No. 3

IN THE

Supreme Court of the United States

October Term, 1956

UNITED STATES OF AMERICA, *Appellant,*

vs.

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

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

BRIEF FOR APPELLEE GENERAL MOTORS CORPORATION

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OPINION BELOW.

The opinion of the District Court dismissing the complaint (R. 291-466) 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 (15 U.S.C. § 4), and Section 15 of the Act of October 15, 1914 (38 Stat. 730), as amended (15 U.S.C. § 25). The judgment of the District Court (R. 466-7) was entered on December 9, 1954, and notice of appeal was filed on February 4, 1955 (R. 467). Probable jurisdiction was noted 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 (15 U.S.C. § 29).

STATUTES INVOLVED.

The statutes involved are Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. §§ 1 and 2), and Section 7 of the Clayton Act prior to the 1950 amendment (38 Stat. 730, 15 U.S.C. § 18). The statutory provisions are quoted at pages 2 and 3 of the Government's brief.

QUESTIONS PRESENTED AND PRELIMINARY ANALYSIS.

In 1949 the Government filed its complaint charging that the appellees du Pont and General Motors (and numerous other defendants who were dismissed thereafter, or as to whom the Government has not appealed) had combined and conspired to restrain and monopolize a substantial part of interstate commerce by means of a continuing agreement and concert of action whereby, in the portion of the case presented on this appeal, General Motors is required to purchase from du Pont its supplies of the products which the latter company manufactures.[1] The Government also charged that du Pont's acquisition of General Motors stock in 1917 violated Section 7 of the Clayton Act.

The case was tried in 1953, the trial lasting six months. The trial court, after hearing a great many witnesses, including the principal actors, and examining the exhibits, found in a detailed and carefully reasoned analysis (R. 291-

[1] The Government also alleged, and in the court below contended, that there was an agreement that General Motors would stay out of the field of manufacturing chemical products and turn over to du Pont its chemical discoveries (R. 219-222, 255). The Government does not seem to be pressing this point here, though it relies on the same evidence in support of its claims that du Pont was favored in the purchase of General Motors supplies.

466) that *as a matter of fact* the Government had not proved any portion of its claim that du Pont had interfered with General Motors' purchasing or manufacturing policies, by coercion, agreement, control or otherwise. The court found that "the evidence of record fails to support the Government's charges" (R. 465); and specifically that (a) du Pont did not control General Motors (R. 323); (b) that there has been "no limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont" or upon its "freedom to deal with its chemical discoveries" (R. 465); and (c) that after 30 years in which no such restraint had resulted, there was no "basis for a finding that there is or has been any reasonable probability of such restraint within the meaning of the Clayton Act" (R. 466).

(1) The fundamental question presented in our view is whether the trial court's findings are clearly erroneous. We shall show that there was ample support for the findings (a) that du Pont did not receive preferential treatment in trading with General Motors (Point II, *infra,* p. 171), and (b) that du Pont did not control General Motors (Point III, *infra,* p. 195). The Government seeks to present as the principal question whether du Pont "controls" General Motors. But this raises only a subsidiary evidentiary issue, for whether du Pont controls the operations of General Motors has relevance only it if proves restraint or monopoly, or a reasonable probability thereof, in the field of trade. If there was and is no restraint of trade or monopolization, as the trial court found, control in itself would not be illegal.

(2) The second question, whether Section 7 of the Clayton Act has been violated, is also factual. In view of the findings that over a period of 35 years no restraint of competition has resulted from du Pont's ownership of General Motors stock, this turns upon whether *both* at the

time of the original acquisition of the stock and at the time of trial 35 years later there was a reasonable probability that the stock acquisition would result in restraint of trade or monopoly. The precise question is whether the findings that there was no such reasonable probability in either of those periods are both clearly erroneous.

An additional question which the trial court did not reach is:

(3) Whether, in view of the fact that sales to General Motors and to the automobile industry constituted only a very small portion of the market for the products du Pont sells to General Motors, the Government proved that the alleged restraint pertained to a sufficiently substantial portion of a market to injure competition in a manner forbidden by the antitrust laws. See Point V, *infra*, p. 223.

STATEMENT.

The above preliminary analysis will assist in understanding the following statement of the facts. This Statement will point out the significance of these facts and discuss the evidence relied upon by the Government. Although this enlarges the Statement and is partly argumentative it avoids, to a considerable extent, the need for restating details of fact in the argument, and thereby serves to prevent an already long brief from becoming longer.

A. Volume of commerce involved, relation to the market.

Before turning to the issues directly, we would like to put them in perspective. Du Pont and General Motors are among the largest of our industrial corporations, and the charge of collusion, control and conspiracy doubtless gives the impression that this case is concerned with a restraint or monopoly of trade of tremendous magnitude involving large portions of substantial markets. But the figures as to the total sales of these companies—$783,000,000 for du Pont

l $3,815,000,000 for General Motors in 1947, and more in)sequent years (R. 347; DPX 442, R. 2684, 6433),[2] do not ect the volume of commerce involved in this case.

There is, of course, no claim that du Pont and General tors are directly competitive. One company produces micals and chemical products, the other automobiles, liances and machinery. The commerce allegedly involved marily concerns the products du Pont makes which heral Motors uses. Among these, of which there are a at number, the Government concentrates on industrial shes or paint, which means principally Duco lacquer for omobiles and Dulux synthetic enamel for refrigerators l appliances, and on certain fabrics used in automobile lies. In 1948 General Motors purchased from du Pont proximately $20,000,000 of finishes (R. 393; DPX 445, 2688, 6436), and $3,700,000 of fabrics (R. 402-3; DPX , R. 2688, 6436).[3] The total of du Pont's sales to heral Motors, which includes many smaller items, was ut $30,000,000 in 1948 (DPX 445, R. 2688, 6436). Al-ugh this, of course, is a large amount, it constituted only of du Pont's total sales (*ibid.*), and obviously a much aller percentage of General Motors' total purchases.

We do not suggest that these amounts are insubstantial. t in a case which turns largely on the intention with ich the officials of the companies acted, the small propor-n of each company's business involved is pertinent in de-mining the existence of an intent to restrain trade or nopolize. It also points up the fact that the total size of

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[2] There record references are separated by a semi-colon, the refer-nces before the semi-colon to pages between R. 291 and 466 are to he findings and opinion of the court below. The record references hich follow the exhibit numbers are first to the page where the xhibit was offered and then to the page where the pertinent part f the exhibit appears in the record. The exhibits begin at Volume V, . 3027. Government exhibits are referred to as GX, du Pont exhibits s DPX, and General Motors exhibits as GMX.

[3] his is the last year for which the record contains full statistics.

the corporations is irrelevant to the restraints alleged in this case.

The significance antitrust-wise of the quantities of these products sold by du Pont to General Motors also depends upon the size of the markets of which they form a part. The market for industrial finishes such as Duco, or fabrics such as artificial leather, or celluloid is not limited to sales to the General Motors Corporation nor even to the automobile industry. Purchases by General Motors comprise only a small percentage of the total market. This was true both in 1917, at the time the du Pont Company first invested in General Motors, when the alleged violation of the Clayton Act occurred, and in the period preceding the trial.

1. **The market in 1917.** In 1917 "General Motors was a small item in the motor business" (R. 931); Ford sold about one-half of the cars and General Motors 10.83%. (Federal Trade Commission, *Report on Motor Vehicle Industry,* 1939, p. 27.)[4] The same kinds of finishes were used on automobiles as on other products, such as carriages and pianos (R. 1286, 1586; DPX 87, R. 788, 5831-32). The quantity of finishes used on automobiles was only a small portion of the total produced by a great many paint and varnish manufacturers.[5] The imitation leather (du Pont's Fabrikoid) used on automobiles, principally for side curtains and tops at that time, also was used on such products

[4] A witness estimated that General Motors' share was one-sixth (R. 931-32). The Federal Trade Commission report shows General Motors' percentage as 18.75% in 1919, 11.79% in 1921 and 18.71% in 1923.

[5] There were over 800 paint and varnish manufacturers in the United States; in 1919 total sales were $382,000,000, of which $71,000,000 was for varnishes, lacquers and japans, the kinds of finishes then used on automobiles. United States Department of Commerce, Bureau of the Census, Census of Manufacturers 1925, pp. 806, 809. GX 111 (R. 477, 3144) gives the number of establishments in 1914 as 855. In 1917 when the Flint Varnish and Color Works (acquired by du Pont in 1918) was "furnishing all the material for all the different constituent companies of the General Motors except the Cadillac, and for all the different plants of the Chevrolet" (GX 277, R. 499, 3699), its sales to General Motors and Chevrolet totaled $905,305.

as luggage and case coverings, furniture, railroad upholstery, footwear, book binding, table cloths (R. 2184, 2065-71; DPX 319, R. 2286, 6264; DPX 245, R. 2191, 6153). In 1917 70% of du Pont's sales were outside the automotive industry (R. 2184), and du Pont was selling to a great many automobile companies besides General Motors (R. 397; 2073-84). Celluloid (du Pont's Pyralin) was used not only for automobile side curtain windows but for ornaments, combs, buttons, cutlery, toys, etc. (GX 108, p. 4, R. 3104; DPX 72, p. 5, R. 764, 5732). In 1917 2.1% of du Pont's Pyralin was sold to the two largest divisions of General Motors, Buick and Chevrolet.[6] Obviously, the share of the *total* market for these products provided by the General Motors Corporation in 1917 and the years immediately following was a great deal less than General Motors' small proportion of the automobile market. There is no evidence of the total quantity of sales to General Motors of these products in that period or of the proportion of the market which sales to General Motors comprised.

The market at the time of trial. In 1947, when General Motors produced 38% of the passenger cars (R. 346), neither General Motors itself nor the automobile manufacturing industry constituted the entire market for the kinds of finishes and fabrics used in motor cars and appliances.[7] From the beginning it was recognized that Duco could be used "in many other industries besides the motor car industry, and our sales are rapidly increasing in some of these other lines" (GX 406, R. 527, 3977).[8] Duco and sub-

[6] $153,878 out of $7,485,442 total sales (DPX 421, R. 2695, 6389). In 1924, when du Pont's total sales were about one-fourth of the industry (GX 1245, R. 656, 5198), the percentage sold to Buick and Chevrolet was 2.8% (GX 1245, p. 7, R. 656, 5204).

[7] Celluloid was no longer a substantial item.

[8] See also R. 2029; GX 379, R. 522, 3920; DPX 558, R. 2997, 6476 (1926 du Pont sales: General Motors 19%, other motor manufacturers 33%, others 48%); GX 492, R. 541, 4146 (1927 du Pont sales: General Motors 33%, other motor manufacturers 23%, others 44%).

sequently Dulux were used on refrigerators and other appliances. In 1947, when du Pont sales of finishes to General Motors totalled about $19,000,000 (R. 393; DPX 445, R. 2688, 6436), the total market for paints and finishes was $1,248,000,000, of which $552,000,000 was for varnishes, lacquers, enamels, japans, thinners and dopes, the kinds of finishes sold primarily to industrial users, which includes the automobile industry.[9] This means that du Pont's total sales to General Motors constituted 3.5% of all sales of finishes to industrial users.

Similarly, a great number of products are made from the same fabrics as are used by the automobile industry (R. 2065-71; DPX 228, R. 2065, 6130).[10] The over-all competitive position of du Pont's Fabrics Division was about 10% in 1946, 1947 and 1948 (GX 1383-1384, R. 2826, 5416, 5418), of which 20% was to the automobile industry, and four-fifths of that to General Motors (R. 402-3; R. 2070).[11] This means that du Pont sales to the automobile industry and to General Motors comprised approximately 2% and 1.6% of the total market.[12]

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[9] United States Department of Commerce, Bureau of the Census, Census of Manufacturers 1947, Vol. 2, pp. 414-15. There were 1,291 establishments manufacturing these products (*ibid.*). Du Pont's total sales were 8.1% of the paint and varnish industry (DPX 444, R. 2684, 6434).

[10] *E.g.*, belts, book bindings, brief cases, card table covers, case coverings, footwear materials, furniture upholstery, hassocks, luggage coverings, novelties, school books, slippers, sporting goods, table mats and pads, baby carriage upholstery and tops, bicycle saddles, loose-leaf book binders.

[11] Du Pont's percentage of the automobile market in 1948 was 21% (GX 1384, R. 2826, 5418) and in 1950 16.8%, and there were many large competitors (DPX 563, R. 2998, 6483).

[12] If the Fabrics Division had 10% of the over-all market, the 20% of its sales to the automobile industry would constitute 2% of the total market. General Motors' 80% of du Pont sales to the automobile industry would then equal 1.6% of the total market.

B. The Relationship between du Pont and General Motors Generally—The Matter of Control.

1. *The Relevance of Control.*

The Government rests its case primarily on the contention that it has proved that du Pont gained and retains practical and working control of General Motors. The trial court found to the contrary (R. 316, 321-3), and the record shows that this finding was correct. Before analyzing the facts on this aspect of the case, and at the risk of anticipating the legal argument to a slight extent, we think it important to put this question also in perspective.

Even complete control by one corporation of another does not violate the antitrust laws, particularly when they are not in competition. Vertical integration is not illegal *per se*. If 100% control is not illegal *per se*, 23% stock ownership is not. The antitrust laws are concerned with trade. "Control" of one corporation by another becomes material only if it results in an unreasonable restraint of trade or monopolization. It follows that the Government must prove not control in general, or *in vacuo*, but a control over aspects of the business relating to trade, which produces the restraints proscribed by the statutes. If there has been no restraint of trade or monopolization, control in itself does not prove illegality.

In subsequent portions of this Statement (pp. 35-135, *infra*) we discuss the findings and supporting evidence which establish that there has been no restraint upon General Motors' purchasing policies or favoritism toward du Pont because of its ownership of General Motors stock. Although such findings make the question of control irrelevant, we shall deal with it first because the facts relating to it provide a historical background for the case as a whole.

2. *From 1917 to 1923.*

In 1916 W. C. Durant, who had organized General Motors in 1908 but had subsequent financial difficulties, had reacquired control (R. 297-8).[13] Pierre and Irenee du Pont and John J. Raskob, treasurer of du Pont, had made personal investments in General Motors and Pierre and Raskob had been on its Board of Directors (*ibid.*). Upon Durant's suggestion that the du Ponts participate further in the company, the du Pont Company in December 1917 invested $25,000,000 in General Motors stock,[14] which gave it a 23.83% share of the total (R. 299; GX 128, R. 1803, 3235-6). During the next three years the total investment was increased to $46,000,000 although, due to an increase in the capitalization of the company, du Pont's proportionate stock interest remained about the same. At the end of 1920 du Pont owned 23.96% of the outstanding stock of General Motors (R. 299; GX 166, R. 1839, 3384).

This, combined with a larger amount of stock held by Durant, constituted over 50% of the stock outstanding (GX 124, R. 1785, 3218), and from the time of the investment until 1920 Durant and the du Ponts together jointly controlled General Motors (R. 303). In accordance with the original understanding between them, the du Ponts undertook primary responsibility for financial matters, but Durant retained control over the company's operations in other respects (R. 303; R. 686, 812, 818, 835; DPX 74, R. 777, 5768). Pierre S. du Pont testified (R. 812):

> "The proposition was that the du Pont Company would come in and take off Durant's shoulders the burden of financing General Motors Company; that would be their position in the General Motors Company, their part in the whole business. Durant would

[13] Durant had formed the Chevrolet Motor Company, which by that time had acquired a majority of General Motors stock (R. 297; R. 933).

[14] The actual investment was in both General Motors and Chevrolet stock, but shortly thereafter General Motors acquired the assets of Chevrolet (R. 303), and shares of General Motors were distributed to Chevrolet stockholders (R. 308; GX 124, R. 479, 3216-17).

be the operating man and du Pont would look after the financial affairs, which Durant acknowledged he was weak in."

(R. 817):

"He [Durant] was the man we looked to to operate the company. We knew nothing of the operations of motor companies, and we relied on him, and the organizations he would build, to govern that part of it. We would not have undertaken it ourselves, and as long as he was with us it was a good proposition. Without Durant we would not have taken it. I would not have voted for it."

In November 1920 it became clear that Durant was greatly over-extended in General Motors stock, to the amount of $27,000,000 (R. 303; DPX 50, R. 827, 5628-38). At the same time, General Motors had very heavy bank loans outstanding, which had been necessary to maintain adequate working capital and at the same time carry inventories which had risen, because of lack of adequate controls, to levels far in excess of those recommended by Raskob and the governing committees (DPX 51, R. 827, 5639; DPX 57, R. 838, 5678-9). Consequently, it was feared that Durant's failure, and the panic that might ensue, might in turn engender a loss of confidence in General Motors, a call of its bank loans, and receivership for the corporation (R. 303-4; R. 583; DPX 50, R. 827, 5628-38). In order to avoid Durant's failure and its feared consequences,[15] du Pont arranged to put up $7,000,000 cash and to borrow $20,000,000 to pay off

[15] "On a falling market with public confidence low and General Motors in a position of rising inventories and decreasing earnings, the difficulties of its president became the difficulties of the corporation. If Durant were to be sold out by his bankers and brokers, a possibility which became more and more imminent with every point decline, the forced sale of his pledged securities on a falling market would have meant a wild decline in the whole stock market. From the standpoint of both the general welfare and corporate credit it was therefore necessary for someone to finance the settlement with Mr. Durant's brokers and take his holdings out of the market. In the General Motors situation only the du Ponts had the financial strength to do this." Federal Trade Commission, *Report on Motor Vehicle Industry*, 1939, House Doc. No. 468, p. 427.

Durant's debts.[16] In return, through a subsidiary, du P took over a portion of Durant's stock, thereby bringing share of General Motors stockholdings up to 38% (R. 30 R. 824-31, 872; GX 154, R. 481, 3329; DPX 50, R. 827, 5 38; DPX 53-4, R. 828, 832, 5641-53).

Shortly thereafter Durant resigned as president of G eral Motors. Pierre S. du Pont, who previously had ret as president of du Pont, was chosen president, u the urging not only of the du Ponts but of the bank group and of persons in General Motors' management 304-5; R. 981-82, 1345). Pierre was reluctant to take position, and did so on the condition that "it would be v definitely a temporary thing in character until he could somebody he felt was qualified to carry the responsibili (R. 1345, 839). He occupied the post until May 1923, w he resigned and was succeeeded by Alfred P. Sloan, who remained as president or chief executive officer u 1946 (R. 307-8).

While Pierre was president he was, of course, resp sible for the management of General Motors, operati as well as financial (R. 307). During this period from 1 to 1923, a number of documentary exhibits contain st ments, mostly by Raskob, referring to du Pont's "contr of General Motors (see GX 1304, R. 664, 5225 (1920); 181, R. 483, 3408 (1921); GX 1345, R. 2813, 5347 (192 GX 235, R. 483, 3496 (1923).)

If there had been a planned policy that du Pont domin General Motors' operations then and in the future, st would have been taken in that direction during this per of greatest du Pont authority. We are, of course, prim ily concerned with activities affecting the future, fo

[16] In the following year du Pont put this financing on a perma basis by issuing $35,000,000 of its own bonds (R. 830-833; DPX R. 832, 5644; GX 166, 483, 3386).

course of events *terminating* in 1923 would be of little consequence in supporting a claim for relief in 1949. Even in this period, however, the evidence indicates that although Pierre was interested in du Pont's sales to General Motors (GX 420-21, R. 529, 4010-4013), he acted independently on behalf of General Motors as against the du Pont Company (R. 305-6).

First, Pierre adopted a program suggested and developed by Sloan, vice president of the company, and not a du Pont man,[17] to decentralize the management of the company, and thereby give the division managers virtually complete control over their own operations (R. 305; R. 840, 973-80, 984; GX 178, R. 484, 3398-3403; GMX 1, R. 975, 6532). There was less direction of operating matters from the top. One result of this, as both Pierre's oral testimony (R. 840-41, 854-5) and his contemporaneous writings (GX 178, R. 484, 3398-3403; GX 408, 410, R. 527, 528, 3983, 3984) show, was that Pierre felt that he could not impair the freedom of the division chiefs in respect of purchasing.

Secondly, as has been said, Pierre undertook the presidency of the company reluctantly, and with the understanding that his tenure would be only temporary (R. 839, 1345). That he meant what he said is proved by the fact that after two and a half years he resigned and was succeeded by Sloan, who had been brought into United Motors by Durant and came with United Motors into General Motors in 1918. (R. 307; R. 990, 958-66).

Thirdly, du Pont sold the stock acquired from Durant. Faced with the problem of how best to assure that the new management under Sloan would operate so as "* * * to attain the greatest possible success in the conduct of the affairs of the General Motors Corporation" (GX 235, R.

[17] The Government, contrary to all the findings, treats Sloan as if he were a du Pont representative with General Motors. As to this, see pp. 200-207.

483, 3497), Pierre sponsored the Managers Securities Plan whereby substantial amounts of General Motors common stock would be sold through the Managers Securities Company to principal General Motors executives on a deferred payment basis (GX 235, R. 483, 3494). This plan was inspired by the fact that the du Ponts believed "owner-management was of a great benefit to a company" (R. 876, 2720; DPX 60, R. 850, 5704). Du Pont had available, in the form of the stock that it had acquired from Durant, the stock that the new plan would require, and it sold that stock to selected General Motors executives through the medium of Managers Securities Company in 1923 (R. 304, 317; GX 244, R. 493, 3529-3561). As a result of that sale and the ultimate complete liquidation of the Managers Securities stockholdings in 1938, du Pont's holdings of General Motors common stock were reduced to the original 23%, where they still remain (R. 304).[18]

None of these major changes is consistent with the charge that the du Pont Company or the du Pont family was en-

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[18] Government counsel, addressing themselves to the post-1938 period, cite the du Pont holdings of 10,000,000 shares and then add, "This is exclusive of the large blocks held by friends on whom du Pont could count in case of a contest" (Govt. Br. p. 28). The authority cited for the quoted sentence is GX 1345, R. 2813, 5347, the date of which is August 19, 1921. This injection of what was said in 1921, without further identification of it, into a paragraph dealing with the period 1938 and after, indicates complete disregard of the passage of time and of the changes wrought thereby. There is in this record no evidence since the mid-1920's that du Pont has or has not had any "friends" holding blocks of stock, large or otherwise, "on whom du Pont could count in case of a contest." If Government counsel are going to rely upon supposition and guess, it seems only proper that they should take into consideration the remarkable performance of the General Motors management over the past thirty years, a performance that may very well have created many "friends" upon whom that management "could count in case of a contest" with du Pont or anyone else.

"As a practical matter, . . . management still has a substantial advantage by virtue of its position of frequently being able almost effortlessly to put a sizable block of votes in its pocket, due to its friendly relationships with securities broker-dealers, bankers, institutions, suppliers, distributors, employees, pensioners, etc." Emerson and Latcham, *Proxy Contests: A Study in Shareholder Sovereignty*, 41 CALIF. L. R. 436 (1953).

deavoring to take over operating control of General Motors, or to do anything more than protect and build up the value of its investment in that company. If control had been the du Pont goal, it would not have sold a large percentage of its stock to the General Motors management, adopted an organizational plan which diminished the authority of the chief executive, who was a du Pont, and then given up that post to some one without any prior du Pont connections. The Government's statement that "It was in this period, up to 1930, that du Pont consolidated its position by its selection of the management" (Govt. Br., p. 73) is squarely contrary to the facts of record.

Other significant events also show that, even with Pierre as president of General Motors, du Pont did not control General Motors' operating policies. When four of the division heads had to be changed,[19] they were not replaced with du Pont men, but with persons chosen by Sloan from within the General Motors ranks (R. 305). When a General Purchasing Committee was established in 1922 to coordinate purchasing by the various divisions and to obtain the advantage of cheaper large-scale buying (R. 306; R. 1031-2), Sloan selected its members from purchasing agents and others who were not du Pont representatives, and named as secretary a person, James Lynah, who had previously left du Pont under acrimonious circumstances (R. 306; R. 1069-74; GMX 139-148, R. 1069-70, 1072-3, 1076, 6955-68). In our discussion of the work of that committee (pp. 45-52, *infra*), we shall show that one of its first decisions was to adopt a rule requiring two sources of supply, which decreased General Motors' purchases from du Pont. Pierre conceded the authority of the committee and the separate

[19] Two resigned, one to go with Durant, and two were replaced as a result of a dispute with the company over their appropriating large sums of money for themselves which they claimed were due under contracts made with General Motors under Durant (R. 305; R. 859-60; DPX 63-64, R. 860-1, 5710-5716).

divisions to adopt this policy, although he opposed it 840-41, 853-56; GX 410, R. 528, 3984).

During the period of Pierre's presidency the du P Company, through his brother Lammot, kept after Gen Motors to enter into a general agreement with respec chemical research for General Motors by du Pont. W Charles F. Kettering, who was in charge of General Mot research, refused to enter into the proposed agreement turned the matter over to Pierre, Kettering was upheld 407-10; R. 1354-6, 1537-8; GX 575-6, R. 608, 4254-8; GX 98, R. 609-11, 4265-95; DPX 155-9, R. 1913, 1915, 1918, 1 5979-83; GMX 246, R. 1536, 7328-9). Conversely, v Pierre requested du Pont to agree to give General Mo exclusive rights to its newly discovered and greatly impr finish for automobiles, Duco, he was turned down by brother Irenee (R. 383-4; R. 875; GX 377, 380, R. 5 3917, 3924-5).

3. *The Sloan Period Beginning in 1923.*

Alfred P. Sloan, Jr. became president of General Mo in 1923, and his tenure as chief executive lasted until 1 He continued as chairman of the board until 1956. (DPX R. 836, 5661-62). Sloan had built up the Hyatt Roller B ing Company from a small and unsuccessful business w $10,000 in 1898 to one which Durant bought in 1915 (R. 959) for $13,500,000 (the largest part of which wen Sloan and his father (R. 962)). Durant merged Hyatt four other accessory manufacturers into United Mo and made Sloan president (R. 962). Near the end of 1 there was an exchange of stock and United Motors consolidated with General Motors (R. 964). Sloan bec a director and member of the Executive Committe General Motors and vice president in charge of the divis which had come with United (R. 967; GX 177, R. 492, 3

After Pierre S. du Pont became president of General tors, Sloan became his principal assistant, eventually ng appointed operating vice president in "charge of the ple corporation" under Pierre (R. 982). Sloan's pro- tions were unquestionably attributable to his demon- ated abilities, and not to any relationship with the Ponts.

The record amply demonstrates, as the trial court found 321-322), that the du Pont Company could not and did control the management of General Motors during the iod of Sloan's chieftainship. Illustrations have already n given of the independence of Kettering, Sloan and n Pierre himself during the prior period of greatest Pont participation.

After 1923, the over-all picture was one of progres- ly increasing strength and self-sufficiency of General tors and of corresponding diminution, to the point of appearance, of its reliance upon du Pont. Whereas in early period, for example, General Motors was depend- upon du Pont to obtain financial guidance and support, t is obviously no longer necessary, and has not been for rs (GX 1238, R. 484, 5185). Except during Pierre's sidency, du Pont has not participated in the general rations of General Motors. By 1934, it had relinquished last seat on the Executive Committee, and it never was resented on the Operations Policy Committee. (See 26-27, *infra*). Du Pont similarly relinquished its trol over General Motors' finances, although retaining ority representation on the committee concerned with ncial matters. (See pp. 25-26, *infra.*) As General tors prospered under the management of Sloan, it t up its own group of able executives. They were de- dent for their own earnings on how General Motors, not Pont, fared (R. 321-322). (See pp. 32-33, *infra*). Although

it is true that at the beginning a handful of these executives had du Pont backgrounds[20]—which the record shows not to have affected corporate policy—even that is not true of the generation which has now been in power for many years.

That the General Motors management did not regard itself as subservient to du Pont is proved by the number of occasions on which it refused to do what du Pont wanted. One incident in 1928 is especially significant because Sloan was embroiled with the entire du Pont family as well as Raskob. Raskob, from the beginning a leader of the du Pont group interested in General Motors, at that time was the General Motors executive in charge of all financial matters as chairman of the General Motors Finance Committee (GMX 3, R. 991, 6562). During Governor Smith's campaign for the presidency, he became chairman of the Democratic National Committee. Sloan thought this put General Motors in politics, and that Raskob should not continue both with General Motors and in politics. Raskob was supported in his position that participation in public affairs was not a disqualification by Pierre and Irenee du Pont, as well as by former Republican Senator Coleman du Pont. If the du Ponts controlled General Motors, this should have been an occasion for that control to be manifested. Instead Raskob resigned his executive position as chief financial officer and chairman of the Finance Committee. In protest against Sloan's decision, Pierre resigned as chairman of the General Motors Board. They retained their positions as directors, and subsequently Raskob returned as a member of the Finance Committee, but he was through as a General Motors executive. In a test of power, the Sloan management, not

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[20] These were on the financial side, except Pratt, who had been brought into General Motors by Durant (R. 354; R. 1396); Lynah, who had left du Pont under "acrimonious circumstances" (R. 306; see fn. 30, *infra* p. 45); and Johnson, who had been brought into General Motors by Walter P. Chrysler (R. 1404).

the du Ponts, won (R. 310; R. 1191-4; GX 262, R. 496, 3597; GMX 17-20, R. 1193-4, 6602-6).

A less striking incident of the same sort occurred in 1937, when Sloan decided that a single policy committee would be more effective than the two committees, Executive and Financial, then in existence. Lammot du Pont vigorously opposed this change (R. 1001-2; GX 194, R. 484, 3428-33), and was supported by Pierre, and apparently also by Irenee and Walter S. Carpenter, who became president of du Pont in 1940 (GX 195, R. 487, 3434). But Sloan's plan was adopted.

Other similar incidents in which General Motors executives disregarded du Pont wishes can be cited. Lammot urged Sloan in 1927 not to have General Motors engage in research in the field of synthetic rubber. But Sloan disagreed and the project continued until General Motors' own chemists recommended that it be abandoned (R. 432-435; R. 1319-20; GMX 131-132, R. 1322, 6945-6; GX 888-894, R. 650-1, 5110-22). Indeed, the General Motors chemist, Midgley, was told not to bother to consult du Pont chemists (GMX 132, R. 1322, 6946-7). In 1931 Lammot, while president of du Pont, strongly expressed his views to John L. Pratt, vice president of General Motors, that General Motors should not go into the oil burner business, but Pratt went ahead and General Motors still is in that business (R. 360; GMX 227-8, R. 1469, 7284-88; R. 1471).

The du Pont Company unsuccessfully sought to induce General Motors to go along on a policy of "reciprocity", whereby both General Motors and du Pont would give preference in purchasing to suppliers who in turn purchased from General Motors and/or du Pont (R. 366-371; R. 1202-06, 1424-6; GX 527-543, R. 602-6, 4207-40; GMX 200-201, R. 1429, 7245-49). A resolution of the General Purchasing Committee took the position that generally General Motors

should not supply to du Pont information showing the volume of business done with other suppliers, but it provided that "in special cases, upon request by the president of the du Pont Company to the president of General Motors, the situation would be properly dealt with" (GX 537, R. 604, 4226-7). Only one such request was ever made, in 1928, where the reciprocity argument had been invoked by certain steel companies against du Pont (R. 368-9; GX 543, R. 606, 4236; R. 1207-10). Although Sloan consented to give du Pont information as to General Motors' purchases from these companies (R. 1210), Pratt violently objected. He wrote to Sloan (R. 369-371, GMX 201, R. 1429, 7246-9):

> "This instance may be the first that Mr. Lammot du Pont has requested information of this kind from you, but we have had a great many similar requests from the du Pont organization in the last three or four years. The position I have taken as Chairman of the Purchasing Committee has been invariably to refuse to give the du Pont Company any information which they might use in any way to influence their customers to think that the du Pont Company in any way could influence General Motors Corporation in buying their materials and supplies because the particular customer bought from the du Pont Company. * * * *Nothing could be more detrimental to the morale of our Purchasing Agents, and to the general interests of our Corporation, than for any supplier to believe that anything can influence General Motors in choosing its sources of supply other than the three fundamentals of purchasing, namely—quality, service and price.* I know you realize that as soon as any supplier feels that he can use collateral influence he is not as apt to give the utmost he can in quality, service and price to the one that deserves same, namely—the purchaser.
>
> "In refusing to give the du Pont Company such information as requested by Mr. du Pont, I have been guided by the following considerations:

"(a)—The du Pont Company in fact has no more right to such information than any of the other 60,000 stockholders in General Motors. * * *

"(c)—The principle of reciprocity must imply that you are giving something in order to get something. If the du Pont Company, in getting business, implies reciprocity on the part of General Motors' purchases, what does General Motors get? It would seem that in such reciprocity we are doing the 'giving' and the du Pont Company the 'getting'. *If there is anything to be gotten our position should be to see that it is gotten for General Motors Corporation, rather than the du Pont Company.*

"(d)—If our Purchasing Agents know that we are willing to allow the du Pont Company to use our purchases to influence du Pont sales, can we expect them to always resist giving weight to other considerations than the best interest of General Motors in placing their orders? * * *

"* * * In my judgment, if the du Pont organization are not able to retain the business they have through the quality of their goods and the service they render, then they should not be allowed to retain it because General Motors purchases goods from that particular customer of the du Pont Company. * * *" (Italics supplied.)

This was the Pratt, who, because he was employed by du Pont before he joined General Motors in 1919, the Government treats as if he were a du Pont stooge!

Carpenter and Crawford H. Greenewalt, who have been the presidents of du Pont since 1940, had never heard of the 1924 resolution except as a result of the institution of this case, and had never requested information from General Motors as to its purchases from other suppliers (R. 2744, 2761-2).

Irenee du Pont (when he was president of du Pont) opposed the program favored by Sloan requiring maintenance of specified standards for gasoline by companies allowed to distribute tetraethyl lead. He wished to sell the lead without restriction, but was overruled (R. 904-5; GMX 94-103, R. 1277, 6839-65; GX 704-5, R. 624, 4505-11; GX 773, R. 632, 4663; GX 773-774, R. 632, 4707-8, 4733; DPX 120 (not printed)). Irenee also disagreed with Sloan as to the need for withdrawing tetraethyl lead from the market after the Bayway disaster in 1924 (see *infra*, p. 114), (R. 1268-70; GMX 96-8, R. 1277, 6842-52), but Sloan's views prevailed (R. 6847, 6860). Irenee also sought to have du Pont rather than General Motors negotiate with Standard Oil with respect to Standard's interest in the development of tetraethyl lead (GX 623, R. 614, 4340). Sloan went ahead, however, and negotiated with Standard the organization of the Ethyl Corporation, jointly owned by Standard and General Motors, without consulting du Pont (R. 894-5; GX 624, R. 614, 4342-6).

Lammot du Pont opposed the entrance of the Ethyl Company into the production of lead, but Sloan disagreed and his program was carried out (R. 1279-80, GX 781, R. 633, 4771, 4773). And it was Sloan who with Webb (president of Ethyl) first suggested in 1930 taking steps to protect Ethyl when the patents would expire in 1947 by requiring du Pont to turn over to Ethyl, as early as 1938, its know-how in producing lead (R. 423; R. 1278; GX 748, 749, R. 628, 629, 4577, 4579). Without that, du Pont alone would have been in a practical position to produce lead in 1948. Instead, by reason of the steps insisted on by Sloan, Ethyl itself became the principal United States manufacturer of tetraethyl lead and has operated since then in competition with du Pont (R. 425). Such conduct is hardly consistent with that of a management dominated or controlled by du Pont.

It is thus plain that Sloan did not feel that he had to carry out the du Pont wishes. The existence of control or domination is tested by what happens in case of disagreement.[21]

In 1937 William S. Knudsen became president of the corporation, and in 1941 Charles E. Wilson succeeded Knudsen, but Sloan continued as chairman of the Board of Directors and chief executive officer. In 1946 the president, Wilson, succeeded Sloan as chief executive officer. Wilson was succeeded by Harlow H. Curtice in 1952. (R. 307-8; R. 2727-28). None of these men had ever had prior connections with du Pont; each had risen through the ranks of General Motors executives, and been recommended by Sloan or Wilson, not the du Ponts (R. 2727-8). The Government introduced no evidence which even remotely suggested that these men ever were influenced by du Pont.

4. *The General Motors Board of Directors and its Committees.*

Since 1923 the membership of the General Motors Board of Directors has ranged from 26 to 35 (DPX 56, R. 836, 5656-62). As of February 1, 1953, there were 34 directors (GMX 10, R. 1031, 6572-75). The number of directors nominated by du Pont has decreased from 6 to 5 (*ibid.*). Twenty-three of the directors in 1953 represented management, and 6 were "outside" directors affiliated with neither management nor du Pont (*ibid.*, R. 6575).

The trial court found:

> "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

[21] The Government cites evidence of occasions on which Sloan agreed with du Pont views as to some controversial matters (see pp. 115-117, *infra*). The fact that he sometimes thought the du Ponts right does not prove that he was dominated by them.

> 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. Sloan and Carpenter testified that no du Pont nominee ever objected to the number of management directors which Sloan wanted on the Board." (R. 310; R. 1021, 2724.)

The Government (Govt. Br., p. 20) seeks to characterize all management directors employed by General Motors in the early 1920's as du Pont representatives on the ground that they were originally selected by du Pont. Nothing in the record supports this attempt to brand as predominantly du Pont men all officials who worked for General Motors between 1920 and 1923. The five management directors who survived from 1923 to 1949 were Mott, McLaughlin, Sloan, Kettering and Pratt. The first three became directors during the Durant regime, and the Government has not even intimated that Kettering owed any allegiance to du Pont. We point out at pages 20-21, 85-90 that there is no basis for saying that Pratt, who had left du Pont to work for Durant in 1919, is to be treated as a du Pont representative. The court found to the contrary (R. 321).

The du Pont representatives were nominated by the Finance Committee of the du Pont Company, usually from among its own members (R. 1021, 2714, 2725). The nominations for outside directors were always discussed by Sloan with a representative group on the Board, including the du Ponts, and they were not added to the Board unless they had the "unanimous approval of the present Board of Directors, particularly the approval of those members of the Board who are serving in the management" (R. 1334, 310, 2725). Carpenter, president of du Pont from 1940 to 1948 (R. 2711-2), who among others suggested possible

outside directors, noted that the list he submitted "had a very poor batting average" (R. 2727).

The record shows that questions as to the purchase of materials do "not come to the Board in any way" (R. 997). The same is true of engineering problems and the initiation of policies and programs. "The Board hasn't sufficient contact with the details of an enormous business like this in order to exercise initiative" (R. 996-7).

The Board of Directors of General Motors has operated to an important degree through committees. Prior to 1937 and after 1946 there were two main committees, of which one dealt with matters of financial policy and the other, known before 1937 as the Executive Committee and after 1946 as the Operations Policy Committee, was concerned with other matters of policy. Between 1937 and 1946 there was a single Policy Committee to deal with broad questions of policy, supplemented by a subordinate Administration Committee to deal with the implementation and administration of policy (R. 312-14; R. 2734-5).

At the beginning du Pont had a majority of the members on the Finance Committee but by 1937 the du Pont representation had declined to 6 out of 14 members.[22] Since 1946,

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[22] Government counsel have indicated surprise that Donaldson Brown is considered by General Motors to have been a management director until 1946, a du Pont nominee thereafter (Govt. Br. p. 20). Brown was so considered by Sloan (R. 1196). Brown came to General Motors from du Pont in 1921, retaining his position as a director and a member of the Finance Committee of du Pont but serving as vice president in charge of finance for General Motors and ultimately succeeding Raskob as chief financial officer of General Motors (R. 315). The trial court found,

> "There is no evidence that Brown was active in commercial relations between du Pont and General Motors or that he ever did anything to encourage the use of du Pont products by General Motors" (*ibid.*).

In view of that finding, there is no reason to consider Brown as other than a management director until 1946, when he retired but remained as a director of General Motors at du Pont's specific request in replacement of Lammot du Pont (GX 224, R. 491, 3485). In 1947 Sloan wrote that he thought Brown only "technically" a du Pont director (GX 228, R. 491, 3488).

when a new Financial Policy Committee was re-established, du Pont has had three nominees out of 10 (R. 312-13; DPX 56, R. 836, 5663-5, 5669; GMX 22, 25, R. 1198, 1202, 6609, 6612). But these finance committees were, as the names imply, concerned only with matters of major financial policy, and had nothing to do with the details of operations or with purchasing practices and policies, or, of course, with particular purchases (R. 2730-33).

The Executive Committee in 1923 was composed of 3 du Pont nominees out of 6 (R. 311), but both the number and proportion of du Pont members rapidly declined as the membership was expanded (R. 311; DPX 56, R. 836, 5666; GMX 21, R. 1196, 6608). By 1934 no du Pont nominees remained (*ibid.*). There never has been a du Pont representative on the Operations Policy Committee since its formation in 1946; the members were chosen from management on the recommendation of Wilson and, later, Curtice (R. 315; R. 1199-1200; GMX 24, R. 1200, 6611; DPX 56, R. 836, 5670).

The Policy Committee from 1937 to 1946 was composed of 9 members, 2 of whom were from du Pont (R. 314; GMX 23, R. 1199, 6610). All of the remainder were management representatives with the exception of one "outside" member, Whitney. There never have been any du Pont representatives on the Administration Committee (R. 2735).

The Government attempts to establish du Pont control over committee appointments by attributing Sloan's decision not to recommend Kettering for election to the Policy Committee in 1943 to the fact that Lammot du Pont said "No"; according to the Government, "that was the end of the matter" (Govt. Br., p. 23). This ignores the fact that Sloan discussed the matter "with the management, and after complete consideration it was decided it was not a wise thing to do" (R. 1342). Sloan testified (R. 1341):

> "* * * others thought the same as Mr. du Pont. As a matter of fact, when I considered it myself, I rather agreed with the point Mr. Lammot made.
>
> "Mr. Kettering was a large stockholder, and of course is a very eminent citizen, but we all agreed that if he 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. That was one of the reasons."[23]

Anyone who heard Kettering testify at the trial would understand the reasonableness of this reaction.

The Executive, Policy, and Operations Policies Committees were concerned with questions of major policy. There is no evidence to show that these committees had anything to do with purchasing practices or policies or with any of the matters involved in this case. One of the members, Carpenter, testified that the Policy Committee did not direct or supervise the purchasing practices of General Motors, or "consider questions relating to the purchases by General Motors of products from du Pont"; no such subject was ever discussed (R. 2735). And this committee, which was superseded in 1946, was the last of the committees concerned with other than financial policy upon which du Pont had any representation at all.

The trial court concluded with respect to the Government's efforts to show that du Pont's membership on the General Motors Board and committees enabled du Pont to dominate General Motors (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

[23] Sloan had said the same thing in 1947: "I think he (Kettering) would perhaps be likely to reduce the efficiency of our meetings by leading into the most interesting subjects * * *" (GX 228, R. 491, 3488).

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 representatives 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.

"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."

5. *Bonus Plans.*

Since 1918, General Motors has had a policy of distributing annually to its executive employees up to 10% (later 12%) of its earnings over a 7% (later 5%) return on its capital (R. 317; R. 1227-8; GX 137, R. 480, 3282-3; GMX 31, R. 1227, 6641-53).[24] These bonus awards were made to 6,450 employees in 1918 (GX 139, R. 480, 3302), and in recent years have extended to more than 10,000 persons (R. 1381).

