by General Motors for purchasers of its automobilies should recommend glycerine or ethyl alcohol as an antifreeze material. Du Pont as an alcohol producer brought its views to the attention of General Motors, as did the glycerine producers (GTX 326, 333, 334, R. 509, 510, 3842, 3859, 3853). The question posed by the Government's contention is whether in this incident General Motors favored du Pont, thereby giving it an advantage over the producers of glycerine.

The evidence shows that General Motors dealt impartially with both sides, and that its final action was based on the facts and resulted in no favor or preferential advantage

---

[63]The manufacturing process was extremely complex (Harrington, R. 1802), and the semi-works process which General Motors had developed proved to be so expensive as to be commercially impossible; du Pont devised a new one (Harrington, R. 1802-1803, DP 128, R. 1803, 5922). A vital raw material, anhydrous hydrofluoric acid, was unavailable in the quantity needed; du Pont invented and patented for Kinetic a process by which it was able to produce it for itself (Harrington, R. 1805-1806, DP 131, R. 1808, 5929). Du Pont assumed the burden of tests and demonstrations which changed fire and building code regulations in several cities which had at first refused to permit "Freon" to be used (R. 429; Harrington, R. 1821-1822, GTX 883, R. 647, 5062 at pp. 5075-5076).

[64]In 1926 General Motors was not buying any of its requirements of antifreeze from du Pont; it did not begin to buy from du Pont until nearly ten years later under circumstances fully explained at pages 85-87, *supra*.

to du Pont. At the very outset of the discussion Sloan advised du Pont of the position which General Motors maintained throughout—"We must, of course, be guided by the facts in the case" (GTX 320, R. 507, 3833). Similarly, he suggested to the Chief Engineer of Chevrolet that General Motors might well avoid stating a preference, and give the facts as to each (GTX 326, R. 509, 3842)—and for a wholly sensible reason: "It seems to me that if we indicate a preference we are discriminating against some manufacturers and distributors and all that sort of thing, all of whom are potential users of General Motors products."

Du Pont pressed the advantages of alcohol, pointing out that the great majority of automobile manufacturers were recommending only alcohol (GTX 334, R. 510, 3859), and submitted evidence of troubles with engines and radiators which glycerine users had experienced (GTX 330, 332, R. 510, 3847, 3851). General Motors referred the matter to the General Technical Committee which verified the possible dangers of glycerine. As a result, General Motors decided to do what Sloan had suggested a year before—state in the instruction books the facts on both products—that alcohol was less expensive but would damage the finish if spilled; that glycerine would corrode the engine and clog the radiator if the cooling system were not airtight (GTX 336, R. 511, 3861).

The Government characterizes the instructions that General Motors finally adopted in various ways, saying at one point that the instructions were "deliberately slanted" in favor of alcohol (Br., p. 47) and in another passage that they were "a weasel-worded set of instructions which could be expected to lead the reader to use alcohol" (Br., p. 130). There are two answers to these accusations, each of which is conclusive. The substance of the statement to be included in the instructions is set out in full in GTX 336 (R. 511, 3861). The relevant paragraph reads as follows (R. 3861):

> "That we would point out that there were two anti-freeze materials—alcohol and glycerin and components of glycerin, like ethylene glycol and prestone; that we would explain the advantages of alcohol and that the disadvantage was that if it was spilled on Duco it disfigured same. We would then deal with glycerin and materials having it as a major ingredient and would point out that it was satisfactory if used in strict accordance with the manufacturer's recommendation, but that any air allowed to get into the system would cause decomposition and corrosion of the engine operating parts and further, that the material was likely to clog up the radiator. In other words, our purpose is to state the facts as we found them in the report which was submitted to the Technical Committee."

There is nothing "slanted" or "weasel-worded" in this statement; it refers to the advantages and disadvantages of both glycerine and ethyl alcohol without indicating any preference whatsoever for one as opposed to the other.

The second answer to the Government's contention is that the Glycerine Manufacturers Association, which had been active in presenting its side of the matter, "had no fault to find" with the statement which was adopted by the General Technical Committee of General Motors and which has been quoted above (GTX 336, R. 511, 3861). It is remarkable that the Government should be able to detect a slant or a distortion in a statement to which the glycerine manufacturers made no objection.

V

The Facts Relating to Other Important Commercial Decisions of General Motors, Which Are Ignored by the Government, Disprove the Government's Contentions

The Government's case is based in large part upon inferences which it asks the Court to make in the face of

uncontradicted documentary and testimonial evidence which is inconsistent with the conclusions sought to be established by the Government. For example, although there is direct and substantial evidence that General Motors purchased fabrics and finishes from du Pont for competitive reasons, the Government argues from inference that the purchases must have been motivated by preferential, non-competitive considerations. This form of argument, resting as it does on inference, and lacking the support of direct and substantial evidence, must necessarily be tested by reference to other inferences that may properly be drawn from analogous subject matter. Thus the inferences which the Government seeks to draw in those instances in which General Motors purchased from du Pont must at the very least be tested against what General Motors did in other comparable situations in which du Pont's commercial interests were involved.

The logic of this test is reinforced by the nature of the arguments with which the Government supports its inferences. Whenever in the course of its argument the Government is pressed by a lack of direct evidence, it falls back upon the thesis that du Pont's stock interest in General Motors necessarily colored the commercial relations between the two companies and gave du Pont a commercial advantage. This inference is asserted in the broadest terms: we are told without qualification that the "inevitable result" of du Pont's stock interest "was that it would receive trade preference over its competitors"; that such a preference was "inherent in the relationship" (Br., p. 127); and that "whenever a business judgment is required in a situation in which du Pont was in competition with other suppliers the stock interest cut across normal competition and resulted in a preference being given to du Pont" (Br., p. 72).

If there is any merit whatsoever in these arguments of the Government they must apply with equal validity to all aspects of the commercial relations between the two companies. A consequence which is "inevitable" or "inherent"

and which operates whenever a business judgment is required cannot be selective in its operation.

The following paragraphs of this section describe briefly certain major commercial decisions which were made by General Motors, notwithstanding that, in each instance, du Pont's commercial interests would have been better served by a different decision. General Motors' reasons for these various decisions can all be classified as competitive considerations of one kind or another. The importance of this evidence is that it shows that General Motors did look to such competitive considerations even though du Pont's interests were involved. In each of the following instances we ask the Government to explain what happened to the non-competitive, preferential position which was allegedly assured to du Pont by reason of its stock interest in General Motors.

Frigidaire's use of Porcelain. In 1927, Frigidaire was finishing practically all of its refrigerators with "Duco".[65] At that time, in a decision in which Pratt participated, Frigidaire decided to invest $1,000,000 in porcelain enameling equipment. It has since used such equipment, instead of paints manufactured by du Pont, to finish a substantial portion of its refrigerator output (GTX 1324, DP 337, R. 2496, 2400, 5281, 6286). Notwithstanding the development of "Dulux," which other major manufacturers have used exclusively to finish the exterior of refrigerators, Frigidaire has continued to finish approximately one quarter of its entire production with porcelain, and is the only major manufacturer that continues to use porcelain for this purpose (DP 351, 352, R. 2408, 6307, 6308, O'Donnell, R. 2406). Furthermore, Frigidaire's insistence upon the use of porcelain for the interior of all of its refrigerators has, as a competitive matter, stood in the way of other

---

[65]This was prior to the development of "Dulux," which supplanted "Duco" as a refrigerator finish.

manufacturers adopting "Dulux" for that purpose. Westinghouse and Crosley have both informed du Pont that they would prefer to use "Dulux" on refrigerator interiors and several smaller companies have used it for this purpose (DP 345, 346, 348, 349, R. 2424, 2426, 2418, 2420, 6300-6304, Kreuer, R. 2419, 2423, 2425, Norberg, R. 2479).[66] In addition, General Motors finishes its washing machines and driers with porcelain, while every other manufacturer of these products uses "Dulux" or a similar type of paint (DP 352, R. 2408, 6308, O'Donnell, R. 2407, 2410).

Neoprene. This synthetic rubber, which was developed and is manufactured by du Pont, is used by Chrysler and Ford in substantial quantities. Both use it as standard equipment for radiator hose; Chrysler uses it for adhesives, seals, gaskets, and universal joint boots; Ford uses it for cable covering. None of the General Motors cars have put neoprene to any of these uses except Buick, which tested neoprene for radiator hoses and abandoned it. Furthermore, in the purchasing of fabricated rubber products from their suppliers, Ford and Chrysler specify neoprene to a much greater extent than does General Motors (DP 353, 354, 357, 358, R. 2507, 2509, 2513, 2514, 6309, 6310, 6314, 6316, Bridgwater, R. 2507-2518).

Brake Fluid. General Motors has refused to buy fluid developed by du Pont and sold for use in hydraulic brake systems. The price of du Pont's fluid has been comparable to, or lower than, the price of competitive fluids, and determined sales efforts by du Pont from 1934 through 1940 established that its fluid met engineering specifications (DP 383-398, R. 2625, 2641, 2650, 2702, 2645, 2650, 6355-

---

[66]A du Pont salesman reported in 1940 that the Frigidaire management had advised him of Frigidaire's opposition to the use of "Dulux" on refrigerator interiors and had threatened "that they would fight it with every facility at their command including advertising to show the advantages of porcelain over "Dulux" (DP 348, R. 2418, 6303).

6380). General Motors has preferred, however, to develop a brake fluid of its own in collaboration with one of du Pont's principal competitors, the Union Carbide and Carbon Company, and has purchased the chemical ingredients for its fluid from that Company (DP 395, R. 2645, 6373, Walker, R. 2642). For the six-year period, 1946-1951, General Motors' purchases of brake fluid, none of which were made from du Pont, totaled $11,500,000 (DP 399, R. 2702, 6381).

Adhesives. Du Pont sells a full line of cements and adhesives (DP 565, R. 3000, 6485 at 6489-6500). In 1945 its Fabrics Division developed an adhesive called "Fairprene" 5115, one of the principal uses of which was to cause weather stripping to adhere to automobile bodies. Until 1951, du Pont was unsuccessful in its efforts to sell "Fairprene" 5115 to Fisher Body, which was purchasing its requirements of this adhesive from competitors of du Pont. In 1951, Fisher Body's purchases from du Pont represented about 3 percent of its requirements (Nickowitz, R. 2095-2096). In 1947, the total volume of adhesives and cements sold by du Pont to all General Motors Divisions was $12,000; in that year General Motors' purchases of adhesives from competitors of du Pont totaled $3,056,000 (DP 570, GTX 1343A, p. 8, R. 3007, 2846, 6528, 5316 at 5323).

The Position of the Dow Chemical Company as a Supplier to Ethyl Corp. Tetraethyl lead, to be used successfully as an anti-knock additive, must be blended with large quantities of a chemical, ethylene dibromide, to prevent engine damage. Over the years, first General Motors and then Ethyl have obtained their requirements of ethylene dibromide exclusively from the Dow Chemical Company, either directly or through the jointly-owned Ethyl-Dow Corporation which was formed in 1933 (Sloan, R. 1281). Du Pont was not consulted about Ethyl's arrangement with its competitor Dow, and contemporaneous correspondence discloses that du Pont first found out about such arrange-

ments "from the newspapers." (DP 106-108, R. 910, 5885-5889).

