DISTRIBUTIONS PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

1340 -1

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS

FIRST SESSION

ON

S. 200

A BILL TO AMEND THE INTERNAL REVENUE CODE OF 1954 SO AS TO PROVIDE FOR RECOGNITION OF GAIN OR LOSS UPON CERTAIN DISTRIBUTIONS OF STOCK MADE PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

MAY 26 AND 27, 1959

Printed for the use of the Committee on Finance

UNITED STATES
GOVERNMENT PRINTING OFFICE
41866 WASHINGTON : 1959

COMMITTEE ON FINANCE

HARRY FLOOD BYRD, Virginia, *Chairman*

ROBERT S. KERR, Oklahoma
J. ALLEN FREAR, Jr., Delaware
RUSSELL B. LONG, Louisiana
GEORGE A. SMATHERS, Florida
CLINTON P. ANDERSON, New Mexico
PAUL H. DOUGLAS, Illinois
ALBERT GORE, Tennessee
HERMAN E. TALMADGE, Georgia
EUGENE J. McCARTHY, Minnesota
VANCE HARTKE, Indiana
JOHN J. WILLIAMS, Delaware
FRANK CARLSON, Kansas
WALLACE F. BENNETT, Utah
JOHN MARSHALL BUTLER, Maryland
NORRIS COTTON, New Hampshire
CARL T. CURTIS, Nebraska

ELIZABETH B. SPRINGER, *Chief Clerk*

CONTENTS

Page

Text of S. 200 ... 1

Reports:

Justice Department ... 6

Treasury Department ... 3

Amendment intended to be proposed by Senator Frear to the bill (S. 200) to amend the Internal Revenue Code of 1954 so as to provide for nonrecognition of gain or loss upon certain distributions of stock made pursuant to orders enforcing the antitrust laws ... 11

Brief explanation of draft amendment to S. 200 ... 12

STATEMENTS

Association of the Bar of the City of New York ... 393

Bicks, Hon. Robert A., Acting Assistant Attorney General, Antitrust Division, Justice Department ... 308

Dallstream, Andrew J., Chicago, Ill ... 375

Dane, John, Jr., representing the Chamber of Commerce of the United States ... 367

Frear, Hon. J. Allen, Jr., U.S. Senator from the State of Delaware ... 8

Funston, G. Keith, president of the New York Stock Exchange ... 303

Greenewalt, Crawford H., president, E. I. du Pont de Nemours & Co ... 297, 339

Jackman, William, president, Investors League, Inc., New York City ... 388

Lenz, Winthrop, vice president, Merrill, Lynch, Pierce, Fenner & Smith Inc ... 355

Lindsay, Hon. David A., assistant to the Secretary, U.S. Treasury Department; accompanied by Jay W. Glassman, assistant general counsel, and Francis A. Lavelle, legal advisory staff ... 14

Magill, Roswell, representing section of antitrust law, American Bar Association ... 349

McComb, J. R., Camden, S.C ... 307

LETTERS

Collier, Mrs. William A., Fairfax, Va., to Hon. J. Allen Frear, Jr ... 392

Gilbert, Lewis D., to chairman ... 397

Jensen, Wallace M., general chairman, Committee on Federal Taxation, Thomas J. Graves, chairman, subcommittee on determination of taxable income, and Leslie Mills, chairman, subcommittee on Corporations and Stockholders, American Institute of Certified Public Accountants, to chairman ... 396

Levi, Edward H., dean of the law school of the University of Chicago, to Hon. J. Allen Frear, Jr ... 304

Lindsay, Hon. David A., assistant Secretary of the Treasury, to chairman ... 297

Miley, Thomas Jefferson, executive vice president, Commerce and Industry Association of New York, Inc., to chairman ... 398

Mueller, Herbert V., Denver, Colo., to chairman ... 397

Payte, Henry L., Jersey City, N.J., to Hon. Clifford Case ... 395

Power, James T., Wilmington, Del., to Hon. J. Allen Frear, Jr ... 391

Rostow, Eugene V., Yale Anniversity Law School, to chairman ... 305

Steele, Dean C., Wilmington, Del., to chairman ... 392

Tracy, H. J., Salt Lake City, Utah, to Hon. J. Allen Frear, Jr ... 391

ADDITIONAL INFORMATION

Comments of the Justice Department on Senator Frear's proposal to provide tax treatment for individual Du Pont shareholders roughly under Internal Revenue Code, section 301 ... 317

Decisions of the Supreme Court ... 29

History of Du Pont-General Motors litigation ... 279

Justice Department comments on Treasury Department proposal ... 325

DISTRIBUTIONS PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

TUESDAY, MAY 26, 1959

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:15 a.m., in room 2221, New Senate Office Building, Senator Harry Flood Byrd (chairman) presiding.

Present: Senators Byrd, Kerr, Frear, Long, Smathers, Douglas, Gore, Talmadge, McCarthy, Hartke, Williams, Carlson, Butler, Cotton, and Curtis.

Also present: Elizabeth B. Springer, chief clerk, and Mr. Colin F. Stam, chief of staff of the Joint Committee on Internal Revenue Taxation.

The CHAIRMAN. The committee will come to order.

The hearing today is on Senate bill 200, relating to gain or loss on disposition of stock made pursuant to orders enforcing the antitrust laws.

A copy of the bill, and reports thereon from the Departments of Treasury and Justice are hereby inserted in the record.

(The bill and departmental reports follow:)

[S. 200, 86th Cong., 1st sess.]

A BILL To amend the Internal Revenue Code of 1954 so as to provide for nonrecognition of gain or loss upon certain distributions of stock made pursuant to orders enforcing the antitrust laws

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subchapter O of chapter 1 of the Internal Revenue Code of 1954 (relating to gain or loss on disposition of property) is amended by adding at the end thereof the following new part:

"PART IX—DISTRIBUTIONS PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

"Sec. 1111. Distribution of stock pursuant to order enforcing the antitrust laws.

"SEC. 1111. DISTRIBUTION OF STOCK PURSUANT TO ORDER ENFORCING THE ANTITRUST LAWS.

"(a) EFFECT ON DISTRIBUTEES.—

"(1) GENERAL RULE.—If a corporation (referred to in this section as the 'distributing corporation') distributes to a shareholder, with respect to its stock held by such shareholder, stock which, when distributed to the distributee, is divested stock (as defined in subsection (d)) then no gain or loss shall be recognized to (and no amount shall be includible in the income of) such shareholder on the receipt of such divested stock.

"(2) NON PRO RATA DISTRIBUTION, ETC.—Paragraph (1) shall be applied without regard to the following:

"(A) whether or not the distribution is pro rata with respect to all of the shareholders of the distributing corporation, and

"(B) whether or not the shareholder surrenders stock in the distributing corporation.

"(3) DISTRIBUTIONS TO AVOID FEDERAL INCOME TAX.—Paragraph (1) shall not apply to any transaction one of the principal purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both (but the mere fact that either corporation has accumulated earnings and profits shall not be construed to mean that one of the principal purposes of the transaction is the distribution of the earnings and profits of either corporation, or both).

"(4) DISTRIBUTION INVOVING GIFT OR COMPENSATION.—In the case of a distribution to which paragraph (1) applies, but which—

"(A) results in a gift, see section 2501, and following, or

"(B) has the effect of the payment of compensation, see section 61 (a) (1).

"(b) BASIS OF PROPERTY ACQUIRED IN DISTRIBUTIONS.—If, by reason of subsection (a), gain or loss is not recognized with respect to the receipt of divested stock, then, under regulations prescribed by the Secretary or his delegate—

"(1) if the divested stock is received by a shareholder without the surrender by such shareholder of stock in the distributing corporation, the basis of such divested stock and of the stock with respect to which it is distributed shall, in the distributee's hands, be determined by allocating the adjusted basis of the stock with respect to which the distribution was received between such stock and the divested stock received; or

"(2) if the divested stock is received by a shareholder is exchange for stock in the distributing corporation, the basis of the divested stock shall, in the distributee's hands, be the same as the adjusted basis of the stock exchanged therefor.

"(c) ALLOCATION OF EARNINGS AND PROFITS.—

"(1) ALLOCATION IN CERTAIN CORPORATE SEPARATIONS.—In the case of a distribution or exchange under subsection (a) of stock in a controlled corporation, proper allocation with respect to the earnings and profits of the distributing corporation and the controlled corporation shall be made under regulations prescribed by the Secretary or his delegate.

"(2) DEFINITION OF CONTROLLED CORPORATION.—For purposes of paragraph (1), the term 'controlled corporation' means a corporation with respect to which at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock is owned by the distributing corporation.

"(d) DEFINITION OF DIVESTED STOCK.—For purposes of this section, the term 'divested stock' means stock which is—

"(1) the subject of a judgment, decree, or other order of a court or of a Commission or Board authorized to enforce compliance in a suit or other proceeding brought by the United States or such a Commission or Board under the Sherman Act (26 Stat. 209, 15 U.S.C. sec. 1–7, as amended) and the Clayton Act (38 Stat. 730, 15 U.S.C. sec. 12–27, as amended), and

"(2) distributed by the distributing corporation pursuant to a judgment, decree, or order entered after June 1, 1958, in such suit or proceeding, if such judgment, decree, or order—

"(A) directs the distributing corporation to divest itself of such stock,

"(B) specifies and itemizes the stock to be divested,

"(C) recites that such divestment is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act, or both, and

"(D) recites that nonrecognition of gain pursuant to section 1111 of the Internal Revenue Code of 1954 is required to reach an equitable judgment, decree, or order in such suit or proceeding.

"(e) CROSS REFERENCE.—

"For determination of the period for which the taxpayer has held divested stock received in a distribution to which subsection (a) applies see section 1223(1)."

SEC. 2. (a) Section 1223(1)(B) of such Code (relating to holding period of property) is amended by adding immediately before the word "applies" the following: "or section 1111."

(b) The table of parts for subchapter O of chapter 1 of such Code is amended by adding at the end thereof the following:

"Part IX. Distributions pursuant to orders enforcing the antitrust laws."

SEC. 3. The amendments made by this Act shall apply only with respect to distributions of divested stock (as defined in section 1111(d) of the Internal Revenue Code of 1954, as added by the first section of this Act) made after June 1, 1958.

THE SECRETARY OF THE TREASURY,
Washington, May 22, 1959.

Hon. HARRY F. BYRD,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: This is in response to a request for the views of this Department on S. 200, introduced by Mr. Frear, a bill to amend the Internal Revenue Code of 1954 so as to provide for nonrecognition of gain or loss upon certain distributions of stock made pursuant to orders enforcing the antitrust laws.

S. 200 would permit a corporation to distribute "divested stock" to its shareholders without dividend or gain tax consequences to the recipients if the transaction does not have as one of its principal purposes the distribution of the earnings and profits of the distributing corporation or the corporation whose stock is distributed. Under the bill, "divested stock" would mean stock which is distributed pursuant to a judgment, decree, or order entered after June 1, 1958, in certain suits or proceedings to enforce the Sherman Act and the Clayton Act. The judgment, decree, or order must direct the divestment of the specific stock, must recite that the divestment is necessary or appropriate to effectuate the policies of the Sherman Act or Clayton Act, and must recite that nonrecognition of gain is required to reach an equitable judgment, decree, or order. The bill contains technical provisions for allocating basis of stock in the hands of recipient shareholders and also for allocating earnings and profits of the distributing corporation if there is a distribution or exchange of stock in a controlled corporation.

It is true that the tax laws in at least three instances have been amended by Congress to provide for the nonrecognition of gain in the case of exchanges or distributions of property ordered or certified to be necessary by a Federal agency. In the interest of completeness, these laws which admittedly have persuasive force are summarized below. But, for the reasons hereafter stated, we do not believe that they should be regarded as controlling precedents in the present case.

First, a provision for nonrecognition of gain or loss on exchanges or distributions in obedience to the orders of the Securities and Exchange Commission was added in 1938, now section 1081 of the 1954 code. This provision relates to an order of the Securities and Exchange Commission issued to effectuate the provisions of section 11(b) of the Public Utility Holding Company Act of 1935. The order must be one requiring or approving action which the Commission finds to be necessary or appropriate to the integration or simplification of the holding company system of which the transferor corporation is a member.

Second, nonrecognition of gain or loss on the sale or exchange of property to effectuate policies of the Federal Communications Commission was permitted under section 1071 of the 1954 code but was recently limited by the Technical Amendments Act of 1958. The section originally provided that if the sale or exchange of property (including stock of a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate the policies of the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as a nontaxable involuntary conversion of such property. Section 1071, however, had been utilized in some instances to obtain deferral of tax on what in reality were voluntary transactions. The taxpayer would purchase broadcasting properties in excess of the maximum number permitted under Commission rules and then obtain certification from the Commission that the disposition of a facility was necessary to effectuate its policies. Accordingly, in September of 1956, the Federal Communications Commission announced that commencing on October 15, 1956, it would certify the disposal of radio broadcasting facilities only where the disposition is required because of a change in,

or adoption of, a new policy of the Commission. Consistent with this policy, the Technical Amendments Act of 1958 amended section 1071 by restricting nonrecognition of gain or loss to the sale or exchange of property certified by the Federal Communications Commission to be "necessary or appropriate to effectuate a change in policy of, or adoption of a new policy by, the Commission."

The third instance relates to distributions pursuant to the Bank Holding Company Act of 1956. Section 1101 of the 1954 code provides that under certain circumstances the distribution of nonbanking assets by a bank holding company may be made without recognition of gain if the Federal Reserve Board certifies that the distribution of property "is necessary or appropriate to effectuate section 4 of the Bank Holding Company Act of 1956." The nonrecognition of gain applies only to a corporation that would have been a bank holding company on May 15, 1955, if the Bank Holding Company Act of 1956 had been in effect on such date, and to distributions of property acquired by the bank holding company on or before May 15, 1955, or of property acquired in a tax-free distribution from another holding company under section 1101.

In addition to the foregoing, taxable gain may be deferred in connection with certain involuntary conversions. For example, section 1033(b) provides that if property lying within an irrigation project is sold or otherwise disposed of in order to conform to the acreage limitation provisions of Federal reclamation laws, such sale or distribution shall be treated as an involuntary conversion and the gain accordingly not recognized. Other involuntary conversion provisions of less pertinence include property compulsorily or involuntarily converted as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof, and livestock destroyed by disease or sold on account of drought.

S. 200 is more related in purpose to a bill introduced in the 85th Congress, H.R. 7628, which would have extended nonrocognition of gain in certain situations where a taxpayer is required under the antitrust laws to sell or dispose of property and subsequently reinvest the proceeds in similar property. H.R. 7628 was reported out by the Ways and Means Committee in August of 1957, with 10 members of the committee dissenting. (See H. Rept. 1269, 85th Cong., 1st sess.)

The Treasury Department opposed H.R. 7628, stating in its report to the chairman of the Ways and Means Committee:

"The revenue effect of H.R. 7628 is difficult to predict in advance but might be large in some years. Special tax relief measures, especially those involving large potential revenue losses, are objectionable in the absence of overriding considerations of general public policy. The Treasury Department is not aware of any general policy considerations which would justify this special tax relief. However, the Department of Justice is in a better position than this Department to comment on this bill as it relates to antitrust policy. The retroactive feature of this bill is also undesirable. We understand that relief would be provided in several important cases under the retroactive coverage of the bill.

"Under the circumstances the Treasury Department is opposed to the enactment of H.R. 7628."

The Department of Justice also opposed the bill, concluding in its report to the chairman of the Ways and Means Committee that from the standpoint of antitrust law enforcement, the Department of Justice was opposed to the enactment of the bill. The reports of the Departments of Treasury and Justice are included in the dissenting views of House Report No. 1269.

The Department recognizes that there may be cases where a taxpayer has acquired property in the past for legitimate business purposes under circumstances which did not appear to involve any violation of antitrust laws. Subsequently, by reason of developments in technology and business relationships, it may be necessary to require that the taxpayer divest himself of such property to assure effective enforcement of the laws against restraint of trade. The Department recognizes that in such a case a strong argument can be made for tax relief especially where tax consequences of a divestiture may create adverse economic consequences for innocent parties. On the other hand, such equitable considerations would not exist in favor of a taxpayer who could or should anticipate a divestiture decree at the time of acquisition of the property.

Enactment of special tax relief for dispositions of divested property would require strict limitations, which might be difficult to devise or enforce, to prevent taxpayers from acquiring prohibited property with a view to a subsequent

tax-free distribution of such property. S. 200 attempts to provide these limitations by excluding from its scope any transaction one of the principal purposes of which is the distribution of earnings and profits and also by requiring that the divestiture decree recite that nonrecognition of gain is required to reach an equitable result. Such general standards may indeed be difficult to administer. If tax relief is to be enacted in this area, consideration might be given to more specific statutory criteria to prevent distributions of property for tax avoidance purposes. One such criterion might be a rule that tax relief will not be applicable to property acquired in reasonable anticipation of a divesture decree coupled with a presumption that such anticipation exists as to property acquired within a stated period, perhaps 5 years, prior to commencement of the antitrust proceedings.

The revenue effect of S. 200 is difficult to assess. In any event, as we indicated in our adverse report on H.R. 7628, special tax relief measures are objectionable in the absence of overriding considerations of general public policy.

If, in the opinion of the Department of Justice, legislation is deemed necessary to implement the public policy underlying the antitrust laws, we nevertheless question complete nonrecognition of tax in connection with distributions pursuant to a judgment, decree or order in suits or proceedings to enforce the Sherman Act and Clayton Act. We reach our position for the following reasons:

First, it is difficult to justify nonrecognition of tax where the distribution has been ordered because the acquisition and holding of property is in violation of law while a voluntary distribution of property, in the absence of any violation of law, is subject to tax.

Second, the instances cited earlier in this letter involving nonrecognition of gain in certain situations are distinguishable and are not, in our view, controlling precedents here. In connection with exchanges or distributions in obedience to orders of the Securities and Exchange Commission to effectuate the provisions of the Public Utility Holding Company Act, provision for nonrecognition of gain or loss was made because Congress enacted a new law making previously legal and proper holdings illegal. The same principle was involved in connection with the nonrecognition of gain in connection with distributions pursuant to the Bank Holding Company Act of 1956. While nonrecognition of gain or loss on the sale or exchange of property to effectuate policies of the Federal Communications Commission had been permitted, it was found necessary in the Technical Amendments Act of 1958 to restrict nonrecognition of gain or loss to the sale or exchange of property certified by the Federal Communications Commission to be "necessary or appropriate to effectuate a change in policy of, or adoption of a new policy by, the Commission." Such a rule would be difficult to apply in connection with the administration of the Sherman and Clayton Acts.

Third, we believe that a distribution of property required by court order in proceedings to enforce the Sherman Act or the Clayton Act, unless the distributing corporation owns 80 percent or more of the stock of a subsidiary whose stock is distributed, more closely resembles a partial liquidation of the distributing corporation than a nontaxable distribution. Where property is required to be distributed because the effect of its acquisition may be to restrain commerce to tend to create a monopoly of any line of commerce, such distribution might well represent a true contraction of the business of the distributing corporation. As stated in the Senate Finance Committee report in connection with H.R. 8300 in 1954, "It is intended that a genuine contraction of the business as under present law will result in a partial liquidation" (83d Cong., 2d sess., S. Rept. No. 1622 (1954)).

Although closely resembling a partial liquidation, under existing statutory provisions, a distribution of securities resulting from a court order issued to enforce the Sherman Act or Clayton Act, cannot be treated as a partial liquidation unless part or all of the stock of the distributing corporation is redeemed. Except where the distributing corporation owns 80 percent or more of the stock of a subsidiary whose stock is distributed, such a distribution without redemption would, under existing law, be taxable as a dividend to the recipients.

We do recognize, however, that treating a distribution resulting from a court decree as an ordinary taxable dividend puts a heavy burden on the individual taxpayers receiving the divested stock as compared with corporate recipients. A corporate shareholder receives a dividend received deduction of 85 percent and accordingly includes only 15 percent of the dividend, thus paying an effective rate of tax of 7.8 percent on the lesser of the fair market value or the cost to the distributing corporation of the property received. An individual stockholder, on

the other hand, must pay a tax on the entire fair market value of the property received at ordinary rates. Moreover, a dividend tax would fall as heavily on a new purchaser of a distributing corporation's stock whose purchase price would, in large part, have reflected the appreciation in the property distributed, as it would on a stockholder who obtained the stock in a distributing corporation at comparatively low cost.

These discrepancies in the tax treatment of the distribution as between various stockholders would be minimized if the distribution of divested property were to be treated as a payment in exchange for part of the stock of the distributing corporation or as a partial liquidation. Under such an approach, shareholders whose stock in a distributing corporation has appreciated in value would pay an imediate tax on the appreciated value of the divested property instead of being accorded nonrecognition treatment as under S. 200.

To summarize, if the Department of Justice believes that some change in the tax law is essential to facilitate antitrust enforcement, then it is suggestet that consideration be given to taxing the distribution of divested stock as, in effect, a partial liquidation of the distributing corporation.

The Bureau of the Budget has advised the Treasury Department that there is no objection to the presentation of this report.

Sincerely yours,

ROBERT B. ANDERSON,
Secretary of the Treasury.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., May 25, 1959.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This responds to your committee's request for Justice Department views on S. 200. That bill would both postpone and alter the tax consequences under existing law of any stock distribution required by an antitrust decree.

Under existing law when a corporation (the distributing corporation) distributed to its shareholders stock of another corporation (the controlled corporation) whose voting stock is at least 80 percent owned by the distributing corporation and the distribution otherwise meets the statuory requirements, provision is made for nonrecognition of gain to the shareholder-recipient. Otherwise individual shareholders receiving such distributed stock must report as a dividend, taxable at ordinary income tax rates, the fair market value of the distributed stock (to the extent of the distributing corporation's earnings and profits). On the other hand, corporate shareholders who receive such distributed stock under conditions not qualifying for nonrecognition of gain are taxed not on the fair market value of the distributed stock but on the original cost of the stock to the distributing corporation. And, in addition, unlike the individual stockholder, the corporate holder receives an intercorporate tax dividend credit of 85 percent. As a result, the maximum tax due from a corporate distributee is 7.8 percent (52 percent of 15 percent) of the original basis of the property held by the acquiring corporation.

Altering existing law, S. 200 specifies that when "divested stock" is distributed "then no gain or loss shall be recognized to (and no amount shall be includible in the income of) such shareholder on the receipt of such divested stock." Instead, the shareholder's basis for his stock in the distributing corporation is to be allocated between such stock and the "divested stock" received. "Divested stock" is defined as "stock which is the subject of a judgment, decree, or other order of a court or of a Commission or Board authorized to enforce compliance in a suit or other proceeding brought by the United States or such a Commission or Board under the Sherman Act * * * and the Clayton Act * * *."

Congress has specified that a finding of violation under Clayton Act, section 7, requires divestiture of properties illegally acquired. And, in Sherman Act cases, courts are granted wide equity powers in their sound judgment, to order divestiture. For a "public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints. If * * * [a] decree accomplishes less than that, the Government has won a lawsuit and lost a cause" (*International Salt Co.* v. *United States*, 332 U.S. 392, 400).

Nevertheless, the courts may be reluctant to grant divestiture, deeming it "harsh"[1] and "an extraordinarily difficult and expensive undertaking."[2] And, courts are obliged to consider, among other factors (*United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911)):

"* * * A proper regard for the vast interests of private property which may have become vested as a result of the acquisition * * * without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

Reflecting such concern, courts may tend increasingly to adopt the view in *United States* v. *Minnesota Mining & Manufacturing Co., et al.* (90 F. Supp. 356 at 358), denying Sherman Act divestiture when substantial taxes would accrue, because:

"* * * the Congress has been content to allow taxpayers who have been accumulating capital gains to postpone pretty much to their own convenience the date when they realize those gains for tax purposes and make the appropriate accounting to the Internal Revenue officials."

In light of such precedents, appropriate alteration of present tax consequences could, as a general rule, increase the likelihood of divestiture relief and simplify as well as speed effectuation of such remedy. However, S. 200 does not seem an appropriate path to this enforcement goal.

First, S. 200's nonrecognition benefits would apply equally to all divestiture cases—regardless of when the acquisition attacked was consummated. This despite the fact that equities in favor of tax relief may loom larger where suit follows long after acquisition and, accordingly, the acquisition's illegality was perhaps not so evident when consummated.

Second, under S. 200, the shareholder is relieved of all dividend income tax liability on account of the divested stock received. Only a capital gains tax may be due—if and when either the divested or original stock is sold. Such absence of immediate tax incidence on antitrust divestiture could, in a few marginal mergers, perhaps tip the scales in favor of risking an acquisition otherwise doubtfully legal.

Third, and most important, S. 200 does not contain sufficiently specific safeguards to insure that benefits would only be available where necessary for effective antitrust relief. Thus, viewing this measure in the context of the pending General Motors-Du Pont proceeding, S. 200 as presently written could enable the granting of nonrecognition benefits, not only to the Du Pont stockholders, but also to stockholders of Delaware and Christiana. The Government's divestiture plan there, however, would require that a trustee sell Du Pont's General Motors stock allocable to Christiana and Delaware and Delaware's stockholders.

Were distribution allowed to stockholders of Delaware and Christiana they would end up with roughly 8 percent of General Motors stock—a block several times larger than that held by any other group. Thus, the goal of the entire relief proceeding might well be thwarted. Since S. 200 as presently written could enable such secondary distribution to stockholders tax free, it could tend to frustrate rather than further the very antitrust objectives which are the sole rationale for any such tax proposal.

---

[1] *Timken Roller Bearing Co.* v. *United States* (341 U.S. 593, 603 (1951)).

[2] *United States* v. *General Electric Co.* (115 F. Supp. 835, 870 (D.N.J. 1953)).

Since 1938, Congress has granted three Government agencies rights of divestiture in furtherance of particular congressional policies. The Securities and Exchange Commission in enforcing the Public Utility Holding Company Act (15 U.S.C. sec. 1081), 922 divestitures involving $13 billion in assets (Securities and Exchange Commission's 24th Annual Report, dated June 30, 1958), the Federal Communications Commission enforcing its duopoly and maximum station regulations (15 U.S.C. sec. 1071), 61 divestitures, and the Federal Reserve Board enforcing the Bank Holding Company Act (15 U.S.C. sec. 1101–7), 5 tax certificates (accompanying divestiture) in 3 years. The Public Utility Holding Company Act (15 U.S.C. 79), had been enacted some 4 years prior to the passage of tax legislation which was requested by the Securities and Exchange Commission. In an appearance before a committee hearing on such tax legislation, then Chairman of the Securities and Exchange Commission, Mr. Justice William O. Douglas, said:

"* * * our big job at the Commission is to put the private utility house in order. We think we can do it expeditiously and constructively if this tax barrier is removed. * * * We down at the Commission do not desire to put the gun at the head of a utility company and say, 'transfer these,' and then to have another branch of the Federal Government collect $2,000,000 or $1,000, or $250,000 as the result of doing what we are forcing it to do" (hearings on H.R. 9682 before the committee on 3d session, pt. 4, Mar. 30, 1938, at p. 73).

In sum, this Department does not recommend enactment of S. 200. However, we are concerned with improving the effectiveness of divestiture as an antitrust remedy. To this end, we would welcome an opportunity to study any proposal which would aid antitrust enforcement generally, but at the same time, insure that tax benefits could not in any case frustrate rather than further competitive objectives.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

LAWRENCE E. WALSH,
Deputy Attorney General.

The CHAIRMAN. The Chair recognizes Senator Frear.

STATEMENT OF HON. J. ALLEN FREAR, JR., U.S. SENATOR FROM THE STATE OF DELAWARE

Senator FREAR. Mr. Chairman, first I want to especially thank you and the members of the committee for granting leave to hold these hearings on S. 200.

Secondly, I would like to state for the record that it is recognized by all members of the committee that tax legislation originates in the House. And that the proper portions of S. 200 will, if and when action is taken, be taken on tax legislation which has previously been acted upon in the House.

Thus it is not contemplated, obviously, to take S. 200 through the committee and directly to the floor.

I would just like to make a brief explanation of the bill which is the subject of these hearings.

S. 200 provides for nonrecognition of gain or loss upon compulsory distributions of stock pursuant to orders enforcing the antitrust laws. It is in the public interest because, first, it would eliminate an unjust tax penalty imposed by existing law upon innocent citizens, and second, I believe, it would facilitate the carrying out of the Government's antitrust policies.

Under present law, as interpreted in a formal ruling of the Commissioner of Internal Revenue, when a corporation is required as the result of antitrust proceedings to distribute to its stockholders the stock which it holds in another corporation, the full market value of the distributed stock is taxable to individual stockholders as a dividend, that is, at ordinary income rates. This is the law if the first corporation owns less than 80 percent of the shares of the other company. If it owns more than 80 percent, the distribution is free from this tax.

Obviously there is no economic gain realized by the stockholder in such a compulsory distribution. When he bought a share in the ownership of the distributing corporation, part of the purchase price represented the corporation's holdings in the second company. The distribution gives him two stock certificates instead of one, but their combined market value is the same as before. Nevertheless, the law insists that he pay income tax at his top bracket, be that 20 percent or up to 91 percent, less the 4 percent dividends received credit, on the full market value of something which he already owned. This would be the consequence of the Supreme Court's decision in the Du Pont-General Motors case if the subsequent demand of the Department of Justice for divestiture of Du Pont's 23 percent holdings of General Motors shares is ordered by the courts.

I expressed my opinion of the Court's decision at the time it was announced in June 1957, but it is the law of the land.

This decision constitutes a precedent which I have no doubt, could very well lead to the institution of antitrust proceedings against countless other corporations which have similar investments. That is bound to be the result of this novel interpretation of section 7 of the Clayton Act.

If this is to be our antitrust policy, Mr. Chairman, the Congress has a responsibility to protect innocent stockholders.

There is ample precedent for such action. As recently as 1956, Congress passed, and the President signed, the Bank Holding Company Act, which provides tax treatment similar to the provisions in my bill for distributions required by that act.

This followed the precedent established in 1938 in connection with the Public Utility Holding Company Act. In 1935, when that act was first passed, it contained no provision relating to the tax consequences of divestiture orders. But 3 years later in 1938, Justice William O. Douglas, then Chairman of the SEC, appeared before this committee to recommend adoption of an amendment granting tax relief in cases of forced divestiture by the SEC under the Public Utility Holding Company Act. This committee acted favorably and the amendment was enacted into law. (Revenue Act of 1938.)

Likewise, there is no tax on certain sales or exchanges involving radio and television stations, made in conformity with policies of the Federal Communications Commission.

The fact is that the present tax law does not provide such treatment with respect to divestitures ordered under the antitrust laws. As the illustrations I have used show, where the Congress has created a situation which would result in injustice under the law as written, it has changed the law to provide tax relief. But here it is the Supreme Court rather than Congress, that has created a situation which would result in serious tax inequities. The Supreme Court has no power to change the tax law. The Congress has the power, and, I submit, the duty, to act to prevent such an injustice.

Let me be specific. If the courts should accept the Department of Justice proposal in the Du Pont case, the stockholders of the Du Pont Co., men and women who have violated no law and have committeed no wrong, would be subjected to a tax penalty practically amounting to confiscation estimated at close to $1 billion for receiving under compulsion of law an investment which is already theirs. Assuming the current General Motors market value of around $50 a share, they would pay from $8 to $43.50 depending on their tax bracket for the right to have two stock certificates in place of one.

Furthermore, no stockholder could escape certain other economic consequences of this inequitable penalty. Qualified witnesses have given court testimony that sales by a trustee over a 10-year period of General Motors stock required by the Department of Justice proposal, coupled with sales of General Motors shares by stockholders to raise funds for taxes, and sales of Du Pont stock by stockholders to escape the tax impact of the distribution, could severely depress the market value of both stocks. The sufferers here would include banks, pension trusts, college and universities, insurance companies, labor unions, and charitable institutions. As one witness testified, this is equivalent to "cutting off an arm to cure a hangnail."

S. 200 would not relieve the Du Pont Co. or the General Motors Co. of any tax. It would not relieve Du Pont stockholders of the tax on any capital gain which might be realized when they disposed of the General Motors shares distributed to them or of the Du Pont stock which they now own. S. 200 would merely eliminate an additional tax penalty which could be imposed under existing law not only upon Du Pont stockholders, but upon shareholders of other corporations which may be the future targets of antitrust proceedings.

The bill is provided with safeguards against abuse. First, it applies only to compulsory distributions pursuant to orders enforcing the antitrust laws. Second, the bill provides that nonrecognition of gain or loss shall not apply to any transaction which has as a principal purpose the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed. Third, the order must recite that divestment is necessary or appropriate to carry out the policies of the Sherman Act or Clayton Act, and that nonrecognition of gain is required to reach an equitable judgment.

Mr. Chairman, I would like to emphasize one other significant fact. I first introduced S. 200 nearly a year ago after a careful evaluation of its objectives. In the months intervening, there has not been a single adverse public comment which has come to my attention. And, in this connection every effort has been made by my office to afford this legislation the widest possible dissemination.

On the contrary, I received an outpouring of support, nationwide, including many favorable editorials in newspapers and magazines. As a part of these public expressions, I have been advised that Mr. Keith Funston, president of the New York Stock Exchange, Dean Edward Levi, University of Chicago Law School, and Dean Eugene Rostow of Yale University Law School are submitting statements testifying to the overriding public purpose that would be served by enactment of S. 200.

(The statements from Mr. Keith Funston, Dean Edward Levi and Dean Eugene Rostow are subsequently inserted in record.)

Senator FREAR. But the question we must decide is not whether my proposal is popular, but whether it is right. Our constituents include stockholders, rich and poor, and it would be a grave disservice to them if we do not move to correct this injustice.

There are Du Pont stockholders in every State of the Union, as well as the District of Columbia. There are more than 200,000 in all, of whom nearly 50,000 are employees of the Du Pont Co. who live and work in all parts of the Nation. Of these, the vast majority are men and women of modest means, who have acquired their stock a share at a time or a few shares at a time, and can ill afford to have their savings stripped away.

Beyond these 200,000 Du Pont stockholders, there are over 700,000 stockholders of General Motors Corp. whose savings may be seriously impaired without corrective legislation, because of the impact on stock values caused by divestiture, which I mentioned earlier. And the stockholders of both corporations, I remind you again, have committed no wrong under any law.

If a single innocent citizen were threatened with harm because of an unforeseen injustice in the application of the law, equity and jus-

tice would demand that Congress correct the statute. Here, Mr. Chairman, we are concerned not with harm to a single individual but to nearly a million innocent persons throughout the length and breadth of the land, and our duty to act is clear and compelling.

May I add one final thought. In discussing the provisions of this legislation, both before and since its introduction, I have expressed to individual members of this committee and to other Members of Congress, generally, my firm conviction that the principle involved is thoroughly sound and in the best public interest. S. 200 is, I believe, carefully drawn so as to prevent any tax loophole. Technical and perfecting amendments, some of which I have discussed with committee members, may be thought desirable. Certainly, I will cooperate to effect any necessary change in S. 200 which will insure its better application consistent with the basic purpose of the bill.

In this connection, I have prepared an amendment which, briefly stated, makes the distributed stock of General Motors to Du Pont stockholders subject to ordinary income tax to the individual on the basis of the cost of this stock to the Du Pont Co.

Mr. Chairman, may I make the amendment so designated and a brief analysis thereof now a part of the record.

The CHAIRMAN. Without objection, it may be done.

(The amendment and explanation referred to follow:)

AMENDMENT Intended to be proposed by Mr. Frear to the bill (S. 200) to amend the Internal Revenue Code of 1954 so as to provide for nonrecognition of gain or loss upon certain distributions of stock made pursuant to orders enforcing the antitrust laws, viz:

On page 2, strike out lines 4 through 11 and insert in lieu thereof the following:

"(1) GENERAL RULE.—If a corporation (referred to in this section as the 'distributing corporation') distributes to a shareholder (with respect to its stock held by such shareholder), without the surrender by such shareholder of stock in such corporation, stock which, when distributed to the distributee, is divested stock (as defined in subsection (d)), the gain (if any) shall be recognized to such shareholder on the receipt of such divested stock, but only in an amount not in excess of the lesser of——

"(A) the fair market value of such divested stock, or

"(B) the adjusted basis (in the hands of the distributing corporation immediately before the distribution) of such divested stock.

"For purposes of the preceding sentence, the adjusted basis of any divested stock shall be the average adjusted basis, determined under regulations prescribed by the Secretary or his delegate, of all divested stock distributed in the same distribution."

On page 2, strike out lines 12 through 19.

On page 2, line 20, strike out "(3)" and insert "(2)".

On page 3, line 5, strike out "(4)" and insert "(3)".

On page 3, beginning with line 12, strike out all through line 4, on page 4, and in lieu thereof insert the following:

"(b) BASIS.—If, by reason of subsection (a), any gain is not recognized with respect to the receipt of divested stock, then, under regulations prescribed by the Scretary or his delegate, the basis of such divested stock and of the stock with respect to which it is distributed shall, in the distributee's hands, be determined by allocating the adjusted basis (immediately before the distribution) of the stock with respect to which the distribution was received, increased by—

"(1) the amount (if any) of the gain recognized under subsection (a) which was treated as a dividends, and

"(2) the amount (if any) of such gain which was treated as gain from the sale or exchange of property, between such stock and the divested stock received."

On page 4, line 7, strike out "or exchange".

Brief Explanation of Draft Amendment to S. 200

The draft amendment to S. 200 would revise S. 200 to provide for only partial nonrecognition of gain on certain distributions of stock made by a corporation to its shareholders pursuant to a court order enforcing the antitrust laws. The amendment would provide, in general, that gain would be recognized to the shareholders (and taxed as dividend income, assuming the corporation had sufficient earnings and profits) to the extent of the lesser of the fair market value of the stock distributed or the adjusted basis (to the distributing corporation) of such stock. This is the rule applicable under existing law to distributions of property (including stock in another corporation, where not distributed in pursuance of a nontaxable corporate reorganization or corporate division) by a corporation to a corporate shareholder.

The draft amendment would revise two provisions of S. 200: (1) The general rule contained in the proposed section 1111(a)(1) would be revised to provide for only partial nonrecognition treatment, as outlined above; and (2) the basic rules contained in the proposed section 1111(b) have been revised to take into account the fact that there is a partial recognition of gain.

A number of other deletions and technical changes would be made to S. 200.

The following paragraphs summarize the provisions of the draft amendment, the changes and deletions from S. 200, and compare the draft amendment to the distribution rule applicable to dividends received by corporate shareholders.

1. DISTRIBUTION OF DIVESTED STOCK

S. 200, as revised by the draft amendment, would continue to apply only to a distribution by a corporation to a shareholder of "divested stock." Divested stock is defined in subsection (d), which would not be changed. In general, divested stock includes stock which is the subject of a court order under the Sherman Act or the Clayton Act, if that stock is distributed by the corporation pursuant to a court order, entered after June 1, 1958, which directs the corporation to divest itself of such stock, specifies and itemizes the stock to be divested, and recites that such divestment is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act. Moreover, no stock can be regarded as divested stock unless the order (or judgment or decree) recites that nonrecognition of gain pursuant to this section is required to reach an equitable judgment, decree, or order in the antitrust suit or proceeding.

Under S. 200, as revised by the draft amendment, the shareholders' gain (if any) on the receipt of divested stock is limited to the lesser of (i) the fair market value of such stock or (ii) its tax basis in the hands of the distributing corporation. To the extent that the shareholder's gain does not exceed the lesser of the fair market value of the stock received or its tax basis to the distributing corporation, it will be taxed under the rules of existing law. These rules are applicable to all shareholders of the corporation, whether they are individuals or other corporations. These rules can be illustrated by the following example: Assume a shareholder (corporate or individual) received divested stock (from a corporation having earnings and profits) having a fair market value of $100 and an adjusted basis to the distributing corporation of $20. The shareholder's gain, to the extent of $20, will be taxed. Accordingly, $20 will be taxed as an ordinary dividend, subject to the $50 dividend exclusion and the 4 percent dividend credit, if the shareholder is an individual and, if the shareholder is a corporation entitled to the intercorporate dividends received deduction, 85 percent of the $20 will be allowed as a deduction under section 243.

For purposes of these rules, it is provided by the draft amendment that the adjusted basis of any divested stock received by any shareholder (corporate or individual) shall be the average adjusted basis, determined under regulations, of all divested stock distributed in the same distribution. Accordingly, if the distributing corporation has acquired the divested stock (which it distributes in the same distribution) at different prices the adjusted basis of all such stock shall be averaged, so that the amount of gain taken into account in the case of every shareholder of the distributing corporation will be determined by reference to the same amount. This rule differs from the rule of existing law applicable to corporate shareholders—under existing law the identifiable bases of the shares distributed to any corporate shareholder (provided the specific shares may be traced to the specific corporate shareholder) are used to determine the amount of the distribution which is taken into account.

Under the draft amendment the distribution of divested stock by the corporation must take the form of a distribution without the surrender by the shareholders of any stock in the distributing corporation. (In this respect, the proposed amendment is like the so-called "spin off" rule of section 112(b)(11) of the 1939 Code and embraces one of the distribution methods permitted under section 355 of the 1954 Code.) The draft amendment differs in this respect from S. 200, which permitted the distribution to be made either in this form or to be made in exchange for part or all of the shareholder's stock in the distributing corporation (whether or not pro rata). The draft amendment does not permit exchanges since they are not permitted by the rules of existing law applicable to distributions to corporate shareholders (except to a very limited extent, in the case of stock redemptions essentially equivalent to a dividend).

2. DISTRIBUTIONS TO AVOID FEDERAL INCOME TAX

The draft amendment does not affect the provision of S. 200 relating to distributions to avoid Federal income tax. Accordingly, nonrecognition treatment under S. 200, as revised by the proposed amendment, would be denied in the case of any distribution which is a part of a transaction one of the principal purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both. (However, the mere fact that either corporation has accumulated earnings and profits shall not be construed to mean that one of the principal purposes of the transaction is the distribution of the earnings and profits of either corporation, or both.)

3. BASIS

The draft amendment would revise the basis provision of S. 200 (proposed section 1111(b) in two principal respects: (i) In determining the amount of basis to be allocated between the divested stock received and the stock with respect to which it was received, the draft amendment would add an amount equal to the gain recognized to the taxpayer under the revised rules and treated either as a dividend (assuming there were sufficient earnings and profits) or as gain from the sale or exchange of property (assuming that the amount of the dividend exceeded the earnings and profits of the corporation and also exceeded the shareholder's basis for his stock with respect to which the distribution was made); and (ii) the rules for determination of basis in the case of an exchange have been eliminated in view of the elimination of exchanges as a type of qualifying distribution (discussed under (1) above).

Accordingly, the draft amendment continues the rule contained in S. 200 providing for the allocation of basis where the distribution is made without the surrender of stock but adds to the amount to be allocated an amount equal to the shareholder's additional investment (i.e., tax cost) in the stock. The rule contained in the draft amendment applies to all distributions of divested stock with respect to which any gain is not recognized by reason of the proposed new section and applies whether the shareholder is a corporation or an individual. This basis rule (as revised by the draft amendment) differs from the rule of existing law applicable to corporate shareholders. Under existing law the amount of a distribution to a corporate shareholder is the lesser of the fair market value or the adjusted basis (in the hands of the distributing corporation) of the property distributed and, in the event that the adjusted basis of the property is the lesser, the corporate shareholder takes over the property at the same basis it had to the distributing corporation and does not reduce the basis of his stock in the distributing corporation (except to the extent that the amount of the distribution exceeds the distributing corporation's earnings and profits). The following example illustrates the basis allocation which would be made under S. 200 (as revised by the draft amendment): Assume that the distributing corporation, X, has earnings and profits sufficient to cover the distribution and that it distributes stock of corporation Y having a fair market value of $100 and an adjusted basis to it of $10. Assume that shareholder A (individual or corporate) receiving the Y stock has a basis for his stock in the distributing corporation, X, of $65 and that the fair market value of the stock of the distributing corporation X immediately after the distribution is $200. The amount of gain recognized to A and taxed as a dividend will be $10 (subject, of course, to the dividends received exclusion, credit, and deduction).

The amount of A's basis for his X stock, $65, increased by $10 (the amount of gain recognized and treated as a dividend), or $75, will be allocated between A's

X stock and the Y stock in proportion to their fair market values immediately after the distribution, so that A's basis for his X stock will be 200/300 × $75, or $50, and A's basis for his Y stock will be 100/300 × $75, or $25.

4. ALLOCATION OF EARNINGS AND PROFITS

The draft amendment does not affect the provisions of S. 200 relating to the allocation of earnings and profits. Accordingly, S. 200, as revised, continues to provide for the allocation of the earnings and profits where the distributing corporation owns the corporation whose stock is divested by 80 percent or more.

5. EFFECTIVE DATE

The draft amendment does not affect the effective date provisions of S. 200. As noted under (1) above, the term "divested stock" is defined as including only stock which is distributed pursuant to an order entered after June 1, 1958. In addition, it is provided by S. 200 that the new section shall apply only with respect to distributions of divested stock made after June 1, 1958. Accordingly, if a court order, entered after June 1, 1958, is issued nunc pro tunc affirming distributions made prior to June 1, 1958, such distributions cannot qualify under this section.

The CHAIRMAN. Thank you, Senator Frear.

Are there any questions by any member of the committee?

(No response.)

The CHAIRMAN. The next witness is the Honorable David A. Lindsay, Assistant to the Secretary of the Treasury.

Senator KERR. Mr. Chairman, you have put the statement of Mr. Lindsay into the record?

The CHAIRMAN. Yes.

Senator KERR. And a letter from the Justice Department addressed to the committee.

The CHAIRMAN. Yes.

Senator KERR. Will the author of the Justice Department's letter be here?

The CHAIRMAN. The author of the Justice Department's letter is here now.

Senator KERR. Fine.

The CHAIRMAN. We will now hear from the Honorable David A. Lindsay, Assistant to the Secretary, U.S. Treasury Department.

STATEMENT OF HON. DAVID A. LINDSAY, ASSISTANT TO THE SECRETARY, U.S. TREASURY DEPARTMENT; ACCOMPANIED BY JAY W. GLASMANN, ASSISTANT GENERAL COUNSEL; AND FRANCIS A. LAVELLE, LEGAL ADVISORY STAFF

Mr. LINDSAY. I have on my right Mr. Jay W. Glasmann, Assistant General Counsel of the Treasury, and on my left Mr. Francis A. Lavelle, of the legal advisory staff of the Treasury.

The Treasury Department appreciates the invitation to appear before this committee. We have been asked to testify on S. 200, a bill to amend the Internal Revenue Code of 1954 so as to provide for nonrecognition of gain or loss upon certain distributions of stock made pursuant to orders enforcing the antitrust laws.

The bill seeks to alleviate the impact of the income tax burden otherwise imposed on the recipients of stock distributed pursuant to court order in suits to enforce the Sherman Act or the Clayton Act.

Before commenting generally on the proposed legislation, it may be in order briefly to discuss the case which has focused particular attention on the tax aspects of antitrust divestitures and S. 200, namely, the proposed divestiture of General Motors stock by E. I. du Pont de Nemours & Co.

The Du Pont Co. holds 63 million shares of General Motors stock out of a total of about 281 million shares outstanding. In June of 1957, the Supreme Court held this investment violated the antitrust laws, and returned the case to the district court for a determination of "equitable relief" necessary and appropriate "in the public interest."

If the court accepts the Justice Department's plan for carrying out the Supreme Court order, all of the 63 million shares of General Motors stock would be transferred to a trustee. The trustee would be directed to distribute about two-thirds or 42 million shares of the General Motors stock over a 10-year period to the public stockholders of Du Pont. He would be directed to sell over the 10-year period the balance remaining for the accounts of two corporate shareholders of Du Pont, Christiana Securities and Delaware Realty, which are largely owned by the Du Pont family, and for the account of the stockholders of Delaware who directly own Du Pont stock. The cash proceeds of such sales would be distributed to Christiana, Delaware, and the stockholders of Delaware. The decree proposed by the Department of Justice also would require sale by Christiana, over the 10-year period, of the 535,000 shares of General Motors stock which it owns directly.

The market value of General Motors stock today is in the order of $50 a share. Accordingly, the distribution over a 10-year period at today's market amounts to a distribution of stock with an aggregate value of over $3 billion.

The magnitude of the proposed distribution raises a question as to the impact of the tax laws on compulsory distributions under the antitrust laws.

Under existing tax law, the General Motors stock received by Du Pont shareholders would be taxable as a dividend. Under S. 200, the Du Pont shareholders would pay no tax upon receipt of the General Motors stock since the distribution would be treated as a nontaxable stock dividend. Certain precedents in the tax law for such treatment have been cited in support of the bill. Thus, it is pointed out that in at least three instances the tax law has been amended by Congress to provide for the nonrecognition of gain in the case of exchanges or distributions of property ordered or certified to be necessary by a Federal agency.

First, a provision for nonrecognition of gain or loss on exchanges or distributions in obedience to the orders of the Securities and Exchange Commission was added in 1938, now section 1081 of the 1954 code. This provision relates to an order of the Securities and Exchange Commission issued to effectuate the provisions of section 11 (b) of the Public Utility Holding Company Act of 1935. The order must be one requiring or approving action which the Commission finds to be necessary or appropriate to the integration or simplification of the holding company system of which the transferor corporation is a member.

Second, nonrecognition of gain or loss on the sale or exchange of property to effectuate policies of the Federal Communications Commission was permitted under section 1071 of the 1954 code but was recently limited by the Technical Amendments Act of 1958. The section originally provided that if the sale or exchange of property (including stock of a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate the policies of the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as a nontaxable involuntary conversion of such property. Section 1071, however, had been utilized in some instances to obtain deferral of tax on what in reality were voluntary transactions. The taxpayer would purchase broadcasting properties in excess of the maximum number permitted under Commission rules and then obtain certification from the Commission that the disposition of a facility was necessary to effectuate its policies.

Accordingly, in September of 1956, the Federal Communications Commission announced that commencing on October 15, 1956, it would certify the disposal of radio broadcasting facilities only where the disposition is required because of a change in, or adoption of a new policy of the Commission. Consistent with this policy, the Technical Amendments Act of 1958 amended section 1071 by restricting nonrecognition of gain or loss to the sale or exchange of property certified by the Federal Communications Commission to be "necessary or appropriate to effectuate a change in policy of, or adoption of a new policy by, the Commission."

The third instance relates to distributions pursuant to the Bank Holding Company Act of 1956. Section 1101 of the 1954 code provides that under certain circumstances the distribution of nonbanking assets by a bank holding company may be made without recognition of gain if the Federal Reserve Board certifies that the distribution of property "is necessary or appropriate to effectuate section 4 of the Bank Holding Company Act of 1956." The nonrecognition of gain applies only to a corporation that would have been a bank holding company on May 15, 1955, if the Bank Holding Company Act of 1956 had been in effect on such date, and to distributions of property acquired by the bank holding company on or before May 15, 1955, or of property acquired in a tax-free distribution from another holding company under section 1101.

The taxable gain also may be deferred in connection with certain involuntary conversions. For example, section 1033(b) provides that if property lying within an irrigation project is sold or otherwise disposed of in order to conform to the acreage-limitation provisions of Federal reclamation laws, such sale or distribution shall be treated as an involuntary conversion and the gain accordingly not recognized. Other involuntary conversion provisions of less pertinence include property compulsorily or involuntarily converted as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof, and livestock destroyed by disease or sold on account of drought.

S. 200 is more related in purpose to a bill introduced in the 85th Congress, H.R. 7628, which would have extended nonrecognition of gain in certain situations where a taxpayer is required under the anti-

trust laws to sell or dispose of property and subsequently reinvest the proceeds in similar property. As indicated in the published committee report, H.R. 7628 was reported out by the Ways and Means Committee in August of 1957, with 10 members of the committee dissenting. (See H. Rept. No. 1269, 85th Cong., 1st sess.)

The reports of the Treasury and Justice Departments on H.R. 7628 are reproduced in the House committee report on that bill. The Treasury Department opposed H.R. 7628, stating in its report to the chairman of the Ways and Means Committee:

> The revenue effect of H.R. 7628 is difficult to predict in advance, but might be large in some years. Special tax-relief measures, especially those involving large potential revenue losses, are objectionable in the absence of overriding considerations of general public policy. The Treasury Department is not aware of any general policy considerations which would justify this special tax relief. However, the Department of Justice is in a better position than this Department to comment on this bill as it relates to antitrust policy. The retroactive feature of this bill is also undesirable. We understand that relief would be provided in several important cases under the retroactive coverage of the bill.
>
> Under the circumstances, the Treasury Department is opposed to the enactment of H.R. 7628.

The Department of Justice also opposed the bill, stating, in part:

> Furthermore, by granting tax relief to antitrust defendants required to divest property, companies considering merger might be more willing to go ahead and—because of this bill's lessened tax consequences—risk the possibilities of suit and divestiture. Indeed, this bill's spur to mergers might be most strongly felt in just those cases where the bans of section 7 of the Clayton Act would likely apply, that is, where suit followed by divestiture may be imminent. As a result, the bill might well encourage those acquisitions which section 7 seeks to inhibit.

That ends the quotes from the report on the other bill.

We recognize that there may be cases where a taxpayer has acquired property in the past for legitimate business purpose under circumstances which did not apepar to involve any violation of antitrust laws. Subsequently, by reason of developments in technology and business relationships, it may be necessary to require that the taxpayer divest himself of such property to assure effective enforcement of the laws against restraint of trade. In such a case a strong argument can be made for tax relief especially where tax consequences of a divestiture may create adverse economic consequences for innocent parties. On the other hand, such equitable considerations would not exist in favor of a taxpayer who could or should anticipate a divestiture decree at the time of acquisition of the property.

Enactment of special tax relief for dispositions of divested property would require strict limitations, which might be difficult to devise, or enforce, to prevent taxpayers from acquiring prohibited property with a view to a subsequent tax-free distribution of such property. S. 200 attempts to provide these limitations by excluding from its scope any transaction one of the principal purposes of which is the distribution of earnings and profits and also by requiring that the divestiture decree recite that nonrecognition of gain is required to reach an equitable result. Such general standards may be difficult to administer. If tax relief is to be enacted in this area, consideration might be given to more specific statutory criteria to prevent distributions of property for tax avoidance purposes. One such criterion might be a rule that tax relief will not be applicable to property acquired in reasonable anticipation of a divestiture decree,

coupled with a presumption that such anticipation exists as to property acquired within a stated period, perhaps 5 years, prior to commencement of the antitrust proceedings.

With respect to the Department's position on S. 200, as stated in our report on H.R. 7628, we believe that special tax relief measures are objectionable in the absence of overriding considerations of general public policy.

If, in the opinion of the Department of Justice, legislation is deemed necessary to implement the public policy underlying the antitrust laws, we nevertheless question complete nonrecognition of tax in connection with distributions pursuant to a judgment, decree or order in suits or proceedings to enforce the Sherman Act and the Clayton Act. We reach our position for the following reasons:

First, it is difficult to justify nonrecognition of tax where the distribution has been ordered because the acquisition and holding of property is in violation of law while a voluntary distribution of property, in the absence of any violation of law, is subject to tax.

Second, the instances cited earlier in this letter involving nonrecognition of gain in certain situations are distinguishable and are not, in our view, controlling precedents here. In connection with exchanges or distributions in obedience to orders of the Securities and Exchange Commission to effectuate the provisions of the Public Utility Holding Company Act, provision for nonrecognition of gain or loss was made because Congress enacted a new law making previously legal and proper holdings illegal. The same principle was involved in connection with the nonrecognition of gain in connection with distributions pursuant to the Bank Holding Company Act of 1956. While nonrecognition of gain or loss on the sale or exchange of property to effectuate policies of the Federal Communications Commission had been permitted, it was found necessary in the Technical Amendments Act of 1958 to restrict nonrecognition of gain or loss to the sale or exchange of property certified by the Federal Communications Commission to be "necessary or appropriate to effectuate a change in policy of, or adoption of a new policy by, the Commission." Such a rule would be difficult to apply in connection with the administration of the Sherman and Clayton Acts.