[24] These awards were made entirely in General Motors common stock until 1943. Since that time, because of increased personal income tax rates, they have been made partly in stock, partly in cash.

Between 1923 and 1937, there were supplemental plans whereby a portion of the amount available under the earnings formula was utilized to enable the higher officials—97 in 1923-1929, and 249 in 1930-1936 (GX 259-260, R. 496, 3587-96)—to buy larger quantities of stock (R. 316-318; 320; R. 1217-19, 1228; GX 235, 240, 267, R. 483, 493, 498, 3494-3506, 3520-39, 3607-29). These plans were designed to increase incentive by creating in every executive a strong ownership interest in the profitability of General Motors (R. 1215, 1217). The stock required for the first of these supplemental plans, known as Managers Securities Plan, was sold by du Pont to Managers Securities Company, a holding company, all of whose stockholders were General Motors' executives, and was substantially the block of stock obtained in consequence of the Durant debacle in 1920.[25]

This 1923 plan was terminated in 1929, when all of the stock was fully paid for. It was succeeded by a similar plan known as the Management Corporation Plan which ran from 1930 to 1936 and for which the necessary stock was made available by General Motors (GX 274, R. 499, 3643).

As the Government says (Govt. Br. pp. 26-27), the result was that the executives participating earned tremendous profits. This however was not preordained, but was dependent upon the future profitability of General Motors, which in turn depended upon the ability and performance of these executives. In 1923 General Motors sold only 18.7% of the cars produced in the United States, and its great growth in the next two decades, particularly in relation to Ford, could not well have been anticipated in 1923. Many automobile

[25] Because of its own tax considerations and also because payment of 85% of the purchase price was deferred, du Pont sold not General Motors common stock as such but its equivalent, and so retained the voting rights (DPX 91, R. 879, 5854; DPX 455, R. 2706, 6451). After receiving payment in full, du Pont relinquished its voting rights, partially in 1930, when the tax considerations of the participating executives precluded relinquishment in full (GX 267, R. 498, 3607), and fully by 1938 (GX 270, R. 498, 3638; GX 274, R. 499, 3643).

companies failed during the periods covered by these two incentive bonus plans.

The Government asserts that these various plans helped tie up General Motors' executives with du Pont because du Pont sold the stock for the first plan in 1923 (see p. 14, *supra*) and because its representatives constituted a substantial proportion of the committees of directors responsible for approving awards under the various plans. The committee charged with determining allotments in the Managers Securities plan in 1923 was composed of Pierre as chairman and two non-du Pont members (R. 318; GX 241, R. 493, 3541). The committee responsible for approving the annual awards under the Bonus Plan was the Finance Committee until 1936, the Bonus and Salary Committee thereafter; each of these had substantial du Pont representation (R. 319-20; R. 1380; GX 276, R. 496, 3679).[26] The Government concludes from this that, since these committees were responsible for approving the bonus awards, all General Motors executives would know that their compensation was dependent upon their willingness to toady to du Pont.

The allotments in the Managers Securities plan in 1923 were made by the three-man special committee. Pierre, chairman of that committee and newly retired as president of General Motors, prepared a rough list of tentative allotments which was reviewed with and materially revised by Sloan, whose recommendations were accepted by the special committee without change (R. 318-19; R. 1225; GMX 30, R. 1225, 6629).

As to the annual awards under the ordinary Bonus Plan, it was the responsibility of the chief executive officer, who

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[26] As to the Finance Committee, see pp. 25-26, *supra*. Between 1941 and 1945, 3 of the 5 members of the Bonus and Salary Committee were du Pont representatives, and 2 between 1945 and 1948 (R. 319-20; GX 276, R. 496, 3679). (GX 276 erroneously classifies Sloan and Pratt as du Pont representatives.)

was Sloan from 1923 to 1946, to prepare and submit recommendations to the Finance (later Bonus and Salary) Committee. Under the procedure that has continued through the years without substantial change (R. 1227), the aggregate amount available for distribution, as determined by the committee under the earnings formula, has been apportioned by the committee among the various operating divisions upon the basis of their respective earnings. Each general manager then prepared his recommendations for the awards to be made within his division (R. 319; R. 1228; GMX 31, R. 1227, 6642), since the chief executive "couldn't be expected to know so many people" (R. 1228). The contribution of each individual employee eligible for bonus has been given substantial weight (GMX 31, R. 1227, 6642). Sloan reviewed the recommendations of the general managers, himself prepared recommendations for the awards to be made to the several general managers (other than those who were directors of the corporation) and submitted the completed list to the committee for approval. The committee reviewed Sloan's recommendations and itself determined the awards to be made to those officers who were also directors (GMX 31, R. 1227, 6639; cf. R. 1226).

In no instance could any witness recall that the committee changed the amounts so recommended by Sloan and the subsequent presidents of General Motors (R. 319; 1226-7, 852). The committee is obviously unable to "evaluate thousands of people so far as performance is concerned" (R. 1381).

The Government offered no evidence that any General Motors director or committeeman had taken into account the attitude of any official toward du Pont in determining how much his bonus should be, nor any evidence that any General Motors executive or official had been affected in his work by a fear that a failure to favor du Pont would affect his compensation. There was no showing whatsoever, in the

many instances in the record where General Motors' executives acted contrary to du Pont's interests, that their bonus awards were affected in any way. Four witnesses flatly and vigorously denied that any such factor was taken into consideration (R. 852, 1229[27], 2667, 2731). The trial court believed them, as he was entitled to do (R. 321). The court also found that many of the executives "who would have been 'influenced' " had testified as witnesses, and that the record showed that they had "acted at all times solely in the best interest of General Motors" (R. 321).

Certainly in these circumstances it cannot be said by way of conjecture that the executive staff of General Motors *must* have thought that their compensation was dependent upon their favoring the du Pont Company, and *must* therefore be presumed to have acted accordingly. The Government cannot justifiably ask this Court to presume to be a fact what the record of over thirty years shows not to have happened.

The Government has stated (Jurisdictional St., p. 20) that "General Motors officers, high and low, could not be free from the consciousness, indeed the vivid realization, that determinations favorable to du Pont's interests were likely to lead to personal promotion and financial reward." The bonus system in itself, however, proves the contrary; it gives them a strong incentive to act solely in furtherance of the interests of General Motors. For they know that the decisive factors in the substantial portion of their incomes derived from the bonus system are the profits and success of General Motors, the profits of their division, and their individual contribution to it—not the profits of du Pont. As Carpenter testified with respect to the Managers Securities plan (R. 2721-2), the actual effect of the bonus plans was

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[27] "Mr. Sloan, to what extent, if any, was the bonus plan intended to induce General Motors executives to respond to the influence or desires of the du Pont Company, as far as you know?

"A. Of course, not. On the face of that, it was an impossibility. No such thing existed."

"just in reverse of the way it seems to be here represented." After describing the way in which the plan might —as it did—accord the participants a tremendous enlargement of their original investment (R. 2721-2) he concluded (R. 2722):

> "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.
>
> "It is for that reason that I say it operated just in reverse of the way that it seems to be here represented."

As Sloan testified:

> " * * * If I were asked, as I often am asked, as to what has contributed to the general and outstanding success of General Motors, I would say it was the decentralized system of management, supported by the incentive plans" (R. 1230).

It should also be noted that by building up throughout the years a large block of stock in the many persons comprising the former and current managements of General Motors, the supplemental compensation plans made it possible for a substantial stock interest to arise in the management which would support its independence of du Pont rather than the contrary. The Managers Securities plan and the other bonus plans have put many General Motors executives into the category of large stockholders and, over the years, these awards to all management officials and employees have aggregated very substantial amounts.[28]

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[28] On liquidation, Managers Securities held 4,509,060 shares of General Motors $10 par value stock (GX 269, R. 498, 3635). In 1938 Management Corporation held 783,301 shares of General Motors $10 par value stock (GX 274, R. 499, 3648). In addition a very substantial number of shares were awarded to General Motors employees and executives under the bonus plan from 1918 to 1949.

6. *Trial Court Findings As to Control.*

After reviewing the evidence on the various aspects of the subject of control (R. 293-321), the trial court summed it all up in the following finding (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.
>
> "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, practical 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."

This finding is not only reasonable, but the only one an impartial trier of fact could have reached on a consideration of the evidence of record. Since it is patently not "clearly erroneous", it must be accepted by this Court.

C. General Motors' Purchasing Policies.

1. *Affirmative Evidence That There Was No Combination or Conspiracy.*

The Government's principal charge was that the defendants combined and conspired to cause each defendant manufacturer (which at that time included United States Rubber Company) using products manufactured by the other "to purchase substantially all its requirements of such products" from the other and to exclude competitors (R. 221, 255). This is now limited to sales by du Pont to General Motors. But even as to this, the Government has been compelled to recede. Its claim at the end of the trial was that the restriction on General Motors' freedom to purchase applied only to three products or groups of products, paints and finishes, fabrics and anti-freeze, and that General Motors only was required to buy 75 to 80% of its needs for those products from du Pont so long as, in General Motors' opinion, du Pont's price, quality and service were at least equal to any competitor's.

Although the emphasis on du Pont's control of General Motors was obviously designed to show that General Motors was compelled to buy from du Pont, in the closing argument Government counsel virtually abandoned any effort to substantiate the charge of coercion, and argued only that an agreement or understanding to that effect had been proved (R. 3021).

The trial court found that there was no conspiracy, agreement or understanding. In this Court the Government does not challenge these findings (Govt. Br. pp. 72, 109n., 113), but now argues that there was a "combination" consisting of a "restraint imposed by force of the relationship" which inevitably and without any instruction or communication influenced General Motors to prefer to trade with du Pont (*ibid.*). It is unnecessary to decide whether this is anything

different from a tacit understanding, which would, of course, constitute a conspiracy. For the court found that even this watered down conspiracy had not been proved (R. 301-2, 361, 371, 381, 396, 405, 426, 437, 447, 465, quoted at pp. 159-162, *infra*).

Twenty witnesses testified directly that there was no such understanding, arrangement or restriction upon General Motors' freedom to trade, and the testimony of the first sixteen covers the Government's new theory of induced favoritism as well as the agreement or understanding for which the Government was contending below:

Sloan, R. 1385-6, 1326-7;
Pierre S. du Pont, R. 853-4;
Pratt, R. 1475-6;
Carpenter, R. 2741-2, 2745-6;
MacShane, R. 2357-9;
Nickowitz, R. 2128-30;
Brown, R. 2195, 2236-7;
Bridgwater, R. 2518-19;
Wirshing, R. 1931;
Williams, R. 1990;
Weckler, R. 2142-3, 2147;
Flaherty, R. 2031, 2033, 2039;
Thompson, R. 2951-2;
H. B. du Pont, R. 2664-5;
P. S. du Pont, III, R. 2672;
Irenee du Pont, R. 872-3;
K'Burg, R. 2532-3;
Copeland, R. 2659-60;
Lynah, R. 1156, 1172-3;
Greenewalt, R. 2767.

These witnesses, of course, either were or had been affiliated with General Motors or du Pont, or they would not have

been in a position to know at first hand the basis upon which General Motors bought, or didn't buy, from du Pont. Three of them, however, had not been associated with either company for over twenty years. Herman Weckler had gone in 1932 from Buick to the Chrysler Corporation, of which he was vice president and general manager when he testified (R. 2143-44). James Lynah, Secretary of the General Purchasing Committee during most of its life, had retired from General Motors in 1930, and subsequently, *inter alia*, had been Director of Athletics at Cornell University and an official of the National Collegiate Athletic Association, as well as an employee of the Government during part of the war (R. 1157-8). MacShane had done sales work for du Pont until 1930; his last employment had been in the Government with the Veterans Administration from 1943 to 1952, when he was retired for disability (R. 2314-5).

The attitude of the witnesses who were actually doing the buying and selling is shown in the following statements of some of the persons referred to above.

Weckler, who was largely responsible for Buick's adoption of du Pont's Duco finish in 1924 (R. 2140), testified (R. 2143):

> "Q. Mr. Weckler, it is charged in the complaint in this case that there was an agreement or understanding or conspiracy between du Pont and General Motors to the effect that General Motors would buy from the du Pont Company all or substantially all of its requirements of its products made by the du Pont Company.
>
> "Did you ever hear of any such agreement or understanding or conspiracy?
>
> "A. I did not.
>
> "Q. Did you ever hear that it was the duty of General Motors to buy substantial quantities of materials from the du Pont Company because the du Pont Company had a stock interest in General Motors?

"A. No, sir.

"Q. In making your recommendation to Mr. Bassett that Buick go to 'Duco,' were you motivated in any way by a feeling that there was an obligation to help out the du Pont Company or to buy from it?

"A. No, sir, such an idea never occurred to me, and I never in all my experience at the Buick Motor Company, had any difficulty in buying any material from anyone at any time.

"Q. In deciding not to go to any of the competitive lacquers later on in the latter part of the 20's or the early 30's, were you motivated in any way by a feeling of duty to favor the du Pont Company?

"A. No, sir. I have just outlined here that we didn't find the material that was superior to the du Pont material. We were making good progress in the application and the experience that we had with it, and this plant being so close to our activity—those were the reasons that we continued on with 'Duco' while I was with Buick."

MacShane, who had sold fabrics for du Pont in the 1920's, testified that he had never heard that General Motors purchasing agents were required to buy part of their requirements from du Pont (R. 2357-8):

"If they were instructed, I would have gotten more business. * * * I worked just as hard to get General Motors' business as I did to get any other business."

Williams, manager of the Automobile Sales Branch of the du Pont Fabrics and Finishes Section, testified that he had never heard of any agreement requiring General Motors to buy substantially all its finishing requirements from du Pont, or that General Motors bought from du Pont because of du Pont's stock ownership. He did not urge salesmen to make such arguments to General Motors because (R. 1990):

"I think it would be a very poor approach, and I think it would be to our disadvantage to attempt to get business on that basis. As I know the managers of the car divisions and accessory divisions, they are primarily interested in quality and service, and I think if you went into one of the plants, and started to discuss that subject you have just called to my attention, they would say, 'If you cannot sell your products on the merits, you had better get out.' "

Thompson, who was responsible for General Motors' purchases of anti-freeze, testified (R. 2952):

"* * * no one ever even indicated to me that we should favor du Pont. When you are running a big organization, you just cannot run it with a lot of strings tied to it.

"Q. Were there any strings tied to your purchases of anti-freeze?

"A. Absolutely none."

The testimony of these witnesses was supported by a vast amount of evidence, discussed below (pp. 40-75, *infra*), which demonstrates how du Pont had to fight for its General Motors business just as it did for that of other companies. In the light of this evidence, the trial court found (R. 361):

"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."

The court made similar findings as to each of the products

with respect to which the Government sought to prove its allegations (R. 395-6, 405, 437).

2. *General Motors' Purchases from du Pont as a Whole.*

Before stating the facts as to finishes and fabrics, which are the only commodities which the Government claims that General Motors purchases illegally, it is important that General Motors' purchasing from du Pont and its competitors be viewed as a whole.

The Government's attempt to limit the issue to these products in itself discredits its entire claim. A general conspiracy was alleged, not one restricted to particular products, and of course whatever effect du Pont's stock interest in General Motors had would apply to all products du Pont could sell to General Motors. Du Pont makes many other things that automobile companies buy or can buy. (See GX 1344, R. 2846, 5340-46; DPX 568-573, R. 3007, 3008, 6526-6531). What the Government seeks to do is to eliminate those which General Motors doesn't buy in large quantities or proportions from du Pont. But du Pont's failure to sell these products to General Motors cannot be swept out of the case that cavalierly. If there were a preference for du Pont products resulting inevitably from the relationship between du Pont and General Motors and irrespective of any conspiracy or agreement, as the Government now contends, such "inevitable" preference would have existed as to all products, not just a selected few.

The Government tried to argue below that it was all right to disregard those products because in each instance in which General Motors failed to buy, or to buy in large proportions, from du Pont, the du Pont product was inferior in quality, service or price and therefore not competitive. But this will not stand up. A few illustrations will suffice. Oldsmobile does not buy any Duco from du Pont, although other General Motors divisions do (R. 389). On the other hand, only Oldsmobile bought anti-freeze from du Pont in 1953

(R. 437). Only Buick buys motor enamel (R. 1985-86). Only Cadillac exclusively uses the du Pont process for copper electroplating; Buick and Chevrolet do not use it at all, and Oldsmobile and Pontiac have used it partially (R. 438; 2561-66; DPX 372-73, 375-78, R. 2563, 2571-73, 6341-43, 6345-49). Fisher Body buys du Pont undercoating, but only for one of its 14 plants (R. 389; R. 1985, 1923). When some divisions buy a product from du Pont, it must be competitive even if others look to another source.

Other auto manufacturers bought 88% (R. 440) of their case hardening materials in 1937 from du Pont; General Motors bought 47% (R. 440; R. 2538-9; DPX 362, R. 2538, 6330). Indeed, when du Pont acquired the company making these materials in 1930, it gained no business from General Motors that it was not previously enjoying (R. 2532-3). "As a matter of fact through normal technical developments and our regular commercial relations, we gained business and lost business over the years, but there certainly was no change" (R. 2533). The same thing happened when in 1930 General Motors acquired, for its Chevrolet Commercial Division, the plant of the Martin-Parry Corp. of Indianapolis which had previously been making bodies for Chevrolet trucks, and using du Pont coated fabrics 100% for upholstery and trim. This continued until 1937, but has since gradually been reduced to less than one-third (R. 401; R. 2276-9, 2281). This division asks for bids, and buys from the three lowest bidders (R. 2201; GX 1354, R. 2890, 5368-9). Thus, although du Pont's products are still competitive, du Pont gets a smaller proportion of the business than when the purchaser was not a part of General Motors.

Neoprene, a synthetic rubber developed by du Pont, has been used to a much greater extent by Chrysler and Ford (R. 442-3; R. 2513-17, 2528). Its major use in this field is

for radiator hoses, for which Ford and Chrysler use it, but not General Motors (R. 442-3; R. 2507-9), which uses a cheaper product (R. 2523). Chrysler also uses, and helped develop, du Pont's synthetic rubber adhesive for brake linings, but General Motors prefers a more expensive type of synthetic rubber (R. 443; R. 2518, 2526; DPX 355-56, R. 2510-11, 6312-13). In all of these situations the products which Chrysler and Ford buy from du Pont are obviously competitive.

The record contains other examples of General Motors' failure to buy from du Pont when du Pont's products were in all respects equal to those of competitors. When du Pont was unable to sell its weatherstripping cement to Fisher Body, except in minor amounts, although its cement was "at least the equal of the competitive ones," the General Motors buyer stated that "there was no advantage in using our [du Pont's] cement," even though "some of the plant managers liked our cement better" (R. 401; R. 2095-8). When du Pont failed to sell rubber coated fabrics to the Electromotive Division of General Motors at a time when it was selling to that division's leading competitor all of its requirements for that type of material, it was told that it could get none of the business because "They are perfectly satisfied with their present sources, and they see no advantage in using ours" (R. 2110). Du Pont was unable to sell seat fabrics to the General Motors Truck and Coach division, even though its product was as good as Goodrich's Koroseal, because "we didn't take care of that need when it first developed. Koroseal did, and therefore they were entitled to a continuation of that business" (R. 2104-5). In one of the episodes relied on by the Government to show favoritism for du Pont (discussed at greater length at pp. 87- 89, *infra*), when du Pont was asked to develop a better product for the Delco-Light Company, du Pont was instructed, after the material had been made, to "delay shipment until they

could determine whether their old supplier * * * would be able to actually satisfy them * * *" (R. 358; R. 2402). When du Pont sought to obtain orders from General Motors' Inland Division for the plastic used in steering wheels, their product was equal, but Inland "just seemed to prefer to do business with" two other companies (R. 2601-2).

These examples show that there was no policy that du Pont would get the business when its products, prices and services were equal to its competitors. They confirm the testimony of many witnesses to the effect that there was no restriction upon General Motors' purchasing in favor of du Pont.

With respect to these miscellaneous products, 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 findings [sic] 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."

The Government has emphasized that du Pont is the largest manufacturer of chemical and related products, and has not impugned the efficiency of its operations or had the temerity to assert that it is never competitive in the fields in which it operates. And yet the import of the Government's position here is just that. Du Pont, if the Government's theory is to be credited, never sells anything in

quantity to General Motors on its economic merits. If General Motors buys, at least in any volume, the reason is not the competitive superiority of what du Pont offers, but a collusive understanding or the inevitable consequence of du Pont's stock ownership. If it doesn't buy, the product must be inferior.

As would be expected, the evidence shows that the notion that du Pont lacks competitive competence is nonsense, whether one looks at the picture as a whole, or only at the commodities upon which the Government chooses to focus attention.[29]

The Court must, of course, look at the entire spectrum of what du Pont does and does not sell to General Motors in order to evaluate the Government's claim. If that is done, it will appear that du Pont's success or failure in selling to General Motors varies not only from product to product but also from year to year and division to division of General Motors, each of which purchases independently.

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[29] Impartial witnesses from the Westinghouse and Crosley Companies testified, with respect to finishes, that:

> "* * * du Pont has the finest trained technical group at their beck and call, at the beck and call of the users of the materials, of anybody in the business * * *" (R. 2488-9).
>
> "* * * in addition to the very fine inherent qualities of the material as we know them, and also the fine association we have had with du Pont for all these years, that one of the next items in importance and in favor of or continuing with du Pont is the fact that they do have an excellent technical service that they offer us constantly, which consists of not only sending technical service people into our plant, but also making available to us their laboratories where we can send our people or send panels in to keep a constant check on the quality of the material as we receive it and also the way we put it on." (R. 2476).

As to fabrics, du Pont's "research and technical facilities were greater than those of our leading three or four competitors—five competitors, who were manufacturing coated fabrics for the automotive industry. Q. You mean the five leading ones combined? A. Yes." (R. 2123). No other competitor had developed anything like the number of new and superior fabrics which du Pont has (R. 2126, 2120-5). General Motors buyers say that they do business with du Pont "because they know our quality and service and dependability are superb. They have had that experience with us. They know that when they have a problem, a difficult problem to lick, that we can usually come through with the results." (R. 2120).

Du Pont provides General Motors with most of its needs for some things, and a smaller proportion or none for others—just as would be expected in a competitive market. And the sales which du Pont makes to General Motors, whether large or small, are traceable to factors relating to the economic merits of the transaction, or having nothing to to do with du Pont's stock interest in General Motors.

3. *The General Purchasing Committee.*

While Pierre S. du Pont was president of General Motors, a committee was established to coordinate purchasing where identical products were used by a number of General Motors divisions. The Government charged that this committee was created "in order to insure that du Pont Company's wishes would be * * * fully complied with", and that the committee was an effective instrumentality in carrying out the conspiracy (R. 233-234). The Government's brief in this Court has abandoned any argument based upon the work of the committee, except for one oblique and misleading reference.[30] Nevertheless, if there had been any du Pont control of General Motors' purchasing policies, it should have manifested itself in the work of this central agency, operating in the period of greatest du Pont author-

[30] The Government states (Govt. Br., p. 103), without record reference, that "placing an ex-du Pont employee in a strategic position" on the committee is an incidence of du Pont's subtle domination. If this reference is to Lynah, the active executive secretary who would seem to have been the man in a "strategic position", he was an ex-du Pont employee, but he quit after a bitter argument with Carpenter because of du Pont's failure to give him what he thought was a deserved promotion (R. 306; GMX 139-148, R. 1069-76, 6955-68). This would hardly make him likely to give du Pont preferential treatment. If the reference is to Pratt, who was chairman after the first two years, he joined in the committee's refusals to give du Pont what it wanted. See GMX 201, R. 1429, 7246-9, quoted at pp. 20-21, *supra*. Since the Government does not challenge the finding that the committee dealt with du Pont only in the same manner as it did with other suppliers (R. 372), it is obvious that the actions of the strategically placed ex-du Pont employee constitute proof of the highest order against the Government's theory. The Government's use of the fact that an official of the committee had formerly been an employee of du Pont, without reference to anything else about him or the committee's activities, gives a highly inaccurate impression.

ity, and in the area with which du Pont was allegedly particularly concerned. The fact that the opposite was true, as the trial court found, is an important indication that the Government's claim of favoritism to du Pont is without foundation.

The committee was established at Sloan's suggestion, but after very thorough intra-company consideration, in order to compete better with the unified purchasing power of the Ford Company by combining the purchases of the various divisions of the company of certain products which all or most of them used (R. 361; R. 1031-2; GMX 43-63, R. 1040-55, 6683-6744).[31] Its membership, appointed by Pierre on Sloan's recommendation, consisted of purchasing agents of the principal divisions, including those of all the car divisions and Fisher Body, and a few officials from the General Motors central management (GMX 63, R. 1055-7, 6744). Sloan was the original chairman (R. 1057) and then Pratt (R. 1419), although Sloan remained a member to 1928, and Pratt was a member throughout the committee's existence (GMX 2, 3, R. 991, 6561-2). Wilson became chairman in 1929 (GMX 285, R. 2778, 7476; GX 1271, R. 653, 5208). The committee was abolished in 1931 (R. 371).

The committee at the beginning prepared a list of 32 products as to which combined purchasing for the divisions might be possible (R. 361). One hundred forty-seven contracts were negotiated with other suppliers before the first contract was made with the du Pont Company in December 1924 (R. 364; GMX 154, R. 1092, 7035). The committee had previously rejected proposals to make such contracts for Pyralin and imitation leather, which were produced by du Pont (R. 364; R. 1101-3; GMX 155, R. 1100, 7077, 7081).

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[31] In 1921, Ford had 55% of the United States automobile business. The largest of the General Motors divisions (each of which was then purchasing separately) was Buick with less than 5% (GMX 36, R. 1034, 6664).

In all, during the period of its existence, the committee entered into 709 contracts, 14 of which were with du Pont, mostly for pyroxylin finishes (Duco), and 30 with du Pont's competitors for products which du Pont made (R. 364; GMX 154, R. 1092, 7023-76). Thirteen requests for contracts by du Pont or for materials which du Pont could have supplied were turned down (R. 364; GMX 155, R. 1100, 7077-98).

The committee adopted a number of general rules, one of which was that where possible there should be more than one source of supply for each commodity (R. 365; R. 1104; GMX 158, R. 1106, 7106). This rule and the others were applied to du Pont the same as to anyone else, as both Lynah's testimony and the minutes of the committee show (R. 1145, 1151; GMX 158, 159, R. 1106, 1107, 7106-11; GX 412, R. 528, 3986). Their first application to du Pont was in the direction of limiting du Pont's sales. In 1923, after du Pont had, for special reasons,[32] enjoyed 100% of certain of General Motors' fabrics business for the preceding year, it was advised that it would be contrary to General Motors' policy to permit more than 75 to 80% of the business to go to any one supplier in the future (R. 361-2; R. 1153, 1161; GX 412, R. 528, 3986).[33] It has been noted (*supra*, pp. 15-16) that this policy was put into effect and applied to du Pont, even though Pierre was opposed to it as a matter of business judgment (R. 362-3). The General

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[32] In return for du Pont's consent to cancellation of part of the 1920 fabrics contracts with General Motors, because of the depression of that year, General Motors agreed to buy its 1922 requirements of coated fabrics from du Pont (R. 399; R. 2186-7; DPX 253, R. 2211, 6165).

[33] The testimony of Lynah was that this did not mean that du Pont was necessarily to get 80% or "any particular percentage" of the business (R. 1153, 1161), and, as the trial court found (R. 362), the records of the General Purchasing Committee corroborate this testimony. The interpretation of the Committee's statement in an intra-du Pont report as guaranteeing du Pont 80% of the business (GX 406, R. 527, 3979-80) was overly enthusiastic and not accurate, as the trial court found (R. 362), and as subsequent events proved.

Purchasing Committee also sought actively to find a finish competitive with Duco, and ceased making contracts obligating the divisions to purchase Duco as soon as other finishes approved by General Motors Research were available (see pp. 55-56, *infra*). The Purchasing Committee in 1923 not only stated that the two-source of supply policy should apply to du Pont, but also specifically applied to du Pont a rule prohibiting the then common practice of giving one competitor the opportunity to meet other competitors' prices (R. 363; GMX 160, R. 1100, 7113-4 (Minutes of August 2, 1923 and July 2, 1924); GX 412, R. 528, 3986).

When du Pont sought a cost-plus contract covering all fabrics needed by General Motors, Sloan and the Purchasing Committee refused (GX 413, 415, R. 528, 1161, 3987-90). When du Pont sought Pierre's aid in inducing General Motors to join with du Pont in the policy of "reciprocity", Pierre turned the matter over to the General Purchasing Committee, which opposed the proposed program, and it never was adopted (R. 366-371). See pp. 19-21, *supra*.

The Government three times (Govt. Br., pp. 63-67, 119-121, 141-142) quotes or refers to various letters written by du Pont officials between 1921 and 1925 expressing their desire to get Fisher's business. The Government says, with entire accuracy, "There can be no doubt they wanted that business" (Govt. Br., p. 141). There was, of course, nothing wrong with that.

The Government then says, "Then du Pont worked out the scheme whereby discounts to General Motors on its large purchases depended on swinging the Fisher Body business to du Pont" (Govt. Br., p. 142). But the special discount "scheme" was not "worked out" by du Pont but was a part of a general program promoted by the General Purchasing Committee to secure lower prices from many suppliers.

The so-called super (or multiple item) discount, was really an over-all additional discount based on the total vol-

ume of General Motors' purchases from a supplier. The idea of giving of such discounts originated with Lynah (R. 1423) of the General Purchasing Committee. At least 18 such contracts were made with companies other than du Pont (R. 1119-23; GMX 164, R. 1119, 7147-54).

The Government, now calling this "pressure through use of special discounts" (Govt. Br., p. 67), has claimed that the super-discount contracts with du Pont for the years 1927-1931 were meant to induce Fisher Body, which by then had been completely absorbed by General Motors, to give du Pont more of its business. Assuming this to be true, the very fact that du Pont should have to offer an extra discount in order to get a part of the General Motors business is entirely inconsistent with the theory of the Government's case. Whether or not a special discount can properly be described as a form of "pressure", it is pressure resulting from a low price, and not from the force of du Pont's stock ownership. Every seller tries to exert that kind of "pressure." Indeed the record indicates that the "pressure" was exerted by General Motors on du Pont, as on other suppliers, in order to secure better prices (GMX 164, R. 1119, 7147). If there had been an agreement, understanding or influence requiring that General Motors buy from du Pont whenever possible, or preferentially, the concession of a super discount would not have been necessary.

But apart from these considerations, the facts as to the super discount show the absurdity of the Government's claim. Fisher was taken over completely by General Motors in June 1926 (GX 505-507; R. 598, 4173-76). The first super discount plan became effective in October 1926, four months later (R. 1120; GX 462, R. 537, 4111; GX 464, R. 538, 4117). According to the Government, this enabled du Pont to sell to Fisher "not on the basis of merit, but on the basis of control" (Govt. Br., p. 142), which obviously means that

du Pont was finally in a position to compel Fisher to buy. Instead, we find du Pont like other suppliers attempting to secure business from Fisher (and the other divisions) by offering large discounts, resulting in substantial cost savings to General Motors. A 1927 du Pont report shows that du Pont was hopeful, but by no means sure, that a savings of "as much as $500,000 a year" to General Motors would get du Pont some of the undercoat and black Duco business (GX 492, R. 541; 4148).[34] This is hardly the attitude of a monopolist exploiting a "captive market" which it controls.

The trial court found (R. 381):

> "Moreover, the record indicates that even the discount did not secure for du Pont all of Fisher Body's business and indeed may not have increased the portion of Fisher's requirements purchased from du Pont though the total dollar purchases from du Pont by Fisher did increase. The record also shows 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 philosophy of the General Purchasing Committee and of General Motors was set forth in 1928 by Lynah, the Committee's Executive Secretary. The sales manager of a du Pont subsidiary had asked him (GMX 193, R. 1155, 7231) to "specify the use of du Pont film" for pictures made for General Motors. In reply Lynah stated (R. 365-6; GMX 194, R. 1155, 7232):

> "In the making of our purchases, we believe that each transaction should stand on its merits and we presume that the company buying films for our use is

[34] "Their own estimate is that General Motors Corporation might save as much as $500,000 a year by placing this business with us, due to our lower prices on undercoats and the increased discount this added volume would enable them to obtain on all other purchases under our so-called 'super discount' agreement. Our latest information is that this subject is being actively agitated by the G. M. Purchasing Committee but have not yet heard to what extent the operation of the super discount plan is swinging sentiment in our favor." (GX 492, R. 541, 4148)

guided by this same principle and that if the quality of your product and service, consistent with prices quoted, are the best he can obtain, he will buy from you."

The record thus amply discloses that the General Purchasing Committee was not created to and did not favor the du Pont Company in the eight years of its existence. The Government offered no evidence to the contrary. The trial court correctly and necessarily found (R. 371-2):

> "The evidence of record does not establish, or tend to support, the Government's contention that the General Purchasing Committee was created and operated as an instrumentality to carry out the desires of du Pont. In fact, actions taken by the Committee were seriously detrimental to du Pont in a number of respects. For example, the Committee initiated the two source of supply policy in connection with artificial leather and top materials; it refused to make a contract with du Pont for pyralin; it encouraged the early development of competition for Duco, and refused to renew du Pont's requirements contract as soon as a competitive lacquer was available.
>
> "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."

If the Government could not prove that this Committee—established while Pierre was president of General Motors, operating in the 1920's at General Motors' headquarters, and in the very field of purchases which du Pont is alleged

to have dominated—had favored the du Pont Company in its purchasing policies, it would seem obvious without more that the Government's charge that du Pont controlled General Motors' purchasing policies is without foundation. The history of the Committee not only does not support the Government; it provides affirmative proof that there was no policy or agreement to favor du Pont in purchasing.

As has been pointed out, the Government has abandoned its claim of coerced favoritism as to all commodities but finishes and fabrics. We have already suggested that this in itself refutes the Government's contention of an inevitable policy of preference. We shall now show, as the trial judge found, that General Motors' purchasing of du Pont products in those fields was motivated by normal competitive considerations.

4. *Industrial finishes*

(a) *Duco*

The major item General Motors purchases from du Pont is Duco—a lacquer used for "painting" automobile bodies. In 1946-47, as in previous years, General Motors purchased about 70% of the finishes it used from du Pont, two-thirds of which was Duco (R. 394-5; DPX 573, R. 3008, 6531; GX 1400, R. 2930, 5431; GX 1344, R. 2846, 5340). In 1947 25 other companies sold finishes to General Motors in amounts ranging as high as $3,205,000 (GX 1400, R. 2930, 5431).

The paint story begins before the advent of Duco. Between 1910 and 1918, the Flint Varnish and Color Works, located in Flint, Michigan, near the General Motors factories, produced almost all of General Motors' requirement of paint, enamels and varnish for all the cars except Cadillac, and also for many other automobile companies (R. 382; GX 277, R. 499, 3699). Du Pont acquired control

of Flint in 1918, shortly after it acquired stock in General Motors (R. 344). In 1921, it *lost* one-half of the Oakland business (GX 420, R. 528, 4010), and in 1923 some of the business at Buick, Oakland and Oldsmobile (R. 382; GX 420, R. 528, 4010; DPX 220, R. 2693, 6122). The opposite, of course, would have happened if there had been any such conspiracy or irresistible du Pont influence as the Government charges.

One of the major problems confronting the automobile industry in the early 1920's was the absence of a suitable paint. Cars had to be painted and repainted, over periods of from 12 to 33 days, and the storage space and working capital tied up in cars otherwise completed was immense (R. 382; R. 585-8, 1285-6, 1586, 2136-7). After the cars were sold, the paint still would not last and the cars had to be repainted frequently by the owners (R. 1285, 2136, 588). In 1919 Kettering tried to interest six paint companies in the problem, unsuccessfully (R. 1586-7). In December 1921 General Motors created a Paint and Enamel Committee which contacted every reputable paint manufacturer in the country in search of a better product (R. 382; R. 1289-90, 2137-8; GMX 104-5, R. 1287, 6867, 6869; DPX 202-9, R. 2034-2038, 6083-93).

Kettering thought that a lacquer such as was used on airplanes might be a possible solution (R. 382-3; R. 1587-8). In the meantime, du Pont had developed a lacquer, which it had marketed to the auto refinishing trade, and to manufacturers of furniture, brush handles and pencils (R. 383; R. 2029-30, 1944), but not to General Motors. When the du Pont Company was approached by one of the General Motors research group, this lacquer was submitted for testing (R. 383; R. 2030-1). When the tests showed promise (R. 383; DPX 202, R. 2034, 6083-5; GMX 113, R. 1296, 6880; GMX 267, R. 1589, 7402), intensive effort was made to

develop a satisfactory product, and a greatly improved and suitable finish, which du Pont called Duco, was the result (R. 383; R. 2032-2034, 2038-2039, 1589-1590, 1945-1946; DPX 177-178, R. 1950, 6013-6018).

Continued testing of Duco and also the products of other companies resulted in the conclusion that Duco was substantially more durable than the others (GX 1228, R. 523, 5180; GMX 109, R. 1294, 6873-6875). Du Pont seemed to have come up with something that was the answer to "a very wild dream", "that cars ought to be able to stay out of doors day and night throughout the entire year" (GMX 122, R. 1310, 6931). Tests indicated that Duco would last for 17 months as against 3 months for other types of colored finishes (GMX 113, R. 1296, 6882-3).[35]

The new finish was adopted by Oakland (now Pontiac) in 1923 (R. 384-5; R. 1951-2, 2043; GMX 121, R. 1309, 6928). It was an immediate success (R. 384; R. 1309-10, 1954-4; DPX 188, R. 1954, 6050). Not only did the public like Duco (R. 1953-4; DPX 188, R. 1954, 6050-51), but its use produced great savings for Oakland. Painting time of an Oakland body came down from 366 hours to 12½ hours; material costs were lowered; the floor space necessary for painting operations was substantially reduced; the number of bodies being painted at one time was reduced from 2400 to 600; inspectors' rejections were cut from 20% to 2% of daily production (R. 2050; DPX 198, R. 2022, 6075).

In the next year the other General Motors cars (except for Cadillac, as to which Duco was optional (R. 385; R. 1962)) and many other cars switched to Duco (R. 385-6; R. 2045; GMX 120A, R. 1308, 6919-27). By the end of 1925 all cars except Ford and Cadillac were using Duco (R. 2048).

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[35] The older enamels were durable only in black (GMX 113, R. 1296, 6882).

Although Sloan and other General Motors officials encouraged this development because they believed Duco to be a vastly superior product (R. 386; R. 1311), the decision was left to each General Motors division independently (R. 385-6; R. 1310, 1957-9, 2141, 2143). The discoverer of Duco, Flaherty of du Pont, testified that Mr. Sloan "was quite clear in his statements to us that the car units were the ones who would make the final decisions" (R. 2041).[36] This pattern is hardly consistent with du Pont control, or a combination or conspiracy.

From the beginning General Motors continued to look for competitive materials (R. 386-7; GMX 168-178, R. 1131-1137, 7162-80; GMX 180-183, R. 1140, 7186-89). As early as July 1924 (before all the General Motors divisions had decided to turn from varnish to Duco), the General Purchasing Committee (of which Sloan was then chairman) "decided to develop the competitive field for pyroxylin paints" (GMX 168, R. 1131, 7162). Letters were sent to other paint companies, asking them to submit samples if their "development of pyroxylin paints have proceeded sufficiently far * * *" (GMX 170-1, R. 1132, 7164-5). In 1925, however, there were none as good as Duco (R. 2010, 2052-53).[37]

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[36] Weckler, then Buick's superintendent, and, since 1932, an executive of Chrysler Corporation, testified that Buick took the lead in testing various finishes, that he recommended that Buick use Duco, that he was not told that Mr. Sloan wanted Buick to use Duco, but that he *favored it himself* (R. 2138-41).

[37] Weckler stated (R. 2142):

> "Well, at the Buick plant our experience was that we did not find any materials that were satisfactory as the 'Duco' material, and we were progressing very well with the materials, and were reluctant to change our entire system, and in addition to that 'Duco,' the du Pont Company had a plant, the Flint Paint & Varnish Company which was located very close to the Buick Motor Company at Flint, and we thought it was a decided advantage to have a plant in that location making material, because, as we say, all of the bugs had not been worked out of the thing, and this established a source of supply which was so convenient that in a few minutes we could work back and forth if we got into some sort of difficulty or if we had any questions, and we were very close together, and we thought with all of those advantages, we thought we might better go along with the material we were working with."

In May 1925, the Committee again pressed General Motors Research for approved competitive sources (GMX 175, R. 1137, 7170). The reply stated (GMX 176, R. 1137, 7174):

> "We feel that in the case of material which is advertised by our Companies as strongly as Duco, no production should be under-taken on material which has not had at least a full year exposure test on test racks."

See also R. 1130-31. It was suggested that test cars be put out on the road with competitive finishes on them; "in this way we feel that the General Motors Corporation will be in a position by next spring to definitely put into production materials made by some of the companies competing with Duco" (GMX 176, R. 1137, 7175-6). The General Purchasing Committee took steps to expedite this suggestion. (GMX 180-183, R. 1140, 7186-89).

During this period, the General Purchasing Committee, unable to find an adequate competitive lacquer, entered into a series of three requirements contracts with du Pont for six months, six months, and one year, covering 1925 and 1926,[38] (R. 386-8; R. 2649-51, 2655, 2671; GMX 167, R. 1128, 7159-60; GMX 179, R. 1139, 7181-85; GMX 184, R. 1141, 7190-99). By 1927, equivalent competing lacquers had come on the market (R. 1923, 2010, 2052-53, 1142). Thereafter the General Purchasing Committee entered into no requirements contract with du Pont for Duco but rather a discount and pricing contract ("requirements of seller's make") under which participation by the divisions was optional (R. 388-9; R. 1142; GMX 185-190, R. 1142-4, 7200-27).

Oldsmobile and Cadillac then switched to a competitor, Rinshed-Mason, and have continued to buy almost exclusively from that company ever since (R. 389; R. 1923-1927).

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[38] The last two contracts applied to only one-half of Fisher Body's requirements (R. 388).

Chevrolet, Buick and Pontiac continued to buy from du Pont. Fisher Body at first divided its purchases of topcoats among du Pont and three other companies, and has continued to buy from du Pont, Forbes and Rinshed-Mason (R. 389; R. 1923, 593). It buys its undercoating from du Pont's competitors for 13 out of its 14 plants (R. 389; R. 1923).[39] In part, the several car divisions were influenced by the proximity of their plants to those of a particular paint supplier. Cadillac was located near the Rinshed-Mason plant in Detroit, and Buick and the main Chevrolet plant were in Flint, near the du Pont paint works (R. 389; R. 1924, 1926-7). "Geographical location" is an "important factor" (R. 1968).

These uncontroverted facts show General Motors seeking to develop competitive sources of supply *vis-a-vis* du Pont, even in an area in which du Pont had pioneered, a picture hardly consistent with the Government's theory that "The natural thing was to lean toward du Pont whenever a reasonable choice existed" (Govt. Br., p. 127.) Certainly it would have been "reasonable", as well as natural if any preferential policy had existed, for General Motors, during this period in the 1920's, to leave well enough alone and to stay with the progressive and satisfactory supplier which had developed the new, improved product. Instead, General Motors made strenuous and eventually successful efforts to develop competitive sources which secured the business of two General Motors car divisions, and part of the large Fisher business. It is to be noted that this action of the General Purchasing Committee, acting contrary to du Pont's interests, took place while Sloan was either its chairman or a member, as well as president of the corporation.