Other products sold by du Pont which General Motors. purchases from competitors of du Pont. There is a substantial body of evidence in the record which discloses the manner in which du Pont has attempted to sell various chemical products to General Motors and the extent to which those efforts have proved successful or unsuccessful over the years. The variety of the results achieved by. du Pont is in itself proof that du Pont enjoyed no over-riding preference or competitive advantage in its dealings. with General Motors. The evidence referred to covers the following products: rubbing compounds and motor enamel, which in recent years the General Motors Car Divisions have purchased almost exclusively from competitors of du Pont (Williams, R. 1985, 1986); fabrics for insulating material, which the Electromotive Division of General Motors refuses to buy from du Pont, but which Electromotive's competitor, the American Locomotive Company, buys 100 percent from du Pont (Nickowitz, R. 2110); fabrics used in the manufacture of diaphragms, which the A. C. Spark Plug Division refuses to buy from du Pont but which du Pont sells to Chevrolet and to the fabricators who supply Chrysler with diaphragms (Nickowitz, R. 2107, 2108); plastics for steering wheels (which Inland Division bought not from du Pont but from Tennessee Eastman) and for various small parts used in automobile manufacture (DP 330, R. 2775, 6277; Gillie, R. 2596, 2604-2607); casehardening compounds, which du Pont has sold with significantly greater success to other automobile companies than it has to General Motors (DP 362, R. 2538, 6330, K'Burg, 2539); electroplating products, which some Divisions of General Motors have purchased from du Pont, while others have adopted systems which use competing products (K'Burg, R. 2552-2570).

It is established by the Government's own evidence that General Motors has purchased the products listed above in substantial quantities from competitors of du Pont. GTX 1343A (R. 2846, 5316) shows that in 1947 General Motors purchased from competitors of du Pont anodes for use in electroplating in the amount of $1,206,000 and chemicals of all kinds in the amount of $3,183,000. Du Pont's sales to General Motors of anodes in that year were insignificant and its total sales of chemicals such as ammonia, sulphuric and other heavy acids, polyvinyl alcohol and acetone to General Motors, amounted to $439,000 (GTX 1344, R. 2846, 5340, and DP 571-572, R. 3008, 6529, 6530).

VI

The Facts Do Not Support the Government's Contention That du Pont Intended, by Control or Influence, to Obtain a Non-Competitive, Preferential Advantage in its Commercial Relations With General Motors.

A substantial part of the Government's brief is devoted to the contention that du Pont had an unlawful intent to control or to restrain the commercial freedom of General Motors so as to obtain a preferential, non-competitive position with respect to General Motors' trade (pp. 29-40, 113-127). The Government asserts (p. 113) that proof of this intent is not essential to its case but that it is, nevertheless, "highly significant". Whatever this significance may be, the Government appears to recognize that it cannot prevail merely by proof of the alleged intent but must also show that in fact du Pont has restrained trade

by obtaining a non-competitive preference in its commercial relations with General Motors (Br., pp. 70, 113, 143).[67]

The significance that the Government finds in intent appears to take two forms. In the first place the Government seems to believe that the deficiencies in its proof of the existence of the alleged preference can in some way be cured by proof of intent. In the second place the Government suggests that if there is any doubt about the illegality of the alleged preference *that doubt may* be removed by proof of the fact that du Pont specifically intended to acquire the preference (Br., pp. 112, 113). There are two answers to these arguments. In the first place, as we have seen in the preceding sections of this brief, du Pont has never had and does not now have any non-competitive advantage in the trade of General Motors. The trial court so found and its findings are fully supported by the evidence. The force of that evidence cannot be overcome by the Government's arguments with respect to intent. On any view of the matter, proof of intent is not proof of the existence of the preference; if there has been no preference there has been no restraint of trade and the question of intent is immaterial.

But there is still another answer to the Government's objections. Whatever legal significance the Government may attribute to intent, the asserted factual basis of its argument does not exist. The evidence does not support

---

[67] At page 70 the Government asserts "the gist of the Government's case is that du Pont acquired control of General Motors with the specific purpose *and effect* of obtaining an illegal preference * * *" and that "the restraint of trade *thus imposed* is of the classic type * * * the commercial relations between the restrainer and the restrained are governed not by the economic laws of free competition but by an external influence * * *." On page 113 the Government in defining the alleged combination says "we mean a restraint *imposed by* force of the relationship rather than one arising from an express agreement." And on page 105 of the brief the Government describes its case in terms of "a situation in which du Pont *has acquired* a preference, etc." (Italics supplied).

the charge that there is, or has been, an intent on the part of the du Pont Company to obtain a non-competitive, preferential advantage in the trade of General Motors.

The Government bases its intent argument upon sentences or passages which it has excerpted from documents and upon its characterization of, or assertions about, other documents which it does not quote in its brief. In considering these documents it is important to bear in mind the nature of the intent which the Government is attempting to prove. The unlawful intent which the Government apparently asserts is an intent on the part of du Pont to use its stock interest in General Motors to obtain, by either control or influence, a preference in the trade of General Motors. The Government states its concept of unlawful intent in precisely these terms.[68] It is this particular kind of intent, and no other, which the Government has undertaken to prove.[69] Mere proof of a desire on the part of du Pont to sell goods to General Motors will not serve the Government. On its own terms the question is whether there was an intent to sell goods on a non-competitive and preferential basis.

In its discussion of intent, however, the Government fails to distinguish between a desire or purpose to sell goods to General Motors, on the one hand, and a desire or purpose to sell to General Motors on a preferential and non-competitive basis, on the other. As a consequence the Government treats documents which prove an intent to sell as if they

---

[68]On page 113 the Government asserts: "Du Pont formed the combination with General Motors with the intention of getting a preference in the trade of General Motors."

[69]We do not contend that the Government must prove a conscious intent to achieve a purpose known to be unlawful; we accept the view that the Government is attempting to prove "a conscious effort to accomplish the prohibited end" (Br., p. 114). In this case the "prohibited end" is a non-competitive, preferential advantage in the trade of General Motors; therefore on its own terms the Government must prove that du Pont intended to get that kind of an advantage.

established an intent to sell on a non-competitive and preferential basis.

The trial court considered the same documents and the same inferences urged as warranted by those documents upon which the Government now relies to establish the existence of an intent to obtain a preference in the trade of General Motors, and found on the basis of all of the evidence that du Pont did not intend to limit the commercial freedom of General Motors (R. 300-301, 302, 316, 360-361).[70] The evidence, including the particular excerpts relied upon by the Government, does not impair these findings, but on the contrary establishes that the trial court's findings on the point of intent, like its findings that there has been no preference, are fully supported by the facts.

A. DU PONT'S INTENTION IN MAKING AN INVESTMENT IN GENERAL MOTORS

The Government contends that du Pont invested in the stock of General Motors "with the specific purpose * * * of obtaining an illegal preference" in General Motors trade (Br., p. 70). The foundation of the Government's argument on this point is an excerpt from a detailed report written by Raskob, the Treasurer of du Pont, in 1917 in

---

[70]Much of the evidence on which the Government relies to prove intent is considered in the opinion of the trial court under the heading "Exchange of Data, Figures and Information on Suppliers by Certain Officers and Employees of du Pont and General Motors Including Requests and Inquiries by Certain Officers of du Pont on Volume of Trade Conducted with General Motors" (R. 348-361). In this section of the opinion, for example, the trial court considered substantially all of the evidence that is discussed at pp. 236-257, *infra*. At the conclusion of its review of this evidence the trial court found (R. 361):

> "* * * Nor does the evidence establish that du Pont dictated or controlled the purchasing policies and practices of General Motors *or sought to dictate or control those policies and practices*. In fact, the evidence shows that General Motors exercised complete freedom in determining where it would purchase its requirements of products of the kind that du Pont manufactured." (Italics supplied.)

which he recommended that du Pont invest in the stock of General Motors. The report is discussed at pp. 143-149, *supra*. The excerpt which is the last of five reasons given by Raskob for recommending the investment, is as follows (GTX 124; R. 479, 3221):

> "Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin, paint and varnish business of those companies, which is a substantial factor."

In addition to this excerpt there was other substantial evidence, both documentary and oral, before the trial court relating to du Pont's reasons for investing in the stock of General Motors. The trial court considered all of this evidence, including the Raskob report, and found (R. 300-301, 302):

> "Raskob's report, the testimony of Pierre S. and Irenee du Pont and all the circumstances leading up to du Pont's acquisition of this substantial interest in General Motors, as shown by the record, establish that the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business.
>
> * * * * *
>
> "The Court also finds based on all of the evidence of record that du Pont did not invest in General Motors with the purpose of restricting that company's freedom to purchase in accordance with its own best interests. Du Pont, the record shows, never intended to preclude General Motors from dealing with suppliers of its choice, never made any effort to so preclude General Motors, and did not limit General Motors' purchasing freedom.
>
> "Raskob's reports and other documents written at or near the time of the investment show that du

> Pont's representatives were well aware that General Motors was a large consumer of products of the kind offered by du Pont. Raskob, for one, thought that du Pont would ultimately get all that business, but there is no evidence that Raskob expected to secure General Motors trade by imposing any limitation upon its freedom to buy from suppliers of its choice. Other documents also establish du Pont's continued interest in selling to General Motors—even to the extent of the latter's entire requirements—but they similarly make no suggestion that the desired result was to be achieved by limiting General Motors' purchasing freedom. On the contrary, a number of them explicitly recognized that General Motors trade could only be secured on a competitive basis."

These findings represent a careful appraisal of all of the relevant facts and they are fully supported by the record.

In considering the Government's attack on these findings it must be remembered that the question at issue is the nature of du Pont's reasons for deciding to invest in the stock of General Motors. That is a question of fact which must be decided on the basis of all of the relevant evidence and not merely by reference to a part of the evidence. Raskob's state of mind is no doubt a relevant and significant component of the proof that must be considered to determine the intent of the du Pont Company in 1917 when it made the investment, and his statement in the report is a relevant and significant factor in determining his state of mind. But the statement is only one component of the proof that bears on Raskob's state of mind; its significance must be appraised in the light of other things said and done by Raskob, and his state of mind, when determined, is not itself a controlling or decisive factor. It, in turn, must be considered in the light of what was said and done by others in the du Pont Company who were also participants in the decision.

Raskob's words show that in December 1917 he believed that du Pont's interest in General Motors would in some manner secure for du Pont the entire paint, "Pyralin" and "Fabrikoid" business of General Motors. The basis of his belief and the manner in which he thought the result would be accomplished are matters of inference or conjecture. Raskob was not available to testify because he died before the trial. The one other important contemporaneous document which he wrote with respect to the stock acquisition—a report to the du Pont Finance Committee on the steps that had been taken in consummating the stock purchase and related arrangements[71]—makes no reference of any kind to General Motors' purchases from du Pont, or to any other commercial relations between the two companies (GTX 128, R. 481, 3234), a fact which suggests that even to Raskob the question of the purchases was not as significant as the Government's arguments assert.

Raskob was an executive of General Motors from 1918 until 1928, a member of its Executive Committee from 1921 to 1928, and a member of its Finance Committee from 1917 until 1937 (GTX 177, R. 492, 3397). There is no evidence that at any time throughout this period he ever attempted to influence General Motors' purchasing policies or to favor du Pont as a supplier of General Motors, although during this period of time General Motors made substantial purchases from du Pont's competitors.[72]

---

[71]The purpose of this report, which was written on March 8, 1918, was "to summarize the conditions surrounding our acquisition of an interest in the General Motors Corporation and the Chevrolet Motor Company, in accordance with authority granted." In view of its purpose and its contents the omission of any reference to General Motors trade is particularly significant.

[72]The fact is that in the period immediately after the investment du Pont lost some General Motors business. This was true of paint (compare page 20 of GTX 277, R. 499, 3699, with GTX 420, R. 528, 4010, and DP 220, R. 2693, 6122) and of "Pyralin" (compare

It thus appears that other relevant evidence casts doubt on the Government's conclusion that Raskob, when he wrote the 1917 report, was expecting to secure for du Pont a non-competitive preferential advantage or had in mind taking steps to that end.