Third, we believe that, generally speaking, except where the distributing company owns 80 percent of the companies whose stock is to be distributed, a distribution of property required by court order in proceedings to enforce the Sherman Act or the Clayton Act more closely resembles a partial liquidation of the distributing corporation than a nontaxable distribution. Where property is required to be distributed because the effect of its acquisition may be to restrain commerce or tend to create a monopoly of any line of commerce, such distribution might well represent a true contraction of the business of the distributing corporation. As stated in the Senate Finance Committee report in connection with H.R. 8300 in 1954, "It is intended that a genuine contraction of the business as under present law will result in a partial liquidation." (83d Cong., 2d sess., S. Rept. No. 1622 (1954)).

Although closely resembling a partial liquidation, a distribution of securities resulting from a court order issued to enforce the Sherman Act or Clayton Act, cannot, under existing statutory provisions, be

treated as a partial liquidation unless part or all of the stock of the distributing corporation is redeemed. Thus, in the Du Pont case, the proposed distribution of General Motors stock could not qualify as a partial liquidation under existing law, even though it amounts to a contraction of business, simply because no Du Pont stock is to be redeemed in exchange for the General Motors stock.

If the law were amended to give partial liquidation treatment to the Du Pont shareholders, discrepancies in the tax treatment of distributions of General Motors stock as between corporate and individual stockholders would be eliminated. Under existing law, an individual must pay tax on the entire fair market value of the General Motors stock received at ordinary rates, whereas a corporate shareholder pays an effective rate of tax of 7.8 percent on the lesser of the fair market value or the cost to Du Pont of the General Motors stock. For example, an individual in the 50-percent tax bracket receiving a share of General Motors stock would pay a tax of $25—based upon the present market value of $50—while the corporate shareholders would pay an income tax of approximately 16 cents for each share of General Motors stock received—7.8 percent of Du Pont's average cost of $2.10 a share for its General Motors stock.

Moreover, a dividend tax would fall as heavily on a new purchaser of a distributing corporation's stock whose purchase price would, in large part, have reflected the appreciation in the property distributed, as it would on a stockholder who obtained the stock in a distributing corporation at comparatively low cost.

If, however, the distribution is treated as a partial liquidation, shareholders, both corporate and individual, whose stock in Du Pont has appreciated in value would pay an immediate capital gain tax on that portion of the appreciated value allocable to the General Motors stock they received. On the other hand, a shareholder who purchased Du Pont stock at a price at or about the current market level would have little, if any, tax to pay.

The Secretary of the Treasury has stated in his report to this committee that if the Department of Justice believes that some change in the tax law is essential to facilitate antitrust enforcement, consideration might be given to taxing the distribution of divested stock as, in effect, a partial liquidation of the distributing corporation. It was also suggested that if tax relief is to be enacted in this area, consideration be given to specific statutory criteria to prevent distributions of property for tax avoidance purposes. One such criterion might be a rule that tax relief will not be applicable to property acquired in reasonable anticipation of a divestiture decree, coupled with a presumption that such anticipation exists as to property acquired within a stated period, perhaps 5 years, prior to commencement of the antitrust proceedings.

If on the basis of this hearing the committee determines that a change in the tax law should be made as an aid to antitrust enforcement, we would be pleased to cooperate with the committee in the development of appropriate legislation, which would provide adequate safeguards and protect the public interest.

The CHAIRMAN. Thank you very much, Mr. Lindsay.

Are there any questions? Senator Kerr?

Senator KERR. Mr. Chairman, I yield to the Senator from Delaware, Mr. Frear.

Senator FREAR. Mr. Lindsay, as I understand the present law, any corporation which owns 80 to 100 percent of the stock of another corporation can make a tax-free distribution of that stock. Thus, if such a corporation is ordered under the antitrust laws to distribute the stock of the other corporation, it can do so without tax to the stockholders.

Isn't that true?

Mr. LINDSAY. That is correct, Senator Frear.

Senator FREAR. Why should a compulsory distribution of 80 percent of the stock of one company be tax free when a compulsory distribution of another percentage results in ordinary income tax to the innocent shareholders?

Mr. LINDSAY. If you would qualify for tax-free distribution in a voluntary situation, the fact that it is compulsory should not change the tax effect.

Senator FREAR. Do you have a copy of the Treasury's statement, the letter?

Mr. LINDSAY. You refer to the letter from the Secretary of the Treasury?

Senator FREAR. Yes.

Mr. LINDSAY. I have a copy before me.

Senator FREAR. In that letter, Mr. Lindsay, it is stated, and I am sure you are familiar with the way it is stated, that—

> Strict limitations are necessary which might be difficult to enforce. S. 200 contains a provision that the distribution is to be tax free only if a Federal district court determines in its decree that nonrecognition of gain is required to reach an equitable result.

Why can't we rely on our Federal district courts to make sure there is no abuse?

Mr. LINDSAY. We might, and I believe that is a helpful provision, but without further standards it would in effect mean the various district courts throughout the country would be determining the tax results of a transaction.

Ordinarily, they look to guidance in the code and try to follow the guidance that Congress has set down.

You may have the same transaction in two different parts of the country taxed differently because one district court thinks that the tax is harsh, and another district court thinks that receiving taxable property is no great burden.

Ordinarily, if there was no change in market value there is no hardship in paying a tax on the distribution of the property. If it were otherwise, if we provided that any distribution of stock was nontaxable, a corporation, rather than distribute the earnings and profits to shareholders which would be taxed as a dividend, the corporation would buy securities in another corporation and distribute those securities tax free. The shareholder would be able to sell and realize the proceeds at capital gain rates rather than ordinary dividend rates.

Senator FREAR. Now, Mr. Lindsay, you are setting up an example that is to be used for tax avoidance, are you not? In the statement you just made, if I understood you correctly, you are giving an example——

Mr. LINDSAY. Of possible tax avoidance, that is correct, Senator Frear.

Senator FREAR. That is correct. Well, S. 200 in no way contemplates anything like that. Of course technical perfecting amendments, if needed, will certainly be agreeable to the sponsors of S. 200.

Mr. LINDSAY. Yes, I am sure the technical amendments could be worked out that would be agreeable to all concerned if legislation was deemed necessary.

Senator FREAR. Mr. Lindsay, this may be in the field of antitrust legislation, or in the courts, and I recognize that we are in the field of taxation primarily, but isn't it true also that you could find a judge in California giving a different decision in the Federal court than one in New York, whether it be on taxes or antitrust or what not?

Mr. LINDSAY. That is correct.

Senator FREAR. His interpretation of the law in California could be different than an interpretation in New York, much the same as we find the nine Justices of the Supreme Court giving different interpretations of the Constitution?

Mr. LINDSAY. That is more likely if you don't have standards. But it is a fact that there are different interpretations of the law throughout the country.

Senator FREAR. Well, I don't think the sponsors of this legislation would refrain from supplying ample standards.

Also, in that same paragraph, Mr. Lindsay—I am referring to the Secretary's letter, now—it is stated:

> That it would be difficult to administer the provisions of S. 200 which permits a tax-free distribution if the principal purpose is not to distribute earnings and profits.

Isn't the Commissioner of Internal Revenue adequately administering a similar provision relating to spinoffs in section 355 of the present code?

Mr. LINDSAY. Yes. We are administering that statute; the Internal Revenue Service has been coping with that and prior statutes for years, but it is difficult to administer. That is why more precise guidance was laid down in the 1954 code.

For example, if 80 percent of the subsidiary is owned by the distributing corporation, then the stock would be distributed tax free, provided the subsidiary was owned for 5 years.

Senator FREAR. Yes.

Mr. LINDSAY. But standing alone, it has been difficult to administer. The forerunner of that provision in the 1939 code was very difficult to administer, and there were very few rulings that were issued under it.

Senator FREAR. But they are administering it?

Mr. LINDSAY. Yes; trying to.

Senator FREAR. And, in your opinion, is it being done in a satisfactory manner or not?

Mr. LINDSAY. Well, I think they are doing it in a satisfactory manner, but that is not to say it is not difficult to administer a provision which turns or whether it is the intent of the taxpayer to distribute earnings and profits or whether he is motivated by genuine business reasons.

Senator FREAR. I suppose, Mr. Lindsay, that you are no more capable of analyzing an intent that I am, but I will give you the benefit of that because I think you very capable. And personally, I respect your

ability and admire the part you are playing in the Treasury Department, sir.

It is never, I am sure, the intention of the lawmakers up here to make decisions difficult for any agency to administer, but sometimes through inadvertence we do. But when we do, you people, and rightfully so, come down and ask for changes which you certainly did, for example, in the codification of 1954. And as you know, at that time, hundreds of examples were corrected, and we thing that maybe S. 200 with some technical amendments will also be in that same category.

Mr. Lindsay, is there any case where the tax law provides for the taxation of a distribution which is compelled by some agency of the Government other than in the antitrust field?

Mr. LINDSAY. Yes; I think the letter of the Secretary and my testimony cited the bulk of the precedents when the tax law does provide for special treatment for involuntary distributions and distributions required by an administrative body, such as the SEC and the FCC, Bank Holding Company Act provisions, and other examples.

Senator FREAR. I am not quite familiar with that, sir. Could you give me an example?

Mr. LINDSAY. Perhaps I misunderstood your question, Senator Frear. Did you ask me whether or not there are instances in the law where nonrecognition is accorded if a distribution is required by a Government body?

Senator FREAR. Let me phrase it in my terms. You can understand mine, I am sure, where I might not be able to understand yours.

Is there any case where the tax law provides for the taxation of a distribution which is compelled by some agency of the Government other than in the antitrust field?

Mr. LINDSAY. Such a distribution would automatically be taxable unless expressly exempted by a statutory provision. I am aware now of the exceptions. I can't for the moment think of a situation other than the antitrust field where there is not an exception.

Senator FREAR. If you can think of one, Mr. Lindsay, I would like to have it.

I now have a statment that I want to read to you, Mr. Lindsay, and ask your comments and see if you agree with it:

The Sherman Act and the Clayton Act are expressed in extremely broad terms. As a consequence, antitrust law is actually made by judicial decisions. This law has developed and changed over the years. This court-made law, the rules of which are frequently difficult, and often impossible to predict, is similar to the statutory or administrative laws requiring divestiture for which Congress has already provided for the deferral of taxation.

S. 200 would extend to antitrust proceedings the treatment which Congress has already provided in the case of the statutory and administrative laws requiring divestiture.

Do you agree?

Mr. LINDSAY. Let me put it this way:

I agree that the Sherman Act and the Clayton Act are drafted in very broad terms. There is very little specificity in those provisions, and there has been a growing body of case law throughout the years, and some of the cases have surprised, I suppose, the practitioners in that field.

I am here as a representative of the Treasury Department and cannot speak competently on whether or not any particular case handed

down by a court really represents a new policy or not, but I do agree that it is a general statute, and some of the court decisions necessarily have added to the body of the law.

Senator FREAR. Although you have been limiting yourself in the field of taxation, I think you are pretty expert in the field of antitrust law, too, Mr. Lindsay.

Now, Mr. Lindsay, going back to the letter of the Secretary, there are three objections raised to S. 200, and I just want to ask you two or three questions in regard to these objections.

The first objection states:

> It is difficult to justify nonrecognition of tax where the distribution has been ordered because the acquisition and holding of property is in violation of law while a voluntary distribution of property, in the absence of any violation of law, is subject to tax.

Isn't a distribution which is ordered by the Securities and Exchange Commission under the Public Utilities Holding Company Act tax free when it is found that there is a violation of the purpose of that act?

Mr. LINDSAY. That is correct; but it was a new act applying to otherwise legal holdings. If the Public Utility Act had been passed in 1913, it would have been a different situation.

Senator FREAR. I want to comment on that statement, but I want to ask you this, first:

Wouldn't the distribution be tax free even though the holding company were formed today?

Mr. LINDSAY. I don't imagine the holding company could be formed today.

Senator FREAR. Assuming that it could, then, sir?

Mr. LINDSAY. I believe so, yes.

Senator FREAR. Right.

You were talking about a new law. It is usually customary to think that new laws are made by Congress. However, in this Antitrust Division it is assumed by some, many expert in the field, that new law is made by the court. So that we do have a difference of opinion.

I think you honestly agree with me, but you can express yourself if you care to, sir.

Distributions that are ordered by the Federal Reserve Board under the Bank Holding Company Act are tax free, are they not?

Mr. LINDSAY. They are.

Senator FREAR. Isn't it true that a distribution made voluntarily by a bank holding company which wished to comply with the act would be taxable to the shareholders, whereas if the same distribution were ordered by the Federal Reserve Board the distribution would be tax free to the shareholders?

Mr. LINDSAY. Yes, that is correct, unless that distribution would have otherwise qualified for one of the tax free—

Senator FREAR. If they followed this they would be.

The second objection contained in the letter from the Secretary is to the effect that the policy regarding distributions under the Public Utilities Holding Act and the Bank Holding Company Act is different from the policy with regard to forced distributions under the antitrust laws.

It seems to me from the letter of the Scretary that the attempted distinction is based upon the fact that this new policy would be set

forth by Congress in these two acts, and I go back to my question again:

Don't you think that the Supreme Court in the Du Pont case say this is the first case presenting this question to the Court of vertical acquisition?

Mr. LINDSAY. I believe the Court did so state, both in the majority and dissenting opinions. Rather than answer it myself, I will read from excerpts from the Court opinion.

Senator FREAR. I think that can be answered "yes" or "no," Mr. Lindsay.

Mr. LINDSAY. I can answer that "Yes."

Senator FREAR. I don't want to cut you off if you have anything else you want to say.

Mr. LINDSAY. No; I would say yes.

Senator FREAR. Isn't the case of that——

Mr. LINDSAY. A very strong argument can be made that it is.

Senator FREAR. The Clayton Act was enacted in 1914. The Du Pont Co. acquired in 1917 to 1919 the principal amount of General Motors stock which it owns. This acquisition was a matter of public record. In fact, in 1927, an investigation by the Federal Trade Commission and the Department of Justice led to no action. It was not until 1949, 30 years after the act was issued, that the Department of Justice brought the present case. The Supreme Court made it clear for the first time that an acquisition made in 1917 could be judged on the facts as of the time of the lawsuit more than 30 years later.

Would you not therefore agree that there has been a change in law essentially similar to the change which occurred as to the public utility holding companies and the bank holding companies?

Mr. LINDSAY. I think it could be so stated, Senator Frear. We were talking in our prepared statement and in the Secretary's letter about legislation involving antitrust divestures in general and comparing the distributions forced under the antitrust laws with distributions forced under the Public Utility Holding Company Act.

In the case of the Public Utility Holding Company Act a new law was passed by Congress; the same is true in the care of the Bank Holding Company Act. We have had the antitrust law on the books since 1890 and 1914. It is not a new law.

You might take a particular case and say the way the Court interpreted it is a new interpretation. There is a difference between drafting guidelines across the board and trying to tailor legislation for a particular case——

Senator FREAR. Mr. Lindsay, it is perfectly obvious, the case we are arguing here. I don't think there is any doubt in the minds of anybody just what S. 200 is attempting to do. It is true that different interpretations come from the same body time and time again, but this decision has been made by the Supreme Court, and if the lower court, and/or on appeal the Supreme Court, takes the Government proposition, it is our contention that a million stockholders will be done a grave injustice, and it is the duty of the Congress, in my opinion, to correct that injustice: therefore, the reason for S. 200.

Mr. Lindsay, is it true that a voluntary distibution of part of the stock of another corporation would not be regarded under present law as a contraction of the business?

The CHAIRMAN. Would the Senator repeat that?

Senator FREAR. Yes, sir.

Is it true that a voluntary distribution of part of the stock of another corporation would not be regarded under present law as a contraction of the business?

Mr. LINDSAY. I would say ordinarily not. Where, however, there is a substantial amount of stock so that in the eyes of the courts there was effective control, or sufficient control to require a distribution, there is a strong analogy to partial liquidation, to a contraction of the business. In this situation concerning Du Pont and General Motors, it appears that there would be a contraction of Du Pont in distributing out a very substantial investment, over 20 percent of the General Motors Co., which it is required to do, if it will be required to do so on the ground that this investment is not a mere portfolio investment but involves a degree of control and a restraint of trade.

Now in answering your question more completely, if we were talking about a pure portfolio investment, I agree with you that it would not be a contraction and it would not be partial liquidation.

Senator FREAR. Then there should be no difference between a "forced" and "voluntary" distribution under that interpretation.

Mr. LINDSAY. True; but I think that if you asked for a ruling, or went to a court on a voluntary distribution and had 20 percent of a company, it might be very difficult to find in a particular case that the 20 percent was more than a portfolio investment. And if you had the background of an antitrust suit, you might come out with a finding of fact which would have some bearing on the question of whether you have a portfolio investment or a business.

Senator FREAR. Maybe I ought to be set straight in this: Did the Supreme Court order divestiture?

Mr. LINDSAY. No; I believe the Supreme Court ordered equitable relief in the public interest, and it is up to the district court in Chicago to determine what that equitable relief should be.

Senator FREAR. I believe we agree there.

Now, Mr. Lindsay, near the end of the Secretary's letter it is stated that shareholders whose stock in a distributing corporation has appreciated in value would pay an immediate tax on the appreciated value of the distributed property.

Isn't it true that a shareholder under the approach suggested by you would pay a tax even though there had been no change in the value of the distributed property between the time it was acquired by the corporation and the time it was distributed by the corporation?

Mr. LINDSAY. The amount of tax he would pay would depend upon his cost in the Du Pont stock. If he purchased a share of Du Pont stock for $100, and we will say it is now worth $250, and he received $75 worth of General Motors stock, he would allocate about 30 percent of his cost in the Du Pont stock to General Motors. So $30 of his $100 would be attributable to the General Motors and he would pay only on the difference between the $30 and the $75 received, a $45 gain. He would not pay any tax on prior appreciation before he purchased into the company.

Senator FREAR. But suppose General Motors stock was only worth $30 now, in this same example.

Mr. LINDSAY. If General Motors was only worth $30, then there would probably be no tax. I think if—it would be thirty two-hundred-and-fiftieths of the cost of $100. You would have to change my basic figures to——

Senator FREAR. I want you to be sure, now.

Mr. LINDSAY. If General Motors was only worth $30 now, then I suppose that the Du Pont would also be less than $250. Probably there might be a proportionate——

Senator FREAR. That is not in our assumption according to our proposition. General Motors remains the same and Du Pont goes up. What is your answer?

Mr. LINDSAY. Then there would be a tax. As Du Pont goes up, there would be a tax.

Senator FREAR. All right. I think that answers my question.

Mr. LINDSAY. I would like to reexamine this.

Senator FREAR. I wish you would.

Mr. LINDSAY. If I may see the transcript, because I am not sure I completely understood the question and gave the correct answer.

Senator FREAR. I would like for you to reexamine that, Mr. Lindsay, in light of what the Secretary states, and I think perhaps you will want to correct it. I think it should be made perfectly clear.

There are not tricky questions; they are not made to take advantage of you, but they are asked to prove a point.

Mr. LINDSAY. I think, generally speaking, if Du Pont went up and General Motors did not, then he would pay a tax in the example we were discussing.

Senator FREAR. Right, sir.

Mr. Lindsay, I see that the letter from the Deputy Attorney General is before us. If you are not familiar with that and don't want to answer this question, it is all right. However, may I pose a question and let you determine whether you want to answer it?

Mr. LINDSAY. I will answer any question, if I can.

Senator FREAR. Thank you.

In this letter from the Deputy Attorney General a number of cases are cited. The Department of Justice points out that the courts have been reluctant to order a distribution of property under the antitrust laws because of the adverse tax effects. Would the court be just as reluctant to order a distribution if the distribution is to be taxed as a partial liquidation?

Mr. LINDSAY. It might; that is why we are not categorical in our recommendation. We think that partial liquidation treatment which, in our minds, fits logically within the framework of the code as it exists, is worthy of consideration. Certainly, it would mean a substantial relief for many persons who otherwise would pay a very heavy tax.

Ordinarily, if I may repeat one point——

Senator FREAR. Certainly.

Mr. LINDSAY. If you pay a tax on stock—if you are paid a dividend in stock of another company, there is no hardship in having to pay ordinary income tax on that stock. It is up to you whether you wish to sell it or not. If the surrounding circumstances of the case are such that the stock values are forced to go down you could be hurt,

because you would be paying a tax on one value, but you would realize less.

If the value stayed the same it makes no difference whether you had $100 of cash and paid the tax, or $100 worth of salable securities, realized your $100 and paid the tax.

Coming back to your particular question as to whether or not the court would be reluctant to order divestiture where there is a capital gains tax, the kind of hardship that might exist under existing law might not exist. If there was a divestiture in one year, which nobody is recommending in connection with the treatment as an ordinary dividend, such distribution in one year might result in an artificial loss in the cost basis allocated to Du Pont. The shareholder could get only a capital loss on that which would be of little use, and in the meantime pay an ordinary income tax on a piece of paper received. That would be far less true under a partial liquidation.

Senator FREAR. I think that is right.

Mr. Lindsay, has any amount been included in the budget for the current fiscal year, or the next fiscal year, because of taxes which would be collected from shareholders receiving distributions as a result of antitrust orders?

Mr. LINDSAY. None that I know of.

Senator FREAR. Wouldn't any tax received as a result of such action, as contemplated in this context, be a windfall to the Treasury?

Mr. LINDSAY. It might, or it might not.

Now, again, the proposal is to distribute shares over a 10-year period. That means about $7 worth of General Motors stock a year per share. The dividend level in the past of Du Pont has been $6.50. There is not much difference there. I don't know whether the Du Pont Co. would or could continue to pay the same level of cash dividends, or whether it would have a supplementary cash dividend. It would depend on what the company would do and could do as to whether there would be a tremendous additional tax to the Treasury.

Senator FREAR. I suppose the company would follow out the orders of any court, certainly; I suppose that would be up to the jurisdiction of the court.

But what I am interested in is that you are saying that the consequences of S. 200 would have little tax effect.

Mr. LINDSAY. Well, it depends. If the market value of General Motors stock stays the same, and that is a big "if," if Du Pont maintains the same level of cash dividends, if the court follows the Justice Department's plan, then over a 10-year period there would be additional revenues of approximately a billion dollars from the distribution. I am not talking about the sales that might be ordered apart from the distribution, the sales attributable to the stock belonging to Christiana and Delaware.

Now, that additional billion might very well be called a windfall, I suppose.

Senator FREAR. Well, then, if it is—if you say it is a billion dollars, or maybe you used my figure——

Mr. LINDSAY. Under all the assumptions.

Senator FREAR. Yes, and you have a pretty long list of assumptions. But if it were divided in 10 years, what would be the income to the Treasury each year?

Mr. LINDSAY. $100 million a year.

Senator FREAR. What is the budget——

Mr. LINDSAY. I left out another assumption. We assumed a 50-percent bracket for that assumption, incidentally.

Senator FREAR. Yes, sir. Well I suppose your assumption is no doubt better than mine and certainly equally as good as anybody else's. But what is the present budget?

Mr. LINDSAY. It is in the order of $77 billion.

Senator FREAR. So what is $100 million; what percentage is $100 million of $77 billion?

Mr. LINDSAY. It is a very low percentage.

Senator FREAR. Thank you.

My last question, Mr. Chairman:

Mr. Lindsay, you have raised several technical objections to S. 200. Do you believe that these technical objections justify the imposition of the gross inequity in the present law on 1 million innocent taxpayers?

Mr. LINDSAY. If we determine that relief is equitable and fair and should be adopted, I don't think that the Treasury would want to be in a position of doing anything other than cooperate in developing a statute that would be the best possible statute under the circumstances.

We suggested, for example, that if there are problems of determining whether or not an acquisition is made with a view to disposition, or with a possibility that antitrust enforcement wouldn't matter because there could be a tax-free distribution, that a presumption based on a 5-year period might be put in the statute.

That might be a hard-and-fast rule; it might be in terms of a presumption; but that kind of thing might help materially in the fringe cases. We would cooperate with the joint committee staff and with your committee in developing any legislation that the committee deems to be appropriate.

Senator FREAR. Mr. Chairman, may I thank the witness for his extreme cooperation, and say that I have always found him a cooperative person, and helpful in most instances.

The CHAIRMAN. Thank you, Senator Frear.

Mr. Lindsay, in answer to a question by Senator Frear as to the decision of the Supreme Court, you stated that the Supreme Court did not require divestiture of the stock.

Mr. LINDSAY. That is correct.

The CHAIRMAN. But it granted equitable relief.

Mr. LINDSAY. That is correct.

The CHAIRMAN. Could you elaborate on that and carry it down further as to what action the district court has taken?

At this point the Chair states that Senator Butler, of Maryland, desires that all decisions of the Supreme Court as well as the district courts be made a part of this record.

Will you supply them?

Mr. LINDSAY. Yes, sir.

(The information referred to is as follows:)

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1956.

United States of America, Appellant, v. E. I. du Pont de Nemours and Company et al.	On Appeal From the United States District Court for the Northern District of Illinois.

[June 3, 1957.]

Mr. Justice Brennan delivered the opinion of the Court.

This is a direct appeal under § 2 of the Expediting Act [1] from a judgment of the District Court for the Northern District of Illinois,[2] dismissing the Government's action brought in 1949 under § 15 of the Clayton Act.[3] The complaint alleged a violation of § 7 of the Act [4] resulting from the purchase by E. I. du Pont de Nemours and Company in 1917–1919 of a 23% stock interest in General Motors Corporation. This appeal is from the dismissal of the action as to du Pont, General Motors and the corporate holders of large amounts of du Pont stock, Christiana Securities Corporation and Delaware Realty & Investment Company.[5]

[1] 32 Stat. 823, as amended, 15 U. S. C. § 29. The Court noted probable jurisdiction. 350 U. S. 815.

[2] 126 F. Supp. 235.

[3] 38 Stat. 736, 15 U. S. C. (1946 ed.) § 25.

[4] This action is governed by the Clayton Act as it was before the 1950 amendments, which by their terms are inapplicable to acquisitions prior to 1950. 64 Stat. 1125, 15 U. S. C. § 18.

[5] The amended complaint also alleged violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2. In view of our determination of the case, we are not deciding the Government's appeal from the dismissal of the action under the Sherman Act.

41866 O—59——3

The primary issue is whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce.

The first paragraph of § 7, pertinent 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." [6]

Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. Acquisitions solely for investment are excepted, but only if, and so long as, the stock is not used by voting or other-

---

[6] 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.

wise to bring about, or in attempting to bring about, the substantial lessening of competition.

We are met at the threshold with the argument that § 7 before its amendment applied only to an acquisition of the stock of a competing corporation, and not to an acquisition by a supplier corporation of the stock of a customer corporation—in other words, that the statute applied only to horizontal and not to vertical acquisitions. This is the first case presenting the question in this Court. *International Shoe Co.* v. *Federal Trade Comm'n*, 280 U. S. 291, and *Thatcher Mfg. Co.* v. *Federal Trade Comm'n*, 272 U. S. 554, involved corporate acquisitions of stock of competitors.

During the 35 years before this action was brought, the Government did not invoke § 7 against vertical acquisitions. The Federal Trade Commission has said that the section did not apply to vertical acquisitions. See F. T. C., Report on Corporate Mergers and Acquisitions, 168 (1955). Also, the House Committee considering the 1950 revision of § 7 stated that ". . . it has been thought by some that this legislation [the 1914 Act] applies only to the so-called horizontal mergers. . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. The House Report adds, however, that the 1950 amendment was purposed ". . . to *make it clear* that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . ." (Emphasis added.)

This Court has the duty to reconcile administrative interpretations with the broad anti-trust policies laid down by Congress. Cf. *Automatic Canteen Co.* v. *Federal Trade Comm'n*, 346 U. S. 61, 74. The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act. Accord, *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U. S. 325, —.

The first paragraph of § 7, written in the disjunctive, plainly is framed to reach not only the corporate acquisition of stock of a competing corporation, where the effect may be substantially to lessen competition between them, but also the corporate acquisition of stock of any corporation, competitor or not, where the effect may be either (1) to restrain commerce in any section or community, or (2) tend to create a monopoly of any line of commerce. The amended complaint does not allege that the effect of du Pont's acquisition may be to restrain commerce in any section or community but alleges that the effect was ". . . to tend to create a monopoly in particular lines of commerce . . . ."

Section 7 contains a second paragraph dealing with a holding company's acquisition of stock in two or more corporations.[7] Much of the legislative history of the section deals with the alleged holding company evil.[8] This history does not aid in interpretation because our concern here is with the first paragraph of the section. There is, however, pertinent legislative history which does aid and support our construction.

Senator Chilton, one of the Senate managers of the bill, explained that the House conferees insisted that to prohibit just the acquisitions where the effect was "substantially" to lessen competition would not accomplish the designed aim of the statute, because "a cor-

---

[7] This paragraph provides:

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.

[8] See, *e. g.*, S. Rep. No. 698, 63d Cong., 2d Sess. 13; H. R. Rep. No. 627, 63d Cong., 2d Sess. 17.

poration might acquire the stock of another corporation, and there would be no lessening of competition, but the tendency might be to create monopoly or to restrain trade or commerce." "Therefore," said Senator Chilton, "there was added . . . the following: 'Or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.' "[9] This construction of the section, as embracing three separate and distinct effects of a stock acquisition, has also been recognized by a number of federal courts.[10]

We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. Thus, although du Pont and General Motors are not competitors, a violation of the section has occurred if, as a result of the acquisition, there was at the time of suit a reasonable likelihood of a monopoly of any line of commerce. Judge Maris correctly stated in *Transamerica Corp.* v. *Board of Governors,* 206 F. 2d 163, 169:

> "A monopoly involves the power to . . . exclude competition when the monopolist desires to do so. Obviously, under Section 7 it was not necessary . . . to find that . . . [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud. Since by defi-

---

[9] 51 Cong. Rec. 16002.

[10] *Aluminum Co. of America* v. *Federal Trade Comm'n,* 284 F. 401; *Ronald Fabrics Co.* v. *Verney Brunswick Mills, Inc.,* CCH 1946-1947 Trade Cases ¶57,514; *United States* v. *New England Fish Exchange,* 258 F. 732; cf. *Transamerica Corp.* v. *Board of Governors,* 206 F. 2d 163; *Sidney Morris & Co.* v. *National Assn. of Stationers,* 40 F. 2d 620, 625.

> nition monopoly involves the power to eliminate competition a lessening of competition is clearly relevant in the determination of the existence of a tendency to monopolize. Accordingly in order to determine the existence of a tendency to monopoly in . . . any . . . line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined. . . ."

Appellees argue that there exists no basis for a finding of a probable restraint or monopoly within the meaning of § 7 because the total General Motors market for finishes and fabrics constituted only a negligible percentage of the total market for these materials for all uses, including automotive uses. It is stated in the General Motors brief that in 1947 du Pont's finish sales to General Motors constituted 3.5% of all sales of finishes to industrial users, and that its fabrics sales to General Motors comprised 1.6% of the total market for the type of fabric used by the automobile industry.

Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." [11] Substantiality can be determined only in terms of the market affected. The record shows that automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes

---

[11] *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 299, n. 5. Section 3 of the Act, with which the Court was concerned in *Standard Oil,* makes unlawful certain agreements ". . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly *in any line of commerce.*" 38 Stat. 731, 15 U. S. C. (1946 ed.) § 14. (Emphasis added.)

and fabrics[12] to make them a "line of commerce" within the meaning of the Clayton Act. Cf. *Van Camp & Sons Co.* v. *American Can Co.,* 278 U. S. 245.[13] Thus, the

---

[12] For example, the following is said as to finishes in the du Pont brief:

"The largest single finish item which du Pont sells to General Motors is a low-viscosity nitrocellulose lacquer, discovered and patented by du Pont and for which its trademark is 'Duco'.

. . . . .

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

"By the early 1920's the need for better finishing materials for automobiles had become urgent . . . . The varnish method then used in finishing automobiles was described in detail at the trial by automobile pioneers . . . . Finishing an automobile with varnish required an intolerably long time—up to 3 or 4 weeks—to apply the numerous coats needed. When the finish was complete, its longest life expectancy was less than a year, and often it began to peel off before the car was delivered. . . ."

Du Pont's Director of Sales since 1944, Nickowitz, testified as to fabrics sold to automobile manufacturers as follows:

"Q. Now, over the years, isn't it true that speaking generally du Pont has followed the policy in selling its fabrics to the automobile field of undercutting its competitors in price? You don't try to sell it on a lower price than that quoted by any other competitor, do you?

"A. Well, we don't know. We go in and we bid based on our costs. *Now, in the automotive industry, we have a different situation than you do in the furniture trade, for example, where you have an established price.*

"You see, in the automobile industry, each manufacturer uses a different construction. They all have their own peculiar ideas of what they want about these fabrics. Some want dyed backs, and some want different finishes, so you don't have any standard prices in the automobile industry." (Emphasis added.)

And see extended discussions in the opinion of the trial court, as to finishes, 126 F. Supp., at 288–292, as to fabrics, *id.*, at 296–300.

[13] "The phrase ['in any line of commerce'] is comprehensive and means that if the forbidden effect or tendency is produced in *one*

bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.[14]

The market affected must be substantial. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 357. Moreover, in order to establish a violation of § 7 the Government must prove a likelihood that competition may be "foreclosed in a substantial share of . . . [that market]." [15] Both requirements are satisfied in this case. The substantiality of a relevant market comprising the automobile industry is undisputed. The substantiality of General Motors' share of that market is fully established in the evidence.

General Motors is the colossus of the giant automobile industry. It accounts annually for upwards of two fifths of the total sales of automotive vehicles in the nation.[16]

---

out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." 278 U. S., at 253.

[14] The General Motors brief states:

"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."

[15] *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, at 314.

[16] Moody's Industrials lists General Motors' proportion of the industry:

	Percent		Percent
1938	42+	1947	38.5
1939	42+	1948	38.8
1940	45.6	1949	42.7
1941	45.3	1950	45.6
1942	W. W. II	1951	41.8
1943	W. W. II	1952	40.3
1944	W. W. II	1953	44.7
1945	W. W. II	1954	49.9
1946	36.3	1955	48.8

In 1955 General Motors ranked first in sales and second in assets among all United States industrial corporations [17] and became the first corporation to earn over a billion dollars in annual net income.[18] In 1947 General Motors' total purchases of all products from du Pont were $26,628,274, of which $18,938,229 (71%) represented purchases from du Pont's Finishes Division. Of the latter amount purchases of "Duco" [19] and the thinner used to apply "Duco" totaled $12,224,798 (65%), and "Dulux" [20] purchases totaled $3,179,225. Purchases by General Motors of du Pont fabrics in 1948 amounted to $3,700,000, making it the largest account of du Pont's Fabrics Division. Expressed in percentages, du Pont supplied 67% of General Motors' requirements for finishes in 1946 and 68% in 1947.[21] In fabrics du Pont supplied 52.3% of requirements in 1946, and 38.5% in 1947.[22] Because General Motors accounts for almost one-half of the automobile industry's annual sales, its requirements for automotive finishes and fabrics must represent approximately one-half of the relevant market for these materials. Because the record clearly shows that quantitatively and percentagewise du Pont supplies the largest part of General Motors' requirements, we must conclude that du Pont has a substantial share of the relevant market.

The appellees argue that the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding or subsequent use of the stock. This argument miscon-

---

[17] Fortune Directory of the 500 Largest U. S. Industrial Corporations, July 1956, p. 2.

[18] N. Y. Times, Feb. 3, 1956, p. 1, col. 3.

[19] A finish developed specially by du Pont and General Motors for use as an automotive finish.

[20] A synthetic enamel developed by du Pont which is used on refrigerators, also manufactured by General Motors.

[21] 126 F. Supp., at 295.

[22] *Id.*, at 300–301.

ceives the objective toward which § 7 is directed. The Clayton Act was intended to supplement the Sherman Act.[23] Its aim was primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case. The Senate declared the objective of the Clayton Act to be as follows:

> ". . . Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act], or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation. . . .*" S. Rep. No. 698, 63d Cong., 2d Sess. 1. (Emphasis added.)

"Incipiency" in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. See *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 166. To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.[24] Even when the purchase is solely for investment, the plain language of § 7 contemplates an action at any time the stock is used to

---

[23] *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346.

[24] Cf. *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 738.

bring about or in attempting to bring about the substantial lessening of competition.[25]

Prior cases under § 7 were brought at or near the time of acquisition. See, *e. g.*, *International Shoe Co.* v. *Federal Trade Comm'n*, 280 U. S. 291; *V. Vivaudou, Inc.* v. *Federal Trade Comm'n*, 54 F. 2d 273; *Federal Trade Comm'n* v. *Thatcher Mfg. Co.*, 5 F. 2d 615, rev'd in part on other ground, 272 U. S. 554; *United States* v. *Republic Steel Corp.* 11 F. Supp. 117; *Vanadium-Alloys Steel Co.*, 18 F. T. C. 194. None of these cases holds, or even suggests, that the Government is foreclosed from bringing the action at any time when a threat of the prohibited effects is evident.

Related to this argument is the District Court's conclusion that 30 years of nonrestraint negated "any reasonable probability of such a restraint" at the time of the suit.[26] While it is, of course, true that proof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement that the effect of an acquisition "may be" such restraint or tendency,[27] the basic facts found by the District Court demonstrate the error of its conclusion.[28]

---

[25] Section 7 provides, in pertinent part:

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. . . ." 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.

[26] 126 F. Supp., at 335.

[27] *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, at 356–357.

[28] There is no significant dispute as to the basic facts pertinent to the decision. We are thus not confronted here with the provision of Fed. Rules Civ. Proc., 52 (a), that findings of fact shall not be set aside unless clearly erroneous.

The du Pont Company's commanding position as a General Motors supplier was not achieved until shortly after its purchase of a sizable block of General Motors stock in 1917.[29] At that time its production for the automobile industry and its sales to General Motors were relatively insignificant. General Motors then produced only about 11% of the total automobile production and its requirements, while relatively substantial, were far short of the proportions they assumed as it forged ahead to its present place in the industry.

At least 10 years before the stock acquisition, the du Pont Company, for over a century the manufacturer of military and commercial explosives, had decided to expand its business into other fields. It foresaw the loss of its market for explosives after the United States Army and Navy decided in 1908 to construct and operate their own plants. Nitrocellulose, a nitrated cotton, was the principal raw material used in du Pont's manufacture of smokeless powder. A search for outlets for this raw material uncovered requirements in the manufacture of lacquers, celluloid, artificial leather and artificial silk. The first step taken was the du Pont purchase in 1910 of the Fabrikoid Company, then the largest manufacturer of artificial leather, reconstituted as the du Pont Fabrikoid Company in 1913.

The expansion program was barely started, however, when World War I intervened. The du Pont Company suddenly found itself engulfed with orders for military explosives from foreign nations later to be allies of the United States in the war, and it had to increase its capacity and plant facilities from 700,000 to 37,000,000 pounds per month at a cost exceeding $200,000,000. Profits accumulated and ultimately amounted to $232,-

---

[29] Before 1917, du Pont supplied General Motors with coated fabrics. 126 F. Supp., at 297.

000,000. The need to find postwar uses for its expanded facilities and organization now being greater than ever, du Pont continued its expansion program during the war years, setting aside $90,000,000 for the purpose. In September 1915, du Pont bought the Arlington Works, one of the nation's two largest celluloid companies. In June 1916, the Fairfield Rubber Company, producers of rubber-coated fabrics for automobile and carriage tops, was taken over by du Pont Fabrikoid. In March 1917, purchase was made of Harrison Brothers and Company, manufacturers of paint, varnish, acids and certain inorganic chemicals used in paint manufacture. Shortly afterwards, Harrison absorbed Beckton Chemical Company, a color manufacturer, and, also in 1917, the Bridgeport Wood Finishing Company, a varnish manufacturer.

Thus, before the first block of General Motors stock was acquired, du Pont was seeking markets not only for its nitrocellulose, but also for the artificial leather, celluloid, rubber-coated goods, and paints and varnishes in demand by automobile companies. In that connection, the trial court expressly found that ". . . reports and other documents written at or near the time of the investment show that du Pont's representatives were well aware that General Motors was a large consumer of products of the kind offered by du Pont," and that John J. Raskob, du Pont's treasurer and the principal promoter of the investment, "for one, thought that du Pont would ultimately get all that business . . . ."[30]

The Company's interest in buying into General Motors was stimulated by Raskob and Pierre S. du Pont, then du Pont's president, who acquired personal holdings of General Motors stock in 1914. General Motors was organized six years earlier by William C. Durant to acquire previously independent automobile manufactur-

---

[30] 126 F. Supp., at 243.

ing companies—Buick, Cadillac, Oakland and Oldsmobile. Durant later brought in Chevrolet, organized by him when he was temporarily out of power, during 1910–1915, and a bankers' group controlled General Motors. In 1915, when Durant and the bankers deadlocked on the choice of a Board of Directors, they resolved the deadlock by an agreement under which Pierre S. du Pont was named Chairman of the General Motors Board, and Pierre S. du Pont, Raskob and two nominees of Mr. du Pont were named neutral directors. By 1916, Durant settled his differences with the bankers and resumed the presidency and his controlling position in General Motors. He prevailed upon Pierre S. du Pont and Raskob to continue their interest in General Motors' affairs, which both did as members of the Finance Committee, working closely with Durant in matters of finances and operations and plans for future expansion. Durant persistently urged both men and the "Wilmington people, as he called it," [31] to buy more stock in General Motors.

Finally, Raskob broached to Pierre S. du Pont the proposal that part of the fund earmarked for du Pont expansion be used in the purchase of General Motors stock. At this time about $50,000,000 of the $90,000,000 fund was still in hand. Raskob foresaw the success of the automobile industry and the opportunity for great profit in a substantial purchase of General Motors stock. On December 19, 1917, Raskob submitted a Treasurer's Report to the du Pont Finance Committee recommending a purchase of General Motors stock in the amount of $25,000,000. That report makes clear that more than just a profitable investment was contemplated. A major consideration was that an expanding General Motors would provide a substantial market needed by the bur-

[31] 126 F. Supp., at 241.

geoning du Pont organization. Raskob's summary of reasons in support of the purchase includes this statement: "Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin [celluloid], paint and varnish business of those companies, *which is a substantial factor.*" (Emphasis added.) [32]

This thought, that the purchase would result in du Pont's obtaining a new and substantial market, was echoed in the Company's 1917 and 1918 annual reports to stockholders. In the 1917 report appears: "Though this is a new line of activity, it is one of great promise and one that seems to be well suited to the character of our organization. *The motor companies are very large customers of our Fabrikoid and Pyralin as well as paints and varnishes.*" (Emphasis added.) The 1918 report says: "The consumption of paints, varnishes and fabrikoid in the manufacture of automobiles gives another common interest."

This background of the acquisition, particularly the plain implications of the contemporaneous documents, destroys any basis for a conclusion that the purchase was made "solely for investment." Moreover, immediately after the acquisition, du Pont's influence growing out of it was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes.

Two years were to pass before du Pont's total purchases of General Motors stock brought its percentage to 23% of the outstanding stock and its aggregate outlay to $49,000,000. During that period, du Pont and Durant worked under an arrangement giving du Pont primary responsibility for finances and Durant the responsibility for operations. But J. A. Haskell, du Pont's former sales

---

[32] 126 F. Supp., at 241.

manager and vice-president, became the General Motors vice-president in charge of the operations committee. The trial judge said that Haskell ". . . was willing to undertake the responsibility of keeping du Pont informed of General Motors affairs during Durant's regime . . . ."[33]

Haskell frankly and openly set about gaining the maximum share of the General Motors market for du Pont. In a contemporaneous 1918 document, he reveals his intention to "pave the way for perhaps a more general adoption of our material," and that he was thinking "how best to get cooperation [from the several General Motors Divisions] 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 [du Pont's artificial leather]."

Haskell set up lines of communication within General Motors to be in a position to know at all times what du Pont products and what products of du Pont competitors were being used. It is not pure imagination to suppose that such surveillance from that source made an impressive impact upon purchasing officials. It would be understandably difficult for them not to interpret it as meaning that a preference was to be given to du Pont products. Haskell also actively pushed the program to substitute Fabrikoid artificial leathers for genuine leather and sponsored use of du Pont's Pyralin sheeting through a liaison arrangement set up between himself and the du Pont sales organization.

Thus sprung from the barrier, du Pont quickly swept into a commanding lead over its competitors, who were never afterwards in serious contention. Indeed, General Motors' then principal paint supplier, Flint Varnish and Chemical Works, early in 1918 saw the handwriting on the wall. The Flint president came to Durant asking to

---

[33] 126 F. Supp., at 245.

be bought out, telling Durant, as the trial judge found, that he "knew du Pont had bought a substantial interest in General Motors and was interested in the paint industry; that . . . [he] felt he would lose a valuable customer, General Motors." [34] The du Pont Company bought the Flint Works and later dissolved it.

In less than four years, by August 1921, Lammot du Pont, then a du Pont vice-president and later Chairman of the Board of General Motors, in response to a query from Pierre S. du Pont, then Chairman of the Board of both du Pont and General Motors, "whether General Motors was taking its entire requirements of du Pont products from du Pont," was able to reply that four of General Motors' eight operating divisions bought from du Pont their entire requirements of paints and varnishes, five their entire requirements of Fabrikoid, four their entire requirements of rubber cloth, and seven their entire requirements of Pyralin and celluloid. Lammot du Pont quoted du Pont's sales department as feeling that "the condition is improving and that eventually satisfactory conditions will be established in every branch, but they wouldn't mind seeing things go faster." Pierre S. du Pont responded that "with the change of management at Cadillac, Oakland and Olds [Cadillac was taking very little paints and varnishes, and Oakland but 50%; Olds was taking only part of its requirements for fabrikoid], I believe that you should be able to sell substantially all of the paint, varnish and fabrikoid products needed." He also suggested that "a drive should be made for the Fisher Body business. Is there any reason why they have not dealt with us?"

Fisher Body was stubbornly resistant to du Pont sales pressure. General Motors, in 1920, during Durant's time, acquired 60% stock control of Fisher Body Company.

---

[34] 126 F. Supp., at 267.

41866 O--59----4

However, a voting trust was established giving the Fisher brothers broad powers of management. They insisted on running their own show and for years withstood efforts of highranking du Pont and General Motors executives to get them to switch to du Pont from their accustomed sources of supply. Even after General Motors obtained 100% stock control in 1926, the Fisher brothers retained sufficient power to hold out. By 1947 and 1948, however, Fisher resistance had collapsed, and the proportions of its requirements supplied by du Pont compared favorably with the purchases by other General Motors Divisions.

In 1926, the du Pont officials felt that too much General Motors business was going to its competitors. When Pierre S. du Pont and Raskob expressed surprise, Lammot du Pont gave them a breakdown, by dollar amounts, of the purchases made from du Pont's competitors. This breakdown showed, however, that only Fisher Body of the General Motors divisions was obtaining any substantial proportion of its requirements from du Pont's competitors.

Competitors did obtain higher percentages of the General Motors business in later years, although never high enough at any time substantially to affect the dollar amount of du Pont's sales. Indeed it appears likely that General Motors probably turned to outside sources of supply at least in part because its requirements outstripped du Pont's production, when General Motors proportion of total automobile sales grew greater and the company took its place as the sales leader of the automobile industry. For example, an undisputed Government exhibit shows that General Motors took 93% of du Pont's automobile Duco production in 1941 and 83% in 1947.

The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one

customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.

We agree with the trial court that considerations of price, quality and service were not overlooked by either du Pont or General Motors. Pride in its products and its high financial stake in General Motors' success would naturally lead du Pont to try to supply the best. But the wisdom of this business judgment cannot obscure the fact, plainly revealed by the record, that du Pont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics.[35]

---

[35] The du Pont policy is well epitomized in a 1926 letter written by a former du Pont employee, J. L. Pratt, when a General Motors vice-president and member of the Executive Committee, to the general manager of a General Motors Division:

"I am glad to know that your manufacturing, chemical and purchasing divisions feel they would be in better hands possibly by dealing with du Pont than with local companies. From a business standpoint no doubt your organization would be influenced to give the business, under equal conditions, to the local concerns. However, I think when General Motors divisions recognize the sacrifice that the du Pont Company made in 1920 and 1921, to keep General Motors Corporation from being put in a very bad light publicly—the du Pont Company going to the extent of borrowing $35,000,000 on its notes when the company was entirely free of debt, in order to prevent a large amount of General Motors stock being thrown on the open market—they should give weight to this which in my mind more than overbalances consideration of local conditions. In other words, I feel that where conditions are equal from the standpoint of quality, service and price, the du Pont Company should have the major share of General Motors divisions' business on those items that the du Pont Company can take on the basis of quality, service and price. If it is possible to use the product from more than one company I do not think it advisable to give any one company all of the business,

Similarly, the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief. It is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended.

The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute. We repeat, that the test of a violation of § 7 is whether at the time of suit there is a reasonable probability that the acquisition is likely to result in the condemned restraints. The conclusion upon this record is inescapable that such likelihood was proved as to this acquisition. The fire that was kindled in 1917 continues to smolder. It burned briskly to forge the ties that bind the General Motors market to du Pont, and if it has quieted down, it remains hot, and, from past performance, is likely at any time to blaze and make the fusion complete.[36]

---

as I think it is desirable to always keep a competitive situation, otherwise any supplier is liable to grow slack in seeing that you have the best service and price possible.

"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."

[36] The potency of the influence of du Pont's 23% stock interest is greater today because of the diffusion of the remaining shares which, in 1947, were held by 436,510 stockholders; 92% owned no more than 100 shares each, and 60% owned no more than 25 shares each. 126 F. Supp., at 244.

The judgment must therefore be reversed and the cause remanded to the District Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in the framing of equitable decrees, are clothed "with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co. v. United States*, 332 U. S. 392, 400–401.

The motion of the appellees Christiana Securities Company and Delaware Realty and Investment Company for dismissal of the appeal as to them is denied. It seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted.

It is so ordered.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1956.

United States of America, Appellant, *v.* E. I. du Pont de Nemours and Company et al.	On Appeal From the United States District Court for the Northern District of Illinois.

[June 3, 1957.]

Mr. Justice Burton, whom Mr. Justice Frankfurter joins, dissenting.

In June 1949, the United States brought this civil action in the United States District Court for the Northern District of Illinois under § 4 of the Sherman Act and § 15 of the Clayton Act to enjoin alleged violations of §§ 1 and 2 of the Sherman Act, and § 7 of the Clayton Act. The amended complaint, insofar as pertinent to the issues here, alleged that du Pont and General Motors have been engaged, since 1915, in a combination and conspiracy to restrain and monopolize interstate trade, and that du Pont's acquisition of General Motors' stock had the effect of restraining trade and tending to create a monopoly. In brief it was alleged that, by means of the relationship between du Pont and General Motors, du Pont intended to obtain, and did obtain, an illegal preference over its competitors in the sale to General Motors of its products, and a further illegal preference in the development of chemical discoveries made by General Motors. Appellees denied the charges.

The trial of these issues took nearly seven months. The District Court heard 52 witnesses, including most of the principal actors, and received over 2,000 exhibits. The evidence contained in the 8,283-page transcript of record covers in minute and intimate detail the facts bearing on the Government's charge that du Pont, by

coercion, agreement, control or influence, had interfered unlawfully with General Motors' purchasing and manufacturing policies. On the basis of this evidence, the District Court found that the Government had failed to prove its case and, specifically, that (a) du Pont did not control General Motors, (b) there had 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," and (c) 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 a restraint within the meaning of the Clayton Act." 126 F. Supp. 235, 335.

The Government's basic contention in this Court is that du Pont violated §§ 1 and 2 of the Sherman Act in that, by means of its alleged control of General Motors, it obtained an unlawful preference with respect to General Motors' purchases of materials. In the closing pages of its brief, and for a few minutes in its oral argument, the Government added the assertion that du Pont had violated § 7 of the Clayton Act in that its stock interest in General Motors "has been used to channel General Motors' purchases to du Pont."

This Court, ignoring the Sherman Act issues which have been the focal point of eight years of litigation, now holds that du Pont's acquisition of a 23% stock interest in General Motors during the years 1917–1919 violates § 7 of the Clayton Act because "at the time of suit [in 1949] there [was] a reasonable probability that the acquisition [was] likely to result in the condemned restraints." *Ante*, p. 17. In reaching this conclusion, the Court holds (1) that § 7 of the Clayton Act applies to vertical as well as horizontal stock acquisitions; (2) that in determining whether the effect of the stock acquisition is such as to constitute a restraint within § 7, the time chosen by the Government in bringing the action

is controlling rather than the time of the acquisition itself; and (3) that § 7 is violated when, at the time of suit, there is a reasonable probability that the stock acquisition is likely to result in the foreclosure of competitors of the acquiring corporation from a substantial share of the relevant market.

In applying these principles to this case, the Court purports to accept the carefully documented findings of fact of the District Court. Actually, it overturns numerous well-supported findings of the District Court by now concluding that du Pont did not purchase General Motors' stock solely for investment; that du Pont's stock interest resulted in practical or working control of General Motors; that du Pont has used or might use this "control" to secure preferences in supplying General Motors with automobile finishes and fabrics; that the relevant market includes only automobile finishes and fabrics; and that there was, even at the time of suit in 1949, a reasonable probability that du Pont's competitors might be foreclosed from a substantial share of this relevant market.

The Court's decision is far reaching. Although § 7 of the Clayton Act was enacted in 1914—over 40 years ago—this is the first case in which the United States or the Federal Trade Commission has sought to apply it to a vertical integration.[1] Likewise, this appears to be the first case in which it ever has been argued that § 7 is applicable to a stock acquisition which took place many years before.[2] The Court, in accepting both of these contentions, disregards the language and purpose of the statute, 40 years of administrative practice, and all the

---

[1] *Ronald Fabrics Co.* v. *Verney Brunswick Mills, Inc.*, CCH Trade Cases ¶57,514 (D. C. S. D. N. Y. 1946), discussed *infra*, n. 10, was a private action for treble damages.

[2] *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C. A. 3d Cir. 1953), involved a series of stock acquisitions over many years, some of which took place at about the time of suit.

precedents except one District Court decision. The sweeping character of the Court's pronouncement is further evident from the fact that to make its case the Court requires no showing of any misuse of a stock interest—either at the time of acquisition or subsequently—to gain preferential treatment from the acquired corporation. All that is required, if this case is to be our guide, is that some court in some future year be persuaded that a "reasonable probability" then exists that an advantage over competitors in a narrowly construed market may be obtained as a result of the stock interest. Thus, over 40 years after the enactment of the Clayton Act, it now becomes apparent for the first time that § 7 has been a sleeping giant all along. Every corporation which has acquired a stock interest in another corporation after the enactment of the Clayton Act in 1914, and which has had business dealings with that corporation is exposed, retroactively, to the bite of the newly discovered teeth of § 7.

For the reasons given below, I believe that the Court has erred in (1) applying § 7 to a vertical acquisition; (2) holding that the time chosen by the Government in bringing the action is controlling rather than the time of the stock acquisition itself; and (3) concluding, in disregard of the findings of fact of the trial court, that the facts of this case fall within its theory of illegality.

I.

Section 7 of the Clayton Act, quoted in full in the Appendix, *post*, pp. 48–49, does not make unlawful all intercorporate acquisitions and mergers.[3] It does not

[3] Section 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18, was amended in 1950 so as to broaden its application, 64 Stat. 1125, 15 U. S. C. § 18. The amendments, by their terms, were inapplicable to acquisitions made before 1950. Thus this case is governed by the original language of § 7 and not by § 7, as amended.

apply to acquisitions of physical assets.[4] It applies only to certain acquisitions of stock, and even then with important exceptions. The first paragraph of § 7, which is the statutory provision primarily involved in this case, 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." 38 Stat. 731–732, 15 U. S. C. (1946 ed.) § 18.