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[39] Another type of undercoat, a pyroxylin surfacer, is sold by du Pont to Nash and Chrysler (and formerly to Marmon) and to General Motors of Canada, but not to General Motors otherwise (R. 389; R. 1982; GX 479, R. 540, 4132).

Most of the automobile manufacturers, including presently Nash, Hudson, Studebaker, Packard and Willys, have bought and still buy finishes in substantial amounts from du Pont (R. 389; R. 1991-4). Chrysler bought from du Pont in volume until the 1930's when Mr. Keller of Chrysler told Williams of du Pont that

> "he thought the best interests of the Chrysler Division would be served if they could find some supplier that would look upon Chrysler as the customer, and he thought that they had just about lined up someone who could take care of almost their full requirements.
>
> "Q. Did Mr. Keller advise you that there was any complaint about your materials or service?
>
> "A. None at all, sir.
>
> "Q. What did he say with respect to those factors?
>
> "A. He said that our service and performance of our products was very satisfactory.
>
> "Q. Were you thereafter successful in obtaining any significant amount of Chrysler's business?
>
> "A. We sell Chrysler a substantial quantity of materials, but it is insignificant in relation, I would judge, to their total requirements." (R. 1995).

Ford produced its own lacquer, but in the 1930's, when it changed to another type of finish, it bought up to 50% from du Pont (R. 1992; GX 1376-77, R. 2824, 5407-8). Henry Ford then "issued instructions that the Ford Motor Company was not to purchase any more material from the du Pont Company" (R. 1992-93). After the war, Henry Ford II said (R. 1993):

> "that he thought that the du Pont Company, with all of its research facilities and capacity, had something Ford could use * * *
>
> "He said that he saw no reason why we should not start to submit samples to their purchasing department and their technical laboratories, and if we could

> give them proof we would be judged on our merits, and if we got the business, why, we would do it in the way that Ford would customarily do business with other sources."

Since then, and at the time of the trial, du Pont was selling "Ford very substantial quantities of topcoats", although Ford still has its own paint plant and manufactures large quantities for itself (R. 1993).

The record thus shows that the failure of Ford and Chrysler to buy from du Pont was not attributable to du Pont's inability to compete on the merits. Nevertheless, the fact that Ford and Chrysler in 1947 either produced most of their own paint or bought elsewhere explains why most of du Pont's sales to the automobile industry were to General Motors. The other automobile manufacturers together comprised only a small portion of the industry. Thus, if du Pont sold in substantial volume to them and to General Motors, but relatively little to Ford and Chrysler, its sales to General Motors would necessarily be a much larger portion of its total sales to the automobile industry than the number of cars produced by General Motors would be of total car production. Accordingly, there is no basis for the Government's argument that influence must account for the fact that du Pont sells proportionately more to General Motors than it does to the automobile industry as a whole.

Du Pont manufactures and sells other finishes used on other parts of automobiles, with varying degrees of success (R. 390-92; R. 1996-2004). The General Purchasing Committee, from 1926 through 1931, contracted with a competitor of du Pont for General Motors' requirements of white lead, commonly known as house paint, which was one of the products made by du Pont (GMX 155, R. 1100, 7043-7076). As with Duco, the distance the du Pont or competing fac-

tories were to the particular General Motors operations was "a big factor" (R. 2004, 1997-1999). "Proximity means a great deal" in furnishing better service (R. 1998).

General Motors continued to test various types of finishes, but found none better than those which it was using (R. 1931, 1934-5). The head of the Chemistry Department in the General Motors Research Laboratories testified:

> "Q. Have you tested paints from manufacturers other than the three suppliers you are referring to?
>
> "A. We are continually testing paints, wherever we can get them. If anybody has an idea that they have a paint that will be better than what we are using, we test them.
>
> "Q. Have you ever found a supplier with a substantial line of colors that seemed to be better than the three suppliers of General Motors at the present time?
>
> "A. Nobody has given us a line of materials which showed enough advantages to make it worth while changing." (R. 1931)
>
> "You do not change your paint materials on a big operation like General Motors, just because it is a little bit better in any respect. When you are painting that many automobiles in a day, you don't have to be wrong very long before you have an awful lot of dissatisfied customers. So when you are not in trouble, you don't change." (R. 1935).

It is apparent from the above pattern, or lack of pattern, that each General Motors division has bought finishes from du Pont and others as a result of normal competitive considerations. General Motors originally turned to Duco because it was a new and superior product. It now buys a considerably smaller percentage from du Pont—but nothing in the record suggests that these continued purchases have not been on the merits of the product and the serv-

ices going with it. This is not evidence that du Pont was accorded any preference, or that there was any understanding because of du Pont's ownership of General Motors stock.

Five witnesses familiar with the purchases of finishes testified that there was no preference or understanding, and made it very clear that du Pont's sales to General Motors were on a competitive basis. Wirshing (R. 1931), Williams (R. 1990), Weckler (R. 2142-3, 2147), Flaherty (R. 2031, 2033, 2039, 2053-54), Lawrence Fisher (R. 592). Weckler testified (R. 2146-47):

> "In my capacity, I would not have cared very much whether the research and development division had brought in some material, or from Joe Doakes or from du Pont or some other division of the corporation. We were looking for a material and when we found something that seemed to have promise, we naturally took onto it, and took it into our plants and began cooperating with the makers of the material, trying to develop it as rapidly as possible to see if it were really the thing that we were looking for, and that was the first thing that we found. * * *
>
> "I was not aware of any pressure being applied to anyone, including myself, in our organization, nor upon the Paint and Enamel Committee members, nor upon the Research and Development Section, nor upon the Fisher Body Section * * *"

Flaherty stated that when competitive lacquers to Duco came on the market beginning in 1927 (R. 2054):

> "We were compelled, not only, of course, to try to do everything we could technically to improve our quality, but we put in manufacturing capacity in areas other than Parlin and Flint, so that we could give better service, and ultimately we reduced prices."

The trial court found (R. 395-396):

> "Duco was invented and patented by du Pont. It made a substantial contribution to the art of automobile finishing and was one of the factors that made possible mass production of automobiles. Testimony of Sloan, Lawrence Fisher and Weckler establish beyond any doubt the high value of this development to the automobile industry. Sloan recognized its potentialities in advance of some of his associates and urged the adoption of Duco. Such action on his part does not evidence a trade agreement with du Pont or response to alleged du Pont control. It is rather an instance of his foresight and leadership, not unlike a number of other incidents that contributed to his success as the Chief Executive Officer of General Motors. The testimony of Weckler, who for many years was an executive of Chrysler Corporation, was similarly convincing that Duco answered a long felt need in the automobile industry and made its way solely on its merits. In short, the Court rejects as wholly without foundation any contention that Duco was forced upon General Motors by reason of du Pont influence or domination.
>
> "The record shows that after competitors began to produce a lacquer comparable to Duco some General Motors Divisions turned to such competitors while others continued to buy in whole or in large part from du Pont. Du Pont, it appears, has retained its position as the most important single supplier of General Motors. The Government has failed to establish, however, that this position was maintained in any illegal manner. Flaherty, Williams and Wirshing all made clear that 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; * * *"

Any other finding would have been without any support in the record.

(b) *Dulux*

Outside of the automobile field, Duco was used as a finish for refrigerators by General Motors' Frigidaire Division until 1927, when it was largely replaced by porcelain (R. 389-90; R. 2395-9). It was also used by other companies (R. 2484). In 1930 or 1931, in collaboration with the General Electric Company, not General Motors, du Pont developed a greatly superior and cheaper product known as "Dulux" (R. 390; R. 2383-84, 2484-85). This was first offered to and used by General Electric (R. 390; R. 2383, 2405), and has since been used exclusively by other principal manufacturers for refrigerators and other appliances —General Electric, Westinghouse, Crosley—and by many of the smaller companies to a greater extent than by Frigidaire (R. 390; R. 2405-06, 2407-10, 2475, 2483-84). Next to Duco, Dulux was the largest item dollar-wise which du Pont sold to General Motors (GX 1344, R. 2846, 5340-46). The trial court found that Dulux (R. 396):

> "is apparently an ideal refrigerator finish and is widely used by a number of major manufacturers other than General Motors. Several representatives of competitive refrigerator manufacturers testified that they purchased 100% of their requirements from du Pont. 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."

5. *Fabrics*

(a) *Generally*

The fabrics picture is the same, but less easy to simplify because of the large number of products involved and the changes in the demand for particular products over a period of 30 years. The products involved during the earlier years, before closed cars (especially those with all-

metal tops) came to predominate, were artificial leather (Fabrikoid and later Fabrilite) and top material (Pontop, Everbright and Teal) (R. 397).

At the present time, fabrics of the types sold by du Pont —artificial leather used for inside trim and top materials for convertibles—constitute a small proportion of the total fabrics used in an automobile. Apart from the top material for convertibles, they averaged in 1946 about 1.6 yards, costing about $2.22 per car (GX 1349, R. 2890, 5355; see also DPX 297-8, R. 2266, 6231-2), and 2.75 yards in 1953 (R. 2092). They are used principally for such things as front seat tops and backs, kick pads and shelves behind rear seats (R. 402; GX 1381, R. 2825, 5414). Du Pont does not manufacture the cotton and wool products of which most of the upholstery is composed.

Du Pont sales of fabrics to General Motors in 1947 were about $3,700,000 which, the trial court found, filled approximately 40-50% of General Motors' requirements; for 1947 the figure was 38.5% (R. 403-4; R. 2171; DPX 569, R. 3007, 6527; GX 1344, R. 2846, 5340).[40] General Motors purchased coated fabrics and imitation leather in substantial quantities from 17 other suppliers (GX 1343A, R. 2846, 5324-5). In 1950 du Pont's share of the automobile market was $6.8 million out of $40 million, or 16.8% (DPX 563, R. 2998, 6483).

The trial court found (R. 405):

> "On the basis of all of the evidence of record • • • that there was at no time any agreement that bound General Motors to buy any fixed portion of its fabric

[40] The trial court rejected as inaccurate the Government's figures of 74.5% for 1946 and 60% for 1947 on the ground that the Government's tabulations failed to include some sales to General Motors by competitors of du Pont (R. 403-4). Although not challenging this finding, the Government commingles its own percentages (and a similarly calculated figure of 63.8% for 1948) with those found by the court to be accurate (Govt. Br., pp. 60-61), with the obvious desire that this Court give them some weight.

> requirements from du Pont with the exception of the year 1922. * * * 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." (Italics supplied.)

The record amply justifies these findings.

Each General Motors division bought its own fabrics.[41] Salesmen for du Pont and other suppliers dealt with the separate divisional purchasing departments, and the contracts were made by various persons operating separately at that level.

The character of the dealings between suppliers' representatives and General Motors' purchasing departments was convincingly and extensively described by several salesmen who worked for du Pont over the years (Brown, R. 2182-2312; Nickowitz, R. 2061-2131, 2161-2182; MacShane, R. 2313-2381; Nalle, R. 2857-2911). Their testimony told in detail of their repeated contacts with divisional purchasing departments and the continuous combat with their competitors, based wholly upon the merits of the offered products. The ups and downs of their successful and disappointing results in a period of 30 years refute any possible claim that the results were produced by any factor other than business considerations. Only by reading their testimony as a whole can this Court get the full competitive flavor, which undoubtedly influenced the trial court, of their

[41] The General Purchasing Committee never made a general contract covering fabrics for General Motors.

attempts to sell du Pont fabrics to General Motors. Their testimony and many documents prove that du Pont acquired and lost the patronage of the various General Motors divisions on the basis of the relative merits of its and competitive products.

Prior to du Pont's acquisition of General Motors stock, du Pont was already the major supplier of coated fabrics to the General Motors car divisions—some buying substantially all their requirements from du Pont, and others one-third to one-half—as well as to other car companies (R. 397; R. 2185, 2290, 2072-83; DPX 233-39, R. 2075-6, 2080-2, 6135-45). There is no question that in the beginning there were persons in du Pont who had an expectation of getting General Motors' fabrics business.[42]

But it did not turn out that way. A 1921 du Pont report as to Fabrikoid, after stating with respect to the competitive situation generally that "Competition is fierce,"[43] frankly declared (GX 106, R. 476, 3076-77):

> "It would appear natural that we should secure a large amount of the business of the General Motors Company.
>
> "This is, however, not the case, as we are placed by them in severe competition, and not always equal competition. By this we mean that during recent months we have been in competition with concerns in receivers' hands, who are willing to take business at most any price."

Indeed, as the 1921 letter quoted in the Government's brief (p. 33) admits, du Pont was often met with "latent resentment" by the General Motors units. (Pratt testified to

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[42] See, *inter alia*, the Raskob report of December 20, 1917, discussed at p. 77, *infra*.

[43] "In short, the outlook appears to be for a long future period of vigorous competition, in which reliance must be had for profits upon superior efficiency in purchasing, production and sales. * * * There would appear to be no necessary or permanent reason why the du Pont Company should not continue in this field on at least an equal footing with any other manufacturer." (GX 106, R. 476, 3076).

the same thing (R. 1412). Du Pont did not overcome this by influence but by making special efforts to outstrip its competitors in the way of service, quality and price in order to secure and keep General Motors' business.[44] 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 material that they were receiving was the best they had ever had from anyone" (GX 303, R. 504, 3808).

During this period, although du Pont was able to maintain its pre-existing status as the supplier of the bulk of General Motors' fabrics, it did not increase its share of the business, although it "endeavored to sell all we could at each time there was an opportunity" (R. 2185). Indeed, in 1918 there had been a temporary decline (R. 2188, 2206-07, 2209, 2222, 2226-27). Competition was so severe that, in passages quoted by the Government (Govt. Br., pp. 32, 37-38), du Pont suggested that General Motors should enter into a "permanent" arrangement whereby it would obtain all of its fabrics from du Pont, "on some *mutually* advantageous basis"; this, it was urged, would enable du Pont to run its plants more steadily and economically, to the advantage of General Motors as well as itself (GX 417, R. 526, 3998; GX 403, R. 526, 3958; GX 413, R. 528 3987-88).[45] But,

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[44] "Both Sales and Production departments have concentrated upon our standing with General Motors; we believe that the object sought has been accomplished and that today Fairfield is 'solid' with General Motors. 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." (GX 417, R. 526, 3999)

[45] One of these letters, written to Pierre du Pont when he was president of General Motors, concludes (GX 403, R. 526, 3960):

"Of course, 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."

This shows a contemporaneous recognition by the du Pont company that Pierre as president did not dominate or control General Motors purchasing policies.

as the Government does not mention, these proposals were never accepted by General Motors.

As has been noted (*supra* p. 47, fn. 32), in order to induce du Pont to cancel some of its orders for what turned out to be more goods than it could use in the depression year 1920, General Motors agreed to buy all its requirement of coated materials from du Pont for 1922 (R. 399; R. 2186-87). But in the next year, the General Purchasing Committee, under Sloan as chairman, saw that du Pont was apprised of General Motors' two-source policy, which meant that, like many other suppliers, it could not supply more than 75% of any product. This did not mean that du Pont received anything like 75% of the fabrics business thereafter, although the Government originally so charged. In no year after 1922 did General Motors ever purchase that much (R. 2129).

The record shows that du Pont won and lost General Motors' business because of the same commercial factors as affected other suppliers. A few examples are all that space will permit. Chevrolet bought top material from du Pont in 1917, switched to another supplier in early 1918, and went back to du Pont when a superior product called Pontop, bought by almost all motor companies, was developed (R. 2188-90). A lot of Chevrolet top orders were lost between 1922 and 1925, but then Chevrolet came back to du Pont to get a satisfactory product (R. 2196-97). Du Pont sold some Teal-type top material to Buick in 1927-28, lost the business in 1929 and 1930,[46] and regained some

[46] "We quoted Buick Motor Company on their Teal business for the last nine months of 1929 without success, the business going to the J. C. Haartz Company, as we understand it, solely because General Motors Export insisted on Haartz's material." (DPX 257, R. 2215, 6168)
"Buick has specified Fairfield teal, (double texture topping for sport models) for the remainder of 1931. This business has been regained after a lapse of two years, during which competitive material was used. The special colors, and especially woven figured backings of the samples submitted, were instrumental in our receiving this business, as competitors did not have a similar product to offer." (DPX 258, R. 2216, 6169)

in 1931 (R. 2205). Oldsmobile bought Teal from du Pont in 1924-1926, but not thereafter (R. 2225; DPX 263, R. 2224, 6175). Cadillac used very little du Pont top material until 1920 (GX 298, R. 503, 3796); although du Pont tried to sell Pontop "it was not until 1920 that they switched over to 'Pontop,' and at that time they told us that it had won out in a series of tests that they had conducted" (R. 2220).

By 1926 General Motors was buying only 55.5% (not 89% as the Government's brief implies)[47] of its fabrics from du Pont, largely because Chevrolet obtained all of its materials from du Pont after an unfortunate experience with competitive products during the preceding year. By 1930 the proportion was 31.5%, and Ford was buying more than all the General Motors cars together, which demonstrates that the du Pont products could be sold to auto companies

[47] The assertions in the Government's brief that du Pont sold 89% of the fabrics to the General Motors operating divisions in that year (Govt. Br., pp. 60, 139) are very deceptive. The Government concededly omits Fisher Body, which purchased 63% of General Motors' fabrics at that time, from its calculation, although admitting that this was "after several years of complete control" of that company by General Motors. Of the $1,623,000 (not $11,623,000 as stated in the Government's brief, p. 139) bought from du Pont by the automobile divisions, $1,411,000 was purchased by Chevrolet. Cadillac bought substantially nothing from either du Pont or its competitors, and Buick, Oldsmobile and Oakland bought small quantities from both. Fisher's purchases of fabrics from du Pont were $1,159,000, as compared to $2,020,000 from other sources; 37% of Fisher's purchases and 55.5% of all General Motors' purchases were from du Pont. A tabulation constructed from the exhibits cited by the Government shows the following:

	Du Pont	*Competitors*	*Percent Du Pont*
Fisher Body	$1,159,000	$2,020,000	37%
Chevrolet	1,411,000	—0—	100%
Buick	126,000	106,000	54%
Oakland	43,000	90,000	31%
Oldsmobile	42,000	13,000	76%
Cadillac	41	—0—	(*de minimis*)
TOTAL	$2,781,000	$2,229,000	55.5%

Purchases from du Pont competitors shown in GX 460, R. 537, 4101.

Purchases from du Pont shown in DPX 297, R. 2261, 6231; DPX 250, R. 2204, 6161; DPX 259, R. 2216, 6170; DPX 260, R. 2221, 6171; DPX 263, R. 2224, 6175; DPX 265, R. 2228, 6177; DPX 297, R. 2266, 6231.

on their economic merits (R. 400; R. 2245-47; DPX 281-82, R. 2245, 2248, 6210-11).

(b) *Fisher Body*

Since that time Fisher Body has been the principal customer for fabrics.[48] Inasmuch as the Government thinks the Fisher "problem" worthy of special treatment, it seems necessary to discuss Fisher purchases in more detail.

The closed bodies for General Motors cars had been manufactured by Fisher Body[49] since before 1917 (R. 400). Prior to 1925, du Pont had received no big fabric orders from Fisher. Then du Pont introduced new and better types of top material, Glazed Pontop, and in the next year Everbright (DPX 274, R. 2237, 6199), shown by Fisher tests to be the best.[50] In 1925 du Pont also hired a special salesman who was able to get substantial orders during the next few years (R. 374; R. 2231-34, 2236, 2354-55; DPX 273, R. 2237, 6198).[51]

Competitors did not approach the quality of the new du Pont top materials until 1929, when du Pont's proportion of Fisher's orders went down to about one-third, where it

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[48] The only other divisions purchasing fabrics in recent years have been the truck divisions, which since 1944 have bought about 30% of the materials for their light truck upholstery from du Pont. They buy on bids from the three lowest qualified bidders. Du Pont has been unable to sell heavy truck upholstery, even though it has a satisfactory material. (R. 2098-2104; GX 1352-7, R. 2890, 5360-78).

[49] Fisher was a separate corporation, 60% of the stock of which was purchased by General Motors in 1919. A voting trust giving the Fisher brothers 50% of the voting power for five years expired in 1924. It became a division of General Motors in June 1926 (R. 372-73), after General Motors had acquired the remainder of the stock.

[50] "Mr. Wescott also told me about some tests made by the Fisher Body Corporation of various rubber-coated top materials. He said that they placed du Pont and Duratex at the top and about on a par, du Pont being slightly better. Chase came next and considerably below these two. Then came Haartz, and lastly Carr." (DPX 274, R. 2237, 6199)

[51] In 1931, a memorandum to a du Pont Vice President stated (DPX 273, R. 2237, 6198):

> "Prior to the employment of Mr. Smith we were unable to secure any Fabrikoid business from Fisher Body, and for a long time after becoming established as one of their sources of supply we were very largely dependent on him to hold a share of that business."

remained for coated top materials until they ceased to be used when the fabric top was replaced by the all-steel body (R. 400; R. 2238, 2241-42, 2252). In the early 1930's Fisher took over completely the manufacture of passenger car bodies for the other divisions, and since then Fisher has bought the fabrics for all the General Motors passenger cars (R. 2128).

Between 1926 and 1931, Fisher bought about one-half of its uncoated top material (such as is used for convertibles (R. 2253)) from du Pont (R. 380; R. 2255). After 1931, when du Pont refused to grant a 2-year guarantee against cleaning damage, Fisher bought this material exclusively from Haartz and continued to do so despite du Pont's willingness to grant the guarantee in 1933 (R. 400; R. 2253, 2255; DPX 287, R. 2256, 6219). In 1947, Fisher was having difficulty with shrinkage and fading of Haartz's top material and told du Pont that if it could develop something better it would get a substantial proportion of the business (R. 380, 400; R. 2258; DPX 292-95, R. 2261-3, 6224-27). By 1948 du Pont had come up with a greatly improved product, which Fisher recognized as superior to competitors'.[52] From then to 1951 du Pont supplied about one-half of Fisher's top requirements and in 1951 one-third (R. 380, 400; R. 2258-63).

When Fisher in 1939 began to use coated fabrics for interior trim (such as on the lower part of doors), du Pont was "ready with a product" which had already been developed for furniture and handbags (R. 2254). As a result, du Pont secured a major portion of the business—60%—

[52] "Mr. Fisher volunteered the information that our present construction is at the top of the list from the shrinkage standpoint at present and he commented that possibly he should recommend to Purchasing that we be given all of the business. He followed this up by saying that it would not be a good thing to make such a recommendation. He then said that possibly we should be given the principal part of the business and should tell the competitor what we are doing to control the shrinkage within such narrow limits. Of course we ducked an answer to that one." (DPX 296, R. 2264, 6229-30)

in 1940 and 1941 (R. 400; R. 2253-54). During the post-war shortage, Fisher purchased as much of this from du Pont as it could get (R. 400-401; R. 2254-55). Beginning in 1947 Fisher has bought from three other major suppliers as well, so that du Pont's share has substantially declined to about 35-45% (R. 401; R. 2092-93, 2255).

The Government's brief twice asserts that by 1947 and 1948 Fisher Body "was just another department of General Motors, buying 65.5% of its fabrics from du Pont in 1947 and 68% in 1948 (GX 1350, 1351; R. 2890, 5356-59)" (Govt. Br., pp. 68, 142). This is accurate insofar as it indicates that long before that time Fisher had become a division of General Motors, but the Government's figures are wrong. The figures of 65.5% and 68% are computed by the Government from incomplete data contained in the reports (GX 1350-51, R. 2890, 5356-59) to his home office of Nalle, a du Pont salesman. He explained on the witness stand (R. 2862-64, 2893-97) that his reports contained merely his estimates of the sales of some competitors to Fisher, based upon the piecing together of details obtained indirectly in conversations with various people (R. 2863-64). The first report omits, for the year 1947, sales to Fisher by Haartz, du Pont's chief competitor, of over $1,400,000 (R. 2895)[53] The second report contains substantial amounts for Haartz, but they were excluded from the calculation whereby the Government reached the figure of 68%. The reports for both 1947 and 1948 omitted data for about twelve other companies which sold Fisher smaller quantities, as to which the author could give no accurate estimate: "I followed the practice, if I wasn't able to put in an estimate that I thought

[53] The magnitude of this ommission is indicated by the fact that du Pont's total sales of fabrics to General Motors in 1947 were $3,639,000 (DPX 569, R. 3007, 6527).

was reasonably representative, I left it off" (R. 2894).[54] He stated (R. 2862) that "I would guess that my report—understand, my reports were in yardage, not in dollars[55]—might have covered perhaps 65 to 75% of the total requirements." (See also R. 2894-7).

On the witness stand Nalle estimated that he thought du Pont had "about 40% of the Fisher business in 1948." This was very close to the figure of 38.5% for 1947 contained in the tables for General Motors as a whole, which the trial court found to be accurate (R. 404), and to the court's finding of 40-50% for 1946-1947 for General Motors as a whole. These tabulations were of course based on actual sales figures, and not on a salesman's rough guess. Since Fisher was the main purchaser for General Motors at that time, this coincidence between the percentages which General Motors as a whole and Fisher bought from du Pont was to be expected. By its use of the incorrect figures of 65% and 68.5% for Fisher, the Government is seeking to imply that du Pont had obtained a much larger share of Fisher's business than it had before, and that this must have resulted from du Pont's supposed ability to put pressure on General Motors. The correct figures support no such theory.

The court's findings as to Fisher are sufficiently important to be read as a whole (R. 380-382):

> "The record, including all the evidence summarized in the preceding paragraphs, amply establishes that du Pont sought to sell its finishes and fabrics to Fisher Body. It early recognized that Fisher would be a substantial consumer of those products since it was making all of the closed bodies for General Motors cars.

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[54] The 1948 estimate was prepared in October of that year (GX 1351, R. 2890, 5358), when Nalle could only conjecture as to total figures for the year.

[55] This has significance, since the Government's percentages based on yardage, do not differentiate between such things as top materials costing $2.60 to $2.75 a yard and bow linings costing 60¢. Top materials, of which du Pont sold the least, were "by far the most expensive" (R. 2895-6).

Du Pont's sales efforts included a personal approach to the Fisher brothers by Lammot du Pont, at the suggestion of Pierre S. du Pont; the employment as a fabric salesman of one Smith who apparently was favorably known to the Fisher management; and the offering of a substantial overall price reduction in the form of a super discount for a period of about five years during the 1920s.

"The first of these efforts appears to have resulted in no advantage to du Pont since its stock ownership in General Motors did not persuade Fisher to use Flint products. The other two efforts did, it seems clear, increase du Pont's sales of finishes and fabrics to Fisher Body but they do not establish the existence of any agreement or understanding that Fisher would favor du Pont, and they do not establish that du Pont's sales to Fisher resulted from its stockholdings in General Motors or its alleged control of General Motors. Moreover, the record indicates that even the discount did not secure for du Pont all of Fisher Body's business and indeed may not have increased the portion of Fisher's requirements purchased from du Pont though the total dollar purchases from du Pont by Fisher did increase. The record also shows 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."

(c) Reasons why du Pont's sales to General Motors were proportionately higher than to automotive industry as a whole.

The Government also argues, as it did with respect to finishes, that, because 80% or more of du Pont's sales to the auto industry were to General Motors, while General Motors manufactured only 35%-45% of the cars, the sales to General Motors could not have been on their merits but must have rested on the stock relationship (Govt. Br., pp. 140-141, 62-64).

The reason underlying du Pont's sales of fabrics to various companies in the automobile industry was explained in the record. Du Pont had been the "principal supplier" of Ford, but in the early twenty's Ford "decided to make the bulk of their own material" (R. 2292). As it did with finishes (see p. 58, *supra*) Chrysler desired "independent sources of supply different from those that were then selling to Ford and General Motors", as did some of the smaller concerns (R. 2292). Accordingly, it "established independent sources, different from those that were supplying big competitors" (R. 2292). As with paint, these decisions of Ford and Chrysler not to buy from du Pont were not attributable at all to du Pont's inability to compete on the merits.

Only about 12% to 15% of the passenger cars were manufactured by companies other than Ford, Chrysler and General Motors (R. 2172, 2291).[56] For 80% of du Pont's sales to the auto industry to be made to a company making 45% of the cars as in 1950 (the latest year for which a figure is given in the Government's brief (Govt. Br., p. 140n)), leaving 20% of such sales to be made to manufacturers of 12% to 15% of the cars, is not disproportionate at all. On the

[56] These estimates of the witnesses for the years preceding the trial were remarkably accurate. Moody's and Standard & Poor show that the independent auto manufacturers produced from 13 to 15.2% of the cars in 6 of the 7 years from 1946-1952. In 1948, the per cent was 19.

contrary, with the Ford and Chrysler markets not open to it, for the reasons stated, du Pont had just about the same degree of success selling General Motors as it had selling the remainder of the industry.[57]

The Government's case as to fabrics rests primarily on its recital of statistics (which we have shown to be highly inaccurate) as to du Pont's share of the General Motors business for the years 1921, 1926 and 1946-48. Irrespective of its errors in the figures, however, such percentages alone would not enable, much less require, a fact finder to conclude that, because du Pont was a substantial supplier, it must necessarily have obtained General Motors' business through influence. This does not follow. The continual struggle on the part of du Pont, sometimes successfully, sometimes not, sometimes partially, to secure General Motors' business by developing new or improved products, by offering better service and quality than its competitors, by making concessions in price even to the extent of selling below costs and by offering special discounts or rebates, is inconsistent with the thesis of illegal preference or a protected market maintained by domination and control. This is the picture revealed by the record as a whole, although not by the selected materials in the Government brief.

6. *The evidence on which the Government relies to show favoritism in General Motors' purchasing policies.*

The Government relies for its contrary conclusion as to General Motors' purchasing policy upon a few statements in reports and letters, between 1917 and the middle of the

[57] If 13%, the actual percentage for the smaller companies in 1950, is compared to 45% for General Motors, a proportional distribution of du Pont's sales would have been 78% to General Motors and 22% to the others. The difference between these percentages and the actual 80%-20% shown by the record for years from 1947 on (see Govt. br., pp. 64, 140) hardly justifies the Government's argument.

1920's. These exhibits must be appraised in the light of the evidence as a whole as to General Motors' purchases from du Pont.

(a) *The Raskob report of December 1917.*

The Government's principal reliance is upon a sentence in the 1917 report in which John J. Raskob, treasurer of du Pont, recommended that du Pont invest in General Motors (GX 124, R. 479, 3208). Almost all of that lengthy document was devoted to an explanation of why it would be a wise investment for du Pont to put $25,000,000 into General Motors. The history of General Motors, the value of its assets, and its probable income were analyzed. The report then summarized the points in favor of the investment. The fifth point stated (GX 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."

On its face, Raskob's statement was one of anticipation, or even assumption, that du Pont would get all of General Motors' business. The error of his view became manifest as time went by and experience showed that General Motors' business still had to be won on merit. Thus in the passage already quoted on page 66, in which R. R. M. Carpenter of du Pont stated in 1921 that "it would appear natural that we should secure a large amount of the business" of General Motors, he continued, "this is, however, not the case, as we are placed by them in severe competition" (GX 106, R. 476, 3076-7).

It is apparent that, whatever some du Pont officers may have expected, General Motors maintained purchasing policies and practices which resulted in du Pont being subjected to the same competitive requirements as other suppliers.

As has already been shown in the narration of the facts relating to finishes and fabrics (pp. 53, 66-67, *supra*), which General Motors had previously been purchasing in substantial quantities from du Pont or its affiliates, General Motors' purchases from du Pont actually declined in the years immediately following the stock acquisition.

Even after Pierre became president of General Motors, while he evinced a sympathetic interest in what General Motors was buying (GX 420-421, R. 528-9, 4010-13), he merely referred du Pont to the buyers for the General Motors divisions (GX 421, R. 529, 4012) and deferred to their judgment even when he disagreed (GX 408, 410, R. 527-8, 3983, 3984). There is no evidence that even during this early period any purchases were made because of du Pont influence or domination or that any of the General Motors divisions bought supplies from du Pont for other than ordinary commercial reasons.

In answer to the Government's argument "that du Pont's investment in General Motors was made with the purpose of using the alleged control of General Motors to require it to buy from du Pont" and that there was an agreement binding General Motors to buy from du Pont substantially all its requirements of products made by du Pont (R. 301), the trial court found, after considering the oral testimony and "other documents written at the time of or within a few years following the investment" (R. 301-2):

> "The Court finds 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. • • • No document, either contemporaneous with the making of the alleged agreement or subsequently executed, makes reference even indirectly to an agreement of the kind alleged by the Government. *The Court does not find*

in the actions over the years of du Pont's executives or salesmen or General Motors purchasing personnel corroboration of the existence of the alleged agreement. (Italics supplied.)

"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."

(b) *Haskell, 1918-20.*

The Government refers to several letters written in 1918 by or about J. A. Haskell, a retired du Pont vice president who had become a director of General Motors even before the du Pont Company's investment (R. 298; R. 690-92, 799), and who became vice president of General Motors and a member of the Executive Committee after the du Pont stock acquisition (R. 303; GX 1309, R. 657, 5237). Haskell died in 1923.

A number of letters written in 1918 and 1920 show that Haskell occasionally obtained information for and was willing to give advice to du Pont people in connection with their efforts to get General Motors' business (R. 349; GX 293, R. 502, 3786; GX 290, R. 501, 3782). On occasions he requested both General Motors and du Pont divisions to report to him as to what General Motors was buying from du Pont, and a number of such reports were furnished by the Fabrics department (R. 348-50; GX 294-301, 305-307, R. 502-4, 504-5, 3787-3802, 3810-14). There was no evidence that Haskell ever actually exerted any pressure on anyone in General Motors to give du Pont an order (R. 2303), and a witness in a position to know denied that

Haskell had given any assistance in the actual obtaining of orders (R. 2302-3).

The Government stresses an April 1918 letter by Haskell to Coyne, a du Pont vice president (GX 290, R. 501, 3782-3), which dealt with the problem raised by the possibility of a shortage of natural leather, then used for auto upholstery. The letter stated that the general manager of the Oakland Division of General Motors, Warner, had said that although

> "he believed artificial leather could be adopted which would give exactly as good results as the grade of split leather they are using at a higher price, but he felt that each manufacturer of motor cars would be disinclined—even if thoroughly satisfied regarding quality, etc.,—to change to artificial leather unless competitors in similar grades were to take the step at the same time, which of course might not be impossible of accomplishment." (GX 290, R. 501, 3782-3.)

Nevertheless, the letter declared, Warner (not Haskell)

> "felt that it would be desirable to get each of the divisions using artificial leather and other material such as Py-ra-lin, etc., samples of sufficient size to enable us to see exactly what was being used and to pave the way for perhaps a more general adoption of our material." (GX 290, R. 501, 3782.)

In this context, which the discussion of the exhibit in the Government's brief (Govt. Br., pp. 29-30, 117) omits, the following paragraph in Haskell's letter, part of which the Government quotes, plainly was a suggestion that du Pont try to put the makers of low priced cars generally, not just General Motors, "in the frame of mind necessary" to the adoption of artificial leather:

> "Would it not seem therefore the proper course of procedure would be to determine and place ourselves in position to furnish Fabrikoid of required quality

> and also consider how best to get cooperation whereby makers of such of the low priced cars as it would seem possible and wise to get transferred will be put in the frame of mind necessary for its adoption?'' (GX 290, R. 501, 3783).

The Government's reference to this passage as illustrating ''the kind of interference with competition which the Sherman Act was designed to eliminate'' (Govt. Br. p. 117) obviously misinterprets it, out of context, as an effort to exert special influence upon General Motors.

This letter read as a whole does not support the Government's contention but the contrary. Faced with the problem of resistance to the use of artificial leather because of the industry's satisfaction with natural leather, Haskell did not advise his former associate to resort to the use of influence. He *did not* say, as one would expect if the Government's theory were true, that he, Haskell, would ''suggest'' to the plant managers that they had better buy from du Pont. Instead, he told Coyne that du Pont would have to take steps to get artificial leather generally adopted by the automotive industry before it could hope to convince the General Motors people of its merits. Here is a contemporaneous letter showing an attitude inconsistent with the Government's theory of influence and consistent only with strictly arm's length competitive dealing.

The Government also quotes (Govt. Br. pp. 30-31) from a letter of Coyne's written in May 1918 (GX 293, R. 502, 3786), relating to Pyralin (celluloid), which stated that Haskell agreed that du Pont could not afford to jeopardize its business with other companies by giving General Motors preferential treatment, and that it was Haskell's opinion that ''continuation of our present policy should result in our securing practically all of the business of the General Motors Company'' (GX 293, R. 502, 3786). Inasmuch as the

record shows that five days later Buick gave substantial orders to a du Pont competitor (GX 294, R. 502, 3788) and reduced its orders for Pyralin in 1918 to $14, and that Chevrolet's orders declined from $83,000 in 1917 to $30,000 in 1918, to zero in 1919—a period in which du Pont's total sales of Pyralin were rapidly increasing (DPX 421, R. 2695, 6389)—it is obvious that this was just an expression of Haskell's opinion, and not a very accurate one at that, of what might happen in the future, and did not mean that he was influencing the General Motors divisions to buy from du Pont.

The Government also quotes from du Pont reports showing that it was selling General Motors 100% of its Pyralin by 1921 (GX 419, 420, R. 528, 4009-10). By that time, however, du Pont had developed an improved celluloid product for use in automobile windows which would not turn yellow or crack easily, with the result that it got substantially all of the business (R. 954-5).

The Government (Govt. Br. p. 31) also refers to a letter written in July 1918 from du Pont to Haskell (GX 302, R. 504, 3803) which begins:

> "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 these several users to agree upon a uniform shade of drab for the back, or lining?"

The record shows that this was written shortly after du Pont had developed a new superior top material (Pontop) which was in great demand by many automobile companies (R. 2189-90), that the du Pont plant was sold up to capacity (R. 2190-91), and that as a result of the shortage in dyes during World War I, it simplified production and dyeing problems to limit the number of shades (R. 2194-5). See DPX 261-2, R. 2222-3, 6172-4. In that setting, the letter

merely asked Haskell's help in dealing with a production problem, and did not indicate that any favoritism or influence was involved.

(c) *Pierre and Lammot du Pont, 1921-24.*

In August 1921, while Pierre du Pont was president of General Motors, he inquired of Lammot whether General Motors was taking its entire requirements from du Pont, and received a report from Lammot showing that, except for Fisher Body, du Pont was doing quite well (R. 351; GX 420, R. 528, 4010). He replied (R. 351; GX 421, R. 529, 4012) with an acknowledgment of this and a statement that (R. 4012):

> "With the change in management at Cadillac, Oakland and Olds, I believe that you should be able to sell substantially all of the paint, varnish and fabrikoid products needed; especially is this true of Cadillac.
>
> "A drive should be made for the Fisher Body business. Is there any reason why they have not dealt with us?"

But this again was an expression of interest and general advice which did not affect the decisions of General Motors. Government counsel admitted at the trial that the three managers were replaced for reasons having nothing to do with their attitude towards du Pont (Trial Transcript, pp. 8238-9), and the record is clear that their successors were chosen by Sloan and had no previous connections with du Pont (R. 860-1; see p. 15, *supra*). Pierre testified that after obtaining the information from Lammot, he took no steps to try to influence General Motors to buy more. "That wasn't my province at all", he asserted. "That was with the purchasing people. I had nothing to do with that" (R. 859). That he regarded the divisions as autonomous in the field of purchasing is shown by his statement that it was "entirely up to" Knudsen (then of Chevrolet) to decide

whether to adopt a two-source policy, though Pierre did not believe in it (R. 854). "That was his province to decide. And he went ahead on his own ideas and started to have two sources of supply * * * " (R. 855; GX 408, 410, R. 527, 528, 3983-84). That Pierre would not meddle with the actual purchasing was recognized by the du Pont Company, as appears from the letter written to him by R. R. M. Carpenter two months later, quoted at p. 67, fn. 45, *supra*.

It is also significant that there is no showing that the purchasing patterns of Cadillac, Oakland, Olds or Fisher Body changed after or as a result of this letter. Du Pont did not get any substantial quantities of Fisher's business until 1925, and then it did so for reasons having nothing to do with du Pont influence, as has been shown. (See pp. 70-71, *supra*). Under the new "management", Cadillac and Olds had within a few years stopped buying finishes from du Pont (see p. 56, *supra*).

The Government also (Govt. Br., pp. 38, 118) refers to correspondence in 1923 in which Lammot urged the new manager of Cadillac to use Flint paint products 100% because "it is to the advantage of both General Motors Corporation and the du Pont Company" (GX 447, R. 535, 4073). But as with du Pont's efforts to get an over-all contract for fabrics this was unsuccessful both at the time and in the following years. Cadillac was the last division to adopt Duco, and it abandoned du Pont as a paint supplier as soon as an adequate competitive product was on the market. (See p. 56, *supra*). Equally unsuccessful was a series of letters addressed by Lammot to Fisher Body (see Govt. Br., pp. 65-7, 120-121) in which he invoked the "stock ownership relations" between the various companies as a reason why Fisher should buy its paint from Flint.

In short, there was no showing that any of these wishful expressions in any way restricted General Motors' freedom in purchasing, that there was any change in General Motors' purchasing policies, or that General Motors bought more from du Pont afterwards than before. Furthermore, these few statements must be read in the light of the uniform testimony of the persons doing the buying and selling during this period—Lynah, L. Fisher, Weckler, Williams, Nickowitz, Brown, MacShane—together with many supporting exhibits which prove that General Motors' buying was not affected by any influence, pressure or agreement.

The significant thing in this case is not the variety of appeals attempted by various du Pont men in their efforts to sell General Motors, but instead the facts that (1) in no case was any degree of coercion attempted to reinforce such appeals and (2) no appeal made to General Motors proved successful which was not based entirely on the merit of du Pont's product.

(d) *Pratt*

The Government refers to John L. Pratt, vice president of General Motors in charge of the Accessory Division, whom Durant had brought in from du Pont in 1919 (R. 354), as the "contact man" between General Motors and du Pont after 1922. Pratt, as we have seen, strongly opposed favoring du Pont on the question of reciprocity in a 1928 letter (quoted at pp. 20-21, *supra*) which set forth his attitude toward du Pont generally. He was equally vigorous in challenging the wisdom of giving information to Lammot, the president of du Pont (GX 368, R. 521; 3908). He "told off" Lammot a number of times when the latter was trying to get favors from General Motors (R. 359-60; R. 1460-1471; GX 471, R. 539, 4125; GMX 218, R. 1461, 7271; GMX 221, R. 1464, 7274; GMX 225, R. 1465, 7281; GMX 228, R. 1469, 7286). Thus, he rejected Lammot's effort to keep General Motors out

of the oil burner business (R. 1470, GMX 228, R. 1469, 7286). When Lammot asked him to give some orders to the son of "a good friend of ours", the Governor of Pennsylvania (GMX 224, R. 1465, 7279), Pratt replied (R. 359; R. 1467; GMX 225, R. 1465, 7281):

> "Mr. Sproul's approach of trying to bring influence to bear in order to get business from General Motors Corporation will not work. If this Company can satisfy our Divisions that they have a product competitive from the standpoint of quality, price and service, I know our Divisions well enough that if the General Refractories Company's representatives go after the business they will have an opportunity to quote, and while I do not claim that our Purchasing Departments are 100% pure, I do believe we have a spirit in our Purchasing Departments of always attempting to get the best as they see it for General Motors Corporation. For this reason we have always hesitated to suggest any firm for special consideration.
>
> "We believe it is the duty of the supplier to establish the merits of his product to our Corporation, and not our duty to ask our Purchasing Departments to give special consideration to any firm." (R. 7281).