Raskob's statement must also be weighed against the statements made by du Pont in describing the advantages of its General Motors investment to its stockholders. In its annual report for 1917 the statement is made that "the motor companies are very large consumers" of our products (GTX 1409, R. 5511) and in the 1918 report the consumption of paints and "Fabrikoid" by General Motors is referred to as providing a "common interest" between the companies (GTX 125, R. 479, 3228). Neither report describes General Motors as an assured outlet for du Pont's products. Nor is there any suggestion that du Pont was to enjoy a preference or an advantage in its dealings with General Motors. The Government relies upon these documents and thus presumably accepts them as contemporaneous and candid expressions of du Pont's intent. It is therefore highly significant that the reports, although referring to trade with General Motors, contain no expressions which can on any basis be regarded as indicating or suggesting that du Pont believed that it was to enjoy a non-competitive and preferential position with respect to General Motors trade.

Pierre du Pont and Irenee du Pont, the two surviving defendants who had participated in the discussions among du Pont directors before it was decided to invest in General

---

sales for 1916 and 1917 with sales for 1918 and 1919 as shown in DP 421, R. 2695, 6389).

The record shows that in 1927 Raskob was told by Lammot du Pont that in the previous year General Motors and Fisher Body together had placed $4,000,000 worth of business with competitors of du Pont as compared with $8,000,000 worth of materials purchased from du Pont (GTX 460, R. 537, 4100-4102). There is no evidence that Raskob took any action on the basis of this advice.

Motors, testified that the matter of securing a trade preference from General Motors was not even discussed in the directors' meetings and that their votes in favor of the investment were not influenced by any consideration of that kind (Pierre du Pont, R. 815, 816, Irenee du Pont, R. 868-870, 872-873). This testimony was not contradicted by any contemporaneous documents or impeached on cross-examination.[73]

In determining the question of du Pont's intent, Raskob's statement and the other proof relating to the state of mind of persons who participated in the original decision to invest in General Motors must be appraised in the perspective of what the record shows with respect to du Pont's attitude in the thirty years that have ensued since the investment was made. As we have shown elsewhere, the evidence establishes that throughout this period du Pont has dealt with General Motors on a competitive and non-preferential basis and has not attempted to secure for itself, by use of either control or influence, a preferential and non-competitive trade advantage. This, in the last analysis, is the ultimate test of the Government's contentions and the ultimate answer to their assertion that the findings of the trial court on the matter of intent should be rejected.

The Government, apparently recognizing that substantially all of the evidence upon which it relies to prove intent is 25 to 30 years old, suggests that the deficiencies of its

---

[73]In its brief the Government does not suggest that the testimony of Pierre and Irenee du Pont was contradicted or impaired by any other evidence or by their cross-examination. The Government can only comment enigmatically that their testimony "is not enough" (Br., p. 116). It must be remembered that the excerpt from Raskob's report is evidence of Raskob's state of mind but not necessarily good evidence of the state of mind of Pierre and Irenee du Pont. Their own testimony, particularly since it was not contradicted or impeached, is entitled to substantial probative weight on the latter point.

proof can be cured by inferring an illegal intent from the mere fact that du Pont continues to sell to General Motors (Br., p. 123). The court below found that the sales were made on the merits and those findings are fully supported by the proof. See pp. 35-109, *supra*. The Government cannot infer an evil purpose from the fact that du Pont competed for and obtained the business of General Motors with respect to some products.

The Government also suggests that in the past 25 or 30 years the executives of the two companies have, out of caution, concealed their true motives. There is no support in the record for this suggestion; indeed, the two documents cited by the Government (Br., p. 123) display a candor that is quite foreign to the caution and concealment suggested by the Government (GTX 202, 1346, R. 485, 2815, 3461. 5352). In view of the large number of persons participating in the commercial transactions between the two companies and the voluminous correspondence involved (to which the Government had full access) this suggestion falls of its own weight. Moreover the defendants called as witnesses persons who testified of their own knowledge with respect to the commercial transactions between the two companies. Their testimony was not confined to general denials or conclusions, as the Government suggests (Br., p. 124), but laid bare the reasons for the actions that they had taken. These witnesses were cross-examined both as to their motives and as to their actions. The trial court, which heard and observed the witnesses, accepted their testimony. The record supplies no support for the Government's suggestion that these witnesses were either disingenuous or self-deceived.

B. EARLY CORRESPONDENCE RELATING TO "FABRIKOID" AND "PYRALIN" (1918-1919)

Fragments of correspondence between J. A. Haskell and various du Pont employees relating to du Pont's efforts to sell "Fabrikoid" and "Pyralin" to General Motors in

1918 and 1919 constitute the evidence upon which the Government next relies to support its argument that du Pont intended to limit General Motors' commercial freedom (Br., pp. 30-31, 117). This argument is a notable example of the Government's failure to distinguish between a purpose on du Pont's part to sell to General Motors and a purpose to restrict General Motors' purchasing freedom and thus obtain a preferential position.

Haskell, who died in 1923, had become a director of General Motors in 1915 and a member of its Executive Committee in 1918, and had prior to 1915 been a vice president of the du Pont Company. See pp. 141-142, 155, *supra*. He was personally known to a number of du Pont employees, and the correspondence relied upon by the Government indicates that he was willing to answer requests for information and to give advice as to how best to sell to General Motors. The letters contain no statements indicating that du Pont was attempting to get, or believed that it could get, a preferential or non-competitive advantage by reason of its stock ownership, or that Haskell believed that du Pont should or would receive such an advantage. This is apparent on the face of the phrases or excerpts that the Government has quoted in its brief. Moreover, when each of the documents is considered in relation to the whole incident of which it is a part, it affirmatively appears that in fact du Pont enjoyed no preferential position in the trade of General Motors.

The Government begins its discussion of these documents with Government Exhibit 290 (R. 501, 3782), which is a letter from Haskell to Coyne of du Pont, dated April 15, 1918. Most of the letter is devoted to a discussion of the possibility of using artificial leather for upholstery instead of the genuine leather which was then being used by most of the General Motors Divisions. The Government does not point out that the letter itself indicates that the

occasion for the consideration of this question by General Motors was that the general manager of the Oakland Division and Durant were fearful that shortages of genuine leather might make the use of artificial leather necessary. The Government extracts two phrases from this letter and uses them as proof of a sinister intent. One of the phrases contains a suggestion that du Pont should try to get makers of other low price cars interested in the adoption of artificial leather. The Government misses the significance of this suggestion in relation to the alleged intent to obtain a trade preference. As the text of the letter shows, Haskell was informing du Pont that it could not expect to persuade General Motors to use artificial leather unless it was successful in persuading other manufacturers of low cost cars to do likewise. This was not an expression of an intent that du Pont should enjoy a preferential position. On the contrary, it was a statement that General Motors would buy du Pont's materials only if it was to its advantage to do so and that du Pont could not expect to sell artificial leather to General Motors for upholstery unless it could make similar sales to competing motor car manufacturers.

The second clause which the Government extracts from the letter contains the words, "to pave the way for perhaps a more general adoption of our material." Those words certainly do not suggest a non-competitive and preferential advantage. Moreover, the Government does not disclose that the words were used in relation to the innocent suggestion that du Pont should give General Motors Divisions samples of its artificial leather and "Pyralin".[74] The truth of the matter is that those car units of General Motors which were using genuine leather for upholstery in 1918,

---

[74]The Government also fails to disclose that the last paragraph of the letter which discusses the quality of du Pont's top material clearly indicates that if du Pont expected to sell that material to General Motors it would have to do so on a competitive basis.

did not thereafter adopt artificial leather (R. 348; DP 280, p. 1, R. 2245, 6208, MacShane, R. 2336, 2347, 2352, 2353, Brown, R. 2214, 2225), a fact which is hardly consistent with the inferences the Government tries to draw from the incident.

The Government next quotes at length from two letters which Haskell received from du Pont employees in 1918 (Br., pp. 30-31). In the first of these, dated May 22, 1918 (GTX 293, R. 502, 3786), a du Pont sales manager reported to Coyne that he had had "a very pleasant and satisfactory talk with him [Haskell] in regard to the requirements of General Motors Company for Pyralin sheeting", and a copy of this report was sent on to Haskell. Apparently the Government reads the language of this report as reflecting an intention or an understanding that du Pont was to secure General Motors "Pyralin" business on the basis of its recent investment in that company's stock. The document, however, does not so state nor does it intimate that du Pont's stockholdings would enter into General Motors purchasing decisions in any way. What is more important, the document does specifically state the means by which du Pont intended to secure General Motors' "Pyralin" business. The sales manager proposed merely "a continuation of our present policy," and Haskell was quoted as being in full agreement with the proposal. Unless it is or was illegal for du Pont to try to secure General Motors' trade through sales efforts, this report surely shows no improper intent. The Government itself, when it departs from its characterizations, seems to realize that the letter merely states that du Pont was to get the business not by reason of the stock but by "continuing its sales policy" (Br. p. 117).[75]

[75]This letter was written May 22, 1918; du Pont had been selling "Pyralin" to General Motors prior to the investment in General Motors stock (DP 424-429, R. 2696-2697, 6394-6410); the "present

The second communication to Haskell from a du Pont employee involves artificial leather, or "Fabrikoid", as du Pont's product was known. A du Pont employee in charge of "Fabrikoid" production wrote to Haskell in July 1918 as follows (GTX 302, R. 504, 3803):

> "If we are ultimately to furnish all, or the greater part, of the top material for the Chevrolet and General Motors cars would it not be well for those several users to agree upon a uniform shade of drab for the back, or lining?"

Contemporaneous documents and uncontradicted testimony describe the background and purpose of this suggestion and establish beyond any doubt that it did not proceed from an understanding or intention as the Government presumably suggests, that du Pont's stock interest was to influence General Motors' purchasing decisions. Du Pont had recently developed an improved top material, "Pontop", which was in heavy demand from all car manufacturers, and at the time this letter was written the General Motors Divisions had already advised du Pont's salesmen that they intended to purchase "Pontop" for the bulk of their top requirements (Brown, R. 2194).[76] In addition du Pont was experiencing difficulties in dyeing "Pontop" to the various manufacturers' specifications because the war had shut off German dyes. The problem that du Pont faced, therefore, was not how to force its "Pontop" upon General Motors but how to satisfy the heavy demands of General Motors and the other automobile manufacturers. The sales and production policy" referred to in the letter must therefore be taken to be the sales policy that du Pont had followed before the stock investment.

The ultimate comment on the Government's use of this letter is provided by the fact that five days after the letter was written Buick gave a competitor of du Pont an order for 100,000 sheets (GTX 294, R. 502, 3788).

[76]In the summer of 1918 du Pont received orders from the automobile industry for "Pontop" in such volume that it was unable to meet Buick's demands (DP 246, R. 2192, 6154).

people in du Pont believed that it might assist them to meet the heavy demands for "Pontop" if the dyeing difficulties could be limited or minimized, and with that in mind the letter to Haskell suggested that it would be desirable for the General Motors units to agree upon a uniform shade of color for the top materials (DP 245-246, R. 2191, 2192, 6153, 6154, Brown, R. 2188-2190, 2194-2195). This is another instance in which neither the particular words which the Government has extracted from the document nor the attendant circumstances supports the Government's arguments.

The Government also relies upon a line of inquiries which Haskell made in 1918 to the manufacturing units of General Motors about their purchases of fabrics and "Pyralin" and asserts that these inquiries "acted as incentives to General Motors' Divisions to purchase du Pont products since the officials felt called upon to explain outside buying" (Br., pp. 31, 117-118).