This paragraph makes unlawful only those intercorporate stock acquisitions which may result in any of three effects: (1) substantially lessen competition between the acquiring and the acquired corporations; (2) restrain commerce in any section or community; or (3) tend to create a monopoly of any line of commerce. The Government concedes that General Motors and du Pont have

[4] One of the earliest rulings of the Federal Trade Commission was that § 7 did not prohibit asset acquisitions. 1 F. T. C. 541–542. The primary purpose of the 1950 amendments was to bring asset acquisitions within § 7. Proponents of the 1950 amendments asserted on several occasions that the omission of asset acquisitions in the original Clayton Act had been inadvertent. See, *e. g.*, 96 Cong. Rec. 16443. However, the legislative history of the Clayton Act demonstrates that the purpose of § 7 was to prevent the formation of holding companies and certain evils peculiar to stock acquisitions, particularly the secrecy of ownership. See 51 Cong. Rec. 9073, 14254, 14316, 14420, 14456; H. R. Rep. No. 627, 63d Cong., 2d Sess. 17; S. Rep. No. 698, 63d Cong., 2d Sess. 13.

never been in competition with each other. Since the substantially lessen competition clause applies only to acquisitions involving competing corporations (generally referred to as horizontal acquisitions), that clause concededly is not applicable to this case. The questions before us are whether the other unlawful effects, namely, restraint of commerce in any section or community and tendency to create a monopoly of any line of commerce, are applicable to this case, and, if so, whether the 1917–1919 acquisition of General Motors' stock by du Pont resulted or may result in either of those unlawful effects.

Section 7 never has been authoritatively interpreted as prohibiting the acquisition of stock in a corporation that is not engaged in the same line of business as the acquiring corporation. Although the language of the Act is ambiguous, the relevant legislative history, administrative practice, and judicial interpretation support the conclusion that § 7 does not apply to vertical acquisitions.

The report of the House Committee on the Judiciary, presented by Representative Clayton, stated emphatically that the provisions relating to stock acquisitions by corporations, which originally appeared as § 8 of the bill, were intended to eliminate the evils of *holding companies.* H. R. Rep. No. 627, 63d Cong., 2d Sess. 17. Although a "holding company" was defined as "a company that holds the stock of another company or companies," the one "evil" referred to was that a holding company "is a means of holding under one control the *competing* companies whose stocks it has thus acquired." (Emphasis supplied.) *Ibid.* Two minority statements appended to the House Report evidence a similar understanding that the provisions of the bill were limited to *competing corporations. Id.*, Pt. 2, p. 6; Pt. 3, p. 8. The substance of the House Report was adopted by the Senate Committee on the Judiciary in its report on the bill. S. Rep. No. 698, 63d Cong., 2d Sess. 13, 43, 46.

The extensive debates on the bill in each House of Congress contain many detailed discussions of the provisions relating to intercorporate stock acquisitions. These discussions are devoid of any suggestion that the provisions were to apply to vertical acquisitions.[5] On the contrary, these provisions of the bill were repeatedly described as prohibiting the acquisition of stock of competing companies.[6] The one specific reference to a vertical acquisition during the entire debate on these provisions ended with a flat statement by Senator Reed to the effect that the bill as then written (containing the tendency toward monopoly clause but not the restraint of commerce clause) would *not* prevent a steel manufacturing corporation from acquiring stock in an ore producing corporation, a classic type of vertical integration.[7] A reading of the legislative history of the bill leaves the distinct impression that intercorporate relationships between buyers and sellers which resulted in noncompetitive

[5] The remarks of Senator Chilton relied on by the majority, *ante*, p. 3, do not indicate that he thought that § 7 was applicable to vertical acquisitions. His statements indicate merely that he thought that the restraint and monopoly clauses of § 7 were not entirely synonymous with the substantially lessen competition clause.

[6] See, *e. g.*, 51 Cong. Rec. 9270-9271 (Representative Carlin); *id.*, at 9554 (Representative Barkley); *id.*, at 14254-14255 (Senator Cummins); *id.*, at 14313 (Senator Reed); *id.*, at 15856-15861 (Senator Walsh); *id.*, at 15940 (Senator Nelson); *id.*, at 16001 (Senator Chilton); *id.*, at 16320 (Representative Floyd).

[7] 51 Cong. Rec. 14455. Senator Reed had offered an amendment to the first paragraph of § 7 which would have prevented a corporation from acquiring stock in another corporation engaged in the same line of business. This was an attempt to *stiffen* the bill in order to relieve the Government from proving that competition had been substantially lessened by the acquisition, an element of proof which he, Senator Cummins, and others thought would be quite difficult. See 51 Cong. Rec. 14254-14255, 14419-14420. Senator Chilton asked Senator Reed whether his amendment would prevent a corporation engaged in the manufacture of steel from acquiring stock in a corporation engaged in the production of iron ore. Senator Reed replied

preferences were intended to be dealt with exclusively by the provision forbidding interlocking directorates (§ 8 of the Clayton Act), if not covered by the specific prohibitions of certain price discriminations (§ 2), and of certain exclusive selling or leasing contracts (§ 3).[8]

Forty years of administrative practice provide additional support for this view. Neither the Department of Justice nor the Federal Trade Commission, the two principal enforcing agencies, has brought any action under old § 7 (other than the instant case) that has not involved a stock acquisition in allegedly competing corporations. The Federal Trade Commission repeatedly has declared its understanding that § 7, prior to its amendment in 1950, applied only to competing corporations.[9] In a recent report it stated without qualification:

> "While the 1914 act applied solely to horizontal mergers, the 1950 act applies not only to horizontal

that his amendment would *not* bar such an acquisition, *but that neither would the bill as written:*

"But I call the Senator's attention to the fact that if the illustration he uses would not be covered by the language of my amendment it certainly would not be covered by the language I seek to amend. His argument would go as much against that, and even more than against my amendment. I do not claim that this will stop everything. I claim that it will be a long step in that direction." *Id.*, at 14455.

No one disputed Senator Reed's interpretation of § 7.

[8] See, *e. g.*, the statement by Representative Carlin, one of the managers of the bill in the House, to the effect that the interlocking directorate provision contained in § 8 would prevent a director of a corporation which supplied railroads with materials from becoming a railroad director and, in effect, "buy[ing] supplies from himself." 51 Cong. Rec. 9272.

[9] See, *e. g.*, F. T. C., Ann. Rep. for Fiscal Year 1929, 6–7, 60, where the Commission stated that it could take no corrective action under the Clayton Act against large consolidations in the food industry "even though the consolidation was effected through the acquisition

> acquisitions but to vertical and conglomerate acquisitions which might substantially lessen competition or tend to create a monopoly." F. T. C., Report on Corporate Mergers and Acquisitions (May 1955), 168, H. R. Doc. No. 169, 84th Cong., 1st Sess.

Beginning in 1927, the Federal Trade Commission included in its annual recommendations to Congress a request that § 7 be amended to remedy its inadequacies. This result was achieved in 1950. 64 Stat. 1125, 15 U. S. C. § 18. As the Court recognizes in its opinion, *ante*, p. 3, n. 6, one of the reasons for amending § 7 in 1950 was, in the words of the House Report on the amendments, "to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. Forty years of established administrative practice, acquiesced in and recognized by Congress, is persuasive evidence of the proper scope of § 7. *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, 351-352.

The cases cited by the Court, with the one exception of *Ronald Fabrics Co.* v. *Verney Brunswick Mills, Inc.*, CCH Trade Cases ¶57,514 (D. C. S. D. N. Y. 1946),[10]

---

or exchange of capital stock," because "most of these consolidations and acquisitions were of corporations engaged in the distribution of allied but noncompetitive products." See also, F. T. C., Ann. Rep. for Fiscal Year 1927, 13-15; Statement by Chief Counsel Kelley in Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 2734, 81st Cong., 1st and 2d Sess. 37; Report of the Federal Trade Commission on Interlocking Directorates, H. R. Doc. No. 652, 81st Cong., 2d Sess. 1.

[10] In the *Ronald Fabrics* case, a rayon converter alleged that a competing corporation had restrained commerce by acquiring control of a source of supply of rayon. The District Court held that this allegation stated a cause of action under § 7 of the Clayton Act.

do not support the Court's conclusion that § 7 applies to a vertical acquisition. In *Aluminum Co. of America* v. *Federal Trade Commission,* 284 F. 401 (C. A. 3d Cir. 1922), the Aluminum Company, which previously had had a monopoly of all sheet aluminum produced in the United States, acquired control through an intermediary corporation of a competing sheet aluminum company established in 1916. A divestiture order of the Federal Trade Commission was upheld, the court holding that the stock acquisition substantially lessened competition and tended to create a monopoly of the sheet aluminum business. In *United States* v. *New England Fish Exchange,* 258 F. 732 (D. C. Mass. 1919), two holding companies which had acquired the stock of virtually all the wholesale fish dealers trading on the New England Fish Exchange, which handled about 95% of all the ground fish sold in interstate commerce in the United States, were held to have violated the provisions of § 7. Each of these cases was concerned with the acquisition of directly competing corporations—not vertical acquisitions. Statements in the opinions, not essential to the decisions, merely stand for the proposition that the restraint and monopoly clauses of § 7 are not entirely synonymous with the substantially lessen competition clause.

Assuming that the three unlawful effects mentioned in § 7 are not entirely synonymous with each other,[11] such an

[11] A minority in the Senate, led by Senators Cummins and Walsh, sought to strike out the "tend to create a monopoly" language of § 7. 51 Cong. Rec. 14314–14316, 14319, 14459–14461. They argued that this language was superfluous because the creation of a monopoly always substantially lessened competition, and because the Sherman Act contained similar language, and that there was a danger that the language would be considered as an implied repeal of the Sherman Act. The failure of these efforts to eliminate the tendency toward monopoly clause (the restraint of commerce clause had not been added

assumption does not require the conclusion that § 7 was intended to apply to vertical acquisitions as well as to horizontal acquisitions. Corporations engaged in the same business activity in different areas do not necessarily "compete" with each other so that their combination would substantially lessen competition between them, even though their combination might result in a restraint of commerce or a tendency toward monopoly violative of § 7. Such a possibility was presented in *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C. A. 3d Cir. 1953), where a banking corporation through a series of transactions acquired stock in 48 local banking corporations, most of which were located in communities in which no other bank was acquired. A divestiture order of the Board was reversed on the ground that the Board had not proved that the acquisitions of these banks in five western States either substantially lessened competition or tended to create a monopoly.

Finally, this Court has twice construed old § 7 as applying only to stock acquisitions involving competing corporations. In *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291 (1930), the Court held that the acquisition of the fifth largest shoe manufacturing company by the largest shoe manufacturer did not violate either the substantially lessen competition clause *or* the restraint of commerce clause of § 7 because the preexisting competition between the two corporations was insubstantial, and because the acquired corporation was

---

to § 7 at this time) indicates that the tendency toward monopoly clause was not intended to be limited to situations already encompassed by the substantially lessen competition clause. Similarly, the remarks of Senator Chilton, quoted by the Court from 51 Cong. Rec. 16002, *ante*, pp. 4–5, indicate that he thought the tendency toward monopoly and restraint of commerce clauses added something. But I find no evidence that what they did add included vertical acquisitions.

in a precarious financial condition. Substantial pre-existing competition was said to be a requisite for violation of either clause of § 7. 280 U. S., at 298, 303. An even more direct holding is found in *Thatcher Mfg. Co.* v. *Federal Trade Commission*, 272 U. S. 554 (1926), where this Court affirmed that portion of the lower court's decree which had allowed Thatcher, a milk bottle manufacturer, to retain the assets of Woodbury, a bottle manufacturer specializing in condiment and whiskey bottles, on the ground that the acquisition did not violate any of the three clauses of § 7 since Thatcher was not in competition with Woodbury. 272 U. S., at 560, affirming in part and reversing in part *Federal Trade Commission* v. *Thatcher Mfg. Co.*, 5 F. 2d 615 (C. A. 3d Cir. 1925). These holdings apparently will be overruled *sub silentio* by today's decision.

The legislative history, administrative practice, and judicial interpretation of § 7 provide the perspective in which the Government's present assertion that § 7 applies to vertical acquisitions should be viewed. Seen as a whole, they offer convincing evidence that § 7, properly construed, has reference only to horizontal acquisitions. I would so hold. However, even if the opposite view be accepted, the foregoing views of the enforcing agencies and the courts are material to a proper consideration of the other issues which must then be reached.

II.

In this case the Government is challenging, in 1949, a stock acquisition that took place in 1917–1919. The Court, without advancing reasons to support its conclusion, holds that in determining whether the effect of the stock acquisition is such as to violate § 7, the time chosen by the Government in bringing its suit is controlling rather than the time of the acquisition of the stock. This seems to me to ignore the language and structure of § 7,

41866 O—59——5

the purpose of the Clayton Act, and all existing administrative and judicial precedents.

The first paragraph of § 7 provides that "no corporation . . . shall acquire . . . the stock . . . of another corporation . . . where the effect of such acquisition may be . . . ." Yet the Court construes this provision as if it read "no corporation . . . shall acquire *or continue to hold* . . . the stock . . . of another corporation . . . *whenever it shall appear that* the effect of such acquisition *or continued holding* may be . . . ." Continued holding, to be sure, is a prerequisite to any action under § 7 because, if the stock is no longer held, the violation has been purged and there is nothing to divest.[12] But the fact of continued holding does not allow the Government to dispense with the necessity of proving that the stock was unlawfully acquired. The offense described by § 7 is the acquisition, not the holding or the use, of stock. When the acquisition has been made, the offense, if any, is complete. The statutory language is unequivocal. It makes the test the probable effect of the acquisition at the time of the actual acquisition, and not at some later date to be arbitrarily chosen by the Government in bringing suit.

The distinction carefully made in the several paragraphs of § 7 between an unlawful acquisition and an unlawful use of stock reinforces this conclusion. The first paragraph of § 7, which speaks only in terms of *acquisition* of stock, is concerned solely with the purchase of stock in "another corporation." It is the only provision that is applicable in this case. The second paragraph, which expressly prohibits both *acquisition* and *use,* is concerned with stock purchases in "two or more corporations." Concededly, it is not applicable here.

---

[12] *Federal Trade Commission* v. *Western Meat Co.,* 272 U. S. 554, 561.

When Congress chose to make unlawful the use of stock subsequent to its acquisition, it did so in specific terms. The omission of the phrase "or the use of such stock by the voting or granting of proxies or otherwise," contained in the second paragraph of § 7, from the first paragraph of the section was not inadvertent. The phrase therefore cannot be read into the first paragraph of § 7.[13]

The Clayton Act was not intended to replace the Sherman Act in remedying actual restraints and monopolies. Its purpose was to supplement the Sherman Act by checking anticompetitive tendencies in their incipiency, before they reached the point at which the Sherman Act comes into play. This purpose was well stated in the Senate Report on the bill:

> "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. Rep. No. 698, 63d Cong., 2d Sess. 1.

[13] It might be argued that the mention of subsequent misuse in the third paragraph of § 7, the investment proviso, enlarges the substantive content of the first paragraph of § 7. This paragraph provides that "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." But the mention of *use* in this paragraph has the effect of limiting the exception it contains, *i. e.*, the exception for stock purchased "solely for investment." This exception is lost if the stock is subsequently misused. But the exception contained in this paragraph does not come into play unless the acquisition first comes within the substantive prohibition of the first two paragraphs of § 7. This limitation on the exception cannot expand the substantive prohibition to which the exception applies.

This purpose places emphasis on the probable anticompetitive effects of transactions or occurrences viewed as of the date of their occurrence. The determination required by the Act is one of predicting the probable outcome of a particular transaction, here an acquisition of stock in another corporation. If, at the time of the stock acquisition, a potential threat to competition is apparent, the acquisition is unlawful under § 7. If, on the other hand, a potential threat to competition is not then apparent, an antitrust violation is not involved unless subsequent use of the stock constitutes a restraint of trade prohibited by the Sherman Act.[14]

The Court ignores the all-important lawfulness or unlawfulness of the stock acquisition at or about the time it occurred, and limits its attention to the probable anticompetitive effects of the continued holding of the stock at the time of suit, some 30 years later. The result is to subject a good-faith stock acquisition, lawful when made, to the hazard that the continued holding of the stock may make the acquisition illegal through unforeseen developments. Such a view is not supported by the statutory language and violates elementary principles of fairness. Suits brought under the Clayton Act are not subject to any statute of limitations, and it is doubtful whether the doctrine of laches applies as against the Government. The result is that unexpected and unforeseeable developments occurring long after a stock acquisition can be used to challenge the legality of continued holding of the stock. In such an action, the Government need only prove that *probable* rather than *actual* anticompetitive

[14] It may be that § 7 is inapplicable when the Government fails to bring suit within a reasonable period after the consummation of the stock acquisition. If so, the 30 years here involved would exceed a reasonable period of incipiency. Even though § 7 of the Clayton Act, under this theory, would be inapplicable, any alleged restraint could be dealt with under the Sherman Act.

effects exist as of the time of suit. The Government may thus set aside a transaction which was entirely lawful when made, merely by showing that it would have been unlawful had it occurred at the time of suit, many years later. The growth of the acquired corporation, a fortuitous decline in the number of its competitors, or the achievement of control by an accidental diffusion of other stock may result, under this test, in rendering the originally lawful acquisition unlawful *ab initio*. Strikingly enough, all of these factors are involved in this case.[15]

The Court's holding is unfair to the individuals who entered into transactions on the assumption, justified by the language of § 7, that their actions would be judged by the facts available to them at the time they made their decision.

> "The prohibition [of § 7] is addressed to parties who contemplate engaging in merger transactions and is meant, in the first instance, to guide them in deciding upon a course of action. The only standard they are capable of applying is one addressed to the circumstances viewed as of the date of the proposed transaction. Since this is the standard which the parties must apply in deciding whether to undertake a transaction, it seems reasonable to conclude that it is the standard which enforcement agencies should

[15] The Court apparently concedes that du Pont's stock acquisition in General Motors was lawful when made because "its sales to General Motors were relatively insignificant" at that time and because "General Motors then produced only about 11% of the total automobile production . . . ." *Ante*, p. 12. Throughout, the Court stresses the growth in size of General Motors. *Ante*, pp. 8–9, 12. The decline in the number of automobile manufacturers is not mentioned, but is well known. And the Court states that diffusion of General Motors' stock through the years has increased "The potency of the influence of du Pont's 23% stock interest . . . ." *Ante*, p. 20, n. 36.

apply in deciding whether the transaction violates the statute." Neal, The Clayton Act and the Transamerica Case, 5 Stan. L. Rev. 179, 220–221.

The Court cites no authority in support of its new interpretation of this 40-year-old statute. On the other hand, examination of the dozen or more cases brought under § 7 reveals that in every case the inquiry heretofore has centered on the probable anticompetitive effects of the stock acquisition at or near the time it was made.[16] See, *e. g., International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291 (1930); *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C. A. 3d Cir. 1953); *V. Vivaudou, Inc.* v. *Federal Trade Commission*, 54 F. 2d 273 (C. A. 2d Cir. 1931); *Federal Trade Commission* v. *Thatcher Mfg. Co.*, 5 F. 2d 615 (C. A. 3d Cir. 1925), rev'd in part on other ground, 272 U. S. 554; *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117 (D. C. N. D. Ohio 1935); *In re Vanadium-Alloys Steel Co.*, 18 F. T. C. 194 (1934). The conclusion thus seems inescapable that the unlawfulness of a stock acquisition under the first paragraph of § 7 properly turns on the potential threat to competition created by the acquisition of the stock at the time of its acquisition and not by its subsequent use.

That the time of acquisition is controlling does not mean that the Government is unable to bring an action if it fails to proceed within a few years of the stock acquisition. It means only that if the Government chooses to bring its action many years later, it must prove what § 7 plainly requires—that the acquisition threatened competition when made.

---

[16] Except in this case, the enforcing agencies appear never to have brought an action under § 7 more than four years after the date of the acquisition. Consequently, the precise problem raised here has not been directly adjudicated. Nevertheless, the cases cited in the text spell out the proof required for a violation of § 7, and thus have an important bearing on this problem.

Nor does it mean that evidence of subsequent events is necessarily irrelevant. Evidence that anticompetitive effects have occurred since the acquisition, and that these effects are traceable to the original acquisition rather than to other factors, may support an inference that such effects were "reasonably probable" at the time of acquisition. The element of causation is the necessary link with the past. However, if events subsequent to the acquisition indicate that no anticompetitive effects have occurred, that evidence may support an inference that an unlawful potential did not exist at the time of acquisition. Evidence as to what happened after the acquisition is relevant to the extent that it bears on the central question whether, at the time of the acquisition, there was a reasonable probability of a threat to competition.

I agree with the Court that § 7 does not require findings and conclusions of *actual* anticompetitive effects. Unlike the Sherman Act, § 7 merely requires proof of a reasonable *probability* of a substantial lessening of competition, restraint of commerce, or tendency toward monopoly. *International Shoe Co.* v. *Federal Trade Commission,* 280 U. S. 291; *Transamerica Corp.* v. *Board of Governors,* 206 F. 2d 163. When a vertical acquisition is involved, its legality thus turns on whether there is a reasonable probability that it will foreclose competition from a substantial share of the market, either by significantly restricting access to needed supplies or by significantly limiting the market for any product. See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 122–127. The determination of such probable economic consequences requires study of the markets affected, of the companies involved in relation to those markets, and of the probable immediate and future effects on competition. A mere showing that a substantial dollar volume of sales is involved cannot suffice. As the Court says, "The market

affected must be substantial," *ante*, p. 8, and "Substantiality can be determined only in terms of the market affected," *ante*, p. 6. Section 7 thus requires a case-by-case analysis of the relevant economic factors.

However, when, as here, the Government brings a proceeding nearly 30 years after a stock purchase, it must prove that the acquisition was unlawful when made (*i. e.*, that there was a reasonable probability at that time that du Pont's competitors would be foreclosed from a substantial share of the relevant market), *and* also that the effect of the acquisition continued to be harmful to competition at the time suit was brought. Illegality at the time of acquisition is required by the first paragraph of § 7; continuing illegality is a prerequisite for obtaining equitable relief. See *United States* v. *W. T. Grant Co.*, 345 U. S. 629; *United States* v. *Oregon Medical Society*, 343 U. S. 326, 333; *United States* v. *South Buffalo R. Co.*, 333 U. S. 771, 774. This is particularly true under § 7 since it is a prophylactic measure designed to prevent stock acquisitions which probably will have a deleterious effect on competition. Proof that competition has not in fact been harmed during a long period following a stock acquisition itself indicates that a restraint in the future is unlikely. In such a case, the *actual* effect of the acquisition largely supplants the conjecture as to its *probable* effects which otherwise must be relied upon.

In this case, the District Court found that the challenged acquisition, which took place "over thirty years ago," had not resulted in any restraint of trade "In those many intervening years . . . ." The District Court properly concluded that, when there had been no restraint for 30 years, "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." 126 F. Supp., at 335. If the evidence supports the District Court's conclusion that there has been no restraint for 30 years, the judgment below must be affirmed.

III.

The remaining issues are factual: (1) whether the record establishes the existence of a reasonable probability that du Pont's competitors will be foreclosed from securing General Motors' trade, and (2) whether the record establishes that such foreclosure, if probable, involves a substantial share of the relevant market and significantly limits the competitive opportunities of others trading in that market. In discussing these factual issues, I meet the Court on its own ground, that is, I assume that the old § 7 applies to vertical acquisitions, and that the potential threat at the time of suit is controlling. Even on that basis the record does not support the Court's conclusion that § 7 was violated by this 1917–1919 stock acquisition.

A. FORECLOSURE OF COMPETITORS.

This is not a case where a supplier corporation has merged with its customer corporation with the result that the supplier's competitors are automatically and completely foreclosed from the customer's trade.[17] In this case, the only connection between du Pont, the supplier, and General Motors, the customer, is du Pont's 23% stock interest in General Motors. A conclusion that such a stock interest automatically forecloses du Pont's competitors from selling to General Motors would be without justification. Whether a foreclosure has occurred in the past or is probable in the future is a question of fact turning on the evidence in the record.

The Court, at the outset of its opinion, states that the primary issue is whether du Pont's position as a substantial supplier to General Motors "was achieved on com-

[17] Cf. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, holding that even the exclusion of competition resulting from complete vertical integration does not violate the Sherman Act unless competition in a substantial portion of a market is restrained.

petitive merit alone," or resulted from du Pont's stock interest in General Motors. *Ante*, p. 2. In resolving this issue, the Court states that the "basic facts" are not in dispute and hence that it is unnecessary to set aside the findings of fact of the District Court as clearly erroneous. See Fed. Rules Civ. Proc., 52 (a). The basic facts are said to be that du Pont had no standing as a General Motors' supplier before the stock purchases of 1917-1919, that it gained a "commanding position" after the stock purchases, and that certain items of evidence in this gigantic record tend to indicate that du Pont hoped to get and actually did get a preference in General Motors' trade. From these alleged facts the Court draws the conclusion that du Pont has misused its 23% stock interest in General Motors "to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics." *Ante*, p. 19. "The inference is overwhelming," the Court concludes, "that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit." *Ante*, pp. 18-19. With these words, the Court overturns the District Court's unequivocal findings to the effect that du Pont was a principal supplier to General Motors prior to the 1917-1919 stock purchases, that du Pont maintained this position in the years following the stock purchases, and that for the entire 30-year period preceding the suit, General Motors' purchases of du Pont's products were based solely on the competitive merits of those products. The evidence supporting these findings of the District Court may be summarized as follows:

Du Pont is primarily a manufacturer of chemicals and chemical products. Thousands of its products could be used by General Motors in manufacturing automobiles, appliances and machinery. Despite du Pont's sales efforts over a period of 40 years, General Motors buys many of the commodities produced by du Pont from

du Pont's competitors.[18] The Court, ignoring the many products which General Motors declines to buy from du Pont or which it buys only in small quantities, concentrates on the few products which du Pont has sold in large volume to General Motors for many years—paints and fabrics. Before examining the history of those large-volume purchases, it is essential to understand where and by whom purchasing decisions within General Motors have been made.

For many years, General Motors has been organized into some 30 operating divisions, each of which has final authority to make, and does make, its own purchasing decisions. This decentralized management system places full responsibility for purchasing decisions on the officers of the respective divisions. To speak of "selling to General Motors" is, therefore, misleading. A prospective supplier, instead of selling to General Motors, sells to Chevrolet, or Frigidaire, or Ternstedt, or Delco Light, as divisions. Moreover, when there are several plants within a division, each plant frequently has its own purchasing agent and presents a separate selling job.

[18] The following table compares General Motors' purchases, in 1947, of several products from du Pont with its purchases of the same products from competitors of du Pont.

Type of product	Purchases from du Pont	Purchases from competitors of du Pont	Total General Motors' purchases	Percent of purchases from du Pont
Finishes	$18,724,000	$8,635,000	$27,359,000	68.4
Fabrics (imitation leather and coated fabrics)	3,639,000	5,815,000	9,454,000	38.5
Adhesives	12,000	3,056,000	3,068,000	.4
Chemicals				
Anodes	2,000	1,206,000	1,208,000	.2
Solvents	439,000	3,183,000	3,622,000	12.1
	$22,816,000	$21,895,000	$44,711,000	51.0

The record discloses that each division buys independently, that the pattern of buying varies greatly from one division to another, and that within each division purchases from du Pont have fluctuated greatly in response to price, quality, service and other competitive considerations. For example, Oldsmobile is the only division which buys antifreeze from du Pont and one of the two car divisions which does not finish its cars with Duco. Buick alone buys du Pont motor enamel, and Cadillac alone uses du Pont's copper electroplating exclusively. Thus the alleged nefarious influence arising from du Pont's stock interest apparently affects the Oldsmobile antifreeze buyer, but not the Oldsmobile paint buyer; the paint buyers at Chevrolet, Buick and Pontiac, but not the antifreeze or electroplating buyers; and the electroplating buyer at Cadillac, but not the Cadillac paint buyer.

1. *Paints.*—Du Pont, for many years, has had marked success in the manufacture and sale of paints, varnishes, lacquers and related products.[19] In 1939, it produced

[19] The following table compares du Pont's total sales of industrial finishes in recent years with its sales of the same finishes to General Motors:

Year	Sales to General Motors			Total finish sales	Sales to General Motors as percent of total sales
	Duco	Other finishes	Total		
1938	$4,569,604	$1,625,625	$6,195,229	$31,357,134	19.8
1939	6,312,005	2,448,844	8,760,849	33,514,763	22.7
1940	8,876,970	2,850,091	11,727,061	44,974,778	26.1
1941	9,768,119	3,757,389	13,525,508	61,204,127	22.1
1946	6,911,596	3,518,256	10,429,852	75,117,079	13.9
1947	12,224,798	6,713,431	18,938,229	105,266,655	18.0

The years 1942 through 1945 are omitted from all tables because of the suspension of automobile production during the war.

9.5% of the total dollar value of all finishes produced in the United States and, in 1947, 8.1%. In recent years, approximately three-fourths of du Pont's total sales to General Motors have consisted of industrial finishes.[20] Although du Pont has been General Motors' principal supplier of paint for many years, General Motors continues to buy about 30% of its paint requirements from competitors of du Pont.[21] Moreover, the sales of paint from du Pont to General Motors do not bulk large in the respective total sales and purchases of either company. In 1948, du Pont's finish sales to General Motors were only 3% of its total sales of all products; they were an infinitesimal percentage of General Motors' total purchases.

Two products account for a high proportion of these finish sales to General Motors: "Duco," a nitrocellulose lacquer invented and patented by du Pont, and "Dulux," a synthetic resin enamel developed by du Pont.[22] However, Duco and Dulux did not come into commercial use until 1924 and 1931, respectively, and du Pont's position as a

[20] In 1947, a typical year, General Motors' total purchases of all products from du Pont were $26,628,274. Of this amount, $18,938,229, or 71% of the total, was finishes.

[21] In 1947, over 400 paint manufacturers other than du Pont sold finishes to General Motors. The total amount they sold was $8,635,000, 31.6% of General Motors' requirements. Twenty-five companies, other than du Pont, each sold amounts of finishes to General Motors in excess of $30,000 in that year; one company sold as much as $3,205,000.

[22] In 1947, General Motors' purchases of industrial finishes from du Pont, by type of finish, were as follows:

Duco	$12,224,798	65%
Dulux	3,179,225	17
All Others	3,534,206	18
	$18,938,229	100%

Thus, Duco and Dulux comprised 82% of du Pont's finish sales to General Motors in that year.

principal manufacturer of finishes was attained much earlier.

Du Pont first assumed a leading position in the automotive finish field with its acquisition, in 1918, of a majority of the stock of the Flint Varnish & Color Works at Flint, Michigan. At that time, and for some years before, Flint supplied the finishes used on all General Motors' cars except Cadillac, and also for many other automobile companies. Du Pont's acquisition of General Motors' stock in 1917–1919 did not influence the General Motors' divisions in purchasing from Flint. In 1921, Flint lost one-half of the Oakland business and, in 1923, a substantial portion of the business at Buick, Oakland and Oldsmobile. 126 F. Supp., at 288.

The invention and development of Duco in the early 1920's represented a significant technological advance. Automobiles previously had been finished by applying numerous coats of varnish. The finishing process took from 12 to 33 days, and the storage space and working capital tied up in otherwise completed cars were immense. The life expectancy of varnish finishes was less than a year. In December 1921, General Motors created a Paint and Enamel Committee which contacted numerous paint manufacturers in an attempt to find a quicker drying and more durable finish.

Meanwhile, du Pont had been doing pioneering work in nitrocellulose lacquers. In 1920, a du Pont employee invented a quick drying and durable lacquer which contained a large amount of film-forming solids. This patented finish, named Duco, was submitted to the General Motors Paint and Enamel Committee in 1922 to be tested along with finishes of other manufacturers. After two years of testing and improvement, the Paint and Enamel Committee became satisfied that Duco was far superior to any other product or any other method of finishing automobiles then available.

The gradual adoption of Duco by some of the General Motors' car divisions, viewed in conjunction with its proved superiority as an auto finish, illustrates the independent buying of each division and demonstrates that Duco made its way on its own merits. Oakland (now Pontiac) first adopted Duco for use on its open cars in 1924. The new finish was an immense success and was used on all Oakland cars the following year. Buick and Chevrolet adopted Duco in 1925, but Cadillac, which had offered it as an optional finish in 1925, did not abandon varnish for Duco until 1926.[23]

From the beginning, General Motors continued to look for competitive materials. Letters were sent to other manufacturers urging them to submit samples of their pyroxylin paint for testing. Until 1927, none of the competing lacquers was comparable in quality to Duco. But the strenuous efforts by General Motors to develop competitive sources of lacquer eventually worked a substantial change in the du Pont position. Oldsmobile and Cadillac switched to a competitor, Rinshed-Mason, in 1927, and have continued to buy almost exclusively from that company ever since. Chevrolet, Buick and Pontiac continued to buy Duco, partly because of better service from nearby du Pont plants, and partly because repeated testing failed to disclose any lacquer superior to Duco.

Finally, the success of Duco has never been confined to the General Motors' car divisions. In 1924 and 1925, nearly all car manufacturers abandoned varnish for Duco. By the end of 1925, all cars, except Ford and Cadillac.

---

[23] Du Pont initially sold more Duco to other auto manufacturers that it did to General Motors. In 1926, du Pont's sales of colored Duco were distributed as follows: to General Motors, 19%; to other auto manufacturers, 33%; to all others, 48%. The primary market for clear Duco has always been the furniture industry.

were using Duco. Nash, Hudson, Studebaker, Packard and Willys have bought, and still buy, Duco in substantial amounts from du Pont. Chrysler bought Duco in large volume until the early 1930's when, in pursuance of a policy to obtain suppliers to whom it would be the most important customer, it concentrated its purchases on one company, Pittsburgh Plate Glass. Ford has chosen to make a large part of its own requirements. During the 1920's, when Ford was losing its leadership in the low-priced field to Chevrolet, it continued to finish its cars in Black Japan. Mr. Ford is reported to have said, "Paint them any color, as long as they are black." Finally, in the 1930's, Ford was forced to shift to a synthetic enamel finish of its own manufacture. During this transition period, du Pont sold Ford a substantial amount of finishes. In 1935, Ford was making half, and buying half from du Pont; by 1937, Ford was making three-fourths and buying one-fourth from du Pont. In 1938, Henry Ford "issued instructions that the Ford Motor Company was not to purchase any more material from the du Pont company." From that time until Henry Ford II became active in Ford management, purchases from du Pont practically ceased. Since then, Ford has purchased finishes from du Pont in very substantial amounts.

General Motors has continued to test paints on thousands of cars annually. Du Pont has retained its position as primary lacquer supplier to several General Motors' divisions because these divisions have felt that Duco best fits their needs. Kettering, who was a leader in General Motors' research activities and who had been active in the testing and development of pyroxylin lacquers, testified that "one of the reasons" why General Motors' cars had a higher resale value than comparable cars "in a used car lot" "is the paint."

As the District Court found, *"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."* (Emphasis supplied.) 126 F. Supp., at 296.

The second largest item which General Motors buys from du Pont is Dulux, a synthetic enamel finish used on refrigerators and other appliances. Prior to the development of Dulux, Duco was widely used as a finish for refrigerators. However, in 1927, Duco began to be replaced by porcelain, particularly at Frigidaire, a General Motors' appliance division. In 1930 and 1931, in collaboration with General Electric, du Pont developed Dulux, a greatly superior and cheaper product. Since its development, Dulux has been used *exclusively* by all the major manufacturers of refrigerators and other appliances—General Electric, Westinghouse, Crosley, and many others—except Frigidaire, which continues to finish part of its refrigerators with porcelain. Disinterested witnesses testified as to the superior quality and service which has led them to continue to buy Dulux.[24] The District Court did not err in concluding that Dulux—

> "is apparently an ideal refrigerator finish and is widely used by a number of major manufacturers

[24] For example, Van Derau, a Westinghouse executive, testified that his company bought its entire requirements of refrigerator finishes from du Pont because of du Pont's quality and service:

"Now, another factor—and I think I can say this without it being harmful to any other suppliers—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 and we have had several times, when we have had a little problem, and I am thinking of one in particular where we were going to find it very difficult to keep in production until the trouble would be overcome, which I called

41866 O—59——6

> 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.*" (Emphasis supplied.) 126 F. Supp., at 296.

The Court fails to note that du Pont's efforts to sell paints other than Duco and Dulux to General Motors have met with considerably less success. Du Pont does sell substantial amounts of automotive undercoats to Chevrolet and Buick but it has failed, despite continued sales efforts, to change the preference of Fisher Body, the largest purchaser of undercoats, for a competitor's undercoat. The successes and failures of other du Pont finish products at various General Motors' divisions emphasize the independent buying of each division and negate the notion that influence or coercion is responsible for what purchases do occur. Frigidaire uses large quantities of black finishing and machine varnish, but has not bought these products from du Pont since 1926. At A C Spark Plug Division, located in Flint, Michigan, where du Pont has a finishes plant, du Pont has been consistently successful in selling a substantial volume of the finishes used by that division. Delco-Remy Division, however, purchases most of its requirements of insulating varnish

---

from Pittsburgh to the Chicago office, and the next morning one of the men of du Pont was on the job, and within a very few hours they had materials coming in from their Toledo plant that kept us in production.

"You cannot laugh off that kind of service. They have been simply excellent, and I don't know how you could say, any better."

from du Pont's competitors. The Electromotive Division prefers a competitive lacquer for the interior finish of its locomotives, but uses Duco on the exterior because the railroads, most of which use Duco for the exterior of the balance of the train, specify that finish. At Guide Lamp Division, du Pont developed and still supplies a finish for the inside of headlight reflectors, but a competitor developed, and has kept, that division's substantial primer business. At the Inland Division, which produces steering wheels, du Pont had some of the business at one time, but has been completely supplanted by a competitor offering better service.

The du Pont experience at the Packard Electric Division, which uses large quantities of high and low tension cable lacquer, is illustrative. Until 1932, Packard Electric was a separate company wholly unrelated to General Motors, and du Pont was a principal supplier of low tension lacquer and the sole supplier of black high tension lacquer. Now, as a division of General Motors, Packard Electric purchases its entire requirements of high tension lacquer from du Pont competitors, and produces its own low tension lacquer from film scrap bought from du Pont competitors.

The District Court did not err in concluding, on the basis of this evidence, that du Pont's success in selling General Motors a substantial portion of its paint requirements was due to the superior quality of Duco and Dulux and to du Pont's continuing research and outstanding service, and 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; nor is there any evidence that General Motors has suffered competitively from its sub-*

stantial use of Duco." (Emphasis supplied.) 126 F. Supp., at 296.

2. *Fabrics.* The principal fabrics which du Pont has sold to General Motors are imitation leather (du Pont's "Fabrikoid" and "Fabrilite") and top material for open cars and convertibles (du Pont's "Pontop," "Everbright" and "Teal").[illegible] Its sales of these materials to General Motors in 1947 totaled $3,369,000, or about 38.5% of General Motors' total purchases of such materials. In earlier years, before closed cars with all metal tops came to predominate, these materials constituted a larger proportion of the total fabrics used in an automobile than they do today. By 1946 they averaged, apart from the top material for convertibles, only about 1.6 yards, costing about $2.22 per car. They are used principally for seat tops and backs, kick pads, rear shelves, etc. Du Pont does not manufacture the cotton and wool products of which most of the upholstery is composed.

Du Pont entered the manufacture of coated fabrics in 1910, when it purchased the Fabrikoid Company of Newburgh, New York. "Artificial leather," as it was then known, was of poor quality and had very limited areas

[illegible] The following table compares du Pont's total sales of industrial fabrics, primarily imitation leather and coated fabrics, in several recent years, with the sales of those same products to General Motors:

Year	Sales to GM	Sales to others	Total sales	GM sales as percent of total sales
1938	$446,357	$6,647,112	$7,093,469	6.6
1939	803,854	7,775,778	8,579,632	9.4
1940	1,285,280	7,780,105	9,065,385	14.2
1941	1,773,079	13,093,469	14,866,548	11.9
1946	2,083,166	14,170,639	16,253,805	12.8
1947	3,639,316	16,723,610	20,362,926	17.9

of acceptance. As du Pont succeeded in improving both its quality and appearance, its use rapidly broadened. By mid-1913, du Pont Fabrikoid, a pyroxylin-coated fabric, had been accepted by the automobile industry for upholstery and interior trim. Three years later, in 1916, almost every automobile company was a purchaser of Fabrikoid, and a contemporary du Pont estimate in that year stated that 60% of all cars produced in the United States would be equipped with Fabrikoid. In that same year, du Pont rounded out its line of fabrics by acquiring the Fairfield Rubber Company, a manufacturer of rubber-coated fabrics. Du Pont thus had achieved, before it purchased its General Motors' stock, a leading position in the automotive fabric field. Before 1917, it was supplying substantially all of the coated fabrics requirements at Chevrolet and Oldsmobile, about half of the requirements at Buick, and about a third of the requirements at Oakland. At the Cadillac division, du Pont supplied all of the coated fabrics for interior trim but none of the top material. 126 F. Supp., at 296–297.

Although there have been variations from year to year and from one car division to another in response to competitive considerations, du Pont generally has maintained its pre-1917 position as the principal supplier of coated and combined fabrics to General Motors. In 1926, General Motors purchased about 55.5% of these fabrics from du Pont, largely because Chevrolet switched entirely to du Pont after an unfortunate experience with competitive products during the preceding year. By 1930, the proportion had declined to about 31.5%, and du Pont was selling more fabrics to Ford than to General Motors. At the time of suit, du Pont's share had increased to 38.5%, the remainder being supplied by du Pont's competitors.

In addition to the mass of evidence supporting the District Court's finding 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*" (emphasis supplied), 126 F. Supp., at 301, the record clearly indicates that du Pont's fabrics can and have made their way in the automotive industry on their merits. Prior to the early 1920's, du Pont was the principal supplier of coated fabrics to all three of the then major producers—Ford, Willys-Overland and General Motors. After Ford and Willys began to produce their own coated fabrics they still turned to du Pont for much of what they could not produce. Chrysler purchased substantial amounts from du Pont until, in the early 1930's, it embarked on its policy of one principal supplier for each product and chose Textileather, a du Pont competitor. Du Pont has continued to be Ford's largest supplier for the material which it does not manufacture for itself. Du Pont likewise has supplied, over the years, a considerable part of the coated and combined fabrics of most of the smaller automobile companies.

The District Court did not err in concluding that "*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.*" (Emphasis supplied.) 126 F. Supp., at 301.

3. *Other Products.*—The Court concludes only that du Pont has been given an unlawful preference with respect to paints and fabrics. By limiting the issue to these products, it eliminates from deserved consideration those products which General Motors does not buy in

large quantities or proportions from du Pont.[26] Yet the logic of the Court's argument—that the stock relationship between du Pont and General Motors inevitably has or will result in a preference for du Pont products—requires consideration of the total commercial relations between the two companies. Du Pont "influence," if there were any, would be expected to apply to all products which du Pont makes and which General Motors buys.

However, the evidence shows that du Pont has attempted to sell to the various General Motors' divisions a wide range of products in addition to paint and fabrics, and that it has succeeded in doing so only when these divisions, exercising their own independent business judgment, have decided on the basis of quality, service and price that their economic interests would best be served by purchasing from du Pont. Six such groups of products were considered in detail by the District Court: plastics, brake fluid, casehardening materials, electro-

[26] The following table compares the dollar amount, in 1947, of du Pont's total sales of the products of its various departments with the amount sold by it to General Motors:

Type of product	Du Pont sales to General Motors	Total du Pont sales	Sales to General Motors, as percent of total sales
Finishes	$18, 938, 229	$105, 266, 655	18. 0
Fabrics	3, 639, 316	20, 362, 926	17. 9
Ammonia	1, 742, 416	50, 320, 207	3. 5
Grasselli Chemicals	1, 024, 320	74, 212, 311	1. 4
Electrochemicals	1, 019, 272	47, 687, 843	2. 1
Plastics	105, 422	34, 828, 026	0. 3
Organic Chemicals	83, 254	94, 632, 256	0 1
Rayon	45, 616	250, 467, 514	(*)
Explosives	26, 032	58, 875, 482	(*)
Pigments	3, 530	31, 496, 024	(*)
Photo Products	867	25, 699, 756	(*)
	$28, 628, 274	$793, 849, 000	3. 4

*Less than 0.1%.

plating materials, safety glass, and synthetic rubber and rubber chemicals. 126 F. Supp., at 319–324. A few examples drawn from the findings will suffice.

Du Pont's sales to General Motors of celluloid (du Pont's "Pyralin"), used as windows in the side curtains of early automobiles, initially declined in 1918 after the stock purchase, and only revived when an improved product was adopted by all the large auto manufacturers. Instead of purchasing brake fluid and safety glass from du Pont, General Motors embarked, during the 1930's, on its own production of these substantial items. With respect to casehardening materials, General Motors has purchased less than half of its requirements from du Pont, while other auto manufacturers have purchased amounts larger in proportion and quantity. Although du Pont's new electroplating processes were widely adopted in the automobile and other industries in the 1930's only Cadillac has used du Pont's processes exclusively, Oldsmobile and Pontiac have used it occasionally, and Chevrolet and Buick never have used it except for brief periods. Neoprene, a synthetic rubber developed by du Pont, has been used to a much greater extent by Chrysler and Ford than by General Motors. Chrysler also uses, and helped develop, du Pont's synthetic rubber adhesive for brake linings, but the General Motors divisions prefer a more expensive type of synthetic rubber.

The record supports the conclusion of the District Court:

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

> numerous instances in which General Motors rejected du Pont's products in favor of those of one of its competitors. *The variety of situations and circumstances in which such rejections occurred satisfies the Court that there was no limitation whatsoever upon General Motors' freedom to buy or to refuse to buy from du Pont as it pleased.*" (Emphasis supplied.) 126 F. Supp., at 324.

Evidence Relied on by the Court.—The Court, disregarding the mass of evidence supporting the District Court's conclusion that General Motors purchased du Pont paint and fabrics solely because of their competitive merit, relies for its contrary conclusion on passages drawn from several documents written during the years 1918–1926, and on the logical fallacy that because du Pont over a long period supplied a substantial portion of General Motors' requirements of paint and fabrics, its position must have been obtained by misuse of its stock interest rather than competitive considerations.

The isolated instances of alleged pressure or intent to obtain noncompetitive preferences are four: (1) the Raskob report of December 1917; (2) several letters of J. A. Haskell, written during 1918–1920; (3) certain reports and letters of Pierre and Lammot du Pont during 1921–1924; and (4) a 1926 letter of John L. Pratt. Passages drawn from these 1918–1926 documents do not justify the conclusion reached by the Court. Each of them is a matter of disputed significance which cannot be evaluated without passing on the motivation and intent of the author. Each failed to achieve its specific object. Read in the context of the situations to which they were addressed, each is entirely consistent with the finding of the District Court that, although du Pont was trying to get as much General Motors' business as it could, there was no restriction on General Motors' freedom to buy as it chose, and that General Motors' buyers

did not regard themselves as in any way limited.[27] Moreover, even if isolated paragraphs in these documents, taken from their context, are given some significance, and the other evidence relating to the period from 1918 to

---

[27] Because the Court quotes fully from, and appears to place special weight on, the 1926 letter of J. L. Pratt, a brief discussion of it is appropriate by way of illustration. *Ante*, pp. 19–20, n. 35.

The letter only purports to be an expression of Pratt's personal views—he makes it clear in the last paragraph that he is expressing his own opinions and not General Motors' policy. It has, therefore, comparatively little bearing on du Pont's intent. Moreover, it is significant that Pratt's attitude toward du Pont was based *not* on the stock relationship, but on the fact that du Pont saved General Motors from financial disaster in 1920. His views, apparently, would have been the same whether or not du Pont owned stock in General Motors. In any event, all that Pratt says is that, in making purchases, General Motors should "always keep a competitive situation," and "the prime consideration is to do the best thing for Delco-Light Company . . . ." (Pratt was writing to the general manager of Delco, a General Motors' division.)

An examination of the circumstances in which this letter was written disposes of any notion that it expressed a policy that General Motors should prefer du Pont's products when they were equal in quality, service and price. The circumstances were these: Delco Light was buying paint from a competitor of du Pont. When the competitor failed to solve a paint problem which confronted Delco, it called on du Pont for help. However, although du Pont solved the problem and obtained one order for paint, Delco asked du Pont to withhold delivery so that the competitor could be given another opportunity to retain the business. Understandingly, Elms of the du Pont Paint Department was somewhat piqued by this, and he wrote a personal letter to his friend Pratt asking for his assistance. Pratt's letter to the general manager of Delco was the result.

Despite the fact that the du Pont product was offered at a lower price and the fact that the technical staff at Delco thought the du Pont product superior, Delco nevertheless continued to buy from the competitor. Du Pont never did receive the business to which the correspondence related. Judged by either its content or its result, the Pratt letter is a poor example of an alleged du Pont policy of "purposely employ[ing] its stock to pry open the General Motors market . . . ." *Ante*, p. 19.

1926 is entirely ignored, *all* of the evidence after 1926 affirmatively establishes without essential contradiction that du Pont did not use its stock interest to receive any preferential treatment from General Motors.

Nor can present illegality be presumed from the bare fact that du Pont has continued to make substantial sales of several products to General Motors.[28] In the first place, the record affirmatively shows that the new products which du Pont has sold to General Motors since 1926 have made their way, at General Motors as elsewhere, on their merits. Sales of Duco, Dulux, Fabrilite and Teal are not attributable in any way to dealings in the earlier period. Secondly, the Court's presumption is based on the fact that du Pont does not sell to all other automobile manufacturers in the same proportion as it does to General Motors. But there is no reason why it should—the Government has not shown that sellers normally sell to all members of an industry in the same proportion. In any event, the record fully explains the disproportion. Since 1930, du Pont's sales to other members of the industry have proportionately declined, largely because Ford has chosen to make the major share of its requirements of paint and fabrics, and because Chrysler has followed the policy of selecting a single supplier to whom it can be the most important customer. The fact is that du Pont *has* continued to sell in substantial amounts to the smaller members of the automobile industry. The growth in the dominance of General Motors, Ford and Chrysler—com-

---

[28] The Court, without referring to any supporting evidence, ventures the conjecture that "General Motors probably turned to outside sources of supply at least in part because its requirements outstripped du Pont's production . . . ." *Ante*, p. 18. As I read the record, du Pont was actively soliciting more business from General Motors and others throughout the period covered in this suit. I find no hint that du Pont was surfeited with business and unable to fill General Motors' orders.

panies which together account for more than 85% of automobile production—when combined with the policies adopted by Ford and Chrysler, adequately explains why du Pont sells a larger proportion of paint and fabrics to General Motors than it does to the industry as a whole.

It is true that § 7 of the Clayton Act does not require proof of actual anticompetitive effects or proof of an intent to restrain trade. But these matters become crucial when the Court rests its conclusion that du Pont's stock interest violates the Act on evidence relating solely to an alleged du Pont intent to obtain a noncompetitive preference from General Motors, and on a finding that such a preference was actually secured through the unlawful use of du Pont's stock interest. Preference and intent are also relevant because the Government has brought this case 30 years after the event. If no actual restraint has occurred during this long period, the probability of a restraint in the future is indeed slight. Especially is this so when the only change in recent years has been in the direction of diminishing du Pont's participation in General Motors' affairs.

Rule 52 (a) Governs This Case.—The foregoing summary of the evidence relating to General Motors' purchases of paint and fabrics from du Pont, comparatively brief as it is, reveals that a multitude of factual issues underlie this case. The occurrence of events, the reasons why these events took place, and the motives of the men who participated in them are drawn in question. The issue of credibility is of great importance. The District Judge had the opportunity to observe the demeanor of the witnesses and to judge their credibility at first hand. Thus, this case is a proper one for the application of the principle embodied in Rule 52 (a) of the Federal Rules of Civil Procedure: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of

the credibility of the witnesses." *United States* v. *Oregon Medical Society*, 343 U. S. 326, 330–332, 339; *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341–342.

This is not a situation in which oral testimony is contradicted by contemporaneous documents. See *United States* v. *United States Gypsum Co.*, 333 U. S. 364. In this case, the findings of the District Court are supported both by contemporaneous documents and by oral testimony. For example, General Motors' search for a better automotive finish, the superiority of the product developed by du Pont, and General Motors' continuous efforts to secure an equally good lacquer from other sources are all proved by letters and reports written in the early 1920's as well as by the oral testimony of many witnesses. Similarly, contemporaneous exhibits prove that General Motors purchased fabrics from du Pont because of the superiority of du Pont products, and that on other occasions it turned to competing suppliers even though du Pont's product was just as good. Appellate review of detailed findings based on substantial oral testimony and corroborative documents must be limited to setting aside those that are clearly erroneous. The careful and detailed findings of fact of the District Court in this case cannot be so labeled.[29]

---

[29] The Court also overturns the District Court's express finding that du Pont purchased General Motors' stock *solely for investment*. The Court does this on the basis of an alleged du Pont purpose to secure a noncompetitive preference which the Court finds expressed in the Raskob letter and in certain statements in du Pont's 1917 and 1918 reports to its stockholders. These documents, however, are not inconsistent with the District Court's finding of an investment purpose. The District Court said:

"Raskob's report, the testimony of Pierre S. and Irenee du Pont and all the circumstances leading up to du Pont's acquisition of this

B. Relevant Market.

Finally, even assuming the correctness of the Court's conclusion that du Pont's competitors have been or will be foreclosed from General Motors' paint and fabric trade, it is still necessary to resolve one more issue in favor of the Government in order to reverse the District Court. It is necessary to hold that the Government proved that this foreclosure involves a substantial share of the rele-

---

substantial interest in General Motors, as shown by the record, establish that the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business.

. . . . .

"Raskob's reports and other documents written at or near the time of the investment show that du Pont's representatives were well aware that General Motors was a large consumer of products of the kind offered by du Pont. Raskob, for one, thought that du Pont would ultimately get all that business, but there is no evidence that Raskob expected to secure General Motors trade by imposing any limitation upon its freedom to buy from suppliers of its choice. Other documents also establish du Pont's continued interest in selling to General Motors—even to the extent of the latter's entire requirements—but they similarly make no suggestion that the desired result was to be achieved by limiting General Motors purchasing freedom. On the contrary, a number of them explicitly recognized that General Motors trade could only be secured on a competitive basis." 126 F. Supp., at 242, 243.

Whether any stock purchase is an investment turns largely on the intent of the purchaser. *Pennsylvania R. Co. v. Interstate Commerce Commission*, 66 F. 2d 37, aff'd by an equally divided court, 291 U. S. 651. In this case, since the District Court's finding with reference to that intent is unequivocal and not clearly erroneous, the stock acquisition falls within the proviso, stated in the third paragraph of § 7, expressly excepting acquisitions made "solely for investment."

vant market and that it significantly limits the competitive opportunities of others trading in that market.[30]

The relevant market is the "area of effective competition" within which the defendants operate. *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 299–300, n. 5. "[T]he problem of defining a market turns on discovering patterns of trade which are followed in practice." *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 303, aff'd *per curiam,* 347 U. S. 521. "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another." *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377, 393. This determination is primarily one of fact.