Pratt constantly resisted any step that he thought might be making policy in favor of du Pont. In explaining the reason for the apparent inconsistency between his unvarying refusal to do what du Pont's highest executives requested and his willingness to give assistance to some of the "small men" he knew in the du Pont Company, Pratt said (R. 1432-3):

> "* * * I might explain why I seemingly have a different attitude with Mr. du Pont than I did with some of the small men in the du Pont organization that wrote to me about reciprocity.
>
> "That was because I felt that when we dealt with Mr. du Pont, we were establishing policy. I felt when

I dealt with Mr. Jones, whom I had known as a boy in the du Pont Company, to help him, I was dealing with an individual and not the du Pont Company.

"That was the fundamental difference that I always kept in mind in writing to the officials of the du Pont Company."

(R. 1475):

"Well, my attitude was based on who made the request, that is, what his position was in the du Pont Company.

"In the case of these exhibits, it was from the president of the company, and any action that we took would be one of establishing policy that he could pass on to his organization.

"I thought that policy should be the same with the du Pont Company as for every other supplier of General Motors. There were cases where men down the line, a great many of them old time friends of mine, who came and asked for favors, wanting this information or that information. In that case, if it was something that I could give them, without, in my judgment, doing injury to the General Motors Corporation, I usually gave it to them.

* * *

"* * * But I did try at all times to differentiate between doing a favor for a friend and doing something that would set policies for the corporation."[58]

The Government (Govt. Br. pp. 39-40) refers to a letter Pratt wrote in 1926 to the Delco Light Division in which he expressed the view that du Pont's great assistance to General Motors in its period of difficulty in 1920 warranted giving du Pont a large proportion of General Motors' business where conditions were "equal from the standpoint of quality, service and price" (R. 358; GX 340, R. 512, 3865

[58] Pratt did similar favors for friends in other companies R. 1456-8; GMX 213-16, R. 1457, 7266-9.

(1926)). But in the same letter, as well as in his testimony (R. 358; R. 1442), Pratt made it clear that he was expressing his "own personal feeling", and not "a General Motors policy". The letter concludes:

> "I have expressed my own personal sentiments in this letter to you in order that you might have my point of view, but I do not wish to influence your organization in any way that would be against your own good judgment, keeping in mind that above all the prime consideration is to do the best thing for Delco-Light Company, and that considerations in regard to the du Pont Company or other concerns are secondary, and I am sure this is your feeling" (R. 3866).

That these were only Pratt's personal feelings, that his subordinates understood them to be such, and that the letter did not evidence a policy of favoring du Pont is borne out by what happened in connection with this incident.[59]

Delco had been purchasing rubbing and finishing varnish from a local manufacturer, Lowe Brothers, not from du Pont. When Lowe could not modify its product to fit a new painting process du Pont was called in at the suggestion of the Chevrolet people, for whom du Pont had done similar work (R. 1439-40). Du Pont produced a satisfactory sample and received an order for one carload. Delco later wired du Pont to hold up delivery in order to give Lowe another opportunity (GMX 204, R. 1440, 7252-3).

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[59] The only known result of Pratt's personal feeling of gratitude to du Pont, which resulted in business for du Pont, was a purchase by the Hyatt Bearing Division of $1,500 of maintenance "undercoat" paint in 1922 (R. 354; GX 311-13, R. 506, 3821-23; GMX 202-03, R. 1436, 7250-1). That this established no precedent for General Motors purchases even of this type of paint is shown by the fact that thereafter, whenever the General Purchasing Committee contracted for General Motors requirements of maintenance paint (white lead), it turned to a competitor of du Pont, the National Lead Company. (See GMX 155, R. 1100, 7043-76.) It should be noted that most of these contracts were made during the period in which Pratt was chairman of the General Purchasing Committee.

It was at this point that Elms, in the du Pont paint department, an old friend, felt justified in complaining to Pratt. Pratt got in touch with the manager of Delco, who explained the situation but said he found his people felt they might "be in better hands possibly by dealing with du Pont than with Lowe Brothers" (GX 339, R. 511; 3864). Pratt then wrote the letter cited by the Government. The Delco manager wrote Pratt thanking him for the "information about the du Pont past history" and advising that he had learned the du Pont paint was lower priced (GMX 205, R. 1440, 7255). Delco accepted the carload in question from du Pont—but that was all. Despite du Pont's help and its lower price and its continued further efforts to get the business, Delco purchased its rubbing and finishing varnish thereafter from another local source, Kay & Ess Company, and du Pont never got another order (R. 358; R. 2402-3).

The Delco incident, looked at as a whole, demonstrates forcibly that there was no influence to favor du Pont. In the first place, it shows Delco, nine years after the du Pont investment, buying almost entirely from local sources rather than from du Pont. Then Delco dealt unfairly with du Pont which had offered not only lower prices but a satisfactory product which its competitor could not deliver. In that situation, Pratt did not talk about a policy to favor du Pont but instead expressed his personal feelings. And, finally, whether Pratt's letter is evidence of any policy to favor du Pont need not be left to inference; his letter was not so regarded by the Delco people themselves, for they bought thereafter from another local source, not from du Pont. Thus, Pratt's Delco letter, as is the case with so many of the documents in this record, emphasizes the unsoundness of relying on what seem plausible inferences from the Government's selected quotations, when the quotations taken together with all the other facts in the picture make such inferences untenable.

The trial court found, in passages already quoted (pp. 39, 43, 51, 62-3, 64-5, 73-4, 78-9) that there was no understanding or agreement or policy favoring du Pont which induced General Motors to buy any part of its supplies from du Pont. The Government's argument to the contrary rests on inferences which it tries to draw from the documentary exhibits which have been discussed. It is to be noted that none of the documents upon which the Government relies specifically mentioned any agreement, understanding or restrictive policy of favoritism. Indeed, the documents, read in the context of the situation to which they were addressed, are entirely consistent with the interpretation, supported by the oral testimony, and accepted by the trial court, that du Pont was trying to get as much General Motors business as it could, but that there was no restriction whatsoever on General Motors' freedom to buy as it chose, and that General Motors' buyers did not regard themselves as in any way limited. Which inferences are the most reasonable must be determined in the light of the whole picture of the events of over thirty years, not by documents read in isolation. A trier of facts could reasonably conclude that the documents should be construed compatibly with the sweep of events over that period, which demonstrates that General Motors was completely independent and that its buying divisions treated du Pont as impartially as any other supplier. Such a conclusion is obviously not "clearly erroneous." On the contrary, it is most sensible.

D. Antifreeze, Tetraethyl Lead and Freon 12.

A considerable portion of the Government's brief (Govt. Br., pp. 40-59, 129-136) is concerned not with General Motors' purchases from du Pont, but with other activities, all now terminated, having to do with antifreeze, tetraethyl lead and Freon 12, in which it claims that General Motors did not deal with du Pont at arm's length. The

Government has heretofore contended that the facts as to two of these commodities, tetraethyl lead and Freon, proved an unlawful division of fields whereby General Motors had agreed not to compete with du Pont in the production of chemicals. The Government seems to have abandoned this argument, not expressly, but by silence, although one quotation (Govt. Br., pp. 137-38) and one footnote (p. 146) hint at it. But "The gist of the Government's case", says the first sentence of the Government's Summary of Argument (Govt. Br., p. 70) "is that du Pont acquired control of General Motors with the specific purpose and effect of obtaining an illegal preference with respect to General Motors' *purchases of materials.*" (Italics supplied.)

The Government does not assert that the defendants' allegedly unlawful conduct with respect to anti-freeze, tetraethyl lead and Freon consisted of an illegal preference for du Pont in the purchase of materials. Its argument seems to be that General Motors gave du Pont preference of other kinds, and that this proved that it must be doing the same thing in its purchases of materials. Both the premise and the conclusion are directly contrary to the findings of the trial court.[60]

We shall set forth the facts and findings as to each of these subjects. They will show that, whichever of the Government's theories is applied, the transactions were entirely lawful and do not prove a combination, conspiracy, agreement, understanding, division of fields, policy induced by inside du Pont influence, or course of preferential treatment.

1. *Antifreeze.*

Government counsel have devoted eight and one-half pages of their brief (Govt. Br., pp. 40-47, 129-130) to the alcohol-glycerin controversy of 1926, an incident that has

[60] Many of the findings are addressed to the Government's prior contention that there was an agreement to divide fields.

long since disappeared into the shades of history. Furthermore, they depict this episode as essentially involving only du Pont and its efforts to push the sale of alcohol as an antifreeze, whereas in fact it involved a struggle between the suppliers of competing antifreezes, alcohol and glycerin, each seeking to insure that his respective product was fairly described to the consuming public in the instruction books issued to automobile owners by the manufacturers.

The evidence relating to this issue is all found in Government Exhibits 319-337, R. 507-511, 3832-3862. Since the Government has carefully omitted from the excerpts referred to in its brief those portions of the exhibits which refute the inferences it wishes the Court to draw, it is necessary for us to describe the matter fully in order to establish its irrelevance.

In November 1925 a du Pont executive wrote Sloan to advise him that du Pont had joined with the Kentucky Alcohol Corporation to form a new company to produce alcohol, and to inquire "whether the General Motors Corporation is giving their official approval to publicity favoring glycerin rather than alcohol. If so, it is suggested that their attention be called to the advantages of alcohol and to the interest which the du Pont Company will have in the future in its manufacture and sale" GX 319, R. 507, 3832). Sloan replied (GX 320, R. 507, 3833-34):

> "As a corporation, we do not usually take any position in matters of this kind; i.e., as a corporation we are concerned of course, with seeing that our cars give satisfaction and I think our position would be in this particular thing that although we would like to be helpful, yet we could not consistently refuse to say that glycerin was satisfactory if it was simply because friends of ours, like your good selves, were interested in the alcohol side of the argument. *We must, of*

> *course, be guided by the facts in the case.* Therefore, I do not see how we really could, unless we did something unusual, be very helpful in this particular situation." (Italics supplied.)

His letter then went on to state that he was informed that alcohol (if spilled) was bad for the Duco finish, but that if General Motors were given "any technical information which would be helpful in developing any facts which would enable us to deal with the matter on its merits in favor of alcohol, then of course that would be an entirely different matter" (*ibid.*).

In a subsequent letter in January 1926 Pratt advised the du Pont Director of Purchases (GX 321, R. 508, 3835):

> "I believe our people have concluded that the mixture called 'Prestone'—made by the Union Carbide Company—is the most satisfactory anti-freeze mixture on the market. I know that our Research Corporation recently made a study of anti-freeze mixtures and as a result of this study we are recommending the use of 'Prestone'. I am also advised that the Yellow Cab operating companies are using this mixture."

In the same month Pratt asked the General Motors Research Laboratories for their views as to the "relative merits" of the various antifreezes (GX 322, R. 508, 3836), and received a reply that glycerin had many advantages (GX 323, R. 508, 3837).

In March 1926, Phelps of the du Pont Development Department wrote Pratt that du Pont was producing alcohol, and was considering producing ethylene glycol (of which Prestone was made), and asking for any information General Motors might have as to the experience of automobile owners during the past winter (GX 324, R. 508, 3838-39). Pratt replied that the glycerin products were superior, but that alcohol was cheaper (GX 325, R. 508, 3840-41).

In August 1926 Sloan wrote the Chief Engineer of the Chevrolet Company as follows (GX 326, R. 509, 3842-43):

> "Regarding your instruction book, frankly, I would suggest that when opportunity presents itself, you cut out the words 'are to be preferred' in the second paragraph under "Winter Driving" and simply state the facts. 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. It is all very well, I believe, to state that alcohol evaporates and glycerine doesn't; that alcohol is likely to cause damage and glycerine is not; that alcohol is much cheaper and glycerine is much more expensive. Let us submit all that to our users, but let them judge which is most preferable after listening to the facts. Don't you think that is the best way to do it?"

This advice that the manual "simply state the facts" and point out that alcohol would evaporate and might damage the paint but that glycerin was more expensive, which Chevrolet heeded (GX 327, R. 509, 3844), does not appear in any way to have been attributable to the correspondence with du Pont some months before. The position not to state a preference was a perfectly reasonable one for an automobile manufacturer to take.

On October 14, 1926, Phelps wrote Pratt to advise him that "the du Pont Company is now engaged in the manufacture of ethyl alcohol for industrial purposes", and asking if they can "have the opportunity to quote your company, or any of its subsidiaries, at any future time when they are in the market to purchase alcohol" (GX 328, R. 509, 3845). Pratt advised Phelps to take the matter up with Lynah of the General Purchasing Division (GX 329, R. 509, 3846) who, in turn, advised Phelps "that if they have any price consideration to offer on a volume purchase I will

ascertain from our divisions what their requirements will be'' (GX 331, R. 510, 3850). This, of course, did not indicate that du Pont was being given any preferential treatment, but implied only that they might get some business if they offered better prices than anybody else.

Phelps again wrote Pratt on October 21, 1926, attaching a memorandum reciting troubles with engines and radiators experienced by the Yellow Cab Company of Chicago and attributed to their use of glycerin and ethylene glycol as an antifreeze the previous winter (GX 330, R. 510, 3848). Phelps asked Pratt if the General Motors Laboratories could find out ''whether these statements are true and whether this report can be verified by you'' (GX 330, R. 510, 3847).

This was apparently referred to Lynah, who thereafter received a report from the Research Section, which both indicated that ''some of the statements made'' in the memorandum attached to Phelps' letter had been in error, and recommended ''Alcohol-Water solutions for any class of service'' (GX 331, R. 510, 3850).

In November, Phelps wrote Pratt two additional letters. The first contained the paragraph, quoted by the Government (Govt. Br., p. 45), calling General Motors' attention to the fact that Proctor and Gamble has been using in its advertising letters from General Motors divisions recommending the use of glycerin. The Government does not mention the next two paragraphs, in which Phelps referred to the ''serious damage'' to motors which the experience of many car owners during the previous winter had shown to have resulted from the use of glycerin (GX 332, R. 510, 3851).

In an attached memorandum (GX 333, R. 510, 3853), Phelps began:

"Probably the most serious objection to the use of glycerine is that it deteriorates and softens the rubber hose connection and gaskets which frequently cause leaks that result in serious damage to the motor. All instructions for the use of glycerin lay special stress upon the importance of having an absolutely tight system,[61] and while there are some automobile owners who will take precautions to tighten up the connections, it is generally found that the owner will do nothing so long as there is no evidence of a serious leak. * * *

"A leaky water system containing glycerin will ruin the motor when it gets into the cylinders."

Although Government counsel quote from this memorandum the paragraph containing Phelps' opinion that "* * * all automobile manufacturers * * * will find it decidedly to their interests to advocate that alcohol be used for anti-freeze and make no mention of glycerine * * *" (Govt. Br., p. 45), they fail to point out that the quoted statement immediately follows an extensive discussion by Phelps on the "disadvantages of glycerin for antifreeze" which he summed up as follows (GX 333, R. 510, 3853):

"Indiscriminate use of glycerin without service attention has and will result in trouble and damages for the car owner while alcohol is practically fool proof, and has been successfully used in radiators over a long period of time."

Phelps' next letter (GX 334, R. 510, 3859) read as follows:

"With further reference to my letter of November 17th regarding the use of glycerin instead of alcohol for anti-freeze.

"The Industrial Alcohol Manufacturers Association

[61] The existence of these dangers was confirmed by the instructions put out by the glycerin manufacturers, which stated (R. 3856):

"Above all, be sure the cooling system is tight. Remember glycerin takes advantage of minor leaks."

has just completed a survey of forty-four automobile manufacturers whose recommendations are as follows:

"29	manufacturers	only alcohol
5	"	only glycerin
10	"	varying mixtures of alcohol and glycerin

"The Cadillac Shop Manual '314' page 50, item 375, states that a solution of glycerin and water is recommended. It is evident that the Cadillac Company is one of the few to advocate the use of glycerin and it will be of much interest to us to learn whether the Cadillac Motor Company is still of the opinion that glycerin is best after having some experience with the difficulties resulting from the use of this material for anti-freeze."

The Government, by quoting only the last paragraph and omitting not only the material already referred to relating to the damage to motors attributed to glycerin but also the report showing that the vast majority of automobile manufacturers did not recommend glycerin, gives the impression that du Pont was taking advantage of its ownership of stock in requesting General Motors to adopt the unusual course of favoring alcohol rather than glycerin. But there is nothing sinister or improper antitrustwise in du Pont's trying to convince General Motors that on the merits glycerin was more harmful to automobile engines than alcohol was to automobile paint, and that therefore glycerin should not be recommended. That was all that Phelps was doing.

By December Cadillac as well as Buick had altered their manuals to recommend alcohol, and Phelps wrote to urge that the other General Motors cars "should profit by the experience of the Cadillac and Buick companies" and change their instruction books (GX 335, R. 510, 3860).

All the papers were then turned over to Sloan, and a policy was

> "decided upon by the General Technical Committee and approved by the chief engineers of all the car divisions, which was as follows:
>
> "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.
>
> "We try to deal with the matter fairly and state the facts, feeling that our customers are entitled to know same and hoping that they would use alcohol, which we would much prefer they would use. In view of the fact, however, that some people prefer glycerin—Mr. Kettering would use nothing else—it did not seem to us that the conditions warranted discrediting same. We must bear in mind that glycerin interests are large and varied. They are all potential users of General Motors product and we do not want to discredit them beyond the necessities of the case, providing we can, in so doing, protect our customers interests.
>
> "I believe I told you further that *the Glycerin Manufacturers' Association was in touch with our findings and had no fault to find with the facts as we had established them.*" (GX 336, R. 511; 3861-3861A). (Italics supplied.)

The Government does not mention this report of Sloan, which indicated (1) that both materials had disadvantages, alcohol in relation to the paint if it spilled and glycerin in relation to the engine if it leaked; (2) that within General Motors opinion was divided, Sloan preferring alcohol whereas Kettering, the Research head, would use only glycerin; (3) that General Motors did not wish to antagonize the glycerin interests; and (4) that the Glycerin Manufacturers Association could find "no fault" with the facts as established by General Motors.

Although the Government does not refer to this exhibit, it does quote a Sloan memorandum to Pratt written later in December 1926, which read as follows (GX 337, R. 511, 3862):

> "I was looking over my file and noted the correspondence you have had with the du Pont Company on the matter of alcohol and glycerine for anti-freeze.
>
> "I believe you know that at the last meeting of the General Technical Committee a decision was reached to the effect that we could put in all our instruction books, in such a way as each Engineering Department thought best, *a statement setting forth the advantages and disadvantages of both materials,* particularly pointing out that under certain conditions glycerine was unsatisfactory but that if those conditions were not present and it was used strictly in accordance with the manufacturer's recommendation, there was no objection to its use." (Italics supplied.)

In the context of what preceded, this statement was entirely reasonable and squared exactly with Mr. Sloan's statement to du Pont more than a year before that "We must, of course, be guided by the facts in the case" (GX 320, R. 507, 3833).

The Government, by the use of partial quotations and its complete failure to mention the exhibits or portion of

exhibits describing the damage to motors that could result from the use of glycerin, seeks to give the erroneous impression that "General Motors reversed its position" so that its instruction books were "deliberately slanted * * * in favor of alcohol" (Govt. Br., pp. 44-45, 47) merely because du Pont had told General Motors that it was manufacturing an alcohol anti-freeze. But the record shows that the changes were not made because of any desire to favor du Pont. When du Pont initially suggested that General Motors not approve publicity favoring glycerin rather alcohol, General Motors refused to acquiesce, saying that it would have to be guided by the facts. When, after a year of experience, General Motors learned, and verified through its own technical staff, that glycerin as well as alcohol had demerits as well as merits it withdrew its statement of preference and took a neutral position, stating the facts relating to both products, without conclusion or recommendation.

This episode was concluded in 1926, and the Government brief before this Court makes no further mention of antifreeze. However, the subsequent history of that product shows that du Pont was not receiving preferential treatment from General Motors. In 1926, 1927, 1928 and 1931, du Pont unsuccessfully sought to get the General Purchasing Committee of General Motors to buy alcohol antifreeze from it (GX 331, R. 510, 3850; GMX 155, R. 1100, 7087, 7089, 7098).

In 1930 du Pont began to market a new kind of antifreeze, made from methyl alcohol, known as methanol (R. 2967-8). Although large quantities were sold, none was purchased by General Motors until 1936 (DPX 556, R. 2969, 6472). General Motors first began to purchase antifreeze for resale to the public through dealers in 1933 (R. 435-6; R. 2945-

46).[62] For the first three years it bought from the Glycerin Producers Association (R. 435; R. 2946-47), although du Pont tried to get the business (R. 2973).[63] When this source became unavailable because of a glycerine shortage, General Motors sought to buy from Union Carbide, the manufacturer of "Prestone" (R. 435; R. 2946-47). Because General Motors wanted the product to be furnished under its own brand name, Union Carbide did not accept the business (R. 435; R. 2947, 2995-96).

General Motors then canvassed "every source we knew" for the best terms it could get (R. 2947). Du Pont finally, and reluctantly, acquiesced in General Motors' demand for its own brand name (R. 436; R. 2994-95). Thereafter, until the war, General Motors solicited bids each year, trying to get Union Carbide interested, and exploring other sources, but continued to buy from du Pont (Zerone as a non-permanent antifreeze and, after 1939, Zerex as a permanent antifreeze (R. 436; R. 2976-77)) "because we felt very definitely that they gave us the best product at the best price" (R. 436; R. 2948-49). Prestone and Zerex were the only permanent antifreezes, which most dealers' customers wanted (R. 2977, 2954), until after the war (R. 2992).

During and for some years after the war there was an acute and continuing shortage (R. 437; R. 2949-50, 2996, 2962); du Pont gave General Motors an allotment based upon its purchases before the war (R. 2949-50). This was not enough and General Motors, like everyone else, tried to obtain additional supplies from other sources, but unsuccessfully (R. 2950). The result was that in 1946 and

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[62] A very small amount of antifreeze is also used by General Motors to protect cars sold to dealers in winter (R. 2951).

[63] By this time it was generally known that the difficulties with glycerin could be overcome if adequate care was taken with the cooling system, and there was a large public demand for glycerin products as a permanent antifreeze.

1947 du Pont secured over 97% of General Motors' antifreeze business (GX 1390, R. 2932, 5425). In 1951 du Pont advised General Motors that it was no longer willing to furnish antifreeze under General Motors' brand name (R. 437; R. 2983-4). As a result, in 1953, when additional supplies became available, Chevrolet, Buick and Pontiac switched to another supplier, and du Pont sold only to Oldsmobile (R. 437; R. 2983-4, 2950, 2991-2). The General Motors official in charge of the purchases testified that he had never heard that he was supposed to favor du Pont as the supplier, that he was not motivated when he bought from du Pont by the fact that it owned stock in General Motors, and that there were "absolutely" no strings attached to his purchases of antifreeze (R. 2952).

The trial court found, on the basis of the above facts, that (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. The proof offered by the defense, however, establishes that General Motors determined initially to make such purchases because du Pont was the only available supplier that could meet General Motors' demands as to price, quality and delivery. The defendants' proof further shows that General Motors re-examined the supply situation each year and sought regularly to obtain new sources of supply. 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 that du Pont best served its needs."

2. *Tetraethyl Lead.*

The Government now argues that the evidence as to the development, production and sale of tetraethyl lead proves not an agreement as to the division of fields, which the

Government alleged and sought to establish below, but a general absence of arm's length dealing between General Motors and du Pont. The findings and the evidence supporting them negate the Government's present claim as well as its prior contention.

In order that the Court may understand the present significance of the subject, it is advisable to begin the story at the end. Since 1948, when the patents expired, tetraethyl lead has been produced and sold by two companies, the Ethyl Corporation, owned jointly by General Motors and Standard Oil of New Jersey, and du Pont. Ethyl is the larger of the two. They are in active and intense competition throughout the nation (R. 425; R. 1639, 1865-71, 1879-1902). This has been the culmination of what the Government regards as General Motors' efforts to see that du Pont was the sole supplier of tetraethyl lead.

(a) *The development of tetraethyl lead.*

Charles F. Kettering was general manager of the Delco Company, a division of United Motors which merged with General Motors in 1918 (R. 405; R. 1529). Kettering also had a separate research laboratory which was not taken over by General Motors until December 1919 (R. 1528-29; GMX 244, R. 1528, 7322). For years before he joined General Motors, where he became Director of Research (R. 1508), Kettering was searching for an anti-knock material for motor fuel (R. 405-6; R. 1514, 1235-6, 881). In 1916 he wrote to an interested du Pont chemist (R. 406; R. 1514; DPX 93, R. 881, 5859):

> "I will be very glad to keep you in touch with this thing, and *any time that we get anything of interest we will be glad to give you the benefit of it.* We are doing this more from the standpoint of acquainting ourselves with the problem, rather than with the idea of commercializing either the apparatus or the fuel." (Italics supplied)

Thus, at that time, several years before either Kettering or du Pont had any connection with General Motors, he was seeking not only du Pont cooperation but also du Pont development of any chemical which was discovered.[64]

Kettering continued his contacts with du Pont during and after the war (R. 406; R. 1524-26). He invited them to visit his laboratory to see what he was doing in developing additives for the suppression of knock (R. 1526), and turned to du Pont as a source for compounds to be tested as anti-knocks (GMX 243, R. 1525, 7317). All this was before Kettering and his laboratory had become a part of General Motors (R. 1527).

Subsequent to joining General Motors, Kettering continued to call on du Pont scientists for assistance (R. 1533-35; DPX 94, R. 883, 5860; GMX 245, R. 1533, 7327). In 1920 he had du Pont determine some explosive pressures for him (R. 1535). Thus, Kettering's looking to du Pont as a source for tetraethyl lead after its discovery was a natural continuation of his earlier association with them as experts in detonation and as suppliers of unusual chemicals for use as anti-knock compounds.[65]

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[64] The Government would be sure that the above quoted passage proved "inside influence" resulting from du Pont's ownership of General Motors stock if it had been written *after* Kettering joined General Motors and *after* du Pont had made its investment. The fact that it was written before there could have been any such influence on Kettering demonstrates the danger of relying on statements of this type as proof of some "illegal preference" when in reality they show only that du Pont was highly regarded on merit alone.

[65] In the light of this background, the letters quoted by the Government (Govt. Br. pp. 48-49; GX 599, R. 612, 4296; GX 601, R. 612, 4298) cannot be attributed to du Pont's stock interest. The first, written in 1919, was an effort by General Motors to get du Pont's Research Department to bear the expense of developing the yet undiscovered chemical on the ground that the marketing of it "will be a matter of interest to du Pont", while General Motors went ahead with other phases of the research. This invitation du Pont declined (GX 558, R. 608, 4252). The second, written by Midgley in 1920 when it was thought that aniline might solve the problem, confirmed the cooperative plan for General Motors to produce a mechanical injector and du Pont the chemical product. Since all of this resulted from the cooperative effort begun by Kettering because of his prior contacts with du Pont and his belief in their capacity as chemists, it does not support the Government's theory.

After experiments in other directions had not proved too successful (R. 406-7; R. 1519-28; GMX 243, 245, R. 1525, 1533, 7317-21, 7325-27), Midgley, a General Motors researcher, discovered in 1921 that tetraethyl lead might be the answer to the anti-knock problem (R. 409; R. 1542, 1237).

Just as Kettering had been before, General Motors was interested in this project primarily "because it would contribute enormously to the efficiency of the automobile from the standpoint of the design of the engine; from the standpoint of fuel consumption by the car" (R. 1236), not in finding a new product to sell (R. 1236-38, 1249). General Motors "had no competence whatsoever in chemical manufacture"; it was a manufacturer of machinery (R. 411; R. 1248-9, 1353-4).[66] The General Motors staff was also aware that lead compounds were deadly poisonous (R. 411; R. 1555, 1545; GMX 242-54, R. 1522, 1525, 1528, 1533, 1536, 1546, 1550-1, 1554-7, 7340-44). The process of manufacturing even a small quantity had resulted in one explosion (R. 1547-48). "Du Pont had demonstrated through its war work 'its ability to deal with the problems involving dangerous materials, such as dynamite' " (R. 411; R. 1249).

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[66] Kettering 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."

Sloan testified (R. 1353-54):

"If it came to a decision between our making the chemical development and someone else making it, I will always rule against our making it because I don't think we have the competence.

"I called attention in direct examination to the fact that we must not confuse what we did in research with the ability to manufacture from a production point of view. As a matter of fact, all these things that have come up here for discussion in the chemical line were the productivity of one research man in General Motors Research. Outside of that, I don't know anybody in General Motors, unless it was Mr. Kettering, that had any chemical background whatsoever, either in research or in manufacture."

For examples of General Motors' self-limitation with regard to other activities outside its field of competency. See p. 187, fn. 102, *infra*.

Consequently Kettering decided to ask the du Pont Company to undertake the manufacture of tetraethyl lead, as the trial court found (R. 411; R. 864, 1548). He and Midgley were "the fellows who first approached them on it" (R. 1550). He testified that he went to du Pont "because we had worked with them a little bit and they were the best chemists that we knew of in the country. We knew the men from chemical associations, and so forth" (R. 1534). He stated that he had not been actuated at all "by the fact that du Pont Company was a stockholder of General Motors" and had given no "thought to that" (*ibid.*). (He later had given no thought to this factor when he turned to the Dow Chemical Co. for bromine because he thought Dow was the best source for this chemical (R. 1572, 1710-11).) That Kettering, who was himself a well-known inventor by that time (R. 1509-12), was not subservient to or over-awed by du Pont was demonstrated by the fact that it was during this period that he steadfastly rejected Lammot du Pont's persistent attempts to get General Motors to enter into a general research contract with du Pont (R. 407-11; R. 1536-38; see p. 16, *supra*).

There were preliminary discussions in the course of which Irenee urged the du Pont scientists to "sell our ability to help them on the Tetra-ethyl Lead proposition" (R. 411; R. 889; GX 613, R. 613, 4307). This would have been unnecessary if du Pont had known that there was a general understanding that General Motors would leave all its chemical work to du Pont, or that it was all cut and dried that du Pont would get the business. Kettering thereupon invited du Pont representatives to visit the General Motors laboratory (R. 1739-40). Harrington of du Pont testified: "They actually gave us one demonstration in the laboratory of how they had tried to make tetraethyl lead. That particular process got entirely out of hand and

spewed all over every place, and we had to get out" (R. 1740). The process General Motors had developed was "not by a long shot" a commercial manufacturing process (R. 1740). After a "tremendous amount of difficulty" (R. 1742), du Pont made substantial changes in the manufacturing process and managed to produce tetraethyl lead by a method which had commercial potentialities (R. 1741-43).

In view of the satisfactory progress, General Motors decided to leave the production and research on production of tetraethyl lead to du Pont (and also to M.I.T.) (R. 411-12; R. 1552; GX 615, R. 613, 4308) and to concentrate its research on "spark-plug and exhaust-valve troubles that have been experienced in the use of lead compounds as anti-knock materials" (GX 615, R. 613, 4309). There was as yet no contract between the two companies, as to price or anything else (R. 412; R. 1553, 1742). An agreement was signed on October 6, 1922 (R. 412; GX 618, R. 613, 4312) whereby du Pont was to produce 1,300 pounds of lead per day, at a price of two dollars per pound, not later than four months after General Motors notified it to commence production, and larger quantities as required. The contract was a continuing one, with provisions for cancellation, and authorized General Motors to obtain lead from other sources if du Pont could not furnish the quantities desired, or if du Pont's prices should not be the lowest. In February 1923, after General Motors had succeeded in eliminating difficulties with spark plugs caused by the new fuel (R. 1545-46, 1557), du Pont was notified to go ahead (R. 1557; GMX 75, R. 1250, 6760).

The Government claims that du Pont "influence" must have governed Kettering's conduct because he did not shop around for tetraethyl lead manufactured by other companies. This ignores the realities of getting commercial de-

velopment of an unknown, dangerous, poisonous chemical substance which had not only never been made before outside of a test tube, but which for all anyone knew might be supplanted tomorrow by a better anti-knock substance. Although on hindsight the Government now blandly regards this as an "extremely valuable business" which was "handed to du Pont," it was not so regarded by businessmen at the time. As late as 1926, Dow Chemical refused to manufacture tetraethyl lead because of the "uncertainty of the business" (GMX 284, R. 7473), as well as its physical hazards (R. 1632). In June 1924, a few months before the enterprise almost collapsed, Irenee du Pont prophetically wrote (GX 773, R. 632, 4689): "Of course this whole development depends on whether the demand for tetraethyl lead is going to stay. It may be killed by a better substitute or because of its poisonous character or because of its action on the engine".

(b) *Standard Oil Joins with General Motors.*

In the meantime the Standard Oil Company of New Jersey had also undertaken research which eventuated in 1923 in the discovery of an improved and cheaper method of producing tetraethyl lead, known as the chloride process (GMX 256A, R. 1559, 7351). When General Motors was informed of this, it first suggested that Standard undertake the manufacture of lead itself, and that General Motors would buy from it under a contract similar to that with the du Pont Company—a suggestion which "did not awaken any enthusiasm" on Standard's part (GMX 256, R. 1558, 7348). Instead, at Standard's suggestion (*id.*, at 7349), in order to get the advantage both of General Motors' original patent and Standard's improvement patent, and in order to secure an affiliation with the oil industry through which the new product would be distributed, General Motors

joined with Standard in August 1924 to form the Ethyl Gasoline Corporation (R. 415; R. 1253-55; GX 667-72, R. 617-8, 4381-4433). Each company was to receive 50% of the stock of the new corporation, and to turn over its patents to it, with General Motors receiving a royalty; the new corporation was to market tetraethyl lead (*ibid.*). The agreement provided for the purchase of lead on a competitive basis, subject to the existing contract with du Pont (R. 415-16; GX 668, R. 618, 4387).

In terms of the issue before this Court, this was a highly significant event. For with the formation of Ethyl, General Motors lost its absolute control over the disposition of lead manufacture. The decision as to who should produce lead henceforth had to be a joint one agreeable to Standard Oil of New Jersey.

Standard Oil of New Jersey was a highly competent and successful business organization. Certainly it could not be conceived to have been "dominated" by du Pont or General Motors, nor was it an industrial babe in the woods which could not look after its own interests. The picture of Ethyl Corporation in the role of a du Pont instrumentality would seem to assume that Standard, the largest oil company in the world, was either non-existent, stupidly managed, or helpless. Standard's equal voice in what happened subsequent to August 1924 is persuasive that rather than being the result of influence there were good and valid business reasons for Ethyl's continuing du Pont as the producer of lead.

If Sloan had been interested in preserving the manufacturing field for du Pont, he had a perfect way of dealing with Standard Oil and its chloride patent process. That was just to refer Standard Oil to du Pont, on the ground that General Motors had a contract with du Pont. Actually, that was exactly what Irenee suggested Sloan should do

when he learned of Standard's interest in manufacture (GX 623, R. 614, 4340). Sloan, however, instead of falling in with that suggestion, as he most certainly would have if he were the alleged du Pont representative, told Standard that General Motors would negotiate with it further (GX 624, R. 614, 4346). As a result of those negotiations, handled without consulting the du Ponts (R. 894), Standard Oil obtained an equal voice in Ethyl Corporation.

The Government makes a great deal of the fact that Sloan was opposed to the independent production of lead by Standard Oil. In January 1924, before the plan which culminated in the formation of Ethyl Corporation, General Motors had licensed Standard to be its sole distributor of lead in the eastern part of the country (GX 620, R. 613, 4319-32). Other oil companies had been given similar contracts for other sections (GMX 76, 78, 80, R. 1251, 1561, 1564, 1565, 6761, 6779, 6800). Standard sought to condition its "willingness to license other large distributors" in its exclusive territory upon General Motors' "willingness to deal with [it] as a manufacturer of tetraethyl lead" (GX 624, R. 614, 4346). Sloan thought it unwise to permit one of the large distributors of lead also to join in the manufacture, "because it would have prejudiced their position with other suppliers in the territory" (R. 1359); their interest would be "in conflict with respect to other distributors of oil" (R. 1360). In the letter of January 28, 1924, quoted by the Government (R. 413; GX 622, R. 614, 4338), he declared:

> "I feel, and have held right along, that in view of the fact that we are in the development stage we should not in any way discuss with these people anything to do with the manufacture of tetra ethyl lead. I question whether it will be good business from our standpoint for them to manufacture tetra ethyl lead and at the same time have such a large slice of the distribu-

> tion on same. I do not say that I fear we will not get a square deal, but that naturally comes into my mind."

He then went on to say that du Pont could manufacture "at the lowest cost plus a reasonable return", and that permitting Standard to manufacture "will be a disturbing influence and would throw an uncertainty on the whole situation that would not be constructive" (*ibid.*).

Sloan testified that this did not mean that he was afraid Standard Oil would be in competition with du Pont; "I didn't care anything about that" (R. 1360). That this was true is attested by the fact that during the same year, Sloan and General Motors were doing their best to get other suppliers to compete with du Pont's newly-discovered Duco (see pp. 55-56, *supra*). There is no reason why he should have felt differently about lead. "What I was concerned with was that, in the development stage, it would involve a lot of confusion, and we might better wait until the development had moved farther along, and then we might take such action as subsequent experience justified" (R. 1360).

Accordingly, Standard was advised that General Motors would not bow to its attempt to connect its licensing of other large distributors with its being granted the right to manufacture (GX 624, R. 614, 4346). This does not prove that Sloan was not acting in General Motors' interest, out of a desire to favor du Pont. The motives he advanced were perfectly reasonable and the trial court was not required to disbelieve him.

Subsequently in the summer of 1924, after it had been decided that Standard and General Motors would join as partners in the distribution of tetraethyl lead, Standard proposed that it put up a temporary 100 gallon experimental plant at Bayway. Its object was not to become a

second source of supply for lead, but to obtain experience with its own chloride process and also to provide a little extra lead for the peak season, September and October (GMX 87, R. 1263, 6828). Indeed, Standard stated specifically that only six months operation was contemplated; "In view of necessity for using the space for other purposes, this should be regarded as the limit of life of the plant" (GMX 81, R. 1259, 6815). It was also Standard's suggestion that du Pont's existing 900 gallon bromide plant be continued; that du Pont put up an additional 1,000 gallon chloride plant; and that construction of an additional plant by the new company (Ethyl) be planned (GMX 87, R. 1263, 6828-29).

The chloride process for manufacturing lead was even more dangerous than the bromide process, although less expensive. Sloan was fully cognizant of the "very great dangers in the manufacture of this material" (R. 1249), and in view of Standard's inexperience, he thought that it lacked the competence to undertake such an operation (R. 1256).[97] During the week that this was under discussion, Sloan had written Kettering expressing his concern as to the hazards of "proceeding along the proposed lines" and recommending appointment of a medical committee to deal with the question (GMX 82, R. 1260, 6817). Nevertheless, Sloan acquiesced in Standard's program to construct and operate the experimental plant at Bayway as well as for du Pont to go ahead with larger plants (R. 415; GX 661, R. 616, 4365-66). He thought that "it will be impossible to operate such an experimental plant successfully when the larger units are running", but that it was advisable to satisfy Standard "from the psychological standpoint" (*ibid.*).

His letter also stated (*ibid.*):

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[97] It was not until after that period that the oil industry became "chemically minded" (R. 1256, 1239).

> "Any further thought of developing any real production other than under the auspices of the du Pont Company will be deferred until some later time".

To this the Government adds (Govt. Br., p. 53) "General Motors adopted this approach despite the fact that du Pont had fallen behind in its deliveries." But the Government omits to say that Sloan's letter also agreed with Standard's proposal that du Pont immediately build an additional large plant to meet the increasing demand.

The Government seeks to make it appear that Standard was anxious itself to become an important producer and that Sloan hoodwinked it into putting up only a small plant while behind its back he was urging du Pont to expand its production. Actually, Standard never wanted to become a real source of supply for tetraethyl lead. The full sequence of events shows that, although Sloan thought it unwise for Standard to go into manufacture, he went along with their proposal; that it was Standard's idea to limit itself to a temporary 100 gallon plant (not du Pont's, as the Government brief would suggest); and that it was Standard's idea that du Pont greatly expand its production. Sloan was going along with what Standard wanted, not siding with du Pont against Standard. This gives an entirely different meaning to what he said in the selected quotations in the Government's brief.[68]

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[68] The Government's brief says that Sloan at this time was more interested in giving du Pont "a reasonable return on capital employed" than in bringing down the price". But can Sloan's business judgment be questioned because at this developmental stage he was not primarily concerned with squeezing down the price? Already du Pont's bromide plant appeared to be obsolete, although it had produced no profit, and sales up to that point had amortized only $14,000 out of $700,000 of capital expenditure (GX 663, R. 617, 4369). In addition, it must be remembered that this was a single purpose plant, the product of which had no market except to the patentee-purchaser, Ethyl Corporation.

It should also be noted that both Sloan and Irenee du Pont opposed a cost-plus contract because it would have provided no incentive for reducing prices. (GX 663-4, R. 617, 4369, 4371).

(c) *The Bayway Disaster.*

Standard went ahead with its plans, and constructed its experimental plant at Bayway, New Jersey. The wisdom of Sloan's apprehension about Standard's ability to operate it was soon manifested. In October 1924, after no more than five or six weeks of operation, the entire force of employees became afflicted with lead poisoning, and five men died (R. 417; R. 1267, 1765).[69] The New Jersey Department of Labor not only ordered a dismantling of the plant, but ordered Standard never again without its permission to engage in tetraethyl lead manufacture (R. 417; GMX 89, 90, R. 1267, 6832-33). Standard of course dropped its interest thereafter in manufacturing tetraethyl lead, and it was not because of some Machiavellian scheming by Sloan working in harmony with the du Ponts.

In May 1925, as a result of the public outcry, the opposition from health authorities, the refusal of some oil companies to continue to sell leaded gasoline, and the banning of such gasoline in cities and towns throughout the country, the Ethyl Board of Directors, Irenee du Pont disagreeing, decided that the manufacture of tetraethyl lead must be discontinued (R. 417; R. 1267, 1269, 1577-78, 1765-67; GX 773, R. 632; 4691-96).

At the request of Ethyl and du Pont, the problem was investigated by the United States Public Health Service. After du Pont devised a "completely closed system" which met with the Service's approval, and also with that of the

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[69] "* * * du Pont advocated a completely closed, airtight system of manufacture, while Standard felt economy would be achieved by permitting the working force to handle the lead residue directly. After visiting the Bayway plant, Harrington said there was unanimous agreement that Standard's process was 'too dangerous' for du Pont to use, notified Standard to that effect, and received permission from Ethyl to install equipment of its own design." (R. 416-17). See R. 1763-4.