The exhibits cited by the Government in support of this proposition (GTX 296-300, R. 502, 503, 3790-3801) are the replies that Haskell received to the inquiries. The Government does not disclose that the record contains examples of Haskell's own letters making the inquiries (DP 326, 327, R. 2305, 6272, 6273). Those exhibits show that the letters written by Haskell were form letters, that they contained no suggestion or intimation that purchases should be made from du Pont, no suggestion or intimation that du Pont should be accorded non-competitive preferential treatment, and did not ask for or invite any explanation of outside buying.[77]

---

[77]These letters corroborate other proof which shows that Haskell's inquiries were made for the purpose of helping the du Pont Company maintain ordinary statistical sales records and that they had nothing to do with helping du Pont obtain a preferential position in General Motors trade. In other industries, notably in the explosives industry, it was then the practice of du Pont to obtain similar statistics

The replies to Haskell's inquiries, which are cited by the Government, show on their faces that the inquiries were not regarded as orders or suggestions that du Pont be preferred. Indeed, the reply from Oakland states in detail that that Division was not buying from du Pont but from two of its competitors and gives no indication of any intention to change (GTX 300-301, R. 503, 504, 3798, 3802).

The Government attempts to link the Haskell correspondence with a letter written seven years later (GTX 340, R. 512, 3865) by J. L. Pratt, then a vice president of General Motors, which is quoted at pp. 39-40 of the Government's brief.[78] Although there is no relation between the two transactions, it is appropriate here to comment on Pratt's letter which, like the Haskell correspondence, fails to sustain the Government's charge that du Pont had an

---

about its customers' purchases. It did this by obtaining the information, if it could, from the customers themselves. The statistics were used for a variety of proper commercial purposes, *e.g.*, "locating plants and warehouses", "routing salesmen and locating salesmen". At this time the Fabrikoid Department of du Pont was attempting to develop a statistical record comparable to that maintained by the departments of the company which sold goods to other industries (Brown, R. 2303-2306). Du Pont had asked Haskell for assistance in this effort. The information which Haskell was giving to du Pont, therefore, was the same kind of information that du Pont was accustomed to obtain from customers in whom it owned no stock. The record indicates that by the early part of 1920 Haskell was no longer making such inquiries and there is no evidence in the record that such inquiries were ever resumed (GTX 305, R. 504, 3810).

[78]Pratt was an engineer who had worked for du Pont until 1919 when he was asked by Mr. Durant to join General Motors. The record clearly indicates that the invitation was Durant's idea (Pratt, R. 1392-1402). Ultimately Pratt became vice president in charge of the accessory Divisions which manufactured parts and appliances and not automobiles and trucks. He was also for a time Chairman of the Purchasing Committee. Most of the evidence in the record with respect to Pratt relates to his activities in relation to the accessory Divisions. GTX 340 (R. 512, 3865), which is discussed in the text, is a letter that he wrote to the General Manager of Delco Light Division, one of the accessory Divisions.

unlawful intent to get a preferred position in the trade of General Motors.

The letter contains an expression of Pratt's personal views, and he was careful in the last paragraph of the letter to make it clear that they were his own opinions and not a statement of company policy. Passing over the point that the letter reflects Pratt's state of mind and therefore has little bearing on the question of du Pont's intent, it is significant that the letter shows that Pratt's attitude toward du Pont was based not on the stock relationship but on the fact that du Pont had saved General Motors from financial disaster in 1920.[79] It is also significant that Pratt emphasizes that in making purchases General Motors should "always keep a competitive situation", and that "the prime consideration is to do the best thing for Delco Light Company."

The Government's discussion of the letter does not disclose the circumstances in which it was written. Those circumstances effectively dispose of the notion that du Pont was getting a preference in its trade with General Motors. Briefly the facts were these: The practice of the Delco Light Division was to buy its paint from a competitor of du Pont. The competitor failed to solve a paint problem and Delco Light had thereupon called upon du Pont for assistance. Du Pont had solved the problem and had been given one order for paint, but before the order could be delivered, Delco Light asked du Pont to withhold delivery and stated that the competitor was to be given another opportunity to obtain the business. At this point Elms of the du Pont Paint Department, who was a personal friend of

---

[79]This point is significant because it indicates that whatever importance Pratt's views have they would have existed even if du Pont had owned no stock in General Motors. Pratt testified that the origin of this attitude on his part was the statement Durant made to Pratt and others when du Pont rescued General Motors from economic collapse in 1920 (R. 354; R. 1411-1412. See pp. 150-151, *supra*).

Pratt, wrote to Pratt, on a purely personal basis, asking for his assistance (GM 204, R. 1440, 7252). Pratt's letter to the general manager of Delco was the result.[80] Despite the fact that the du Pont product could be secured at a better price and the fact that the technical staff of Delco Light told its general manager that in their view the du Pont product was better, Delco Light nevertheless continued to buy from the competitor and du Pont did not thereafter at any time receive the business (GM 205, GTX 339, DP 338, R. 1440, 511, 2403, 7255, 3864, 6288, Pratt, R. 1439-1441, O'Donnell, R. 2401-2404).

We have discussed these examples of routine sales correspondence, written thirty to forty years ago, at greater length than is justified by their evidentiary significance. We have done so because they illustrate the infirmities of the Government's attempt to prove unlawful intent by extracting words and phrases from selected documents. As we have shown, (a) the Government consistently fails to observe that the documents taken in their entirety do not support the conclusions which the Government seeks to draw from them; (b) even the words and phrases selected by the Government do not justify the Government's characterizations and conclusions, and (c) the Government's arguments ignore relevant actions, inextricably related to the documents, which are inconsistent with and in fact disprove the conclusions with respect to the intent that the Government seeks to establish.

C. PROPOSALS BY DU PONT FOR FABRICS CONTRACTS FOR GENERAL MOTORS REQUIREMENTS (1921-1923)

The evidence shows that on three separate occasions, twice in 1921 and once in 1923, different du Pont officials

---

[80]Pratt testified that he received many such inquiries from friends, and the record shows similar letters and instances of advice and assistance by Pratt to friends in companies other than du Pont (R. 359; GM 213-216, R. 1457, 7266-7269, Pratt, R. 1433, 1436, 1456-1458).

proposed that a contract be negotiated with General Motors pursuant to which du Pont would supply General Motors with its fabrics requirements. Such a contract was never made. The third and latest effort was rejected by General Motors in 1923, and there is no evidence that either of the earlier proposals was ever acted upon by General Motors.

Although the Government ignores the rejection of the third proposal, it refers to two documents written in connection with the two earlier proposals (GTX 417, 403, R. 526, 3992, 3958) and asserts that they prove an unlawful intent on the part of du Pont. Neither the particular portions of the documents extracted by the Government nor the documents in their entirety support the view that du Pont believed that its stock interest assured it of General Motors' business or that du Pont believed that it could sell General Motors on a preferential non-competitive basis.

The first of the two documents is dated May 31, 1921 (GTX 417, R. 526, 3992) and was transmitted by A. Felix du Pont to the du Pont Executive Committee. (There is no reason to believe that it ever went beyond that Committee.) The text of the document shows that du Pont had been selling General Motors on a competitive basis and expected to continue to sell General Motors on the same basis; the document refers to the competitive efforts that du Pont had made to get General Motors business and states that as a result of these efforts du Pont products were considered by the General Motors units to be equal or superior to those of competitors. It also states that du Pont, at some increase in its own costs, had prepared its products in a form better adapted to the practices of General Motors than the goods of competitors. The whole tenor of the report indicates that the writer realized that du Pont had secured such business as it then held only through extensive and concentrated sales efforts and on a competitive basis, and that he wished to take advantage of du Pont's present

"standing" to obtain some kind of a more permanent contractual arrangement. If, as the Government suggests, the stock interest gave du Pont a permanent and assured advantage without regard to the quality of its product, both the competitive efforts described in the letter and the contractual arrangements suggested would have been unnecessary.[81]

The second of the two documents to which the Government refers (GTX 403, R. 526, 3958) is a letter written in October 1921 by R. R. M. Carpenter of the du Pont Company to Pierre S. du Pont, then president of General Motors. That letter states that Carpenter would like to make a contract with General Motors on a cost-plus basis for all of the artificial leather and rubber business of General Motors. The second and third paragraphs of the letter, which are not quoted by the Government, point out that at times price competition had caused the du Pont Company to accept General Motors orders for fabrics at prices which were below du Pont's costs and comments that the connection between the two companies is a "disadvantage" rather than advantage.

Even the portions of the letter quoted by the Government negative the notion that du Pont was trying to get, or believed that it had, a non-competitive preferential advantage. The first paragraph states that du Pont "would like to present to the General Motors Corpora-

---

[81]The letter refers to the "latent resentment which we experienced at the outset against the partial obligation under which the General Motors units felt themselves to be with respect to using our goods." The sentence in which this statement appears makes it clear that the words "at the outset" refer to conditions existing "two years ago", which would have been during the Durant regime. What the writer of the report meant by the words "the partial obligation" is unknown; A. Felix du Pont was unavailable to testify, having died before trial. Whatever condition the words were intended to describe, the report states that it was one which worked to the disadvantage and not to the benefit of du Pont, and was overcome not by the stock relationship but by du Pont's competitive efforts.

tion in the proper way the subject of entering into negotiatons for the supplying of all the artificial leather and rubber which General Motors uses" on some mutually advantageous basis. Here again the proposal for the contract would have been unnecessary if in fact the stock assured du Pont of the General Motors business on a preferential, non-competitive basis. It is also to be noted that the final paragraph of the letter clearly indicates that Carpenter did not expect Pierre S. du Pont to use his position or influence in General Motors to obtain for du Pont the kind of contract under discussion; Carpenter stated, "I appreciate that you, personally, can take no steps in this direction, but I was anxious to learn whether you are personally opposed to such a policy."

Certainly the fact that du Pont was desirous of obtaining a cost-plus contract for General Motors' entire fabrics requirements does not reflect an intention on the part of du Pont to limit General Motors' commercial freedom or to get a non-competitive, preferential advantage. As we have shown, both of the proposals contemplated "negotiation" with General Motors and recognized that the terms would have to be "mutually advantageous". In short, they recognized that the desired contract could not be achieved through du Pont's stock ownership or on any basis other than General Motors' satisfaction with the proposal, and asserted, in justification of the proposal, not du Pont's stock ownership but the quality of its products and services.

Some two years later a proposal for a cost-plus contract on fabrics was formally presented to General Motors (GTX 413, R. 528, 3987). Sloan in acknowledging receipt of the proposal stated that he personally was "fundamentally against anything like a cost-plus contract" but would present it to the Purchasing Committee for decision (GTX 415, R. 1161, 3889). The records of the Purchasing Committee disclose that the proposal was rejected because a

cost-plus arrangement was considered unsatisfactory by General Motors (GM 155, R. 1100, 7079).

D. UNSUCCESSFUL SALES EFFORTS BY LAMMOT DU PONT (1921-1923)

The final group of documents relied upon by the Government in support of its contention that du Pont intended to restrain General Motors' commercial freedom relate to efforts made by Lammot du Pont between 1921 and 1923 to sell du Pont paint to General Motors (Br., pp. 34-38, 119-121). At this time Lammot du Pont, in addition to being a vice president of the du Pont Company, was Chairman of the Board of the Flint Varnish and Color Works, the subsidiary which conducted most of du Pont's industrial paint operations.[82]

The correspondence shows that Lammot du Pont took a personal interest in selling paint to General Motors, and that he made vigorous sales efforts in the course of which on one occasion he mentioned the stock relationship as a reason why Fisher Body should buy from du Pont.[83] At the same time his letters show that he recognized that the du Pont products had to make their way with General Motors on the merits and that du Pont could not expect to sell General Motors on a non-competitive or preferred basis. Indeed in large part the letters are directed to ascertaining why it was that du Pont products did not meet General Motors' requirements and to stimulating the du Pont organization to improve the quality of their goods.

For example, the stock ownership reference was an introductory remark in Lammot du Pont's extended and unsuccessful effort to persuade Fisher Body to purchase

---

[82]This correspondence all antedates the adoption of "Duco" for automobiles and therefore has nothing to do with the adoption or use of "Duco" by General Motors.