The Court holds that the relevant market in this case is the automotive market for finishes and fabrics, and not the total industrial market for these products. The Court reaches that conclusion because in its view "automobile finishes and fabrics have sufficient peculiar characteris-

---

[30] The District Court did not reach this question since it found that there was no reasonable probability of any foreclosure of du Pont's competitors by reason of du Pont's 23% stock interest in General Motors. Consequently, there are no findings of fact dealing with the relevant market. Also, the record appears deficient on such crucial questions as the characteristics of the products, the uses to which they are put, the extent to which they are interchangeable with competitors' products, and so on. For these reasons, I believe the Court in any event should remand the case to the District Court to give the District Judge, who is more familiar with the record than we can be, an opportunity to review the record, and entertain argument with respect to the substantiality of the share of the relevant market affected by the foreclosure which the Court finds to exist. By declining to remand, the Court necessitates a scrutiny here of this huge record for a determination of an essentially factual question not passed on by the District Court, and not thoroughly briefed or argued by the parties.

tics and uses to constitute them products distinct from all other finishes and fabrics . . . ." *Ante*, pp. 6–7. We are not told what these "peculiar characteristics" are. Nothing is said about finishes other than that Duco represented an important contribution to the process of manufacturing automobiles. Nothing is said about fabrics other than that sales to the automobile industry are made by means of bids rather than fixed price schedules. Dulux is included in the "automobile" market even though it is used on refrigerators and other appliances, but not on automobiles. So are other finishes and fabrics used on diesel locomotives, engines, parts, appliances and other products which General Motors manufactures. Arbitrary conclusions are not an adequate substitute for analysis of the pertinent facts contained in the record.

The record does not show that the fabrics and finishes used in the manufacture of automobiles have peculiar characteristics differentiating them from the finishes and fabrics used in other industries. What evidence there is in the record affirmatively indicates the contrary. The sales of the four products principally involved in this case—Duco, Dulux, imitation leather, and coated fabrics—support this conclusion.

Duco was first marketed not to General Motors, but to the auto refinishing trade and to manufacturers of furniture, brush handles and pencils. In 1927, 44% of du Pont's sales of colored Duco, and 51.5% of its total sales, were to purchasers other than auto manufacturers. Although the record does not disclose exact figures for all years, it does show that a substantial portion of du Pont's sales of Duco have continued to be for non-automotive uses.[31]

---

[31] The Court states that "General Motors took 93% of du Pont's automobile Duco production in 1941 and 83% in 1947." *Ante*, p. 18. These figures are of little significance. Not only do they omit the crucial sales—those made outside the automobile industry—but they

It is also significant that Duco was a patented product. Prior to the expiration of the patent in 1944, only three years before this suit was brought, du Pont issued over 250 licenses—to all that applied—covering its patented process. If Duco is to be treated as a separate market solely because of its initial superiority, du Pont is being penalized rather than rewarded for contributing to technological advance.

Dulux has never been used in the manufacture of automobiles. It replaced Duco and other lacquers as a finish on refrigerators, washers, dryers, and other appliances, and continues to have wide use on metallic objects requiring a durable finish. Yet the Court includes it as a finish having the unspecified but "peculiar characteristics" distinctive of "automobile finishes." *Ante*, p. 6.

In 1947, when du Pont's sales of Duco and Dulux to General Motors totaled about $15,400,000, the total

---

give a misleading impression with respect to du Pont's sales to the automobile industry. As previously stated, Ford chose to make its own requirements after about 1935 and Chrysler desired to concentrate its purchases on one supplier. Under these figures, after eliminating Ford and Chrysler, and deducting du Pont's sales to General Motors, du Pont must have supplied nearly half of the entire requirements of all remaining auto manufacturers in 1941 and an even larger portion in 1947.

The record does not contain complete figures on the amount of Duco sold outside the automobile industry. However, there are figures for selected years. In 1927, for example, 51.5% of all Duco sales were to other than automobile manufacturers (1,166,220 gallons, out of a total of 2,263,000 gallons). In 1948, du Pont's gross sales to purchasers other than General Motors of the same kinds of finishes bought by General Motors amounted to about $97,000,000; its sales to General Motors in the same year were $21,000,000, or 21.7% of the total. The record reveals that General Motors' purchases of finishes from du Pont have ranged, in recent years, from 14% to 26% of du Pont's sales of such finishes to all customers. The conclusion seems clear that du Pont's finishes have found wide acceptance in innumerable industries and that du Pont is not dependent on General Motors for a captive paint market.

national market for paints and finishes was $1,248,000,000, of which about $552,000,000 was for varnishes, lacquers, enamels, japans, thinners and dopes, the kinds of finishes sold primarily to industrial users.[32] There is no evidence in this record establishing that these industrial finishes are not competitive with Duco and Dulux. There is considerable evidence that many of them are. It is probable that du Pont's total sales of finishes to General Motors in 1947 constituted less than 3.5% of all sales of industrial finishes.

The record also shows that the types of fabrics used for automobile trim and convertible tops—imitation leather and coated fabrics—are used in the manufacture of innumerable products, such as luggage, furniture, railroad upholstery, books, brief cases, baby carriages, hassocks, bicycle saddles, sporting goods, footwear, belts and table mats. In 1947, General Motors purchased about $9,454,000 of imitation leather and coated fabrics. Of this amount, $3,639,000 was purchased from du Pont (38.5%) and $5,815,000 from over 50 du Pont competitors. Since du Pont produced about 10% of the national market for these products in 1946, 1947 and 1948, and since only 20% of its sales were to the automobile industry, the du Pont sales to the automobile industry constituted only about 2% of the total market. The Court ignores the record by treating this small fraction of the total market as a market of distinct products.

It will not do merely to stress the large size of these two corporations. The figures as to their total sales—$793,000,000 for du Pont and $3,815,000,000 for General Motors in 1947—do not fairly reflect the volume of commerce involved in this case. The commerce involved here

---

[32] U. S. Department of Commerce, Bureau of the Census, II Census of Manufactures: 1947, Statistics by Industry, 414–415. There were 1,291 establishments manufacturing these products. Du Pont's total sales were 8.1% of the industry.

is about $19,000,000 of industrial finishes and about $3,700,000 of certain industrial fabrics—less than 3.5% of the national market for industrial finishes, and only about 1.6% of the national market for these fabrics. The Clayton Act is not violated unless the stock acquisition substantially threatens the competitive opportunities available to others. *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291; *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163; *V. Vivaudou, Inc.* v. *Federal Trade Commission*, 54 F. 2d 273. The effect on the market for the product, not that on the transactions of the acquired company, is controlling. *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534.[33]

The Court might be justified in holding that products sold to the automotive industry constitute the relevant market in the case of products such as carburetors or tires which are sold primarily to automobile manufacturers.

---

[33] In the *Fargo* case, Maytag, an appliance manufacturer, acquired a 40% stock interest in, and contracted to purchase the entire output of, Globe, a gas range manufacturer. A Globe dealer, who lost his source of supply as a result of the transaction, brought a treble damage action alleging, *inter alia*, that the stock acquisition violated § 7 of the Clayton Act. The evidence showed that there were about 70 manufacturers of gas ranges, and that Globe was about eighteenth in size, selling a little less than 2% of the national market (about $5,000,000 a year). The Court of Appeals for the Seventh Circuit held that the stock acquisition did not violate § 7 because the plaintiff had other readily available sources of supply.

The acquisition of an outlet is governed by similar principles. In either case, the question is whether competitors may be substantially limited in their competitive opportunities. Assuming that du Pont had purchased General Motors outright, and thus commanded an outlet consuming about 4% of the national market for industrial finishes and about 2% of the national market for industrial fabrics, it seems unlikely that du Pont's paint and fabric competitors would be substantially limited in selling their products, when 96% and 98%, respectively, of the national market would remain open to them.

But the sale of Duco, Dulux, imitation leather, and coated fabrics is not so limited.

The burden was on the Government to prove that a substantial share of the relevant market would, in all probability, be affected by du Pont's 23% stock interest in General Motors. 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 during the later years covered by the record. The Government did not show that the identical products were not used on a large scale for many other purposes in many other industries. Nor did the Government show that the automobile industry in general, or General Motors in particular, comprised a large or substantial share of the total market. What evidence there is in the record affirmatively indicates that the products involved do have wide use in many industries, and that an insubstantial portion of this total market would be affected even if an unlawful preference existed or were probable.

For the reasons stated, I conclude that § 7 of the Clayton Act, prior to its amendment in 1950, did not apply to vertical acquisitions; that the Government failed to prove that there was a reasonable probability at the time of the stock acquisition (1917–1919) of a restraint of commerce or a tendency toward monopoly; and that, in any event, the District Court was not clearly in error in concluding that the Government failed to prove that du Pont's competitors have been or may be foreclosed from a substantial share of the relevant market. Accordingly, I would affirm the judgment of the District Court.

"SEC. 7. 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.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from

acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided." 38 Stat. 731–732, 15 U. S. C. (1946 ed.) § 18.

No. 3

In the Supreme Court of the United States

October Term, 1956

United States of America, appellant

v.

E. I. du Pont de Nemours and Company, et al.

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

OPINION AND JUDGMENT OF DISTRICT COURT

[The following is a reprint from the record of the opinion of the district court which it adopted as its findings of fact and conclusions of law (R. 467, *infra*). We have indicated by underscoring the portions which are challenged by the Government on this appeal. The underscoring appears on the following pages: 300, 301, 302, 316, 320, 321, 322, 323, 361, 395, 396, 405, 425, 426, 434, 435, 437, 447, 464, 465, 466.]

[fol. 450] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C-1071

UNITED STATES OF AMERICA, Plaintiff,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, UNITED STATES RUBBER COMPANY, CHRISTIANA SECURITIES COMPANY, DELAWARE REALTY & INVESTMENT CORPORATION, PIERRE S. DU PONT, LAMMOT DU PONT, IRENEE DU PONT, ET AL., Defendants.

OPINION OF JUDGE WALTER J. LABUY—December 3, 1954

[fol. 451] APPEARANCES:

Stanley N. Barnes, Assistant Attorney General, and Victor H. Kramer, Trial Attorney, both of Washington, D. C.; Earl A. Jinkinson and Willis L. Hotchkiss, Special Assistants to the Attorney General; Ewart Harris, Paul V. Ford, Charles W. Houchins, all of Chicago, Illinois, Margaret H. Brass, Washington, D. C., Dorothy M. Hunt, Francis C. Hoyt, and Raymond P. Hernacki, all of Chicago, Illinois, Trial Attorneys. Attorneys for the United States of America.

Covington & Burling, Washington, D. C., by John Lord O'Brian, Hugh B. Cox, Charles A. Horsky, Daniel M. Gribbon, Wilbur R. Lester.

Sidley, Austin, Burgess & Smith, Chicago, Ill., by Howard Neitzert, George Ragland, Jr., Attorneys for Defendant E. I. du Pont de Nemours and Company.

Root, Ballantine, Harlan, Bushby & Palmer, New York, N. Y., by John M. Harlan, Philip C. Scott.

Sidley, Austin, Burgess & Smith, Chicago, Ill., by Howard Neitzert, George Ragland, Jr., Attorneys for Defendants Pierre S. du Pont, Irenee du Pont, Christiana Securities Company and Delaware Realty and Investment Corporation.

[fol. 452] Pope & Ballard, Chicago, Ill., by Ferris E. Hurd, Frank F. Fowle, Jr., Henry M. Hogan, Detroit, Mich., Robert E. Nitschke, Detroit, Mich., James D. Carpenter, Jersey City, N. J., William A. Grier, New York, N. Y., Attorneys for Defendant General Motors Corporation.

Snyder, Chadwell & Fagerburg, Chicago, Ill., by John T. Chadwell, Rudy L. Ruggles, James A. Rahl, Arthur, Dry & Dole, New York, N. Y., by Paul H. Arthur, Morris E. Dry, Nelson F. Taylor, Walter Barthold, Jr., Attorneys for Defendant United States Rubber Company.

Howard Ellis, Chicago, Ill., A. Leslie Hodson, Chicago, Ill., Guardians ad litem for certain minor Defendants.

Andrew J. Dallstream, Chicago, Ill., Guardian ad litem for certain minor Defendants.

Claude A. Roth, Chicago, Ill., Guardian ad litem and Attorney for Henry Belin du Pont, III.

[fol. 453] Moore, Prangley & Clayton, Chicago, Ill., by Mark H. Clayton, Attorney for certain individual Defendants.

Berl, Potter & Anderson, Wilmington, Del., by William S. Potter, William Poole, Attorneys for certain individual Defendants.

Morris, Steel, Nichols & Arsht, Wilmington, Del., by Alexander L. Nichols, Attorney for certain individual Defendants.

Winston, Strawn, Black & Towner, Chicago, Ill., by Guy A. Gladson, Thomas A. Reynolds.

Richards, Layton & Finger, Wilmington, Del., by Robert H. Richards, Jr., Attorneys for Defendant Wilmington Trust Company.

[fol. 454] This action is brought by the United States

Government for alleged violation by defendants of Sections 1 and 2 of the Sherman Act (15 U. S. C. A) declaring illegal every contract, combination, or conspiracy in restraint of trade and prohibiting monopolization or the attempt to monopolize trade and commerce, and Section 7 of the Clayton Act (15 U. S. C. A. § 18) declaring illegal the acquisition of stock by a corporation in another where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly.

[fol. 455] The defendants against whom the action is brought are named and identified in the amended complaint as follows:

The three defendant "manufacturers": E. I. du Pont de Nemours and Company, General Motors Corporation, and United States Rubber Company. All of these companies transact business within the Northern District of Illinois and are found here.

The three "corporate" defendants: Christiana Securities Company; Delaware Realty & Investment Corporation; and Wilmington Trust Company, individually and as trustee.

The remaining defendants come within the categoric description of "members of the du Pont family." These members of the du Pont family are divided into the following:

The three "defendant individuals": Pierre S. du Pont and Lammot du Pont, for whom Suggestions of Death were filed May 6, 1954 and January 16, 1953, respectively; and Irenee du Pont.

The five "individual defendants": Lammot du Pont Copeland; Colgate W. Darden, Jr.; Henry Belin du Pont; Pierre S. du Pont III; and George P. Edmonds. These defendants are alleged to be members of the du Pont family and to hold substantial amounts of voting stock of the defendant United States Rubber Company.

The twenty-six "beneficiary" defendants, ten of whom are minors, also identified as "party in interest" defendants, who are not named as conspirators and who are beneficiaries of one or more trusts of which the defendant Wilmington is trustee.

With the exception of the twenty-six beneficiary defendants, all defendants are alleged to have participated in acts which violate the anti-trust statutes.

[fol. 456] **The Government's statement of the offense is** stated as follows:

> The Amended Complaint charges that the defendants have engaged in a conspiracy to restrain trade in certain products produced by the du Pont Company, United States 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, namely, that they have restrained trade and monopolized a part of the commerce in certain products. (Post-trial Brief, U. S., Vol. I, p. 3.)

In its summary of the statement of evidence the Government states that the evidence, when viewed as a whole, shows that the defendants have designed and followed a pattern of business conduct which has three basic objectives. The first of these objectives has consisted of obtaining control of the management and policies of the three manufacturing defendants, du Pont, General Motors, and United States Rubber. The second of these objectives has consisted of the creation and exploitation of protected markets for certain of the products produced by du Pont and United States Rubber, to the exclusion of competitive suppliers. The third of these objectives has consisted of the reservation of certain exclusive fields of production to the du Pont Company. These three purposes have been served by the fostering of a network of interrelationships among the corporate and individual defendants. This has insured the perpetuation of control of the corporate entities [fol. 457] under persons possessing in essence the same interests, and has enhanced the market position of each of the manufacturing defendants.

The Government further charges that the central thread of the entire pattern of conduct is the acquisition of interlocking stock controls and the use of such controls to domi-

nate the management of the controlled corporations. (Post-trial Brief, U. S., Vol. I, p. 5.)

There is no dispute regarding the facts culminating in the formation of the present du Pont Company. From 1802 to 1899 it was operated as a family partnership. The first corporate predecessor to du Pont was formed in 1899. In 1902 T. Coleman du Pont, Alfred I. du Pont, and Pierre S. du Pont acquired the assets of the 1899 company pursuant to a proposal advanced by Alfred I. du Pont. These assets were later taken over by the 1903 company. Until 1915, T. Coleman du Pont was the largest stockholder in du Pont; his holdings being about equal to the combined holdings of Alfred I. du Pont and Pierre S. du Pont. The present du Pont Company was organized in 1915 to succeed the 1903 company.

The factual approach to the issues involved herein will be clarified and simplified by division of this memorandum into two general categories: First, the aspects of alleged control reflected in stock holdings, selection of officers, board and committee members; and, second, the trade aspects. The issue of conspiracy underlying as it does both phases of the case is of necessity interwoven and inseparable and is an ultimate fact which permeates the entire case.

[fol. 458] Facts as to Control

Christiana and Delaware

In December 1914 T. Coleman du Pont offered to sell a substantial block of his du Pont stock to du Pont for resale by the company to its principal younger executives, but the offer was rejected since the price was considered too high.

In the early part of 1915 T. Coleman du Pont offered to sell his stock to Pierre S. du Pont and others at a higher price.

It is admitted that in 1915 Christiana was formed by a syndicate composed of Pierre S. du Pont, Lammot du Pont, Irenee du Pont, together with A. Felix du Pont, R. R. M. Carpenter, and John J. Raskob, for the purpose of acquiring this stock.

The evidence shows that Christiana was organized so that members of the syndicate could use the stock of tne

corporation as security for a loan it was necessary for them to obtain to buy the stock of Coleman du Pont.

This block of stock consisting of 63,314 shares of common and 14,599 shares of preferred was transferred to Christiana along with 28,177 shares of du Pont common transferred to it by the six syndicate members. The six incorporators of Christiana held all of the 75,000 shares of Christiana. The day after Christiana was organized each returned to its treasury approximately 15% of the Christiana stock to be distributed to the chairman of the Executive Committee of du Pont, the eight department heads of du Pont, and the General Counsel of du Pont under an agreement that the stock so assigned to each would become his property if he continued in the employ of the company for one year and that no assignee would sell or hypothecate [fol. 459] the stock for three years. After this allocation, the six incorporators held 68,250 shares of the 75,000 outstanding shares of Christiana.

After Coleman's stock had been acquired, Alfred du Pont and others brought suit alleging that Pierre and his associates abused the trust of their official positions in obtaining the Coleman stock. The trial court determined to submit to a vote of the stockholders the question of whether or not the Coleman du Pont stock should be acquired by the du Pont Company. In the ensuing proxy battle, the Pierre S. du Pont group won.

Thus, Christiana at its inception held 91,491 shares of the du Pont common stock amounting to approximately 27% of the du Pont's outstanding common shares. The evidence shows that commencing with the original acquisition of the Coleman stock, this percentage has continued throughout the years and that substantially all the stock now held by Christiana traces directly to the stock transactions occurring in 1915. No additional or other acquisitions of du Pont stock have been made by Christiana, and the evidence shows that a majority, or 68% of the outstanding Christiana stock has been held continuously by Pierre S. du Pont and the members of the du Pont family, either directly or through Delaware.

In 1923 Pierre S. du Pont, having retired from active business life, decided to invest in an annuity to provide himself and his wife with an appropriate income. His decision to buy an annuity was based in part on the favor-

able tax treatment granted annuities under the existing tax laws. Pierre S. du Pont being unable to find a standard life insurance company which would offer him an arrangement not involving the sale of his stockholdings which event would depreciate the value of his estate, a group of [fol. 460] his brothers and brothers-in-law offered to sell him an annuity.

In 1923 Pierre S. du Pont transferred the bulk of his holdings in Christiana consisting of 49,000 shares, together with 24,000 shares of du Pont common, and other stock in other companies to Delaware Realty & Investment Corporation, which was specifically organized to hold the same and pay him and his wife an annuity for life. The common stock of Delaware was then divided into eight equal shares for Pierre S. du Pont's eight brothers and sisters or their families.

The evidence shows that the stock of Delaware up to the date of the filing of the complaint has continued to be wholly owned by the members of the du Pont family and in many instances transfers were made through the formation of trusts. Delaware also holds 49,000 shares of Christiana, being Pierre S. du Pont's previous holdings, which constitutes about 32% of the outstanding Christiana stock.

On March 29, 1944 E. H. Tinney, Secretary of Delaware, submitted a memorandum to members of the Advisory Committee of Delaware Realty and Trust dealing primarily with tax considerations on the advisability of liquidating that corporation. In addition to the tax factor, he stated:

> "Liquidation would afford greater flexibility, including better marketability, and permit diversification. Without liquidation, the stockholders are practically compelled to go along together; whereas if liquidated each stockholder could do as he thought best suited his individual purpose. There is no certainty whether those factors would in the final analysis represent reasons for or against liquidation.
>
> Delaware Realty, at least to some extent, facilitates [fol. 461] control of the du Pont and General Motors industries. While liquidation would not eliminate this immediately, it would weaken it; more particularly with the passage of time." (GTX 1335).

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.

Defendants admit that Christiana holds 3,049,800 shares of du Pont common stock out of 11,158,340 outstanding du Pont stock, equivalent to 27%; that Delaware holds 304,480 shares of du Pont common stock, or 3%, of the outstanding du Pont stock; that defendant individuals and certain members of the du Pont family, who are either officers or directors of du Pont, own a further block of approximately 5.3% of the stock of du Pont; while other members of the du Pont family, who are not officers or directors of du Pont, own directly a further 2.2% of the stock of du Pont. Du Pont common stock at the time the complaint was filed was held by 82,000 shareholders.

It is also admitted that 30% of the outstanding du Pont common stock held by Christiana and Delaware has been consistently voted as a block always in support of du Pont management at du Pont stockholder meetings, that di- [fol. 462] rectors of Christiana have in most instances been directors and officers of du Pont, and that defendant individuals, younger members of the du Pont family and officers and directors of Delaware have assumed major responsibilities in du Pont management.

There is no evidence that either Christiana or Delaware, or both of them, had voting control of du Pont. However, the fact that the du Pont family had voting control of Christiana and Delaware whose du Pont stock is consistently voted as a block in favor of du Pont management, coupled with the fact that for many years members of the du Pont family have been major executives of the corporation, indicates control of management of du Pont by the du Pont family.

The Government has failed to prove that the stock held by the defendant individuals and members of the du Pont family in Christiana and Delaware was for the purpose of perpetuating control over the du Pont Company, and has failed to prove that there was any agreement, understanding, or conspiracy that they would continue to hold such stock, keep it within their families, or dispose of or vote the Delaware stock for the purpose of utilizing du Pont to create protected markets for du Pont, or to otherwise restrain or monopolize trade. The Government has further failed to prove that either Christiana or Delaware, or both, were formed, and their stock held, for the purpose of creating protected markets for du Pont and to otherwise restrain or monopolize trade.

General Motors Corporation

In the spring of 1914 Pierre S. du Pont purchased approximately 2000 shares of General Motors upon the recommendation of John J. Raskob. His personal holdings from 1914 to 1917 are set forth in GTX 114. Irenee du [fol. 463] Pont purchased 400 shares of General Motors in 1914 on the expressed enthusiasm of John J. Raskob, but did not know his brother had done the same. His personal holdings from 1914 to 1917 are set forth in GTX 115. He attended no General Motors meetings during this period.

General Motors was organized in 1908 by W. C. Durant and had acquired a number of previously independent automobile manufacturing companies—Buick, Cadillac, Oakland and Oldsmobile. In 1910 in order to raise needed working capital Durant had been compelled to borrow $14,000,000 from a group of "Boston" bankers under a voting trust agreement which supplanted Durant as President by Charles W. Nash, and gave control of the Board of Directors for five years to said bankers. Upon leaving the active management of General Motors, Durant and close associates incorporated the Chevrolet Motor Company to manufacture a new low-priced car. The Chevrolet Motor Company bought stock of General Motors until in 1916 it owned 450,000 shares of common stock out of 825,000 outstanding.

About September 1915 Pierre S. du Pont and John J. Raskob became actively involved in the affairs of General Motors when both attended a stockholders meeting at the

invitation of Mr. Kaufman, who was president of the Chatham & Phoenix National Bank of New York. At this meeting, Durant and the lending bankers, who were operating General Motors under the voting trust agreement which expired in 1915, became deadlocked on the composition of a new Board. A compromise was reached whereby both sides agreed that each name seven candidates and Pierre S. du Pont was empowered to name three neutral directors not connected with either Durant or the lending bankers. Pierre S. du Pont submitted the names of J. A. Haskell, who had been a vice-president of du Pont for many years [fol. 464] and now retired; John J. Raskob, Treasurer of du Pont; and Lammot Belin, his brother-in-law. These were accepted by both factions. Pierre S. du Pont was elected Chairman of the Board.

Durant extended an invitation to Pierre S. du Pont and John J. Raskob to become members of the General Motors Finance Committee, which invitation was declined, and in October 1916 both declined chairmanship of that committee. In January 1916 Durant offered Pierre S. du Pont and Raskob the opportunity to exchange their General Motors holdings for Chevrolet Motor stock on the basis of five shares of Chevrolet for one share of General Motors, which offer was declined. Raskob stated "we were not sure he had control of the General Motors Company and being in the position of neutral directors, we might be charged with taking sides should we do anything which would tend to give one side or the other control of the Company." (GTX 119.) After it became clear in May 1916 that Durant, through Chevrolet Motors holdings in General Motors, had obtained control of General Motors, Pierre S. du Pont and Raskob availed themselves of the offer which Durant had held open for them, and as a result Pierre S. du Pont and Raskob became large holders in Chevrolet Motors which controlled General Motors.

In August 1917, Pierre S. du Pont and Raskob accepted Durant's invitation to become members of the General Motors Finance Committee, and Durant suggested that the "Wilmington people, as he called it, take more stock and more interest in the General Motors Corporation." (Pierre S. du Pont 1997) After Pierre S. du Pont and Raskob became members of the Finance Committee both saw a

41866 O--59---8

"good deal" more of Durant and he talked freely to them about operations and finances of General Motors and plans for its future expansion.

[fol. 465] Shortly prior to December 19, 1917, Raskob talked with Pierre S. du Pont with respect to a proposed company investment in General Motors. Raskob prepared a draft report in connection with this proposal which was reviewed and approved by Pierre S. du Pont and discussion was had between them regarding parts of the report. Raskob proposed to Pierre S. du Pont that he take on the promotion of such a plan with the du Pont directors and it was submitted in final form as a Report of the Treasurer to the Finance Committee of du Pont. On December 21, 1917 the Executive and Finance Committees of du Pont approved the acquisition of common stock in General Motors and Chevrolet Company in the amount of $25,000,000.

General Industries, Inc., all of whose stock was held by du Pont, was formed to acquire the General Motors stock. By March 8, 1918 General Industries, Inc. had purchased approximately 23% of the common stock of General Motors and Chevrolet. During the next two years the investment was increased to approximately $49,000,000 and in 1920 du Pont owned approximately 23.96% of the outstanding stock of General Motors.

The Raskob report submitted to the Finance and Executive Committees of du Pont in connection with the proposed purchase of General Motors and Chevrolet stock summarized the following points in favor of a substantial investment in the motor industry:

> "1. With Mr. Durant we will have joint control of the companies.
>
> 2. We are immediately to assume charge and be responsible for the financial operation of the Company. This involves the direction of cash balances which will aggregate upwards of $25,000,000 and the handling of annual gross receipts aggregating $350,000,000 to [fol. 466] $400,000,000. From a financial standpoint, I feel that a consolidation of the financial divisions of the du Pont and General Motors Companies will be of tremendous advantage to us as well as to the General Motors Company and is a thing to be sought and desired from our standpoint.

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

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

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

Management

Perhaps it is not made clear that the directorates of the motor companies will be chosen by Du Pont and Durant. Mr. Durant should be continued as President of the Company, Mr. P. S. du Pont will be continued as Chairman of the Board, the Finance Committee will be ours and we will have such representation on the Executive Committee as we desire, and it is the writer's belief that ultimately the Du Pont Company will absolutely control and dominate the whole General Motor's situation with the entire approval of Mr. Durant, who, I think, will eventually place his holdings with us taking his payment therefor in some securities mutually satisfactory. * * *" (GTX 124).

[fol. 467] Announcement of the purchase was made in the annual report of du Pont to its stockholders as follows:

"Announcement was recently made of the acquisition of a large interest in the General Motors Corporation and Chevrolet Motor Company. Though this is a new line of activity, it is one of great promise and one that seems to be well suited to the character of our organization. The motor companies are very large customers of our Fabrikoid and Pyralin as well as paints and varnishes." (P. S. du Pont 2245).

Raskob's report, the testimony of Pierre S. and Irenee du Pont and all the circumstances leading up to du Pont's

acquisition of this substantial interest in General Motors, as shown by the record, establish that the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business.

The Government asserts that an agreement was made in 1917 at or about the time of du Pont's investment in General Motors which bound the latter to purchase from du Pont substantially all of its requirements of products of the kind made by du Pont. It also argues that du Pont's investment in General Motors was made with the purpose of using its alleged control of General Motors to require it to buy from du Pont.

The principal basis for both of these contentions appears to be the portion of Raskob's report wherein he stated:

> "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 substantiail factor." (GTX 124).

[fol. 468] The Court has also considered in passing upon these contentions of the Government the testimony of Pierre S. and Irenee du Pont and other documents written at the time of or within a few years following the investment.

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. Raskob's report does not describe any such agreement. Pierre S. du Pont was party to the preparation of this report and he testified that he had no knowledge of any such agreement. Irenee du Pont similarly testified that he knew of no such agreement. The Court believes it most unlikely that an agreement of the kind alleged by the Government would have been made without the knowledge of these two important officials. On the General Motors side, neither Sloan nor Pratt was ever advised of any such agreement though both occupied positions under Durant in which they would be expected to have known of one had it existed. No document, either contem-

poraneous 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.

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 [fol. 469] made any effort to so preclude General Motors, and did not limit General Motors' purchasing freedom.

Raskob's reports and other documents written at or near the time of the investment show that du Pont's representatives were well aware that General Motors was a large consumer of products of the kind offered by du Pont. Raskob, for one, thought that du Pont would ultimately get all that business, but there is no evidence that Raskob expected to secure General Motors trade by imposing any limitation upon its freedom to buy from suppliers of its choice. Other documents also establish du Pont's continued interest in selling to General Motors—even to the extent of the latter's entire requirements—but they similarly make no suggestion that the desired result was to be achieved by limiting General Motors purchasing freedom. On the contrary, a number of them explicitly recognized that General Motors trade could only be secured on a competitive basis.

At the time of this investment, Pierre S. du Pont, Haskell and Raskob were members of the General Motors Board and after the investment two additional du Pont nominees were elected to that Board. In 1919 the Board was increased to twenty members and the du Pont nominees remained at six.

The Finance Committee consisted of seven members, five of whom were du Pont representatives—Pierre S. du Pont, Irenee du Pont, John J. Raskob, Henry F. du Pont, and J. A. Haskell. Mr. Raskob was appointed chairman. It is apparent, and it is admitted, that a majority of this committee were officers and directors of du Pont.

The Executive Committee consisted of ten members, including one du Pont nominee, J. A. Haskell, with Durant as chairman and the other members consisting of management representatives.

[fol. 470] The evidence establishes that following the period of this investment until 1920 du Pont and Durant jointly controlled General Motors and that du Pont, through its affiliation with Durant, assumed the responsibility for the financial operation of General Motors.

During 1918 and 1919 General Motors acquired the assets of the Chevrolet Company, United Motors, which was an amalgamation of a number of accessory companies, the McLaughlin Buick properties in Canada, and a sixty per cent interest in Fisher Body Corporation. This expansion of General Motors had required the raising of new capital.

The Board of Directors of General Motors in 1920, after a previous unsuccessful effort to raise the necessary additional capital by an issue of seven per cent debenture stock, authorized an issuance of approximately 3,200,000 shares of new common stock to the common stockholders at $20 per share. It was also decided that du Pont and Durant would turn over their stock subscription rights amounting to 1,800,000 shares to Nobel and Canadian Explosives, Ltd., since Durant and du Pont were reluctant to make any further investments. J. P. Morgan & Co. subscribed to 600,000 shares of the new issue and one of its partners was named to the Board, together with representatives of Nobel and Canadian Explosives. The stock acquisitions of Nobel and Canadian Explosives were in large part taken over by du Pont at a later date.

The evidence shows that this new issue was accompanied by the formation of a syndicate managed by J. P. Morgan to buy and sell General Motors stock and subscription rights for the purpose of supporting the value of General Motors stock in the market. During the Fall of 1920, Durant, through individual stock market operations apparently designed to support the market price, had become [fol. 471] indebted in the amount of $27,000,000 to various banks and brokerage houses for which he had pledged some 2,700,000 shares of General Motors stock. These stock market investments by Durant were disclosed to Pierre S. du Pont and Raskob in November and alarm was felt as to the possible consequences in the event Durant failed

in the market. Du Pont Securities Company was organized to borrow $20,000,000 and take over Durant's loans, pay his creditors and preserve for him a 40% equity in du Pont Securities stock, which was later exchanged for 230,000 shares of General Motors stock. The new company had seven million dollars in cash and loaned 1,375,000 shares of General Motors stock to borrow the balance needed. Du Pont in 1921 authorized a bond issue in order to finance the transaction.

The net result of the foregoing stock transactions was that du Pont owned, through du Pont Securities, the equivalent of 7,362,540 shares of General Motors stock at a cost of $75,581,259 and in addition owned directly 200,000 shares acquired at a cost of $4,000,000; being the equivalent of approximately 38% of General Motors stock outstanding.

In 1923 du Pont sold about 2,250,000 shares of General Motors stock (substantially the amount acquired through the 1920 stock transactions) to Managers Securities, a corporation organized by General Motors for the purpose of providing additional incentive to principal executives of General Motors. Du Pont began to surrender the voting right on this stock in 1930, and from time to time thereafter surrendered such rights as holders of Managers Securities stock surrendered their stock and took down the underlying securities. By 1938 du Pont had surrendered the voting rights on all of this stock. It is admitted that since the release of the voting rights to [fol. 472] such stock, du Pont has for many years owned 10,000,000 shares, or approximately 23% of General Motors common stock, and that the remaining shares in 1947 were held by 436,510 stockholders, 92% of whom owned no more than 100 shares each and 60% owned no more than 25 shares each. In 1950 a two for one split was effected resulting in du Pont holding 20,000,000 out of 88,000,000 shares, which did not change the percentage of du Pont holdings.

At the conclusion of the 1920 events Pierre S. du Pont became president of General Motors. He was urged to accept this position by the du Pont Finance Committee since du Pont had a large investment in General Motors to protect. In addition, the record discloses that he was urged to as-

sume the presidency of General Motors by the bankers, by Sloan, and by others in the management.

Pierre S. du Pont held the presidency of General Motors until May 1923 when Alfred P. Sloan became president.

During Pierre S. du Pont's term of presidency significant and important changes were effected within General Motors. These were:

(1) A plan of reorganization for General Motors providing for substantial autonomy of the operating divisions of General Motors. The evidence shows that Pierre S. du Pont presented to the Board a plan, originated by Sloan during Durant's presidency, to decentralize the General Motors divisions.

(2) Certain changes in management and in the personnel of the Executive Committee were made. Under Durant the ten man Executive Committee consisted of managers of the operating divisions. In 1921 the Executive Committee was reduced to four members. They were Pierre S. du Pont, the President; Haskell and Sloan, heads of the Line and Staff Divisions; and John J. Raskob, Chairman of the [fol. 473] Finance Committee. This four man committee was enlarged to six in 1922 by the addition of Charles Fisher, a General Motors director, and C. S. Mott, also a General Motors man. Durant started a competing automobile company and the question of loyalty on the part of some of the car division managers to Durant was one of the reasons for reconstituting the Executive Committee.

The managers of the operating divisions became an Operating Committee under Haskell. Four out of five car division managers were appointed by Pierre S. du Pont, upon the recommendation of Sloan. Of the four replaced, two resigned and two were replaced as a result of disputes regarding contract rights under employment agreements made during Durant's presidency. The four new managers recommended by Sloan had in each case been with General Motors for years and never had any connection with du Pont. Testimony of witnesses shows that the changes in managers were unrelated to the use of du Pont products.

The Finance Committee of General Motors remained the same except the Durant vacancy was filled by Donaldson Brown, a former du Pont employee who was also a member of du Pont's Finance Committee.

(3) A General Purchasing Committee was created in 1922. This committee was created at the suggestion of Sloan in order to enable General Motors to set up machinery for standardizing items and for coordinating purchases where two or more divisions used a common product. James Lynah, who left employment of du Pont in 1919 under "acrimonious" circumstances, was appointed secretary by Sloan and the committee was composed principally of purchasing agents of the General Motors divisions. It is this committee which in September 1923 with Lynah's recommendation urged the adoption of a rule requiring a second source of supply for leather substitutes and rubber [fol. 474] coated fabrics which were being purchased in large quantities from du Pont. John L. Pratt, who was a du Pont employee from 1905 to 1919 when he resigned and went to work for Durant at General Motors, also became a member of this committee and was its chairman from 1924 to 1929.

(4) In 1918, during the Durant regime, at the suggestion of the du Pont nominees, General Motors initiated a bonus plan to outstanding employees. Before retiring as president, Pierre S. du Pont recommended that another plan be instituted providing for additional compensation to principal executives of General Motors.

Allotment of bonus awards was made by the Chief Executive Officer of General Motors subject to the approval of the Finance Committee. This procedure was followed until 1936 when a Bonus and Salary Committee of the Board replaced that function of the Finance Committee.

In addition to these changes in General Motors, two important discoveries affecting the automotive industry occurred.

In the latter part of 1920 Edmund M. Flaherty, an employee of du Pont, invented and carried to the commercial development stage a quick-drying, durable nitrocellulose lacquer, which was patented and called "Duco".

The other was the discovery of tetraethyl lead. In 1918 General Motors engaged in an extensive investigation into the nature and the causes of "knocking" in engines. In the General Motors laboratories chemical research under the direction of Charles F. Kettering and Thomas Midgely developed that the use of tetraethyl lead blended with gaso-

line in proper proportions constituted an effective anti-knock. It was further revealed that TEL, as it was called, was a scarce and expensive product, production of which [fol. 475] was extremely hazardous. General Motors discovered that TEL could be produced commercially from ethyl bromide. In 1922 General Motors and du Pont entered into an agreement under which du Pont manufactured TEL and it was distributed through a General Motors subsidiary organized to handle its marketing.

The record shows that during the 1920 to 1923 period du Pont had a 38% interest in the stock of General Motors. Three of the six members on the Executive Committee and seven of the eleven members on the Finance Committee were du Pont men. Haskell, former sales manager and vice-president of du Pont, who was willing to undertake the responsibility of keeping du Pont informed of General Motors affairs during Durant's regime, was Vice-President in Charge of the Operations Committee.

The defendants have conceded that "during the period of P. S. du Pont's Chief Executive Officership nominees of du Pont were thrust into positions of responsibility in General Motors which went beyond the financial supervision which had been their earlier role". (D. P. Brief, p. 332)

On April 24, 1923 Pierre S. du Pont informed the Finance Committee of du Pont of his desire to retire as president of General Motors and of his intention to recommend Alfred P. Sloan, Jr., as his successor. Sloan was a vice-president of General Motors and was in charge of the General Advisory Staff. He had been president of Hyatt Roller Bearing Company, one of the companies controlled by United Motors, which had been organized in 1916 by Durant. When General Motors acquired United Motors, Durant appointed Sloan as its president. The Finance Committee of du Pont adopted a resolution acquiescing in Pierre S. du Pont's decision and expressing confidence in Sloan as his successor to the presidency. Thereafter, [fol. 476] Pierre S. du Pont informed the directors of General Motors of his intention to resign and of his recommendation of Sloan for president.

On May 10, 1923 Sloan was elected president of General Motors and also was its Chief Executive Officer from 1937

until 1946. William S. Knudsen was elected president May 3, 1937 and served as such until September 3, 1940. In 1941 Charles E. Wilson was elected President and also became the Chief Executive Officer in 1946. Shortly after Sloan became president he was elected a director of du Pont.

Board Members.

On May 10, 1923 when Sloan became president, the Board consisted of thirty-two directors. The evidence shows that during the period of Sloan's presidency and that of Wilson, the du Pont nominees on the Board never exceeded six. The total number of members of the Board between 1949 and February 1, 1953 did not exceed thirty-two and was not below thirty.

Of the thirty-two directors when Sloan became president, sixteen were so-called management directors and only two of these had been connected with du Pont—Donaldson Brown and Haskell. The other than management directors were five bankers, three American industrialists, and two foreign industrialists.

Sir Harry McGowan of Imperial Chemicals, William McMaster of Canadian Explosives, Seward Prosser of Bankers Trust Co., Edward P. Stettinius of J. P. Morgan, William H. Woodin of American Car & Foundry, C. M. Woolley of American Radiator, and Owen D. Young of General Electric, all became members of the Board during the 1920 financing. There is no evidence that they were added at the suggestion of the du Pont nominees.

[fol. 477] The defendants have admitted that in 1942 du Pont suggested additional directors who were neither management nor du Pont nominees. At that time there were only three directors on the Board who were neither management nor du Pont nominees.

In July 1944 Carpenter wrote to Sloan urging selection of additional non-management and non-du Pont directors. Sloan testified he took the initiative in attempting to find qualified men who would be willing to serve. He also testified that in such search he sought suggestions from other members of the Board, including du Pont nominees, and discussed generally with all Board members the suggestions received.

In 1943 Sloan wrote to Carpenter, who was a member of the General Motors Board, that in his search for "outside" directors, he was "against Bankers on Boards of industrial companies" and had therefore eliminated the suggestions of Henry C. Alexander, Vice-President of J. P. Morgan, and R. K. Mellon, President of Mellon National Bank, whose names had been proposed by Carpenter some time previously. On January 8, 1948, five years later, R. K. Mellon was named to the Board of General Motors at the suggestion of Donaldson Brown. Mellon had by this time become "a very large stockholder in General Motors". In 1949 at the request of Sloan, Alexander, the other banker, was added to the Board. Thus some period of time passed between Sloan's indicated aversion to bankers on boards and the subsequent appointments.

In addition, on December 18, 1944, Lammot du Pont wrote to Sloan regarding Bernard Peyton, a nephew of Eugene du Pont who owned 60,000 shares of du Pont common "which is more than enough to give him a predominating interest in the affairs of that company and indirectly in [fol. 478] General Motors." (GTX 1230). Lammot du Pont wondered if "this would be a suggestion for consideration from the standpoint of directorship in General Motors". Sloan's reply admitted that neither he nor Donaldson Brown, to whom he spoke about Peyton, knew Peyton, and replied that if Peyton was the owner of a large block of du Pont common, involving indirectly substantial ownership in General Motors, together with his past business experience as Vice President and Treasurer of New York Air Brake Company, he would be qualified. He further stated that if necessary he would make inquiries regarding Peyton, but felt that since Lammot du Pont knew him no more was needed. In any event, Peyton never became a member of the Board.

On December 10, 1945 Sloan wrote to Carpenter, then President of du Pont and a member of the General Motors Board, regarding the suggestion of Mr. Pratt to consider General Marshall as a member of the General Motors Board and indicated that he did not favor the suggestion. A reply came from Lammot du Pont, Chairman of the Board of du Pont and also a member of the General Motors Board, that he was not in favor of General Marshall's

membership. On Sloan's letter to Carpenter, there appears a handwritten notation of the name of "E. F. Johnson", and in the following month Johnson was elected a director of General Motors. Prior to his service with General Motors, he was an employee of du Pont.

On April 22, 1930, in an exchange of correspondence, Lammot du Pont agreed with Sloan's suggestion that Mr. Bishop should not be re-elected a vice-president of General Motors but thought he should be retained a director, and suggested further that Curtis C. Cooper, who had severed connections with the corporation, be dropped as a director. On May 1, 1930 Mr. Bishop was not re-elected [fol. 479] Vice-President but continued as a director, and Mr. Cooper was not retained as a member of the Board.

In 1928, Raskob, while chairman of the General Motors Finance Committee, became Chairman of the National Democratic Committee in connection with the candidacy of Alfred E. Smith for President. Sloan testified he considered it unsound for Raskob to manage a political campaign and at the same time continue as "unofficial" spokesman for General Motors because he felt it put General Motors in politics. Raskob differed with Sloan's view and was supported by Pierre S., Irenee, and Coleman du Pont. The episode resulted in Raskob's resignation and also the resignation of Pierre S. du Pont as Chairman of the Board. Both, however, remained as members of the Board and the Finance Committee. Lammot du Pont succeeded Pierre S. du Pont as Chairman of the General Motors Board and held that position until 1937.

Mr. Sloan testified that he discussed prospective directors, particularly "outside" directors, with the entire Board.

A majority of the directors have always been the nominees of management. Sloan testified that management directors were always nominated by him when they had achieved in the management hierarchy of the corporation a position which entitled or required that they be on one of the committees of the Board, and further that he never discussed these nominations with anyone except the management group and after his recommendation their election was automatic. Sloan and Carpenter testified that no du Pont nominee ever objected to the number of management directors which Sloan wanted on the Board.

Committees of the Board

The Executive Committee, until merged with the Policy [fol. 480] Committee in 1937, dealt with operational management problems. In May 1923 when Sloan became president of General Motors there were six members, three of whom were du Pont representatives, i.e, Pierre S. du Pont, Chairman of the Board, John J. Raskob, Chairman of the Finance Committee, and Donaldson Brown, a member of the Finance Committee. The membership of this committee was increased to twelve during the period 1923-1934, and new members were added at the suggestion and request of Sloan.

It is the Government's contention that du Pont directly intervened in decisions touching on changes in the membership of the Executive Committee and refer to the incident following the resignation of Raskob and Pierre S. du Pont from the Executive Committee. Irenee du Pont, then Vice-Chairman of the Board of du Pont wrote to Lammot du Pont, Chairman of the Board of General Motors, reminding him of the recommendations made by Pierre S. du Pont and Raskob for their vacancies—that Knudsen be placed on the Executive Committee for Raskob, Mr. Mooney in place of Mr. Mott, and possibly Walter Carpenter in place of Pierre S. du Pont. Knudsen was placed on the Executive Committee within three months; Mooney became a member of the Executive Committee some six years later; and instead of Carpenter, Lammot du Pont took Pierre S. du Pont's place on that committee. Neither Knudsen nor Mooney was connected with du Pont.

On April 22, 1930 Sloan received a reply from Lammot du Pont, then Chairman of the Board of General Motors, which approved of Sloan's idea expressed in an earlier letter of abolishing the Operations Committee and of placing its members on the Executive Committee. Lammot du Pont went on to say this meant that Bradley, Grant, Hunt and Wilson, all of whom were vice-presidents, would [fol. 481] have to become members of the Executive Committee and presumably would have to be elected directors, but added there was no reason why Glancey, Reuter and Strong, who were also vice-presidents, should be added to the Board. Some four or five years later, 1934 and 1935, Bradley, Hunt and Wilson were added to the Executive

Committee and to the Board. The others mentioned by Lammot du Pont never became directors.

Lammot du Pont, Chairman of the General Motors Board, who had become a member of the Executive Committee in 1930, resigned as a member in 1934. In this connection Sloan wrote to Lammot du Pont inquiring whether Lammot du Pont would like to have Carpenter elected in his place. The evidence shows that Carpenter did not go on the Committee and no one replaced Lammot du Pont. After his resignation, du Pont had no representative on the Executive Committee. Donaldson Brown remained a member of this committee.

The Finance Committee until merged with the Policy Committee in 1937 dealt primar-ly with financial matters. In 1923 of the eleven members, seven were du Pont men. These were Pierre S. du Pont, Chairman of the Board of du Pont, Irenee du Pont, President of du Pont, Lammot du Pont, Vice President and a director of du Pont, John J. Raskob, a director and member of the du Pont Finance Committee, J. A. Haskell, a vice-president and director of du Pont, H. F. du Pont, a director and member of the Finance Committee, and Donaldson Brown, a director and member of the Finance Committee of du Pont. With the death of Haskell in 1923, the du Pont representation was reduced to six. The Finance Committee in 1923 with continuing du Pont representation reflected the original understanding with Durant that in financial matters the du Ponts would assume the primary responsibility.

[fol. 482] In 1924 this committee was increased to twelve and eventually to fourteen. In 1927 Carpenter became a member of this committee.

With the resignation of Raskob from the Executive Committee and Chairmanship of the Finance Committee, Lammot du Pont, then President of du Pont and a director of General Motors, wrote to Sloan regarding the chairmanship of this committee stating that he felt it was up to du Pont to make a nomination since du Pont "has always assumed the responsibility for the financial direction of General Motors" and suggested the appointment of Carpenter and, if not agreeable, Donaldson Brown. The record shows that Donaldson Brown succeeded Raskob as Chairman.

On May 3, 1937, the membership of the Finance Committee was fourteen, seven of whom were du Pont representatives, i.e., Pierre S., H. F., Irenee, and Lammot du Pont, Raskob, Brown and Carpenter. The other members were Baker, Prosser, Sloan, Whitney, Morgan, Mott and Bradley. Sloan testified that most of the additions to this committee during the period 1923-1937 had been at his suggestion.

In 1937 at the insistence of Sloan, the two committee operation was consolidated into the Policy Committee. Sloan testified that the change was desirable because experience proved that the Finance Committee for some years prior to 1937 had dealt with problems which though financial in nature were operating problems as well. After some discussion, his recommendation was accepted and a Policy Committee which had complete authority to deal with broad policy questions was established. At this time Sloan resigned as President and was succeeded by Knudsen. Sloan remained the Chief Executive Officer and Chairman of the Board.

[fol. 483] The one committee idea had been discussed with du Pont representatives. It was considered by the Finance Committee of du Pont and the committee was in favor of the objectives of the proposal, but misgivings were expressed with respect to the discontinuance of the Finance Committee without creating some body whose particular function would be the handling of financial problems. A proposed compromise plan was submitted which was not adopted.

In connection with the 1937 reorganization, Lammot du Pont wrote to Carpenter reporting on a conference held in New York. Those present, including himself, were Alfred Sloan, Donaldson Brown, J. T. Smith, John Raskob, John Pratt and Pierre S. du Pont. At this conference it was agreed that the Board would be reduced to 28 omitting McGowan, H. F. du Pont, W. A. Fisher, Kaufman, Opel, Swayne, Woolley and Young; a Policy Committee would be appointed consisting of Bradley, Brown, Knudsen, Sloan, Smith, Wilson and three representatives of du Pont; and an Administrative Committee would be appointed with Wilson as Chairman. In addition it was agreed that eventually Sloan should become Chairman of the Board and

Knudsen, President. Lammot du Pont stated that Sloan seemed so insistent on his one committee idea, which was concurred in by the others, that he felt any objections Carpenter or he had should be waived in view of the fact that some other man of financial experience from du Pont might be named on the Policy Committee.

The record shows that during the life of the Policy Committee, continued misgivings were expressed as to its efficacy. Sloan, Carpenter and Lammot du Pont exchanged correspondence with reference to the weaknesses disclosed by operating under the Policy and Administration Committees. Sloan had reached the conclusion that the com- [fol. 484] mittee set up should be altered. In writing to Donaldson Brown Sloan stated "we put too many things on the Policy Committee that involve administration and do not confine their work sufficiently to broad questions of policy." In addition, Sloan in his correspondence with Lammot du Pont stated that the General Motors Organizational scheme of things was not adaptable to the same type of organizational set up existing in du Pont. A change in committee organization was effected in 1946 by a return to the two committee plan: one was the Financial Policy Committee and the other the Operations Policy Committee. Mr. Sloan testified as to the considerations evoking a return to this system. He also testified that the reason correspondence evidence existed with the du Pont group and none with the management group of directors was that the management group was in the same office and these matters of organization changes were discussed orally with them.

The Policy Committee always consisted of nine members. During the entire period of this committee the following du Pont officers and directors, not incuding Sloan, were members: Donaldson Brown, Carpenter and Lammot du Pont. The management members were Bradley, Sloan, Smith, Wilson and Knudsen, who was replaced by Hunt in 1940 on the nomination of Sloan. The other member was George Whitney of J. P. Morgan. With the exception of Knudsen, the personnel of this committee remained the same throughout its life.

In 1943 Sloan wrote to Lammot du Pont asking his reaction to the suggestion of Kettering as a member of the Policy Committee. Lammot du Pont did not favor the

41866 O—59——9

suggestion and Kettering was not appointed. Testifying regarding this incident, Sloan stated that others agreed with Lammot du Pont, including himself after giving the subject further consideration. Sloan also testified that he [fol. 485] consulted with all the directors regarding the appointments to the Policy Committee.

In 1946 with the change of committee organization, there were no du Pont representatives on the Operations Policy Committee. The Financial Policy Committee started with nine members and was later increased to ten. At no time during its existence were there more than three du Pont representatives on this committee.

The evidence shows that since 1934, with the exception of Donaldson Brown, no du Pont representative was on the Executive Committee. Brown had been described by Sloan as a General Motors man although he was a former officer of du Pont, retained his membership on its Board and its Finance Committee when he went to General Motors. Brown became a part of the General Motors organization in 1921 when Raskob in a letter to Irenee du Pont, who was then President of du Pont, wrote that General Motors needed expert financial assistance and that the person selected should not only be a man of unquestioned ability but one who enjoyed the absolute confidence of the directors of du Pont, which now controlled General Motors. He recommended Donaldson Brown and stated that since the financial interests of both companies were so closely interwoven, Brown should be retained as a director and member of the Finance Committee of du Pont. Brown eventually succeeded Raskob in General Motors and became chief financial advisor to its president.

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.

During the life of the Policy Committee, of a membership of nine, three, including Brown, were du Pont repre- [fol. 486] sentatives. There were no du Pont representatives on the Operations Policy Committee.

On the Finance Committee, which was changed to the Policy Committee in 1937, there were seven du Pont representatives, including Brown, in a total membership of four-

teen. Of the ten members on the Financial Policy Committee in 1946, three were du Pont representatives. Thus, numerically, the du Pont representatives were not in a majority on the governing committees of General Motors. The record shows that during 1941 du Pont was interested in the retention and placing of able personnel in the financial department of General Motors.

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

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. [fol. 487] 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.

Bonus Plans and Awards

The record shows that in 1923 du Pont sponsored and supported the Managers Securities Plan. The idea had been suggested by Pierre S. du Pont, then President of General Motors, and the details, with some variations before the final adoption, are set forth in a report prepared

by Raskob and Brown. This report was submitted to the du Pont Finance Committee and stated that Pierre S. du Pont's interest in the plan caused the report to be made. The report stated that Pierre S. du Pont felt that the most effective manner of attaining maximum success in the conduct of the affairs of General Motors was to interest its principal men as substantial stockholders or partners in the business, that du Pont with its large and controlling interest in General Motors would enhance the value of its own investment by the adoption of such a plan in General Motors and would retain the same control of General Motors through owning two-thirds of the stock of General Motors Securities Company, plus the fact that "it will definitely tie up with us in the management and control of this huge investment the men in General Motors Corporation who are definitely charged with the responsibility and success of the corporation." (GTX 235).

Managers Securities Corporation was organized by General Motors to purchase 2,250,000 shares, or approximately one-third of the common stock of General Motors Securities [fol. 488] Company, the du Pont Company which held 7,500,000 shares of common stock in General Motors. Du Pont from time to time surrendered voting control of the 2,250,000 shares until 1938 when the successor corporations, General Motors Securities, was liquidated.

In the course of evolving this additional compensation plan, the evidence shows that Irenee du Pont had certain objections and suggested that the stock for Managers Securities be procured through circularization of General Motors stockholders. Mr. Laffey, Chief Counsel for du Pont, advised Irenee du Pont that a direct sale of the stock to General Motors would have incurred a federal capital gains tax. Irenee du Pont testified to this as one of the considerations for the plan ultimately adopted. The plan originally proposed by Raskob and Brown, and objected to by Irenee du Pont, was retained and du Pont supplied the stock which was the sole asset of Managers Securities. The Managers Securities common stock was sold to General Motors and resold by it to about eighty of its executives.

General Motors agreed to pay Managers Securities 5% of its earnings annually, plus $2,000,000 per year, after deducing 7% on invested capital. Prior to Managers Secu-

rities, General Motors had annually set aside 10% of its earnings, after deducing 6% on invested capital, for the bonus fund. With the creation of Managers Securities, one-half of the 10% previously set aside for the bonus plan, or 5%, was allocated to Managers Securities for distribution in Class A stock, having a par value of $100, and Class B stock, having a par value of $25. Sloan testified that the Class A, five million par value stock of Managers Securities was not entirely allotted to executives, a reserve being held so that in subsequent years the allotment to Managers Securities was reduced below 5%, the balance going to the bonus fund. The Class B stock of Managers [fol. 489] Securities received the dividends earned by 2,-250,000 General Motors common purchased by Managers Securities from du Pont.