New Jersey authorities, manufacture was resumed in May 1926 (R. 420-21; R. 1270-73, 1767-77).[70]

The Government refers to a sentence in a letter written by Sloan to Irenee in December 1924 at the height of the

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[70] One result of the shut-down was controversy between du Pont and Ethyl as to how much should be paid to du Pont for lead as to which delivery had been deferred—whether the price should be the higher price agreed upon for the period when the lead was originally to be delivered, or the lower price for the subsequent period in which it actually was delivered (R. 417-19). Du Pont's position was that since Ethyl had requested deferral of the January deliveries called for by the contract, which du Pont "voluntarily abstained from making and shipping in January" (R. 418; GX 679, R. 619, 4457), it was only fair that du Pont get the price agreed upon for January. Sloan wrote Irenee that he thought that the trouble was "largely due to a misunderstanding of the equities", and that he believed du Pont's position "absolutely correct" (GX 680, R. 619, 4459). The Government treats this as proof of his allegiance to du Pont rather than to Ethyl and General Motors (Govt. Br., pp. 54, 134). But it does not follow that because a man believes that the other side to a dispute may be right that he is disloyal to his own business. The record does not show the outcome of this controversy.

The Government next, without distinguishing the two, refers to a different claim of du Pont to be made whole on the cost of building the chloride plant, which had been abandoned when the contract was cancelled because of the shut-down (GX 685, 686, 688, 691-93, R. 620, 621, 623, 4470, 4475, 4480-93; DPX 116, R. 1778, 5900). There was no controversy as to the basic principle that du Pont was entitled to be made whole, but there was disagreement as to who was to get title to the plant, which was located in the middle of du Pont's manufacturing facilities (R. 1778). At Sloan's suggestion (GX 692, R. 621, 4488), resolution of this was deferred until the resumption of manufacturing operations made it unnecessary (R. 421; R. 1778). The ultimate settlement by paying du Pont $1,820,000 for its costs, excluding profits (GX 773, R. 632, 4698), but permitting it to retain the plant, has not been shown to be unreasonable—and has nothing to do with the controversy over the price of the deferred lead. After mentioning the latter controversy, the Government says "Ultimately du Pont got what it wanted" (Govt. Br., p. 54), but for this it refers to and cites the description of the settlement of the second dispute. As a matter of fact Ethyl also made whole Standard Oil despite its having caused all the difficulty and despite Kettering's view that it should stand its own losses. (GX 676, R. 618, 4446) An analogous settlement was made with Dow whose bromide contract was cancelled. (R. 1641; GX 681, R. 619, 4462)

Sloan kept out of this negotiation, not only because he thought it better, because of his admitted friendship with the du Ponts, to let others negotiate for Ethyl, but also because

> "I have never had much respect for my own ability as a negotiator. I am too apt to look at two sides of the question" (R. 1273).

It is apparently this last quality to which the Government objects.

None of this complicated story, which is entirely academic now, proves that Sloan was not acting in the interest of General Motors or Ethyl, or that he was motivated in any way by du Pont's stockholdings in General Motors.

storm over the Bayway catastrophe, which stated (R. 417; GX 710, R. 625, 4530):

> "Du Pont will always be the manufacturing agent of Ethyl Gasoline Corporation whether we make tetraethyl lead or whatever we make, now or in the future. I am sure of that."

That statement doubtless expressed Sloan's view in the atmosphere of that time, when the lead program was close to complete cessation because manufacture of the dangerous chemical had been undertaken, contrary to Sloan's judgment, by a company without prior experience in the field. But by 1926 he had approved Webb's contract with American Research Laboratories for the manufacture of lead and Webb's efforts to negotiate a contract with the Dow Chemical Company (see pp. 117-118 *infra.*) An expression written when the lead program was *in extremis* and not adhered to thereafter cannot be taken as a statement of General Motors' policy or a manifestation of a restrictive agreement with du Pont.

The Government (Govt. Br., pp. 55, 135) cites GX 704 (R. 624, 4505) as showing that Sloan sided with du Pont and Ethyl in price negotiations. This letter was written in February 1926, when the project was closed down, and when Irenee was in disagreement with Standard on many facets of the tetraethyl lead program. Apparently, in response to a letter from Irenee indicating that he wished to withdraw from the Ethyl board, Sloan wrote a tactful letter in which he indicated:

> (1) that he agreed with Irenee that du Pont should be allowed "a proper and constructive price based upon a fair cost of manufacture with a reasonable allowance for all the hazards that we are going into", and that he would be satisfied to let Irenee fix a fair price "knowing that it is to your interest as well as ours to get the price down as low as is consistent" (R. 4505).

Standard apparently wished a definite price to be established (R. 4507). Sloan's position was certainly not unreasonable for a businessman of integrity dealing with a person he trusted, at a time when the program had been brought to a complete halt because of the health problem and when it would obviously be difficult to determine what would be a reasonable price for the future.

(2) The letter also *disagreed* with Irenee's views as to (a) the need for closing down the operation (R. 4506); (b) whether, because of the hazard, distribution should be restricted to a relatively few large sources and not extended to service stations and tank wagons (R. 4506-07); and (c) the need for requiring "ethylized" gasoline to conform to certain standards (R. 4507-08). As to the last point, Irenee stood for a policy of unrestricted selling, and there was a "radical difference" of opinion between him and Sloan, who favored rigid standardization, and whose views prevailed for a number of years (GX 773, R. 632, 4706-08).

GX 704 as a whole shows Sloan as friendly with Irenee, but still entirely willing to agree or disagree with him as the merits of the particular issue dictated. Such an independent attitude does not manifest du Pont domination.

(d) *Efforts to Obtain a Competitive Manufacturer.*

In 1926 the Ethyl Corporation sought to induce two other companies to manufacture tetraethyl lead. Webb, the president of the Ethyl Corporation (who had come from General Motors) (R. 421; R. 1623), visited the Dow Chemical Company headquarters in Michigan and (R. 1631):

> "I told them we would be very much interested in their going into the matter of manufacturing if they felt they could do it at prices that would warrant our making such a contract, primarily from a price standpoint."

A memorandum from Mr. Dow's files noted that (GMX 283, R. 1717, 7472):

> "They are desirous of having the Dow Company manufacture the lead tetraethyl * * *. Mr. Webb stated very positively that he felt that we are the logical people to undertake its manufacture as he could not afford to depend on one source of supply * * *."

Dow, however, finally decided, after giving the matter serious consideration, not to go into such a hazardous enterprise (R. 1719-24). The Government does not mention this attempt to induce a major chemical company to compete with du Pont.[71]

Webb also, with Sloan's approval (R. 1650), went so far as to enter into a contract for the production of tetraethyl lead with the American Research Laboratory of Denver, a small company which offered to undertake the manufacture under a new process (R. 422; R. 1640, 1643-48, 1626-30, 1656-57; GX 1313, R. 1656, 5250-58). After visiting the Dow Chemical laboratories and comparing the Dow experience with their own, the Denver people decided that "it was rather foolish for them to think of going into the manufacture of this product" (R. 422; R. 1629, 1659). They accordingly suggested the cancellation of their own contract, which offer was accepted by Ethyl (R. 422; R. 1630, 1657-59; GMX 270-71, R. 1631, 7412-15).

The Government does admit that Ethyl entered into this contract (Govt. Br., p. 54), but it then states:

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[71] General Motors and later Ethyl bought all their bromine supplies from Dow Chemical Company (R. 1582), although du Pont had originally assisted Ethyl and General Motors in extensive and expensive research into the methods of producing bromine, including extraction from sea water (R. 1573, 1576, 1709-11; GX 773, R. 632, 4671). In 1934 Ethyl formed jointly with Dow the Ethyl-Dow Corporation, which was thereafter the supplier of all Ethyl's ethylene dibromide (R. 1713-14; DPX 108, R. 910, 5887). This was a major chemical operation, which in 1952 produced 125,000,000 pounds of ethylene dibromide (R. 1572). Here is an example of General Motors together with Standard going to another chemical supplier, not du Pont, for its sole source of supply when this seemed to be to its best interest.

"Mr. Irenee du Pont objected vigorously (GX 711, R. 625, 4532). It was cancelled (GMX 270, R. 1631, 7416)."

This is an example of the highly misleading technique often found in the Government's brief of *post hoc, ergo propter hoc.* For the cancellation was not suggested by Ethyl at all, but by the other party to the contract (R. 1629-30, 1657-59), as the trial court found (R. 422), and Irenee's letter had nothing to do with it.[72] Certainly his letter did not dissuade Ethyl from attempting to enter into a contract with Dow shortly afterwards.

Although these efforts to obtain additional sources of supply turned out to be fruitless, they show that Ethyl was willing and indeed eager to obtain tetraethyl lead from other sources than du Pont. And Ethyl could not have undertaken such a course of action without the acquiescence and approval of Sloan on behalf of General Motors (R. 1648-50).

The result, however, was that du Pont remained as the only supplier, and that it produced tetraethyl lead from

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[72] Irenee's letter, after admitting that du Pont's status as a supplier placed him in an "embarrassing position", opposed the ordering of lead from the American Research Laboratories not only because their proposed method of manufacture was outmoded, but because (GX 711, R. 625, 4532-33):

"They evidently are not conversant with the true dangers from poisoning and are using make-shift apparatus where poisoning becomes not only likely but almost a certainty.

"If another disaster happens in Colorado no amount of explaining will excuse our directors for having encouraged novices to undertake such a dangerous operation. * * * the risk of a serious catastrophe of poisoning is too grave to be considered.

"I hope that you will understand that it is only my feelings of the seriousness of such a move that causes me to put myself in an embarrassing position of refusing to acquiesce in the Executive Committee's judgment."

Undoubtedly Irenee was right in his views, which reached the same conclusion as the American Research Laboratories and the Dow officials arrived at independently when they decided not to produce lead. Thus even if the cancellation of the contracts had been attributed to Irenee's letter, it could not be said to have been based upon du Pont "influence", as distinct from the merits of the reasonable views expressed therein.

1928 to 1937 under a series of short-term requirements contracts (R. 422-23; GX 706, 745, 747, 752-54, 757-59, R. 624, 628, 629, 630, 4512, 4559, 4570, 4588-4606, 4621-4642; DPX 118, R. 1782 5911). The public demand for tetraethyl lead in gasoline increased at a tremendous rate and facilities for manufacture were rapidly expanded (DPX 119, R. 1783, 5914). The price of the product was steadily reduced as the demand increased, from the original $2.00 to 26 cents per pound in 1937 (R. 1782-83, 1785-86; DPX 119, R. 1783, 5914; DPX 123-25, R. 1785, 5918-20).

(e) *Ethyl Corporation Becomes a Manufacturer, Competing with du Pont.*

Beginning in 1929, Webb and Sloan began giving consideration to the situation that would exist when the basic patents expired at the end of 1947 (R. 423; R. 1687).[73] As things then stood, Ethyl Corporation, not being a manufacturer of tetraethyl lead, would have nothing to sell. Furthermore, as a result of its successful commercial production, du Pont had developed know-how and some patented improvement processes which would make it difficult for Ethyl Corporation successfully to establish itself as a manufacturer, at least to do so on its own without help from du Pont (R. 423).[74]

In 1930 Sloan was in a perfect position—if he was the du Pont tool the Government tries to picture him—to accomplish, or at least to attempt to accomplish, the alleged purpose of preempting the lead business for du Pont. If he had used his influence to get Ethyl Corporation merely

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[73] The controlling and basic use patent (Midgley) expired on December 30, 1947; the chloride process patent (Kraus and Callis) expired January 1, 1946 (GX 773, R. 632, 4725-7; GMX 246A, R. 1546, 7330; GMX 256A, R. 1559, 7351).

[74] The du Pont process patents related to manufacturing details, and as of 1936 at least were considered by du Pont to be "of subordinate character and of less than controlling importance" (GX 773, R. 632, 4726). The know-how was the important thing.

to continue along the same course without change, the result would have been that by 1948 du Pont, as the only manufacturer with the technical know-how and patented processes, could have sold direct to the oil companies, and continued as sole producer of tetraethyl lead while Ethyl either died on the vine or struggled to start up a plant of its own *ab initio*.

Instead, Sloan took the initiative (contrary to du Pont's interests) in a campaign to get Ethyl Corporation into the position of being a successful manufacturer in competition with du Pont. In the Spring of 1930, as the result of a conversation on the train with Lammot du Pont, Sloan learned that du Pont had developed patented processes which would make it difficult for anyone else to produce lead successfully (GX 748, R. 628, 4577-8). Sloan immediately wrote Webb, urging that Webb concern himself about the position Ethyl might be in on the expiration of Ethyl's patents (*ibid.*):

> "* * * it seems to me that we ought to look forward, and I have no doubt that you are but, of course, I do not know that, and try to make our contracts so that the supplier of lead, the du Pont Company now *but perhaps the du Pont Company together with others later on,* would at all times sell to us exclusively or, in other words, should tetra-ethyl lead be a factor in the fuel situation at the time the patent expires and should there be no restrictions on the manufacturers as to whom they would sell the material to, the field would naturally be open and there would be no place in the picture for the Ethyl Gasoline Corporation. * * *" (Italics supplied.)

It should be noted that Sloan's reference to other suppliers "later on" is totally inconsistent with any idea that he was promoting du Pont as a sole supplier. Webb replied to this letter that he had during the past few months con-

cerned himself with the same problem, and was attempting in the current negotiations with du Pont to get a clause in the contract which would give Ethyl du Pont's know-how and patents as of January 1, 1938, in exchange for Ethyl's agreeing to buy 50 per cent of its tetraethyl lead requirements from du Pont (GX 749, R. 629, 4579). Neither of these letters is mentioned in the Government's brief.

Sloan replied to Webb (GX 750, R. 629, 4582), in another letter not mentioned in the Government's brief, that he was not opposed to contracting to give du Pont 50 per cent of Ethyl's business, but that he felt strongly that Ethyl was entitled to any of du Pont's improvements resulting from manufacture under the Ethyl patents (R. 4584). And then, in the last letter of this series, in the one paragraph which the Government doesn't quote, Sloan urged Lammot du Pont to do anything he could, in connection with the proposal for the eventual transfer of du Pont know-how to Ethyl, "to facilitate this and broaden the base upon which it is developed" (GX 751, R. 629, 4586). The Government concludes from other portions of this letter that Sloan "worked in harmony with du Pont" to continue "du Pont's exclusive supplier status" (Govt. Br., pp. 134-5). But if this letter is read in full and in light of others of the same series, as well as of the situation at the time it was written, it leads to the opposite conclusion.

In pressing for the vital concession which ultimately produced a strong competitor for du Pont, Sloan, with perhaps understandable diplomacy, may have been trying to soften the effect on du Pont's position by also stating to Lammot that he thought du Pont and Ethyl could work together so well that no thought need be given to anything other than a single source of supply. In view of all the correspondence and in view of Sloan's *actions*, which were directly opposed to maintaining du Pont's exclusive supplier status,

the court below was not in error in refusing to go along with the Government in its attempt to convert this letter into a commitment from Sloan that du Pont would have a perpetual monopoly in the manufacture of lead. Cf. R. 424.

As a result, in 1930, the renewal of Ethyl's contract with du Pont was made conditional on the latter's agreeing to make its know-how and patents available after 1938, provided that Ethyl would purchase from du Pont at least 50% of its requirements of lead for the years 1930-37 (R. 423; R. 1680-81, 1687; GX 749, R. 629, 4579; GX 752, R. 629, 4588, 4593). All subsequent contracts up to 1938 contained the same commitment (R. 423; GX 752-4, R. 629, 4588-4609; GX 757-9, R. 630, 4621-42). Armed with this, Ethyl Corporation could look forward to being in a position either to make lead itself or to have it made. However, there was much more to building a plant and actually producing this difficult and hazardous material than just being given a patent license and told what the processes were. The ideal situation was to have the expert in the field, du Pont, construct plants for Ethyl and teach it how to operate them.[75]

This was accomplished through the second step in the campaign, i.e., the Manufacturing Service Agreement of January 1, 1938, under which du Pont contracted to construct plants at Baton Rouge, Louisiana, for Ethyl Corporation and to operate them as agent for Ethyl during the next ten years (R. 423; GX 799-801, 804, R. 635-6, 4838-4902.[76] It was Sloan who had recommended in 1937 that General Motors make the investment to get Ethyl Corpo-

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[75] It should be remembered that there was no construction company in the United States with any experience on how to build such a plant. Du Pont had constructed its own plants.

[76] Ethyl leased from du Pont the du Pont plants at Delaware during this period. Du Pont then operated *all* the tetraethyl plants at both Deepwater and Baton Rouge as agent for Ethyl, and received in compensation a percentage of Ethyl Corporation's gross operating profits (R. 423; GX 797-800, R. 635, 4815-92).

ration into manufacture at Baton Rouge under this Agreement (GX 797, R. 635, 4815). And he did this over opposition from Lammot du Pont, who felt that Ethyl Corporation did not have the background to undertake the manufacture of a dangerous chemical (R. 1686).[77]

The Baton Rouge plants were completely integrated, producing their own requirements of the two important raw materials, ethyl chloride and sodium (R. 1697).[78] By the time of the break-off in 1948, Ethyl Corporation had expanded these plants to a point where their production exceeded du Pont's at Deepwater, and at the time of the trial Ethyl's production had been further expanded by construction of additional plants at Houston, Texas (R. 425; R. 1638-9, 1909-10).

The result was that in 1948, each company "went its separate way" (R. 425; R. 1639; GX 833, R. 638, 4960). Du Pont took back its own plants at Deepwater (GX 833, Ex. A, R. 638, 4960). The companies entered into active competition, both within and without the United States (R. 1902), which has continued ever since (R. 425; R. 1865-66, 1879-1902). Ethyl even built a terminal near Wilmington, Delaware, in order better to compete with du Pont in that area (R. 1638).

Thus, by 1948, Ethyl Corporation had accomplished successfully its purpose of putting itself into the manufacturing business. And du Pont, instead of being the exclusive producer, had become the lesser producer faced with

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[77] Lammot wrote to Webb during the early negotiations for the 1938 agreement, as follows (GX 781, R. 633, 4773):

"I have told you on many occasions, have told Mr. Sloan and Mr. Brown on several occasions, and have told Mr. Teagle on at least one occasion, that it is my carefully considered opinion that Ethyl Gasoline Corporation would make a very grave error in undertaking the manufacture of tetraethyl lead. I wish to repeat that statement now and to make it a matter of record; and I am therefore sending a copy of this letter to the three gentlemen above mentioned."

[78] Prior to Ethyl's production of sodium at Baton Rouge, du Pont was the sole United States producer (R. 1679).

a competitor which was armed not only with all of du Pont's technical know-how and experience,[79] but which was also completely integrated, and backed financially by Standard Oil of New Jersey and General Motors Corporation.

These facts, none of which can be disputed, do not support the Government's charges that du Pont acquired or retained the right to manufacture ethyl because of any arrangement that it alone could develop General Motors' chemical discoveries, or because of any preference for du Pont resulting from its ownership of General Motors stock, as distinct from its acknowledged competence in this field. They support the testimony that Kettering turned to du Pont at the beginning because of its experience in handling dangerous chemicals, and that this was not necessarily a permanent arrangement (R. 1248, 1284, pp. 103-8, 110-111, *supra*). Even more importantly, they do not prove that there was, has been, or is, any general agreement or understanding that General Motors would leave the chemical field to du Pont, or accord du Pont preferential treatment in commercial transactions generally. If there had been, efforts would not have been made to get Dow or American Research Laboratories also to manufacture lead, and General Motors would not, through Ethyl, now be competing vigorously with du Pont. The Ethyl story thus not only fails to support the Government's theory; it shows that there is nothing to it.

As the trial court properly found (R. 425-26):

> "The evidence with respect to the discovery and development of TEL fails to establish the Government's charges. It will not support a finding that the discovery of TEL was surrendered to du Pont pursuant to

[79] Most of the du Pont people who operated Baton Rouge prior to 1948 remained there as employees of Ethyl Corporation (R. 1694-5).

any agreement that du Pont was to have exclusive rights to General Motors chemical discoveries. 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."

3. *Freon.*

In 1928 there was urgent need of a new refrigerant, all of the then known refrigerants being unsatisfactory and at least some being highly dangerous (R. 1482, 1593-6; GX 883, R. 647, 5062-7). Midgley and his associates were accordingly assigned to "find a refrigerant that didn't have all those troubles" (R. 1482, 1593-4). By the end of 1928, Midgley had discovered the Freons and had determined that Freon-12 met all of the primary requirements of a refrigerant, namely, being nontoxic and noninflammable and having a suitable boiling point (R. 1595; GX 883, R. 647, 5062). Freon, however, is a combination of chlorine and fluorine, both highly dangerous chemicals (R. 1483, 1596), so that the production of Freon involved an element of danger in the minds of Sloan and Pratt which Government counsel have consistently ignored, both here and in the court below.

The refrigerant having been found, the next step was "to develop suitable manufacturing processes" so that it might be made available commercially; this occupied Midgley's attention during all of 1929 and early 1930 (GX 883, R. 647, 5069).

Frigidaire, in the meantime, had become increasingly impatient to introduce Freon-12 "as quickly as possible," so that Biechler, its General Manager, wrote to Pratt in March 1930 asking for an early decision as to who would manufacture the new refrigerant and recommending that General Motors do so itself (R. 427; R. 1486; GX 838, R. 638, 4975). Pratt, who in 1929 had declared that "whether or not we should eventually manufacture" the refrigerant "should depend a great deal on the sources of the ingredients" (GMX 234, R. 1484, 7296), replied that he wanted to talk the matter over with Sloan, because General Motors had previously confined itself to mechanical and not chemical manufacture (R. 427; GX 839, R. 639, 4976); his letter stated (R. 4976):

> "In regard to the manufacture of the new refrigerant, I am of the opinion that this should be made at Dayton in the plant adjacent to the Frigidaire plant. Whether or not it should be made by one of General Motors' subsidiaries or divisions I have not just been able to determine in my own mind, and shall discuss same with Mr. Sloan, who will return in a few days.
>
> "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. I do not believe we should start in manufacturing until we have the problems of manufacture a little more definitely solved than they were when I was last in Dayton."

He did discuss the problem with Sloan shortly thereafter (R. 437; R. 1487). The lesson of tetraethyl lead had not been forgotten. Sloan determined against manufacture by General Motors, partly because of General Motors' "lack of competence" in chemical manufacturing and partly because "the manufacture of this particular material involved certain questions of danger in manufacture, somewhat analogous to tetraethyl lead" (R. 427; R. 1351, 1487). Pratt agreed, principally because of the "danger" and "lack of experienced men" (R. 1488, 1802).[80] The possibility that du Pont might disapprove General Motors' manufacturing chemicals "was not a factor in our considerations" (R. 1489).

If there had been a pre-existing agreement or understanding that General Motors' chemical discoveries be turned over to du Pont, because of du Pont's stock interest in General Motors or otherwise, some or all of the three executives mentioned—certainly Pratt and Sloan—would have known about it. In that event, there would have been no point to Biechler's recommending that General Motors undertake the manufacture, or to Pratt's telling Biechler that he couldn't "determine in my own mind" whether General Motors should produce Freon itself and that he would therefore have to discuss the matter with Sloan, or to the latter having to come to a decision based in large part upon the nature of the particular chemicals. Unless the documents written in 1930 as well as the testimony of Pratt and Sloan are all false, the indecision as to whether General Motors should manufacture Freon in itself disproves the Government's claim.

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[80] Pratt told Harrington of du Pont that (R. 1820);

> "he felt that the materials which were necessary for the manufacture of F-12 were dangerous, and he had seen what had happened in the tetraethyl lead, and he didn't feel that General Motors had the personnel with the competence to go ahead and pick up that dangerous performance without having some sort of a mishap occur."

Sloan then left the development of the program to Pratt (R. 427; R. 1351). Pratt decided to see if he could interest Harrington, Vice President of du Pont, "the man who had successfully worked out the manufacture of tetraethyl lead"; experience had shown that the du Ponts were the right people, and it was natural to go to people with whom he had worked so well before (R. 427; R. 1489, 1802). Pratt testified that he was not "motivated in any way * * * as a result of the stock ownership that the du Pont Company had in General Motors * * * Nothing influenced me but the fact that I thought it was good business for General Motors to do, a good business act, and there was no outside influence at all" (R. 1502). What Pratt had in mind, however, was not turning the matter over to du Pont, but a joint venture in which General Motors would participate (R. 427; R 1489, 1802).[81] He told Harrington that (R. 1802):

> "he wanted to have a company in the chemical industry in which General Motors would have a stake, and yet have the company operated by somebody who would have the responsibility."

Accordingly, Pratt suggested that a new company, Kinetic, be formed, to be owned 49% by General Motors and 51% by du Pont, since du Pont was to have responsibility for the manufacture (R. 427; R. 1489-91, 1809-10; GX 842, R. 639, 4979-83). An earlier du Pont outline of the proposed plan would have given General Motors 50% of the stock, and the presidency the first and alternate years (DPX 132, R. 1811, 5931-3). Pratt's plan was adopted, and a formal agreement signed on August 27, 1930 (R. 428; GX 850, R. 641; 4992-5007).

Some time was required to work out all of the detail of the aforesaid formal agreement, but du Pont was in agree-

[81] This is no different from Ethyl's formation of Ethyl-Dow with the Dow Chemical Company as the best way for Ethyl to have produced the chemical, ethylene dibromide (*see supra*, p. 118, fn. 71).

ment with the General Motors view that the project should be gotten under way "with the least possible delay" (GX 840, R. 639, 4977). Accordingly, on March 28, 1930, or only two weeks after Frigidaire's general manager had written to Pratt, du Pont advised that it was sending to Frigidaire representatives to "discuss fully the question of methods of manufacture of this product" (*ibid.*). Du Pont's technicians quickly determined that the manufacturing process developed by Midgley at Frigidaire over the preceding year or so, was not commercially suitable; they reported that they were taking a new line of attack in an effort to overcome the difficulties inherent in the Midgley process (DPX 128, R. 1803, 5922; R. 1802; cf. DPX 130, R. 1807, 5926).[82] Du Pont experienced a "great many difficulties" but ultimately succeeded in developing a manufacturing process "sufficiently satisfactory and so superior to the Dayton (i.e., Midgley) process to warrant the erection of a plant" (DPX 131, R. 1808, 5929, 1817). This plant was completed in December 1930 and in 1931 Kinetic Chemicals, Inc., the new company, produced 1,175,000 pounds of Freon-12 (DPX 131, R. 1808, 5929; GX 883, R. 647; 5062).

Thus within nine months after du Pont was first called in, Frigidaire had available in commercial quantity the refrigerant it so urgently required. The validity of Pratt's original judgment, that he knew "the right people to do a thing," was established.

From the outset Freon-12 was made available to the entire refrigeration industry, and used universally (R. 430; R. 1821-24; DPX 136, R. 1822, 5960). Another Freon, F-114, developed by Frigidaire for a particular machine of its own, but which Sears Roebuck and other companies

[82] "In addition, an essential raw material—anhydrous hydro-fluoric acid —was not commercially available in sufficient quantities and du Pont invented and patented for Kinetic a process which enabled Kinetic to make its own acid" (R. 428; R. 1803-6; DPX 128, R. 1803, 5922).

strenuously fought to get, was until 1944 reserved for Frigidaire at General Motors' insistence and over the opposition of du Pont (R. 430-31; R. 1824-31; GX 853-81, R. 641-7; 5011-60). Indeed, "Du Pont was refused samples of F-114, the same as everybody else" (R. 1828). This, of course, does not show du Pont domination of General Motors but the contrary.

Kinetic Chemicals was established to deal with refrigerants. An outline of the proposed agreement submitted by a du Pont official would have restricted it to this field (DPX 132, R. 1811, 5931-32). In reply, Pratt stated that (GX 842, R. 639, 4979):

> "We recognize from the Du Pont standpoint the necessity for limiting the kinds of chemicals manufactured in which the new company should embark."

But "from General Motors' standpoint", he declared, "in addition I would like to see the charter provide that the company could manufacture any chemicals that might originate in the laboratories of General Motors Corporation" (GX 842, R. 639, 4979-80). He obviously regarded the new corporation as a producer of chemicals for General Motors as well as for du Pont, as indeed it was. The result was that at Pratt's suggestion, not du Pont's (R. 1491, 1813, 2740), the Kinetic agreement contained a clause in Paragraph 7th which provided that General Motors should offer its future chemical developments to this company "on such terms as may be mutually agreed upon" (GX 850, R. 641, 4994).

In a letter to Lammot du Pont written a year later (GX 899, R. 641, 5129), in which Pratt declined to cooperate with du Pont in the development of fuel accelerators on the ground that it would not be justified "from a General Motors' standpoint" "to take your organization into our confidence on everything that we are doing along the lines

of fuel research" (R. 5132), he stated that (R. 429; R. 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 does not mean that the purpose was to favor du Pont. Pratt's 1930 letter (quoted at p. 127, *supra*) as well as his and Sloan's testimony (p. 128, *supra*) show that they believed that General Motors should keep out of the field of chemical manufacturing because its competence lay in other directions, the reason having nothing to do with du Pont. Moreover, for Pratt or General Motors to turn problems over to du Pont because it was "an organization in which we have confidence from the standpoint of their ability to carry on chemical manufacturing processes" would, of course, violate no antitrust policy. The persons concerned in the transaction testified that they were not influenced by du Pont's stock interest in General Motors, and the contemporaneous documents confirm their statements.

This provision in Paragraph 7th was never invoked in the 15 years that it remained in the contract (R. 429-30; R. 1384, 1813, 1492, 2740). It was cancelled at General Motors' request in 1945, on the advice of counsel (GX 886, R. 648; 5104) that it was unenforceable "if either party did not want to agree" (R. 429-30; R. 1817-18, 2740; DPX 133, R. 1814, 5945). Subsequently in 1950 du Pont purchased General Motors' stock in Kinetic for $10,000,000 (R. 431), after protracted negotiations—obviously at arm's

length—lasting 10 months (R. 1904-06).[83] Since this occurred after the institution of this case, the transaction was submitted to the Department of Justice, which advised that it did "not object", and that it would "waive that part of its prayer for relief relating to Kinetic" (R. 432; DPX 145, R. 1833, 5975).

The trial judge, who heard the witnesses testify about these events, found that (R. 435):

> "The provision of the agreement between du Pont and General Motors establishing Kinetic Chemicals Company which related to further chemical discoveries is no longer in effect, having been eliminated some years before the Complaint herein was filed. The Court finds that this agreement was not executed pursuant to any prior understanding or arrangement that du Pont was to have the exclusive right to discoveries of General Motors. 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 history of Kinetic is supposed to prove the Government's contention that du Pont's interest in General Motors has resulted in an understanding that General Motors leave the chemical field to du Pont. Instead, it shows the contrary. If there was any such understanding, the discussion

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[83] The du Pont official who did the negotiating testified that his General Motors counterpart (R. 1906):

"* * * made the negotiation very difficult because he was holding out for a very high figure. We just had to stop negotiating for a few periods in there until somebody could come up with a possible new idea which might help to resolve the situation.

"Q. Was the final figure, Mr. Daley, one that was up from your original offer, and down from theirs, or did you finally take theirs?

"A. It was. They reduced their figure gradually, and we upped ours gradually until we got to a common meeting ground. I would say it took ten months."

leading up to the agreement would have been pointless, and the clause in Paragraph 7th would have been unnecessary. That provision did not keep General Motors out of the field of chemical manufacture in favor of du Pont but provided for a venture in which General Motors was a partner. In any event, any issue as to the effect of that unused clause is academic, in view of its demise.

E. The Findings on the Record As a Whole.

Upon the basis of "both documentary and testimonial evidence of record and upon the more detailed findings made in the earlier parts" of its memorandum opinion, the trial court found (R. 464-65):

> "* * * that none of the actions taken in concert had as their objective, or necessary consequence, the imposition of any limitation upon the free flow of trade and commerce. A number of such actions such as the formation of Christiana in 1915 and Delaware in 1924, were undertaken for purely personal reasons of the participants, largely financial and unrelated to restraint of trade and commerce or the monopolization thereof. The record as a whole does not support a finding that any of them, or all of them in the aggregate, did restrain or intended to, or had the effect of, restraining or monopolizing trade and commerce.
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> * * *
>
> "* * * 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 restraint or monopolization of the trade and commerce between du Pont and United States Rubber."

The preceding analysis of the evidence demonstrates that these findings are not clearly erroneous.

SUMMARY OF ARGUMENT.

I.

The issues in this case are factual. Whether General Motors' purchasing is affected by du Pont's ownership of General Motors stock is a question of fact. The trial court resolved that issue against the Government both generally and in relation to each of the specific subjects upon which the Government relied. After making a thorough analysis of both the oral and written evidence, carefully appraising the credibility of the key witnesses and measuring the significance of particular exhibits against the background of the entire record, the court found that the Government had not proved its case. This Court repeatedly has held that such findings are not be set aside unless clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-2; *United States* v. *Oregon Medical Society*, 343 U.S. 326, 330-332, 339; *United States* v. *E. I. du Pont de Nemours and Co.*, 351 U.S. 377. The record here establishes that the trial court's findings were correct.

In the court below the Government stated again and again that its case rested on conspiracy. The trial court found that there was no conspiracy or agreement. The Government does not challenge these findings, but now says that the evidence establishes an unlawful "combination". In the context of this case, however, "combination" and "conspiracy" are merely different names for the same offense. The trial court's findings of no conspiracy took into account all of the elements of the charge which the Government now calls "combination". These elements are (1) power to control or influence General Motors' management, stemming from du Pont's ownership of General Motors' stock, and (2) resulting preference accorded du Pont by General Motors in the purchasing of supplies. But the court's findings negative both the existence of the alleged power or influence and

the alleged fact of preference. Thus the Government's abandonment of its original claim of agreement or understanding and its present reliance upon some kind of coercive influence, perhaps even uncommunicated, (Govt. br. p. 79) does not prevent the trial court's findings from completely negating the Government's case.

Although the Government concedes that it must show error in the trial court's "ultimate" findings, it urges this Court to overturn those findings without reviewing all of the evidence on which the trial court based them. But this Court cannot rely merely on the small part of the documentary evidence which the Government has chosen to call to its attention. The exhibits and parts of exhibits cited by the Government often omit the most significant parts of the story told by the documentary record as a whole. Moreover, the Government completely ignores the credible testimony of 39 witnesses whom the trial judge believed to be truthful. This is not a case in which the Court must choose between written evidence on one side and oral testimony on the other, as the Government would have the Court believe. Here contemporaneous exhibits which the Government does not mention combine with uncontradicted oral testimony to show that the documents singled out by the Government, when viewed in the setting in which they were written, do not warrant the inferences which the Government seeks to draw from them. The case is thus one in which the findings must be upheld unless the Court should hold that the trial judge had no right to believe the testimony of many witnesses, when that testimony was substantiated by a mass of documentary evidence.

II.

The Government's basic contention now is that du Pont, by means of its alleged control of General Motors, obtained an unlawful preference with respect to General Motors'

purchases of materials. The Government does not suggest that either control by itself, or preference not resulting from corporate affiliation, is illegal. Control and preference resulting therefrom are both essential elements of the Government's case. The trial court found that the Government had proved neither. The Government cannot prevail without showing that the findings as to both of these elements are clearly erroneous.

A. The trial court's findings that General Motors did not favor du Pont in its purchasing policies are based upon the clear weight of the evidence and are not "clearly erroneous". The record is overwhelming in its demonstration that General Motors did not buy from du Pont on any different basis than from anyone else. This is established by the testimony of the people who did the actual buying and selling, and of their superiors, as well as by many documents which reveal du Pont's successes and failures in its attempts to sell various types of commodities to the different General Motors divisions.

The record discloses that each General Motors division buys independently, and that the pattern of buying varies greatly from one division to another. There are many examples of cases in which one General Motors division alone bought a particular product from du Pont, although du Pont influence or power, if it existed at all, would obviously affect all divisions alike (see pp. 40-41, *supra*). The record also contains many examples of cases in which General Motors divisions have not bought from du Pont, although du Pont's product was equal to its competitors' (see pp. 42-43, *supra*).

In only one period, 1922-31, did General Motors engage in any centralized buying, through the General Purchasing Committee. The Government's original contention was that that committee was a du Pont dominated agency. But the

record shows, as the trial court found, and the Government no longer denies, that that committee saw to it that du Pont was treated like any other supplier. Indeed, in dealing with the committee, du Pont found it necessary to give special discounts when it desired to increase its share of General Motors business, a competitive method of obtaining business which is hardly consistent with domination and control. The very fact that that committee, established when du Pont's participation in General Motors' affairs was at its greatest, did not favor du Pont, disproves the Government's case.

The Government refers to a few commodities which du Pont sold in volume to General Motors, but not to the many chemical products which General Motors bought in small quantity or not at all from du Pont. Du Pont "influence", if there were any, would be all-pervasive, and would cover the whole spectrum of the products made by du Pont which General Motors could use.

Of the products actually bought, by far the largest in volume and proportion were the two finishes, Duco and Dulux. Both of these were new and superior products developed by du Pont to fill long-felt needs. Nevertheless, General Motors from the beginning sought sources of supply competitive with du Pont and two of its car divisions turned to other suppliers as soon as a competitive product was available. The fact that three divisions continued to buy from du Pont does not prove that they did so because of "influence". The record shows, on the contrary, that du Pont retained their business for the same reasons that it retained and lost other business, to wit, the relative merits of its products and services. As to Dulux, the record shows that General Motors used it less than its competitors in the appliance field.

With respect to fabrics, the other product which General Motors bought in substantial volume, the evidence shows

and the trial court found that General Motors' purchases from du Pont rose and fell over the years, varied from division to division, and were motivated by ordinary commercial considerations having nothing to do with du Pont's stock interest in General Motors.

When all the commodities which General Motors did and did not buy from du Pont are considered, there can be no question as to the reasonableness of the trial court's findings that General Motors' purchasing policies were not affected by du Pont's ownership of stock.

B. The Government tries to establish favoritism for du Pont in the past by reference to other types of dealings. Its claim that General Motors altered the instructions as to antifreeze in the manuals for car owners at du Pont's request disregards a large part of the documentary evidence on that point, which proves the contrary (see pp. 92-100, *supra*). As to tetraethyl lead, the record shows that Kettering began to work with du Pont before either had any connection with General Motors, and that he selected du Pont as the company to produce the lead because he thought "they were the best chemists", an opinion which was borne out by what subsequently happened. A few years later, efforts were made to induce other manufacturers to produce tetraethyl lead, and ultimately a program was developed which resulted in the Ethyl Corporation, half owned by General Motors, and half by Standard Oil of New Jersey, becoming the leading manufacturer of lead in active competition with du Pont. Both as to lead and Freon, the evidence supports the trial court's findings that General Motors was not influenced by du Pont's stock ownership in its decisions to turn to du Pont for assistance in the development and manufacture of dangerous chemicals.

C. The Government's case rests entirely on evidence of disputed significance which relates to things which hap-

pened up to 1930. Even if the other evidence of that earlier period—which the trial court found disproved the Government's claim even for that period—be disregarded, all of the evidence after that date proved affirmatively, without any contradiction or impeachment, that du Pont did not control or influence, or receive any preference from, the purchasing operations of General Motors.

Testimony as to efforts since 1930 to sell General Motors the various types of products made by du Pont disclosed a competitive picture in all respects. The record demonstrates that except for Duco, introduced before 1930, the important sales in recent years have been of fabrics and finishes developed after 1930. Such sales are not attributable in any way to dealings in the earlier period. As to Duco, as well as the articles purchased more recently, General Motors' purchases have rested on the comparative merits of the products of du Pont and its competitors.

As to tetraethyl lead and Freon, the Government is in no better position. It has abandoned its objections to the manufacture of Freon by Kinetic, and there is presently intense competition between Ethyl and du Pont in producing and marketing tetraethyl lead, a result contemplated and planned for since 1930 by Ethyl and General Motors officials.

The mere fact that du Pont still owns its General Motors stock and is represented on the General Motors Board of Directors and certain committees of the Board was proved to have no effect whatever upon trade between General Motors and du Pont.

Many cases hold that evidence of past violations of the law will not justify equitable relief unless violation is likely to recur in the future. *E.g., United States* v. *W. T. Grant Co.*, 345 U.S. 625. *A fortiori* the same principle must apply when the evidence out of the past is insufficient even to convince the trial court that there was a violation of law then.

The question before this Court is not whether some items of evidence might support an inference contrary to the findings of the trial court, but whether the trial court's findings based upon the record as a whole are clearly erroneous. This is a purely factual question. There is no room for error of law in a finding that General Motors bought supplies from du Pont, as from du Pont's competitors, on the merits of their products and services, in the exercise of its own best judgment, and not because of du Pont pressure, coercion, influence or dominance, or any understanding resulting therefrom.

III.

The trial court also found that the Government had not established its claim that du Pont's 23% stock interest gave it control of General Motors. By control the Government means power which enabled du Pont to gain an economic advantage over its competitors in dealing with General Motors.

The trial court did not hold that in no case could a 23% stockholder control a corporation. On the contrary, the court took into account all of the factors relied upon by the Government to show that control may sometimes be exercised by a minority stockholder. But the court did not stop there. It refused to ignore the evidence which showed that over a long period of years General Motors had not felt compelled to kowtow to du Pont's wishes, and had not done so. It refused to disregard the evidence showing that General Motors has bought supplies from du Pont on the basis of quality, service and price, as from other suppliers, and that it did not give du Pont preferential treatment. This, of course, is the strongest possible evidence that du Pont had no control or coercive influence over General Motors' buying policies. The court also did not disregard the fact, affirmatively established by the evidence, that the Board of Directors and the

committees on which du Pont was represented had nothing to do with General Motors' purchasing policies, and that the only centralized purchasing agency did not treat du Pont differently from anyone else. Nor did the trial court disregard the many occasions of disagreement between the two companies on which the General Motors management refused to follow du Pont's wishes.

Although the Government disclaims resting its arguments solely on the percentage of stock owned by du Pont, that is what its contention comes down to. But it is not true as a matter of fact that a substantial minority stock interest *necessarily* controls a corporation, and no case suggests that there is any rule of law to that effect. This Court has recognized that control "is an issue of fact to be determined by the special circumstances of each case". *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 145. Even under the Public Utility Holding Company Act the statutory presumption of control based upon minority stockholdings may be rebutted. *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 697.

Here the evidence shows that the General Motors management did not regard itself as subject to du Pont control. It often rejected suggestions from the highest officials of the du Pont Company. Certainly it had no reason to fear that if a contest arose over its failure to buy from du Pont preferentially, the other stockholders would vote against the management.

The issue is whether over 35 years the General Motors management was in fact dominated by du Pont. The record shows that it was not, and the trial court properly so found.

IV.

The trial court's findings, amply supported by the record, establish that there has been no actual restraint or

monopolization of General Motors trade and that power resulting from du Pont's stock ownership has not affected General Motors' purchasing policies. The Government has abandoned its claim of conspiracy or agreement. It argues, however, that a few early documents show that in the beginning du Pont acquired General Motors stock with the intention of securing all of General Motors' business, and then cites cases holding unlawful a power to exclude competition coupled with an intention to exercise that power.

The trial court, considering *all* of the relevant evidence, found that du Pont did not have the intention for which the Government contends. In any event, power and intent cannot both have been present when restraint or monopolization has not occurred in fact during a period of many years. If power existed, but was not exercised for such an extended period, the possessor could not have intended to exercise it. If the intent were held to have existed over such a long period of time, but had not resulted in restraint or monopolization, it must have been because the possessor lacked the power to implement such intent.