[83]The reference to the stock relationship is found in two letters, one written on October 20 and the other on December 2, 1922 (GTX 434, 437, R. 532, 4054, 4059).

paint from Flint (GTX 434, R. 532, 4054).[84] In the same letter, he stated his understanding that Flint's price, quality and service were in all respects satisfactory to Fisher Body's organization and asked to be set straight if his information were incorrect. The balance of his effort was devoted to establishing the qualities of Flint's products to Fisher Body's satisfaction (GTX 437-441, R. 532, 533, 4059-4065). His sales campaign directed at Cadillac in 1923 further discloses Lammot du Pont's recognition that du Pont could not sell General Motors on a preferential or non-competitive basis. He wrote to Rice, the General Manager of Cadillac, "If the Flint Varnish and Color Works can manufacture as good, or better, varnish than you are using, we would like to have an opportunity to do so." (GTX 442, R. 534, 4066). In the ensuing correspondence Rice and others in Cadillac made clear that they were examining Flint's offerings solely on the merits, and did not regard Lammot du Pont's sales efforts as a suggestion that they should do otherwise[85] (GTX 442, 444-449, R. 534, 535, 4066, 4068-4077).

The reference to the stock ownership in Lammot du Pont's two letters to Lawrence Fisher in 1922 will not support the weight of the Government's argument on intent. The letters themselves, though they make reference to the stock ownership, clearly recognize that du Pont could sell to General Motors only on the basis of superiority of product and are thus inconsistent with the existence of the kind

---

[84]In this letter he made the argument, not that the stock entitled du Pont to favored treatment, but rather that the stock relationship "assures Fisher Body Corporation that its orders will be given preference by Flint over any other customer (except, of course, General Motors Corporation and its subsidiaries) * * *." It seems clear that Lammot du Pont realized that he could sell to General Motors only if it saw an advantage to itself in terms of price, quality or service.

[85]The effort closed with Lammot du Pont's looking "forward to the time when the Flint products have proved their value to you" (GTX 449, R. 535, 4077).

of intent that the Government is seeking to prove; *i.e.*, an intent to sell General Motors on a non-competitive, preferential basis. Moreover, these letters stand alone in a record which contains ample additional evidence with respect to Lammot du Pont's interest in selling to General Motors. They are the only occasion in thirty years in which he referred to the stock relationship as a reason why General Motors should buy from du Pont. The absence of further expressions with respect to the stock cannot be explained, as the Government attempts, on the ground that General Motors' buying habits had by the early 1920's been established to du Pont's satisfaction (Br., pp. 123, 124). Until the introduction of "Duco" neither Cadillac nor Fisher Body, the Divisions to which Lammot du Pont directed his sales efforts, ever bought paint from Flint in any significant quantities (DP 216, 220, R. 2694, 2693, 6107, 6122, L. Fisher, R. 587-588). Moreover, Cadillac, a few years after the introduction of "Duco", commenced to buy its lacquer from a competitor of du Pont and has continued that practice until the present time. Fisher Body, as has been shown, has consistently purchased substantial quantities of lacquer and practically its entire requirements of undercoats from competitors of du Pont. These Divisions' buying habits had certainly not "been firmly steered in the right direction" as far as du Pont was concerned either in the early twenties or at any time since then (Br., p. 123).

Lammot du Pont's personal interest in sales to General Motors accounts for the letter that he wrote to Pierre du Pont in 1921 and the latter's reply (GTX 420, 421, R. 528, 529, 4010, 4012) which are set forth at pages 34-36 and 119 of the Government's brief. This exchange of correspondence, although indicating interest on the part of both Lammot and Pierre du Pont in du Pont's sales to General Motors, contains no statement which suggests

that either of them believed that General Motors was required or expected to buy from du Pont, or that du Pont could expect to sell General Motors on any preferential basis. Lammot du Pont's letter establishes that du Pont was selling General Motors a substantial part of its requirements of du Pont products at the time. But it does not provide any basis for an inference that the sales were attributable to the stock interest or were based upon anything other than the merits of du Pont's offerings before the investment. Du Pont had been an important supplier of fabrics and "Pyralin" to General Motors and Flint (later acquired by du Pont) was an important supplier of paint to General Motors.[86] Perhaps the principal significance of GTX 420 so far as concerns the Government's contentions is that it shows that following the investment, Flint lost half the Oakland business which it formerly supplied.

The Government's comment on Pierre du Pont's observation regarding the change in management at three of the General Motors Divisions requires elaboration (Br., p. 119, n. 40; see also pp. 18, 60). By stating that the reference "may have been" to the replacements of general managers after Durant left the corporation, the Government appears to leave open for speculation the question whether the changes might have been made with a view to enhancing du Pont's trade position. The Government should know that the evidence will admit of no such speculation. The trial court found unequivocally that these changes "were unrelated to the use of du Pont's products" (R. 305). The evidence supports that finding and shows that of the managers who left, two resigned, one to take a position with Durant, and two were replaced because they had appropriated substantial sums of corporate funds (Sloan, R. 988-989, Pratt,

---

[86]Fabrics: DP 237, R. 2080, 6140, Brown, R. 2184-2185; "Pyralin": DP 421, R. 2695, 6389; Paint: GTX 277, p. 20, R. 499, 3680 at p. 3699.

R. 1417-1418, Pierre du Pont, R. 859-960, DP 63, 64, R. 860, 861, 5710, 5713). The evidence further shows that the new managers appointed were in each case recommended by Sloan, had been with General Motors for years, and had never had any connection with du Pont (Pierre du Pont, R. 861-862, Sloan, R. 989-990, Pratt, R. 1417-1418).[87]

VII

There Is No Merit in the Government's Attack on the Trial Court's Findings that du Pont Has Not Controlled and Does Not Control General Motors

The Government attacks the trial court's findings on the question of control on two grounds: (1) that the court "adopted an incorrect test of the meaning of control" and (2) that its findings of fact on control are "without reasonable support in the record" (Br., p. 88). The Government is wrong on both counts.[88]

1. In support of its first point the Government asserts that the trial court erred "by requiring the Government to prove the equivalent of 51% stock interest" (Br., p. 71). The trial court imposed no such burden on the Government.

The findings themselves show that the trial court accepted the principle that in appropriate circumstances a minority stockholder may have "practical" or "working" control. On the basis of all the evidence the trial court found as a fact that du Pont "has not had, and it does not today have, practical or working control of General Mo-

---

[87]One of the new managers appointed was Rice at Cadillac with whom Lammot du Pont was unsuccessful in his efforts to sell paint.

[88]As we have pointed out at p. 137 n. 17, *supra*, the Government cannot prevail merely by proof of control; it must also prove that the control has resulted in an unlawful restraint of trade.

tors" (R. 322). But this finding was not based on any notion that the Government was required to prove the equivalent of a 51 percent stock interest. The trial court did not define practical or working control in terms of a 51 percent stock interest, and whenever in its findings it intended to refer to the equivalent of a 51 per cent stock interest it either did so explicitly or used the term "voting control" as distinguished from "practical or working control" (see R. 316, 322, and compare R. 296 and 342).[89]

In asserting that the trial court applied an improper test of control, the Government relies largely upon the fact that the trial court, in addition to finding that du Pont did not have practical or working control of General Motors, made a further and separate finding that du Pont "did not and could not conduct itself for the past twenty-five years as though it were the owner of a majority of General Motors stock" (R. 322). This separate finding was not stated in terms of a definition of practical or working control, and was not a declaration of a controlling legal standard. It was simply a finding of fact that one of several indicia of control was absent.[90] Indeed, it was one of the indicia urged upon the court by the Government (see pp. 259-260, *infra*).

The entire content and structure of the findings on the control issue show that the trial court did not make the error of assuming that nothing less than 51 percent of the stock of a

---

[89]At another point in its findings (R. 316) the trial court recognized that being the "controlling force in the direction of General Motors' affairs" is not necessarily the same thing as being "in a position to act as if it owned a majority of General Motors' stock." The trial court referred to the two concepts in the disjunctive, indicating that it recognized that a stockholder might be the "controlling force" without being in a position to act as if he owned a majority of the corporation's stock.

[90]In another relevant passage of the findings the court found "that du Pont's participation in the selection of General Motors' directors and management does not establish that it controlled General Motors" (R. 316). This, again, does not constitute the adoption of a legal standard, but rather a finding of fact on another indicia of control urged by the Government.

large corporation will suffice for control, and the Government's charge that it did rests upon a misreading of the findings. The trial court made the finding that du Pont could not act as if it owned 51 percent of the stock because that fact, along with others, was relevant to the issue, and the propriety of the finding can hardly be contested when one considers how important the Government would have regarded a finding of fact to the contrary.

The Government also attempts to support its assertion that the trial court applied the wrong test by pointing out that it "placed much weight on testimony by Mr. Sloan that in case of a proxy fight du Pont might not succeed" (Br., p. 94). The Government does not point out, however, that the finding of the trial court on this matter was made in response to an issue which was tendered by the Government itself.[91] The Government introduced in evidence an exhibit which showed that at meetings of the stockholders of General Motors from 1928 to 1932, and in 1936, the du Pont stock constituted a majority of the shares present and voting (GTX 1307, R. 664, 5230). On the basis of this exhibit, as the trial court found, "counsel for the Government sought to obtain from him [Sloan] an admission or concession that du Pont's block of stock was at all times sufficient to prevail at a stockholders meeting" (R. 322). In response to this line of cross-examination, Sloan testified that it was impossible to predict whether du Pont's vote would have prevailed at a stockholders' meeting in case of a controversy, because that question would depend upon the

---

[91] In the trial court the Government Post-Trial Brief (pp. 169-171, 695) and its closing argument (Tr. 7309) referred to the fact that the du Pont stock was often a majority of the stock present at a stockholders meeting, and urged that du Pont would prevail in the event of a proxy contest and that its asserted ability to so prevail was one of the appropriate indicia of control to be considered by the trial court. Thus it said in its brief below (p. 171): "* * * The possibility of a successful challenge to the du Pont Company's control of General Motors is so remote as to be non-existent."

nature of the issues and all the other circumstances involved (R. 1331-1333). The trial court in its findings took the same common-sense view of this line of cross-examination as was taken by Mr. Sloan. The Government, having tendered the issue, is not now entitled to complain because the trial court made findings on that issue, or to assert that because the trial court made such findings it applied an erroneous test.

Finally the Government attempts to support its assertion that the trial court applied an erroneous test to the question of control by arguing that the court took into account none of the factors which the relevant decisions lay down as applicable to the question (Br., p. 94). Here again the Government's argument is destroyed by the test of the findings themselves. The findings show that in fact the trial court gave careful attention to all of the indicia of control which are discussed in the cases cited by the Government and which the Government now urges as a basis for rejecting the trial court's findings. It considered the percentage of du Pont's stockholdings (R. 304), the wide distribution of the stock not owned by du Pont (R. 304), the percentage of stock voted by du Pont at stockholders meetings (R. 322-323), the origin and operation of the supplemental compensation and bonus plans of General Motors and the part played therein by du Pont (R. 316-321), the historic relationship between the two companies (R. 297-308, 321-322), the extent of interlocking officers and directors (R. 308-316), the number of du Pont representatives on the Board of Directors of General Motors and on its several committees at different times (R. 308-310), the conduct and functions of the Board and of its committees (R. 308-316), the selection of Directors and of management (R. 316), the strength and standing of the General Motors management (R. 321) and finally the absence during the past three decades of any control or influ-

ence over General Motors commercial policies and decisions (R. 361).