The executives purchasing Managers Securities stock paid one-seventh of the purchase price in cash and the balance was paid on a deferred payment basis out of future bonuses and out of the earnings of the stock purchased.

The Board of Directors created a committee which was empowered to designate the employees of General Motors who were to participate in the Managers Securities stock. This committee consisted of three members—Pierre S. du Pont, Chairman of the Board, and two other directors, Seward Prosser of J. P. Morgan, and Arthur G. Bishop, President of a Flint, Michigan, bank.

Sloan testified the stock allotments were made and determined by the special committee, then submitted to him as Chief Executive Officer for consideration and recommendation in the way of changes in the allotments. The initial awards of Managers Securities stock were made November 22, 1923 when Pierre S. du Pont wrote to the two other members of his committee making suggestions as to the distributions of stock. Sloan testified that the original allotment by the committee was made before submission to him, that Exhibit GM 30 contained the final allotment after submission to him, and showed the changes he had made.

Pierre S. du Pont testified the general method followed in bringing to the Special Committee recommendations for allotments for General Motors personnel of Managers Securities stock was that allotments were initiated by heads of the different departments of General Motors in

a recommendation to the president of the corporation, who expressed his opinion thereon and passed the entire recommendation to the committee of three and so far as he knew no recommendation was changed by the commit- [fol. 490] tee after it came from Sloan. Sloan testified that bonuses were distributed by the Chief Executive Officer of the corporation whose recommendations went before the Finance Committee for approval. He further testified that although the chief executive officer had jurisdiction so far as the higher executives of the corporation were concerned, their compensation came through Managers Securities and he made no allotments to the higher officers since it was automatic and determined by the Special Allotment Committee. With respect to the operation of the bonus plan, he stated that although the responsibility rested with the chief executive officer he could not determine the allotments in the lower echelon of authority. A certain amount was allocated to a division and the chief executive of the division was the responsible agent in distributing the bonus within that division. He then submitted his recommendations to the chief executive officer who in turn submitted them to the Finance Committee until the year 1936 and thereafter to the Bonus and Salary Committee. Sloan testified that he could not remember any instance where the recommendations so made were changed by the Finance Committee or the Bonus and Salary Committee.

In 1923 the Finance Committee of General Motors, which received the recommendations of the Chief Executive, and the heads of the divisions, still reflected the original understanding with Durant that in financial matters du Pont would assume primary responsibility. Du Pont had six representatives in a total membership of eleven. After the membership was increased to fourteen in 1923, there were six du Pont representatives.

For the years preceding 1941 there are no records of the personnel of the Bonus and Salary Committee which replaced the function of the Finance Committee in connection [fol. 491] with the compensation plan. From 1941 to 1948, Government Exhibit 276 shows that of the five directors constituting this committee, the majority were du Pont representatives. They were W. S. Carpenter 1941-1944; H. B. du Pont 1944-1948; John J. Raskob 1941-1945;

Echols 1946-1948; and Lammot du Pont 1941-1945, who was also its chairman during that period. The other members were John L. Pratt 1941-1946; George Whitney 1941-1948; and E. F. Johnson 1947-1948. Carpenter suggested his position on the Bonus and Salary Committee in 1944 be taken by H. B. du Pont and added that this would give H. B. du Pont "an excellent opportunity to better familiarizing himself with the personnel" of General Motors. (GTX 210).

Mr. Sloan and Pierre S. du Pont testified that in the allocations made no consideration was given to the purchasing practices or attitudes of any executives toward du Pont.

The Managers Securities Plan as submitted and approved by the General Motors stockholders gave the corporation an irrevocable option to repurchase all or any part of the Class A or B stock and provided that the Finance Committee make a yearly review of the recipients of stock for the purpose of determining whether their stockholdings were disproportionate to the service being rendered, and providing for repurchase of stock in the event it was so found.

The Managers Securities Plan was terminated in 1929 because with the increase in the number of executives it was felt "something had to be done to broaden the scope of the plan." On January 1, 1930 a new seven year plan was developed and General Motors Management Corporation was organized. Du Pont did not provide any of the stock for this new corporation. Upon the expiration of the Management Corporation plan in 1938, General Motors [fol. 492] reverted to the old Bonus Plan as the sole vehicle for rewarding its personnel.

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

Du Pont for many years has had supplemental compen-

sation plans in various forms. Pierre S. and Irenee du Pont testified that they believed strongly that management should share in the success of a company and should participate in its earnings as owners. Their sponsorship of the Managers Securities Plan was no more than the application to General Motors of a business principle they had long practiced.

The record shows that some du Pont representatives did participate in the determination of the allotments under the Managers Securities plan and the bonus awards. There was opportunity, therefore, for them, in passing judgment on such matters, to attempt to further du Pont interests as a supplier of General Motors and as a chemical manufacturer. However, there is no evidence that any of them made any such attempt. The witnesses who testified and who would have been parties to such efforts vigorously denied the Government's charges. The Court refers to Pierre S. du Pont, Irenee du Pont, and Carpenter. A number of other executives who were witnesses such as Sloan, Kettering, Pratt, Lawrence Fisher, Lynah, and Wilson are [fol. 493] among those who would have been "influenced", if the Government's contention is correct. These men, the record shows, acted at all times solely in the best interest of General Motors.

The record as a whole and the findings made in the previous sections of this memorandum support these further findings on the issue of the alleged control of General Motors.

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.

[fol. 494] The Government cross-examined Sloan respecting GTX 1307 which shows the percentage that the du Pont stock voted at the annual General Motors stockholders meetings bears to the total stock voted at such meetings. Counsel for the Government sought to obtain from him an admission or concession that du Pont's block of stock was at all times sufficient to prevail at a stockholders meeting. Sloan's position was that he did not believe one could tell what would happen if there was a conflict at a stockholders meeting. He pointed out that, for instance, in the year 1932 there were 17 million shares which were not represented at the meeting and further stated that, if there had been a contest for directors, there would have been a much larger representation than 26 million shares. His conclusion was that he did not think that anyone could tell how that large representation would vote because it would depend upon the issue that caused a particular conflict. He further stated that the stockholders owning those shares would be guided by the record of General Motors Corporation with respect to the advancement of its competitive position, its earnings, and its dividends.

Sloan testified that at no time had there been a contest over the selection of directors. He said that while it was true that the du Pont block of stock represented over 51% of the stock at certain of the meetings he emphasized that it was not 51% of *all* the stock entitled to vote. In this connection he said:

> "In case of conflict you immediately—the interest you arouse and all that, and the issues that are put

before the stockholders, would mean that a much larger percentage of the stockholders would come into the meeting, and that would dilute in a way the du Pont interest. So I can't just say what would happen. * * * It would depend, as I say, upon a lot of circumstances that I can't evaluate." (3087)

[fol. 495] The Court finds the testimony of Sloan on this question of control both reasonable and persuasive. 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.

United States Rubber Company

It is admitted that in June 1927 the defendant individuals, together with Henry B. du Pont, Lammot du Pont Copeland and certain other members of the du Pont family and their close business associates formed a syndicate to purchase United States Rubber stock. It is the Government's contention that the syndicate's acquisition of this stock stemmed from a scheme to bring United States Rubber into the alleged conspiratorial plan involving General Motors and the du Pont Company. United States Rubber Company at this time was one of the largest manufacturers of rubber products in the United States.

In 1913 Irenee du Pont purchased 400 shares of United States Rubber common as a personal investment. He testified he made this initial investment through his confidence in a former fraternity brother, Raymond B. Price, who had invented a rubber reclaiming process which was sold to United States Rubber, and because he "was quite aware of the peculiar properties of rubber" and felt a "rubber company ought to be a good growing business." He later in- [fol. 496] creased his holdings to 12,000 shares and the extent of his investment from 1913-1926 is set forth in

GTX 1029. During this same period, Lammot du Pont had also invested in United States Rubber common without the knowledge of his brother, Irenee.

Irenee du Pont testified as to the background, the reasons and circumstances which caused the formation of the syndicate to buy United States Rubber stock. He stated that in 1927 the stock took a very "sudden nosedive", but the stock of other rubber companies remained firm; that he believed the drop in price was due to the fact that "somebody knew the position of the United States Rubber Company was not what it ought to be; that there had been mismanagement somewhere, and somebody wanted to get out of it and get into something else"; that the United States Rubber balance sheet showed excessive accounts receivable, and excessive inventories, materials, supplies, and finished products which he thought indicated incompetent financial management. However, he thought this was a good time for a profitable investment in United States Rubber, but since it would have required a larger investment than he could properly go into alone, he discussed the formation of a syndicate to purchase United States Rubber stock with his brother-in-law, William Winder Laird. He testified that he and Laird were of the opinion that if they could get a group to purchase a large block they would establish prestige with the management and be in a position to make suggestions and offer criticisms.

Without discussing the identity of the syndicate members with Irenee du Pont, Laird drew a syndicate agreement. With the exception of Raymond Price and Henry Davis, who were solicited by Irenee du Pont, Laird solicited the other ten members of the first syndicate who were, in the main, clients of Laird's brokerage firm.

[fol. 497] Irenee du Pont wired Raymond Price on June 17, 1927, as follows:

> "Would you join syndicate to buy control your former company." (GTX903).

He also sent him a letter reciting the fact that it would be a good plan to organize a syndicate to acquire control. Price accepted the invitation. On June 30, 1927, Irenee du Pont wrote inquiring whether Price would return to United States Rubber if "we should succeed in getting a

large block and had a voice in the management". (GTX 906). Irenee du Pont testified this invitation to Price was not to replace anybody with him, since they "were backing the management, not through revamping the management" but supporting the management with the best advice. He stated that the syndicate thought the company would be impressed by the weight of a large stockholder, would get the matter "cleaned up" and as a result the company as a whole would prosper.

The syndicate agreement dated June 30, 1927 recited that the purpose was to acquire common stock in "quantities sufficient to give practical control, or at least a voice in the management". There were twelve persons in the syndicate at its inception. With the exceptions of Price and Henry Davis, all were stockholders in Christiana Securities and four—Irenee, Lammot and H. B. du Pont and W. W. Laird—who subscribed for over half of the amount were Delaware stockholders. Six of the subscribers were directors of the du Pont Company and the rest, with the exception of Price and Davis, were members of the du Pont family. At this time Irenee du Pont was Vice-Chairman of the Board of du Pont and Lammot du Pont was its President. Both were serving on the Finance Committees of General Motors and the du Pont Company.

[fol. 498] A report, addressed to Mr. Laird and presumably undertaken at his suggestion, was submitted on August 4, 1927 by Mr. Lytle on the problems and potentialities of United States Rubber. It was brought to Irenee du Pont's attention and he testified that it confirmed his views of the problems besetting United States Rubber.

A second syndicate was formed September 2, 1927 after the first syndicate had purchased 97,750 shares of United States Rubber stock. The second syndicate was formed in order to admit six additional subscribers. Among them was Pierre S. du Pont, who was Chairman of the Board of du Pont and General Motors, a member of the Executive Committee of General Motors, and also a member of the Finance Committees of du Pont and General Motors. With the exception of H. S. Meeds, Jr., the additional subscribers were Christiana or Delaware stockholders.

By December 9, 1927 the syndicate had purchased 154,750 shares of common stock, or 11% of the 1,379,503 total out-

standing shares, both preferred and common, since both had voting rights. Of the 154,750 shares, the defendant individuals and members of the du Pont family, all of whom were stockholders in Christiana or Delaware, held 149,500 shares and the balance of 5,250 shares was held by Henry Davis, Raymond Price, and H. S. Meeds.

In December 1927 the syndicate operation was closed and some 154,000 shares of United States Rubber common were distributed to the syndicate members. Irenee du Pont testified that because they already had the ear of management there was no further need for the syndicate. In connection with the syndicate dissolution, H. B. du Pont wrote to Irenee and Lammot du Pont and other members on December 30, 1927 suggesting a voting trust of the syndicate stock be formed. On January 25, 1928 Henry B. du Pont, in writ-[fol. 499] ing to Pierre S. du Pont, indicated that all the members of the syndicate approved the idea and it was agreed that the trustees—Irenee and H. B. du Pont and H. S. Meeds—were to receive the stock from the syndicate members, deposit it in a box at the Wilmington Trust Company, and vote the stock as they saw fit. Irenee du Pont testified the reason for this procedure was to reassure Seger, then President of United States Rubber, that the investment by the group was not for speculation and also to make it possible to vote the stock as a unit.

In December 1929 after the termination of the second voting trust, Rubber Securities Company was organized by the syndicate members. Irenee du Pont had written to the syndicate members the month preceding that Mr. F. B. Davis, Jr., President, Mr. William de Krafft and Mr. Henry Davis, Directors of United States Rubber, were willing to undertake tc organize a company to be known as Rubber Securities Company with a capital of 110,000 shares for the purpose of centralizing control of certain stock of United States Rubber. The syndicate stock of 254,300 common shares was to be sold at $26.50 to Rubber Securities; Rubber Securities stock was to be issued and subscribed to by such of the syndicate members who cared to subscribe in an amount equal to $29.50 for each share of United States Rubber common. This sale of syndicate stock to Rubber Securities permitted the members to crystalize a tax loss since the stock had been purchased at $40.50 per share.

Thus, H. S. Meeds, Jr. wrote to Irenee and Lammot du Pont on December 14, 1928 proposing the formation of a corporation with a view of taking advantage of such losses and expressing the belief that a corporation would offer a better means for "concerted action of the several interests involved" and suggested a Delaware corporation be formed.

In connection with the formation of Rubber Securities, [fol. 500] Irenee du Pont invited Cyrus Eaton, a banker, to join in the purchase of Rubber Securities stock and sell his United States Rubber shares to Rubber Securities. It appears from the record that Eaton, through Continental Shares, had about 100,000 shares of United States Rubber stock. Irenee du Pont testified that he thought it would be a very good thing to have him "definitely working with us rather than against us." Eaton refused the invitation.

The idea of centralizing the stock holdings of the syndicate members was one of the purposes for the creation of the new corporation. This is shown by both the record and testimony of Pierre S. du Pont.

Rubber Securities issued 106,335 shares of stock. A total of 101,146 shares was held by the members of the du Pont family; 80,930 shares were held by Delaware stockholders, and 5,159 shares were held by others who were not stockholders in Delaware or Christiana. Thus, 95% of Rubber Securities stock was held by Delaware and Christiana stockholders. Rubber Securities Company in December 1929 held 314,000 shares of United States Rubber common and 46,000 shares of preferred, or about 17% of the voting stock of 2,107,915 shares. It is admitted that this stock was voted as a unit at United States Rubber stockholders meetings.

The stock of Rubber Securities was closely held and kept intact until November 13, 1937 when, in anticipation of its dissolution, its stockholders received United States Rubber preferred and common stock on an approximate pro rata exchange for Rubber Securities stock. The reason for the dissolution of Rubber Securities, which was completed by December 1, 1938, was stated by Irenee du Pont to be a feeling among the stockholders that they would like to have something of tangible value on the stock exchange that they could borrow on as collateral and, further, the need for holding the group together had disappeared because they [fol. 501] had the ear of management.

After the dissolution of Rubber Securities, the holdings of United States Rubber stock were held by individuals and members of the du Pont family. These holdings have remained substantially intact since the dissolution of Rubber Securities. On June 30, 1949 the members of the du Pont family held a total of 324,516 shares of United States Rubber common, or 18% of a total of 1,761,000 shares, and 75,619 preferred, or 11%, of a total of 651,000 shares. The record shows that there were 14,000 other stockholders in United States Rubber besides the holdings above described. United States Rubber has introduced evidence showing that from 71.7% to 76.8% of United States Rubber stockholders were represented at the annual stockholders meetings for the years 1947-1949. At no time subsequent to the dissolution of Rubber Securities have the members of the du Pont family held more than 17% of the United States Rubber voting stock.

Irenee, Lammot and Henry B. du Pont transferred large blocks of their original holdings of Rubber Securities stock to trusts for the benefit of their children wherein the Wilmington Trust Company was designated as the trustee. On June 30, 1949 the Wilmington Trust Company held approximately 150,425 shares of United States Rubber common and 17,736 shares of United States Rubber preferred in the various trusts so established. Thus, almost one-half of the family holdings in United States Rubber common stock are held by the Wilmington Trust Company, as trustee. Most of the trust agreements provided that stock in the corpus of the estate may be voted by the trustee only with the advice and consent of a designated Advisor. Twenty-one of these trusts are listed in Appendix A to the Amended Complaint.

[fol. 502] In this connection the Government asserts that the Wilmington Trust Company is controlled by the du Pont family and this control directed the voting of shares of United States Rubber held by Wilmington Trust as trustee.

George Edmonds, President and Director of the Wilmington Trust Company, testified that the provisions regarding the holding and voting of securities underlying the trusts were entirely usual and in common use throughout the country; that specific or "blanket" approval by the Ad-

visor to vote all the stock in a particular trust in favor of the management, provided there is no dispute, is required before the trustee will vote the stock; that where there is no contest for election of directors or other controversial question, the trustee follows the policy of voting for the management.

The members of the du Pont family hold 31,590 shares of voting stock in Wilmington Trust, and Christiana Securities holds 7,210 shares, constituting 24% of the total 161,150 shares of outstanding Wilmington Trust stock. The Raskob report lists the Wilmington Trust under the heading of "du Pont control". The government has introduced GTX 3 and 1276 to show that members of the du Pont family and their close associates have been and are directors of Wilmington Trust. As of June 1949, the board of Wilmington Trust consisted of twenty-two directors, seven were members of the du Pont family and three were their close associates.

Kuhn, Loeb & Co. had been issuing bankers for United States Rubber since 1917 and had been underwriters for about twelve issues of United States Rubber securities before 1927. It was in connection with the 1917 financing that Seger became a director in United States Rubber on recommendation of Kuhn, Loeb.

[fol. 503] Beginning in October 1927 Irenee du Pont had a series of meetings with Charles B. Seger, whom he met for the first time in July and who was the President and Chairman of the Board of United States Rubber. Irenee du Pont testified that the first time he met him, Seger inquired whether he had called to obtain his resignation. Irenee du Pont replied that they had bought into United States Rubber to support him and give what assistance they could to effect an improvement in the financial setup of the corporation. He also testified that he was favorably impressed with Mr. Seger and that he felt reassured that conditions would improve with guidance from some one who had been "through the mill" in similar problems. He sent Seger a copy of the Lytle report and a copy of the du Pont bonus plan, with the suggestion as to the latter that Seger see John J. Raskob, who had no interest in United States Rubber, regarding his views on United States Rubber adopting some such plan.

When the syndicate made its investment Irenee du Pont at a meeting with Wiseman and Schiff of Kuhn, Loeb & Co., subsequent to his meeting with Seger, informed Kuhn, Loeb of the syndicate investment in United States Rubber and asked for their cooperation in improving its financial management. At Schiff's suggestion, Irenee du Pont and the Kuhn, Loeb representatives met with Seger. Irenee du Pont offered to help Seger solve United States Rubber's problems of excessive accounts receivable and inventories. Seger appeared receptive to the views expressd at these meetings.

After the meetings with Irenee du Pont, Seger invited him to become a member of the United States Rubber Board but he declined for the reason he did not want to undertake the burdens and feared the presence of a du [fol. 504] Pont name on the Board might mislead the public as to the value of United States Rubber stock.

Early in 1928 when the price of crude rubber dropped from forty cents to twenty cents a pound, United States Rubber having a large inventory was faced with a possible inventory loss of almost two million dollars. This drop in the price of rubber reduced the value of the company's assets below the point at which payment of dividends was permitted under the terms of one of its note indentures, and the decline in the value of its assets made it imperative to conserve the company's cash for meeting approaching maturities on its borrowings.

Wiseman and Irenee du Pont testified that Seger was reluctant to recommend that no dividend be paid, but was eventually persuaded by Kuhn, Loeb to recommend to the Board that no dividend be declared. Seger, in a letter to the stockholders on April 5, 1928, explained the action of the company and stated that "except for the limitations imposed by the Indenture" there was no reason why the dividend should not have been declared at this time. Wiseman testified that Seger's reluctance to recommend non-payment of the preferred dividend strengthened the Kuhn, Loeb view that Seger needed help in running the company.

During the Spring and Summer of 1928 the price of crude rubber continued to decline and the company's loss of inventory value, plus a twenty million dollar indebted-

ness, created concern among its creditors and it was feared that a receivership might result.

In April 1928 Lewis L. Strauss of Kuhn, Loeb prepared a plan for the issuance of new common stock by United States Rubber. Irenee du Pont also regarded the raising of new capital necessary. Seger, however, took no action regarding it.

[fol. 505] In the Summer of 1928 the syndicate sold 27,600 shares of United States Rubber stock at a loss. Irenee du Pont testified the sale was made by the syndicate members for the reason that they suspected there might be a receivership and "that we had better sell some of the stock and reduce our commitments". In October 1928 the Guaranty Trust Co. threatened to cut off its credit to United States Rubber and several other banks expressed concern to Kuhn, Loeb about the continuance of credit to the company. Seger was finally persuaded that it was necessary to raise new capital, and at his request in October 1928 Kuhn, Loeb drafted another plan for the issuance of common stock. The issue of 728,412 shares of common was to be offered to the existing common stockholders on a share for share basis. Kuhn, Loeb invited other banking and brokerage firms to participate in the underwriting, including Laird, Bissell & Meeds, who were included at the request of Irenee du Pont.

Sir William Wiseman testified that as early as 1927, Kuhn, Loeb had come to the conclusion that Seger should be replaced as President because of his poor health, his difficulty in reaching decisions on pressing problems, and for the reason that United States Rubber was making a poor showing in comparison with its leading competitors.

Irenee du Pont, in November 1928, wrote the members of the syndicate informing them of the decision for the new issue of stock and suggesting that in order to improve the management the Board be enlarged by three additional members and to fill the two vacancies; that these appointees should be two from Kuhn, Loeb, two from the syndicate, and the proposed new president. In December 1928 Roger Winthrop and Sir Wiseman of Kuhn, Loeb, and Henry Davis, for the syndicate, were elected members of the Board. In addition, it was contemplated that these mem-[fol. 506] bers of the Board would become members of the

Finance Committee. Irenee du Pont testified that the decision to replace Seger as president became necessary because nothing had been accomplished to improve the weak financial structure of the company, and because of his unrealistic attitude in the dividend controversy and the new stock issue.

With the exception of H. F. and H. B. du Pont, all of the syndicate members decided to subscribe to the new stock issue. H. B. du Pont testified he was discouraged over the prospects of United States Rubber and did not wish to risk more capital in the company.

In the underwriting of the new common stock issue, Kuhn, Loeb allotted to Laird, Bissell & Meeds a 20% participation which was approximately the percentage which the syndicate members held in the common stock of United States Rubber. Wiseman testified this was a common arrangement. Thereafter, Laird, Bissell & Meeds and the syndicate members had an agreement whereby the syndicate members would receive a discount of $2.40 out of each $3.00 cost of underwriting their stock. The new stock was issued January 11, 1929 and the syndicate acquired 125,150 shares at a cost of over four million dollars.

Preceding the investment and issuance of the new stock, Irenee du Pont testified that the syndicate members had decided that if they were to take up their subscription rights to the new issue some safeguard against lack of proper financial management would be necessary and took "the position with Kuhn, Loeb that we should have some representation on a body which might be termed a finance committee so that we would have some control over the financial management of the company". This concern over the financial structure and the desire of the syndicate to [fol. 507] assume that responsibility is reflected in several letters written by Irenee du Pont.

Officers, Directors

Wiseman testified that he and Mr. Schiff, his partner, urged Seger to become Chairman and that a younger and more active man be made President. Kuhn, Loeb were unable to find anyone whom they considered suitable and in November 1928 asked Irenee du Pont to try to find such a person.

Irenee du Pont testified that H. S. Meeds suggested F. B. Davis, Jr. to him and Davis stated that Meeds had advised him he might be approached by Irenee du Pont. Shortly after the suggestion of Meeds, Irenee du Pont saw Davis and asked if he would be willing to take the post if elected, and Davis accepted.

On January 5, 1929 Irenee du Pont wrote a letter to Schiff of Kuhn, Loeb, sending a copy to Seger and Davis stating he had found a suitable man for the office of President. That same month, at the request of Irenee du Pont, Davis met with Schiff and Wiseman of Kuhn, Loeb. Schiff and Wiseman introduced Davis to some of the directors—J. S. Alexander, H. R. Winthrop, Matthew Brush, and L. B. Gawtry. Wiseman stated that they were impressed with Davis' qualifications and concluded he was an excellent candidate for president. Mr. Schiff advised Irenee du Pont that Seger had no objection to bringing F. B. Davis into the situation, but that there was difference of opinion as to how this could be accomplished without unfavorably affecting the organization. Wiseman negotiated with Seger as to the terms of his retirement. Irenee du Pont in writing Wiseman January 11, 1929 stated he was in favor of continuing Mr. Seger's contract with United States Rubber [fol. 508] and his salary payment "if it will assure the Rubber Corporation of his good advise based on many years' experience as head of that institution."

At a meeting of the Board on January 15, 1929 presided over by Wiseman, Seger resigned as President and Chairman of the Board, and F. B. Davis was elected President, Chairman of the Board and a director. Wiseman testified that Kuhn, Loeb, when sponsoring the election of Davis, did not know or inquire into the amount of stock held by the syndicate.

Prior to Irenee du Pont's letter to Kuhn, Loeb suggesting Davis as a suitable candidate for president, he had written to the Voting Trustees—H. S. Meeds, A. Felix du Pont, and Lammot du Pont—summarizing the steps regarding the central organization of United States Rubber which, as principal stockholders, the syndicate should advocate. Irenee du Pont indicated the recommended changes were to continue the body now known as the Executive Committee under the name of the Finance Committee to

consist of five persons—two representatives of bankers, William Wiseman and James S. Alexander; two representatives from the syndicate, Henry Davis and William de Krafft; and the new president. Irenee du Pont stated: "(This would leave our group in control of those matters which will be delegated to the Finance Committee . . .)". (GTX988). A real Executive Committee was to be made up of not over eleven men familiar with United States Rubber operations headed by the president or one of the other principal employees, and the number and personnel of this committee to be subject to change on the advice of F. B. Davis, Jr. The evidence shows that the persons recommended by Irenee du Pont were elected members of the Finance Committee, and William de Krafft became its Chairman; that an Executive Committee was organized with F. B. Davis as Chairman and William de Krafft be-[fol. 509] came a member the following year.

At the time F. B. Davis, Jr. was elected President, the syndicate's representation on the Board was one director —Henry Davis. In addition there were the two representatives from Kuhn, Loeb. There were fifteen members, including Seger, on the Board at this time.

F. B. Davis, Jr. was the President of the Viscoloid Company; a du Pont subsidiary, at the time he accepted the presidency of United States Rubber. In 1909 he had been in charge of the black powder division of du Pont, later becoming superintendent of the sporting powder division when Lammot du Pont was its divisional manager. Following the end of World War I, he was assigned to the du Pont Central Office as assistant in charge of salvage and later became superintendent of the Pyralin operations. He left du Pont because he was ambitious and felt there were too many bosses over him, going to General Motors as assistant in charge of its Saginaw Products Division where he remained until 1923. He was asked to return to du Pont by a member of the du Pont Executive Committee and accepted because, as he stated, du Pont had changed its organization to a decentralized type and because the compensation offered was larger than he was receiving. He became assistant general manager of the Pyralin Department, later its general manager, and was also made a du Pont director. The Pyralin Department was consolidated

with the Viscoloid Company and in 1927 Davis became its president. After he became President of United States Rubber he continued as a director of du Pont until about 1941. He was also one of the incorporators of Rubber Securities, organized in December 1929. Irenee du Pont testified that F. B. Davis was known to all members of the syndicate and that therefore they were familiar with his [fol. 510] record. He also said that he had discussed the suggestion of Challen Parker as president with the syndicate, but since none of the members knew him he withdrew the suggestion. Irenee du Pont stated that he felt it was a requisite that the new president be personally known so that they would know what kind of a man they were getting.

Both Davis and Pierre S. du Pont testified that while Davis was president of United States Rubber he visited with the du Ponts, particularly Irenee and Lammot. He discussed with them the affairs of United States Rubber, consulting with them regarding the financial side, because as he said, "that was the part of it that they were most vitally interested in", but did not seek their advice on management or the operating end except to report on accomplishments.

Prior to Davis becoming president, Lucius D. Tompkins, Vice President of the Tire Division in United States Rubber, testified that it was a centralized organization and "was run by Mr. Seger as Chairman and President, and Mr. Homer Sawyer, Executive Vice-President". One of the first steps undertaken by Davis was to decentralize the organization and the commercial activities were conducted by separate and autonomous divisions, each under control of a general manager having full authority and responsibility as to manufacturing, selling, purchasing, accounting and research within his division, subject to the over-all policies decided by the Executive Committee.

Davis testified that the first thing he did on becoming president was to get acquainted with the Board, appraise the value of each individual member, and consult with them as to their desire to continue with United States Rubber; that he determined who would be most helpful to him and made up a proposed slate to be elected at the annual meeting. He testified further that he selected all the directors. [fol. 511] Davis testified that he not only discussed this

proposed slate with the du Ponts but also with Sir William Wiseman of Kuhn, Loeb and "anyone else that seemed to me could be helpful in giving me advice on that subject". In addition, he stated he felt it was not only proper to discuss directors with important stockholders, but also with each member of the Board.

In March 1929, prior to the first meeting, Davis submitted his proposed slate to the members of the syndicate. This list consisted of twenty-eight names, some already members of the Board, and indicated that as to non-company representation, John W. Davis, and Samuel M. Nicholson desired to resign and that he did not favor continuing Lewis Gawtry. In addition he suggested that Henry L. Hotchkiss be dropped for reasons of age and Homer E. Sawyer be discontinued since he was relinquishing active duties with United States Rubber. He listed eight directors as outside representatives and three company representatives whom he considered desirable to retain, and these were approved by the syndicate. The syndicate also approved three suggested additions for company representatives. Lammot du Pont replied to Davis' suggestions stating the syndicate members approved the retention of the men already on the Board; approved five of nine suggested additions to outside representatives; and stated in the event Gerard Swope, Victor M. Cutter and James A. Farrell would not serve as outside representatives, that the syndicate did not favor the suggestions made by Davis to substitute Carle C. Conway, Harold E. Talbott, or Lewis Gawtry.

Charles B. Seger and Gerard Swope did not wish to serve and Homer E. Sawyer and James A. Farrell were not elected. Lewis Gawtry and Carle C. Conway were [fol. 512] elected directors on April 16, 1929 and August 6, 1929, respectively.

Davis testified that following 1929 when he became more experienced in United States Rubber operations there was no necessity for discussing changes on the Board with the du Ponts and syndicate members, but he did discuss the changes with every member of the Board to obtain their approval.

B. W. Doyle, a former Vice President of du Pont's Viscoloid Company, became a Board member in 1939; George P. Edmonds, a du Pont son-in-law and president of the Wil-

mington Trust, became a Board member in 1944; John L. Pratt was a director of General Motors at the time of his election to the Board of United States Rubber in 1937; W. P. Allen, a former vice-president and director of du Pont became a Board member in 1936; and H. E. Humphreys, Jr., a former employee of Delaware Realty, went on the Board in 1938. Allen, Doyle and Pratt were personally known to F. B. Davis. Between June 21, 1927 and June 30, 1949, a total of fifty-three men served on the United States Rubber Board, seven of whom were elected as temporary directors, leaving a total of forty-six regular members of the Board who served during this period at different times.

Davis and de Krafft did not get along together and eventually de Krafft resigned on June 30, 1938. Davis had previously met H. E. Humphreys, Jr., and thought he would be a suitable replacement. He asked Irenee du Pont whether Humphreys could be released from his duties as Secretary of Delaware Realty. Irenee du Pont approached Humphreys regarding United States Rubber, and when it was clear that he was interested his release was obtained and Humphreys was proposed by Davis as a member of the Board.

[fol. 513] In 1942 Herbert E. Smith became President of United States Rubber when F. B. Davis resigned. Davis remained as Chairman of the Board and Chief Executive Officer. Smith had been an employee of United States Rubber for about fourteen years before the syndicate was formed. Smith testified that he had only a casual acquaintance with the three du Pont brothers. He stated that following his election he had discussions with the du Ponts and many other stockholders a few times a year regarding the financial situation in United States Rubber.

When Davis retired as Chairman of the Board on December 31, 1948, Smith became the Chairman and the office of President was filled by Humphreys.

In this connection Lammot du Pont Copeland on April 5, 1948 wrote to the three defendant individuals and George Edmonds about a discussion he and Wiseman had concerning the situation when Davis would retire. Lammot du Pont wrote to Davis asking what his views were and stated that he knew of no candidates for president, with a single exception. Herbert E. Smith testified that the "one man who

had what it took, had all of the qualifications that I recognized to succeed me, was Elmer Humphreys".

After he became President, Humphreys stated that he discussed with the du Ponts certain proposals of importance involving financial matters, and followed their advice only half the time and acted contrary to their advice at other times.

Executive Committee

In a letter to the stockholders on April 23, 1929 Davis stated the Executive Committee was to be made up of those members of the organization who had been heretofore charged with the responsibility of some of the major ac- [fol. 514] tivities of United States Rubber and would hold meetings each week to advise the president on all operations relating to manufacturing, selling, development and research. On April 23, 1929 the Executive Committee consisted of Edward J. Coughlin who had been with United States Rubber since 1892; William O. Cutter, an employee since 1916 who resigned from the Executive Committee in January 1930; William de Krafft who became a member in 1930; Ernest Hopkinson, an employee of United States Rubber since 1897; Herbert E. Smith, an employee since 1913; Lucius D. Tompkins, an employee since 1916; Eric Burkman, an employee since 1919; F. B. Davis, Jr., Chairman 1929. It is this committee which had the responsibility of approving contracts involving the sale or purchase of goods.

Six members of this Executive Committee were on Irenee du Pont's recommended list in addition to five others who were not elected. Irenee du Pont had included all the company's chief executive officers on this committee for the reason he felt that experienced operating personnel should be members. Tompkins stated he was approached by F. B. Davis with respect to becoming a member and that thereafter Davis discussed with him appointments or recommendations to that committee. Tompkins testified that Davis indicated to him that length of service was one of the qualifications for membership. Aside from Davis and de Krafft, the other members of the committee had all been employees of United States Rubber for many years before 1929.

The replacement of Cutter by de Krafft as a member of

this committee occurred when Cutter was unable to perform the accounting functions inherent in a decentralized form of organization and there was no one in the company to take his place. Tompkins testified that when he and Davis were discussing this problem he told him that de Krafft impressed him as the type to undertake that responsibility. He testified he did not know that others had [fol. 515] also considered de Krafft suitable for the post. De Krafft remained a member of the Executive Committee until his resignation in 1938.

Finance Committee

The old Executive Committee of United States Rubber served the functions of a Finance Committee during the Seger regime and when Davis became president it became the Finance Committee. Its members on April 23, 1929 were James S. Alexander, F. B. Davis, Henry Davis, and Sir William Wiseman. William de Krafft became a member in January 1930 when James S. Alexander's membership ended. Charles H. Sabin and D. Dwight Douglas were also added to the committee the same year. In November 1948 the following were members of the Finance Committee of United States Rubber: Colgate W. Darden, Jr., F. B. Davis, Jr., Henry Davis, Bernard W. Doyle, George P. Edmonds, H. E. Humphreys, Jr., Herbert E. Smith, and Sir William Wiseman.

On April 8, 1947 Lammot du Pont Copeland wrote Pierre S. du Pont, stating that he, Copeland, and Lewis Strauss had resigned as members of the Board and Finance Committee, that Colgate Darden was elected to fill his place but that the bankers' nominee remained open on the Board, and that Wiseman had suggested Schiff be appointed which idea was not accepted. He stated that because Wiseman was frequently absent, the management group on the Finance Committee were a majority, and since United States Rubber was again pretty well in debt, the Finance Committee should be strong and play a dominant part in watching the finances. At that time the Finance Committee was composed of three management representatives, F. B. Davis, H. E. Smith, and Elmer Humphreys; and three non-man- [fol. 516] agement representatives, B. W. Doyle, Henry Davis and Sir William Wiseman. Copeland testified that

his concern was that stockholder representation on the Finance Committee constitute a majority in order to maintain the proper balance between the Finance Committee and the Executive Committee; otherwise, a majority of management representatives on the Finance Committee would be approving their own actions, which "seemed like a weak position". In answer to this, Pierre S. du Pont replied, stating:

> "I do not fear the result of the management group being in the majority. If such fear is real, we should change the management."

Pierre S. du Pont testified that he used the noun "we" as meaning all the stockholders. Copeland in his letter to Pierre S. du Pont had suggested that Darden and Edmonds become members of the Finance Committee but since Darden's other interests were heavy, he suggested that Davis be urged to put Edmonds and Whelpley on that Committee. Irenee du Pont wrote Copeland April 21, 1947 stating that Darden should be given a chance to refuse, that Edmonds had his approval, and that he did not know Whelpley. Edmonds was elected to the Board and he and Whelpley became members of the Committee.

Incentive Plan

The stockholders of United States Rubber adopted an executive's incentive compensation plan in 1929 by a vote of 1,245,269 to 100. A study of several plans was made before the Managers Share Plan was finally adopted. The Plan provided that the Company should issue 100,000 shares of its common stock at $35 per share and the trustees would issue to the company 100,000 trust shares without par value, representing ownership of the assets to be held by the trustees of the plan. The plan further pro-[fol. 517] vided that the company should from time to time sell the trust shares to employees occupying responsible positions, including directors, actively engaged as officers, employees or members of the Executive Committee, to be chosen by a Special Committee of directors in such quantities as the committee determined and on such terms of payment, interest and prices as fixed by the Finance Committee of United States Rubber.

On December 20, 1929 Irenee du Pont wrote to Lammot, A. Felix and H. B. du Pont, H. S. Meeds and Henry Davis, officers of Rubber Securities, that he had discussed with F. B. Davis and William de Krafft the question of apportionment of Managers Securities stock and the setting aside of some 3000 shares of Rubber Securities stock for Davis to be paid out of bonuses voted him by Rubber Securities.

The members of the Special Committee appointed to act upon the allotment of trust shares from 1930 to 1949 were:

Matthew Brush, Chairman, 1930-1936
Lewis L. Strauss, Chairman, 1936-1947
Bernard W. Doyle, 1947-1949
Sir William Wiseman, 1930 to date, Chairman since 1947
Henry Davis, 1930 to date
F. B. Davis, Jr., 1948 to date

Wiseman testified that he consulted with Irenee du Pont with respect to the original allotment to be made under the plan in 1930 for the reason he had more experience than possibly any of the directors of United States Rubber and also asked him what allotment should be made for F. B. Davis. Irenee du Pont stated Davis should receive 15,000 shares. On March 28, 1930, Davis was allotted 20,000 shares [fol. 518] by the Special Committee and Wiseman advised Irenee du Pont of that action. This action of the Special Committee was approved by the Rubber Securities Board and Henry B. du Pont testified that when there was an increase in Davis' allotment from 15,000 to 20,000 shares it obviated the necessity of Rubber Securities assigning stock to him.

Irenee du Pont stated that at the time F. B. Davis went to United States Rubber his salary should not be less than Seger was receiving. The salary was fixed at that figure by a special sub-committee appointed for that purpose. Wiseman testified he did not know that Irenee du Pont had discussed with Davis the probability that his salary would be the same as Seger's. In 1937, after a study by a sub-committee of the Finance Committee, the company entered into an employment contract with Davis for a term of six years effective January 1, 1938 which remained in

effect until his retirement in 1948. This action was adopted by vote of the stockholders. The contract fixed his salary at a definite figure and made him ineligible for any further participation under the incentive plan.

There is no evidence that the syndicate, or Rubber Securities Co., or the du Pont family in the aggregate ever had voting control of United States Rubber. The Government, moreover, has failed to show that the United States Rubber stock held by the defendant individuals and the members of the du Pont family was acquired with the intent to create a protected market for du Pont or for United States Rubber, or was ever used for that purpose. While much of the rubber stock acquired by the syndicate continues to be held, directly or indirectly, by members of the du Pont family there is no proof of any agreement or understanding that it will continue to be so held, or that it will be voted in concert.

[fol. 519] Trade

Prior to 1910 du Pont had confined itself principally to the manufacture of military and commercial explosives. Nitrocellulose, a nitrated cotton, was the principal raw material used by du Pont in the manufacture of both military and commercial smokeless powder. Du Pont sold its military powder largely to the United States Army and Navy. By 1908, these principal customers had erected and were operating plants of their own and du Pont foresaw the ultimate loss of its smokeless powder business and recognized that diversification and expansion into other fields was essential to its progress.

To this end in 1908 the Executive Committee of du Pont appointed a committee to report "what additional steps they would recommend, in the direction of developing further uses for guncotton or any of the other products of our smokeless powder plants." The Development Department whose immediate jurisdiction it was to explore these fields, made an investigation of new outlets for the excess nitrocellulose in 1909 and found the most important industries in order of size were celluloid, artificial leather, artificial silk, and lacquer, which du Pont was already producing.

In 1910 du Pont purchased the Fabrikoid Company, the

largest manufacturer of artificial leather, which in 1913 was incorporated as the du Pont Fabrikoid Company.

During World War I, du Pont plant facilities, sales and profits in the powder and explosives fields expanded and its net profits from all business during 1915-1918 totaled approximately $232,000,000. In addition during 1917 the du Pont Company, anticipating the end of World War I and the cessation of orders for powder and explosives, [fol. 520] determined to utilize part of its war profits to expand into fields other than gunpowder and explosives.

In September 1915 du Pont purchased the Arlington Company, one of the two largest celluloid companies in the United States.

In June 1916, the du Pont Fabrikoid Company, manufacturers of artificial leather, purchased the entire stock of the Fairfield Rubber Company, producers of rubber coated fabrics for automobile and carriage tops. The principal customer of Fairfield was the Ford Motor Company, which accounted for 60% of Fairfield's total business. Fairfield was dissolved and the entire stock was taken over by the Fabrikoid Company.

A report of the Development Committee of du Pont in August 1916 "recommended the paint and varnish industry shall be accepted as a suitable expansion of operations at Parlin" and it further recommended "to acquire by purchase one or more suitable going concerns . . . with a view to transfer of operations to Parlin at the first opportune time."

In March 1917, du Pont purchased Harrison Brothers & Company, Inc. manufacturers of paint, varnish, acids, and certain inorganic chemicals used in paint manufacture. The Harrison Company owned 52% of the capital stock of the Beckton Chemical Company, the other 48% being owned by Cawley Clark & Company, a color manufacturer. In the middle of 1917 Harrison purchased Cawley Clark & Company, including its interest in Beckton Chemical Company. In 1917 the Bridgeport Wood Finishing Company, a varnish manufacturer, was acquired by Harrison.

After considerable study, du Pont in February 1917 [fol. 521] decided that consideration of new industries at that time should be confined to five chemical fields: Dyestuff and allied organic chemicals; vegetable oil industry;

paint and varnish; water soluble chemicals; and industries related to cellulose and cotton purification.

Thus by the end of 1917, preceding the investment in General Motors, du Pont had made investments in companies manufacturing artificial leather, celluloid, rubber coated goods, paints and varnishes. In 1917 du Pont was engaged in the production of paints, varnishes and related products although it was still principally producing powder and explosives and manufactured few items used in the production of automobiles; among these were celluloid, used in making side curtains, and artificial leather, used in seats and upholstery.

Following the investment in General Motors, du Pont in 1918 purchased a majority of the common and preferred stock of Flint Varnish & Chemical Works. This event was preceded by a letter from Raskob to Carpenter, Vice President of du Pont. Raskob stated Durant had told him that W. W. Mountain, President of Flint, had approached him about consolidating Flint with Harrison, since Mountain knew du Pont had bought a substantial interest in General Motors and was interested in the paint industry; that Mountain felt he would lose a valuable customer, General Motors. Durant told him the du Ponts would not consider a consolidation but suggested "that they deliver control of the common stock to du Pont's" and that Willys-Overland, Mountain and General Motors retain a 20%-25% interest. This was effected—du Pont purchased 80% of the common stock; Willys-Overland, Mountain, and General Motors acquiring 20%, which was later purchased by du Pont. Flint was dissolved in 1924. At the time of the du [fol. 522] Pont investment, Flint made products primarily used in the finishing of railroad equipment and automobiles.

A few months after the Flint investment, du Pont acquired certain assets of the New England Oil Paint & Varnish Company.

A report by the Development Department in 1920 showed that existing facilities at Flint were insufficient to meet the demands of General Motors and a considerable volume of that business was being diverted to competitors. In April, 1920, W. S. Carpenter, Vice President of du Pont, reported to its Executive Committee, that the Sales Department anticipated increased orders from General Motors and

other automobile companies, prompting an interest in an additional plant, that he favored acquisition of The Chicago Varnish Company. That year du Pont acquired certain assets of the Chicago Varnish Company, and in 1934 it acquired the assets of Mountain Varnish and Color Works.

In addition to the above acquisitions, du Pont also made investments in and acquisitions of other companies as set forth in ¶¶ 88, 90, 91, 92, 94, 95, 96, 98, 99, 100, 101, 102, 103 and 104 of the Amended Complaint.

It is admitted that du Pont is a substantial producer in the United States of explosives, powder and chemicals and that its principal manufacturing operations are conducted through ten departments. These departments and their products are:

Electrochemicals: Electro and industrial chemicals, including sodium, cyanides, peroxides, chlorinated solvents for metal cleaning, dry cleaning and extraction, refrigerants, formaldehyde, polyvinyl alcohol and acetate, ceramic decorations, and furfural products;

Explosives: Commercial explosives, blasting accessories, [fol. 523] miscellaneous chemicals, liquid and solidified nitroglycerin, oil and gas well torpedo service, military and sporting powders, and commercial nitrocellulose.

Fabrics and Finishes: Pyroxylin, synthetic resin, neoprene and rubber coated fabrics, and processed plastic sheeting, window shade fabrics, rug underlay, and synthetic rubberized tubing, protective and decorative finishes for all industrial, automotive, marine, transportation, and household purposes, wire enamels, automotive maintenance specialties, adhesives, plasticizers, and pyroxylin solutions.

Film: Cellophane, cellulose bands, cellulose sponges and sponge yarns, cellulose acetate film, and polythene film.

Grasselli: Inorganic and organic acids and heavy chemicals, zinc and zinc products, fungicides, seed disinfectants, household sprays and dusts, insecticides, animal remedies, weed killers, adhesives, wood preservatives, and chemicals for the textile, water purification, paper, leather, steel and food industries.

Organic chemicals: Dyestuffs, tetraethyl lead, neoprene, ethyl alcohol, camphor, and other organic chemicals for the rubber, petroleum, textile, paper, perfumery and other industries.

Photo Products: Motion picture, X-ray, portrait, lithographic, and micro films, intensifying and fluoroscopic screens, photographic printing papers, processing chemicals, and television phosphors.

Pigments: Titanium dioxide, extended titanium pigments, lithopone, dry colors, copperas, titanium metal and "Erifon" flame retardant.

Polychemicals: Ammonia, urea, urea fertilizer compounds, methanol, high alcohols, solvents, organic acids, hydrogenated products, antifreezes, food chemicals, acrylic [fol. 524] plastics, polyvinyl butyral, polythene, cellulose nitrate and cellulose acetate plastics, nylon molding powder and monofilaments, polytetrafluoroethylene, and fabricated articles.

Rayon: Viscose rayon yarn, staple, and tire yarn, acetate rayon yarn and staple cellulose acetate flake and vinyl acetate, nylon yarn, staple and flake.

It is admitted that General Motors is the largest customer of the Fabrics and Finishes Department, that its purchases from that department exceed its purchases from any other department of du Pont, that the total purchases General Motors makes from this department exceed its total purchases from all other departments, and that the sales made to General Motors by it are a significant part of its total business.

General Motors admits its principal business consists of the manufacture of passenger cars and trucks, including various parts and accessories. Paragraph 14 of the Complaint alleges it is the largest producer of passenger cars and trucks in the United States, constituting 38% of the industry total in 1947 and 43% for the period 1937-1941. General Motors also manufactures diesel locomotives, ball bearings, roller bearings and a wide range of household appliances, such as electric refrigerators and heating systems. General Motors operations are conducted through the following four divisions:

Car, Truck and Body Divisions—Buick, Chevrolet, Cadillac, GMC Truck and Coach, Pontiac, Buick-Oldsmobile-Pontiac Assembly, Fisher Body and Oldsmobile.

Accessory and Parts Divisions—A C Spark Plug, Aeroproducts, Brown-Lipe-Chapin, Central Foundry, Delco Products, Delco Radio, Delco-Remy, Detroit Transmission,

41866 O—59——11

Guide Lamp, Harrison Radiator, Hyatt Bearings, Inland [fol. 525] Manufacture, Moraine Products, New Departure, Packard Electric, Rochester Products, and Saginaw Steering Gear.

Household Appliances—Delco Appliance and Frigidaire.

Engine Divisions—Allison, Diesel Equipment, Cleveland Diesel Engines, Electro-Motive, and Detroit Diesel Engine.

United States Rubber admits it is the largest manufacturer in the United States of certain rubber products, other than tires and tubes. It conducts its business through five divisions: Tire; Mechanical Goods; Footwear and General Products; Naugatuck Chemicals; and Textile. General Motosr and United States Rubber admit that United States Rubber is the principal supplier of tires and tubes to General Motors as original equipment on the cars produced and sold by General Motors.

General Motors admits that it sells truck and passenger cars to du Pont and United States Rubber.

Paragraph 18 of the Amended Complaint alleges, and the defendant manufacturers admit, that the assets, sales volume and net income after taxes for the year 1947 are substantially as follows:

	Assets	*Sales*	*Net Income*
Du Pont	$1,438,000,000	$ 783,000,000	$120,000,000
General Motors	2,473,000,000	3,815,000,000	288,000,000
U. S. Rubber	348,000,000	581,000,000	21,000,000
Total	$4,259,000,000	$5,189,000,000	$429,000,000

Three phases of alleged trade control, apart from those specifically considered under Fabrics and Finishes, Tetraethyl Lead, Kinetic Chemicals, Synthetic Rubber, Antifreeze, miscellaneous products and Tires and Tubes, have [fol. 526] been accepted by the Government. They are (1) exchange of data, figures, and information on suppliers by certain officers and employees of du Pont and General Motors, including requests and inquiries by certain officers of du Pont on volume of trade conducted with General Motors; (2) the use of the General Purchasing Committee as a medium in alleged trade control; and (3) Fisher Body's

trade with du Pont, and the use of the discount and rebate system in purchases and sales between the defendant manufacturers with special reference to Fisher Body.

Exchange of Data, Figures and Information on Suppliers by certain officers and employees of du Pont and General Motors, including requests and inquiries by certain officers of du Pont on volume of trade conducted with General Motors

Defendants admit that on occasion and for various purposes du Pont employees requested and obtained information from General Motors as to its suppliers and certain statistics.

During the time Durant was President, J. A. Haskell, former Sales Manager and Vice President of du Pont, then a member of the Executive Committee of General Motors, kept du Pont informed of General Motors affairs in order to better discharge the financial responsibility du Pont had assumed. The Government's evidence concerning Haskell shows that he was in contact with du Pont sales executives.

On April 15, 1918 Haskell wrote to William Coyne, Vice President of du Pont Sales, reporting that a conference had been held with General Motors car division managers and that the manager of the Oakland Division, Warner, had felt "it would be desirable to get each of the divisions using artificial leather and other material such as Pyralin" [fol. 527] samples to see what was being used. Haskell said this would "pave the way for perhaps a more general adoption of our material" and suggested du Pont place itself in position to furnish Fabrikoid of required quality and consider how best to promote its use and adoption by the car companies. A copy of this letter was sent to Pierre S. du Pont and John Raskob. The text of this letter shows, the question under consideration was whether the General Motors Division should adopt the use of artificial leather for upholstering. In fact the General Motors Divisions did not adopt the use of artificial leather for upholstery but continued to use genuine leather.

Shortly thereafter, at the request of the sales agent for du Pont Fabrikoid, Haskell provided him with a complete

list of the firms comprising the General Motors organization.

In May 1918 Coyne in a letter to C. L. Petze, Director of Sales at du Pont Fabrikoid, reported on a discussion he had with Haskell regarding General Motors requirements for Pyralin sheeting. He stated that Haskell agreed with him that du Pont could not afford to jeopardize its business with other motor car companies by giving General Motors preferential treatment, but that Haskell thought "a continuation of the present policy should result in their securing practically all of the business with General Motors without jeopardizing its business with other manufacturers". In addition, Coyne stated Haskell asked he be kept advised periodically "as to the business shipped and booked with the different motor branches of General Motors and also advise him what proportion of our business is going elsewhere," that

> "* * * With this information in his possession he will be able to keep in touch with the relations between the [fol. 528] Arlington Works and the General Motors Company." (GTX 293).

On June 15, 1918, one of the sales managers at du Pont sent Haskell information regarding pyralin sheeting sales to General Motors and the amount of General Motors business placed with du Pont competitors.

Car division managers including Olds Motor Works, GM Truck, Cadillac, Oakland Car Co. made reports to Haskell on purchases of artificial leather and yardage for top and side material for the period 1917-1918. GM Truck reported that it purchased all its artificial leather from du Pont. Other divisions of General Motors reported that they had purchased varying amounts of artificial leather from du Pont and from several of its competitors. For example, Cadillac purchased the major share of its requirements from two competitors of du Pont, Pantasote Company and Hodgman Rubber Company. On July 12, 1918 Haskell received from du Pont Fabrikoid a report of General Motors yardage purchases for the month of June 1918.

J. S. O'Rourke of Oakland Motor in a letter to its manager, Warner, stated that purchases of artificial leather were being made from du Pont Fabrikoid and L. C. Chase

and that the product of the latter company was superior to du Pont's, but upon being advised of the trouble had with the du Pont product, du Pont had sent a representative to investigate and another shipment had been received on which O'Rourke would report. Oakland, according to O'Rourke's report, had purchased small amounts of artificial leather from du Pont and substantial quantities from L. C. Chase, and also had purchased top material and curtain material in substantial amounts from competitors of du Pont.

[fol. 529] The Vice-President of du Pont Fabrikoid wrote a letter to Haskell on July 3, 1918 stating that if they were ultimately to furnish all or the greater part of the top material for Chevrolet and General Motors cars it might be better to have the users agree upon a uniform shade and was writing to him because he thought Haskell would put the request into proper hands.

On November 18, 1919 du Pont Fabrikoid submitted a report to the directors of the company regarding a contract made to supply yardage to Buick. This report stated that prior to the company's acceptance of General Motors contracts, the Fairfield plant was to all intents and purposes a "one-customer" plant (Ford Motor Co.) and it had been difficult to interest manufacturers of higher grade cars; that following the contracts with Buick, Chevrolet, Oldsmobile, and Oakland, they were placed in the position of writing contracts in other directions "at considerably higher prices than" the General Motors contracts. In addition, Petze, the Vice-President, reported that Pierre S. du Pont had instructed that prices for the Buick contract be quoted as low as cost since he had been advised that due to du Pont's relations with General Motors competitors were quoting abnormally low prices.

In 1920 the manager of du Pont Fabrikoid's Statistical Bureau wrote to the Treasurer of General Motors stating that he was not receiving "the statistical information formerly received from Detroit regarding purchases of Leather Substitutes and Rubber Cloth by the several units of General Motors" and asked whether there was any reason why this information which was statistically valuable to du Pont could not be continued. Later the same year the manager wrote to Haskell acknowledging receipt of data from Olds Motor Works on its purchases of Leather

Substitutes, Rubber Cloth and Mohair top material from December 1919 to May 20, 1920 and expressed his appre- [fol. 530] ciation to Haskell for securing the information.