The same answer applies to the Government's argument that the "inevitable result" of du Pont's ownership of General Motors stock is that it would receive trade preference. If, as the trial court found, there was no such trade preference for the many years preceding the trial, it cannot be that any such result was "inevitable". This is particularly true when the Government, in a case extending back 35 years, was unable to produce as a witness a single du Pont competitor who claimed to have been injured.

V.

As the Statement shows (pp. 4-8, *supra*), the market for the products du Pont sells to General Motors is not limited to that company or even to the entire automobile industry.

General Motors' shares of the total markets for fabrics and finishes, the products upon which the Government rests its case, are very small.

The Government made no effort to prove the contrary, although the burden was upon it to establish that there was restraint of a market. It thought it sufficient to show that du Pont's sales of finishes and fabrics to General Motors were large in volume, and that General Motors was the leading manufacturer of automobiles for the later years covered by the record. But it is the share of the market affected, not merely the amount sold to a single customer, which is significant antitrustwise. *Report of the Attorney General's National Committee to Study the Antitrust Laws*, pp. 48,122,125. The Government might have been warranted in relying on General Motors' proportion of the automobile industry if that industry were the sole or main market for the products in question. But that is not the case with respect to the products du Pont sells in volume to General Motors.

Even the complete exclusion of competition resulting from 100% vertical integration—which is not illegal unless competition in a substantial portion of a market is restrained (*United States* v. *Columbia Steel Co.*, 334 U.S. 495)—does not violate the antitrust laws when so small a percentage of the competitive market is affected. The result must be the same when a 23% stock interest is involved.

VI.

Section 7 of the Clayton Act was designed to halt in their incipiency stock acquisitions which might be harmful to competition. Here the Government brought suit over 30 years after du Pont first acquired its General Motors stock, and the evidence showed that during that long period trade was *not* restrained. In view of this, the trial court reason-

ably found both that there "has been" and "is" no reasonable probability that the acquisition would tend to restrain commerce.

A. The Government is not entitled to prevail unless the acquisition was unlawful when made. When a Section 7 proceeding is commenced close to the time an acquisition takes place, the finder of the facts will necessarily have to speculate as to whether an acquisition will probably have the effect of substantially lessening or restraining competition. But when the Government does not proceed until years later, such speculation is unnecessary. It is then appropriate to look to facts subsequent to the acquisition in determining whether there was any reasonable probability that competition might be impaired. If there has been no restraint for 30 years after the acquisition, it would hardly be reasonable to find that there had been at the outset a substantial probability of restraint.

Furthermore, in 1917 General Motors was only a small proportion of the market for products made by du Pont—both because it then was a small part of the automobile industry, and because the market for those products was not restricted to that industry. And the record indicates that du Pont's sales to General Motors at that time were not even large in volume. The Government introduced no evidence as to these matters, although the burden was on it to do so. The result is that there was no evidence that at the time of the acquisition General Motors was either a substantial market or a substantial share of the market for articles manufactured by du Pont. What there is in the record indicates the contrary. The Government's case under the Clayton Act is therefore defective for failure to prove that competition was likely to be adversely affected at the time of the acquisition.

B. Even if it be assumed that there was in 1917-1919 a reasonable probability that du Pont would secure all of General Motors' business, and that this was a sufficient portion of a market at that time to subject the acquisition to Section 7, the Government is not entitled to prevail now. When there has been such a long intervening period between the acquisition and suit, in which no restraint occurred, it would be absurd to hold that the Government is entitled to relief now because of what might be deemed a probability, unrealized, of injury to competition thirty years before. Although Section 7 permits the fact finder to act upon the basis of reasonable conjecture when necessary, as it is when the Government seeks to protect competition against probable future impairment, the section was not intended to perpetuate error when sufficient time has elapsed to permit the test of experience to be substituted for conjecture.

The same result is reached if the test of "reasonable probability" is applied at the later date. The absence of any actual restraint for the many years preceding the suit in itself justifies the finder of fact in concluding that there is no reasonable probability of any such effect in the future. Clearly this is so when, as here, the only change in recent years has been in the direction of *diminishing* du Pont participation in General Motors' affairs.

ARGUMENT.

I.

THE TRIAL COURT'S FINDINGS OF FACT ARE CONCLUSIVE IN THIS CASE.

A. The Trial Court's Findings of Fact Are Entitled to Great Weight.

As the Statement shows, the trial court found that there was "no conspiracy to restrain or monopolize trade" and "no limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont • • • [or] to deal with its chemical discoveries" (R. 465).

> "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." (*Ibid.*)

The court also made specific findings as to each article of commerce referred to by the Government's evidence, to the effect that there was no coercion, no understanding, no agreement, no limitation upon General Motors' freedom of action, and therefore no conspiracy or restraint. These are findings of fact, not conclusions. They rest on evidence, not theories of law. The court in making its findings considered all of the testimony and all of the exhibits—not just excerpts from a relatively few exhibits such as the Government relies on here. Contemporaneous writings which the Government does not mention, as well as those the significance of which the Government often misses, together with the oral testimony of many witnesses, demonstrated to the satisfaction of the trial judge that the excerpts relied upon by the Government did not support the

inferences or conclusions which the Government sought to draw from them.

The court's findings based on the record as a whole dispose of the case presented by the Government in its pleadings, evidence and argument. In deference to Rule 52(a), and to the recognition in that rule of the superior position in fact finding of the trial judge who hears the witnesses personally and has more time to study the record, this Court repeatedly has held that such findings are not to be set aside unless clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-2; *United States* v. *Oregon Medical Society*, 343 U.S. 326, 330-332, 339; *United States* v. *E. I. du Pont de Nemours and Co.*, 351 U.S. 377.

The case which most closely parallels this one in the issues it presents and in its present posture is *United States* v. *Yellow Cab Co.*, 338 U.S. 338. In that case, as here, the Government sought to have this Court overturn findings of the district judge. That case, like this one, involved a charge that acquisition by a supplying corporation of stock (in that case a majority) of corporations buying supplies (taxicabs) from it was intended to and did foreclose competition between the supplying corporation and other suppliers of taxicabs. In that case the evidence showed that for many years the supplier generally had sold to the affiliated cab companies their entire requirements of taxicabs. The trial court found, however, that the Government had not proved that the purchases of stock were intended to force the purchase of taxicabs by the subsidiary companies. In language which is squarely applicable to the case at bar, the Court quoted Rule 52(a) and declared (338 U.S. at 341-42):

> "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. If de-

fendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'."

In 1952 the Court reaffirmed the same principle in *United States* v. *Oregon Medical Society*, 343 U.S. 326, a case in which the trial judge had to some extent weakened the force of his findings by "irrelevant soliloquies" allegedly indicating a bias as to related subjects. This Court nevertheless said:

"The appeal brings to us no important questions of law or unsettled problems of statutory construction. It is much like *United States* v. *Yellow Cab Co.*, 338 U.S. 338. Its issues are solely ones of fact. The record is long, replete with conflicts in testimony, and includes quantities of documentary material taken from the appellees' files and letters written by doctors, employers, and employees. The Government and the appellees each put more than two score of witnesses on the stand. (pp. 330-331)

* * *

"* * * We are asked to review the facts and reverse and remand the case 'for entry of a decree granting

> appropriate relief.' We are asked in substance to try the case *de novo* on the record, make findings and determine the nature and form of relief. We have heretofore declined to give such scope to our review. *United States* v. *Yellow Cab Co., supra.*
>
> "* * * There is no case more appropriate for adherence to this rule 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. (p. 332)
>
> * * *
>
> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd* v. *Boyd,* 252 N.Y. 422, 429, 169 N.E. 632, 634." (p. 339)

All of these observations apply to the present case. Here the trial judge, after hearing testimony for six months, made a thorough analysis of both the oral and the written evidence, carefully appraising the credibility of the key witnesses and measuring the significance of particular exhibits against the background of the entire record. The court's findings that there was no coercion, no understanding, no conspiracy, no restraint, and no limitation upon General Motors' freedom to purchase as it saw fit were based upon this analysis of the record. The trial court's opinion demonstrates the detailed and painstaking consideration which the court gave to the case. It is to be noted that the court prepared its own findings, embodied in its

opinion, rather than accepting the findings submitted by the litigants on either side.

B. The Government Cannot Escape the Controlling Finding That There Was No Conspiracy, Which It Does Not Contest, By Now Saying That "Combination", Rather Than "Conspiracy", Is The Theory of Its Case.

The trial court's ultimate finding is that the Government failed to prove its charge of conspiracy. That finding is buttressed by additional findings against the Government on such sub-ultimate key issues as du Pont's alleged control of General Motors and whether or not there was any actual restraint of trade. They are buttressed in turn by a great number of even more specific findings covering every issue of fact which the Government raised in the trial court.

The Government now attempts to circumvent the lower court's ultimate finding of no conspiracy by purporting to recast its argument on a different legal theory, which it claims was not passed upon by the trial court. It now says that it will not contest the trial court's finding of "no conspiracy" (Govt. Br., pp. 72, 109n, 113), but that the judgment should be reversed because the evidence proved an unlawful "combination" between du Pont and General Motors. Analysis shows, however, that this is merely attaching a different label to the same thing and that in fact the trial court's finding of "no conspiracy" was based squarely upon every element of the charges which the Government now calls "combination".

It is true that the Government's complaint broadly alleged in the usual form a "combination and conspiracy" in restraint of trade and to monopolize (Par. 29, R. 219-220). But the next paragraph averred that,

> "The aforesaid combination and conspiracy to restrain interstate trade and commerce and to monopolize

> a substantial part thereof, has *consisted of a continuing agreement and concert of action among the defendants*" (Par. 30, R. 220). (Italics supplied.)

Subsequent paragraphs itemizing "substantial terms" of the "agreement and concert of action" charged that the defendants "agree to utilize [their] control" by requiring each to purchase "substantially all of its requirements" from the other (R. 220-222). In the concluding summation, significantly entitled by the Government "Effects of the Conspiracy" (R. 255)—not the "combination"—the complaint again alleged that (R. 255):

> "The aforesaid *agreements and concerted action* by the defendants pursuant to and in furtherance of the combination and conspiracy alleged in this Complaint, have had the effects * * * of requiring each defendant manufacturer to purchase its requirements of the products of each of the other defendant manufacturers in a substantially closed market." (Italics supplied.)

In its briefs and argument before the court below, the Government again and again summarized its own case as charging a conspiracy. Thus on page 3 of the Government's post-trial brief, quoted in the opinion below (R. 292) and containing the Government's own statement of "The Offenses Charged", the Government declared:

> "The Amended Complaint charges that the defendants have engaged in a *conspiracy to restrain* trade in certain products produced by the du Pont Company, U.S. Rubber, and General Motors, in violation of Section 1 of the Sherman Act, *and to monopolize* a substantial part of such trade in violation of Section 2 of the Sherman Act. It also alleged that the defendant du Pont Company has acquired a controlling interest in the stock or other share capital of General Motors in violation of Section 7 of the Clayton Act. The Amended Complaint states further that the defendants *have done the things which they conspired to do,* name-

ly, that they have restrained trade and monopolized a part of the commerce in certain products." (Italics supplied.)

Six hundred fifty-two pages later, at the commencement of the Argument on the Law in the Government's post-trial brief, the Government again stated that its complaint "alleges the existence of a conspiracy" (Govt. Post-Trial Br., p. 655) and began its Argument with this declaration:

> "The basic elements of the conspiracy as alleged in the Amended Complaint are that the defendants have concertedly agreed: * * *"[84]

Neither in pleadings nor brief did the Government make any separate references to a combination which did not consist of a conspiracy, agreement or understanding.

The Government urged that the District Court conclude (Proposed Findings of Fact and Conclusions of Law, p. 144) that:

> "The defendants have violated and are now violating Sections 1 and 2 of the Sherman Act by *combining and conspiring* unlawfully to restrain unreasonably interstate trade and commerce and to monopolize a part thereof by acquiring and maintaining common control of du Pont, General Motors, and U.S. Rubber, and by utilizing such control *to effect and execute understandings and agreements* that (a) General Motors would purchase from du Pont the major portion of General

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[84] The brief continued (Govt. Post-Trial Br., pp. 656-657):

"The evidence analyzed in Point I of this brief demonstrates that *defendants' conspiracy* has progressed through three principal phases. * * * The brunt of *the conspiracy* as a whole thus has been brought to bear upon competitors, to their detriment and to the benefit of defendants.

"In discussing the *conspiracy as a whole*, we shall integrate our discussion in accordance with the component elements of *the conspiracy*. * * *" (Italics supplied.)

In the introductory section of its reply brief, the Government concluded (p. 5):

"The Government has proved what was required—the origins and the unfolding of *the conspiracy* and the broadening of its objectives to seize new opportunities as they arose." [Italics supplied]

> Motors' requirements of products manufactured by du Pont, * * *'' (Italics supplied.)

The Government proposed no finding or conclusion on the subject of a supposed unlawful "combination" which was not also a conspiracy.

It is clear from the above that although the Government in the court below occasionally used the word "combination" in conjunction with the words "conspiracy", "understanding" and "agreement", it never used "combination" as meaning anything different from conspiracy.

The trial judge, with the case before him in that posture, quoted verbatim in his opinion the Government's own characterization of its charges and, in the closing paragraphs of his opinion, reached this ultimate finding and conclusion, among others (R. 464):

> "At the outset of this memorandum the Court stated that the issue of conspiracy permeated the entire case, underlying both the trade and the control aspects thereof. This is so because conspiracy to restrain trade can only be determined after consideration of the entire record of evidence. The Court finds, on the basis of all the evidence of record, that the Government has failed to establish the existence of any such conspiracy."

The Government now says that it does not challenge this finding. But the Government implies that the lower court failed to understand the issues because it "treated the Government's case as though only a conspiracy were charged" and did not recognize that the "Government's case is broader" because it charged both combination and conspiracy (Govt. Br., p. 72).

Plainly the trial court did not misunderstand the Government's case. He characterized it in the Government's own words, and the Government is not now in a position to assert or imply that he dealt only with half of it.

Whether or not there could be a non-conspiratorial "combination", violative of the Sherman Act, is an abstract question that is not involved here.[85] The Government never deemed the alleged combination to be other than conspiratorial. In the context of this case "combination" and "conspiracy" have always been, and still are, but two names for the same alleged offense.

The substance of this case is exactly the same in this Court as it was in the lower court, where it was called "conspiracy". The Government tries to distinguish a restraint "imposed by force of the relationship" from one "arising from express agreement" (Govt. Br., p. 113). But both of those concepts were involved in the Government's theory of

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[85] In none of the many cases in which this Court has been called upon to deal with combinations and conspiracies under the Sherman Act has it distinguished between them. The usage in substantially every opinion has been to use the terms interchangeably, or to use either in a way which could equally well have permitted use of the other. The majority and minority opinions in *Northern Securities Co.* v. *United States*, 193 U.S. 197, are perhaps the most explicit. The majority quotes (*id.* at 340) from a Pennsylvania Supreme Court decision which stated:

> "In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what severally no one could accomplish, and even what when done by one would be innocent. . . ."

Mr. Justice Holmes, in dissent, stated (*id.* at 403):

> "The words hit two classes of cases, and only two—Contracts in restraint of trade and combinations or conspiracies in restraint of trade, . . . "

(*Id.* at 404):

> "Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business."

Recent cases which treat the terms indistinguishably include *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500, 511, 516; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 183; *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 298; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809.

In the *Yellow Cab* cases, which like this case involved the alleged use of stock ownership to restrain purchases, this Court's first opinion (332 U.S. 218) sometimes referred to "combination and conspiracy" (pp. 220, 224, 226, 227), and sometimes just to "conspiracy" (pp. 225, 226, 227). In the second case, after the trial, both the district court (80 F. Supp. 936) and this Court (338 U.S. 338) spoke entirely in terms of conspiracy.

conspiracy in the lower court, and that court specifically found against the Government on both of them. It stated in its general conspiracy findings that (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.*" (Italics supplied.)

It then held:

> "But the evidence of record fails to support the Government's charges." (*Ibid.*)

The Government is not really changing its theory from that upon which the case was tried and decided.[86] It only is changing a word—the label by which it characterizes its charges—in an effort to escape the effect of the trial court's ultimate finding that there was no conspiracy. The consequences of this maneuver must be either:

1. That the Government has conceded itself entirely out of court by not contesting the ultimate and controlling finding of no conspiracy by the trial court, or

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[86] If it were—that is, if the "combination" talked about in this Court really were something different from the "conspiracy" alleged, argued and adjudicated below—the change obviously would come too late, after the evidence on both sides had been submitted and findings had been made by the court in reference to the charges the Government said it was making.

> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*." *Robinson & Co.* v. *Belt*, 187 U.S. 41, 50.

See also *Virtue* v. *Creamery Packaging Co.*, 227 U.S. 8; *McCullough* v. *Kammerer Corp.*, 323 U.S. 327.

2. At the very least, that the Government has discarded one of its alternative theories of conspiracy—that charging voluntary agreement by General Motors—and has limited itself in this Court to the theory that General Motors was coerced by du Pont to purchase from it preferentially.[87]

C. Regardless of Whether the Ultimate Issue Here be Called "Combination" or "Conspiracy," the Government Cannot Prevail Without Showing That the Trial Court Clearly Erred in Its Sub-ultimate Findings That du Pont Had No Power to and, in Fact, Did Not Restrain Trade by Controlling the Purchasing Operations of General Motors.

Even if it were true that the Government's theory of "combination" had not been adjudicated against it by the trial court's ultimate finding of no conspiracy, the Government still could not prevail in this Court without demonstrating that numerous other findings of the trial court, sub-ultimate in nature, were clearly erroneous.

The Government's theory of "combination" is that, as a result of du Pont's ownership of General Motors stock, du Pont obtained "an illegal preference with respect to General Motors' purchases of materials" (Govt. Br., p. 70), and that,

> "* * * du Pont achieved, through its purchase of a controlling stock interest and the corollary influence on

[87] In the court below Government counsel argued that the defense contention that "we must show throughout that there is this coercion exerted by du Pont * * * is unrealistic". He then continued (R. 3021):

> "We have shown that the du Pont Company does have control; we have shown that the du Pont Company has determined the management; and we have shown that since 1917 there has been an understanding between the parties, and you don't have to coerce somebody that you have got an understanding with."

Thus, counsel below apparently recognized that the record might not sustain the Government's theory of coercion, and found it expedient to fall back on the theory of "understanding", which Government counsel have abandoned here.

> the General Motors' management, and not because of lower prices or superior quality or service, power over a substantial part of General Motors' trade, a position of superiority *vis-a-vis* its competitors for such trade." (*ibid.*)

This means that General Motors' freedom to buy as it chose was impaired and restricted. But the trial court found precisely the opposite, both with respect to du Pont's power to control General Motors and with respect to whether General Motors actually had shown du Pont any preference in its purchases of materials.

The trial court found generally that,

> "* * * since the 1920's du Pont has not had, and does not today have, practical or working control of General Motors." (R. 322).

and that

> "* * * there has not been, nor is there at present, a * * * limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont and * * * no restraint or monopolization of the General Motors market, * * *" (R. 465).

Those findings negatived the Government's claim of coercive control of General Motors by du Pont, both in the normal sense of practical or working control through the ability of a large minority stockholder to dominate the management of a corporation and in the more amorphous sense of some kind of less specific, but subtly effective, spell or influence over the management of General Motors.

But those are not the only sub-ultimate findings which the Government must show to have been clearly erroneous in order to prevail on its theory of "restraint imposed by force of the relationship." The trial judge's specific findings on various segments of the case show just as clearly that he considered and passed upon the theory of

"combination", consisting of control and resulting preference, which the Government now infers that he overlooked. Although those findings have been set forth in fuller context in the Statement of Facts, pertinent excerpts will bear repetition here.

As to purchasing policies and practices (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 or products of the kind that du Pont manufactured."

As to the General Purchasing Committee (R. 371-2):

> "The evidence of record does not establish, or tend to support, the Government's contention that the General Purchasing Committee was created and operated as an instrumentality to carry out the desires of du Pont. In fact, actions taken by the Committee were seriously detrimental to du Pont in a number of respects. * * *
>
> "* * * it dealt with du Pont only in the same manner as it did with other suppliers. * * *"

As to Fisher Body (R. 381):

> "The record also shows 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. * * * His [Lawrence Fisher's] 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."

As to finishes (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."

As to fabrics (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."

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. * * *

"* * * 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."

As to Freon (R. 435):

"* * * The Court finds that this agreement was not executed pursuant to any prior understanding or arrangement that du Pont was to have the exclusive right to discoveries of General Motors. 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."

As to miscellaneous products (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 the 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."

Although the Government now seeks to avoid the trial court's findings of "no conspiracy", its brief leaves no room for doubt that it does ask this Court to review a large part of the evidence and to set aside the trial court's controlling findings on the questions of control and restraint of trade. Whatever the Government's theory, it cannot prevail unless these findings of fact are overturned.

D. This Court Should Not Overturn Findings Based on the Whole Record on the Basis of the Government's Selected Fragments, Which Disregard a Large Portion of the Documentary Evidence and All the Oral Testimony.

The Government's brief recognizes that what it calls "ultimate" findings cannot stand if the judgment below is to be reversed (Govt. Br., p. 128). But the Government would have the Court believe that the findings can be set aside without having this Court "retry the case" (Govt. Br., p. 128).[88] Virtually all of the evidence heard below was

[88] The Government says, "In arguing that restraint has resulted, we do not ask this Court to retry the case" (Govt. Br., p. 128).

directly pertinent to the all-important questions of power, influence, preference and restraint of trade. What the Government seems to mean is that it is sufficient for the Court to look at the small and carefully selected portions of the record which it refers to in its brief.

As to control, the Government charges the lower court with "overlooking the many admitted facts which lead inevitably to the conclusion that control existed" (Govt. Br., p. 103), but does not mention any of the great mass of uncontradicted evidence which supports the findings.

As to the alleged preferential treatment, the Government's brief suggests that the Court need only consider its version of certain transactions which it describes as "examples" of preferential treatment, "whether or not these examples are, as we believe, illustrative of the record as a whole" (Govt. Br., pp. 128-129). The unfairness of that suggestion is patent. In the first place, the supposed "examples," as they are described in the Government's brief, do not correctly reflect the evidence on those subjects. In the second place, the isolation of certain incidents from the whole context of the course of dealings between du Pont and General Motors clearly is an improper method of attacking findings which represent the trial court's conclusions upon consideration of the entire record. The Government's technique is to recite excerpts from a few exhibits, without reference to the remainder of the evidence, and on this basis to argue that the ultimate findings should be disregarded.

The ultimate findings are factual, not legal. The trial court took into account the exhibits cited by the Government, and a great deal more besides. If this Court is to go behind the ultimate findings to determine whether they are clearly erroneous, it must take into account the evidence upon which the trial court relied, and not just the Govern-

ment's excerpts. Particularly is this necessary when those excerpts, which seemingly lend plausible support to the Government's inferences, give a distorted picture of the record as a whole, as well as of the matters with which they deal. What is omitted may be the most significant part of the story. A few illustrations will show what we mean.

a. In its discussion of General Motors' purchases of paint and finishes from du Pont, the Government's brief nowhere mentions:

(1) That the principal items, Duco and Dulux, were du Pont discoveries, far superior to anything else on the market when they were brought out and never thereafter, according to the evidence, surpassed by other products for the same uses (*supra*, pp. 52-4, 63).

(2) That other manufacturers as well as General Motors bought Duco and Dulux for their merit alone (*supra*, pp. 54, 58, 63).

(3) That contemporaneous documents show General Motors' efforts to develop competitive sources of supply for lacquer equal to Duco, as well as its eventual success in this endeavor, with two divisions turning to du Pont competitors as their principal source for paint (*supra*, pp. 55-7).

b. The Government's statement (Govt. Br., pp. 60, 139) that the General Motors *car divisions* bought 89% of their fabrics from du Pont in 1926 does not reveal:

(1) That this figure resulted almost entirely from large orders by one division, Chevrolet (*supra*, p. 69, fn. 47).

(2) That 63% of all General Motors' fabric purchases were by Fisher Body, not a "car division" (*supra*, p. 69, fn. 47).

(3) That only 37% of Fisher's purchases were from du Pont, and that consequently only 55.5%, not 89%,

of General Motors' purchases of fabrics were from du Pont (*supra,* p. 69, fn. 47).

c. Referring to a later period, when Fisher Body made the bodies for all of the car divisions, the Government, disregarding accurate evidence based on company records, twice asserts in its brief that Fisher Body bought 65% of its requirements from du Pont in 1947 and 68% in 1948. But the record shows that the Government computed these percentage figures from reports showing the rough estimates of a du Pont salesman who stated that he necessarily omitted the purchases which Fisher made from numerous competitors as to whose sales he had no information, and that these constituted 25-35% of the whole (*supra,* pp. 72-3).

d. In its discussion of the antifreeze episode of 1926 the Government's brief does not mention contemporaneous documents showing that the use of glycerin, which competed in the market with alcohol, which du Pont was selling, sometimes resulted in serious harm to automobile engines, and that the glycerin producers themselves did not object to General Motors' comparison of the qualities of glycerin and alcohol—although these facts were highly pertinent to the Government's claim that du Pont influence had caused General Motors to indicate a preference for alcohol instead of glycerin (*supra,* pp. 95-100).

e. With respect to tetraethyl lead, the Government's portrayal of favoritism for du Pont would have lost considerable force if the Government had mentioned:

(1) That Kettering had begun to work with du Pont on the subject of antiknock materials years before he or du Pont had any connection with General Motors (*supra,* pp. 103-4).

(2) That he was responsible for the original selection of du Pont to manufacture lead, and that he chose du Pont because of his belief in its primacy in the chemical field (*supra,* p. 106).

(3) That General Motors and later Ethyl made three unsuccessful efforts to induce other companies to produce lead in competition with du Pont (*supra,* pp. 108, 117-9).

(4) That the cancellation of a contract with one of these other companies, which the Government attributes to a letter from Irenee du Pont, was suggested by the other company, not by Ethyl, and was then followed by further efforts by Ethyl to procure a competitive source of supply (*supra,* p. 119).

(5) That a Sloan letter to du Pont in 1930, which contains a reference to Ethyl giving no thought to other than a single source of supply for tetraethyl lead, and which the Government characterizes as illustrating "the way Mr. Sloan worked in harmony with du Pont" to continue "du Pont's exclusive supplier status," contains a paragraph which shows that Sloan was urging du Pont to give Ethyl Corporation a patent license and its manufacturing know-how under processes which would enable Ethyl itself to manufacture. This eventually resulted in Ethyl's becoming the principal United States manufacturer of tetraethyl lead in competition with du Pont (*supra,* pp. 122, 124-5).

f. The Government attributes Sloan's failure to appoint Kettering to the Policy Committee in 1943 to the fact that Lammot du Pont said "No." But this ignores the testimony that Sloan consulted with the management and other groups and that it was the consensus of all that the appointment would not be wise (*supra,* pp. 26-7).

These examples should be sufficient to convince the Court that the trial court's findings cannot be branded as erroneous on the basis of any such one-sided picture as the Government presents. What the Government ingenuously calls the "undisputed facts" and "admitted evidence" is only a very fragmentary and strongly biased glimpse of the real record. We have attempted in the Statement of Facts in this brief to present a fair summary of the whole record, including the fragments referred to by the Government.

Apart from what is said in the briefs, the record itself demonstrates the reasonableness of the trial judge's findings. And this Court cannot properly brand his findings as clearly wrong without giving the record the same thorough consideration which he gave it.

E. The Trial Court's Findings Must Be Sustained Unless This Court Finds To Be Untruthful a Great Many Witnesses Whom the Trial Court Believed and Whose Testimony Was Both Uncontradicted and Corroborated by Documentary Evidence.

The Government would have this Court disregard entirely the testimony of a great many witnesses which the trial court found credible and convincing. Thirty-nine of these witnesses gave evidence which proved that there was no basis for the Government's charge of General Motors favoritism toward du Pont. A score of them flatly denied influence resulting from du Pont's stock ownership. (See p. 36, *infra*.) Unless they were lying, their testimony refutes the Government's case. Even apart from the evidence corroborating what many of them said, the trial judge was entitled to believe them. Authority is not necessary for the proposition that a judge's findings based on his appraisal of the credibility of witnesses will not be overturned except in the clearest case.

The Government seeks to give the impression that this case is one in which the oral testimony of these witnesses is opposed by the documentary evidence to which the Government refers. But the testimony of the witnesses is confirmed by a mass of documentary material which the Government does not mention. We do not suggest that this evidence is inconsistent with the exhibits cited by the Government; on the contrary, it provides the setting in which it can be seen that the documents relied upon by the Government do not warrant the conclusions which it seeks to draw from them.

On every aspect of this case the appellees' position is supported by contemporaneous documentary material. Thus, General Motors' search for a new kind of finish for automobiles, the superiority of the product developed by du Pont, and General Motors' continuous efforts to secure an equally good lacquer from competitive sources are all proved by letters and reports written in the early 1920's.[89] Contemporaneous exhibits prove that General Motors purchased fabrics from du Pont because of the superiority of du Pont products, or because du Pont hired the salesman Fisher Body wanted, and that on other occasions it often turned to competitive suppliers even though du Pont's product may have been just as good.[90] The whole antifreeze episode, which shows that General Motors' attitude toward

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[89] GMX 104-122, R. 1287, 1291, 1292, 1294, 1296, 1298, 1300-1, 1305-10, 6866-6932; GMX 168-190, R. 1131-33, 1135, 1137, 1139, 1139-44, 7162-7227; DPX 177-189, R. 1950, 1953-4, 1989, 6013-6061; DPX 198-213, R. 2022, 2027, 2031, 2034-8, 2042-3, 2047, 6073-6101; DPX 218, R. 2691, 6117; GX 383-388, R. 523-4, 3932; GX 406, R. 527, 3966; GX 418, R. 528, 4001; GX 1228, R. 523, 5180.

[90] DPX 242, R. 2126, 6148; DPX 258, R. 2216, 6169; DPX 261-262, R. 2222-3, 6172-4; DPX 266-268, R. 2232-3, 6178-81; DPX 272-274, R. 2236-7, 6192-9; DPX 278-279, R. 2243, 6204-7; DPX 287, R. 2256, 6219; DPX 289, R. 2259, 6221; DPX 291-296, R. 2260-64, 6223-30; DPX 300-301, R. 2271, 6234-5; DPX 563, R. 2998, 6483; GX 290, R. 501, 3782; GX 303, R. 504, 3805; GX 381, R. 523, 3926; GX 401, R. 525, 3950; GX 406, R. 527, 3966; GX 417-418, R. 526, 528, 3992-4008; GX 490, R. 596, 4133; GX 492, R. 541, 4115; GX 1318, R. 5270; GX 1353, R. 2890, 5362; GX 1356, R. 2890, 5374;

alcohol and glycerin depended upon the facts, and not upon du Pont pressure, appears in documents written in 1925 and 1926 (see pp. 92-100, *supra*).

The fact that Kettering originally contacted a du Pont chemist with respect to anti-knock materials and offered to give him "anything of interest" appears in a 1916 letter.[91] The efforts made to induce American Research Laboratories and Dow Chemical Company to produce tetraethyl lead in competition with du Pont are shown in a contract written in 1926 and a contemporaneous memorandum from Dow's files.[92] That Sloan was aware of the dangers of producing tetraethyl lead, and that he and Pratt did not believe that General Motors was competent to manufacture dangerous chemicals, is also disclosed in documents of the period. See pp. 105, 112, 126, *infra*. And the contractual arrangements between Ethyl and du Pont after 1930 prove, along with letters written in 1930, that Sloan was sponsoring a policy which later would make Ethyl a competitor of du Pont in the manufacture of tetraethyl lead.[93]

In the same way the findings that the General Motors management was not dominated by du Pont find support in what was written as well as what was said. This is true as to the episode in which Raskob was forced to resign, and of each of the other incidents described in the Statement in which General Motors officials refused to acquiesce in du Pont's wishes (see pp. 18-22, *supra*). Pratt's attitude of independence toward du Pont is revealed by the letter written in 1928 (GMX 201, R. 1429, 7248, quoted at pp. 20-21, *supra*), in which he said:

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[91] DPX 93, R. 881, 5859.
[92] GX 1313, R. 1656, 5250; GMX 283, 284, R. 1717, 7471, 7473.
[93] GX 748-754, R. 628-9, 4577-4609; GX 757-759, R. 630, 4621-42.

> "If there is anything to be gotten our position should be to see that it is gotten for General Motors Corporation, rather than the du Pont Company."

Plainly this is not a case like those in which the Court found that the unsupported oral testimony of interested witnesses was outweighed by contemporary writings. In the cases the Government cites for this proposition—*United States* v. *Gypsum Co.*, 333 U.S. 364; *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D. N.Y.), appeal dismissed 249 U.S. 621; *United States* v. *Hartford Empire Co.*, 46 F. Supp. 541, decree modified 323 U.S. 386—the documents upon their face proved unambiguously violations of the antitrust laws, which could not be explained away by oral testimony.

In the instant case there was no such proof of violation. Selected documents, written many years ago and involving unique problems and events, are not truly understandable without an explanation of the surrounding circumstances. The testimony of the witnesses in this case was not merely "protestations of innocence" (Govt. Br., p. 103) or attempted disavowal of what any documents said. Instead, it was testimony about contemporaneous activities without which the true significance of the documents could not be understood. The inferences the Government draws from the documents which it cites are inconsistent not only with the testimony but with other contemporaneous documents omitted from the Government's brief but upon which the court properly relied.

It is the function of the trier of facts to consider all the evidence, documentary and oral, and, after giving appropriate weight to the evidence on both sides, to decide where, in his opinion, the truth lies. That is what the trial court did here.

In Points II and III of this brief we will undertake to show that the trial court did not err in its findings of no restraint and no control, and that to the extent that the Government attempts to base its objections to those findings upon supposed errors of law, such claims are contrived and groundless.

II.

THE TRIAL COURT'S FINDINGS THAT GENERAL MOTORS DID NOT FAVOR DU PONT IN ITS PURCHASING POLICIES ARE BASED UPON THE CLEAR WEIGHT OF THE EVIDENCE AND ARE NOT CLEARLY ERRONEOUS.

The Government's basic contention now is that du Pont, by means of its alleged control of General Motors, obtained an unlawful preference with respect to General Motors' purchases of materials. The Government does not say that control alone would be illegal, however. It admits that it does "not contend that it is illegal for one corporation to buy a controlling interest in another" (Govt. Br., p. 71). Nor does it suggest that for a corporation to prefer to buy from one supplier rather than another would by itself violate the antitrust laws. Cf. *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500, 511, in which preferential treatment was held not to contravene the antitrust laws in the absence of conspiracy.[94]

Thus there are two separate elements in the offense which the Government charges, control and preference resulting therefrom, both of which must be established, since neither is illegal without the other. We shall take up these two

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[94] The Court there said (297 U,S. at 511):

> "Discriminatory privileges and payments given by a carrier to a consignor or consignee are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-Trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends."

elements of the Government's case in turn. In this Point II we shall show that the trial court did not err in finding that General Motors did not accord du Pont a preference. In Point III we shall show that the trial court did not err in holding that du Pont does not control General Motors. If the trial court's findings on either of those points be sustained, the judgment below must be affirmed on the Sherman Act aspects of this case.

In one sense every buyer accords a supplier a "preference" when he buys from him instead of a competitor. But a preference based upon a belief that one supplier provides higher quality products, or gives better service, or is more reliable in deliveries, or has superior research facilities would, of course, not be objectionable. We use the term in the Government's sense of an advantage attributable to du Pont's stock interest in General Motors.

Whether or not General Motors accorded du Pont any such preference in its purchases of materials is a pure question of fact. It depends upon whether the evidence shows that General Motors bought from du Pont when it would not have done so on the merits. This is a factual matter, determination of which rests on analysis of the facts with respect to the course of sales by du Pont and other suppliers to General Motors, in this case over a long period of years, as well as upon the reasons underlying General Motors' choice of one supplier over another.

The trial court made this determination of fact after an exhaustive analysis of the record, and concluded not as a matter of law but as a matter of fact that General Motors enjoyed complete freedom of choice and that the Government had not proved that it favored du Pont in its purchasing or was constrained to do so. The Government's brief says (p. 128):

> "Our dispute with the lower court is over its conclusionary findings, not its determination of what events took place."

But what the Government means by "conclusionary findings" are these factual findings that General Motors' purchases from du Pont were motivated by ordinary competitive considerations. These findings (quoted at pp. 159-162 *supra*) were the court's summary statement of what took place, after considering all the "events" shown by the evidence. The Government's attack on these findings is therefore its way of saying that it does not agree with what the trial court found from the evidence. It is precisely this type of finding "as to the design, motive and intent with which men act" which this Court has said "depend peculiarly upon the credit given to witnesses by those who see and hear them". *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341.

As has been pointed out already in this brief, the Government does not consider it necessary to review all of the evidence upon which the trial court based its findings on the subject of alleged preference. It relies instead upon its version of three supposed "examples" of preferential treatment, which it asserts are "determinative—whether or not these examples are, as we believe, illustrative of the record as a whole" (Govt. Br., p. 129). The Government relies also upon the fact that over the years du Pont has made substantial sales of fabrics and finishes to General Motors.

On each of those subjects the trial court found, upon *all* of the evidence, that no preference had been accorded du Pont, but that each transaction had been handled entirely on its merits by General Motors, which had valid reasons based upon its own best interests for doing business with du Pont when it did so.

The record as a whole shows that General Motors purchased on the basis of quality, service and price, not du Pont influence. Du Pont developed a number of new and improved products. It had outstanding technical and research facilities, and provided exceptional service (see p. 44, fn. 29, *supra*.) The Government failed to produce a single complaint from any of du Pont's competitors during the period of time extending back 35 years.[95] If General Motors were a "captive market" and if du Pont's competitors were provided with the "very hard road to the GM market" which the Government claims, it is inconceivable that the Government could not have produced one competitor so to testify.

We believe that a fair review of the evidence demonstrates not only that the trial court did not err with respect to the supposed "examples" cited by the Government, but also that in instance after instance General Motors management failed or refused to deal with du Pont when du Pont badly wanted the business and, on the whole, treated du Pont with the same jealous regard for the best interests of General Motors as motivated it in dealing with du Pont's competitors.

A. Evidence As to Purchasing.

Since this case is primarily concerned with General Motors' purchases from du Pont, we shall deal with that before discussing the examples which relate to other matters.

The record is overwhelming in its demonstration that General Motors does not buy from du Pont on any different basis than from anyone else. This is established by the testimony of the people who do the actual buying and sell-

[95] The Government conducted its investigation of this case by grand jury proceedings in which it called many General Motors purchasing agents and ex-purchasing agents, but called none of them as witnesses at the trial.

ing, and of their superiors, as well as by many documents which reveal du Pont's successes and failures in its attempts to sell various types of commodities to the different General Motors divisions.

The record discloses that each General Motors division buys independently, and that the pattern of buying varies greatly from one division to another. This variation in itself is inconsistent with the notion that du Pont "influence" is a factor which governs their purchases. If such "influence" is not expressed in any instruction or other document, but is manifested as a power "inevitably" felt by General Motors buyers, which seems to be the Government's present theory, it would affect one division as much as another. And yet, Oldsmobile is the one division which buys antifreeze from du Pont and one of the two car divisions which does not buy Duco from du Pont. Buick alone buys du Pont motor enamel, and Cadillac alone uses du Pont's copper electroplating exclusively. Can "inevitable influence" affect only the Oldsmobile antifreeze buyer, but not the Oldsmobile paint buyer; the paint buyers of Chevrolet, Buick and Pontiac, but not the antifreeze or electroplating buyers; the electroplating buyer only at Cadillac, but not the Cadillac paint buyer; only the Buick buyer of motor enamel, but not the Buick antifreeze buyer? (See pp. 40-41, *supra.*)

The only centralized buying done by General Motors for all of its divisions was by the General Purchasing Committee during its life between 1922 and 1931. Although the Government's original charge was that that committee was established primarily for the purpose of favoring du Pont, its present brief hardly mentions the committee at all. The reason for this is that, as the trial court found (R. 371-72), the history of the General Purchasing Committee disproves the Government's case in the

very period in which most of the exhibits the Government cites were written. The chairmen of the committee during almost all of its existence were Sloan and Pratt, whom the Government treats as the General Motors officials who were most amenable to du Pont influence. (Sloan remained as a member after Pratt became chairman (GMX 2-3, R. 991, 6561-2).) If ever there was a place where such influence over General Motors' purchasing policy would have been manifest under the Government's theory, this would have been it. The membership of the General Purchasing Committee included the purchasing agents of the car divisions and Fisher Body, *inter alia*. If no such influence affected the work of that committee, it would be strange indeed if it had affected the same persons when they were buying for their respective divisions.

The minutes of the committee—or such portions of them as either party desired to introduce—are in evidence.[96] These contemporaneous documents, together with the evidence of Lynah, the executive secretary of the committee, who had not been connected with General Motors for over 20 years before he testified, show that the committee told du Pont that it must submit its bids like everybody else, that it would be subject to a two-source of supply policy like everybody else, and that "in the making of our purchases [from du Pont], we believe that each transaction should stand on its own merits." (GMX 194, R. 1155, 7232, *supra*,

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[96] A complete set of minutes was supplied to the Government at the trial (R. 1089), but because of their volume only the relevant portions were collected and submitted as exhibits (GMX 152-153, R. 1089-90, 6988-7022; GMX 156-166, R. 1105-7, 1107, 1100, 1114, 1116, 1119, 1123, 1128, 7099-7158). In addition, two complete tables were introduced showing all contracts made and all contracts rejected by the committee (GMX 154-155, R. 1092, 1100, 7023-7098). Many other letters, memoranda, contracts and policy and procedure statements showing the committee's activities were also put in evidence (GMX 146-151, R. 1076, 1079, 1084-5; 6966-87; GX 412, R. 528, 3986; GX 405, R. 527, 3964; GX 453, R. 536, 4082; GX 458, R. 2818, 4096; GX 462-466, R. 537-8, 4111-20; GX 494, R. 541, 4155; GX 499, R. 597, 4162; GX 537, R. 604, 4226; GX 1331, R. 2652, 5306).

pp. 50-1). The committee refused to give du Pont a cost-plus contract for fabrics and refused to join du Pont in a policy of reciprocity. See p. 48, 19-21, *supra*. During its nine years of operation, it contracted with respect to products du Pont could supply more often with du Pont's competitors than with du Pont (see p. 47, *supra*). This committee, in which Pratt and Sloan were active, set the pattern for General Motors purchasing in a way which precluded preferential treatment for du Pont.

During this period du Pont found it necessary to grant the so-called "super-discount" in an effort to increase its General Motors sales. See pp. 48-50, *supra*. That was hardly the tactic of a company receiving preferential treatment.

The Government cites no evidence as to General Motors' purchases during the period between 1931, when the committee went out of existence—or for that matter, after 1926—and the time of trial in 1953, except that General Motors and Fisher Body bought substantial percentages of their finishes and fabrics from du Pont in later years. But an inference of preferential treatment cannot be legitimately drawn merely from a consideration of two of the many commodities which General Motors buys and du Pont sells. The "inevitable influence" of du Pont's stock ownership, if it had existed, would have affected other products as well. If no such influence appeared with respect to anything else—and the Government makes no claim that it did—a trier of fact might reasonably be skeptical of its existence as to finishes and fabrics, and would reasonably credit the evidence which showed that the purchases of those commodities were entirely attributable to ordinary commercial factors.