The scope and detail of the trial court's consideration of the various points of contact between du Pont and General Motors conclusively establish that the court applied the principles of practical or working control which the Government espouses here. In truth, the gist of the Government's complaint is not that the court applied an erroneous legal standard, or that the court did not consider any matter that was relevant, but rather that the court did not accept the Government's evaluation of the evidence (see Gov't Br., p. 103).

2. The Government's assertion that the trial court's findings on the question of control are without support in the record is, we believe, answered by the full statement of facts found in Part One of this brief (pp. 137-186, *supra*), which shows that the court's findings reflect a thorough consideration of all the evidence. The Government's position, in effect, is that the trial court should have disregarded the facts in their totality and accepted as conclusive those particular portions or aspects of the facts upon which the Government bases its inferences and conclusions.

In advancing this kind of an argument the Government overlooks the fundamental principles applicable to the question of control which are laid down in the decisions cited in its own brief (pp. 88-94). The decisions show that the question of control is a question of fact which should be decided on the basis of all the relevant facts and not merely on the basis of some of them; and that the question should be decided on the basis of the particular facts involved in each case and not by precedents drawn from decisions dealing with different facts, or by the application of *a priori* assumptions of fact or presumptions of law. The Government departs from these principles by selecting only a part of the

facts as relevant and insisting that those facts give rise to a presumption so strong that all conflicting or inconsistent evidence should be ignored or rejected. The extent to which the Government violates the legal principles for determining control appears from its assertion (Br., p. 103) that the particular facts upon which it relies "lead inevitably to the conclusion that control existed."

The Government puts primary emphasis upon such matters as the percentage of du Pont's stockholdings, the wide dispersion of the balance of the stock, du Pont's membership on the Board of Directors of General Motors, the operation of the General Motors compensation and bonus plans and similar and related matters. The matters relied upon by the Government are all relevant and were considered by the trial court. But the facts with respect to those matters, as distinguished from the Government's conclusions and assertions, do not justify the attack on the findings, nor do the facts justify the Government's assertion that the trial court should have accepted the Government's view of these matters and rejected all other evidence which related to the issue of control.

There are three particular observations that should be made with respect to the Government's arguments.

The Government disregards the facts with respect to the position and strength of the General Motors management in the past twenty-five or thirty years. These facts, from the point of view of business and corporate reality, are perhaps the single most important aspect of the issue of control.[92] The Government apparently recognizes that

---

[92]It is generally recognized that the capacity of a minority stockholder to exercise "practical" or "working" control is affected to a very large measure by the position and strength of the management. The statistics appearing in the Government's brief on recent proxy contests (pp. 95-96) indicate by the variety of results that the percentages of stock held by the contending parties is but one of many factors, and that the strength of the management is extremely important. They also indicate that it is not merely the voting strength

it cannot prevail in its attack on the findings unless it can establish that the General Motors management has been and is subservient to du Pont. Throughout its argument it seeks to create the impression that there is no real distinction of identity or interest between du Pont and the management of General Motors and indeed that the management is merely the *alter ego* of du Pont. Since there are no facts to support this impression, the Government resorts to assertion. It declares that the management is selected by du Pont and is subservient to du Pont (Br., pp, 20, 74-75, 102). These assertions are not correct. The trial court found otherwise and its findings are supported by the evidence.

After reviewing the course of the relations between du Pont and General Motors over the years, the trial court found that du Pont's "influence and position in General Motors declined radically", and found affirmatively that (R. 321):

> "During the twenties, a force of considerable strength arose in General Motors that was important in determining any question of control. This force was the management, headed by such a forceful and resolute character as Sloan and including such positive personalities as Kettering, the Fisher brothers, Knudsen, Pratt, Brown and Wilson."

And the trial court also found (R. 321) that "These men, the record shows, acted at all times solely in the best interest of General Motors".

The trial court also considered the Government's contention that du Pont selected the directors and management of General Motors. It found (R. 310):

---

of the management but its reputation for successful and profitable operation that determines whether the stockholders will follow or reject it. In this connection it should be remembered that in the event of any contest it is the management that controls the proxy machinery.

> "A majority of the directors have always been the nominees of management. Sloan testified that management directors were always nominated by him when they had achieved in the management hierarchy of the corporation a position which entitled or required that they be on one of the committees of the Board, and further that he never discussed these nominations with anyone except the management group and after his recommendation their election was automatic."

In a further finding dealing with the selection of directors and of management the trial court found, on the basis of the evidence (R. 316):

> "Sloan's testimony and the record as a whole are convincing that at all times he acted independently and steadfastly in the best interests of General Motors."

These findings are supported by the evidence of what has been done in the past thirty years by the executives of General Motors—evidence which has been described in Part One of this brief. They are also supported by the sworn testimony of Sloan, Kettering, Fisher, Pratt, Wilson and Lynah, which was tested on cross-examination, and which the trial court, who heard the witnesses and observed their bearing and demeanor, accepted as true. The Government's treatment of this oral testimony is interesting. At page 103 of its brief it demands the rejection of this testimony which it characterizes as "protestations of innocence which were merely the conclusions of interested parties on an issue which it was the duty of the court to resolve." The demand is not accompanied by any reference to specific evidence which contradicted or impeached the witnesses, or by anything else in the record which provides a basis for rejecting their testimony. And the demand is made in the face of the fact that the testimony of these men is cor-

roborated by other evidence as to what they did as members of the management of General Motors—evidence which consists in substantial part of contemporaneous documents. In these circumstances the trial court was fully warranted in basing its finding on the facts instead of on the Government's assertions.

The second respect in which the Government's argument deserves comment relates to its disregard of the changes which the passage of time has effected in the relationships between the two companies. Although the decisions cited by the Government recognize the importance of historical relationships, the Government throughout much of its argument treats the companies as if the facts that existed between 1920 and 1923 still existed today. Thus, the Government relies heavily upon conditions that existed and statements that were made in the period between 1920 and 1923 when Pierre du Pont was president of General Motors and the company had not developed the strong and independent management which it has possessed in the past twenty-five or thirty years. It quotes three documents which contain statements to the effect that du Pont is responsible for the "management" and "control" of General Motors (GTX 235, 1304, 1345, R. 483, 664, 2813, 3494, 5225, 5347).[93] These documents were all written in the period 1921-1923 when General Motors was still recovering from the collapse of the Durant regime and when Pierre du Pont was president and he and Raskob and Haskell were members of the Executive Committee.[94]

---

[93]The only recent statement referring to "control" of General Motors was made in 1944 by the Secretary of the Delaware Realty and Investment Company in a memorandum dealing with the possibility of a tax-free liquidation of that company (GTX 1335, R. 2677, 5307). The trial court considered this document and found it to be an unpersuasive statement of opinion which was not based upon knowledge of the facts (R. 296).

[94]At this time du Pont temporarily owned a much larger percentage of General Motors stock, and one of the documents (GTX

The trial court considered the conditions and circumstances described in these documents (R. 304-307, 321-322). But the court also recognized what the significant events, the documents, and the testimony all made clear: that the era of Pierre du Pont, Haskell and Raskob ended long ago, and that for many years General Motors policies have been determined by Sloan, the Fisher brothers, Kettering, Knudsen, Pratt, Brown, Wilson, and others in the management whose "strength and standing" has "continued to increase and improve" (R. 321). As the trial court found, and the record shows, this change in the position of the management is "reflected in the contemporaneous documents, the changes in the membership of the Board, the various committees of the Board and in the testimony of Sloan and other witnesses" (R. 322).

Finally it should be observed that although the Government recognizes that the control which is here involved is "a power in du Pont to direct the business policies of General Motors so as to gain for itself an economic advantage over its competitors" (Br., p. 88), it consistently attempts to establish control by evidence which has little or no probative force with respect to that kind of control.[95]

1345, R. 2813, 5347) discloses that when Raskob spoke of "control" during this period he actually had in mind majority voting control and was able to list the votes that could be counted upon to achieve voting control.

[95]The early documents relied upon by the Government in which control is ascribed to du Pont illustrate the lack of relationship between the Government's proof and the question at issue (GTX 235, 1304, 1345, R. 483, 664, 2813, 3494, 5225, 5347); none of these documents is concerned with any trade policy of General Motors. The first is a report by Raskob describing the Managers Securities Plan which the court found was not intended to influence General Motors to trade with du Pont and did not have such effect (R. 320). The second is an excerpt from the du Pont Company's 1920 Annual Report which explains the details of the Durant collapse, and the third is merely a report by Raskob to the du Pont directors giving the financial details of du Pont's investment in General Motors.

If the Government is correct and for thirty years du Pont has possessed the power to direct the business policies of General Motors so as to gain for itself an economic advantage over its competitors, it might be supposed that there would be some direct evidence of the existence and exercise of that control. As we have seen in the earlier sections of the brief, when the Government attempted to prove in specific instances that General Motors' purchases were non-competitive, or that the arrangements with respect to tetraethyl lead or "Freon" were preferential, it had no direct evidence of du Pont intervention, or control, but instead fell back on inference, conclusion and assertion. Similarly, when the Government attempts to prove control in general or abstract terms it produces no evidence with respect to commercial relations, but merely evidence with respect to such matters as membership on the Board of Directors and on its committees, financial matters and similar transactions which are remote from the commercial transactions between the two companies and which the trial court found to be devoid of commercial significance.

This is not, as the Government seems to fear, a suggestion that it is possible to "compartmentalize" control (Br., p. 102). The question is not whether control can be divided but why the Government has found it necessary to "compartmentalize" its proof and to attempt to prove control of commercial relations with evidence that has nothing to do with commercial relations. The answer is to be found in the facts which establish that the asserted control does not exist.

PART THREE

THE LAW

I

THERE IS NO LEGAL BASIS FOR THE GOVERNMENT'S DEMAND THAT THE TRIAL COURT'S FINDINGS SHOULD BE REJECTED OR IGNORED

The decisive issues in this case are issues of fact. The ultimate question of fact is whether du Pont, by reason of its stock interest, has obtained and now enjoys a non-competitive, preferential advantage in the trade of General Motors.

That question of fact, in turn, breaks down into a number of subsidiary or intermediate questions of fact. Has General Motors purchased paint from du Pont on a non-competitive, preferential basis? Has it purchased fabrics from du Pont on a non-competitive, preferential basis? Did General Motors make arrangements to have du Pont manufacture tetraethyl lead because of the stock interest or because General Motors in the exercise of its own independent judgment believed that du Pont was best qualified? Was Kinetic Chemicals organized because of du Pont influence or control or was this a decision made by General Motors on the merits and for its own business reasons? Are the numerous instances in which General Motors refused to purchase from du Pont and dealt instead with du Pont's competitors consistent with a non-competitive, preferential advantage to du Pont?

These questions and all of the other decisive questions with respect to other commodities and transactions and with respect to the issue of control are questions of fact to be decided on the evidence.

After a long trial and a careful and detailed review of the evidence the trial court found as a fact that in all of the relevant matters affecting the commercial relations between the two companies General Motors had acted on a fully competitive and non-preferential basis and that du Pont had not obtained a preferential or non-competitive advantage by reason of its stock interest. If these findings are correct the Government's case is at an end because there has been no restraint or monopolization of trade.

It thus appears that this is pre-eminently a case for the application of the principle embodied in Rule 52(a) of the Rules of Civil Procedure:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Indeed, because of the extent to which the trial court, in making its findings, relied on both oral testimony as well as documents, the principle applies with particular force. As the Court stated in *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 332:

> "There is no case more appropriate for adherence to this rule [52(a)] than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses."