Pierre S. du Pont, then President and Chairman of the Board of General Motors, inquired of Lammot du Pont, Vice-President of du Pont, whether General Motors was taking its entire requirements of du Pont products from du Pont. Lammot du Pont on August 10, 1921 replied that they were not, listing seven divisions of General Motors and covering purchases of paint, varnish, fabrikoid, rubber cloth and transparent pyralin, stating where du Pont was enjoying all the business, where "no reason" appeared for withholding business, and "good reason" when withholding of business from du Pont was logically explicable. Pierre S. du Pont replied stating it appeared from the summary that Flint paint and varnish and fabrikoid were doing pretty well with General Motors and "that with the change in management at Cadillac, Oakland, and Oldsmobile", he thought du Pont should be able to sell substantially all the paint, varnish and fabrikoid products needed, further he thought a "drive for the Fisher Body business" should be made. Lammot du Pont replied that there appeared to be no real reason why Fisher body had not used Flint Varnish Co. products.

R. R. M. Carpenter of du Pont on October 7, 1921 addressed a letter to Pierre S. du Pont, President of General Motors, stating that while he knew that he personally could take no action, he wanted to know whether he was opposed to the policy of presenting to General Motors the subject of entering into negotiations to supply all the artificial leather and rubber goods on a mutually advantageous basis. He suggested this for two reasons: that du Pont was at a disadvantage owing to its connection with General Motors since other artificial leather companies were quoting "ridiculous prices" to General Motors believing that "du Pont would take all the business anyway" which forced [fol. 531] du Pont to accept the business at a loss; and if du Pont could secure all the artificial leather and rubber goods business, their plant could be operated on an economical basis resulting in lower costs which would operate to General Motors' benefit. There is no evidence that any arrangement of the kind described by Mr. Carpenter was ever made. In 1923 a somewhat similar proposal was made

by du Pont to the General Purchasing Committee of General Motors and was rejected.

During the latter part of 1922, Lammot du Pont, Chairman of Flint, directed a letter to Fred Fisher, President of Fisher Body. This letter stated that in view of the stock ownership relation between Fisher Body, Flint Varnish, General Motors and du Pont, it would seem that Flint should be enjoying a large part, if not all, of Fisher Body's paint and varnish needs unless a good reason existed for not having it. He assured Mr. Fisher that Fisher Body orders would be given preference over those of any other customer, except General Motors, whenever contract conditions were equal between Fisher and Flint's other customers.

In this same period, Pierre S. du Pont, President of General Motors, wrote to Lammot du Pont, a member of the General Motors Board, stating he was considering Fred Fisher, already a member of the Board, as a member of the Executive Committee. As the reason for suggesting the membership of Fisher, he stated that Fisher Brothers had brought up the question of their future relations with General Motors, expressing a desire for closer association, and requesting consideration for an exchange of Fisher Body common stock for General Motors shares. He stated he had the approval of ten directors for such closer association with General Motors, and wanted the opinion of the members of the Board on adding Fisher and C. S. Mott [fol. 532] to the Executive Committee. At this time General Motors owned 60% of Fisher Body, the Fisher brothers owned 20%, 10% was owned by interests friendly to Fisher, and the balance was owned by others. Pierre S. du Pont stated that a closer association and closer cooperation between the two corporations would be of great benefit. Lammot du Pont replied, approving, and stating in addition that such closer association would be desirable, suggesting merely that it might be advisable to hold the election of Fisher coincident with the arrangements on consolidation so it would not appear that an important General Motors executive was personally interested in a controlled subsidiary. There is no evidence that the proposal to place Fred Fisher on the General Motors Executive Committee was related in any way to the effort of Lammot du Pont to persuade the Fisher Body Company

to use the products of the Flint, Varnish & Color Works.

Pursuing his initial effort to secure the Fisher Body business, Lammot du Pont again wrote to Fred Fisher on the subject of paint and varnish and again referred to the "close stock relationship of the companies", making it seem "ridiculous that no business should be done between Flint and Fisher." Eventually an exchange of telegrams took place between the two and a meeting was set between them. Lawrence Fisher, who met with Lammot du Pont as the result of this exchange of telegrams, testified that the Fisher Body Division never did use the products of the Flint, Varnish & Color Works to any significant extent.

During the year 1921 Felix du Pont, Vice President of the Cellulose Products Department of du Pont, wrote to its Executive Committee reporting that the sales department was securing for Fairfield all the General Motors orders for rubber coated fabrics. He stated that both the sales and production departments had concentrated on Gen- [fol. 533] eral Motors and that today Fairfield was "solid" with General Motors, that with the "community of interest" existing between du Pont and General Motors he thought a plan should be worked out to make this a permanent arrangement so that the profits from manufacture could be retained. He stated that the latent resentment of the General Motors units encountered by du Pont in selling had been overcome since du Pont had started a fixed program of giving the best product, which several of the General Motors Divisions had considered to be equal to or superior to those of competitors.

On February 12, 1923, W. P. Allen, General Manager of the Cellulose Products Department, reported to the du Pont Executive Committee on the present status of General Motors relations with respect to Duco, Fabrikoid, and auto top material. He reported that several of the car divisions had expressed a keen interest in Duco but that they were unwilling to come to a decision until after extended experimentation and suggested that in view of this an aggressive campaign with other leading motor car manufacturers to test the material, who were anxious for du Pont to start experimental work with them, be adopted even though du Pont felt "under considerable obligation to General Motors in the development of this material on account of the assistance they had rendered". Allen stated the General Mo-

tors units were being furnished all leather substitutes and top material by Fabrikoid.

During 1923 Lammot du Pont wrote H. H. Rice, Manager of Cadillac, asking whether Flint could supply varnish to it if they could manufacture a varnish as good or better than that presently used by Cadillac. Rice replied, indicating Cadillac was already using Flint's primer color and finish varnishes on Cadillac chasses, but as to enamel Cadillac was not ready to make a change since Flint's enamel [fol. 534] had not as yet passed the tests. Lammot du Pont expressed the hope that a modified Flint enamel would soon prove satisfactory. Later he again wrote Cadillac, stating he had heard nothing from Rice and that it was to the advantage of both General Motors and du Pont to have Flint products used 100%.

To this Rice replied that Cadillac was anxious to use Flint products but was cautious in changing paints only after long trial and felt that as Flint material proved itself it was expected to be adopted by Cadillac.

There are many letters in the record involving requests made to John L. Pratt by du Pont employees for information and assistance covering the years 1922-1934. Pratt had a personal feeling of gratitude toward du Pont for what it did in saving Durant and General Motors from bankruptcy in 1920 and was inclined to do favors for his friends when, as he testified, it involved no injury to General Motors.

John L. Pratt had been an employee of du Pont in 1905 and met Durant in 1917, doing some personal work for him. In 1918 he was in charge of du Pont's motor development section, which was doing some research for Durant. In the Spring of 1919 Durant asked Pratt to work for him. Pratt left du Pont in the Fall of 1919 and became Durant's general assistant. In late 1922 he took over Alfred Sloan's position as Vice President in charge of the Accessories Division Companies of General Motors. He became a General Motors v-ce-president and director in 1921, a member of the Executive Committee in 1924, and was chairman of the General Purchasing Committee from 1924 to 1929.

On October 23, 1922, MacGregor of the du Pont Paint Department, wrote to Pratt for assistance regarding get- [fol. 535] ting a share of the up-keep paint for Hyatt

Roller Bearing Company, since he had been unable to secure any orders from Weiss, its purchasing agent. Pratt replied stating he had written to the General Manager of Hyatt to look into the situation and asked whether the quality had been improved so that du Pont had a paint of the quality, price and service equal to other manufacturers which he could "conscientiously recommend" to General Motors, and if so he would gladly do so. The General Manager of Hyatt replied to Pratt enclosing a copy of the purchasing agent's memorandum which stated that Hyatt had been using du Pont paint except the undercoat, which several years ago proved to be unsatisfactory, but since receiving the General Manager's request he had inquired further into it and "regardless of the wishes of the Paint Department" would purchase the du Pont product which he felt would serve the purpose equally as good. The dollar amount involved was about $1500 per year.

On March 22, 1924 Harrington of du Pont's Dye Stuff Department, who had known Pratt for about eighteen or nineteen years wrote to him about the fading of Cadillac upholstery and inquired whether du Pont could possibly offer its service to Fisher Body as to dyes. In his reply Pratt stated that "the Fisher Body outfit is pretty difficult to deal with" and did not know how to advise Harrington in approaching them. Pratt testified that he talked with Fisher about the problem. Five years later, on January 29, 1929, Harrington again wrote Pratt that General Motors frequently rejected fabrics because of the dyes and inquired whether it would be helpful if du Pont offered the services of its dye laboratories to General Motors. Pratt replied he thought it a "constructive" suggestion and sent Harrington's letter to Fisher, head of Fisher Body, and asked that if he agreed he would be glad to make the [fol. 536] arrangements. Fisher replied that they didn't dare "dictate" to the manufacturers regarding dye.

In August 1824, Z. Phelps, head of the Development Department of du Pont wrote Pratt whether he could conveniently find out the total quantity of ethyl alcohol used by General Motors, because du Pont wanted to find an outlet for a small surplus instead of selling it on the open market. Pratt replied he would obtain the information but that General Motor's requirements were small. In reply to

Pratt's inquiry, James Lynah informed him that 75,000 gallons a year would be required by General Motors and 50,000 for Fisher Body and this information was transmitted by Pratt to Phelps.

In 1925, H. F. Brown, Vice President of du Pont, wrote to Sloan informing him that du Pont and Kentucky Alcohol Corporation had formed Eastern Alcohol Corporation to manufacture industrial alcohol; stated that a news clipping had appeared concluding that glycerin had an advantage over alcohol as an antifreeze; that Kentucky Alcohol wanted to know whether General Motors was giving their official approval to such publicity, and, if so, "that their attention be called to the interest which the du Pont Company will have in the future" in the manufacture and sale of alcohol, To this Sloan replied that as a corporation, General Motors could take no position in the matter and must be guided by the facts in the case; that alcohol had been discovered to have a bad effect on Duco finish, used extensively by General Motors units, and therefore he would out of necessity favor glycerin.

In 1926, Pratt wrote to F. LaMotte, Director of Purchases at du Pont, that after study General Motors had concluded that Prestone, an antifreeze manufactured by Union Carbide, was the most satisfactory mixture on the [fol. 537] market and that General Motors was recommending its use. Thereafter, Sloan wrote to J. B. Jackson of General Motors Research Laboratory requesting information regarding the amounts of glycerin and alcohol used in antifreeze mixtures and their respective merits. The Laboratory report specified several points favoring glycerin and Pratt conveyed the information to du Pont.

In an exchange of letters between Sloan and the Chief Engineer of Chevrolet, Sloan suggested that the Chevrolet instruction book simply state facts on antifreeze and omit the words "are to be preferred". The Chevrolet instruction book eliminated the paragraph expressing preference for glycerin.

In October 1926 du Pont began production of ethyl alcohol. General Motors was approached as an outlet and was also requested to ascertain to what extent glycerin antifreeze might cut into the use of alcohol as an antifreeze. In addition, Phelps of the du Pont Development Department,

asked Pratt to find out whether the shortcomings of glycerin as an antifreeze, as reported by du Pont, could be verified by the General Motors laboratory.

James Lynah, the Executive Secretary of the General Motors laboratory, reported to Pratt in November 1926 that as alcohol-water solutions were recommended for any class of service, and in view of the indifference toward Prestone, it was evident that General Motors divisions would largely employ the alcohol solution as an antifreeze. Lynah further stated that he had written Phelps regarding price considerations for volume purchases, and if that could be obtained, he would ascertain the requirements for the divisions.

Phelps again wrote Pratt stating some of the General Motors divisions, particularly Cadillac, were recommend- [fol. 538] ing glycerin instead of alcohol, although Buick recommended the use of alcohol. In the following month Cadillac recommended that only alcohol be used.

During this period when du Pont was seeking General Motors endorsement of alcohol for use as an antifreeze, glycerin manufacturers such as Armour & Company were similarly seeking General Motors endorsement of their product for use as an antifreeze.

In December 1926 Sloan advised Pratt that the General Technical Committee of General Motors, approved by the chief engineers of the car divisions, had decided on the policy of pointing out there were two antifreeze materials —glycerin and alcohol—and that the sole disadvantage of alcohol was that when spilled it would disfigure the finish and that glycerin was satisfactory if used in strict accordance with the manufacturers recommendation. In December 1926 Sloan wrote Pratt that he had looked over the file of correspondence Pratt had with du Pont on the question of alcohol and glycerin, and that with the decisions reached by the General Technical Committee, the new instruction books would contain a statement setting forth the advantages and disadvantages of both. The record shows that du Pont attempted in 1926, 1927 and 1928 to sell ethyl alcohol to General Motors. In each of these years its bid was rejected by General Motors Purchasing Committee.

On January 9, 1926 James Elms of the Paint and Varnish Department of du Pont wrote to Pratt about the Delco-

Light Company, one of the accessory companies of Genera Motors. He stated that Delco-Light had been purchasing rubber and finish varnish from Lowe but that Lowe hac been unable to solve a paint problem and du Pont had been called in; that the problem was solved and du Pont received an order from Delco-Light but before delivery it had been [fol. 539] cancelled in order to give Lowe another opportunity. Biechler, General Manager of Delco, wrote Pratt that Lowe had come up with a satisfactory enamel, but continued that the manufacturing, chemical and purchasing divisions felt they would be in better hands to deal with du Pont than Lowe and would be sure to advise him of this within a few days. To this Pratt replied that in view of the sacrifice du Pont made for General Motors in 1920 and 1921, he felt where "conditions are equal from the standpoint of quality, service and price, the du Pont Company should have the major share of those items" but that this was his personal sentiment and that Biechler should use his good judgment keeping in mind the prime consideration was what was best for Delco. Pratt testified he invariably insisted that his personal sentiments were not to control and the division managers were to make their own decisions, but that he personally thought in the above situation du Pont had not been treated fairly. Du Pont made one sale of the enamel which was the subject of Elms' inquiry and thereafter a competitor, The Kay & Ess Company, took the business from du Pont and has ever since retained it.

AC Spark Plug Division of General Motors wrote a memorandum on April 15, 1926 to Curtice of General Motors stating that du Pont had been giving very poor service and it would be to the advantage of AC Spark Plug to change their source of supply. The President of AC Spark Plug, Albert Champion, wrote Pratt enclosing that memorandum stating it was being brought to his attention because naturally they wanted to do business with du Pont. Pratt sent the letter to Moosmann at du Pont asking how he should reply. Moosmann responded he would have the situation corrected. Some months later Champion wrote to Pratt enclosing a memorandum from one of his men who desired direct contact with Parlin to work out a technical [fol. 540] problem. Pratt sent this to Moosmann. The

matter was solved and Pratt thanked Mossmann for giving Champion the kind of service he should have.

On October 28, 1926, Lammot du Pont, President of du Pont, wrote to Sloan that du Pont's Paint Department was upset because of the difficulty of getting accurate information on the probable requirements of General Motors units for Duco and inquired whether there was any objection to giving production schedules he received from the General Motors Finance Committee, of which he was a member. Pratt, in Sloan's absence, replied stating the figures should not be given and upon his return Sloan confirmed this decision. Lammot du Pont pursued the subject further with Sloan and Sloan replied that in the meantime, until he looked into the matter, he had no objection to Lammot du Pont giving the production schedule figures to his paint man, confidentially. Pratt did not approve and wrote to Sloan that du Pont should not be put in any different position than any other supplier from whom General Motors was buying many times the amount purchased from du Pont.

On May 1, 1926 Phelps of du Pont asked Pratt whether he could conveniently get the approximate quantity of oil cloth and black enamel used by General Motors as du Pont was considering manufacturing oilcloth. Pratt sent the inquiry to Lynah and transmitted the information received from Lynah to Phelps. Pratt testified there were many inquiries along these lines not limited to du Pont and the committee customarily furnished the requested information as it was always interested in new potential suppliers.

Lammot du Pont in September 1926 wrote Pratt on behalf of Jack Sproul, a son of the Pennsylvania governor, who was with the General Refractories Company, about [fol. 541] giving that concern a chance at the fire brick business of Remy Company, a General Motors accessory division, stating that it would be greatly appreciated if some business could be turned his way. Pratt replied that Sproul's effort to use influence to get business from General Motors would not work, that General Motors purchasing departments tried to get the best for General Motors, that suppliers had to establish the merits of their product and it was not the duty of the purchasing departments to give special consideration to any firm.

Again in 1931, Lammot du Pont wrote to Pratt that the anthracite coal people had protested to du Pont regarding General Motors entering into the manufacture of oil burners. Lammot du Pont stated that the outlook for du Pont's business in the anthracite field was jeopardized, that though he was convinced that du Pont could not dictate to General Motors with respect to their going into the oil burner business nor could the advantages or disadvantages to du Pont be considered as a factor in General Motors' decision, that General Motors might be injured by going into that business. Pratt replied that because a "poorly led association of coal producers did not recognize that the world progresses" and takes an unsound position was no reason to discontinue that activity. Pratt continued to recommend the manufacture of oil burners by General Motors, and it entered that field and is still one of the large manufacturers of oil burners.

During 1934 Pratt wrote to Fred G. Hughes, General Manager for New Departure Manufacturing Company, a General Motors subsidiary, that some of his friends in du Pont had called him about the National Ammonia Company, a du Pont subsidiary, having lost the ammonia business they had formerly enjoyed with New Departure although their price and service were in every sense competitive [fol. 542] and stated he would be interested to know the reason. Hughes replied that the du Pont product had proved unsatisfactory, that the Barrett Company product which they used gave no trouble, that the truck division had asked New Departure to buy from Barrett as it was a large user of General Motors trucks, and further he did not know National Ammonia Company was a du Pont subsidiary, but did not believe that should make any difference. Pratt wrote to National Ammonia enclosing Hughes letter and said it might be more desirable and do the "desk warmers" in du Pont some good to contact General Motors units more closely to see whether or not their product was suitable. Pratt testified that Hughes' letter showed that du Pont had not even contacted New Departure and did not know their ammonia was unsatisfactory. Pratt wrote Hughes thanking him and stating that his reason for buying from Barrett was entirely satisfactory.

The evidence relating to the exchange of data, figures,

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

[fol. 543] *General Purchasing Committee (1923-1931)*

This committee was created at the suggestion of Sloan and was to enable General Motors to compete with Ford, which had approximately 55% of the business in 1921. James Lynah became its Secretary. After the establishment of this committee, Lynah conducted a study to determine what items might be common to some of the divisions and to pool the purchase of such items. Lynah reported a list of thirty-two possible items to Sloan, Chairman of the General Purchasing Committee. Only three of the thirty-two items listed were products manufactured by du Pont—imitation leather, top fabrics and paints.

In February 1923, Allen, General Manager of the Cellulose Department of du Pont, in a report to its Executive Committee on the subject of Fabrikoid and top materials, referred to a meeting in Detroit at which he, Lynah, the Assistant Director of the Purchasing Committee, Pratt, a member of that committee, and the purchasing agents for Chevrolet and Cadillac, met; that he discussed with them the great risk inherent in du Pont covering the grey goods requirements for six months and in turn selling the finished product on a requirements basis without protection against a slump in the motor industry; that their reaction was that it was a risk which other manufacturers in the same line assumed. The question of an additional source of supply was discussed and the conclusion reached that General

Motors units should purchase 20% of their leather substitutes and top material from one of du Pont's competitors leaving 80% to du Pont at prices determined by competition.

The Government has placed considerable emphasis upon this document and others written at about this time which [fol. 544] relate to General Motors' decision to limit its purchases of fabrikoid and top materials from du Pont to not more than 75% or 80% of its requirements. GTX 406 and related documents reflect the imposition by General Motors upon du Pont of the two-source-of-supply purchasing policy. Lynah testified that early in 1923 the General Purchasing Committee began to put that policy into effect wherever it found that all the Divisions were buying their requirements from the same supplier. The records of the Purchasing Committee corroborate his testimony. Since Allen, in GTX 406, was reporting to his superiors a substantial loss of business, it was natural that he should attempt to soften the blow by expressing his confidence that no further losses need be anticipated. Lynah's testimony, as well as the other evidence of record—both testimonial and documentary—relating to du Pont's varying success thereafter in the sale of its fabric and top materials to General Motors indicate that there was no agreement between Allen and the General Motors officials; and that his confidence about retaining 80% of General Motors business was based upon a belief that du Pont's quality and service were superior to those of any competitor.

On July 18, 1923, William Coyne, Vice President of du Pont, wrote to Pierre S. du Pont, reporting that for the last six months of 1923 du Pont had lost 25% of the Chevrolet top business although the price and quality of the du Pont material was as good as that of competitors; that he had been told Mr. Knudsen had Pierre S. du Pont's permission to give 25% of the business to O'Bannon Corporation which was in the hands of receivers, and wondered whether he could tell him the reasons for this so that the next time 100% of the Chevrolet business could be procured. Pierre S. du Pont replied stating that he thought the "two source of supply" idea was foolish, but that he did not think it advisable to interfere in any case [fol. 545] unless the "Executive Committee of the company outlines a policy advocating one source of supply",

41866 O—59——12

that as to the policy of General Motors he could not refuse permission to Knudsen to divide his orders for fabrikoid. He later sent a letter to Knudsen referring to the Chevrolet two source policy and expressing that he firmly believed that one good source of supply, properly maintained, was more reliable than two sources, but stated that Knudsen had no doubt given personal consideration to the Chevrolet matter and continued,

> "I find no fault with the principle which would apply as well to other manufacturers as to the du Pont Company." (GTX 410).

The minutes of the General Purchasing Committee on September 27, 1923 sent to all division purchasing agents of General Motors on the subject of leather substitutes and rubber coated fabrics stated that it was shown du Pont supplied the larger portion of General Motors requirements of these items, that on account of constantly increasing consumption, sound judgment demanded maintenance of more than one source of supply, that du Pont had been afforded the opportunity of meeting competitive prices and that competitors now believed that no matter what price they put in they would receive no business. It was agreed:

> "that on an equal competitive basis at least 25% of the business should be placed with sources other than the du Pont Company. That the du Pont Company be notified that they should make their best price in their initial offer and not count upon having the opportunity to meet competitive prices, and that on the basis of competitive prices the Divisions were free to place their business to the best advantage. * * *" (GTX 412).

[fol. 546] The minutes further directed the secretary to advise C. L. Petze, at du Pont's Newburgh plant regarding their decision. Lynah testified that it was he who brought up the subject of more than one supplier of imitation leather and rubber coated fabrics and further testified that there was no understanding that du Pont would have any particular percentage of the business, that being left to the division managers; that the instruction to advise du Pont of the decision was not unusual and was done with all large contractors.

From 1923 to 1931 the committee negotiated 709 contracts. Only fourteen were with du Pont, and thirty were with du Pont competitors. The committee rejected a total of 342 contracts, of which thirteen were proposed by du Pont or were for material du Pont was in a position to supply to General Motors. The committee authorized 147 contracts before any contract was made with du Pont.

Lynah testified that anyone in the corporation could suggest an item for consideration by the committee as a contract possibility and if worthwhile a questionnaire would be sent to the divisions from the committee asking for their annual consumption of the item, specifications under which they purchased, prices and sources of supply. If the item was approved by the committee after return of the questionnaire, the committee would notify the division that it intended to ask for bids and would be given an opportunity to suggest bidders. After bids were received, the committee would decide whether to contract for the item and with whom. If a contract was negotiated, the interested divisions were notified and required to participate unless specifically exempted, and any objecting division was excused from participation if it could not be persuaded or its objection "ironed out".

[fol. 547] The rule against a division purchasing outside of a general contract was contained in a letter which Sloan sent to Pierre S. du Pont, John J. Raskob, C. S. Mott and Fred J. Fisher, as follows:

> "* * * as Chairman of the Committee I wrote to the Purchasing Agents of all Divisions and told them that they were not to be permitted to purchase outside of the General Purchasing Committee's contracts and indicated that anything of that kind that was done would certainly have the disapproval of the Corporation and in a way would not be tolerated." (GTX 458).

The committee frequently referred specification problems to production experts with the view of ascertaining whether standardized specifications were feasible on some of the common items used by the divisions, where the specifications varied. Lynah testified that this was one of the important functions of the committee.

He further testified that the committee followed certain general rules in carrying out its work; such as (1) no general contract was developed unless the item was used by more than one division as there would be no price advantage unless there was increased volume, (2) no general contract was developed unless it would result in substantial savings, (3) where possible the committee desired more than one source of supply, (4) contract prices were to be kept confidential to protect sellers as the General Motors volume would justify lower prices than the seller could allow a customer purchasing in less quantity. These rules were adopted eighteen months before the committee made any contract with du Pont.

The first items reached by the committee which were manufactured by du Pont were fabrikoid and top or rubber coated fabrics and no contract for these items was [fol. 548] ever entered into by the General Purchasing Committee. In the Fall of 1923, twenty-one months after the formation of the committee, the subject of paints was considered and was referred to the Paint and Enamel Committee as there were no standards established for that material. No contract was entered into by the General Purchasing Committee requiring purchase of paints and varnishes, although du Pont requested such a contract. After quantity discount, a two year contract supplying requirements of seller's make was made.

The General Purchasing Committee rejected contracts with du Pont because of lack of volume on photographic supplies, maintenance paint, floor paint, stripping materials and thinners, machinery enamels and aluminum spar mixing liquid, and because of lack of savings rejected contracts with du Pont on pyralin, leather substitute and rubber coated fabrics, denatured alcohol, antifreeze material, antifreeze methanol, varnish and oil type materials.

Lynah testified that once the committee decided to contract for an item, selection of the supplier was premised only on "quality, service and price" and in 1928, answering a Mr. O. H. Briggs, Sales Manager of du Pont-Pathe Film Manufacturing Company, who had asked him to specify the use by General Motors of du Pont photographic film, stated:

> "In the making of our purchases, we believe that each transaction should stand on its merits and we pre-

> sume that the company buying films for our use is 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." (GM 194).

Early in 1924 the committee developed the idea of a sliding scale discount contract permitting a supplier to fix [fol. 549] his base price on volume of business he had previously enjoyed and for increased volume offer an additional discount. Many contracts were made by the committee on this basis and the divisions were encouraged to participate in them.

In April 1924 G. H. Kerr, a du Pont executive in the Explosives Department, wrote to Pierre S. du Pont, Chairman of the Board of du Pont and General Motors, stating that about two years ago he conceived the idea that it might be of value to du Pont to use their purchasing power for the purposes of influencing concerns from whom they purchase to purchase in turn from them; that if the purchasing power of General Motors were added to that of du Pont, and if used intelligently, it would result in securing large business for du Pont; that this was proved in the Acid and Heavy Chemicals Division of the Paint Department of du Pont which received consideration from Bethlehem Steel because of the purchases General Motors made from them. Pierre S. du Pont wrote to Sloan asking him to talk the matter over with Kerr saying that "one of our representatives was with the Bethlehem Steel people and happened to see their file card in which they classified du Pont and General Motors as one." Sloan replied to Pierre S. du Pont's letter stating the suggestion was constructive and referred it to the General Purchasing Committee. Lynah and a Mr. Kother subsequently saw Mr. Kerr.

About a year previously, Pratt, Vice President of General Motors, wrote to R. R. M. Carpenter that it had recently come to his attention that a number of the automobile companies outside of General Motors were considering their purchases from the General Motors Accessories Division and from du Pont as purchases from "one interest" and that consequently to have a better view point when considering those outside companies it might be helpful to get the entire volume of sales that du Pont and

[fol. 550] General Motors make to the outside companies. He procured the sales figures from the Accessory Division and Parts Companies of General Motors and obtained from Carpenter the 1922 figures on sales du Pont made to outside companies.

On July 2, 1924 the General Purchasing Committee reported that while there are cases which might be profitably dealt with on a reciprocity basis, there were so many complications and difficulties involved that it would be best "to stand on our own equities and require our suppliers to do so"; but that the divisions were at liberty to treat such cases individually as the situation might require.

Lynah advised Kerr on August 13, 1924 that the information relating to Manhattan Rubber Company and Nairn Linoleum Company would be secured since it was available without any expenditure of time on the part of the divisions, but stated:

> "It is understood that information in connection with our purchases such as I have tentatively agreed to endeavor to secure for you, is not to be used to influence our sources to place business with the du Pont Company, or to place the du Pont Company in a preferred position as a source because of its interest in General Motors.
>
> "There would be no objection to your advising our sources that the du Pont Company holds a large interest in General Motors and solicit their earnest consideration on this account." (GTX 538).

The following month, the General Purchasing Committee determined that as a practice General Motors could not undertake to supply information showing the volume of business done with any suppliers to the du Pont Company [fol. 551] but "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" by the presidents; and, that it was believed General Motors' buying position "would be prejudiced in that suppliers who had been influenced to place business with the du Pont Company through their relationship with General Motors might reasonably expect" General Motors to place business with them.

On September 6, 1924, excerpts of the committee's meeting were sent to Irenee du Pont by Lynah with a letter wherein he stated the reciprocity practice had been discussed by the committee at two meetings and

> "as we are following a very definite policy in General Motors of having our Sales activities and Purchasing activities maintain their own status without the one influencing the other, it was felt that to supply the du Pont Company with the information requested by Mr. Kerr would convey the impression that the du Pont Company could influence General Motors' purchases." (GTX 539).

The General Purchasing Committee agreed that it could not undertake to supply to du Pont information showing the value of business done with its suppliers. Irenee du Pont answered that, of course, any action which General Motors took was entirely its own affair and du Pont should not be critical, but that reciprocity yielded excellent results.

That same month, Pratt wrote to the General Manager of the Paint Department of du Pont, who was anxious to secure an acid contract with Bethlehem Steel:

> "It is practically impossible for me to give you any information as to where our steel requirements will be [fol. 552] placed from month to month, as our Purchasing Agents in the various divisions do not know themselves until a day or two before the order is placed." (GTX 542).

that one of the divisions was buying extensively from Bethlehem during the first six months of the year and would continue buying according to their needs if "Bethlehem's price and quality continue to be favorable in comparison with other companies."

The only special occasion in which the President of du Pont requested information from the President of General Motors occurred in 1928. In January 1928 Lammot du Pont wrote to Sloan that the du Pont Explosives Department was confronted with the loss of its trade through the use by a competitor of a reciprocity argument; that du Pont desired to supply Jones & Laughlin Steel and

Inland Steel with figures as to purchases from them by du Pont and its affiliated companies; that General Motors 1927 purchases from Jones and Laughlin and Inland were requested; and stated:

> "It is, of course, understood that in presenting these figures to our customers it will be for the purpose of retaining trade now enjoyed. There will be no promise or assurance that these purchases will continue or that the du Pont Company's efforts in the past have caused General Motors to place this business." (GTX 543).

Sloan sent the letter to Pratt stating that on general principles he was not keen about this matter but it was the first time it had happened and was not very important since he did not believe General Motors was buying to any great extent from these companies. Pratt replied to Sloan indicating that little was bought from Inland but a great deal was bought from Jones & Laughlin, and continued, that as [fol. 553] Chairman of the Purchasing Committee, he had invariably refused

> "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 supply because the particular customer bought from the du Pont Company. Personally, I think it is very necessary that we have a definite policy in this respect, especially in connection with our dealings with the du Pont Company (who are working on the principle of reciprocity while General Motors is not), as I am afraid there are instances where du Pont salesmen have implied that they could influence General Motors in choosing its source of supply as other than the three fundamentals of purchasing, namely, quality, service and price. * * *" (GM. 201).

He continued stating he had been guided only 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 * * *

(b) If we supply the du Pont Company with th amount of our purchases from any company they wish to sell, and their salesmen are allowed to display this information to their prospective customers, it necessarily follows that the impression would be made upon the customer that General Motors wishes that particular supplier to consider in dealing with Genera Motors its relationship with the du Pont Company, or otherwise General Motors would not supply the du Pont Company with the information.

[fol. 554] (c) * * * The principle of reciprocity must imply that you are giving something in order to get something. * * * If there is any thing 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?

(e) I think that we are all pretty well agreed that we could not afford to use the principle of reciprocity in General Motors purchases. If that is true we certainly can not allow anyone else to imply that they can use General Motors' purchases for the purpose of reciprocity.

In the particular case under consideration I see no difference in Mr. du Pont using the information he requested in order to retain business than for him to use same to get business. In my judgment, if the du Pont organization are not able to maintain 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. The steel companies must know the amount of business they are doing with General Motors Corporation, and if being reminded of this volume of business by the du Pont Company results in the steel companies being willing to do something for the du Pont Company

> that they would not have done without such reminder, [fol. 555] then we in General Motors are not getting all we should from the steel companies." (GM 201).

He continued that since Sloan had promised the information to Lammot du Pont, it would be supplied but felt it was a very bad precedent to establish. Pratt testified concerning this letter that his seeming inconsistent attitude toward Mr. du Pont and toward "some of the small men in the du Pont organization" regarding exchange of information was that when Mr. du Pont was involved, General Motors was establishing a policy and when dealing with employees of du Pont it was on an individual basis.

Other than the single incident in 1928 referred to above, the Purchasing Committee Resolution of 1924 appears to have been a dead letter. The Government has offered no proof that any information was passed to du Pont since that time. Sloan could recall no instance and the last two presidents of du Pont not only could recall no such instance and also were unaware of the Resolution until the trial of this case. The Court is satisfied on the basis of all of the record that the Resolution never was carried out and does not represent the parties' practice—certainly not in the last twenty-five years. Accordingly, the matter deserves no further attention.

The General Purchasing Committee was abolished in 1931 and no centralized purchases of products have been made since that time.

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 [fol. 556] 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.

Fisher Body; and use of the discount and rebate system in purchases and sales between the defendant manufacturers with special reference to Fisher Body.

Lawrence Fisher testified that Mr. Durant, and Mr. Chrysler, who was associated with him, had stated that General Motors would have to expand their capacity because of the increased public demand for closed bodies, that General Motors was not organized to do that, and needed a source of supply for such bodies, that they wanted the Fisher brothers to agree to come into General Motors for that purpose. In the negotiations, it was agreed that General Motors was to purchase from Fisher Body such of the closed body business as Fisher Body "was able to handle now and in the future". The affiliation was reported to the stockholders of both companies, each stating that the association of the two assured both a continuity of demand and supply for the Fisher Body product.

The voting trust agreement made in 1919 between Fisher brothers and Durant also provided that General Motors acquire 60% interest in Fisher Body and the majority of [fol. 557] Fisher Body stock was placed in a trust for five years with the right to vote same placed in the hands of four trustees—two representing Fisher Body interests and two representing General Motors. At the same time the six brothers contracted to remain with and direct the operations of Fisher Body for five years ending in 1924; the voting trust to expire the same time as these contracts. The Fisher brothers had expressed a wish for closer association with General Motors, and in 1922 Fred Fisher, already a General Motors director, became a member of the General Motors Executive Committee.

In 1924 it was agreed that three of the brothers would devote their entire efforts to General Motors and the other three were to operate Fisher Body; that all six would take

allotments in Managers Securities in lieu of compensation provided in the employment contracts; and the voting trust would expire. In October of that year Pierre S. du Pont wrote to Sir Harry McGowan that for months General Motors had been negotiating with the Fisher brothers for the purpose of arriving at a satisfactory plan to continue their association with General Motors and in the plan evolved it was thought that

> "interesting two members of the Fisher family directly in General Motors will have a very beneficial effect in breaking up a line of separation of the two companies' interests that has not been altogether wholesome. From lack of knowledge, the two sides have tended to criticize each other, without good result. Hereafter the Fishers will better understand GM problems and difficulties and, I think, GM men will better appreciate the Fisher problems. * * *
>
> "We all feel that the settlement of this business will prove very beneficial. Messrs. Fisher are very happy [fol. 558] over the solution of the problem, as for some time they have been fearful lest failure to get together would necessitate the breaking up of relations, perhaps a break in the Fisher family, concerning which they naturally have great pride, as they have been phenomenally successful in the cleanest kind of a business enterprise." (GM 32).

On June 30, 1926 General Motors acquired the remaining 40% interest in Fisher Body for the reason that Fisher Body had been unable to make price reductions which General Motors needed or to expand its plant capacity and reserve its entire production for General Motors. Fisher Body became a division of General Motors. In connection with this acquisition, John J. Raskob requested du Pont to loan General Motors a quarter of a million shares of General Motors common to finance the transaction, which was done.

In 1919 when the voting trust was first established only 25% of General Motors car production was in closed bodies, but by 1926 the percentage had increased to 90%. The 1919 contract with Fisher Body provided that Fisher Body was to receive cost plus 17% on all closed body work for General Motors.

At the time of the du Pont investment in General Motors, Fisher Body was building closed bodies for General Motors and buying pyroxylin coated materials for closed body tops from Textileather. Before and after 1917 du Pont sought to secure this business of Fisher Body but was unsuccessful. In July 1925 the Executive Committee of du Pont was informed that du Pont had been unable to sell Fisher Body closed car curtains and had lost orders of about 200,000 yards on rubber coated fabrics to Chase and Haartz, [fol. 559] owing apparently to price considerations. In 1925 du Pont's total fabric sales to Fisher Body amounted to $[illegible]03,000.

In 1925 three events occurred which established du Pont as a substantial supplier to Fisher Body of rubber coated material: (1) Fisher Body made a change from pyroxylin coated to rubber coated decking not produced by Textileather; (2) du Pont introduced a new rubber coated decking "Glazed Pontop" which tests showed to be superior to others; and (3) du Pont, at the request of a Fisher Body Vice-President, employed Mr. J. Henry Smith as its Detroit sales representative for coated and combined fabrics. This last event resulted in an order to du Pont for 300,000 yards of Pontop for the balance of 1925. This Brown testified was "about six times as much business as we had got from Fisher in previous years."

During the last half of 1925 Fisher Body placed with du Pont heavy fabric orders that increased its purchases almost fourfold the following year.

In early 1926 du Pont introduced "Everbright" a new rubber coated decking which was widely adopted by the automobile industry and in 1926, after Fisher Body had tested it, du Pont was supplying Fisher Body with considerably more than one-half of its top material requirements. Thus, during the last half of 1926 Fisher Body placed the greater portion of their rubber coated fabrics business with du Pont's Fairfield plant.

The advent of the so-called super discount plan is considered under this heading since the Government's analysis reflects that its operations were directed to the Fisher Body business.

Early in 1924 the General Purchasing Committee devel-

oped the idea of sliding scale discount contracts. This [fol. 560] permitted a supplier to fix his base price upon the volume of business he had previously enjoyed and as an inducement for increased volume offered an additional discount. Several contracts were made by the committee on this basis and GM 162 contains excerpts of these.

Preceding the adoption of the super discount plan in August 1926, du Pont had been making discount arrangements with General Motors on certain fabric materials. In July 1925 the Paint, Lacquer and Chemicals Division reported to the Executive Committee of du Pont as follows:

> "We are negotiating a one year's contract dating from July 1st with General Motors which will cover the entire requirements of the General Motors units for pyroxylin finishes and a minimum of 50% of Fisher Body requirements. The committee has approved an extension of the discount scale which has been in force this year, and by purchasing maximum amounts during any given quarter General Motors may gain up to 12% discount from the present standard price. It is hoped that, since almost all of the Fisher Body business must be included if General Motors as well as Fisher is to obtain this maximum discount, that this will prove such a strong inducement for Fisher to give us this business that competition for Fisher business will be greatly lessened." (GTX 454, p. 4.)

The General Purchasing Committee invited W. P. Allen of du Pont to present a proposal for sliding scale quantity discounts on all purchases from du Pont and invited Standard Oil of Indiana to submit a similar proposal on its products. In August 1926 W. P. Allen, General Manager of the Chemical Products Department of du Pont, attended a meeting of the General Purchasing Committee of General Motors and presented a plan for sliding scale quantity dis- [fol. 561] counts to General Motors and Fisher Body purchases on Duco, thinner, fabrikoid, rubber coated fabrics, pyralin, paints for maintenance purposes, etc., and the details were set forth in a letter from Allen to the General Purchasing Committee in September 1926, setting forth

that the discount arrangement would begin when purchases totaled $9,000,000:

	Discount
$9,000,000	$ 75,000
10,000,000	175,000
11,000,000	300,000
12,000,000	450,000
Each additional One Million	150,000

(GTX 461, 462)

He wrote again, stating it was desirable to keep the arrangement confidential:

> "I want to say a word to you about the desirability of keeping this matter confidential and in treating it as an arrangement within the du Pont-G. M. family rather than as a mere concession in prices on individual commodities.
>
> "* * * I again want to emphasize the importance of treating this whole matter in a confidential manner. It is obvious that we would be unable to continue this arrangement unless we can secure much higher prices from our other customers; and, if the terms of this arrangement become public knowledge in the trade, we would inevitably be forced to reduce prices generally, which would in turn wipe out the earnings which we propose to return to you as a rebate under this plan." (GTX 463).

[fol. 562] In January 1927 Lammot du Pont wrote a memorandum addressed to Pierre S. du Pont, Chairman of the Board of General Motors and John Raskob, Chairman of its Finance Committee, giving figures on General Motors purchases of fabrikoid, rubber and parlin, and stated:

> "I gather you were somewhat surprised at the statement that General Motors was not buying anywhere near all of their requirements of products which du Pont makes, from the du Pont Company." (GTX 460).

The tabulation attached consisted of figures for the year 1926 on products consumed by General Motors and Fisher Body, which were not enjoyed by the Fabrikoid and Chemical Products Divisions of du Pont, in a total amount of

$5,339,500. It showed that Fisher Body purchased from competitors a larger amount of fabrikoid and rubber products than the other divisions and was the only one listed as purchasing from competitors products in the chemical field, approximately $3,012,500 in primers, surfacers, ground coats, black Duco and thinners. The reason for this was stated by Allen to be that the figures on chemical products did not mention General Motors car units since Buick, Chevrolet and Olds purchased practically 100% of their requirements from du Pont, so that Oakland was the only unit purchasing anything worthwhile from competitors and this mostly in undercoats. He stated:

> "When we were discussing with the General Motors Purchasing Committee in the middle of last year the question of granting them a super discount as an inducement to place with the du Pont Company more of the General Motors business, they admitted that for the year up to that time General Motors and Fisher Body had bought a total of $12,000,000 worth of materials made by the du Pont Company, of which $8,000,000 [fol. 563] had been placed with us and $4,000,000 with competitors." (GTX 460).

A report by the Paint, Lacquer and Chemicals Department to the Executive Committee of du Pont for the month of November 1926 stated that General Motors was unwilling to make a requirements contract for 1927 although du Pont had reduced the prices of thinner and although these prices were subject to quantity discount; that competition in the pyroxylin finish field was apparently the cause for General Motors' attitude. It was also reported that du Pont had succeeded in selling Buick its fabrikoid requirements for the first half of 1927 "notwithstanding competition from Federal Leather Co. at a differential of 11¢ per yard under our quotations."

The following month, December 1926, another report was made stating that General Motors' action in receiving a bid from U. S. Industrial Alcohol on specified thinner composition, compelled du Pont to make an offer "at approximately the same net price when all discounts are included" and that this would have to be extended to all customers with the result that profits from the thinner business during

1927 would be less than in 1926. The report also stated under Sales of Special Significance that Oakland Motor Co. had placed an order for their requirements of fabric for the first six months of 1927 with du Pont "notwithstanding lower prices being quoted by Federal Leather and Cotex." The contract on thinner requirements was granted by the General Purchasing Committee to U. S. Industrial Alcohol for a six month period.

In October 1927 the Paint, Lacquer and Chemicals Department reported as follows:

> "Renewed interest on the part of General Motors people has been aroused in the question of the volume [fol. 564] oil-type undercoats and black 'Duco' business that is being placed with competitors by Fisher Body Division. 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's' agreement. Our latest information is that this subject is being actively agitated by the General Motors Purchasing Committee but have not yet heard to what extent the operation of the super discount plan is swinging sentiment in our favor." (GTX 492).

The General Purchasing Committee of General Motors in July 1928 wrote the purchasing agents of the General Motors Divisions and Fisher Body regarding the du Pont super discount saying that while it was agreed that healthy competition was to be maintained if 80% of the purchases of material such as du Pont was in a position to supply are given to them on an even basis, the earnings under the super discount will be materially increased and they were urged to cooperate to that end.

During 1927 Fisher Body went back to pyroxylin decking on most models and purchased about one-half of its requirements from du Pont's competitors. In 1928 Fisher Body returned to Everbright and in 1929 competitive materials met its quality and Fisher Body reduced its purchases from du Pont to about one-third of its coated fabric re-

41866 O—59——13

quirements, which it continued to purchase until 1935 when the all steel top eliminated its use.

The du Pont Fabrics and Finishes Department reported to the Executive Committee for the month of June 1929 on the effect of the special discount plan stating that [fol. 565] $379,000, representing discount earned on total purchases of du Pont products amounting to $11,528,000, had been paid for the year ending June 30, 1929, and that for the previous year the discount had amounted to $200,000 on purchases of $10,201,000; that

> "While the value to us of this arrangement has been subject to question at times, there appears to be no longer any doubt that it has had and is continuing to have a very beneficial effect in fostering a friendly attitude toward du Pont products in general, which serves to minimize the occasioned differences that must of necessity arise in handling of such a large volume of varied products." (GTX 496).

With the depression years, General Motors production and its purchase declined. From 1929 to 1932 Fisher Body curtailed its output 71%—from 1,360,617 units to 395,604 units—and its purchases from du Pont were reduced. Since General Motors requirements had been cut to a point where it was unable to earn a discount in 1930, du Pont lowered the minimum amount at which super discount would become payable during the next year. In 1932 the super discount plan was terminated.

In October 1931 du Pont bought 300,000 shares of General Motors common stock from the Fishers; the other 200,000 were purchased by the Opel interests in Germany. Before this purchase the Fisher Brothers held 532,069 shares of General Motors common, or 11.8% of the 4,509,060 General Motors common held in Managers Securities. In addition, they held 1,600,000 shares of common stock received when General Motors purchased the remaining 40% minority interest in Fisher Body in 1926. In 1934 F. J. and C. T. Fisher retired as directors and members of the Executive Committee of General Motors and L. Fisher [fol. 566] succeeded C. T. Fisher as Central Office Executive at General Motors. He held this post until his retirement in 1944.

When the all steel top for passenger automobiles was adopted for all General Motors cars in the mid-1930s and until 1939 the principal use of fabrics at Fisher Body was the combined uncoated fabric for tops of convertible cars. Du Pont presently enjoys between one-third and one-half of this business. Fisher Body first used du Pont Teal, a fabric used for convertible tops, in 1926, and purchased 50% of its requirements of this fabric until 1930. In 1931 Fisher Body requested all its suppliers, including du Pont, to give a two year guarantee against damage by cleaning materials. Although du Pont tests showed its Teal would withstand cleaning materials, du Pont felt it could not make the guarantee, and Haartz Auto Fabric Company, which was willing to make such a guarantee, became Fisher Body's sole supplier of this type of fabric. By 1933 du Pont felt it could make the two year guarantee and sought to regain some of this business, but secured none until 1948.

In late 1946 Fisher asked du Pont to develop a combined uncoated fabric which would not be subject to the fading and shrinking problems evidenced in Haartz material. By 1948 du Pont had solved the problem and was awarded part of Fisher's business. From that year to 1951 du Pont enjoyed one-half of Fisher's business, and in 1951 about one-third. Since 1946 or 1947 du Pont supplies Fisher Body with 35-45% of its coated and combined uncoated fabric requirements.

In 1940 and 1941 du Pont secured the major share of Fisher Body requirements for coated fabrics. Since 1947-1948 this business has declined and du Pont is only one of four major suppliers of this fabric to Fisher Body. The [fol. 567] other suppliers are Haartz, Textileather, and United States Rubber. Fisher Body has adhered to a policy of several sources of supply.

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. 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 the 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 sale 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 [fol. 568] 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 victum of du Pont domination.

Finally, the extent to which Fisher Body has purchased over the years from competitors of du Pont in substantial quantities cannot be squared with the charge that Fisher is a captive market for du Pont. The record is clear, for example, that Fisher immediately encouraged competitors of du Pont to produce a lacquer comparable to Duco, and has consistently over the years bought substantial amounts

of topcoats from two or three of du Pont's competitors, and practically all of its undercoats are purchased from a single competitor of du Pont. Other examples are found in the detailed analysis of the evidence relating to the various products sold by du Pont.

Finishes

Duco

In 1910 General Motors and Chevrolet had been purchasing practically their entire requirements of automobile finishes from Flint. After the acquisition of Flint by du Pont, Flint's position as a supplier of paint and varnish to General Motors was not enhanced; in fact, Flint lost position as a supplier. In 1918 Flint had all the Buick, Oakland, Olds and Chevrolet business. In 1921 it lost half of [fol. 569] the Oakland business, and in 1923 some of the varnish business at Buick, Oakland and Olds.

Immediately following World War I the automobile industry entered into an era of great expansion. One important problem remained, however, that of a finish which would last as long as the automobile and which could be applied on the assembly line in a matter of hours.

Du Pont had entered into the nitrocellulose lacquer field in 1903. By 1920 it had a small but varied line of products. These lacquers were quick-drying and provided a durable film, but use was limited because the lacquer did not contain much solid material and if that were increased the lacquer became too viscous to work.

General Motors officials were interested in the problem and upon recommendations of Walter P. Chrysler and Herman L. Weckler of Buick, a Paint and Enamel Committee was created in December 1921 to study the problem. Clements of General Motors Research became Chairman and representatives of the car divisions were members.

The Paint and Enamel Committee began to test the finish used in each of the car plants and discovered the difficulty was in the top coat. It contacted every reputable paint manufacturer in the country and tested available material.

Kettering and Fisher Body used lacquer on airplanes during World War I and Kettering thought it might be the solution to the problem in the automotive industry. It had

never been used on automobiles because it had a low solids content requiring application of many coats when used in colors.

Among the paint manufacturers approached was du Pont, which evinced an interest in the idea. By this time [fol. 570] du Pont discovered a process for producing a lacquer with a high solids content, called Duco. Edmund M. Flaherty, Assistant Director of Sales for du Pont's Chemical Products Division, told Harry Mougey, a member of the General Motors research group, of this new lacquer and agreed to send samples to Dayton, Ohio, to be tested with the other materials under observation by the Committee.

After testing samples of this new lacquer, Kettering and Henry Mougey became enthusiastic over its possibilities. However, it lacked the high gloss of varnish and it would not adhere to the traditional undercoats used on metal.

This was in the Spring of 1922 and marked the beginning of an experimental and production testing period that lasted more than two years. Both General Motors and du Pont joined in the testing to adapt the new lacquer to the demands of the automobile production line and a great deal of collaboration ensued toward this end. Williams of du Pont spent a considerable period of time working with Mougey of General Motors before the problem was solved. Both Williams and Flaherty testified that they met no chemists from other companies in the General Motors laboratories.

While Duco was still in this testing stage Pierre S. du Pont, then President of General Motors, at the request of the Paint and Enamel Committee asked du Pont to stop all negotiations with other possible consumers and all plans for selling these products in the open market "until such time as a suitable conference may determine whether it is possible for General Motors Corporation to obtain the entire product for the du Pont factories over a period of time in order to insure a satisfactory quantity of material". At the same time, he requested Sloan to secure a sample estimate from the several General Motors Divisions as to their probable needs if Duco were to be used so that [fol. 571] du Pont might set about constructing the necessary facilities. This feeling had been orally expressed to

Irenee du Pont and had been discussed at a meeting of the General Motors Paint and Enamel Committee which was attended by a du Pont representative.

In a report to the Executive Committee of du Pont in October 1922, the Cellulose Products Department stated that they had seriously considered the whole matter and after weighing all the factors was of the opinion that "it would not be to our best interests, nor General Motors', to give them this exclusive right." The report further stated that "any competitive advantage that General Motors might obtain by getting the exclusive use of our finishes must be temporary only" and such a practice "would have the effect of encouraging competition in the field," so that it would be better to take full advantage of the start du Pont had by being first in the field and "getting entrenched just as widely as possible."

Irenee du Pont in reply to Pierre S. du Pont's request said:

> "We are embarrassed at your request to stop all negotiations with possible consumers and plans for selling these in the open market, this because we have already started a number of small users in business and cannot now cut them off from their source of supply. Also, the rumors of the value of these products are spreading and inquiries will be received from others who are users of Fabrikoid, Pyralin, etc., and we would be in a most embarrassing position to have to refuse sale of 'Viscolac' or 'Duco'. This might even result in their ceasing to use Fabrikoid and Pyralin by way of retaliation. Finally, if we don't sell on the outside the demand will be filled by other manufacturers which will entrench competition for us at a later date." (GTX 380).

[fol. 572] Flaherty testified that du Pont was selling Duco to Franklin, Pierce Arrow and other automobile companies.

By early 1923 General Motors Research was convinced that Duco was the answer. In March 1923, Mr. Rogers, the paint superintendent at Oakland, did some experimental work of his own and developed a burnishing process that brought up the lustre of Duco. In the Spring of that year, Oakland decided to use Duco on its 1924 open car, with the

hope that it would reestablish its lagging reputation. The promotion report on automobile companies in October of that year reported that Oakland distributors were demanding Duco on closed cars. Oakland's use of Duco was an immense success. Fisher Body Division, which was building the Oakland closed bodies, decided to use Duco.

Herman L. Weckler, Works Manager at Buick, recommended Duco to its manager, Mr. Bassett, in 1923, but Bassett decided to wait until the Oakland results were in. In the Spring of 1924, upon the continued recommendation of Weckler, Bassett decided that Buick would use Duco on its 1925 models.

H. H. Rice, President of Cadillac, wrote to Clements, who had urged a speedy decision on the use of Duco by General Motors Divisions, agreeing that "all speed should be used in making the investigation but I think one of the most dangerous things the Corporation could do would be to adopt, generally, the new method of painting before it had been tried out in every conceivable fashion." Lawrence Fisher testified that in 1924 Fisher Body used Duco on the first steel bodies for Cadillac. In writing to Allen of du Pont, Sloan stated that he disagreed with the attitude of Cadillac and would see what he could do toward helping the situation. Regarding Buick, he suggested that Allen contact Mr. Bassett of that Division.

[fol. 573] The caution on the part of Cadillac and Buick in adopting Duco was set forth by Sloan in a letter to Allen on February 4, 1924 wherein he said that he was disappointed to find Cadillac and Buick reluctant to accept a car with a dull finish.

At a meeting in April 1924, Bassett stated that he intended to put the entire Buick production into Duco and it was adopted for both its open and closed bodies on the 1925 model. Cadillac, for about two years before it adopted Duco as its standard finish, offered it only on an optional basis, and did not make it standard until 1926. Thus the change over to Duco was slow. Sloan said:

> "It is hard to separate reluctance from responsibility. Responsibility of a general manager of a division is very great, and while he wants to make technological progress, and improve his product, he has got to be

pretty careful that any decisions he has made lead to that end. * * *" (Sloan 3017-3018).

Sloan testified that he was interested in Duco because it had great significance from the standpoint of consumer appeal and because of its economic advantage; that he had no interest in "pushing" Duco other than improving General Motors; and that the decision to try Duco was left entirely to the respective Divisions who were given no orders by him or anyone else.

In July 1924 the General Purchasing Committee began development of a general contract covering Duco. The minutes of the General Purchasing Committee in November 1924 in connection with a discount provision in the proposed general contract for Duco stated:

> "It was brought out that no effort had yet been made to develop competitive price situation as regards [fol. 574] pyroxylin paints and that this fact should be given consideration by the du Pont Company."