Du Pont, of course, is principally a chemical manufacturer. The record (GX 1344, R. 2846, 5341-6) shows that in

1946 and 1947 du Pont sold 147 different chemicals to General Motors. The total volume of such sales in 1947 was $2,028,000.00. And yet General Motors bought only a minor proportion of its needs for those commodities from du Pont. The percentage for various groups of chemicals ranged from 0.2% to 12.1% (DPX 573, R. 3008, 6531). The Government certainly has not established—or even asserted—that in the broad chemical field du Pont, which it characterizes as the leading chemical manufacturer, could not compete with other companies on an equal basis. If General Motors had been required to purchase from du Pont preferentially, the purchases in that field would obviously have been much greater. And yet the story frequently was that the General Motors' buyers would insist on adhering to their prior supplier so long as he was satisfactory, whether or not the du Pont product was just as good. (See pp. 42-3, *supra*.)

Plainly, therefore, the fact that General Motors in 1946 and 1947 bought large quantities of fabrics and finishes from du Pont does not prove that they were purchased because of du Pont pressure or influence. The Government's conclusion does not follow from its bare statistics. The reasons why du Pont sold those products were explained fully in the record, which has been summarized in the Statement.

We will not repeat at length what is there set forth. It is sufficient to recall that the automobile industry was searching for a new kind of finish which would dry quickly and also be durable. General Motors turned to du Pont when it found that du Pont had already developed a quick-drying lacquer which might be suitable, and du Pont developed a new finish Duco, which almost every automobile company adopted. Weckler, a disinterested witness who had a good deal to do with the adoption of Duco by Buick, testi-

fied not only that he was uninfluenced by du Pont's interest in General Motors, but that he didn't care whether du Pont or Joe Doakes found a superior paint—he was interested only in the quality of the product. (R. 2146-7; *supra,* pp. 61, 37-38).

Both before and after the development of Duco, General Motors sought to get other paint manufacturers to produce a competitive product, and it has continually tested all available products to see which was the best (R. 1921-22, 1931; *supra,* p. 60). As soon as adequate competitive lacquers were available, two of the car divisions, as well as Fisher Body in part, turned to other suppliers (*supra* pp. 56-7). The fact that three divisions did not abandon du Pont does not prove that du Pont retained their business by reason of stock influence. These divisions exercised their autonomy over purchases in favor of du Pont because they believed Duco most satisfactory for their programs, just as Cadillac and Oldsmobile regarded a competitor's product as best for their needs.[97] The Government has not dared to suggest that du Pont's product did not remain fully competitive in all respects. The record shows that General Motors tests paint on several thousand of its cars, as well as on competitors' cars (R. 1927-31), each year, and Kettering's conclusion was that "one of the reasons" why General Motors' cars brought more than substantially identical cars of other companies "in a used car lot * * * is the paint" (R. 1592).

Certainly the trial judge cannot be said to have been clearly erroneous because he credited the uncontradicted evidence that the purchases of Duco resulted from the original and continued merit of the product.

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[97] As to Buick and Chevrolet, this was partly due to the location of their main factories in Flint, near the plant in which Duco was produced, just as Cadillac turned to a supplier located near its factory in Detroit (R. 1923-24, 1926-27, 2141-43).

The second largest item which General Motors buys from du Pont is Dulux, a synthetic enamel finish for refrigerators and other appliances. But Dulux was developed by du Pont in collaboration with General Electric, not General Motors, was used by a number of companies before General Motors adopted it, and has since been used by General Motors to a lesser extent than by most of its competitors. Sales of this product to General Motors, about $3,000,000 in volume in 1947, can hardly be attributed to favoritism or preference.

With respect to fabrics, orders for which only slightly exceeded those for Dulux, the Government refers only to du Pont sales of large percentages of General Motors' requirements in the very early years, to the inaccurate figure of 89% in 1926 (see p. 69, *supra*), and to the 40-50% sold in recent years. It does not mention that General Motors bought most of its fabrics from du Pont prior to the stock purchase in 1917, and that by 1931 the proportion had dropped to 31.5%. (See pp. 67-69, *supra.*) Other evidence showed that du Pont's sales rose and fell as improved products were developed by it or competing suppliers, or because of such factors as the employment of a special salesman. (See pp. 67-8, 70-71, *supra*). Four du Pont witnesses testified that selling fabrics to General Motors was as hard as selling to anyone else, and that du Pont's stock interest was neither mentioned nor helpful (R. 2128-31, 2310, 2357-58, 2672, 2903-5; pp. 65, 38-9, *supra*). Their testimony was corroborated by many contemporary exhibits.[98] The trial court was not required to find that the bare statistics cited by the Government outweighed all this testimony.

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[98] DPX 228-327, R. 2065, 2072-6, 2080-2, 2105-6, 2126, 2188, 2190, 2191-2, 2277, 2198, 2200, 2204, 2206, 2210-11, 2213-6, 2221-4, 2227-8, 2232-7, 2239, 2242-3, 2245, 2248-9, 2252, 2256-7, 2259-64, 2266, 2269, 2271-4, 2276, 2279-81, 2283-6, 2288-9, 2204-5, 2229, 2299, 2305, 6130-6273.

The Government attempts to bolster the inferences it seeks to draw from these statistics by reference to another percentage figure. It argues that because about 80% of the fabrics and finishes which du Pont sold to the automobile industry were purchased by General Motors in a period when General Motors was manufacturing only 35-45% of the automobiles, General Motors could not have been buying from du Pont on the merits, but must have done so for preferential reasons.[99]

In the Statement we have set out the reason for this with respect to both finishes and fabrics (see pp. 58-9, 75-6, *supra*). In short, Ford adopted the policy of manufacturing the bulk of its own materials and Chrysler deliberately sought "independent sources of supply, different from those that were then selling to Ford and General Motors," (R. 2292; *supra,* p. 75), although conceding that du Pont's "service and performance * * * was very satisfactory" (R. 1995; *supra,* p. 58). With the remaining manufacturers enjoying only 12-15% of the business, the result was that the distribution of du Pont's sales among the manufacturers available to it was not disproportionate, as we have shown at pages 75-76, *supra.*

Furthermore, the fact that a supplier sells in different proportions to different customers, or even exclusively to some and nothing to others, does not prove that its sales are made on a non-competitive basis. In no market that we have ever heard of does each supplier sell to each customer in proportion to the latter's share of the market.[100]

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[99] Since the sales to General Motors include sales to its non-automotive divisions, comparing such sales with sales to other automobile companies gives General Motors a larger percentage than if only sales for automobile use were compared.

[100] If the Government ever detected any such proportional division of the market, it would be sure that there had been a violation of the antitrust laws.

How much each customer purchases depends on its judgment of any number of tangible and intangible factors, as is shown, if proof be needed, by the variance in the percentages bought from du Pont by the different General Motors divisions.

The Government also attempts to support its argument by saying that in the early 1920's du Pont made a drive (unsuccessfully) for Fisher Body business, that it used the super-discount to get some of this business (in the late 1920's), that Fisher was completely "bought out" by General Motors (this was in 1926), that (jumping 20 years) Fisher bought 68% of its fabrics from du Pont in 1945 (the actual figure was about 40%; see pp. 72-3, *supra*), and that therefore du Pont sold to Fisher "not on the basis of merit, but on the basis of control" (Govt. Br., p. 142). A more complete *non sequitur* would be difficult to find.

The full story has been told in the Statement at pages 70-74, *supra*. Influence or control did not enlarge Fisher's purchases in the years immediately after it became a General Motors division. The very fact that du Pont was required to offer lower prices in the form of a super-discount is completely at variance with the existence of influence or control. Influence or control was not responsible for Fisher's purchases of Teal; it refused to buy any from du Pont from 1931 to 1948, although du Pont's product was competitive, and then gave du Pont only one-half to one-third of its business when it developed a new and superior product (p. 71, *supra*). There is nothing in the record to suggest that Fisher's purchases were not on the basis of merit in 1947 and 1948 as well as earlier, and a great deal which shows that they were, as the trial court found.

The Government presumably was deceived by its own misuse of statistics, since its statement that du Pont's

sales to Fisher in the late 1940's were based on control is followed by this sentence (Govt. Br., p. 142):

> "The picture is particularly clear because of the comparison with contemporaneous sales to other divisions of General Motors."

Since Fisher was purchasing the fabrics for all General Motors passenger cars in 1947 and 1948, the only "other divisions" in the market for fabrics were the truck divisions, which bought about one-third of their fabrics from du Pont (R. 2098-2102; GX 1352-1357, R. 2890, 5360-79; *supra*, p. 70). This is not very different from the true figure of about 40% for Fisher, or from the 38.5% for General Motors as a whole in 1947, most of which was attributable to Fisher (see p. 73, *supra*).

B. Evidence As to Transactions Not Directly Involving Purchases.

Although "the gist of the Government's case" is an "illegal preference with respect to General Motors purchases of materials" (Govt. Br., p. 70), more of its brief is devoted to the subjects of antifreeze, tetraethyl lead and refrigerants than to the course of General Motors purchasing, presumably on the theory that if it could be shown that du Pont was favored in any other kind of dealing, that would prove an unlawful preference in the purchase of supplies.

As appears from the Statement (*supra*, pp. 90-134), the evidence does not establish any unlawful preference for du Pont in connection with any of these commodities. Indeed, when all the facts of record as to each are examined, as distinct from the selected excerpts which the Government chooses to mention, they demonstrate that du Pont's stock interest in General Motors did not result in its obtaining special treatment.

(a) *Antifreeze.*

The Government's claim as to antifreeze is that General Motors changed its instruction manuals for car owners so as to eliminate a statement of preference for glycerin over alcohol when it was advised that du Pont had begun to produce the latter. But the fact was that Sloan refused to do this in the first instance, because at that time General Motors believed glycerin to be superior; he stated that he would have to "be guided by the facts" (GX 320, R. 507, 3833-34). Only when experience during the following year indicated that glycerin also had its disadvantages did he come to the reasonable conclusion that General Motors should take a neutral position stating the merits and demerits of the competing antifreeze products (see pp. 92-100, *supra*). His personal preference for alcohol (GX 336, R. 511, 3861) was based on the discovery that, unless properly used, glycerin "would cause decomposition and corrosion of the engine operating parts". This can hardly be charged to du Pont's stock interest in General Motors.

(b) *Tetraethyl Lead.*

As to tetraethyl lead, the Government asserts that du Pont's ownership of General Motors stock was the reason General Motors turned to du Pont to manufacture the lead in the first instance, instead of manufacturing it itself, and why du Pont continued to manufacture lead for the Ethyl Corporation.

The record shows that Kettering had begun to work with du Pont chemists on the anti-knock problem before he or du Pont had any interest in General Motors,[101] and that he selected du Pont to help develop the anti-knock compounds because of his belief that "they were the best chemists that

[101] This is proved by contemporaneous documents, as well as by oral testimony (DPX 93, R. 881, 5859; *supra*, p. 169).

we knew of in the country'' (R. 1584; *supra,* p. 106). The obstacles which du Pont overcame to make tetraethyl lead a commercially useful product, when viewed in the light of the disastrous consequences of similar efforts by a concern little experienced with dangerous chemicals and the unwillingness of another large chemical company experienced in that area to undertake the risks (pp. 114, 117-118, *supra*), prove that Kettering's opinion was an entirely reasonable one. Certainly the Government has not suggested that he could not honestly have thought that the du Pont chemists might be the best in the field. The trial court was therefore not clearly in error in believing his testimony.

After du Pont had undertaken to produce the lead, General Motors joined with Standard of New Jersey in the formation of the Ethyl Corporation to market the product. Sloan did not follow the du Pont suggestion that negotiations with Standard be turned over to du Pont, although this might have preserved the manufacturing field exclusively for du Pont. It is true that Sloan did not believe that Standard should manufacture lead itself and that it was better to concentrate the manufacturing in du Pont during the developmental stage, but he acquiesced in the experimental operation which was all that Standard itself wished to undertake. Seldom was a judgment so speedily vindicated, when the disaster which befell Standard's Bayway plant within a few weeks halted the entire project and almost led to a permanent prohibition of this new and important material.

When production by du Pont under a safer process was about to be resumed, Standard having had enough, Ethyl, with Sloan's approval, sought unsuccessfully to induce two other companies to enter the manufacturing field (*supra,* pp. 117-118). A few years later when it became apparent that du Pont would be the only company with adequate

facilities and know-how after Ethyl's patents expired, Sloan proposed and supported a program whereby du Pont would be required to share its knowledge with and construct facilities for Ethyl. The result was that when the patents expired, Ethyl was able to establish itself as the largest manufacturer in the industry, and since 1948 it has been competing with du Pont throughout the country.

This course of events does not bespeak du Pont domination of General Motors or Ethyl. It shows the making of business judgments for business reasons by General Motors' officials in the interests of General Motors. On some occasions they agreed with du Pont and on others they disagreed. The fact that Sloan agreed with the du Ponts as to some matters does not prove that he was influenced or dominated by them. He could hardly be expected to find them wrong on everything in the course of dealings lasting many years.

The Government seeks to support its arguments that the trial court erred in not finding that General Motors' purchasing was influenced or dominated by du Pont by reference to excerpts from a few letters, none written after 1930. The most important of these are discussed in the Statement (*supra*, pp. 121-123). It is sufficient here to say that if each is read *in toto* and in the context of the situation confronting the author when it was written, it does not support the Government's contention that the General Motors officials were motivated by du Pont influence. Thus, for Sloan to say that he favored du Pont as the sole producer of tetraethyl lead immediately after the Bayway debacle at Standard's experimental plant only proves that in the tense and worried atmosphere of that period, Sloan thought that du Pont was the only safe producer.

The Government's arguments with respect to both tetraethyl lead and Freon imply that du Pont domination kept

General Motors from manufacturing those chemicals itself. But the record reveals the reasons why General Motors chose not to go into the business of producing dangerous chemicals. The reason was simply that General Motors was a manufacturer of machinery, and that its officials did not believe that it had competence in the field of chemical manufacture.[102] They were properly and reasonably—and it turned out, very wisely—afraid to get into a field in which a mistake might not only have severe financial repercussions, but also would, as it did, imperil the health and lives of all of those engaged in it. General Motors proved to be right in its judgment that a project fraught with such physical hazards should not be undertaken except by persons with the most experience in handling such matters. With respect to both tetraethyl lead and Freon, it turned out that the methods of producing the chemicals developed by the General Motors researchers were impracticable for manufacture on a large scale. The expert du Pont staff, after considerable difficulty, discovered improved techniques which were essential to the usefulness of the inventions.

The question, of course, is not whether General Motors in time could have established a chemical manufacturing department, or whether it was wise for it not to have entered a field which might have made it considerably larger. The issue here is whether there was a reasonable basis for the trial court to believe that General Motors' failure to manufacture these chemicals itself, and its selection of du Pont as the manufacturer, were based on considerations other than du Pont's stock interest in General Motors.

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[102] Compare General Motors' policy over the years of getting out of businesses which, despite their profitability, proved unrelated to General Motors' field of competency, e.g., glass, leather, woolen cloth, aviation and marine instruments, aircraft, car rentals, banking (Hearings, United States Senate Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, 84th Cong., 2d Sess., 1956, *Study of Antitrust Laws*, Vol. VII, pp. 3658-3659, Vol. VIII, pp. 4295-4314).

Since the evidence as to the factors motivating the General Motors executives was both uncontradicted and inherently reasonable, the trial court was not clearly in error in giving it credence.

(c) *Freon and the Kinetic Corporation.*

Freon, a refrigerant discovered by General Motors, was manufactured by Kinetic Chemicals, a company jointly owned by General Motors and du Pont, rather than by General Motors itself. The Government refers to this as proof that General Motors' manufacturing contracts with du Pont were not awarded "on the basis of merit alone" (Govt. Br., p. 137). As with tetraethyl lead, and in large part as a result of that experience, Sloan did not think that General Motors was competent to undertake the manufacture of dangerous chemicals (see pp. 127-8, *supra*). After Sloan made the decision that the manufacture should be by an outsider, Pratt asked du Pont to join with General Motors because of "their experience in handling dangerous chemicals" including tetraethyl lead. The resulting 51-49% arrangement enabled General Motors to keep almost one-half of the profits, while du Pont had the responsibility for production in a field with which it was familiar. Pratt testified that he was not "motivated in any way" by du Pont's stock ownership in General Motors. The trial court cannot be said to be clearly in error in believing this testimony. (*Supra,* pp. 126-30)

The Government also referred to an unused and subsequently cancelled clause in the Kinetic agreement, whereby General Motors' future chemical developments would be offered to Kinetic on such terms as might be mutually agreed upon by the parties. It quotes Pratt's explanation, (see pp. 131-2, *supra*), that this was designed "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." But this again meant only that he and Sloan didn't believe that General Motors should manufacture chemicals, for the reasons already stated, and that they wanted their chemical developments to be in the hands of an organization in whose ability in that field they had confidence.

It should be noted that General Motors' interest in Kinetic was sold to du Pont after this suit was begun, with the Department of Justice expressly not objecting (DPX 145, R. 1833, 5975). If the Government does not object to du Pont's taking over General Motors' interest in Kinetic, it is hard to see how it can say that General Motors violated the antitrust laws when it permitted du Pont to have a half interest in the enterprise.

The documents the Government cites, whether read by themselves or in the light of the evidence as a whole, do not establish that in creating Kinetic, General Motors was not acting in its own best interests or was motivated in any way by pressure or influence emanating from du Pont's ownership of General Motors stock. They relate to an episode which is now only of academic interest, both in view of the fact that the clause in paragraph 7 on which the Government relies was cancelled in 1945 and the fact that General Motors' Kinetic stock was purchased by du Pont with the Government's acquiescence. They certainly do not prove that General Motors has or ever had a purchasing policy of giving du Pont preferential treatment.

C. The Government Relies Principally Upon Evidence Which Is Ancient, Of Disputed Significance, And Not Connected With Events Of Recent Years.

The Government's case here rests almost entirely on evidence relating to events which took place from 26 to 39

years ago—from 1917 to 1930. The Government's Statement of Facts cites no evidence relating to anything which has happened since 1930—19 years before suit was commenced—from which it possibly could hope to persuade any court that du Pont has received any trade preferences from General Motors.

The Government assumes that expressions prior to 1930 (as it construes them, contrary to the findings), combined with the fact that General Motors continues to buy substantial amounts of a few commodities from du Pont, prove preferential treatment during all the years thereafter, down to the present.

All of the testimony as to efforts since 1930 to sell General Motors the various types of products made by du Pont disclosed a competitive picture in all respects. See pp. 40-43, 56-57, 71-2, 100-2, *supra*. In some fields du Pont was quite successful with *some* of the General Motors divisions, in others not at all—which is just as it should be in a competitive market if it be assumed, as no one denies, that du Pont is capable of obtaining some business on its competitive merits. General Motors' purchases of three of the four main products which it has obtained from du Pont in recent years—Dulux, Teal for convertible tops, and trim for automobile bodies—did not begin until the early 1930's, 1948 and 1939, respectively, and are not connected with any course of dealing during the earlier period. We have shown that in each instance the merits of the du Pont products at the time were responsible for these purchases. Although purchases of Duco began in the early 1920's, there cannot be the slightest doubt on the record that General Motors began and continued to purchase Duco because it was a new and superior product discovered by du Pont. The bare statistical fact, which is all that the Government presents, that after competitive lacquers came on the market, some of the larger General Motors divisions continued to buy

from du Pont while other divisions did not does not warrant the inference that such purchases are attributable to an illegitimate influence which was not ever shown to have been responsible for the original purchases.

The Government does not mention the other items which General Motors buys from du Pont because they do not support its charges of preference—and it refuses to recognize the fact that they actually refute it. The only one of these items substantial in 1947—antifreeze—was bought from du Pont when other adequate sources of supply were unavailable. After the post-war shortage most of the business went to another supplier. See pp. 101-2, *supra*.

The record thus demonstrates affirmatively, as the trial court's findings show, that General Motors' purchases from du Pont in recent years unquestionably have been at arm's length, and no Government evidence relating to the same or even reasonably contemporary transactions indicates otherwise.

As to tetraethyl lead and Freon, the Government is in no better position. It has abandoned its objections to the manufacture of Freon by Kinetic (now wholly owned by du Pont), and there is presently intense competition between Ethyl and du Pont in producing and marketing tetraethyl lead, a result contemplated and planned for since 1930 by Ethyl and General Motors officials.

The Government will say that du Pont still owns 23% of General Motors stock, is represented by 5 out of 34 members (about 15%) on the General Motors Board of Directors, and has representation on the Financial Policy and Bonus and Salary Committees of the General Motors Board. But the Government has no evidence that any of these facts had any effect upon trade between General Motors and du Pont. Apart from the facts summarized above as to the absence of any evidence of restriction by

way of preference or otherwise on General Motors' trade, the record affirmatively shows that neither the Board of Directors nor any of its committees—and *a fortiori* those committees whose functions do not relate to trade—ever concerned itself with trade or purchasing policies in the slightest. See pp. 25, 27-8, *supra*.[103]

In sum, the Government's case rests entirely on evidence of disputed significance which relates to things which happened up to 1930. Even if the other evidence of that earlier period—which the trial court found disproved the Government's claim even for that period—be disregarded, all of the evidence after that date proved affirmatively, without any contradiction or impeachment, that du Pont did not control or influence, or receive any preference from, the purchase operations of General Motors.

The principles governing this type of situation have been established and applied in many cases. This is a suit in equity to restrain violations of the antitrust laws in the future.

> "It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. The sole function of an action for injunction is to forestall future violations. * * * All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur." *United States* v. *Oregon Medical Society*, 343 U.S. 326, 333.

Evidence of what has happened in the past, even long in the past, is admissible to illuminate the "connections and

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[103] The only evidence as to du Pont participation in General Motors' affairs in the many years preceding the institution of this suit related to suggestions as to who should be chosen for outside members of the Board of Directors, the organization of the Board's committee system, and an interest in the continued high calibre of General Motors' chief financial officers. Attitude towards du Pont was never taken into account in such matters. See pp. 27-8, *supra*. But in any event, none of this could have, or was proved to have, any effect upon General Motors' trade policies.

meanings" of "currently questioned conduct" (*id.* at 332). But (*id.* at 333):

> "In a forward-looking action such as this, an examination of 'a great amount of archeology' is justified only when it illuminates or explains the present and predicts the shape of things to come."

"The crucial question is whether there was a contemporaneous violation or a threat against which the writ of the court should be directed" (*United States* v. *South Buffalo Ry. Co.*, 333 U.S. 771, 774).

The rule that equitable relief is granted only when the fact of past violations affords a reason for believing that violations will recur in the future has been applied and recognized in a great many antitrust cases, in each of which it was assumed or held that the past conduct was clearly unlawful. *United States* v. *Oregon Medical Society, supra; United States* v. *South Buffalo Ry. Co., supra; United States* v. *W. T. Grant Co.*, 345 U.S. 629; *United States* v. *Borden Company*, 347 U.S. 514, 519; *Maple Flooring Manufacturing Assn.* v. *United States*, 268 U.S. 563, 577-8; *Industrial Association* v. *United States*, 268 U.S. 64, 84; *Standard Oil Co. of Indiana* v. *United States*, 283 U.S. 163, 181; *United States* v. *Reading Co.*, 226 U.S. 324, 346; *United States* v. *United States Steel Corp.*, 251 U.S. 417, 444, 452; *United States* v. *Aluminum Company*, 148 F. 2d 416, 448 (C.A. 2).[104]

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[104] In the *Oregon Medical* case the defendants had abandoned their allegedly illegal course of conduct several years before the suit was begun. This Court agreed "with the trial court that conduct discontinued in 1941 does not warrant the issuance of an injunction in 1949" (343 U.S. at 334). In the *Grant, Standard Oil of Indiana, Reading, Industrial Association, Maple Flooring* and *U. S. Steel* cases, equitable relief was denied where conduct admittedly illegal had been abandoned. In the *Grant* and *Standard Oil* cases the abandonment was after suit was begun; in the *Steel* case 9 months before; in the *Maple Flooring* case several years before; in the *Industrial Association case*, "long before".

If that be the rule even in cases where unlawful acts in the past were proved or admitted, *a fortiori* the same principle must apply when the evidence out of the past was insufficient even to convince the trial court that there was a violation of law then.[105]

Here the trial court has found that there was no violation of law at any time. But if the trial court had found otherwise in this case, with respect to the early period, the principles just summarized would have precluded granting the Government any relief, in the face of overwhelming evidence that there has been no preference of du Pont during the period of at least 19 years before the trial.

The heart of the Government's case is that du Pont has attained an illegal preference with respect to General Motors' purchases of materials. The Government relies on documents almost all of which are at least 30 years old, bare statistics as to percentages of sales, and episodes relating to antifreeze, tetraethyl lead and Freon, which do not involve General Motors' purchasing policies at all. Analysis of the record as a whole and as to each subject the Government relies on, however, proves that there has been and is no policy of favoring du Pont with respect to General Motors trade.

The question before this Court is not whether some items of evidence might support an inference contrary to the

[105] In the *Industrial Association* case, "three or four sporadic and doubtful instances during the period of nearly two years" were held insufficient to establish a conspiracy (268 U.S. at 84). In the *Reading* case the Court referred to evidence indicating that "there occurred a conference in 1896" [16 years before the Supreme Court's decision,] looking to an unlawful arrangement to apportion tonnage. "But the weight of proof", the Court continued, "satisfies us that whatever might have been contemplated or attempted, the scheme proved abortive, or, if attempted, was abandoned long before this bill was filed." (226 U. S. at 346).

findings of the trial court, but whether the trial court's findings based upon the record as a whole are clearly erroneous. Obviously the trial court did not err in looking at all of the evidence and not merely at a few items selected by the Government. We are unable within the compass of a brief to enable this Court to have before it more than a fraction of what the trial court considered in reaching his conclusion. We submit, however, that enough of the record has been summarized to show beyond peradventure that the trial court's findings are entirely reasonable and plainly not clearly erroneous.

This is a purely factual question. There is no room for error of law in a finding that General Motors bought its supplies from du Pont, as from du Pont's competitors, on the merits of the products, in the exercise of its own best judgment, and not because of any limitation resulting from du Pont pressure, coercion, influence, dominance or any understanding resulting therefrom. The findings adverse to the Government on this question are therefore sufficient to dispose of the charge that the Sherman Act has been violated.

III.

THE TRIAL COURT'S FINDINGS THAT DU PONT DID NOT CONTROL GENERAL MOTORS ARE AMPLY SUPPORTED BY EVIDENCE AND INVOLVE NO ERROR OF LAW.

A. The Government's Theories of Control.

The original theory of the Government's case was that General Motors agreed to prefer du Pont over its competitors in purchasing its requirements of materials which du Pont made. General Motors was claimed to have agreed to this either voluntarily or because of coercion by du Pont.

Voluntary agreement by General Motors now is out of the case, by every possible interpretation of the Government's election not to contest the trial court's findings of "no conspiracy". This leaves coercion of General Motors by du Pont, which was only an alternative theory below, an indispensable part of the Government's case.

Du Pont's claimed control of General Motors is described generally as the power "to influence business judgments of General Motors" (Govt. Br., p. 77). Since this case is concerned with trade, the Government properly limits the business judgments to which it refers to the situations "in which du Pont was in competition with other suppliers" (Govt. br., p. 72), and defines the power to be "power over a substantial part of General Motors' trade" (Govt. Br., p. 70), "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" (p. 88).

The Government is careful to disclaim that its position is that such "control automatically follows from some fixed percentage of stock ownership" (Govt. Br., pp. 91-2), such as 23%, though, as we shall show, that is what its argument really comes down to. But in order to have such control, "it is not necessary to hold a majority" of the voting securities (Govt. Br., p. 88). Various factors are to be considered, including the percentage of stock held, the distribution of the stock, the percentage voted at stockholders meetings, the historic relationship of the companies, the number of interlocking directors and officers, and the relationship of the management to the parent company (Govt. Br., p. 92).

We agree that a substantial minority stockholder *may be* the dominant and controlling factor in a corporation, that this does not automatically follow because he holds 23% or some other percentage of the stock, and that the factors which the Government mentions are to be considered. But

those factors, we submit, are not exclusive. The Government ignores, or gives little heed to, evidence as to the *actual* relationship between the two companies over a long period of time.[106]

When the issue is the relationship between two particular companies, this last factor is of special importance. As this Court said in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145:

> "Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case."

The Government has chided the trial court (Jurisdictional St., p. 17-18) with not recognizing the "realities" of corporate life. But the "realities" upon which the Government relies are only the formal relationships between General Motors and du Pont—such as the percentages of stock held, the percentages of stock voted and the number of nominees on the board of directors and certain committees of the board—and the abstract fact that control is sometimes associated with such factors. What the Government fails to recognize is that this case is concerned with the demonstrated realities of General Motors' corporate life, and not merely with considerations which are relevant in dealing with corporations generally, or with mere theories of intercorporate relationships.

The trial court took into consideration each factor the Government relies on. It took into account the extent to which du Pont participated in the choice of General Motors management (R. 316), the number of du Pont representatives on the General Motors board and committees and

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[106] This may fall under the Government's category of "historic relationship of the companies". If it does, our criticism is not of the Government's choice of category, but of its omission to mention most of the evidence which demonstrates what that historic relationship actually was.

the manner in which the board and committees were chosen (R. 308-316), the distribution among 436,500 stockholders of the stock not owned by du Pont (R. 304), the percentage of the du Pont stock to the total voted at stockholders' meetings (R. 322-3), and whether or not du Pont's 23% would have been sufficient to control the company if there had been a contest at such meeting (R. 322-3).

The Government would have the Court stop there, and say that these factors, looked at by themselves, show that du Pont had either working control of General Motors, or a "controlling influence" over it, or, at any rate, would justify a conclusive presumption that General Motors inevitably would act so as to prefer du Pont over its competitors. But the court below quite reasonably did not ignore the remainder of the record and the evidence in it which showed that over a long period of years General Motors had not felt compelled to kowtow to du Pont's wishes, and had not done so.

B. The Evidence on Which the Trial Court Based Its Findings.

The record shows that the General Motors divisions do their purchasing independently of the central management, that the management does not tell them what to buy and certainly has not told them to buy preferentially from du Pont, that the bonus compensation of each General Motors employee who participates in the purchase of supplies is dependent upon the profits of General Motors and his division, as well as the quality of his own work, and that the du Pont Company could go "bankrupt" without his being affected at all. Thus there is every incentive for the purchasing staffs of the General Motors divisions to be loyal only to General Motors, without any regard for the du Pont Company. When there was coordination of purchasing of some commodities in the 1920's, the General Purchasing Committee made it a policy to see that all suppliers, in-

cluding du Pont, were treated alike. See pp. 45-52, *supra.*

Moreover, the record shows that the decentralization of management and the General Purchasing Committee were set up during Pierre du Pont's presidency, when du Pont had the greatest opportunity to coerce the General Motors operating management, had it desired to do so. Instead, that management deliberately was made independent of du Pont control. See p. 13, *supra.*

Of course, the fact that the record shows that for many years General Motors has bought supplies from du Pont on the basis of quality, service and price, as from other suppliers, and that it did not give du Pont preferential treatment, as described in Point II *supra,* pp. 172-183, is the strongest possible evidence that du Pont had no control or coercive influence over General Motors' buying policies.

The evidence also shows that the Board of Directors and its committees were not concerned with or informed about the identity of General Motors' various suppliers. They did not pass upon particular contracts or arrangements, or even fix purchasing policies. They did not determine the compensation by way of bonus or otherwise of the persons who did represent General Motors in those transactions. The record affirmatively demonstrates that the attitude of a General Motors executive towards du Pont had never been taken into consideration by the Board, its committees or anyone else, in determining his authority, his compensation or his advancement. See pp. 23-33, *supra.*

The Government says (Govt. Br., p. 102) that it does not do for the appellees "to assert that perhaps there was control over financial policy, but not over purchasing practice. It is not possible to compartmentalize such authority—it exists or it doesn't exist." The Government's position that control over financial policy cannot be separated from control over purchasing practices is refuted by its own exhibits as to the situation when du Pont first bought its stock in

General Motors. The record shows that separation of authority over finance and operations was exactly what was planned and what happened, up to the time of Durant's collapse. During the brief period of Pierre du Pont's emergency administration, there may have been a partial merging of all management functions. Pierre, however, as a matter of deliberate policy, saw to it that by the time he stepped out, after two and one-half years, the operational management of General Motors, which included its purchasing policies, had been set up on a basis which again separated it from the financial side of the business, in which du Pont retained a representation commensurate with its sizeable investment.

The Government attempts to undermine this picture of complete freedom from du Pont influence at the levels which affect the operations with which we are concerned by treating Sloan, chief executive officer of General Motors from 1923 to 1946, as a du Pont representative, on the ground that he was advanced to the presidency by the du Ponts in 1923 and was shortly thereafter named a member of the du Pont Board of Directors. Much is made of his personal friendship with some of the du Ponts, and of his reference to himself as a "member of the du Pont family."

But this is only a small part of the Sloan story. Sloan did not come into General Motors through du Pont, but through United Motors, a manufacturer of various auto parts, at the time Durant was the head of the company. Prior to that Sloan had headed, and with his father was principal owner of, the Hyatt Roller Bearing Company, which he sold for $13,500,000. See p. 16, *supra*. Thus, when he first came to General Motors he already was a successful business leader in his own right and a man of independent means who had no reason to feel any such concern over his "business future" as the Government suggests might make him subservient to du Pont (Govt. Br., p. 127). Under Durant his abilities brought him further advancement, and he be-

came vice president of General Motors. When Pierre du Pont took over the presidency temporarily in 1920, he soon recognized that Sloan possessed the stature and capacity needed for the chief executive's position. Within two and a half years Pierre resigned, recommending that Sloan succeed him.

It was under Sloan's leadership that General Motors rose from the producer of 12%-18% of the automobiles manufactured in this country to its present position. Sloan's success was achieved in large part because of his policy of *decentralizing* responsibility. He would select the heads of the manufacturing divisions and then give them the freedom of the head of an independent company (R. 992). Although certain staff functions remained centralized, they were largely advisory.[107] Except for the activities of the

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[107] *Contributions to Administration by Alfred P. Sloan, Jr. and GM*, by Ernest Dale, Associate Professor, Cornell Business School, Administrative Science Quarterly, June, 1956, Cornell University:

"Then, in December 1920, Pierre S. du Pont presented Sloan's reorganization plan to the board of directors. (It had been incorrectly assumed that since du Pont himself came from what was then a centralized organization, he would not favor the decentralized pattern Sloan recommended.) Sloan's plan was accepted, largely in its original form, on December 30, 1920. * * *

"Sloan's organization study—the report on which the GM reorganization was based— is a remarkable document. Almost entirely original, it would be a creditable, if not a superior, organization plan for any large corporation today. * * * It is a landmark in the history of administrative thought." (pp. 39, 40) * * *

"The recommendations of 1920 rested on two principles, which are stated as follows:

"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 enabled to exercise its full initiative and logical development. [Decentralization of operations.]

"2. Certain central organization functions are absolutely essential to the logical development and proper coordination of the Corporation's activities. [Centralized staff services to advise the line on specialized phases of the work, and central measurement of results to check the exercise of delegated responsibility.]" (p. 41) * * *

"The decentralization theory was based on a concept somewhat akin to the theory of atomistic competition—each self-sufficient activity of the corporation would operate on its own within the over-all framework of the rules of a free enterprise system. Freedom of operation would make it possible for each activity and its leadership to contribute to the maximum of their abilities in the light of their superior knowledge of the local situation." (p. 53)

General Purchasing Committee (1922-1933) already described—which were of no help to the Government's theory, although they would have been if that theory had an actual basis—the purchasing functions remained decentralized.

The entire thrust of Sloan's management policies was irreconcilable with the Government's theories of control. If Sloan had permitted himself, or anyone working under him, to feel that du Pont should be favored in the purchasing of supplies, or thought of in any way except as a large stockholder with an interest in the success of General Motors identical with that of other stockholders, it would have impugned the sincerity and undermined the effectiveness of his basic policy of decentralized authority.

There is no support in the record whatsoever for the Government's intimation that because the officers of General Motors down the line were for many years chosen by Sloan, and because Sloan was originally selected by du Pont, General Motors executives deemed themselves bound to favor du Pont in any way. This false picture rests on the premise that Sloan himself was a du Pont man.

Sloan testified for 11 days, on direct and cross-examination. A reading of the printed page cannot possibly convey to the Court an appreciation of the strength of his personality, of his integrity, and of the fact that his business life had been General Motors and nothing else.[108] He stated (R. 1284):

> "My responsibility was General Motors. I had a large interest in General Motors, and my position as an industrialist entirely depended on General Motors, and nothing else. In all my life, I really lived General Motors."

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[108] His membership on the du Pont Board of Directors was mainly a formal one; during the 19 years of his most active direction of General Motors' affairs he seldom went to meetings of the du Pont board; in many years he attended none of them. (R. 118-91; GMX 15-16, R. 1190, 6594-6601)

Sloan testified on cross-examination (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 operations 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."

The trial judge, who had ample opportunity to appraise the witness and evaluate his testimony, was entitled to believe this, particularly in the light of the mass of corroborative evidence. The court referred to the fact 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 * * *."

The court found (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 interest of General Motors."

The Government's theories of "working control" and "controlling influence", which no longer rest on any voluntary agreement, boil down to an argument that since 23% of the stock of General Motors is owned by du Pont, the remainder being widely held, the management of General Motors must fear that if it does not bow to the wishes of du Pont it will be voted out of its jobs at a stockholders' meeting. Even if du Pont would not necessarily prevail in a proxy contest, the Government argues, it would be a formidable opponent and therefore the management of

General Motors would seek to avoid the "substantial likelihood" that du Pont might be able to oust it by avoiding "any action displeasing to du Pont." (Govt. Br., p. 97.)

Sloan's testimony reveals that he had no such fear. The trial court found his testimony on that subject "both reasonable and persuasive." (R. 323). Sloan testified (R. 1331-2, 1336):

> "I believe that in those years, and all the other years, that the stockholders would be guided by the records of General Motors Corporation, both with respect to its advancement of its position, its earnings, dividends, and so forth. * * *
>
> "I think you have got to know what the issue is, what the position of the corporation was, the attitude of the stockholders, how liberally they have been treated, the confidence they had in the management, and all of those things very definitely enter into it according to my best judgment. * * *
>
> "* * * *I am of the opinion that with the record of General Motors—I will not elaborate on that—that if it came to an issue, the stockholders would support the management.*
>
> "That is only an opinion, but of course it would depend a great deal on the then existing circumstances as to the status of the business. If the management let the business down, and the record was unsatisfactory, that might change it. I don't think you can deal with a case of that kind. It is too hypothetical, because you don't know the circumstances under which the issue would arise." (Italics supplied.)

Sloan's testimony was marked by a becoming modesty as to the magnificent record of achievement by the General Motors management under his guidance. It is well known that management has substantial advantages in a proxy battle. While 23% of the stockholdings in a widely held company, when supported by the power of management,

might virtually insure control, or at least create a "substantial likelihood" of it, the same situation would not exist if management were on the other side. When the management possesses a national reputation for efficiency and consistently has returned large profits to its stockholders, as is the case with General Motors, the opposition would need a strong case, in addition to 23% of the stock, to create even a serious threat of overthrowing management.[109]

The Government seems to suggest that the trial court should not have believed the perfectly reasonable testimony of Sloan because, at some meetings in the past, du Pont's shares constituted a majority of the shares voting. But that proves nothing as to what would happen in case of a conflict. Shareholders often do not bother to send in proxies when nothing controversial is at stake. Sloan testified that in the event of a conflict a much larger percentage of the stockholders would vote. (R. 1332-3).[110]

The trial court found (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."

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[109] That stockholders will support a management which is successful and producing good dividends, see Knauth: *Managerial Enterprise, Its Growth and Methods of Operation*, 1945, p. 45; Bonneville and Dewey: *Organizing and Financing Business*, 1945, p. 78, 79; Emerson and Latcham: *Shareholder Democracy—a Broader Outlook for Corporations*, 1954, p. 147, 148.

[110] Moreover, the exhibit on which the Government relies shows that since 1938, when du Pont's stockholdings had been reduced to 23%, the percentage of shares voted by it at stock-holders' meetings has fallen steadily from 39.6% to 29.9% (GX 1307; R. 664, 5230).

It is important to remember that we are not here concerned with control in the abstract. The question is whether du Pont controlled General Motors' trade relations sufficiently to force or induce General Motors to give du Pont preferential treatment. If du Pont had sought to overthrow the General Motors management for its failure to comply with du Pont's wishes in that respect, it does not take a mathematician to figure out what would happen. On such an issue the other shareholders would certainly support a management which they know to be independent, efficient and successful.

The trial court, of course, did not rely entirely, or even mainly, upon Sloan's testimony on the question of control. It relied upon the entire record, including the evidence of what happened throughout the history of the relationship between General Motors and du Pont. That history, which reveals what was done by Sloan and his associates and successors, contains the strongest possible confirmation of their testimony that they did not feel under any compulsion to grant trade preferences to du Pont.

What happened when Sloan, or his subordinates, and the du Ponts disagreed most clearly demonstrates whether or not Sloan was dominated or influenced by reason of the du Pont's stockholdings. In the Statement of Facts we have called attention to the many instances in which he refused to follow du Pont's wishes. See pages 18-23, *supra*. These were situations in which the du Ponts made their desires known. We do not have to speculate here about subtle or psychological, but unexpressed, influence, which the Government insists inevitably would be effective in controlling General Motors' actions. The man who, as a matter of principle, forced Raskob to resign as the chief financial officer of General Motors in 1928, against such strong opposition of all the du Pont family that Pierre felt impelled

to resign as Chairman of the Board of General Motors, would not have been coerced by "subleties" when he was not swayed by active opposition.

General Motors, acting through Sloan, Kettering, Pratt and others, refused to go along with du Pont in its attempts to obtain a general chemical research agreement, over-all contracts to cover General Motors' fabrics requirements (see Govt. Br., p. 32, pp. 36-7), or a policy of reciprocity in purchasing, or to heed du Pont's request that General Motors stay out of the oil burner business, or research in synthetic rubber. As we have seen, Pratt rebuffed the du Pont executives repeatedly on matters of policy, although he occasionally did a minor favor for an old friend in the du Pont company when he felt that it was consistent with General Motors' interests. Sloan overrode du Pont's wishes in refashioning the General Motors' committee system in 1937. He did not inevitably follow du Pont's suggestions as to directors. He gave them respectful consideration, as he did other suggestions, though Carpenter, the president of du Pont, felt he had "a low batting average" with his nominations for outside directors. Irenee and Lammot du Pont, successively presidents of du Pont, expressed their dissatisfaction with many of the policies approved by Sloan in the development of tetraethyl lead. Irenee opposed the maintenance of standards for purchasers of lead and the suspension of operations after the Bayway disaster. Lammot opposed the entrance of Ethyl into the production of lead, which resulted in its becoming a competitor larger than du Pont. On all of these matters, Sloan and his associates in General Motors acted independently, and contrary to du Pont's express wishes. See pp. 16, 18-22, 25, 67-8, 85-7, *supra*.