And as stated in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit

given to witnesses by those who see and hear them."[96]

The Government attempts to avoid the effect of the findings by citing the decision in *United States* v. *Gypsum Co.*, 333 U. S. 364, and invoking the principle that findings of fact need not stand if they are based on oral testimony which is contradicted by contemporaneous documents. The principle is beyond question but it has no application in the instant case. The discussion of the facts in the preceding sections of this brief has shown that the findings of the trial court did not result from an acceptance of oral testimony which contradicted contemporaneous documents. On the contrary, the trial court's findings in many and substantial respects are supported by contemporaneous documents. The oral testimony on which the court relied is in many important respects corroborated and confirmed by contemporaneous documents. And in those instances where there was no such corroboration and confirmation of the oral testimony the Government produced no documentary evidence that contradicted or impeached it. It is significant that in the passage in its brief in which the Government invokes the *Gypsum* case it does so without pointing to any particular testimony here that is contradicted by any specific contemporaneous document. It cannot do so because the primary support of the Government in the crucial areas of the case is not direct evidence found in contemporaneous documents, but inferences or conclusions which the Government seeks to draw either from collateral documents or

---

[96]See also the language of Judge Learned Hand in United States v. Aluminum Company of America, 148 F. 2d 416, 433 (2d Cir., 1945):

"However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.' Davis v. Schwartz, 155 U. S. 631, 636; Adamson v. Gilliland, 242 U. S. 350, 353; Alabama Power Co. v. Ickes, 302 U. S. 464, 477."

from collateral facts. Repeated instances in which this is true have been noted in the earlier sections of the brief. A few examples should suffice to make the point.

There is direct and substantial testimony, corroborated in important respects by contemporaneous documents, that General Motors buys paint from du Pont on the merits (see pp. 45-59, *supra*). There is no contemporaneous documentary evidence to the contrary. The Government relies rather on inferences which it seeks to draw from the fact that General Motors buys large quantities of paint from du Pont and that a high percentage of du Pont's sales of paint to automobile manufacturers is made to General Motors.

There is direct and substantial testimony, corroborated in important respects by contemporaneous documents, that General Motors buys fabrics from du Pont on the merits. There is no contemporaneous documentary evidence to the contrary. Instead the Government relies on the same kind of inferences which it asserts in the case of paint.

Kettering testified under oath that it was he who decided to ask du Pont to manufacture tetraethyl lead and that he did so because of his confidence in du Pont's competence and not because of the stock interest, and his testimony is corroborated in important respects by contemporaneous documents. There is no contemporaneous documentary evidence that contradicts this testimony. The Government makes no reference to this testimony, and acceptance of its argument would require the Court to reject it.

There is sworn testimony, corroborated by contemporaneous documents, that the supplemental compensation and bonus plans of General Motors were not used to influence the executives of General Motors to favor du Pont and that the operation of those plans has not had that effect. There is no contemporaneous documentary evidence to the contrary. Again the Government asks this Court to reject that testimony merely on the basis of the Government's assertion that it is unbelievable and that it

does not conform to the Government's preconceptions of human nature.

These examples and other similar instances which have been noted in the previous sections of this brief show that the Government is in no position to invoke the rule of the *Gypsum* case. The choice here is not between oral testimony and contradictory contemporaneous documents; the choice is between the findings of the trial court which are supported both by contemporaneous documents and by oral testimony, on the one hand, and the assertions of the Government, on the other.

II

There Has Been No Violation of the Sherman Act

The general principles laid down in the authorities cited by the Government in its discussion of the Sherman Act are not in issue in this case because the facts here do not justify their application. For example, the Government's argument under the Sherman Act refers to a number of cases dealing with the legal tests that are to be applied in determining whether one corporation controls another (Br., pp. 88-94). The teaching of those cases is that the question of control is a question of fact which must be decided on the particular facts of the case in which the question arises. We accept that principle, as did the trial court. We also agree that those decisions lay down the criteria to be applied in determining the question of control in this case, and we have shown at pages 260-261 *supra*, that the trial court properly applied those criteria. Because the question of control is one of fact, it is not to be decided on the basis of legal precedents. Each of the cases cited by the Government was decided on its own facts

and in each of them the facts differed in important respects from the facts here involved. Those cases therefore provide no legal basis for overturning the trial court's findings on the question of control, because that question turns on the particular facts of this case and not on legal principles.[97]

For similar reasons extended comment is unnecessary on the other Sherman Act decisions cited in the Government's brief. It is axiomatic that the decision of an antitrust case depends primarily upon the facts. *Maple Flooring Mfgrs. Ass'n* v. *United States*, 268 U. S. 563, 579; *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 597, 600; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 531. Particularly is this true where the question presented is whether a non-competitive advantage has been gained or freedom of economic choice controlled or influenced, since those questions by their very nature are wholly ones of fact. It follows that the relevance of decisions in other antitrust cases, and of statements of general principles taken from the opinions, depends upon the relationship between the facts in those other cases and the facts in the case under consideration.

Of all the cases cited by the Government the only one which involves facts closely analogous to those in this case is the decision in *United States* v. *Yellow Cab Co.*, 338 U. S. 338.[98] There, as here, the Government's charges was that

---

[97]It should be noted further that in each of the cases cited by the Government the initial finding by the trier of fact on the issue of control was affirmed. None of them purported to prescribe criteria which would require a finding of control in other cases and on other facts.

[98]United States v. National City Lines, 186 F. 2d 562 (CCA 7th) certiorari denied, 341 U. S. 916, cited by the Government at page 106 of its brief, involved a series of long-term exclusive dealing contracts. There was therefore no question in that case with respect to whether a restraint of trade had been imposed or as to the nature of the restraint. The only question was whether the restraint was of a character that violated the Sherman Act. The facts therefore bear no resemblance to the facts here where the crucial issue is whether there has been any restraint at all.

a manufacturing company had, for the purpose of pre-empting or monopolizing a market, intentionally acquired control of companies that consumed its products. After trial the District Court found on the facts that the Government had failed to prove its case. This decision was supported by findings of fact which this Court refused to overturn. We do not urge this case as a precedent on the question whether the findings here should be accepted; whether the findings here are correct depends upon the facts in this record and not upon the facts in the *Yellow Cab* case.[99] But while we do not contend that the *Yellow Cab* decision is a precedent on the factual issue presented in this case, we do suggest that if the findings of the court below are accepted, the *Yellow Cab* case is an answer to all of the legal questions presented in the Government's brief. Indeed, the findings in this case are not subject to the objection made to the findings in the *Yellow Cab* case by the dissenting justices. The dissenters urged there (338 U. S. at p. 343) that the findings were deficient in that the trial court "did not make specific findings as to whether the freedom of the taxicab companies to buy taxicabs from other manufacturers had been hobbled by the defendant's business arrangements, regardless of compulsion or intent to destroy competition." In the present case the court below made such findings, and made them in detail and with reference to specific incidents, commodities and transactions. The find-

---

[99]It may be noted in passing, however, that in two significant respects the Government had a stronger case in Yellow Cab than it has here. In the Yellow Cab case the manufacturing company owned a majority of the stock of the consuming companies and therefore clearly possessed a kind of "power" or "control" or "influence" which is not present in this case. In the second place, the evidence in the Yellow Cab case showed that the consuming companies bought from the manufacturing company their entire requirements of cabs. Here the evidence shows that General Motors purchases substantial quantities of products from competitors of du Pont. In the circumstances of the present case the distincion suggested by the Government (Br., pp. 109-110)—that Yellow Cab was a conspiracy case and therefore

ings here, therefore, as compared with those in the *Yellow Cab* case, remove the only question of law which the dissenting justices thought remained open there.

While, as we have shown in the preceding paragraphs, the Sherman Act decisions cited by the Government do not cure the infirmities in the Government's factual proof, those decisions do raise additional obstacles which are not answered either by the Government's arguments or by its proof.

(1) By abandoning the charge of conspiracy or agreement and basing its case on control over purchases, the Government has assimilated its case to one involving integration. It is well settled that integration is not unlawful *per se*. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 519-525. Its legality depends upon a number of factors, one of the most important being a showing of economic consequence in terms of the market affected. *Id.* at pp. 525-527. The Government has apparently proceeded in this case on the theory that the Sherman Act is violated if it can be shown that General Motors, because of control or influence arising from du Pont's stock ownership, buys substantial quantities of goods from du Pont. There is no support in the decisions for this assumption. Compare *United States* v. *Columbia Steel Co.*, 334 U. S. 495. In the instant case the Government offered no proof that would justify the conclusion that the part of General Motors' paint and fabric requirements supplied by du Pont would be significant enough economically in terms of the relevant market for each of those products to satisfy the test of illegality. Indeed such comparisons as can be made

---

required proof of intent—is of no importance. The asserted distinction leaves the Government with the burden of proving that in fact trade has been restrained, *i.e.*, that du Pont has obtained and enjoys a non-competitive, preferential advantage in the trade of General Motors. In this case the Government has failed on that point as well as on the point of intent.

on the basis of the record suggest that those requirements are too small in relation to the total market to support the conclusion of illegality which the Government seeks to establish.[100]

(2) It should also be noted that the Government's own view of the facts is so vague that it leaves the nature, extent and operation of the alleged restraint in doubt and confusion. In the usual integration case there is no doubt as to the nature of the restraint. "A subsidiary will in all probability deal only with its parent for goods the parent can furnish." *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 523. The same certainty attaches to a restraint imposed by a requirements contract or a tieing clause. Compare *International Salt Co.* v. *United States*, 332 U. S. 392. But here the Government speaks vaguely of an "edge" (Br., p. 98) and of a preferred position (Br., p. 100) which du Pont is alleged to enjoy. Nothing in the Government's argument gives form or content to these assertions, doubtless because there is no evidence in the record from which the essential elements could be supplied. We are not told in plain and consistent terms when or in what way or to what extent the alleged "preference" or "edge" operates. We are not told why the alleged "preference" or "edge" which is said to be "inherent" and "inevitable" is not also invariable. The Government does not explain why it oper-

---

[100]General Motors' purchases of paint from du Pont in 1947 totalled approximately $19,000,000, while total purchases of all varnishes, lacquers, enamels and similar finishes shipped primarily to industrial users totalled $566,000,000. In the same year General Motors' purchases of fabrics from du Pont amounted to approximately $3,600,000; in that year du Pont's total sales to all users were $20,000,000 and du Pont's position in the industry was approximately 11 percent. Accordingly General Motors' purchases of such fabrics from du Pont represented less than 2 percent of total sales of such fabrics in that year (DP 445, R. 2688, 6436, U. S. Department of Commerce, Bureau of the Census, Census of Manufacturers, 1947, Vol. 2, pp. 414-415, GTX 1383, R. 2825, 5416).

ates as to some commodities and not as to others, or at one time and not at another, or in some Divisions of General Motors and not in others. In the court below the Government grappled with this problem and finally, after a variety of different formulations, felt obligated to take the position that General Motors was expected to buy from du Pont, and did buy from du Pont, only when du Pont's product, quality and service satisfied the "requirements" of General Motors, and that General Motors itself without control or influence by du Pont decided on the nature of its own requirements (R. 3020-3023). Stated in these terms this definition of the alleged restraint came to nothing more than that General Motors bought from du Pont when General Motors decided for its own reasons that it wished to do so and not otherwise. A " preference" or "edge" so defined is not an "edge" or a "preference" at all and is certainly not a restraint. Perhaps for that reason the Government in its brief in this Court does not repeat the concession which it made below.

(3) When the Government on its own view of the evidence states the alleged "preference" or "edge" in such vague and general terms and couples with the statement the suggestion that the "preference" or "edge" may not be the result of command or control but merely arises as a result of a unilateral choice made by General Motors (Br., p. 98), its arguments present legal issues not resolved or considered in any of the Sherman Act cases cited in the Government's brief. Certainly a wide gulf exists between a restraint conceived in these terms, even if, contrary to the findings and evidence, such a restraint had existed, and the tieing clauses or requirements contracts involved in *International Salt Co.* v. *United States,* 332 U. S. 392, *Standard Oil Co. of Calif.* v. *United States,* 337 U. S. 293, and *United States* v. *National City Lines,* 186 F. 2d 562, *certiorari denied,* 341 U. S. 916.