In December 1924 an agreement was reached with du Pont whereby General Motors undertook to purchase its entire requirements of pyroxylin finishes for the first six months of 1925. Within a month, Lynah pointed out that a field of competition for Duco should be developed and suggested that the Research Laboratories begin "characteristic and durability tests of competitive pyroxylin finishes." Lynah in February 1925 requested Research to test the products of seven named companies. The general contract provided for purchase of buyer's requirements of Duco and thinner.

By May 1925 Lynah, in a letter to Mougey, made reference to the fact that other automobile manufacturers—Paige-Jewett, Flint, and Packard—were using a competitive pyroxylin finish sold by the Zapon Company. Before the expiration in July 1925 of the first contract with du Pont, Lynah undertook again to find a competitive product and suggested to the members of the General Purchasing Committee:

> "* * * It is appreciated that a field of competition for 'Duco' should be developed." (GM 172).

At this time Fisher Body had started to use Forbes black lacquer in addition to Duco which it had adopted in 1924, although the Forbes product had not been tested or approved by General Motors Research. Du Pont did not regain any of the black Duco business from Fisher Body until 1931 when it offered a new and superior product. Du Pont, Rinshed-Mason, and Forbes have continued to be Fisher Body's major sources of supply for topcoats, and [fol. 575] for undercoats Fisher Body has used Rinshed-Mason almost exclusively.

In May 1925, Mougey, Chief Chemist for General Motors Research, wrote to Lynah that the problem of testing lacquers was not easy:

> "* * * the matter of tests on cellulose nitrate finishes is a very difficult one. When one is dealing with material as durable as Duco, it is very difficult to estimate its total life and also estimate the life of other materials as compared with Duco. * * *
>
> "* * * One of the reasons why it is so difficult to approve finishes made by different companies is because each color is a problem in itself. A company may make a very good black and yet certain shades of grays, blues, etc., may be very bad. * * *
>
> "Another factor which makes it very difficult to judge these finishes is the fact that all of the companies who are trying to duplicate Duco are constantly improving their materials. We feel that none of the exposure tests which we made last Summer and last Winter represent the same material as was submitted by you this Spring. In most cases we feel that the Companies have improved their materials in the meantime, but in some cases, due to inability to actually determine whether a change is an improvement or not, we feel that changes have been made for the worse. This matter of changing the composition of the material is one on which we have insisted very strongly with the du Pont Company. No changes are made in the material until after very extensive tests. * * *
>
> "We feel that in the case of material which is advertised by our Companies as strongly as Duco, no pro- [fol. 576] duction should be undertaken on material

which has not had at least a full year exposure test on test racks. * * *

"In conclusion we believe that the other Companies who are competing with du Pont have already developed individual colors in many cases which are the equal of Duco. We also believe that most, if not all, of the other Companies have not as yet developed a full line of colors of high durability. It is an open question whether it is possible at the present time to choose any individual color made by a competing company and guarantee that its durability is as great as that of Duco. In addition, there are many other properties such as quality of the color, ease of spraying, covering power, polishing properties, and other working properties which must be determined by actual tests on cars under production conditions.

"Under these conditions we believe it would be desirable for the General Motors Corporation to put out a limited number of cars finished with the particular colors from competing Companies in which we are most interested. * * * 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. * * *" (GM 176).

Upon the expiration of the first general contract for Duco, a second agreement covering the last six months of 1925 was executed for all requirements of the car divisions, and 50% or more of Fisher Body's requirements. Lynah testified that the reason for the 50% requirement of Fisher Body was that it "was not a wholly owned division of General Motors" and had to be sold on the desirability of par- [fol. 577] ticipating in this contract. When the second contract was to expire, Lynah advised Research that it would be impossible to approve a competitive lacquer for at least another year and the same contractual arrangement was continued for 1926.

In 1927 the contract was changed so that General Motors bought its requirements of seller's make. Lynah testified this meant that General Motors could buy as much or as little of du Pont's pyroxylin finish as it wished and was free to purchase from competitors and this interpretation of the

contract is supported by the terms of the contract itself. Competitive lacquers were approved by General Motors in 1927.

Some time between 1927 and 1930 Cadillac and Oldsmobile began using competitive lacquers. Fisher Body for many years purchased finishes from a number of sources, including du Pont, and is the principal purchaser at General Motors of undercoats, but buys these principally from Rinshed-Mason. Cadillac has continued to use Rinshed-Mason topcoats since the late 1920's, and its undercoats have been supplied by a number of different companies, including Rinshed-Mason, Ferbert-Schorndorfer. Ralph J. Wirshing, head of General Motors Research Laboratories, testified one of the reasons Cadillac uses Rinshed-Mason is because of the proximity of its plant to Cadillac. The Chevrolet Division continues to buy its entire requirements from du Pont for both its topcoats and undercoats. Pontiac Division buys exclusively from du Pont; the du Pont plant being only thirty miles away. Buick uses du Pont topcoats and undercoats from a du Pont plant close by. Oldsmobile has used Rinshed-Mason topcoats since 1927 and Forbes undercoats since the 1930s.

It has been admitted that soon after the advent of Duco [fol. 578] du Pont sold this finish to a considerable number of other automobile companies. Shortly after the adoption of Duco, du Pont offered and sought to promote a nitrocellulose undercoat made from essentially the same material as Duco as a substitute for the oil base product then used. The new product was sold to automobile companies other than General Motors—Nash, Marmon, and Chrysler—because it afforded quicker drying and better surfacing qualities. Du Pont was unable to sell it to Fisher Body or any of the General Motors car divisions.

Dulux

By 1926 Duco was in extensive use as an exterior finish for domestic refrigerators. At that time Frigidaire used Duco as an exterior finish for substantially all of the refrigerators which it made. In 1927 Frigidaire abandoned the use of Duco and spent over $1,000,000 to install equipment for finishing refrigerators with porcelain. It did this despite the efforts of du Pont to persuade Frigidaire that it should continue to use Duco. By 1930 Frigidaire was

using a porcelain exterior finish on more than 80% of its refrigerators. Throughout this period General Electric Frigidaire's major competitor, continued to use Duco or similar lacquer finish. When Westinghouse began to manufacture refrigerators in 1932, it also used Duco. Even after the development of Dulux, Frigidaire continued to finish the exterior of about one-fourth of its refrigerators with porcelain—and is the only manufacturer of refrigerators in the United States which uses an exterior porcelain finish.

In 1932 General Electric and Westinghouse used Duco. The technical personnel of du Pont, and General Electric worked closely in General Electric's plants and laboratories on the problem of adopting Dulux to General Electric's [fol. 579] manufacturing process. General Electric was the first refrigerator manufacturer to use Dulux, Westinghouse was second, and Frigidaire did not adopt it until a year later.

C. L. Van Derau, a manufacturing executive at Westinghouse for over twenty-five years, testified that the reason it has purchased its entire requirements of refrigerator finishes from du Pont for many years was the fact that du Pont had "the finest trained technical group at their beck and call" and rendered excellent service.

With the exception of Frigidaire, the principal manufacturers and many of the smaller companies use Dulux exclusively; Frigidaire uses it on three-fourths of its refrigerators. Knight of General Electric, Norberg of Crosley, and Van Derau of Westinghouse, testified that these companies have used Dulux for many years because of its outstanding quality.

Dulux is not used by Frigidaire or the other major refrigerator manufacturers in inner liners or food compartments.

Finishes—Accessory Divisions

Richard C. Williams, Manager of Automotive Sales, Fabrics and Finishes Section of du Pont, testified that it sold substantial quantities of black lacquers to AC Spark Plug, but that Delco-Remy purchased its insulating varnish from two other sources. Du Pont has not sold to the Inland

division in large quantities because the service problem was too great.

Guide Lamp Division has purchased quantities of enamel from du Pont, but a competitor succeeded in developing a primer which gave greater satisfaction and secured the business. The Ternstedt Division before World War II [fol. 580] obtained its interior enamel requirements from du Pont for a number of years but "as an economy move" switched to a competitive product although du Pont still has some of its business.

Williams testified that du Pont enjoyed varying degrees of success in its efforts to sell to the accessory divisions. Each division, he testified, purchases from du Pont or one or more of its competitors in accordance with the division's determination of price, quality and service.

Electro-Motive Division, manufacturer of Diesel locomotives, purchases 70-75% of its exterior finish requirements from du Pont. Its interior finish and its insulating varnish requirements are supplied by competitors.

The Packard Electric Division which uses cable lacquers and varnish was supplied by du Pont from 1929-1933 with all its requirements of black high tension lacquer being approximately 15,000 gallons a year. In 1933 a superior product was introduced by a competitor and du Pont lost the business although it continued as a supplier in lesser volume. In 1936 du Pont regained 50-75% of the black high tension lacquer business due to improvement in its product and continued to supply Packard Electric until 1939, when a competitor, the Standard Varnish Company, produced a lacquer of considerably higher heat and oil resistance and procured practically all the requirements of Packard Electric until the war.

Packard Electric was purchasing clear high tension lacquer from Arco and Ferbert-Schorndorfer, until 1934 when William Fisher testified they recognized the need for higher quality clear and started to buy most of their requirements from du Pont. This continued until 1936 when ethyl cellulose was produced. The Glidden Company secured the business in 1936, although du Pont was selling the lower quality [fol. 581] clear high tension lacquer to Packard Electric, until 1939. Fisher testified that since the war du Pont has not sold this lacquer to the Packard Electric Division.

In 1929 du Pont failed in its attempt to sell Packard Electric its low tension lacquer for cables. This was before the Division was acquired by General Motors. In 1931 Packard Electric produced its own low tension lacquer and purchased its film scrap solution from the Eastman Kodak Company. Fisher testified that du Pont was never able to persuade them to purchase their low tension lacquer and their film scrap solution from them.

Price Inertia

In 1927 the manager of General Motors Canadian subsidiary wrote to Pratt protesting that du Pont's subsidiary in Canada was not giving them a square deal on prices charged for Duco, that they were therefore contemplating using in part competitive products. Pratt replied that he saw no objection to using competitive products to get the du Pont subsidiary on a "proper basis" and that in fact it had been recently necessary for General Motors in the States to place some thinner business with a competitor as a disciplinary measure to bring down the price of Duco and thinner. The record shows that six months later du Pont met the competitive price and gained a general contract for 60% of General Motors thinner requirements.

In February 1927 Pratt wrote to Coyne of du Pont, complaining of their price policies:

> "* * * I want to tell you confidentially that the fellows responsible for the price policies in selling du Pont products to General Motors Corporation have used very bad sales psychology. I think I am safe in saying the du Pont Company has never voluntarily [fol. 582] made a price reduction on its products to General Motors. Price reductions have only been obtained by General Motors bringing in outside competition and forcing the du Pont Company to meet prices of outside competition in order to maintain the business. * * * Practically all successful suppliers of automotive parts and materials (with the exception of the du Pont Company)—when through improved design or increased production are in a position to make lower costs—pass part of the advantage of the lower costs on to their customers with reduced prices, without solicitation or pressure. I know you are salesman

> enough to appreciate the psychology in this policy, and realize the lack of good will created with a customer when it is necessary for that customer to take steps to bring down prices to a proper point, rather than having proper prices made through the initiative of the supplier." (GTX 485).

In response Coyne wrote Pratt stating he assumed he would have no objection to showing that part of the letter referring to the sales policy to du Pont's sales advisor so that he could look into the matter.

Du Pont's slowness in meeting competitive prices on Duco was contained in a du Pont report for 1928 wherein it was stated:

> "Naturally the manufacturers welcomed this reduction although several of them did not fail to remind us that our competitors had long since favored them with lower prices." (GTX 490).

80% of du Pont's total finish sales are made to customers other than General Motors. In 1948 du Pont sales of finishes to General Motors totaled $21,209,642 and its finishes [fol. 583] sales to customers other than General Motors totaled approximately ninety-seven million dollars. The loss of a number of the early automobile customers for Duco had been due to the fact that they had gone out of business—such as Franklin, Rickenbacker, Marmon, Moon, Cleveland, Chalmers, Morris, Lexington, Paige, Hupmobile, Gardner, etc. Williams testified that du Pont had been selling to Nash, Studebaker, Hudson, Packard and Willys since the middle 1920s. Until the early 1930s du Pont sold substantial quantities of topcoats and undercoats to Chrysler, but Chrysler thought their interests would be better served if they found a supplier who would take care of their entire requirements, and Pittsburgh Plate Glass has enjoyed the major share of Chrysler's finish requirements. Government Exhibits 1376-7 show that in 1935 Ford was buying one-half of its requirements from Du Pont and manufacturing the other half. In 1938 Ford ceased to buy Duco from du Pont but resumed substantial purchasing when Henry Ford II became active in Ford management.

Du Pont admits that for the ten years preceding the filing of the complaint, approximately three-quarters of its total sales to General Motors have consisted of products of its Finishes Division and that General Motors has been its largest single customer. The largest single finishes item which General Motors purchases from du Pont is Duco. In recent years about two-thirds of General Motors total purchases of finishes from du Pont have consisted of Duco, and the thinner and solvents used in its mixing and application. Thus in 1947 of du Pont's total sales of finishes to General Motors amounting to approximately nineteen million dollars, Duco and thinner sales constituted over twelve million dollars. For the six year period 1938-1941, 1946-1949, the sales totaled sixty-nine million dollars, forty-eight million dollars of which, con- [fol. 584] stituting slightly over 69% of the total sales, were for Duco and thinner.

Statistical Charts on Finishes

The charts submitted by the Government are GTX 1387, being du Pont's percentage of finish sales to General Motors; GTX 1393, 1394 and 1400 being General Motors' purchases of finish products from du Pont and from competitors of du Pont. GTX 1387 indicates 90% of du Pont's finish sales in the automotive field were to General Motors. GTX 1393 and 1394 show General Motors percentage and dollar volume of purchases from du Pont and competitors in paints, enamels, primers, lacquers, thinners and pyroxylin was 70% in 1946 and 72% in 1947. GTX 1400 is a tabular representation of the same information contained in GTX 1393 and 1394 and lists approximately twenty suppliers of finishes to General Motors other than du Pont with the amounts supplied in 1946 and 1947, and indicates that General Motors purchased finishes from du Pont constituting 70% of its purchases in 1946 and 71.55% in 1947. Defendants have offered DP 568 as being an accurate portrayal of General Motors' purchases of finishes from du Pont and its competitors. This chart shows that General Motors purchased 67% of its finishes from du Pont in 1946 and 68% in 1947.

The only differences in Government charts GTX 1393, 1394 and 1400 and defense chart DP 568 are: (1) the

41866 O—59——14

Government has excluded from its charts the purchases of solvents which are items listed in GTX 1343A as being purchased from competitors of du Pont in the amount of one-half million dollars in 1946 and over a million dollars in 1947, and (2) the defendants have included solvents and excluded from their charts products [fol. 585] described as heavy-bodied cements, pyroxylin solutions, plastic protective coating, wax, and rubbing and polishing compounds.

Since the range of difference between the percentages submitted in the defense chart and the Government charts are not in significant disagreement—the Government asserting 70-71% and the defense 67-68%—the Court is of the opinion that a conclusion as to percentages will have no material bearing on the issues herein, and will not indulge in a technical discussion of the relative methods used in arriving at the respective percentages.

The record discloses that a very substantial portion of finishes sales consist of Duco, a pyroxylin lacquer used principally as a topcoat on automobiles, and Dulux, a synthetic enamel widely used as a refrigerator finish. The Court finds on the basis of all of the evidence of record that du Pont's success in the sale of finishes to General Motors is in large part attributable to the superior quality of these finishes and to the pre-eminence it gained as the developer of these two products, its continuing research, and outstanding service.

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 [fol. 586] 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 simi-

larly 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; nor is there any evidence that General Motors has suffered competitively from its substantial use of Duco. Kettering testified explicitly that the superior finish used on General Motors cars was responsible for their higher resale value. 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. It is apparently an ideal refrigerator finish and is widely used by a number of major manufacturers other [fol. 587] 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.

Fabrics

One of the first fabrics which du Pont developed after its 1910 purchase of the Fabrikoid Company was a pyroxylin coated fabric which was used in the automobile industry

for upholstery. My mid-1913 sales of this artificial leather fabric were made to nearly every major automobile company including the General Motors car units. In 1918 du Pont developed "Pontop" a double rubberized top material. During 1925, it produced "Glazed Pontop", which was replaced in 1926 by "Everbright", a material similar to the Pontop but having greater lustre and durability. Everbright at one time supplied % of all the closed car top material business in the country. In 1937 Cavalon, a rubberized upholstery material compounded with ground leather and finished with a thin coating of shellac, which was brominated or given a case hardened surface, was developed and was used particularly in the trucking, theatre seating and public seating trades. During the period Glazed Pontop and Everbright were manufactured, du Pont developed a combined uncoated fabric which it called "Teal". This fabric was dyed before it was woven and used for the tops of open cars.

For about two decades none of the automobile divisions of General Motors have been purchasers of fabrics for use in making automobile bodies. With the advent of the closed body car in the late 1920s and early 1930s, these automobile divisions discontinued the making of open car [fol. 588] bodies. Fisher Body had manufactured closed bodies for General Motors cars before that type became popular and later continued the manufacture. In the mid-1930s it adopted the all steel top for all General Motors cars. Since these changes Fisher Body became a large consumer of fabrics for automotive use.

Until the adoption of the closed body car, fabric purchases by the General Motors car divisions were made principally by the respective divisions.

Before the stock purchase in late 1917, du Pont was supplying substantially all of the coated fabric requirements for both upholstery and top material for Chevrolet and Oldsmobile; about one-half for Buick; about one-third for Oakland; and all interior trim for Cadillac, but none of the top material.

Cadillac, Oldsmobile and Oakland used fabrikoid for interior trim and by 1916 Buick was one of du Pont's four largest fabrikoid customers.

In 1918-1919 Chevrolet, Buick, Oldsmobile and Oakland

made purchases of Pontop when it was introduced but Cadillac made no purchases until 1920.

Chevrolet continued to use artificial leather until 1930 and du Pont enjoyed a substantial portion of its upholstery and trim requirements. After the discontinuance of the open body it made only limited purchases of the same for upholstery and trim. In 1917 du Pont attempted to persuade Chevrolet to change to another top material which it believed was superior but was unsuccessful and the business went to a competitor; this was regained in 1919, however, when du Pont introduced "Pontop". Du Pont maintained its pre-1917 position as Chevrolet's rubber coated top material supplier until 1924 when it purchased its requirements from competitors, but regained that business in 1925 when Chevrolet was having both quality and [fol. 589] delivery difficulties with its other suppliers. Du Pont did not succeed in selling Chevrolet its combined uncoated top material until 1927, when it started buying du Pont's Teal. During this time Haartz was Chevrolet's supplier. In 1929 Chevrolet used this fabric for about one-half of its production. In 1930 Chevrolet abandoned rubber coated top materials and du Pont secured about one-half of Chevrolet's business for uncoated materials.

During 1920 du Pont, at Chevrolet's request developed a coated panel board and sold it to Chevrolet at about one-half the price charged by other panel board manufacturers. By the end of 1920 these manufacturers reduced their prices and Chevrolet thereafter purchased exclusively from them. During the 1920s and 1930s Chevrolet used a large quantity of coated fabrics for winter fronts to prevent radiator freezing and during this period purchased the du Pont product for only one year—1936.

Cadillac purchased du Pont's fabrikoid for interior trim for all its requirements until 1924. In that year for six months it purchased its requirements from Textileather. Prior to 1917 Cadillac purchased all its requirements of top material from competitors of du Pont until 1920. In that year it purchased du Pont's "Pontop" and continued to do so until 1924 when it ceased manufacture of open bodies.

Oakland purchased fabrikoid for use as interior trim until 1933 when it ceased the manufacture of open bodies. Previous to 1917 and from 1919 to 1922 this division pur-

chased one-third of its coated fabric requirements from du Pont. In 1918 du Pont had difficulty in maintaining color uniformity and Oakland purchased from competitors. In 1922 Oakland purchased its entire requirements of coated fabrics from du Pont, but in 1923 began to purchase from competitors. By 1925 du Pont again received about [fol. 590] one-third of its coated fabric business. In 1926 it converted to uncoated combined top material and purchased from du Pont competitors.

Except for 1922, when du Pont supplied Buick's entire requirements for coated fabrics, it supplied one-half of this division's requirements. When du Pont commenced the manufacture of uncoated combined top material, it solicited the Buick business but received no orders until 1927-1928, when it supplied all its requirements. In 1929-1930 Haartz became Buick's supplier of this fabric. Buick discontinued the manufacture of open bodies in early 1930.

Oldsmobile, between 1923 and 1929, purchased about one-half of its requirements for coated and combined fabrics from competitors of du Pont. In 1923 it purchased one-half of its requirements from du Pont in the rubber coated material "Pontop". From 1924 through 1926, this division used uncoated combined top material and purchased a substantial amount from du Pont. In 1927 and until 1929 it purchased from du Pont's competitors.

Between 1918 and 1923 du Pont supplied the bulk of General Motor's fabric business. The depression of 1920 and 1921 caused a drop in automobile sales and the automobile manufacturers, including General Motors, had large stocks of coated fabrics on hand, including future commitments under contracts. Several of the General Motors units requested du Pont to cancel their contracts but du Pont refused. An agreement for deferred delivery was made on Chevrolet's contract and settlement eventually made on the Buick, Oldsmobile and Oakland contracts to cancel same on the condition that each would purchase their entire requirements of coated material for the year 1922 from du Pont. Due to the settlements of the 1920 contracts, du Pont in 1922 supplied a greater percentage [fol. 591] of General Motors requirements than it had previously. In 1923 these three divisions commenced to purchase this fabric from other manufacturers.

Early in 1923 the General Purchasing Committee found

that General Motors had purchased nearly all its fabric requirements in the preceding year from du Pont and determined that at least 20% of the requirements should be placed elsewhere. In 1931 du Pont made a study of its total sales of coated and combined fabrics and the study showed that du Pont supplied 31.5% of General Motors requirements in 1930.

Fisher Body manufactured closed cars for the General Motors car divisions before 1917, and between 1924 and the early 1930s, manufactured the open bodies and convertibles. Until 1935 or 1936, when the all steel top was introduced, Fisher Body used coated fabrics as top material for the closed cars, but used no coated fabrics for upholstery and trim until 1939. It used combined fabrics as top material on convertibles. Fisher Body was buying none of its material from du Pont, purchasing from Textileather, until it bought du Pont's "Glazed Pontop" in 1925. In 1927 it changed to pyroxylin top materials and purchased one-half of its requirements from Textileather. It commenced to use du Pont's Everbright in 1928-1929. In 1929 it purchased two-thirds of its requirements from du Pont competitors. It continued such purchasing until 1936, when all of the General Motors closed bodies had an all steel top practically eliminating requirements for coated or combined fabrics except for convertible top material. Fisher Body began to use uncoated combined fabrics for top material on convertible models in 1926, purchasing about one-half of its requirements from du Pont. In 1931, when du Pont refused to grant a guarantee against damage by cleaning, it purchased its entire requirements from Haartz. In late 1946 or early 1947 Fisher Body had dif- [fol. 592] ficulty with shrinkage and fading of top material purchased from Haartz. In 1948 du Pont successfully met the difficulty and secured a part of the Fisher Body business. Since that year du Pont has supplied Fisher Body with less than one-half of its requirements of top material.

In 1939 Fisher Body began to use coated fabrics for interior trim and purchased part from du Pont and part from its competitors. Du Pont secured a major portion of its requirements for the years 1940-1941, and immediately following the war Fisher Body purchased from du Pont all of the coated fabrics du Pont would sell since there was

a shortage of said material. Since 1947 or 1948, Fisher Body has been purchasing its coated and combined fabrics from Textileather, Federaleather, Haartz Auto Fabric Co., and United States Rubber, as well as du Pont.

Fisher Body also purchases about $1,000,000 of weather stripping cement. It purchases from du Pont a neoprene base adhesive called Fairprene 5115. Sales of this cement amount to about 3% of Fisher Body's total purchases. The bulk of its requirements for this material are purchased from Armstrong Cork, although Nickowitz testified that du Pont was still trying to sell larger quantities of Fairprene 5115.

In 1930 General Motors purchased the Indianapolis plant of the Martin-Parry Corporation, which became the Chevrolet Commercial Division of General Motors. This division makes bodies for light trucks and commercial vehicles. Between 1922 and 1930 Martin-Parry Corporation purchased 100 percent of its requirements of coated fabrics for upholstery and trim from du Pont. From 1930 to 1937 it purchased only du Pont pyroxylin coated fabrics. In 1937 du Pont supplied 90% of its rubber coated fabric requirements, but in that year it started to purchase from [fol. 593] United States Rubber a part of its requirements. In 1940 du Pont lost more of this business, and in 1948 supplied only 60% of this division's requirements. Du Pont now obtains less than one-third of the approximately two million dollars of annual fabric purchases made by this division.

GMC Truck & Coach Division buys one-third of its requirements for light truck upholstery from du Pont. Its requirements of heavy truck upholstery are supplied by United States Rubber. When GMC Truck shifted, after the war, to vinyl coated fabrics instead of natural leather for the upholstery of its heavy trucks, United States Rubber succeeded in getting that business. Vinyl material for bus seats was supplied by B. F. Goodrich Company.

A C Spark Plug purchases about $2,000,000 annually of coated fabrics for fuel pump diaphragms and continues to use its own material despite du Pont's sales efforts. At Chevrolet's request A C uses du Pont material for its automatic transmission. Electromotive's requirements of synthetic rubber coated material for batten strips and rub-

ber coated fabrics for insulating material are not supplied by du Pont although it supplies its principal competitor. Delco Appliance Division has a large requirement for synthetic rubber coated fabrics and sheet stock, but does not purchase from du Pont. Packard Electric Division also has large requirements for vinyl coated insulating tape, but does not purchase from du Pont. Du Pont supplies one-half of Packard Electric's requirements in "Teflon" a coated glass fabric for insulating aircraft ignition wire.

General Motors Overseas Division, which before the war purchased substantial amounts of coated fabrics in the United States, purchasing one-half from du Pont, has since the war made all its purchase abroad.

[fol. 594] A du Pont Annual Report for 1940 shows that demand for rubber coated fabrics continued until 1940 when pyroxylin coated material came into being. It stated:

> "About five years ago rubber coated fabrics started to supplant proxylin materials for automobile truck seat upholstery and usage of the latter by the automobile industry gradually decreased until 1940 when style changes resulted in considerably higher requirements of pyroxylin coated fabrics as trim on the interior of closed cars. Our sales improved from $360,000 in 1939 to $870,000 in 1940, approximately 50% of the industry's total requirements." (GTX 1380).

In 1941 a du Pont Annual Competitive Report stated:

> "The trim of the interiors of 1941 and 1942 passenger cars was such as to permit increased usage of pyroxylin coated fabrics for such purposes as the tops and backs of front seats, kick-pads, shelves behind rear seats, etc. Du Pont sales increased to $1,365,000 in 1941, 5% over 1940, and represents 30% of the total automobile requirements. It is believed that Textileather Corporation secures the next largest share, as they supply a sizeable portion of Chrysler's needs." (GTX 1381).

In 1949 du Pont's total dollar sales to General Motors increased from $3,500,000 in 1948 to $3,700,000; and du Pont's Annual Market Survey for 1948 stated that du Pont's fabric division sold four million dollars of its fabric to the auto-

motive industry, General Motors purchasing over 80%, or $3,700,000.

Nickowitz testified that since 1944 when he became Director of Sales at du Pont, sales of coated fabrics to the [fol. 595] automobile industry represented only 20% of the total, and that sales of coated fabrics represented approximately 2%-3% of its sales. He stated the largest customer in the automobile field of the Fabrics Division for the year 1948 was General Motors which purchased $3,700,000 of fabrikoid, fabrilite and Teal, and that sales to General Motors in that year represented about 80% of the Fabrics and Finishes Departments automobile sales.

Statistical Fabric Charts

The charts submitted by the Government in this field are GTX 1391 and 1392, showing General Motors' percentage and dollar volume purchases from du Pont and its competitors for 1946 and 1947. These charts indicate that 74.5% of General Motors' purchases of fabrics in 1946 and 60% in 1947 were made from du Pont. Defendants have offered DP 569 showing that in 1946, 52.3% in 1946 and 38.5% in 1947 was purchased from du Pont.

In support of its charts the Government states a study of the evidence shows that the largest usage of any automobile fabric was for upholstery and trim; that GTX 1391 and 1392 reflect the percentage of fabric purchased by General Motors from du Pont for that use. It is stated that one of the chief reasons for concluding that this sole classification is an accurate one and the one most commonly used in the automotive field, was the usage of that term by Thomas A. Nalle, a du Pont fabrics salesman, whose reports are represented by GTX 1349 and 1358. The Government arrived at its percentages by comparing du Pont total sales of fabrikoid, fabrilite and Cavalon to General Motors, as shown on GTX 1344, with only that part of General Motors purchases from du Pont competitors which is shown in GTX 1343A under heading "Imitation Leather".

[fol. 596] The defendants object to the accuracy of this

comparison and to the assumptions on which it rests for the following reasons:

1. The Government's assumption that all fabrikoid, fabrilite and Cavalon sold by du Pont to General Motors is used solely for upholstery and trim is improper; the du Pont sales figures shown on GTX 1344 are for total sales and purchases without regard to the end use of the fabric; the record does not support the assumption that all coated fabrics purchased by General Motors from du Pont were used for upholstery and trim; on the contrary the record shows that these fabrics had other uses such as head linings, winter fronts, seat covers, top materials, case coverings, spring boots, sheet stock, work clothing and curtains.

2. The Government's assumption that only those purchases by General Motors from du Pont competitors shown on GTX 1343A under the heading "Imitation Leather" were used for upholstery and trim is likewise improper; that the record shows that the terms "coated fabrics" and "imitation leather" are used interchangeably and that these separate headings in GTX 1343A were used merely to permit recording in accordance with personal preference in usage of terms, and that in collecting and presenting the figures contained in GTX 1343A, General Motors included under both headings fabrics that were competitive with those offered by du Pont. The Government states that General Motors did not use the fabric suppliers listed under "coated fabrics" as suppliers for upholstery and trim fabric; that they supplied fabrics which General Motors used for other purposes as gaskets, welts, gimps, etc. as is substantiated by the testimony of Nalle and Nickowitz and the documentary evidence. Defense chart DP 569 includes both categories of "coated fabrics" and "imitation leather" figures in its computations.

[fol. 597] The Court is of the opinion that the product comparison made by the defense chart from the base charts, GTX 1344 and 1343A, reflects the proper delineation to be accorded the figures contained therein, and the use figures submitted by the Government calls for assumptions not supported by the record. Thus, the Court concludes that in the fabrics field General Motors purchased approximately 40-50% of its requirements from du Pont for the years 1946 and 1947.

Du Pont since 1910 has been one of the major producers of coated fabrics and related products. At the time of its investment in General Motors it had been engaged in selling such products to the automobile industry for many years and its customers included many of the companies that subsequently became a part of General Motors. Following its investment it continued to sell to the General Motors divisions, and over the years those divisions that use fabric products have purchased them from du Pont in varying amounts.

On the basis of all of the evidence of record the court finds that there was at no time any agreement that bound General Motors to buy any fixed portion of its fabric requirements from du Pont with the exception of the year 1922. In that year it appears that du Pont was promised, and perhaps received, all of General Motors' fabric business. This arrangement grew out of the cancellation of certain contracts in the previous year which caused du Pont substantial loss. It thus grew out of a normal buyer-seller relationship. 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 [fol. 598] in the field and by concentrating upon satisfactorily meeting General Motors' changing requirements as to quality, service and delivery.

Tetraethyl Lead

C. F. Kettering became associated with General Motors in 1918 when it merged with United Motors, a division of which included the Delco Company. He was its General Manager and retained that office after the merger. On December 31, 1920 he was made a director and shortly thereafter a Vice-President of General Motors.

Kettering became interested in exploring the causes of engine "knock" in 1912 or 1913. He conceived the idea that he might lessen the knock and improve the engine efficiency by adding something to the mootor fuel.

This was a subject of revolutionary interest in the evo-

lution of the internal combustion engine because until the problem of "knocking" could be solved, the possibility of improving engines and engine performance was limited. The oil and automotive industries both were tremendously interested in Kettering's research.

Research was conducted at the Delco Company, then a part of United Motors, with Thomas Midgley in charge, and was later transferred to the Dayton Metal Products Company, acquired by General Motors in 1919.

During this research Kettering prepared papers and made talks before technical groups, wrote letters, and invited help in the research. Among those interested, who directed an inquiry to Kettering in 1916, was a Mr. Kurtz of du Pont who inquired for more particulars after hearing of a talk Kettering had made in Cleveland. Kettering sent him a copy of a new paper he was about to deliver, also stating "any time we get anything of interest we will be [fol. 599] glad to give you the benefit of it." In 1919 Frank Howard of Standard Oil of New Jersey contacted Mr. Kettering because of Standard's interest in the problem. Kettering explained the work he was doing, and Standard started research work on its own.

Through the American Chemical Society, Kettering testified he met some du Pont chemists and after World War I invited them to visit his laboratory to see what he was doing. In August 1919 Dr. Midgley or Dr. Clements wrote to the Manager of the du Pont laboratory listing materials which had been tried in the "suppression or elimination of the kerosene knock" and indicated that a study was to be made of the "homologues of aniline," listed the materials desired to be studied in connection therewith, and requested du Pont to supply them with any information they had on the best methods of preparing compounds which du Pont could not supply, and closed with the statement that "we are anxious to cooperate with you in every possible way." Subsequent to joining General Motors, Kettering testified he continued to call on du Pont scientists for assistance.

On October 28, 1919 K. W. Zimmerschied, Assistant to the President of General Motors, wrote C. M. Stine, Assistant Director of Chemical Research at du Pont that:

> "The Dayton Laboratories will continue the broad subject of fuel utilization in internal combustion en-

> gines, and your people will take up the development of chemicals which may be added to undesirable fuels for the purpose of converting them into usable products. * * *
>
> "It is presumed that the marketing of this chemical will be a matter of interest to the du Pont organization, and that the expense of developing it will be borne by your Research Department. We are glad to lend [fol. 600] the mechanical equipment * * * without charge for the purpose of this investigation." (GTX 599).

Du Pont's Chemical Director replied that he had no funds available for such work and that in any case the ultimate expense of the research should be borne by whichever company derived the greatest benefit from the work.

On June 20, 1920 Lammot du Pont, Chairman of the du Pont Executive Committee, submitted to it for their approval a form of proposed general chemical agreement between General Motors Chemical Department and du Pont, which the committee approved.

On August 5, 1920 General Motors Research wrote to the Chemical Director of du Pont stating:

> "Confirming our conference on my recent visit to Wilmington: I understand that the du Pont Company will cooperate with our Company in placing aniline on the market for use as an anti-knock material, in connection with the aniline injector which we are developing.
>
> "* * * A further working out of this program would comprise the sale of aniline by the du Pont Company through some satisfactory distributing agency, such as has been suggested by the Standard Oil Company, who could give aniline national distribution * * *
>
> "In connection with the above, it was agreed that we would cooperate with du Pont in securing satisfactory patent protection on the above mentioned devices." (GTX 601).

Dr. C. M. Stine, Assistant Director of Chemical Research of du Pont, on April 22, 1920, reported on a conference held in Wilmington at which Mr. Kettering was present and

[fol. 601] members of the du Pont Chemical Department, including Irenee and Lammot du Pont and Raskob, wherein "various phases of the proposal to use the Chemical Department of the du Pont Company in a consultant capacity and for research work for the General Motors" was discussed.

On August 14, 1920 Lammot du Pont wrote Kettering that he believed that a memorandum submitted by Mr. Midgley on the results of the conference was substantially correct except in one respect: "We agreed that the du Pont Company would cooperate with General Motors on this aniline subject, provided the manufacture, distribution and sale of aniline for this purpose appeared sufficiently attractive from the profit standpoint."

In connection with the General Chemical Research agreement urged by Lammot du Pont, Kettering replied on October 21, 1921 that the Executive Committee of General Motors was antagonistic to the proposition and after talking with Pierre S. du Pont Kettering wanted to arrange a later meeting between du Pont and General Motors to discuss the whole problem, but that at the present time to consider the matter of the contract "out of the picture." Lammot du Pont again wrote Kettering on October 24, 1921 stating:

> "Our understanding of present conditions is that we are expected to take up experimental chemical work for the General Motors Corporation when requested. We have taken up such work from time to time and have consulted and advised from time to time.
>
> "At present we have no definite authority for doing this and have no mutually agreed upon basis of charging for the work or dividing the results in the shape of rights. The purpose of the agreement is to give the du Pont Company definite authority and a basis for [fol. 602] charging, and either reserving or turning over to General Motors any rights that may be developed. It seems to me that this purpose must be accomplished regardless of what arrangement is made with respect to any of the work, and that, therefore, the agreement should be executed at once." (GTX 583).

Research continued for a better anti-knock solution and negotiations with du Pont for the production of aniline were suspended. In December 1921 Kettering's research organization discovered tetraethyl lead to be a more effective anti-knock than aniline. On January 28, 1922 General Motors advised du Pont that their work at the laboratories had taken an entirely different turn and that it had been decided for the time being no contract would be made. On March 18, 1922 Frank A. Howard of Standard was also advised by the General Motors Research that "research work took a very sudden turn in a direction that would indicate that it would be a mistake both on your part and on ours to enter into an agreement such as we discussed."

On March 27, 1922 Lammot du Pont again wrote Kettering stating he had heard nothing from him on the General Motors-du Pont contract regarding experimental chemical work, that the fuel problem was in no way the cause of his present writing, that he felt a general contract should be prepared and executed in order to clear up the present situation, and he had no objections to any suggested changes Kettering would make. Mr. Kettering replied he had taken the matter up with Pierre S. du Pont suggesting it would be well to get some representative of the du Pont Company to come to Dayton to "get a picture of what our problems really are" and that after a time, if "we find it would be desirable to enter into a contract" it would be worked out. Lammot du Pont on April 1, 1922 replied that Kettering seemed to have missed his point stating that General Motors [fol. 603] in its research frequently runs into chemical problems, that the du Pont Company in its research was continually dealing with all kinds of chemical problems, that duplication of staff could be avoided "by an arrangement whereby General Motors has a contract with du Pont" to assign chemical problems to du Pont whenever desired, that an arrangement of this kind should provide for some form of compensation or payment of expenses otherwise the assignment of each particular problem would "require a conference and settlement in each case before work could proceed, which obviously would cause delay and loss." He also said:

> "Why can we not execute a general contract to cover any and all future cases?

"The only reason I can see for not doing so is the decision by General Motors to establish their own chemical staff. If you have come to this conclusion, I have no objection as a representative of the du Pont Company, and have nothing more to say." (GTX 591).

Kettering replied affirming the desirability of the du Pont organization supplementing the work in the General Motors laboratory, but felt that some of the du Pont associates should come out to their laboratory to see "what we are aiming at" and that possibly after such visit "there would be no difficulty whatever in getting together and working this matter out." The following month he replied to Lammot du Pont's renewed urging saying:

"In going through this matter I consider that this is entirely outside the range of the Research Laboratory to enter into a contract of this kind. I am, therefore, turning the matter over to the head of our Corporation and any plan which they may work out will be entirely satisfactory to us." (GTX 594).

[fol. 604] Kettering sent a copy of the proposed contract submitted by Lammot du Pont to Pierre S. du Pont. On November 6, 1922 the matter was permanently closed as shown by a file memorandum written by Lammot du Pont:

"In conversation with Pierre S. du Pont he advised that it does not seem possible at this time to institute any plan for cooperation on chemical research work between General Motors Corporation, his feeling being that as problems come up, special arrangements with reference to each should be made between the two companies, rather than an attempt now to make a general arrangement to cover prospective cases." (GTX 598).

Kettering testified that when the proposed contract was originally discussed at the Wilmington conference, he was opposed to it because "du Pont Company was thinking in terms of manufactured chemicals rather than the research chemicals General Motors was interested in." Sloan also testified: "the fact is that the whole proposition was unsound. Mr. Kettering was against it. Everybody was

against it. It couldn't be considered from the General Motors point of view."

During the negotiations concerning thi General Chemical Agreement, on March 22, 1922, Pierre S. du Pont sent a brief report to Irenee du Pont on the new "doping" compound--tetraethyl lead—and stated that:

> "Mr. Kettering would like to take up the question of manufacture with the du Pont Company representatives at an early date." (GTX 610).

On April 15, 1922 the patent application covering TEL was filed and Dr. Midgley wrote to Dr. Stine of du Pont advising him of the "new anti-knock material" TEL.

[fol. 605] It was Kettering who made the decision to call in du Pont for assistance in the manufacture of tetraethyl lead. In June 1922 Kettering invited Irenee du Pont to come to Dayton to discuss the problem. Thereafter, he met with C. S. Mott and Pierre S. du Pont and proposed that the manufacture of TEL be started as soon as possible by du Pont in order to produce about one hundred gallons a day. Sloan testified that he recognized General Motors had no competence in chemical manufacture and that research and manufacture of chemicals were quite different; that the manufacture of tetraethyl lead involved danger and was an entirely new venture, the product never having been manufactured in the United States. He stated du Pont had demonstrated through its war work "its ability to deal with problems involving dangerous materials, such as dynamite; and their well organized research offered the best opportunity for us to produce tetraethyl lead and put it on the market."

Kettering and members of his staff went to Wilmington for a series of conferences with Irenee du Pont and members of the du Pont chemical staff. Irenee du Pont advised Dr. Stine, Harrington and Reese of du Pont of Kettering's forthcoming visit and stated he was anxious for du Pont to sell Kettering on du Pont's ability to help General Motors on the TEL proposition.

At this time, du Pont without a written contract, undertook the production of TEL using the bromine process developed by Midgley. On September 5, 1922 General Motors Research reported to the Executive Committee of General

Motors that satisfactory progress had been made in the production program, that research and production at General Motors could be dropped, and that the du Pont Company would continue production. Kettering testified he told Sloan that a contract should be made since there was [fol. 606] nothing between the two companies regarding prices or anything else. Sloan wrote Kettering advising him that Irenee du Pont also felt that a more definite arrangement between the companies should be made and that an appointment had been made for Kettering, Irenee du Pont, Harrington of du Pont, and Sloan to discuss the matter.

On October 6, 1922 General Motors and du Pont entered into a contract relating to the manufacture of tetraethyl lead. Under this agreement du Pont was to build a plant to produce TEL at the rate of one hundred gallons (1300 lbs.) a day using the ethyl bromine process; the price was set at $26 a gallon; the contract was a "continuing one" but included a provision for cancellation and gave General Motors the right to manufacture TEL itself or have it manufactured by others if at any time du Pont prices should not be the lowest.

The distribution of tetraethyl lead was made in February 1923 at gas stations in Dayton, Cincinnati, and Hamilton, Ohio and by the middle of 1923 had tremendous public acceptance. In April 1923 Midgley of General Motors met with Howard of Standard Oil, which corporation had been interested in the anti-knock project from the beginning. At this meeting Howard revealed a new ethyl chloride process developed by a chemist at Standard Oil. This new process could produce tetraethyl lead at less than $10 a gallon which was cheaper than the ethyl bromine process. There was a shortage in the supply of bromine from commercially developed sources.

During this time Midgley continued working out distribution arrangements of TEL with the various oil companies, including Standard. Midgley suggested that Standard consider the possibility of its manufacturing TEL and offered that if Standard would establish facilities for manu- [fol. 607] facturing one hundred gallons of TEL per day, General Motors "would then sign with them a similar contract to the one now in force with the du Pont Company";

that Mr. Howard stated to him they were not chemical manufacturers and suggested a meeting between the principal executives of the two companies to develop a "working arrangement between General Motors and Standard Oil." On June 15, 1923 Mr. Pickard, General Manager of du Pont's Dyestuffs Department wrote to Irenee du Pont that Standard had developed a new cheaper process for producing TEL.

On January 28, 1924 Sloan wrote to Irenee du Pont, president of du Pont, that he had talked with two or three of the Standard Oil people with reference to TEL; that they reported that in discussing the manufacture of TEL with Kettering and Midgley they had been encouraged to see what they could do in developing a process for marketing TEL; that they had a method covered by patents which gave lower cost of production; that Standard had a contract with General Motors on the distribution of TEL and was urging a deal to license competitors to distribute TEL thereby getting broader distribution which "they claim will be in our interest in return for that they want the right to manufacture for our account tetraethyl lead at a price competitive with the du Pont Company." He expressed his thought that since TEL was still in the development stage that manufacture by Standard should not be discussed and further did not think it was good business "from our standpoint for them to manufacture tetraethyl lead and at the same time have such a large slice of the distribution." In addition he stated he would rather obtain a license from them, pay for it and "get the du Pont Company to use it in reducing the cost" instead of dealing with Standard as a manufacturer. Irenee du Pont replied on February 2, [fol. 608] 1924 that du Pont was in accord with that course of procedure and suggested General Motors write Standard indicating it had contacted du Pont on its estimated requirements for TEL "believing that they are the best equipped company to handle complicated organic chemical problems" and also suggesting that Standard contact du Pont "to see if they are in any wise interested in your proposed method for the manufacture of that compound." Sloan sent Irenee du Pont a copy of the letter he sent to Standard Oil, and stated he thought it best in view of his conversation with Standard Oil to write along dif-

ferent lines and had taken the liberty of modifying Irenee's suggested letter. His letter to Standard stated that because of rapid developments in the plant built for the manufacture of TEL and the fact that the whole picture is more or less in the development stage, it was desirable to refrain from discussing the situation at the present time" but that General Motors would be glad to discuss the relative merits of the two processes and perhaps work out a plan which would preserve the equities."

The minutes of the Executive Committee of General Motors for February 27, 1924, members present being Pierre S. du Pont, Raskob and Sloan, reported that discussion was had on the future policy of General Motors in the development and marketing of TEL and that "it might be possible to work out a plan whereby a company could be formed to control our patents and the distribution of the material which would be jointly controlled by the large oil companies and ourselves."

Several conferences took place in June 1924 between General Motors and Standard Oil on the subject of tetraethyl lead and the possibility of Standard engaging in its manufacture. Standard proposed to erect a one hundred gallon plant, chlorine process, to be installed at the Bayway Re- [fol. 609] finery for the purpose of affording "the experience basis for future construction of this process" and "provide an additional one hundred gallons of TEL per day for the end of the peak season, September and October."

On June 25, 1924 Howard of Standard Oil had a meeting with Irenee du Pont to be shown through the du Pont plants. Irenee du Pont testified that he learned for the first time of Standard's interest in the manufacture of the anti-knock compound. Irenee du Pont wrote to Sloan following Howard's visit stating that Howard was anxious to start the Standard plant at Bayway, that Irenee appreciated there would be some advantages in having an independent plant operated by General Motors and Standard "as a check on prices charged by the du Pont Company and also to obtain such advantage as there may be in the enthusiasm of the Standard Oil men to put across their own 'baby.'" To this letter Sloan replied indicating du Pont should in-

crease its production and production facilities for TEL; that

> "for psychological reasons we should permit the Standard Oil Company of New Jersey to expend $35,000 or $40,000 of their own money to experiment with the 100 gallon a day outfit in one of their plants, I believe in Bayway, in a building which they could use temporarily for the purpose. This will serve to satisfy them from the psychological standpoint and it is certain that it will be impossible to operate such an experimental plant successfully when the larger units are running, but will give them a means to work out their viewpoint which certainly can do us no damage when we approach it from the bigger way.
>
> "Any further thought of developing any real production other than under the auspices of the du Pont [fol. 610] Company will be deferred until some later time." (GTX 661).

Sloan wrote to Kettering on July 25, 1924 reporting a conference he had with Howard of Standard Oil for the formation of the company to be jointly owned by General Motors and Standard under the name of the Ethyl Gasoline Corporation. In August 1924 a formal agreement was entered into between General Motors and Standard Oil organizing such a corporation.

This agreement provided that the capital stock of Ethyl be divided equally between General Motors and Standard, each to have a 50% interest; each was to have five directors of the ten members on the Board; each was to grant Ethyl exclusive licenses under all patent rights from their respective patent applications in the field of anti-knock compounds; and each was to grant Ethyl exclusive rights on all future discoveries until August 1, 1940. In addition, the agreement provided that Ethyl would handle the distribution of TEL and would purchase the same.

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

including the Standard Company; * * * provided, however:

"Purchases shall be made from E. I. du Pont de Nemours & Company under the existing contract between it and General Motors * * * until the expiration of said contract or until a substitute therefor is made direct with the Ethyl Company." (GTX 668).

The General Motors directors on the Ethyl Board were Sloan, Kettering, Donaldson Brown, Midgley and John T. [fol. 611] Smith; the officers were Kettering, President, Howard of Standard, Vice President, and Midgley, General Manager.

Tetraethyl lead is a poisonous substance. Both General Motors and du Pont were fully aware of its toxic effects. Sloan in June 1924 wrote to Kettering regarding the appointment of a board of medical men to study the problem. Sloan and Kettering both testified that General Motors had not invented TEL as a product to add to its line in order to make money producing and selling it, but that its interest was the advance in engine compression and to make a better and more efficient motor car.

The properties of tetraethyl lead made its production on a commercial scale a hazardous undertaking and Sloan stated he fully realized the dangers incident to the manufacture of this material. He testified that he knew Standard was not a chemical manufacturer, that its chief business was digging wells and pumping oil from the ground, and he felt Standard was not equipped to enter the field of chemical manufacture at this stage of TEL's development. His acquiescence to Standard's plant at Bayway was because Standard wanted to try the manufacture of TEL and further he thought something might be learned from the experiment.

During the Summer of 1924 technical planning at Bayway and du Pont's Deepwater plant proceeded, and a difference of opinion emerged between the engineers of the two companies with respect to the manufacturing equipment to be employed in producing the ethyl chloride process. Harrington testified that 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 [fol. 612] "too dangerous" for du Pont to use, notified Standard to that effect, and received permission from Ethyl to install equipment of its own design.

In October 1924 the Bayway plant was stricken with a series of fatalities resulting from TEL poisoning—there were five deaths within a period of a few days, with many other employees being poisoned. A public uproar followed; exaggerated reports filled the press; university professors made adverse comments; major oil companies announced they would no longer distribute TEL and municipalities banned its distribution. The Standard plant was immediately closed. The New Jersey authorities ordered its dismantling and Standard was ordered not to engage in TEL manufacture. Following this disaster Sloan in writing to Irenee du Pont on December 12, 1924 asking him to take a position on Ethyl's Board stated:

> "du Pont will always be the manufacturing agent of Ethyl Gasoline Corporation whether we make tetra ethyl lead or whatever we make, now or in the future. I am sure of that. * * *" (GTX 710).

Ethyl was forced to suspend its sales of TEL completely. Ethyl requested du Pont to withhold deliveries from its bromine process plant. The figure of $1.66 per pound was the approximate cost of producing TEL at this plant and $1.17 at du Pont's chloride plant. Du Pont withheld its deliveries. Howard wrote to Irenee du Pont on March 28, 1925 stating the problem following the Bayway disaster as follows:

> "while owing to conditions over which neither party has had any control it would have been to the ad-[fol. 613]vantage of the du Pont Co. to have continued uninterruptedly to produce lead from its bromine plant and its failure to do so, out of consideration for the interests of the Ethyl Corp., resulted in some loss to the du Pont Co., this is a loss of profit which neither party contemplated at the beginning the du Pont Co. would make. On the other hand, the du Pont Co. is suffering a loss of profits which the parties did con-

template the du Pont Co. would make, through the failure of the chloride plant to deliver the quantity of lead which both parties hoped and expected it would deliver prior to April 15th.

"Owing to conditions over which neither party has had any control, the Ethyl Corp. at the same time finds itself with a stock of over $1,000,000 worth of lead on hand and deliveries still coming in very much more rapidly than the goods can be marketed at present. This situation was not contemplated by the Ethyl Corp., but, on the contrary, the Ethyl Corp. had hoped and expected to be able to market immediately and at a profit to itself any lead supplied to it by the du Pont Co. prior to April 15th, even though such lead bore a price of $1.66 per pound." (GTX 677).

He continued stating that he was content to leave the decision in Irenee du Pont's hands, "with entire confidence in your reaching a fair conclusion."

Irenee du Pont replied to this letter stating:

"apart from the contract we were asked to defer deliveries of material which we could make in January and would have made at a profit. We suggested that these deliveries be simply deferred and not cut out entirely, an eminently fair proposition to make. Owing [fol. 614] to the fact that the Ethyl Gas executives were very busy and/or away, delay would have ensued detrimental to your interests if we had stood 'pat' and waited for you to 'come across'. In our desire to be helpful to the 'picture' we acted on your orders without getting approval for a deferment of the deliveries in question. It seems to me only equitable that you should have accepted our offer of deferment and not take advantage of our efforts to be of service to you.

"It is, therefore, my judgment that you should accept delivery at $1.66 per lb. of the amount of tetraethyl lead which we voluntarily abstained from making and shipping in January, and that, further, if owing to our misfortune at the ethyl chloride plant you are sufficiently short of ethyl lead so as to make a loss thereby, the amount up to that accruing by reason of the lead not delivered in January, should not

> be assessed to us on the damage paragraph." (GTX 679).

He admitted that from a law point of view Ethyl might maintain its position, but that the equities indicate otherwise.

When the manufacture of TEL was suspended, there was also disagreement between Ethyl and du Pont as to the settlement to be made on cancellation of their contract. Under the terms of its contract du Pont was to be reimbursed for its expenditures in building the chloride plant. Webb in a letter to Sloan stated that Ethyl had informed du Pont it would be reimbursed for the cost of such building and any expenditure incurred so as to make du Pont "whole". He stated further:

> "It seems to me that we should get from the du Pont [fol. 615] Company at the time of settlement assurances of placing us in possession of all facts and data relative to this work, so that we may have the benefit of any information or knowledge gained in such research work. This has not been suggested to the du Pont Company as a part of settlement, but I feel confident that Mr. du Pont will not raise the slightest objection to giving us full and complete copies of or access to this data." (GTX 685).

He also reported that he wrote to Mr. du Pont:

> "I naturally assume that if operation of the plant is not resumed during our present contract period and meanwhile it has been paid for by us in accordance with the terms of the understanding which we are now attempting to reach, then it would seem to me that the building, its equipment and appurtenances (excluding land) would be our property." (GTX 685).

but that Mr. du Pont replied:

> "If it is your desire that the plant be scrapped at your expense, the proceeds of the scrapping should properly be yours under a general proposition that we shall be made whole. However, the economies of such a procedure are not good, which being the case, it

> seems essential that the physical property of unknown and somewhat doubtful value should be left in our hands, perhaps as a compensation for our having waived any profits on the contract." (GTX 685).

Webb stated that "if it should not ultimately be used to manufacture something for us that we be paid the salvage value, whether demolished or converted to some other purpose."

[fol. 616] Howard had written Webb of Ethyl on June 29, 1925 regarding the discussions concerning settlement and stated:

> "If at any time the du Pont Co. wishes to make use of the ethyl plant for any purpose, it shall then pay to the Ethyl Corp. the then value of the plant to the du Pont Co. for the purpose for which they contemplate its use." (GTX 686).

He further revealed the sum of $1,500,000 was to be paid du Pont on account of the settlement. On June 30, 1925 Webb delivered the $1,500,000 "without any strings attached to it at all" and further discussion of the settlement terms were to be had later with Irenee du Pont.

Irenee du Pont wrote to Webb on July 1, 1925 that Howard's letter of June 29, 1925 relating to the adjustment of the controversy was "not satisfactory" stating that du Pont could not cede ownership of the plant and that

> "our contract speaks for itself as regards ceding to you any inventions on the anti-knock compounds but we could not undertake to teach you * * * how to carry on that manufacture as well as we could do." (GTX 688).

Webb replied saying that he considered the salvage or conversion value of the chloride plant as the principal matter to be adjusted between them.