In the light of all this, the statement in the Government brief that du Pont's position "insures avoidance by the management of any action displeasing to du Pont" (p. 97)

bears no resemblance to the facts of record. If the General Motors management would not accept du Pont's efforts to lead it when urged by the most important du Pont executives, can it be so susceptible to du Pont influence that it inevitably and naturally would do what du Pont desired when du Pont made no effort to impose its will? The Government's theory is that the trial judge was clearly in error because he did not come to the conclusion that General Motors inevitably would act in the way which the record showed it had not acted for 30 years.

The Government argues that in the early 1920's du Pont had "control" of General Motors in a general corporate sense, due to the collapse of Durant, and that therefore the question really is, "Has anything happened to terminate a control relationship which admittedly existed?" The appellees do not suggest that Pierre du Pont did not have general executive direction of General Motors during the short time he was its president, but we do point out that the evidence indicates that even at that time, neither Pierre nor anyone else forced General Motors to adopt a purchasing policy favorable to the du Pont Company.

What stands out from the record as a whole, however, is that since the early 1920's du Pont's participation in General Motors' activities has steadily declined in almost every respect. As it grew in relative size and acquired its present financial and industrial stature, General Motors has come to be unmistakably what Raskob said in 1923 it should be—"a free and independent institution" which would "never again have to look to the du Pont Company or anyone else for support" (GX 185, R. 1142, 7200).

When Sloan assumed the presidency of General Motors, the management became independent of du Pont, as has already been indicated. Within the management, those

persons who have been said to have represented du Pont have gradually been replaced, over the years. No one in the present management, or in the management at the time of the trial, has had any connection with du Pont, and the Government has made no effort to show the contrary. The older du Ponts who had been interested in General Motors' activities since their investment in 1917 had also disappeared from the management of du Pont by 1940.

Although originally du Pont had substantial representation upon the Executive Committee, as well as a majority of the Financial Committee, by 1934 its membership on the Executive Committee had disappeared, and since 1946 it has had no representation at all upon the committee concerned with operating policies, which is what this case deals with. On the Financial Committee, its representation has been reduced from a majority to 3 out of 10.

The du Pont nominees on the General Motors Board and the Financial Policy and Bonus and Salary Committees have not sought to intervene actively in the management of the business. Their presence in these positions is no more than the normal and proper shepherding of a large investment. They have had nothing to do with purchasing policy. There is not a shred of evidence that any of these people ever sought to do anything which could be construed as coercing or influencing General Motors to favor or prefer du Pont in its purchasing policies or anything else—and the evidence of the people on the firing line is that there were no such efforts.

All of the foregoing changed the relationship which existed in and prior to 1923. They have made it increasingly improbable that there could exist such control by du Pont over the operational side of General Motors as the Government claims, but failed to prove, existed even a quarter of

a century ago.[111] 1930 is the last date at which the Government had pointed to any evidence, other than the bare fact that General Motors bought substantial quantities of supplies from du Pont, from which it attempts to infer General Motors' favoritism toward du Pont.

The Government's argument is based upon its erroneous conception of Sloan as a toady, fearful of losing the support of du Pont, rather than as the tough-minded and independent leader of General Motors which he actually was. But even Sloan retired from active duty 10 years ago. No one has connected Knudsen, Wilson or Curtice with du Pont in any way.

Nevertheless, the Government asks that its concept of Sloan's subservience to du Pont, which amounts to a charge that he served two masters, be imputed also to his successors who have been in charge of General Motors and its purchasing and trading policies for a number of years. The forceful characters of Knudsen, Wilson and Curtice, as revealed by their public activities as well as the evidence of their dynamic leadership of General Motors, cannot be reconciled with the conduct which the Government suggests should be imputed to them.

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[111] Government counsel attempt to project the 1920-1923 situation forward into more modern times by quoting the 1944 statement of Tinney, Secretary of the Delaware Realty and Improvement Company, as follows (GX 1304, R. 664, 5525):

"Delaware Realty, at least to some extent, facilitates control of the du Pont and General Motors industries. While liquidation would not eliminate this immediately, it would weaken it; more particularly so with the passage of time" (Govt. Br. p. 18).

The court below found:

"There is no evidence that Tinney knew anything about the relations between du Pont and General Motors and no evidence that he knew anything about the intentions of the individual defendants or other members of the du Pont family or that he was acquainted with their state of mind as it related to Delaware. Pierre S. and Irenee du Pont both testified that Delaware was not organized for the purpose of controlling du Pont or General Motors as charged by the Government and that it was not used for that purpose. Similar testimony was given by other individual defendants. Having heard the testimony of these witnesses, the Court finds their testimony more persuasive than the statement of opinion made by Tinney." (R. 296).

It is to be noted that we do not rely, and the trial court's findings did not rest, merely on the absence of any convincing evidence for any period, and of any evidence at all for many years preceding the trial, that General Motors has been coerced to buy preferentially from du Pont. This defendant relies as well upon the affirmative evidence which showed that in fact du Pont was treated no differently by General Motors than was any other supplier, and upon the affirmative evidence that even the climate in which preferential treatment might have arisen has changed as General Motors has grown steadily and strongly away from du Pont since the early 1920's.

C. The Trial Court Committed No Error of Law in Refusing to Find For the Government on the Issue of Control.

In view of the trial court's findings, the Government agrees that it must show "either that the court below adopted an incorrect test of the meaning of 'control' or that it decided the issue without reasonable support in the record" (Govt. Br., p. 88). We have already shown that the trial court's decision had ample support in the record, and was entirely reasonable.

It is equally clear that the trial court did not apply any incorrect standard or rule of law. The Government contends that control is not an "abstract theoretical conception," that the case is concerned with "control sufficient to insure business preferences" when desired, which "adds up to practical working control," and that "its existence depends upon the actual facts" (Govt. Br., p. 75). We agree with all this. So did the trial court. He examined all the "actual facts" in the record, including those factors relied upon by the Government. The Government's real grievance is that the court failed to arrive at the factual conclu-

sion which the Government sought, not that the court applied any different standard. As this Court stated in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 340-341:

> "* * * The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."

The Government now tries to find an error of law in the trial judge's factual analysis. The Government implies that he did not recognize that a minority stockholder may control the corporation (Govt. Br., pp. 94-95). Nothing in the opinion supports this notion. The fact that the trial court felt impelled to, and did, look to all the evidence in determining whether in *this* case a minority stockholding had resulted in control, shows that the trial court did not fall into any such error of law as the Government suggests.

The Government says (Govt. Br., p. 94) that the court below "seems to have proceeded on the basis that, in order to control, du Pont must have conducted itself as though it held a majority of the General Motors stock." That certainly is the meaning of "working control," which was one of the Government's theories of control. The trial court, however, neither limited its findings to that theory nor rested them on that one test. He found also that du Pont has not been "the controlling force in the direction of General Motors' affairs" (R. 316), which directly meets and disposes of the Government's "controlling influence" theory. Finally, his specific findings that General Motors' purchases were not influenced by any preference extended to du Pont are a complete negation of the Government's theory of "inevitable" psychological control.

The Government also says (Govt. Br., p. 97) that "The outcome of a possible future proxy fight is not an appropriate test of control." We would agree that it is not *the* test of control, but it is a factor which is not irrelevant, and which need not be ignored. Moreover, it was an issue which the Government, not the defendants, injected into the trial. All the trial court did was take into account along with everything else the evidence indicating that it was entirely speculative whether du Pont's 23% interest would prevail in case of a contest. That was certainly not an error of law.

The Government cites a number of cases which hold or recognize that a corporation *may be* controlled by a large minority stockholder, as if that were dispositive of the issue here. Neither appellees nor the trial court have denied that possibility. They only have asserted that such control does not necessarily exist. This Court went no further in the statement from *North American Co.* v. *S.E.C.*, 327 U.S. 686, which the Government cites. It said (327 U.S. at 693):

> "But it does not follow that North American's domination of its system was any less real or effective. Historical ties and associations, combined with a strategic holding of stock, *can on occasion* serve as a potent substitute for the more obvious modes of control." (Italics supplied.)

The Court said "can on occasion," not "always does." The next sentence states only that "Domination *may* spring as readily from subtle or unexercised power as from arbitrary imposition of command." This again was merely a statement of a possibility of fact, not a rule of law.

In *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, this Court was concerned with a company holding one-third of the stock of another, together with a veto power over its decisions by reason of a provision in the corporate

charter requiring an 80% vote to decide major questions. The Federal Communications Commission had held this to be "control" under a statutory provision subjecting to the Act certain types of carriers if they were directly or indirectly controlled by another carrier. This Court did not peremptorily decide that the first company controlled the second, although the case seems like an easy one. It said (307 U.S. at 145-146):

> "Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply *artificial* tests of control. *This is an issue of fact to be determined by the special circumstances of each case.* So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one third of the common stock of the Rochester as *conclusive of the former's lack of control* of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations." (Italics supplied.)

It is to be noted that although the Court was rejecting the suggested rule of law that a company owning one-third of the stock of another cannot conceivably control the second corporation, it was not establishing a converse rule of law that any such stockholding necessarily implies control.

The Government cites a number of cases under the Public Utility Holding Company Act, of which the *North American* case, 327 U.S. 686, is the leading decision in this Court. But those cases arose under a statute the purpose of which was to regulate the holding company relationship as such because of particular abuses in the public utility field. The statute provides that a holding of 10% or more of voting securities of a utility company is presumed to be sufficient to establish a "controlling influence," (defined as something less than actual or working control—*American Gas*

and Electric Co. v. *Commission,* 134 F. 2d 633 (C.A.D.C.), certiorari denied, 319 U.S. 763), but this presumption is subject to rebuttal before the Commission, as this Court recognized in the *North American* case (327 US. at 697).[112]

Thus under the Holding Company Act, a company is given a chance to prove its independence, despite a large minority stock interest. If it fails, the consequence is that it is subject to regulation by the Securities and Exchange Commission, but the relationship does not become illegal.[113]

The Sherman Act contains no such broad, but rebuttable, definition. It reflects a different legislative policy applicable to all business, not just public utilities. And yet the Government would read into it a policy far more stringent than that embodied in the Public Utilities Act, to the effect that a substantial minority stock interest by one business corporation in another must have such an effect on commercial relations between the two companies as to be outlawed.

The cases cited by the Government all are consistent with the findings of the trial court.[114] None of them suggests

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[112] Another section of the Public Utility Holding Company Act defines an affiliate as a company owning 5% of the stock of another company, or any person determined by the Commission to stand in such relation thereto that there is liable to be an absence of arm's length bargaining, so as to require that they be subject to the regulatory provisions of the statute (15 U.S.C. 79b(a) (11)).

[113] In the course of the debate on the bill, Senator Wheeler, chairman of the Committee in charge, said, with reference to the 10 percent clause (79 Cong. Rec. 8397): "That is only prima facie evidence; but even if they hold 40 percent of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company, and the Commission is directed to make a finding and to exempt them if they are not actually controlling the company as the word "control" is defined in the bill.

[114] In the single antitrust case referred to, *Union Pacific Railroad* v. *United States,* 226 U.S. 61, 95-6, the Union Pacific had acquired 46% of the stock of Southern Pacific and had admittedly obtained full control of the latter company. In *Morgan Stanley & Co.* v. *Securities & Exchange Comission,* 126 F. 2d 325 (C.A. 2), the company had not invoked its right to rebut the statutory presumption under the Holding Company Act, and the Court of Appeals merely noted that applying the statute in such cases was not unreasonable, since "much less than a majority of stock is *frequently* sufficient for

more than that a substantial minority *may* possess control of a corporation. They do not foreclose factual inquiry, but invite it. This Court in the *North American* and *Rochester* cases and the lower courts in the Securities and Exchange Commission cases have been careful to note that they were not deciding the factual question for themselves, but sustaining decisions of the fact finding agency as supported by substantial evidence. Although the scope of review is somewhat different in reviewing a trial court's findings, the issue here is just as factual and the findings of the fact finder are entitled to weight, whatever way the issue has been decided.

Government counsel are careful never to say that their position is that a 23% stock interest, plus a somewhat smaller proportion of the Board of Directors, constitutes control as a matter of law. But their argument comes down to the same thing. This is shown by their repeated statements that control is "inevitable" (Govt. Br., pp. 77, 79) in that circumstance, and by their statement that (Govt. Br., p. 79):

> "* * * So long as human activity is influenced by personal interest, the management of General Motors must tend to lean toward du Pont whenever a reasonable choice exists; without instructions, without any communication or guidance, General Motors will prefer its associates over strangers."

These references to "inevitable consequences", and to what

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purposes of control." And the passage from *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 92 F. 2d 580, 590-91 (C.A. 2), aff'd. 303 U.S. 419, which the Government quotes, states only that the rebuttable statutory presumption is not arbitrary and unreasonable since "practical control is *often* exercised and retained, through the ownership by those who are already in *managerial* control of a substantial minority of the voting power." [Italics supplied] *Natural Gas Pipe Line Co.* v. *Slattery*, 302 U.S. 300, cited by the Government at page 89 of its brief, was concerned with the constitutional right of a state to *inquire into* whether contracts between public utility holding companies and their affiliates were at arm's length, even though the parent held less than a majority of the affiliates' stock.

the management of General Motors "must" do, in the face of evidence and findings that it didn't, appear to be an effort to establish what is in substance a conclusive presumption. Whether this be called factual or legal, its effect is to create a rule of law irrespective of the facts—contrary to the Government's statement elsewhere (Govt. Br., pp. 91-2) of its own position and to all of the cases which recognize that control is a matter to be determined upon the facts of each case.

Either the record shows that du Pont exercised a controlling influence over General Motors or it doesn't. If it does, resort to the theory of inevitability is unnecessary. If it doesn't, the theory is obviously fallacious so far as this case is concerned. In either event, the theory does not justify a disregard of the findings, amply supported, that on this record General Motors was not subject to du Pont domination.

Even if the Government were right in the factual premises of its argument and were conceded to be omniscient as to what is "inevitable" in human behavior under given circumstances, its argument does not make out a case under the Sherman Act. The argument postulates that the partially owned corporation, General Motors, has free will in the conduct of its business.[115] By this variation of the Government's theory not only conspiracy is dispensed with, but coercion as well. What remains is only a hypothetical predilection for dealing with a substantial stockholder. That is not "restraint," in any sense that the courts yet have construed the word under the Sherman Act.

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[115] Thus, the Government argument continues (Govt. Br., p. 98):

> "Let it be assumed, for example, that Corporation A purchases a sufficient interest in Corporation B so that, everything else being equal, Corporation B will prefer A over its competitors. At the same time, A has not a sufficient interest to impose its will on B in other matters. B is free to act as it desires, but, because of A's stock holdings, gives it preference. That, we submit, is but another type of 'combination' in restraint of trade."

The theory of inevitable psychological preference thus advanced by the Government would have the practical result that no one could conduct business with a corporation in which that person owned a substantial amount of stock, because it would be presumed conclusively that in all such dealings the corporation would favor its stockholder and therefore would illegally restrain the trade of others. More specifically, it would mean that Curtice, the present president of General Motors, could not lawfully permit General Motors to buy anything from du Pont, even though it were the best and cheapest product of its kind which could be found. No case supports any such view, and the fact that even under the Public Utility Holding Company Act Congress only established a rebuttable presumption proves how unsound it is.

The Government, discarding its former claims of conspiracy by voluntary agreement, has rested its case in this Court squarely upon the theory that du Pont controlled the purchasing policies of General Motors, thereby obtaining preferential treatment for du Pont.

The trial court found, upon the entire record, that du Pont did not have such control of General Motors as would enable it to coerce or dominate General Motors' operating management. It found also that in fact du Pont had not been preferred by General Motors in purchasing but had been obliged to compete for all the business which it obtained from the General Motors divisions. An abundance of convincing evidence supports those findings.

The attempts of the Government to pose its disagreement with the trial court's findings of fact as if they arose from some error of law are transparently artificial. Every relevant rule of law in support of which the Government

has produced any authority was applied correctly by the trial court in deciding the issues of control.

The trial court's findings of "no control," like those of "no preference," are not clearly erroneous, or erroneous in any degree, and they require affirmance of the trial court's judgment in favor of General Motors.

IV.

THE FACT THAT FOR 35 YEARS NO RESTRAINT OF TRADE HAS OCCURRED INVALIDATES THE GOVERNMENT'S THEORY THAT DU PONT HAD BOTH THE POWER TO EXCLUDE COMPETITION AND AN INTENT TO DO SO.

For conduct to constitute a violation of the Sherman Act, there must be an actual restraint or monopoly, a conspiracy or agreement, or power coupled with an intent to restrain or monopolize. Although the essence of the Government's case in the court below was conspiracy and agreement, it has abandoned those claims here. The trial court's findings, amply supported by the record, establish that there has been no actual restraint or monopolization of General Motors trade. The Government failed to prove that du Pont restricted General Motors' freedom to deal with whom it chose, or that General Motors had accorded du Pont preferential treatment because of "power" or "influence" resulting from its ownership of General Motors stock. The Government's argument to the contrary runs squarely into the trial court's findings. (See Point II, pp. 171-95, *supra.*)

The Government argues, however, that du Pont bought the stock "with the intention of getting a preference in the trade of General Motors" (Govt. Br., p. 113). It cites cases holding unlawful either an actual restraint or the "existence of power to exclude competition when it is desired

to do so * * * coupled with the purpose or intent to exercise that power'' (*United States* v. *Griffith,* 334 U.S. 100, 107; *American Tobacco Company* v. *United States,* 328 U.S. 781, 809, 811, 814). And it makes repeated references to the Raskob report of December 19, 1917 (GX 124, R. 479, 3208) and a few other early documents—none later than 1926—which it claims show that du Pont acquired its General Motors stock with the intention of getting all of General Motors' business.

But none of the documents relied on by the Government says that the du Pont company, or anyone connected with it, ever intended to exert coercively any power or influence over General Motors in order to obtain preferential treatment from its purchasing departments. That is only what the Government thinks should be inferred from the documents which it cites. It would have that inference drawn from those documents alone, without reference to the testimony that the writers of them had no such intention or to all of the other evidence, including the fact that no such coercive power or influence ever was brought to bear upon General Motors, which puts those documents in a different light.

The trial court, considering *all* of the relevant evidence, found that du Pont did not have the intention for which the Government contends.

Furthermore, even assuming that there was any evidence of such an intention, it would fall short of an intention to restrain trade or to monopolize. In 1917 and the years immediately thereafter General Motors was a relatively small part of the automobile industry and that industry, in turn, was only a small part of the market for the things which du Pont hoped to supply to General Motors (see Statement of Facts, *supra,* pp. 6-7). Consequently, an intention to preempt the General Motors business would not have in-

volved a sufficient share of the relevant market to violate the antitrust laws. (See *infra*, pp. 223-8).

Moreover, quite apart from the evidence which supports the trial court's findings on both control (power to exclude) and intent, we submit that the doctrine set forth in the cases referred to above, that power to exclude competition coupled with an intention to do so is unlawful, cannot be applied reasonably, or consistently with the context in which those cases were decided, when, as here, no exclusion of competition has resulted over a long period of time.

It seems obvious that when monopolization has not occurred in fact during a period of many years, either the power or the intent, or both, must have been absent. If power existed, but was not exercised for such an extended period, the possessor could not have intended to exercise it. If the intent were held to have existed over such a long period of time, but had not resulted in monopolization, it must have been because the possessor lacked the power to implement such intent.

In the *American Tobacco* case it was found that the defendants had adopted and practiced restrictive arrangements both in the purchase of tobacco leaf and in the merchandising of cigarettes which plainly were exclusionary in purpose and effect and could have no other result than that of curtailing existing competition or inhibiting potential competition. Under those circumstances, the exercise of the monopolistic power through trade practices, with the obvious intent of monopolizing, rendered unnecessary any evidence of specific instances of the exclusion of competition.

The same thing is true as to *United States* v. *Paramount Pictures*, 334 U. S. 131, where this Court held that proof of specific instances of exclusion was not necessary to the Government's case. There the defendants had formulated a framework of trade practices and had perfected a

network of interdependence which specifically were found to have been exclusionary in intent and in necessary effect.

In the *Griffith* case the defendants had used their circuit buying power to obtain monopoly rights in the form of exclusive privileges which were unavailable to their competitors (334 U.S. at 109):

> "It cannot be doubted that the monopoly power of appellees had some effect on their competitors and on the growth of the Griffith circuit."

It is one thing to hold, as in the cases discussed above, that specific proof of exclusion or elimination of competition may be dispensed with where both the power and intent to monopolize have been established convincingly by other evidence. It would be quite another thing to hold, as would be necessary in order to apply the "power plus intent" rule to this case, that a court may disregard the logical compulsion of the fact that the natural effects of the possession of power to monopolize coupled with intent to monopolize have failed to materialize over a period of more than three decades.

The Government further contends that even if a specific intent has not been shown, the "inevitable result" of du Pont's ownership of General Motors stock is that it would receive trade preference. The same answer applies here. If there was no such trade preference for many years preceding the trial, there is no room for the argument that any such result was "inevitable". The Government relies on such concepts as "inevitability" to conceal its lack of evidence, in disregard of the affirmative evidence that General Motors did not buy on a preferential basis.

V.

THE GOVERNMENT HAS NOT PROVED THAT COMPETITION IN A MARKET HAS BEEN RESTRAINED OR MONOPOLIZED.

There is an additional reason, not reached by the trial court in its findings, why the Government failed to prove any violation of the Sherman Act.

In the Statement of Facts (*supra*, pp. 7-8) we have shown that both at the time of du Pont's acquisition of stock in General Motors and at the time of trial, du Pont's sales to General Motors and to the entire automobile industry constituted a small proportion of the market for the products which it could sell to General Motors. The trade which appellees are alleged to have restrained or monopolized is in the commodities which General Motors buys from du Pont. The Government has chosen to rest its case on the items bought in largest volume, finishes and fabrics. If the market for these products were solely or mainly the General Motors Corporation, or the automobile industry as a whole, General Motors' volume and present share of the automobile industry might constitute a market large enough for the Government to rely on. But the record shows that the market for these products is not so limited.

Both in 1917 and today the varnishes, enamels and lacquers such as are used on automobiles were and are used on many other products; in 1948 du Pont's sales to General Motors constituted less than 4% of all sales of such products. (See p. 8, *supra*.) In 1917, when General Motors' share of the much smaller automobile market was 11%, the percentage was undoubtedly much less.

The record also shows that the kinds of fabrics used for automobile trim (artificial leather) and convertible top material are used in the manufacture of many other products, such as furniture, luggage, brief cases, baby carriages, has-

socks, bicycles, sporting goods, footwear, belts and table mats, *inter alia*. General Motors' purchases of $3,700,000 of these fabrics from du Pont constituted only 20% of du Pont's fabric sales and 1.6% of the total market. (See p. 8, *supra*.)

We submit that even the exclusion of competition resulting from complete vertical integration—which is not illegal unless competition in a substantial portion of a market is restrained (*United States* v. *Columbia Steel Co.*, 334 U.S. 495)—does not violate the antitrust laws when so small a percentage of the competitive market is affected. The result must be the same when a 23% stock interest is involved. No case suggests that a preferential buying policy, such as the Government has alleged but not proved, affecting such a small percentage of a market would be illegal.

The Government proved only that du Pont's sales of finishes and fabrics to General Motors were large in volume, and that General Motors was the leading manufacturer of automobiles for the later years covered by the record, its proportion then running from 38% to 45%. The Government did not seek to show that the identical products were not used on a large scale for many other purposes in many other industries, as the record, as well as judicially noticeable statistics, show they were. Nor did the Government prove that the automobile industry in general, or General Motors in particular, comprised a large or substantial share of the total market. But it is the share of the market affected, not merely the amount sold to a single customer, which is significant antitrustwise.

Fargo Glass & Paint Co. v. *Globe American Corp.*, 201 F. 2d 534 (C.A. 7), certiorari denied, 345 U.S. 942, holds that the effect upon the market for the product, not upon transactions of the acquired company, is controlling. There the Maytag Company had bought 40% of the stock of the

Globe Corporation, a manufacturer of gas ovens, in order to obtain all of Globe's output, amounting to about $5,000,000 a year, for distribution by Maytag. This caused Globe to cancel a number of agreements with local distributors and dealers including the plaintiff. Unquestionably the acquisition restricted the market for Globe's output. But the evidence showed that there were about 70 manufacturers of gas ranges, that Globe was about eighteenth in size, selling a little less than 2% of the total, and that accordingly the plaintiff had other sources of supply readily available. The court accordingly held (p. 540) that neither the Sherman Act nor Section 7 of the Clayton Act had been violated, inasmuch as there was no evidence that "Maytag intended to monopolize the trade of selling gas ovens," even though it was obviously monopolizing the entire market for Globe's gas ovens.

The Government might have been warranted in relying on General Motors' share of the automobile industry as being a substantial enough part of the market if the automobile industry had been the sole market, as it would be for such a product as tires (as to which the Government has abandoned its case), salable in no substantial market other than the manufacture of automobiles. But to take an example which differs only slightly from the actual case, General Motors doubtless buys a large quantity of pencils and paper clips, though certainly only a very small percentage of the total market for those products. For General Motors to enter into a requirements contract for its pencils or clips would not affect a substantial enough portion of a market to be unlawful.

Here the effect upon competition in the paint and fabrics markets of the conspiracy originally alleged, whereby General Motors was to buy all possible supplies from du Pont, would have been the same as if du Pont had acquired 100%

interest in a company consuming 1.6% of the kinds of fabrics it manufactured, and perhaps 4% of the kinds of finishes. (The effect of the preferential buying policy to which the Government has now reduced its charge, and which the court below found not to exist, would obviously be much less.) Neither the effect nor its illegality can be different because the company is a very large consumer or manufacturer of other products.

The Government doubtless will stress the great size of General Motors. But this case does not involve any transactions of great magnitude in proportion to the pertinent market.

We recognize, of course, that this Court has stated that in some circumstances "It is unreasonable *per se* to foreclose competitors from any substantial market" (*International Salt Co.* v. *United States,* 332 U.S. 392, 396; *Fashion Originators Guild* v. *Federal Trade Commission,* 114 F. 2d 80 (C.A. 2), aff'd. 312 U.S. 457), and that it is enough if some "appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy" (*United States* v. *Yellow Cab Co.,* 332 U.S. 218, 225). If this generalization were taken literally all large-scale purchase contracts, and all vertical integration—the natural result of which is that "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)—would become illegal *per se.* The *Report of the Attorney General's National Committee To Study the Antitrust Laws* states (p. 48):

> "Under Sections 1 or 2, *Columbia Steel* makes clear that this concept of the market cannot be invoked whenever competition is excluded for a substantial volume of business, as in ordinary cases of vertical integration. Their legality does not turn on the intentional monopolization of the business of the company

> integrated. This would make all vertical integration illegal under Section 2. Instead, the legality of integration rests on the extent to which analysis reveals that market competition is restrained."

The *Yellow Cab* case was concerned with allegations that a cab manufacturer required affiliated taxicab companies in four cities to buy exclusively from it. In those cities the affiliates operated various percentages up to 100% of the taxicabs, so that the alleged exclusive dealing requirement established local monopolistic situations. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 521, the Court noted that there was charged in the *Yellow Cab* case "a plan, an intent, to monopolize the cab business, from manufacture through operation in the four large cities". The *Columbia* case construes the *Yellow Cab* decision as not supporting the theory that all exclusive dealing arrangements or vertical integrations are illegal *per se* whenever they involve substantial amounts, but not a substantial portion of the market (334 U.S. at 523, 525).

Restraint of a substantial quantity by itself may be unlawful when it "falls within the class of restraints that are illegal *per se*" (334 U.S. at 522), as in the *International Salt* and *Fashion Guild* cases, or within a category of restraint explicitly singled out by Congress as obnoxious, as in Section 3 of the Clayton Act (*Standard Oil Co.* v. *United States,* 337 U.S. 293, 311-314). The *Standard Oil* case noted specifically that "We are dealing here with a particular form of agreement specified by §3 and not with different arrangements by way of integration or otherwise, that may tend to lessen competition" (337 U.S. at 311).

These cases together, and the *Yellow Cab* case on its facts and as construed in *Columbia Steel,* do not hold that even a vertical integration, which necessarily will eliminate

competition for the products of the affiliated company, is illegal whenever the transactions between the affiliated companies are substantial in volume. There must be a restraining effect upon competition in the market, national or local, as the case may be, of which the intra-company transactions are a part.

This principle is plainly applicable here, where the most that is now alleged is that a 23% stockholder received a preference. Such restraint even if proved would not be unlawful *per se*. The burden was on the Government to prove that a sufficient portion of a market was affected, not merely that the sales to General Motors were large. It made no effort to meet this burden—and what evidence there is in the record on the subject shows that the contrary is true. The Government's case is therefore defective for this reason, as well as for those mentioned by the trial court.

VI.

THE GOVERNMENT IS NOT ENTITLED TO RELIEF UNDER SECTION 7 OF THE CLAYTON ACT.

Section 7 of the Clayton Act, before the 1950 amendment which is admittedly inapplicable here, provides that:

> "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."

The purpose of this provision was to reach in their incipiency acquisitions which were likely to restrain or mo-

nopolize commerce—not to require the divestiture of stock over 30 years after an acquisition, when no restraint or monopolization has been shown.

We do not contend that the Government is barred merely because it does not proceed under the Clayton Act until many years after the acquisition.[116] But when the Government brings a proceeding 30 years after a purchase of stock, it must pass two barriers, which would coalesce into one in a suit brought near the time of the acquisition. It must show:

(1) *That the acquisition was unlawful when it was made.* Section 7 only makes acquisitions unlawful in certain circumstances, not the retention of stock lawfully acquired. It has never been thought to apply retrospectively so as to invalidate acquisitions lawful when made. We do not deny, however—indeed, we insist—that it is proper to take into account evidence as to what happened after the acquisition occurred in order to determine whether at the time of the acquisition there was a reasonable probability of a lessening of competition or a monopoly.

(2) *That the acquisition will be harmful to, or likely to harm, competition at the time suit is brought.* For when the Government's action is instituted 30 years later, and there has been no injury to competition and no present probability that there will be, equity will not act even though a court, years ago, might

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[116] "The lapse of time, indeed, may not condone the offense if offense there was. It, however, may call offense in question and be an element in the refutation of accusations long deferred, or determine against particular remedies." *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32, 45, 46.

> have found a reasonable probability of a restraint which never occurred in fact.[117]

Here the trial court found "no basis for a finding" that there (1) "has been" or (2) "is" "any reasonable probability of such a restraint within the meaning of the Clayton Act" (R. 466). We submit that both of those findings are clearly correct, on the basis of the record as a whole. In view of the 30-year gap between acquisition and suit, unless this Court can say that *both* are clearly erroneous, the decision of the trial court as to the Clayton Act must be sustained.

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[117] Section 7 has previously generally been regarded as not applicable to vertical combinations at all. The Federal Trade Commission, which has administrative authority under Section 7, stated as recently as 1955 that:

> *"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." Federal Trade Commission, *Report on Corporate Mergers and Acquisitions* (1955), p. 168 (Italics supplied)

The Federal Trade Commission on a number of occasions has described the section as prohibiting "acquisition of stocks in competing corporations". Report of the Federal Trade Commission on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. 1 (1951); Federal Trade Commission, Annual Report, 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).

A 1947 Report of the House Judiciary Committee in connection with an earlier effort to amend Section 7 described the scope of the section as prohibiting "the acquisition of stock of competitors." H. Rep. No. 596, 80th Cong., 1st Sess. 4 (1947). Indeed, the Government's brief recognizes that the House Committee Report on the 1950 Amendment to Section 7 states that "It has been thought by some that this legislation applies only to the so-called horizontal mergers." H. Rep. 1191, 81st Cong., 1st Sess. p. 11 (1949).

So far as we have been able to discover, neither the Federal Trade Commission nor the Department of Justice, apart from this case, has ever sought to apply Section 7 (prior to the 1950 amendment) to a vertical integration. This interpretation of a statute as inapplicable to circumstances which must have frequently recurred during the period between 1914 and 1950 is entitled to great weight. *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349.

A. There Was No Violation of the Clayton Act When the Stock Was Acquired.

Du Pont bought $25,000,000 worth of General Motors stock in December 1917, and another $25,000,000 (which, in view of an enlargement of General Motors' capital, still left it with about 23%) in 1919.[118] We submit that these acquisitions were not unlawful at that time (1) because there was no reason in those years for believing that the supplies needed by General Motors would constitute a sufficiently large proportion of a market for competition to be probably impaired, even if General Motors' purchases of some of its supplies were restricted to one company; and (2) because subsequent facts, which can be considered in deciding whether there was a reasonable probability at that time, show that there was no such probability.

1. In 1917-1920, when du Pont acquired its General Motors stock, there was no reasonable probability that this would lessen competition or tend to create a monopoly in the market for the products du Pont was selling to General Motors.

The question is not whether there was a reasonable probability that du Pont might secure substantially all of General Motors' business in finishes, artificial fabrics and celluloid. At that time, as we have pointed out, General Motors was only a small proportion of the market for those products—not only because it was a small part of the automobile industry, but because the market for those products was not restricted to that industry. The Government made no effort to show General Motors' proportion of the total market, although the burden was on it to do so. The record and official sources show that General Motors' share of the

[118] Late in 1920 it also acquired the stock purchased from Durant, but this was disposed of long before suit was brought. See pp. 11-12, 13-14, *supra*.

automobile industry in this period ran from 11-19%. The General Motors divisions together in 1917 sold only about one-quarter of the cars sold by Ford. Federal Trade Commission, *Report on Motor Vehicle Industry,* 1939, p. 27. Probably General Motors consumed no more than about $1,000,000 amounting to 1.4% of the market for varnishes, lacquers and japans. Du Pont sold $153,000 worth of celluloid, a little over 2% of its production, to Buick and Chevrolet. See pp. 6-7, *supra.* No precise figures are available for the kinds of fabrics here involved, but the record does show the use of those fabrics for many purposes outside of the automobile industry. See pp. 6-7, *supra.*

Thus, when the du Pont Company acquired its General Motors stock, General Motors as a customer was neither a "substantial market", nor a "substantial share of the line of commerce affected". (Cf. *International Salt Co.* v. *United States,* 332 U.S. 392, 396; *Standard Oil Co.* v. *United States,* 337 U.S. 293, 314). Even if a supplier had been able to preempt all of the General Motors' market for finishes, artificial fabrics and celluloid at that time, there would not have been a substantial diminution in competition in the market for those products. Certainly not enough of the market would have been affected to control price or to keep competitors from having a large number of other outlets.

The *Report of the Attorney General's National Committee To Study the Antitrust Laws,* agreeing with the decision of the Federal Trade Commission in the matter of *Pillsbury Mills,* F.T.C. Dkt. 6000 (1953), states (p. 122):

> "* * * that the effect of a merger must be tested with reference to carefully defined markets in regions where the merging companies do business. For Section 7 cannot be satisfied by a mere showing that the merging companies do a large dollar volume of business. * * *

* * *

"The inquiry under Section 7 typically occurs in two settings: cases of vertical integration, involving noncompeting firms in related markets, or horizontal mergers, involving combinations of competitors. The legality of a vertical acquisition may turn on whether the integration significantly restricts access to needed supplies or significantly limits the market for any product. In short, is there a reasonable probability that the merger will foreclose competition from a substantial share of the market. Sometimes, the market share foreclosed may be so large as to support the necessary inference of substantially lessening of competitive opportunity. In others, different market factors may be equally significant in determining whether Section 7 has been transgressed. In no merger case—horizontal, vertical or conglomerate—can a 'quantitative substantiality' rule substitute for the market tests Section 7 prescribes.

* * *

(p. 125) "Similarly, in a vertical acquisition, the fact that competitors of one company are foreclosed from selling to the other need of itself signal no reasonable probability of a substantial lessening of competition or tendency to monopoly. On the contrary, the integration may create a company better able to compete with larger rivals. In addition, it may mean economies which in a competitive market may spell consumer savings. The question therefore is not merely whether competitors of either of the merging companies are denied access to outlets or sources of supply but whether companies competing, buying, or selling in the markets in which either company operated may, as a result of the acquisition, face a substantial lessening in their opportunity to take independent competitive action."

The Government cites the *International Salt* and *Standard Oil* cases as authority for the proposition that whenever a large amount of commerce is affected, the Clayton Act is violated. These cases arose under Section 3 and not

Section 7. They cannot reasonably be thought to require construing the latter section as forbidding all stock acquisitions affecting a quantitatively large amount of commerce, irrespective of the actual effect on the competitive markets. (Cf. *United States* v. *Columbia Steel Co.*, 334 U.S. 495.) If that were not so, such mergers as have recently occurred in the automobile industry, between Studebaker and Packard and Nash and Hudson, which involved quantitatively much larger units than either the *Standard Oil* or the *International Salt* cases, would have been unlawful.

If Congress had meant to outlaw all substantial acquisitions, the statute would have said so. The language of Section 7 does not forbid all acquisitions, or all large acquisitions. Even as to the horizontal acquisitions which are most likely to impair competition, the section applies only

> "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."

Section 7 has never been construed as prohibiting all large-scale acquisitions, where no such effect on commerce is to be anticipated; the courts have always paid attention to the statutory language. *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 298; *Vivaudou* v. *Federal Trade Commission*, 54 F. 2d 273 (C.A. 2); *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117 (N.D. Ohio); see also *In the matter of Pillsbury Mills*, F.T.C. Dkt. 6000, December 28, 1953.[119]

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[119] The House Report on the 1950 Amendment to Section 7 (H.R. 1191, 81st Cong., 1st Sess., 1949) states (p. 7):

"The language in the amendment it will be noted follows closely the purpose of the Clayton Act as defined by the Supreme Court in the *International Shoe* case."

The same assertion was made in debate on the Senate floor by Senator O'Connor, the Senate floor manager. (96 Cong. Rec. 16485 (1950).)

The application of the *Standard Oil* and *International Salt* cases to Section 7 was recently considered by Judge Maris, speaking for the Court of Appeals for the Third Circuit, in *Transamerica Corporation* v. *Board of Governors*, 206 F. 2d 163, certiorari denied, 346 U.S. 901, where he pointed out (p. 170):

> "The situation with respect to corporate stock acquisitions, the subject matter of section 7, is wholly different, however. For the acquisition of the stock of two or more corporations engaged in interstate commerce is not per se a violation of the section. 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 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. Evidence of mere size and participation in a substantial share of the line of business involved, the 'quantitative substantiality' theory relied on by the Board, is not enough."

To the same effect see *United States* v. *Brown Shoe Company*, January 13, 1956, E.D. Mo., C.C.H. Trade Reg. Rep., par. 68, 244, pp. 71, 114.

Since the Government introduced no evidence in this case as to the relationship between du Pont's possible sales to General Motors at the time of the acquisition of General Motors stock and the markets for the products involved, its case under the Clayton Act is defective for failure to prove that competition was likely to be affected.

2. When a Section 7 proceeding is commenced close to the time an acquisition takes place, the finder of the facts

will necessarily have to speculate as to whether an acquisition will probably have the effect of substantially lessening or restraining competition. But when the Government does not proceed until years later, "when the picture [becomes] clear" (Govt. Br., p. 148), such speculation is unnecessary. It is then appropriate to look to facts subsequent to the acquisition in determining whether there was any reasonable probability that competition might be impaired. If there has been no restraint for 30 years after the acquisition, it would hardly be reasonable to find that there was a substantial probability of restraint. Subsequent events are helpful in appraising the events of any particular period, particularly when what is to be determined is the probable effect of the events of that period in the future.

> "Experience is * * * available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within." (*Sinclair Refining Co.* v. *Jenkins Co.*, 289 U.S. 689.)

It was because of the absence of any restraint for over thirty years that the trial court was of the opinion that there was no basis for a finding that there "has been any reasonable probability of such restraint within the meaning of the Clayton Act" (R. 466). Such a reasonable finding is not clearly erroneous.

B. There Was No Violation of the Clayton Act, Or Reason for Granting Relief Thereunder, at the Time Suit Was Brought.

Even if it be assumed that there was in 1917-19 a reasonable probability that du Pont would secure all of General Motors' business, and that this was a sufficient portion of a market to subject the acquisition to Section 7, the Government is not entitled to prevail now.

The record establishes, and the trial court found, that for many years before this case was instituted, General Motors has bought its supplies on a competitive basis without according du Pont a preference,[120] and that there has not been, and was not at the time of the trial, any impairment of competition or tendency toward monopoly. When there has been such a long intervening period between the acquisition and suit, in which no restraint occurred, it would be absurd to hold that the Government was entitled to relief now because of what might be deemed a probability, unrealized, of injury to competition thirty years before.

Courts of equity will not act unless there is danger of violation in the future; that rule should be decisive here. This principle applies in antitrust equity cases as in others. *United States* v. *Oregon Medical Society,* 343 U.S. 326, 333; *United States* v. *W. T. Grant Co.,* 345 U.S. 629; *United States* v. *South Buffalo Ry. Co.,* 333 U.S. 771, 774. Apart from this general principle, however, consideration of the purpose of Section 7 leads to the same conclusion.

Congress was seeking in Section 7 to bar acquisitions of stock which would deleteriously affect competition. The object was not to wait until a restraint of trade or monopolization had occurred, but to grant relief as a preventive measure to protect the public against competitive effects which might be regarded as reasonably likely in the future.

Proof that for thirty years after an acquisition competition has not in fact been harmed demonstrates as plainly as anything can that that particular acquisition did not contravene the policy of Section 7. It demonstrates instead that if anyone had guessed, no matter how reasonably, at the time of the acquisition that competition would probably have been lessened, he would have been wrong. Although

[120] The Government has abandoned its charge that there was any agreement or understanding that du Pont be favored. See p. 152, *supra.*

Section 7 permits the fact finder to act upon the basis of reasonable conjecture when necessary, as it is when the Government seeks to protect competition against probable future impairment, the section was not intended to perpetuate error when sufficient time has elapsed to permit the test of experience to be substituted for conjecture.

We submit, therefore, that when suit is brought many years after the acquisition, the fact that competition has not been restrained is sufficient to defeat the Government's case.

The same result is reached if the test of "reasonable probability" is applied at the later date—although, as we have said, actual effect should supplant conjecture when the facts permit. But the absence of any actual restraint for many years preceding the suit in itself demonstrates that restraint in the future is not likely. Clearly this is so when, as here, the only change in substance in recent years has been in the direction of *diminishing* du Pont participation in General Motors' affairs. Certainly a finder of fact can reasonably conclude that, when there has been no restraint which lessened competition for many years, there is no reasonable probability of any such effect in the future.[121]

Here the trial court did so find. After stating that the challenged acquisition took place "over 30 years ago" and that no restraint had resulted "in those many intervening years", the court found that:

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[121] Since, so far as we can discover, there are no cases in which Section 7 has ever been invoked many years after the acquisition of stock took place, there are no judicial decisions under that section which deal with this problem. But this Court has recently held under Section 8, which forbids interlocking directorates among corporations which are in competition, that a trial judge may deny relief when the violation ceased after the complaint was filed, on the ground that recurrence was unlikely. *United States* v. *W. T. Grant Co.*, 345 U.S. 629. The same must be true under Section 7, if there is no probability of violation at the time of the action—and even more clearly where the feared effect on competition has not occurred for many years before.

> "there is not * * * any basis for a finding that there *is* * * * any reasonable probability of such a restraint within the meaning of the Clayton Act." (R. 466) (Italics supplied.)

Such a finding was obviously not clearly erroneous.

CONCLUSION.

For the reasons set forth above, the judgment below should be affirmed.

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