Similar legal difficulties are raised by the Government's reference to decisions which it asserts hold "that if intent and power to monopolize were present, then proof of restraint was unnecessary" (Br., pp. 113-114). In this case the Government has not proved either the alleged intent or the alleged power. The fact that there has been no restraint of trade for thirty years establishes that either the alleged intent or the alleged power, or both, are nonexistent. But the Government faces legal difficulties over and above these. In each of the cases cited by the Government (*United States* v. *Reading Company*, 253 U. S. 26; *United States* v. *Griffith*, 334 U. S. 100; *American Tobacco Co.* v. *United States*, 328 U. S. 781), the power to which the Court referred was a monopoly power over prices or a monopoly power to exclude competitors. That kind of power is essentially different in character from any concept of control or power that the Government advances here, even on its own view of the facts. The Government does not allege, for example, and the record would not support any allegation, that du Pont has any monopoly power over the prices that General Motors pays for its supplies. Indeed, it is not even clear that the Government means to assert that the alleged "edge" or "preference" gives du Pont any real protection against price competition. Nor does the Government suggest that du Pont has any monopoly power, in the sense in which power was discussed in the cases cited by the Government, to exclude competitors from General Motors' trade. On the Government's own theory any exclusion of competitors follows not from an exercise of monopoly power but from the operation of a vaguely defined "edge" or "preference" which in turn depends upon the decision and judgment of General Motors.

In raising these several questions with respect to the legal theories advanced by the Government we do not intend to suggest that the questions are presented on this record.

The evidence, and the findings of the trial court based on the evidence, establish that du Pont has had no intention or power to restrain trade, and has enjoyed no preference or edge in General Motors trade; it follows, therefore, that no legal question under the Sherman Act remains to be decided. The questions here discussed, however, suggest that even if the Government's characterizations of the evidence should be accepted, there would remain a serious question whether it could articulate a restraint of trade that would constitute a violation of the Sherman Act.

III

THERE HAS BEEN NO VIOLATION OF SECTION 7 OF THE CLAYTON ACT

The issues of fact which are decisive against the Government's contentions under the Sherman Act are also decisive against its charge that du Pont's acquisition of General Motors stock violated Section 7 of the Clayton Act. Admittedly Section 7 condemns stock acquisitions whose effect "may be" to restrain trade, and in that respect the section, as the Government suggests, imposes a "less stringent burden of proof" than the Sherman Act (Br., p. 149). Even so, to make out a case under Section 7 the Government must establish that there is a reasonable probability that the effect of a stock acquisition may be to restrain trade or tend to create a monopoly. *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 298.

The question whether there is such a reasonable probability is a question of fact.[101] The trial court resolved this

---

[101]See Transamerica Corp. v. Board of Governors, 206 F. 2d 163, 170, (3d Cir. 1953), certiorari denied, 346 U. S. 901:

> "On the contrary such acquisition is a violation only if its effect may be in fact to substantially lessen competition between such corporations, to restrain commerce or to tend to create a

critical factual issue against the Government. It found (R. 466) "There is not, nor has there been, any basis for a finding that there is or has been any reasonable probability of" a restraint within the meaning of the Clayton Act.

This finding finds ample support in the other findings of the trial court which establish that in the thirty years that have elapsed since du Pont's acquisition of stock in General Motors there has been no restraint of trade because du Pont's stock interest has not conferred upon it a non-competitive, preferential advantage in its commercial dealings with General Motors. In the circumstances of this case thirty years' experience makes it both unnecessary and improper to base any findings upon speculation as to the future. There can be no rational basis for asserting that a relationship which for thirty years has not restrained trade presents a reasonable probability that it will restrain trade in the future.

This is particularly true here, since the Government makes no contention that there has been any intervening event, or any change in circumstances, which makes restraint of trade more probable or more imminent now than it was in 1917, when du Pont first acquired its stock in General Motors, or in the years that immediately followed the acquisition. On the contrary, to establish its case the Government relies primarily on evidence of events that occurred in the 1920's. The Government does not contend that the relations between du Pont and General Motors are any closer today than they were twenty-five or thirty years ago. Indeed, the evidence shows that the opposite is the case and the trial court so found. On the basis of the Government's own case, therefore, if it cannot establish

---

monopoly. Otherwise the acquisition is entirely lawful, so far as Section 7 is concerned. It necessarily follows that under Section 7, contrary to the rule under Section 3, the lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked."

that du Pont's acquisition of the stock has in fact resulted in restraint of trade in the past, it has no factual basis for asserting that there is a reasonable probability that it may do so in the future.

The Government appears to recognize that it has no case under Section 7 unless it can upset the findings of the trial court that there has been no restraint of trade in the past. Thus it asserts (Br., p. 144) that du Pont's acquisition of General Motors stock violated Section 7 "since it has been used to channel General Motors' purchases to du Pont." The trial court found that du Pont's stock interest in General Motors has not been used to channel General Motors' purchases to du Pont and that the stock relationship has not controlled or limited General Motors' purchasing freedom. These findings are fully supported by the evidence and it follows that the Government is not entitled to relief under Section 7. Accordingly we shall not discuss at length the legal problems raised by the Government's attempt to apply Section 7 to du Pont's acquisition of stock in General Motors. We note the problems only to make clear that the Government's Clayton Act contention, like its Sherman Act contention, suffers not only from a complete failure of proof but from serious legal deficiencies as well.

(1) Section 7 of the Clayton Act has never been authoritatively interpreted to prohibit the acquisition of stock in a corporation that is not in competition with the acquiring corporation. The legislative history of the Section clearly indicates that the sole practice with which the Congress was then concerned was that of bringing competing companies under common control.[102] Neither the Department of Justice nor the Federal Trade Commission, the two

---

[102] *E.g.*, H. R. Rep. No. 627, 63rd Cong., 2d Sess. 7-8, 17 (1914); Sen. Rep. No. 698, 63rd Cong., 2d Sess. 13 (1914); 51 Cong. Rec. 9077-9078, 9554, 9595, 14254.

principal enforcement agencies, has ever brought an action under old Section 7 that did not involve an acquisition of stock in competing companies.[103] Indeed the Trade Commission has for many years declared its understanding that Section 7, prior to its amendment in 1950, applied only to acquisitions involving competing companies.[104] In a recent report it stated without qualification (*Report on Corporate Mergers and Acquisitions* (1955), p. 168):

> "While the 1914 act applied solely to horizontal mergers, the 1950 act applies not only to horizontal acquisitions but to vertical and conglomerate acquisitions which might substantially lessen competition or tend to create a monopoly."

Thus, in this, its first effort to extend old Section 7 to include acquisitions involving non-competing companies, the Government is asking the Court to write new law which would reject forty years of established administrative practice. Cf. *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349.

(2) The Government's invocation of Section 7 in this case is without precedent in another important respect: it challenges for the first time, in 1949, an acquisition that took place in 1917. The prohibition, it will be noted, is directed solely and unequivocally at "the acquisition" of

---

[103]In Aluminum Co. of America v. Federal Trade Commission, 284 Fed. 401 (3d Cir. 1922), certiorari denied, 261 U. S. 616, which the Government cites to the contrary (p. 147), the defendant and an admitted competitor jointly acquired stock of a newly-organized company which purchased all the assets of the competitor.

[104]See Annual Report, Federal Trade Commission (1937) p. 15; Statement by Chief Counsel Kelley in Hearings on H. R. 2734 and other Bills before Subcommittee No. 3 of the House Judiciary Committee, 81st Cong. 1st Sess. 37 (1949); Report of the Federal Trade Commission on Interlocking Directorates, H. Doc. No. 652, 81st Cong. 2d Sess. 1 (1951).

stock, not the holding or subsequent use of the stock.[105] The dominant characteristic of the Section has been consistently reflected both in its enactment and in its enforcement; it is intended to arrest restraints of trade in their incipiency.[106] Both the purpose of the Section and the extraordinary procedure authorized to accomplish that purpose belie its application here. Thirty years far exceed any reasonable period of incipiency; and there is no occasion, or justification, for prediction as to *probable* effect when the *actual* effect of the challenged acquisition can be and has been ascertained. The Government's error is not laches, but a misconception of the place of Section 7 in the panoply of antitrust laws. It supplements the Sherman Act in the manner described above, but its full force is spent once the actual effects of an acquisition become ascertainable. At that point—which in this case was long before 1949—any alleged restraint can be dealt with under the Sherman Act.

(3) Even if the Government were permitted to invoke Section 7 as the basis for a decree directing divestment of an acquisition made almost forty years ago, it has offered no adequate proof to show the illegality of the challenged acquisition. The present size of the two com-

---

[105]No reported decision has been found in which either the Department of Justice or the Federal Trade Commission invoked Section 7 more than four years after a challenged acquisition occurred. Again, we submit, there has been an "established practice" which is persuasive evidence as to the proper scope of the Section. Federal Trade Commission v. Bunte Brothers, Inc., *supra*.

[106]In the words of the Senate Judiciary Committee, "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices . . . and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." Sen. Rep. No. 698, 63rd Cong., 2d Sess. 1 (1914). This Court has stated, "The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency . . ." Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 356.

panies cannot affect the legality of the 1917 acquisition.[107] At that time du Pont was an explosives manufacturer seeking to diversify its lines of activity. It did not compete with General Motors in any respect. General Motors at the time was but a collection of separate companies brought together by Durant. Ford dominated the infant auto industry and General Motors was but one of several companies sharing the balance of what market there was. The proof which would determine whether or not du Pont's acquisition of General Motors stock violated Section 7 of the Clayton Act is proof adequately disclosing the economic setting in 1917 when the acquisition was made and the impact of that acquisition upon competition in the relevant market at that time; as to these matters, there is a complete failure of proof on the Government's part. The very fact that neither the Department of Justice, nor the Federal Trade Commission, nor any competitor of du Pont or General Motors, challenged the acquisition under Section 7 when it was made or at any reasonable time thereafter, is in itself persuasive evidence that the acquisition did not violate that Section.

(4) There is a further barrier in the way of the Government's attempt to apply Section 7 here. Du Pont's purchase of General Motors stock falls squarely within the provisions of Section 7 which excepts from the prohibition of the Act acquisitions made "solely for investment" and not used "to bring about, or in attempting to bring about, the substantial lessening of competition." This exception distinguishes stock acquisitions made with the purpose of controlling the commercial policies of the company whose stock is acquired from those made with a view to receiving finan-

---

[107]The Government has made no adequate showing that even at the present time the alleged economic consequences of du Pont's stock interest in General Motors are significant enough in terms of a relevant market to sustain a charge under Section 7. See the discussion of this point with respect to the Sherman Act at p. 275, *supra*.

cial gain in the form of dividends and capital growth. The District Court found that du Pont's acquisition of General Motors stock "was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business" (R. 301). Such action as du Pont has taken in financial matters has been entirely consistent with an investment intention and objective and has not been directed at General Motors commercial policies. Thus, the District Court found that du Pont has not "sought through such participation to place people in General Motors who would further du Pont's interests as a supplier or as a chemical manufacturer" (R. 316).

We do not argue these defects in the Government's Section 7 contention at length, because the Court need not reach them. As in the case of its Sherman Act contentions, the fatal deficiency in the Government's case is that the facts do not support its charges.

CONCLUSION

WHEREFORE, the judgment of the District Court should be affirmed.

Respectfully submitted,

JOHN LORD O'BRIAN
HUGH B. COX
CHARLES A. HORSKY
DANIEL M. GRIBBON
701 Union Trust Building
Washington 5, D. C.
Attorneys for Appellee
E. I. du Pont de Nemours and Company

Of Counsel:
COVINGTON & BURLING