In August 1925 Webb suggested that settlement of the question of ownership of the plant be deferred until the investigation then being conducted by the Surgeon General of the United States was completed, and if the report made by him was favorable Ethyl would make another contract

covering manufacture of TEL with du Pont and "the salvage problem would have answered itself," but this sug- [fol. 617] gestion was not acceptable to Irenee du Pont who did not wish to defer the issue. Harrington testified that eventually Webb's suggestion was accepted and the matter was not settled until the contract between Ethyl and du Pont was negotiated in March 1926. Du Pont retained the chloride plant at Deepwater, since in January 1926 the Surgeon General of the United States in a report approved renewal of the business and production of TEL and manufacture was resumed in March 1926.

In the negotiations regarding this controversy Sloan testified he took little part since he wanted to be in a completely unprejudiced position, although he revealed he believed the du Pont position was entirely correct. In March 1925 he wrote to Irenee du Pont that he had come to the conclusion it was a mistake to leave the management of Ethyl's property so largely in the hands of Dr. Midgley who was entirely inexperienced in organization matters, and thought progress would be made more rapidly and constructively if there was more of a business side to the development, but that Kettering opposed that idea. He continued that while Standard Oil was not receptive to the idea in the beginning he found later in discussion with Mr. Teagle of Standard that they had come to the same conclusion and it was agreed that Mr. Kettering and Mr. Howard, President and Vice-President, respectively, should resign and "an active President should be appointed of proper ability, administrative and otherwise, to deal with the problems that confront the Corporation". Sloan proposed Earl W. Webb then in the Legal and Real Estate Department of General Motors and Standard accepted the recommendation. Webb was appointed President in the Spring of 1925 when he had made a satisfactory report on Ethyl's operations as a preliminary test of his qualifications.

Ethyl's losses during the shutdown necessitated a series [fol. 618] of loans from Standard and General Motors and by July 1925 General Motors and Standard had loaned Ethyl $1,700,000 with authorization for further loans of $500,000. On May 22, 1925 Irenee du Pont wrote to Raskob at General Motors that he approved of the borrowing of

funds by Ethyl from General Motors and Standard and said:

> "As the amounts due to the du Pont Co. are in some particulars overdue, I am very glad you can arrange to immediately send the necessary cash to Ethyl Gasoline Corp." (GTX 682).

During the cessation of manufacture at Ethyl's plant, Webb and the Dow officials had a series of conferences on the subject of the manufacture of TEL for Ethyl. Dow had developed a process for producing TEL by means of a reaction which used magnesium. In April 1926 Webb also came in contact with the American Research Laboratories, which also claimed to have developed a process using magnesium and offered to undertake the manufacture of TEL. Webb visited the Dow plant with a representative of the American Research Laboratories and upon seeing the Dow chemical manufacturing facilities, the American Research Laboratories realized "it would be rather foolish for them to venture into anything of this kind", suggested cancellation of the contract and an arrangement whereby manufacture under their process would be conducted by Dow. The American Research Laboratories process proved worthless. Irenee du Pont, then a director of Ethyl and aware of American Research Laboratories' desire to manufacture, expressed opposition pointing out that if another disaster occurred after the Bayway disaster only a few months before:

> "No amount of explaining will excuse our directors for having encouraged novices to undertake such a dangerous operation." (GTX 711).

[fol. 619] Dow continued as a prospective manufacturer until late in 1926 when it informed Webb it was unwilling to undertake the manufacture of TEL by any process because of the hazard factor.

During these incidents du Pont and Ethyl entered into a contract in March 1926 for the production and sale of TEL. From 1926 to 1937 du Pont sold TEL to Ethyl under a series of short term contracts negotiated for Ethyl by Webb. The 1926, 1928 and 1929 contracts made no reference to patents, improvements or new developments in TEL,

and from 1928 the contracts provided that Ethyl's entire requirements were to be taken from du Pont.

In 1929 Ethyl Corporation gave consideration to the situation that would exist when the basic patents expired—Midgley's to expire December 30, 1947, and the chloride process patent of Standard January 1, 1946. Ethyl, not being a manufacturer, would find it difficult to manufacture the product without knowledge of the du Pont processes. Sloan stated in a letter to Webb of Ethyl that they should make their contracts on the supply of TEL so that the supplier of the lead, the du Pont Company

> "together with others later on, would at all times sell to us exclusively" (GTX 748)

so that if tetraethyl lead is still a factor in the fuel situation at the expiration of the patents and there was no restriction on manufacturers as to whom they would sell the material, "there would be no place in the picture for Ethyl."

In 1930 a new contract was executed between Ethyl and du Pont and in all subsequent contracts between them until 1938, it was provided that if Ethyl would purchase at least 50% of its annual requirements of TEL from du Pont [fol. 620] until January 1, 1938, du Pont would on that date make full disclosure to Ethyl of all its patents, know-how and secret processes on TEL manufacture and would license Ethyl to manufacture TEL under the du Pont patents.

From 1930 to 1937 Ethyl began a long term campaign to put itself in a position to manufacture TEL. Several proposals were considered and rejected before the execution of a Manufacturing Service Agreement between du Pont and Ethyl on January 1, 1938. In 1936 du Pont agreed to build a TEL plant for Ethyl at Baton Rouge, Louisiana and the following year agreed to construct a second plant for Ethyl. Under the 1938 agreement du Pont contracted to construct for Ethyl plants at Baton Rouge, Louisiana, a site selected by Ethyl, lease the du Pont facilities at Deepwater to Ethyl, and operate them as Ethyl's agent in return for a specified percentage of Ethyl's proceeds from operation for the next ten years. Du Pont further agreed to advance certain funds to Ethyl and build such tetraethyl

lead and raw material plants as Ethyl required. In addition, the agreement provided that on the expiration of patent protection in 1948, Ethyl and du Pont would each be free to engage in both the manufacture and distribution of tetraethyl lead.

During the negotiations preceding the ultimate agreement, Sloan replied to a letter from Webb that he was not opposed to contracting to give du Pont 50% of the business of Ethyl but felt strongly that Ethyl should be entitled to any of du Pont's improvements resulting from the manufacture under Ethyl's patents.

Sloan wrote to Lammot du Pont in April 1930 in connection with the proposed know-how clause and urged him to do anything he could to "facilitate this and broaden the base upon which it is developed." Lammot du Pont felt that Ethyl did not have the background to undertake the manufacture of a dangerous chemical.

[fol. 621] On June 9, 1936, prior to the ultimate agreement, a comprehensive report and study of the origin and early history of the tetraethyl lead business, including suggestions on arrangements to be worked out between Ethyl and du Pont, was made on behalf of the du Pont Company by N. P. Wescott and submitted to F. Spaare, Director.

During the pre-1938 period du Pont fixed its prices on the sale of TEL to Ethyl at a level high enough which would give du Pont a manufacturing profit equal to one-third of the total profits derived both from the manufacture and distribution of TEL, and the remaining two-thirds to be divided equally between General Motors and Standard in the form of dividend payments from Ethyl, after deducting the royalty due General Motors on its patents. From 1930 to 1937 du Pont's total profits from Ethyl's operations were approximately $35,000,000 and General Motors and Standard received dividends of approximately $30,000,000 each, and in addition General Motors received the sum of $19,000,000 in royalties.

The Manufacturing Service Agreement in 1938 provided a compensation of 30% of Ethyl's gross operating profits to be paid to du Pont. The 30% was premised on a minimum of 53,000,000 pounds of tetraethyl lead and one-tenth of the profits for production above that figure.

The percentage of profits received by du Pont is reflected

in the defendants' chart which premises the ratio of du Pont profits to Ethyl's profits on figures before taxes and bonus of either corporation. The basic figures used by the Government chart also show du Pont's profits before taxes and bonus. The average share of Ethyl's gross operating profits which du Pont received during the 1938-1948 period was 18%.

Shortly after the 1938 agreement Standard Oil conveyed [fol. 622] to du Pont and Ethyl the information that a new oil cracking process in the gasoline industry would require an expansion in the production of TEL, and necessitate the erection of additional plants at Ethyl's Baton Rouge site.

On December 31, 1947, all the basic patents relating to the production and use of TEL having expired, du Pont and Ethyl discontinued operations under the 1930 agreement and each went its separate way. Ethyl's lease on du Pont's Deepwater plant expired at the same time and du Pont undertook to manufacture lead for its own account. Ethyl took over the direct operation of the larger plant facilities at Baton Rouge. Both sold their respective fluid to oil companies. J. R. Sabina, a du Pont executive, testified that beginning in 1945 du Pont began to expand its petroleum products staff; a petroleum laboratory was organized in the Fall of 1947, and in anticipation of freedom from Ethyl's patent in 1948, every oil company in the United States had been personally visited and orders were solicited.

In 1948, all but seven of the fifty-nine companies that dealt with du Pont had dealt previously with Ethyl. In 1948 du Pont owned at Deepwater the four original plants constructed before 1938, and Ethyl owned five plants at Baton Rouge, four of which were designed to have the same size and capacity as the Deepwater plants. In 1948 du Pont had a capacity of between 180,000,000 and 194,000,000 pounds per year for its four plants, or about four-fifths of Ethyl's capacity. John F. Daley, General Manager of the Organic Chemical Department at du Pont, testified that in selling to the oil companies, the Ethyl trademark was very much of an obstacle. He also testified that du Pont lost customers to Ethyl and vice-versa in the years following the severance.

The evidence with respect to the discovery and development of TEL fails to establish the Government's charges.

[fol. 623] It will not support a finding that the discovery of TEL was surrendered to du Pont pursuant to 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.

Kinetic Chemicals, Inc.

In 1928 Frigidaire and its leading competitors were using sulphur dioxide as a refrigerant, a chemical presenting health hazards. Pratt, Kettering, and E. G. Biechler, General Manager of Frigidaire, expressed a desire for a new safe refrigerant and Mr. Midgley was assigned the task of working on the problem. An appropriation for this research was approved by Frigidaire. The objective sought by this research was a refrigerant which had a suitable boiling point, non-toxic and non-inflammable, and which had a distinct but not unpleasant odor.

Thomas Midgley spent eighteen months on this project and by the end of 1928 had determined that Freon 12 (F-12) met the above requirements and the discovery was [fol. 624] patented, with patents being assigned to General Motors. The principal elements of freon were chlorine and fluorine, both being dangerous and toxic. During 1929 and early 1930 Midgley continued to work on Freon "to develop suitable manufacturing processes." In August 1929 Pratt approved the erection of a small plant to produce F-12 in quantities sufficient to make laboratory tests. Frigidaire erected a semi-commercial plant in the Winter of 1929-1930.

In March 1930 Biechler wrote to Pratt stating a decision on the manufacture should be made as quickly as possible, recommending that either Frigidaire or some other division of General Motors manufacture the same because he felt

> "a great deal would be gained if we would control this rather than let a chemical company do it." (GTX 838).

Pratt, on March 15, 1930, although having approved the small scale production for test purposes of Frigidaire, stated:

> "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 a very thorough consideration has been given to all of the factors involved." (GTX 839).

He stated that he would have to discuss the same with Sloan. When he did so, Sloan agreed that General Motors should not manufacture the new refrigerant. Sloan testified that he took that position on the basis of General Motors' lack of competence to manufacture a material involving the dangers in manufacture "somewhat analogous to TEL." Sloan left it to Pratt to investigate and develop [fol. 625] a suitable program for supplying Frigidaire's requirements of F-12. Without consulting Sloan further, Pratt went to see H. F. Harrington of the Dyestuffs Division of du Pont and suggested that a joint company be formed between General Motors and du Pont to sell freon. He testified he selected du Pont because of their experience in handling dangerous chemicals and because he had confidence in the du Pont people. Biechler expressed his pleasure that the responsibility of manufacture had been assumed by du Pont. The desirability of getting into the production of freon quickly was recognized by all.

Harrington and Pratt agreed substantially upon the details of the contractual agreement and Pratt suggested that the new company be owned 51% by du Pont and 49% by General Motors, so that operating responsibility rested on du Pont which had the personnel and experience required

for manufacture. Pratt also suggested a provision that future chemicals developed by General Motors be first offered to Kinetic, the joint company.

The formal agreement organizing Kinetic was executed August 27, 1930 and was approved by the General Motors Finance Committee, the minutes reciting:

> "It was felt that because of the experience of the du Pont Company in the chemical field that it is to the interest of General Motors Corporation to arrange with the du Pont Company for the commercial development and production of these chemicals rather than for us to undertake the organization of the necessary personnel, technical staff, etc. for their production; and in order to give the du Pont Company an incentive for the most efficient development of these chemicals it was considered mutually advantageous that the du Pont Company should have the right to subscribe to [fol. 626] 51% of the stock of the Kinetic Chemicals, Inc. Under this agreement a royalty will be paid to General Motors for the right to use the inventions transferred to Kinetic Chemicals, Inc. as covered more fully in the agreement." (GM 238).

The clause regarding future General Motors chemical discoveries required that the offer to Kinetic of any such discovery should be "on such terms as may be mutually agreed upon." The new corporation had a board of directors of five members—three selected by du Pont and two by General Motors; its personnel was furnished by du Pont and the latter received a management fee of $50,000 a year; General Motors granted Kinetic an exclusive license on its patents covering freon and received a royalty in the amount of 5% of sales.

The process used by Frigidaire during the experimental period was found to be so expensive as to be commercially prohibitive. Du Pont chemists assigned to the problem succeeded in developing a feasible commercial manufacture which reduced the costs. In addition, an essential raw material—anhydrous hydrofluoric 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.

The New York Fire Department was disturbed over the possible danger in the use of freon and du Pont was able to demonstrate its properties as being a safe refrigerant. Du Pont, through Kinetic, also undertook a general educational campaign to convince the public of its safety.

With respect to the clause regarding future chemical discoveries by General Motors, Pratt wrote to Lammot du Pont on July 20, 1931, as follows:

> [fol. 627] "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 process.
>
> "To summarize, as far as I am concerned I hope to see General Motors Corp. utilize to the fullest extent the chemical experience of the du Pont Company in manufacturing any chemical compounds that General Motors laboratories may discover, where there is a possibility of commercialization." (GTX 899).

Clause Seventh of the agreement provided:

> "* * * it being further agreed that future chemical developments (other than those relating to 'said products') originating in the laboratories of General (Motors), or its subsidiaries, shall be offered by General to the New Company, on such terms as may be mutually agreed upon, and if after six months the New Company shall elect not to exploit such new chemical developments, the General shall be free to dispose of the same elsewhere." (GTX 850, p. 3).

Pratt suggested this clause for the reason he believed that "General Motors instead of having a lot of different activities" might wish to use Kinetic as a single vehicle for developing any chemical discovery it made. He also testified that during the existence of the clause, no development was turned over to Kinetic.

In May 1944, fourteen years after the agreement, John T. Smith, General Counsel for General Motors, gave his

opinion that this clause was "unenforceable," and the tw [fol. 628] companies by formal contract cancelled it in it entirety on June 6, 1945.

In the Fall of 1923, Biechler reported to Pratt that the supply of lithium chloride necessary to be used in an air-conditioning system which Frigidaire was developing was limited and asked Pratt to investigate the possibility of additional supply of lithium chloride. Pratt informed Harrington condfidentially of the Frigidaire work on the air-conditioning system, asked whether du Pont could provide the additional supply, stated that he would rather have the du Pont Company undertake the chemical development than General Motors, and inquired whether it would be an industry in which du Pont would be interested. He testified, "It was a business that required mining, and just a complete new business that wasn't in line with anything we were doing." General Motors did not pursue the experiment using lithium chloride and there was no need for an additional supply of the lithium chloride refrigerant.

From the outset, Freon 12 and all of the freons, with one exception, were offered for sale to all refrigerator manufacturers. Thomas Midgley in 1932 discovered Freon 114. Each of the freons had distinct properties and were suitable to different uses and types of refrigerator machines. Frigidaire developed a rotary compressor for its household refrigerators and discovered that Freon 12 could not be used efficiently in the new compressor. Freon 114 was found to be effective and a product patent was obtained.

The Kinetic Board on September 29, 1932 approved the construction of a plant to manufacture F-114 and it fur- [fol. 629] ther resolved that for the time being commercial distribution should be confined to Frigidaire. Pratt testified that Frigidaire had developed its own machine, developed the special refrigerant for it, and to release that refrigerant would cause competitors to duplicate their machine.

The exclusive sales policy on F-114 continued, and in 1938 Sears Roebuck threatened an appeal to the Federal Trade Commission to force the release of this freon. In the Fall of 1938 W. W. Rhodes, Sales Director of Kinetic, reported to its President, E. G. Robinson, that a market for approximately one million pounds of F-114 a year could be obtained if sales restrictions were lifted.

Harrington testified that the attitude of the du Pont members on Kinetic's Board was that for the first year or two it was reasonable for Frigidaire to make the request for exclusive use, and after that argument regularly ensued between General Motors and du Pont on this policy but "General Motors was so urgent and so insistent on the thing, rather than create the ruction that would be involved if we just completely overrode them, the du Pont directors went along and allowed the product F-114, to be exclusive for quite a long time."

Following the challenge Sears Roebuck had made, the Kinetic Board on October 3, 1938 met again to review this policy. Harrington testified at this meeting "General Motors was more vehement than ever that we should reserve the thing to them for a further length of time, and in order to keep peace in the family we agreed."

General Motors General Counsel, John T. Smith, wrote to Ernest R. Breech, General Motors Vice President, on May 8, 1939 on the exclusive use by Frigidaire and concluded that the best way to protect Frigidaire in such use was to have Kinetic Chemicals grant an exclusive license [fol. 630] to it. This recommendation was adopted and an agreement executed on September 18, 1939 accomplishing such result. During the war Frigidaire granted permission to others to use the refrigerant. In June 1943 the question of its unlimited sales again arose and in 1944 the product was offered for sale generally when the exclusive use license to Frigidaire was cancelled. However, F-12 proved to be a cheaper and better refrigerant, and Sears Roebuck refused to purchase F-114 when it was offered to it, and no manufacturer of household refrigerators uses F-114 today, including Frigidaire.

The Development Department of du Pont reported to the Executive Committee in April 1945 on anticipated post war demand for freons and their future promise in plastics and other fields, and recommended that du Pont negotiate for the purchase of General Motors interest in Kinetic if General Motors indicated a desire to sell.

The actual purchase of General Motors interest in 1950 was preceded by negotiations which began in 1948. On January 1, 1950, General Motors sold its 49% interest for approximately ten million dollars. Since this purchase was

subsequent to the filing of the complaint in the instant case, the Department of Justice was consulted, and it assured du Pont in writing that it did not oppose the purchase and if it were carried out the prayer in the complaint seeking divestiture from du Pont would be dropped. Upon that assurance the purchase was made.

Synthetic Rubber

In January 1926 Sloan authorized Midgley to conduct some research on synthetic rubber under Kettering's supervision, authorizing a budget of $60,000 for the first year. When Midgley had worked two months on the project, [fol. 631] James McEvoy, Director of the General Motors Patent Section, wrote to Sloan expressing concern about Midgley's project, criticized Midgley's research technique as being deficient in failing to give sufficient evaluation to existing literature in the field, and indicated that Midgley was wasting time and money because prior patents existed on the discoveries he was trying to make. Sloan decided to let Midgley continue, pointing out that Midgley was "a research man first and foremost", and stated that he fully recognized that it was a problem on which it would take over six months to accomplish anything. Midgley went ahead with his research, and under arrangements approved by Sloan conducted his research in the Thomas and Hochwalt Laboratories in Dayton.

A year after this work began, Lammot du Pont heard of it and stated that du Pont had been working on one phase of synthetic rubber and was not conducting as broad an investigation as General Motors. In writing to Raskob, he questioned the advisability of General Motors spending this money, since a great deal of work had already been done on the subject by competent people and well organized research groups; he thought that the du Pont Company, which had also been doing some research, was better equipped for the purpose than General Motors. He further stated:

> "Should General Motors be successful in developing a process, it would probably not be desirable for it to go into the manufacture; whereas if du Pont were successful, it is just the kind of manufacturing opera-

tion which the Company should be qualified to enter. This is an additional reason why du Pont should work on the problem rather than General Motors.

> "In view of the above, it seems tc me that either Gen- [fol. 632] eral Motors must be making a mistake in working on this problem, or du Pont is making a mistake in not working on it in a broader way. Won't you refer this letter to the party responsible for General Motors having embarked on this investigation, and ask him to let me know the reason which has guided his decision to undertake the work." (GTX 888).

Raskob replied that the rubber situation was very close to General Motors Corporation and it was tremendously important for the corporation to interest itself in every possible phase of it, and further felt that the laboratories were equipped to do the research that was being conducted. Raskob referred Lammot du Pont's letter to Sloan, who also wrote to Lammot du Pont defending the research being conducted. Lammot du Pont replied that he regarded synthetic rubber to be a problem which would tax the facilities of the most complete laboratory, but

> "Do not let me trouble you any further on this point —I am not trying to force upon you my views or opinions. If I have put into your mind the thought that possibly synthetic rubber is not a suitable subject of investigation by the General Motors Chemical Department, then I am perfectly willing to accept your decision." (GTX 891).

In February 1927 Sloan again wrote to Lammot du Pont that he thought it was desirable to encourage people in the General Motors organization, that he had done so in Midgley's case even though he did not expect the research to accomplish much, and stated:

> "As I said before, if nothing tangible develops during the current year, I shall feel fully warranted in feeling that he has been given his chance and that, [fol. 633] considering we are not directly concerned even if we are greatly indirectly concerned, we might

better transfer his efforts to some other direction.' (GTX 892).

Lammot du Pont replied acknowledging the letter and stated that he appreciated fully the desirability of allowing good minds to "have a little more than the normal amount of rope", and that du Pont followed this also since it tended to "keep up the enthusiasm and interest of all concerned."

In March 1927 Midgley suggested that his work be reviewed by a "good rubber chemist". Sloan replied that he thought this was a mistake since he felt a chemist in commercial practice and even the du Pont Company would not have the imagination, sympathy, and ethusiasm possessed by Midgley, and preferred to leave the determination to his own judgment, supported by Mr. Kettering.

Midgley went forward during 1927 with his research and made his progress reports directly to Sloan. In December 1927 McEvoy wrote to Pratt that Midgley knew nothing about the subject he had not learned from others and recommended that the "whole operation be terminated".

By April 1928 the price of rubber had dropped from $1.00 to twenty cents a pound. Midgley thought that if he could produce a synthetic rubber it would cost not less than thirty-five cents a pound. Sloan testified that both Midgley and Kettering then determined that General Motors should abandon the project. In late March or early April 1928 it was decided that while the work for General Motors should cease, Midgley could have all the equipment and continue the research on his own if he desired. On April 27, 1928 an agreement to that effect was executed.

Midgley went ahead on his own, but as Sloan testified, [fol. 634] he never succeeded in solving the problem, but made some very outstanding contributions to the evolution of synthetic rubber.

The evidence relating to the formation and operation of Kinetic Chemicals and to General Motors synthetic rubber research does not establish that General Motors had agreed to surrender or was bound to surrender to du Pont its chemical discoveries.

The Court finds that du Pont did not terminate or in any way limit General Motors research on synthetic rub-

ber, although Lammot du Pont, as well as others in General Motors, suggested it was an inappropriate project for General Motors to undertake. Despite this suggestion Sloan directed that the project should be continued. The evidence bearing on the entire incident is inconsistent with either a basic agreement with respect to General Motors chemical research or with du Pont domination of that research.

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.

[fol. 635] Antifreeze

In connection with the glycerin-alcohol incident in 1926, du Pont's proposal that General Motors make a contract to purchase ethyl alcohol from du Pont was rejected by the General Purchasing Committee even though in 1927 du Pont quoted a "special price".

General Motors commenced selling antifreeze in 1933 using glycerin purchased from Glycerin Producers Association. In 1935 the association advised General Motors, which sold the antifreeze to its dealers for resale to the public, that due to a glycerin shortage, none would be available for 1936. General Motors made an effort to meet its needs by trying to purchase ethylene glycol from Union Carbide, which was sold under the name of Prestone. Union Carbide was unwilling to accept the condition that it be furnished under General Motors' private brand name.

Before 1929 du Pont was engaged in the production of a synthetic methyl alcohol known as methanol. In 1930 it

sought an outlet for it. Du Pont marketed the product in 1934 under the trade name Zerone and sought to persuade General Motors to purchase it for resale to its distributors. Zerone had a large market by the end of 1935, but du Pont was unable to sell it to General Motors.

Du Pont made no sales of antifreeze to General Motors until 1936, when it agreed to General Motors' condition that the product be sold under its private brand name. Elmer F. Schumacher, Director of the Polychemical Department at du Pont, testified that at that time he had become aware of the volume of General Motors business and "couldn't for-go the opportunity to enlarge our sales of methanol", capitulating to General Motors demand on the brand name. Irvine W. Thompson, General Parts & Accessories Merchandising Manager of Chevrolet and General [fol. 636] Manager of the Parts Division, testified that after the notification from the Glycerin Producers Association, General Motors immediately sought to find a source of supply for the non-permanent, or methanol antifreeze; that permanent type antifreeze sources were limited to Union Carbide and that company was not interested in contracting with General Motors. He stated that after canvassing every source available for methanol type antifreeze, a contract was signed with du Pont. Contracts were made for six months duration because of future possibilities of getting a better price or product. General Motors purchased this type of antifreeze from du Pont for the period 1936-1940 and packaged the same under the private brand name. It purchased the product from du Pont because it was the only available supplier and because it offered both quality and fair price.

Thompson, who was in charge of General Motors purchases of antifreeze, testified that each season bids were solicited from all known suppliers and a thorough canvass was made for other sources of supply. According to his testimony, the General Motors Divisions continued to buy from du Pont "because we felt very definitely that they gave us the best product at the best price."

In 1939 du Pont developed a new process for making a permanent type antifreeze, described as ethylene glycol, and sold it under the trade name Zerex. The product was approved by the General Motors Laboratories and in 1940

purchasing of this product began and continued until 1953. Du Pont and Union Carbide were the only two producers of ethylene glycol antifreeze. Both Schumacher and Thompson testified that during 1946 and 1947 this type and the methanol type were in short supply; and ethylene glycol was not produced in quantities to meet the market demand until 1952-1953. Du Pont packaged both the methanol and [fol. 637] ethyelene glycol products under General Motors private brand name.

In 1946 and 1947 General Motors purchased 97% of its antifreeze requirements from du Pont. In 1951 when du Pont advised General Motors that it could no longer sell either type of antifreeze under the private brand name for the reason that its purchases were a small portion of du Pont's total sales and too costly to accommodate the packaging requirements, General Motors sought to find another source. In 1953 when other sources became available, Buick, Chevrolet and Pontiac turned to a competitor who agreed to General Motors private brand packaging. Du Pont presently sells antifreeze for resale only to Oldsmobile.

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 reexamined 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.

Miscellaneous Products

Electroplating Chemicals

Electroplating is a process of depositing a coating of one metal upon another and is a highly technical field in [fol. 638] which metallurgists disagree sharply in assess-

ing relative merits of various processes. In 1934 du Pon developed the first improved copper plating process know as du Pont's "High Speed Copper", and development wor on it was done for the next four years. When it was offered in 1938 it was accepted and adopted by a number o electroplaters which supplied the automobile industry, including companies, which did work for Chrysler, Studebaker and Nash. In addition, du Pont sells chemicals for copper electroplating and has sold to electroplaters materials for zinc, cadmium, and tin plating, including sodium, copper, zinc, cyanides, anodes, additive agents and brighteners, even though the most important of its processes was the "High Speed Copper" method.

There are three processes for copper electroplating—the cyanide process in which du Pont is interested; the acid copper method developed by General Motors Research; and the pyrophosphate process.

Chevrolet installed the du Pont process in 1939 and discontinued it within two months returning to heavy nickel electroplating. During the nickel shortage, it installed the acid, "Day-Brite" and pyrophosphate "Unichrome" methods.

Ternstedt, a Division of General Motors which is relied upon by the General Motors car units for their electroplating, installed the du Pont copper process in 1938 and discontinued it in 1939. It adopted the General Motors Research acid process in 1939.

Buick has never used the High Speed Copper process, but does little electroplating.

Cadillac has continued to use the High Speed Copper process and purchases the majority of its chemical requirements for it from du Pont since its introduction in 1938.
[fol. 639] Oldsmobile did not adopt the High Speed Copper process until 1941 and used it until 1949 when it shifted to a competitive process.

Pontiac adopted the process in 1940 for part of its plating work and in 1950 shifted entirely to a different and competitive process.

Although Cadillac and AC Spark Plug use the du Pont process for the major part of their plating operations, eight of the nine General Motors Divisions have installed it for varying periods of time and have gone to other proc-

esses for all or a major portion of their electroplating process.

In a du Pont study of the electroplating industry in 1945 or 1946 it was reported that unless certain difficulties in the high speed copper process were eliminated or greatly minimized, a "further serious loss of business will result". However, the study reported that "regardless of the difficulties with High Speed Copper * * *, the process, because of certain basic factors, has a greater potential field of usefulness than any offered by competition."

Du Pont's Durobrite process of zinc plating is used by Delco-Remy which does a substantial amount of zinc plating, although Chevrolet, which also does a substantial amount of zinc plating, and purchases a portion of the zinc and sodium cyanide from du Pont, does not use it. Du Pont's two processes, "Zin-O-Lyte" and "Durobrite", are well established in the trade and enjoy a major part of the business in the plating field.

Case Hardening Chemicals

Prior to its acquisition by du Pont in 1930, R & H Chemical Company supplied sodium cyanide, a chemical used for hardening steel surfaces, to all of the automobile manu- [fol. 640] facturers. Sodium cyanide was imported from France in substantial amounts; before du Pont entered the field, Chevrolet and Buick Divisions of General Motors were using case hardening materials.

Beginning in the early 1930s the first of two departures from the sodium cyanide method of case hardening occurred. A new chemical product was introduced on the market by another chemical manufacturer, called "Aerocase". This and other subsequently developed processes by Perliton, Holden and Parkcase resulted in a loss of business for du Pont. With these newly developed processes, Chevrolet, Buick and GM Truck turned to the newly accelerated deep case hardening method.

When Aerocase was introduced by the American Cyanamid Company, Buick became the first major user. Du Pont sought to develop a competitive product and in 1933 introduced Ducase, which was never adopted for general use since it was not the complete answer to the type of case hardening requirements of many large customers.

In the 1930s shortly after Aerocase was introduced, a gas carburizing process was developed wherein the steel to be case hardened was run through a furnace into which gas was introduced at high temperature. Initially the larger installations for gas carburizing were expensive and the largest units of the automobile manufacturing industry were the first to convert to this method. Buick commenced displacement of liquid hardening with the gas process in 1936 and in 1937 Ford had partially converted to the process. Saginaw Steering Gear Works of General Motors and Chevrolet Gear and Axle started the new process in 1937.

In 1937 du Pont conducted a comprehensive survey of the quality and type of casehardening material used in [fol. 641] the Chicago territory, including Michigan. The survey showed that automobile manufacturers other than General Motors were buying 88% of their case hardening requirements from du Pont while General Motors bought only 47% of their requirements from them. Of four divisions using over 100,000 pounds per year of case hardening products, two bought less than 5% from du Pont and two bought over 90%. In 1937 Ford was buying a greater quantity of case hardening materials from du Pont than all General Motors Divisions combined.

With the new gas carburizing process liquid case hardening operations were largely displaced by the new process, although a demand for du Pont case hardening materials still exists.

Cadillac purchased its needs from R & H before its acquisition by du Pont in 1930 and continued to do so under 1935; from 1935 to 1947 it obtained its case hardening materials from competitors. Since 1947 Cadillac has used the gas process to an increasing extent and purchases its liquid hardening materials in part from du Pont and in part from du Pont competitors.

Buick purchased none of du Pont's case hardening materials until 1946, using imported sodium cyanide or competitive case hardening salts. Since 1946 Buick has purchased du Pont materials for a minor part of its liquid case hardening operations and has converted the majority of its operations to the gas process.

Chevrolet Gear & Axle and Saginaw Transmission pur-

chased a minor part of their case hardening materials from du Pont prior to 1938, purchasing the bulk of their requirements of sodium cyanide from importers and other competitors. In 1938 du Pont developed a special case hardening material for Chevrolet Gear & Axle which pur- [fol. 642] chased substantial quantities thereafter. Saginaw Transmission continued to purchase imported cyanide until such material became unavailable. Since 1946 most of the Chevrolet plants have purchased part of their materials for liquid case hardening from du Pont and part from its competitors. Chevrolet's case hardening operations have been largely displaced by gas carburizing.

Oldsmobile purchased no du Pont case hardening materials prior to 1937. From 1937 through 1946 Oldsmobile purchased some of du Pont's sodium cyanide and small quantities of du Pont's heat treating salts. Since 1947 Oldsmobile has used the gas hardening process to an increasing extent and purchased its requirements of liquid case hardening materials entirely from du Pont competitors.

Pontiac purchased only a minor part of its requirements of case hardening from R & H before the acquisition and from du Pont thereafter. Since 1938 du Pont has sold no case hardening materials to Pontiac except for small quantities of high-purity sodium cyanide.

General Motors Truck & Coach, A. C. Spark Plug, Ternstedt, and Saginaw Steering Gear all have displaced their liquid case hardening processes with gas and purchase only small quantities of du Pont's sodium cyanide. Brown-Lipe-Chapin and Frigidaire prior to 1930 had purchased sodium cyanide from R. & H. Brown-Lipe-Chapin continued to purchase from du Pont for about two years after its acquisition of R & H, using competitive materials for a majority of its case hardening operations until they were discontinued in 1936. Shortly after the acquisition of R & H, Frigidaire commenced using imported sodium cyanide and other competitive materials. Since 1946 it has purchased some sodium cyanide and carburizing salts from du Pont. Delco-Remy and Delco Products purchased all their case hardening requirements from R & H prior [fol. 643] to 1930 and continued to buy from du Pont until 1941 and 1948, respectively. Delco Remy since 1946 and

Delco Products since 1948 purchased sodium cyanide and small quantities of heat treating salts from du Pont, purchasing other case hardening materials from du Pont's competitors.

Before the advent of the new processes, du Pont's sodium cyanide was from one-half to one cent higher per pound than the imported product. In 1947 and 1948 when no imported sodium cyanide was available du Pont supplied all the requirements of 96-98 per cent sodium cyanide to General Motors and other users.

In addition to sodium cyanide, du Pont developed accelerated salt and carburized salt to meet the competition of Aerocase. These compete with the other liquid case hardening products, including sodium cyanide.

Rubber Chemicals and Synthetic Rubber

Ernest R. Bridgewater, Director of Sales for the Rubber Chemicals Division of du Pont, testified that he believed this Division enjoyed about 25% of the rubber chemicals requirements of the Packard Electric and Inland Manufacturing Divisions of General Motors; that du Pont is the second largest supplier to these divisions. Of 65 rubber chemicals which du Pont offers, there were only three that du Pont supplied to these Divisions in larger volume—M.B.T.X., Thiuram M and Thionex.

About 15% of the Rubber Chemical Division's sales are comprised of rubber chemicals; the remaining 85% of the business of this division being represented by sales of neoprene, du Pont's synthetic rubber product.

Neoprene, the first synthetic rubber made on a commercial scale in the United States, is regarded as one of the outstanding achievements of du Pont's research. It was introduced in 1931, receiving acceptance in the market be- [fol. 644] cause of its resistance to oil, heat and sunlight. By 1940 more than three hundred rubber fabricators were using neoprene. Neoprene competes with other synthetic rubbers and with natural rubber. Some synthetic rubbers are less expensive than neoprene.

Automotive radiator and heater hose made of neoprene are being used as standard equipment by Chrysler and Ford because their experience in using this hose has demonstrated advantages for neoprene which justify its higher cost.

41866 O—59——17

Buick once used neoprene for radiator hose but discontinued its use and switched to butyl rubber which cost seventeen cents less per pound than neoprene. Du Pont did not consider reducing the price of neoprene to retain the Buick business because

> "we sell 'neoprene' at the same price to everybody . . . so that if we were to reduce the price of 'neoprene' for Buick, we would have to reduce it for everyone, and we could not afford to do that." (Bridgwater 4987).

Chrysler and du Pont worked together to pioneer a synthetic rubber adhesive based on neoprene to replace old countersunk brass rivets formerly used to attach brake linings to the brake shoe. At General Motors adhesive for this purpose was based on a Buna-N type of synthetic rubber which is more expensive than neoprene. Du Pont sought to sell neoprene to General Motors as an adhesive for use in brake linings but was not successful. A du Pont trade report stated that General Motors would not use neoprene in resilient applications where oil resistance was the primary requirement.

Chrysler and Ford purchase and use neoprene for covering electric wires, seals, gaskets, and have used it to a greater extent than any General Motors Division.

[fol. 645] General Motors followed the common practice of using sub-contractors for major parts and these were left to choose adhesives for brake linings as they desired consistent with specifications, whether it be neoprene or some other material, and du Pont sales efforts were directed to General Motors sub-contractors. Chevrolet Division on one occasion supplied du Pont with the names of its sub-contractors who were supplying it with axle seal, but did not specify the material to be used in their manufacture. Chrysler also provided du Pont with a list of its suppliers fabricating its synthetic rubber parts and included the specifications.

Du Pont also sought to interest Fisher Body in using neoprene for weather stripping. Fisher admitted it was to its advantage to use neoprene but that the price was too high. Since 1945 the du Pont Fabrics Division has sought to sell Fisher Body its special rubber cement—Fairprene

5115—to fasten weather stripping to automobiles. Fisher Body uses about one million dollars worth of adhesive annually. It was not until 1951 that du Pont secured an order for this product although it was equal competitively to others. Since 1951 du Pont secures about 3% of this business. Louis Weyand of Minnesota Mining & Manufacturing Company testified that General Motors bought various adhesives from his firm for attaching trim materials to metal, rubber weather stripping, rubber for windshields and rear lights, felt for sound deadeners. In 1946 it sold two million dollars worth of adhesive to General Motors, and in 1947 three million dollars worth.

Automotive Plastics

In 1930 du Pont marketed a cellulose acetate—Plastacele—and commenced selling some to the Inland Division of General Motors for use in the manufacture of steering [fol. 646] wheels which it made for all automobile companies, including General Motors. In 1937 sales to Inland amounted to $1,200; in 1938 $39,000; and in 1939 sales increased to $157,000, representing about 25% of Inland's requirements—the major supplier being Tennessee Eastman. After 1940 no sales of cellulose acetate were made by du Pont and Inland purchased all of its supply from Tennessee Eastman, which had developed a product called Tenite. Gillie testified that he felt du Pont's product was equal to that of its competitor, and the price was the same. Du Pont made large sales of the product to other customers for uses other than steering wheels.

Du Pont began producing acrylic resin molding powder in 1937 which it sold under the trade name of Lucite. It is a transparent plastic used in the manufacture of reflectors, instrument panels, tail lights and various knobs. Du Pont sells the product to the Inland, Guide Lamp, and A C Spark Plug Divisions. Du Pont's first sale of this material for the manufacture of automobile parts was to Dodge, and it sold no substantial amount of the plastic to General Motors until 1946. Two years after du Pont produced Lucite, Rohm & Haas offered Plexiglas. In 1948 Rohm & Haas supplied more of the requirements of AC Spark Plug Division than du Pont and at the present time du Pont gets a little more than 50% of it. At times du Pont had as much

as 95% of the business. At Guide Lamp, du Pont was able to develop a colorfast red composition and obtained its business, but Rohm & Haas matched it and Guide Lamp began to divide its purchases equally between du Pont and Rohn & Haas.

Brake Fluid

Brake fluid is used in hydraulic brakes which came into usage on automobiles in the early 1920s when Chrysler [fol. 647] adopted them. General Motors commenced to install such brakes in 1934 and Ford in 1936. Both Chrysler and Ford used brake fluid which they themselves mixed. No technical skill is required in the making of brake fluid, it being a mixture of several oils and no hazards are present in the mixing. The characteristics sought in brake fluid are a high boiling point and a low freezing point.

General Motors first used a brake fluid supplied by Wagner Electric Company, but shortly thereafter followed Chrysler and Ford in mixing its own, and continues to do so to date.

The General Motors Division assigned to the brake fluid mixing operation is Delco Products. In 1935 it produced a satisfactory fluid and improved it from time to time. Du Pont in late 1934 offered General Motors a fluid to replace that provided by the Delco Division but did not succeed. Other automobile manufacturing companies used du Pont's propylene glycol fluid called Lockheed 21. In 1939 du Pont developed a new fluid marketed as Lockheed 21-11, but was not able to sell it to any of the General Motors car units.

In late 1938 or early 1939 Delco and Union Carbide developed a fluid called Delco 9 which was more expensive than Lockheed 21. Walker testified the reason for the refusal of General Motors units to purchase the du Pont fluid was an agreement among the car division engineers to buy from Delco and help Delco write off the investment they had made in the equipment. Delco bought the chemical ingredients for the Delco 9 fluid from the Carbide & Carbon Chemicals Corporation, a unit of Union Carbide.

Safety Glass

In 1928 du Pont's Viscoloid Company and Pittsburgh Plate Glass jointly and equally owned Duplate Company [fol. 648] which made safety glass. Duplate supplied the glass and Viscoloid supplied the laminating plastic, or pyralin. The automobile industry was a market for safety glass, but all automobile manufacturers were not then entirely converted to its use. In February 1929 only Cadillac and La Salle were using it, while it was optional equipment at Buick.

In 1929 General Motors was installing experimental equipment for compositing safety glass and expected to build a regular compositing plant at their subsidiary, the National Plate Glass Co. A report in 1929 by the President of the du Pont Viscoloid Company stated:

> "... a larger proportion of the safety glass for Cadillac and La Salle is being produced by the Fisher Body Company. The progress which is being made by the General Motors and its subsidiaries in laminating safety glass indicates that the best prospects for the immediate future for Duplate sales depend upon manufacturers other than General Motors." (DP 164).

and the Annual Report for the year 1929 states:

> "Competition became more severe during the year. In the latter part of 1929 Libby-Owens Glass Company came into production with strong sales efforts being made to secure business. Fisher Body Company increased production with the result that they were able to supply practically all safety glass required for Cadillac and La Salle, with a consequent loss of this business which had previously been supplied by Duplate." (DP 169).

In January 1931 du Pont sold its interest in Duplate to Pittsburgh Plate Glass, and later that year General Motors disposed of its safety and plate glass business to Libby-Owens-Ford.

[fol. 649] Total sales by Duplate to General Motors and Fisher Body exceeded two million dollars in 1928 and 1929, but as General Motors expanded its purchases, decreased to $67,000 in 1930 and $37,000 in 1931.

All of the evidence bearing upon du Pont's efforts to sell these various miscellaneous products to General Motors supports a findings 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.

Sales to General Motors by United States Rubber

The rubber plantations in the Far East were considered the most valuable single asset owned by United States Rubber when the syndicate investment was made, and in 1926 profits from these amounted to six and one-half million dollars, being approximately one-half of United States Rubber's total profits. These plantations supplied less than 25% of United States Rubber's requirements of crude rubber. In 1926 the rubber corporation had the smallest proportion of its total sales in tires—70% of its production being in footwear and mechanical goods. Tire sales accounted for 98% of Fisk's business and 95% of Firestone's business. In addition, both Goodyear and Goodrich had a higher portion of their business in tire sales than did United States Rubber.

[fol. 650] Of total raw inventories which United States Rubber had, 45% were in the tire department. During the correspondence between Sloan and Lammot du Pont concerning the synthetic rubber project, Sloan in 1927 stated:

> "As a matter of fact, however, the single item by all odds that we purchase from outside sources and the one that has been most satisfactory from the standpoint of erratic costs out of line with the real economics of the case is the rubber tire." (GTX 892).

As early as 1925 General Motors had considered buying a rubber tire manufacturing company—the Ajax—and the

Executive Committee of General Motors to whom the matter was submitted concluded it would be a constructive thing for General Motors to acquire an interest in an established tire company. The matter was postponed for further consideration and finally dropped because the profit opportunities did not warrant the investment.

Prices in the crude rubber industry during the period 1923-1932 fluctuated widely from twenty cents in 1924 to over a dollar per pound in 1925, forty cents in 1926 and 1927 and below twenty cents in 1928, falling to ten cents and lower in 1930.

Wilson testified that the problem at the time was how the tire manufacturers who had rubber stock at high prices and could buy rubber cheaper with the decline, could get their customers to purchase tires on the basis of high rubber prices. Another factor leading to the high cost of tires was the fact that contracts were written for short periods of from three to six months. The General Purchasing Committee in 1926 and again in June 1930 voted against a general contract for tires and had been continually reviewing the situation on tires to see if anything could be done about it. A plan was considered for General Motors to manufac- [fol. 651] ture its own requirements or to acquire a small tire plant and get some knowledge of cost as a check on the tire companies prices.

During this period United States Rubber negotiated with Goodyear on a proposal to sell or lease its tire business. Irenee du Pont in February 1929 wrote to F. B. Davis that while negotiating for such a lease of the tire business to Goodyear, that United States Rubber should negotiate for a lease of Goodyear's plantations as well; he stated further that it seemed likely that Chrysler or General Motors would acquire their own tire manufacturing facilities which would leave the tire manufacturers in a "very trying position". These negotiations with Goodyear never came to fruition.

In April 1930 at a joint meeting of the General Motors Executive and Operations Committees a discussion was had on whether General Motors should manufacture tires either by buying a small plant or undertaking substantial manufacture. Pratt was designated to investigate both proposals, and he assigned Wilson to make the study.

Wilson made a report on June 3, 1930 stating he had

made a survey of the tire industry, had visited the Kelly-Springfield and United States Rubber plants, and recommended against General Motors going into the tire business since his investigation showed the companies were losing money on both original equipment and replacement sales. His recommendations were accepted.

Wilson then proposed a plan whereby General Motors was to purchase the necessary raw materials—rubber and cotton—and furnish the same to a tire manufacturer who would fabricate them into finished tires thus eliminating the cost of raw material going into the tire price. He prepared and submitted a plan for investing twenty million dollars in raw materials such as copper, lead, zinc, tin, rub- [fol. 652] ber and cotton. The plan was approved by the Finance Committee of General Motors on September 8, 1930 and the purchase of these commodities was started and continued for several years. Wilson also believed that this plan should be combined with a long term contract with a tire manufacturer who could then plan his production more efficiently, enabling him to produce more and to sell at a lower price.

While getting Sloan's approval on this plan, Wilson learned that Sloan and Litchfield, President of Goodyear, had been classmates at Massachusetts Institute of Technology, and Sloan arranged an appointment. In the Fall of 1930 Wilson discussed the matter of long term fabrication with Goodyear since he thought it was the "best", "biggest", and "a progressive company", and one of General Motors' principal suppliers. Litchfield was not interested in the fabrication plan.

Goodrich, which was supplying one-half of the tire business of Chevrolet, was approached by Knudsen, who knew its President, Mr. Tew, and Goodrich quoted some prices which were unsatisfactory.

The formula used in requesting submission of prices was

A—rubber converted into pounds of raw rubber

B—cotton converted into pounds of raw cotton

C—all other items of cost

Wilson finally contacted United States Rubber through Emmet Sheehan, its Detroit Sales manager. Sheehan contacted F. B. Davis and L. D. Tompkins, Vice-President of

the Tire Division of United States Rubber, made an appointment with Wilson, and the plan appealed to them. Tompkins testified:

> "We evidenced all the interest we possibly could in the matter, and told him very frankly that at least [fol. 653] part of it was not new to us because we had already negotiated contracts with Montgomery Ward and Atlas in which the question of rubber and cotton financing and so forth, had become a part, so we were playing along the same alley with him in connection with his plan. We knew what he was talking about, at least." (5732).

Wilson invited United States Rubber to submit prices and indicated that W. S. Knudsen, head of the Chevrolet Division would have to be satisfied since this division accounted for one-half of General Motors' tire business. Knudsen was delegated to talk price with the rubber corporation. Tompkins said that "we sharpened our pencils more than we had ever done"; costs were carefully calculated; account was taken of the additional increase in operating efficiency if General Motors' volume was obtained; and the prices were then submitted to Knudsen. Both Goodyear and Goodrich were asked and gave prices on the sale of tires if they could buy rubber and cotton at the current market price and of the three companies, the price quoted by United States Rubber was the lowest.

Wilson then made a report to the Operations Committee concerning all of these negotiations with the three companies, the price formula followed and recommended an authorization for 50% of General Motors' requirements to be supplied by United States Rubber. He also attached a schedule comparing the prices submitted. He stated:

> "Goodrich brought in figures as above, but added 6% to the total, for profit. United States included their profit in factor 'C'. When prices were compared, it was decided to ask for prices on other General Motors sizes, with the result that we have today a complete list of all, making it possible to compute the tire prices [fol. 654] by simply multiplying Factors 'A' and 'B' with today's market price and adding Factor 'C' to the total.

"Comparison developed that United States Tire & Rubber Company have given us the most favorable terms, and Mr. Pratt has notified them of our willingness to enter into a contract for 1½ years on the above basis, and has at the same time signified our willingness to underwrite the purchase of up to 5,000 tons of rubber @ .08 per lb. this representing about 25% of the Corporation's requirements for one year and an expenditure of $800,000.

"Immediately when the decision was announced to the trade, Goodyear and Goodrich both made applications for permission to quote on the balance of the Corporation's requirements, or any part of them, at competitive prices.

"It is our opinion that it would not be desirable to close contracts for 100% of the Corporation's tire requirements, but that the remaining open 50% should be left to the Divisions to handle on the best possible basis. We therefore ask authority to conclude the contract for 50% of General Motors tire requirements with United States Tire & Rubber Company." (GTX 1089).

On October 9, 1930 the Operations Policy Committee approved a contract with United States Rubber for 50% of General Motors' requirements.

Purchases from United States Rubber by the General Motors Car Divisions for the years preceding 1928 are not available.

In 1928, 1929 and 1930 Pontiac purchased approximately 18%, 8% and 10%, respectively, of its requirements of [fol. 655] casings from United States Rubber based on an estimate in 1929 of 315,000 cars produced.

In January 1928 the sales manager for United States Rubber wrote to the Oakland Division confirming that it was to receive from 20-25% of the Pontiac business, both domestic and foreign, and 40-50% of Oakland's business, domestic and foreign, for the first six months of 1928. In May 1929 Glancy wrote Davis that United States Rubber was getting 30% of Pontiac business, a percentage larger than any other manufacturer received, and 15% of Oakland's business, which was the same percentage other sup-

pliers received; that although the large percentage for Pontiac had been opposed by the Sales Department, he believed that it was United States Rubber's intention to bring the quality of its goods up to competition and was "happy to take this chance" with United States Rubber.

In 1929 Chevrolet purchased no tires from United States Rubber and in 1930 through the efforts of its sales staff a small volume was procured. General Motors purchases in 1929 decreased from 524,205 units in 1928 to 441,659 and to 465,267 in 1930 before reaching 2,508,241 units in 1931. Oakland-Pontiac purchases declined from 227,652 units in 1928 to 105,882 in 1929, and to 124,005 in 1930.

Both Chrysler and Ford were also purchasing tires from United States Rubber in 1928; Ford purchasing 362,016 units and Chrysler 287,742.

In 1929 General Motors had a car manufacturing subsidiary in Canada—General Motors of Canada, Ltd., and United States Rubber had a Canadian subsidiary—Dominion Rubber Company. Canadian Industries, Ltd., in which du Pont held an interest, held stock in the Dunlop Tire & Rubber Goods Company of Canada. On March 25, 1929 [fol. 656] R. S. McLaughlin, President of General Motors of Canada, wrote to A. B. Purvis, President of Canadian Industries, advising him that du Pont had acquired an interest in United States Rubber and

> "they naturally would like to see us do some business with the Dominion Rubber Company." (GTX 1082).

He inquired whether Canadian Industries was still interested in Dunlop. Purvis replied that it was still interested in Dunlop, holding 35% of its common stock, that General Motors' business was vital to Dunlop and would be sorry to see it go to United States Rubber, and that McGowan would appreciate their continued support of Dunlop.

Six months later, Purvis forwarded copies of this correspondence to Lammot du Pont and advised that Dunlop, effective April 18th, 1930, would be entirely supplanted as a tire supplier to General Motors of Canada by Dominion Rubber Company, and asked that McLaughlin of General Motors be relieved of the "evident pressure to which Mr. McLaughlin refers and which Mr. Davis would very naturally bring to bear upon them."

Lammot du Pont wrote to F. B. Davis:

> "Now it is, of course, all right for United States Rubber Company to 'go after' the General Motors of Canada business through the Dominion Rubber Company, but I do not believe it is either fair or proper, under the circumstances, to use as an argument the interests of the U. S. Rubber stockholders or their connection with General Motors. Could you not get the business on the basis of quality, services and price?
>
> "I have told Mr. Purvis that as far as I am personally concerned, and I think I represent the feelings of [fol. 657] the other individuals here, that I cannot subscribe to the idea of using our interests in both General Motors and United States Rubber as a means of getting business." (GTX 1085).

Davis replied stating that this account was secured on

> "the basis of quality, service and price, and we not only do not use any du Pont or General Motors connections as arguments for getting business, but find that many times we are handicapped because of rumors of the tie between the three companies, and we take great pains in explaining the facts—just as we have done to Mr. McLaughlin." (GTX 1086).

He continued that Mr. McLaughlin had advised Eden, President of Dominion Rubber that

> "he would be very glad to give him a portion of his business but that his hands were tied as he had instructions from Mr. John L. Pratt, of the General Motors Company, requiring him to favor Dunlop." (GTX 1086).

and that if this could be rescinded he would be able to give Dominion some of his tire business; that Tompkins had immediately contacted Mr. Stettinius of Mr. Pratt's office and

> "Mr. Pratt arranged to have the instructions whatever they might have been, rescinded." (GTX 1086).

whereupon Dominion actively opened negotiations with General Motors of Canada.

Tompkins testified that when he called on Mr. Stettinius in 1929 he was advised no such instructions had in fact been issued, and Pratt testified he had never given any instruc- [fol. 658] tions that General Motors of Canada was to use Dunlop. For the years 1928 to 1930, inclusive, Goodyear was the principal supplier of tires to General Motors of Canada. Dunlop's business with General Motors of Canada shrank from 23% in 1929 to 4.6% in 1930, whereas Goodyear's increased from 70.83% to 84.34% in the same period. The 1931 contract with United States Rubber provided for 50% of General Motors of Canada's requirements.

In 1930 Davis contacted General Robert E. Wood, President of Sears, Roebuck & Co., with the view, shared by Tompkins, that large retail outlets would result in volume business for the tire department. He found that Sears had an arrangement with Goodrich and that Montgomery Ward was buying its tires from several small suppliers but might be interested in dealing with United States Rubber. Following a conference with Mr. Everett, Ward's President, a contract was signed covering 90% of Ward's requirements of its own brand of tires. In the same year United States Rubber succeeded in obtaining a five year contract with Atlas for 50% of that company's requirements of "Atlas" brand tires to be sold through Standard Oil Service stations. In 1937 United States Rubber's share of Atlas business was increased to 100%. Tompkins stated the procurement of this business was of vital importance to the company and "was the turning point" in the future success of the tire division.

Tompkins and Davis testified that throughout the 1930s Emmet Sheehan, the Rubber Company's sales representative contacted all automobile manufacturers, including Ford, Chrysler, and the General Motors Divisions, and succeeded in getting orders from Ford and Chrysler until both turned to Firestone and Goodyear respectively as their principal suppliers.

[fol. 659] The 1931 tire contract was for a term of 21 months containing an automatic renewal clause and was signed by L. D. Tompkins and Charles E. Wilson. It provided that (1) General Motors would buy at least 50% of its original equipment tires, including spare tires, for cars produced and sold in the United States and Canada, (2) the

prices to be determined by the A, B, C formula in Wilson's plan—that is the number of pounds of rubber in a set of four tires multiplied by the price per pound of rubber specified by General Motors, a similar computation for the cotton used, and all other costs, including profit, the total of these three items being the price per set of four tires, (3) General Motors designated United States Rubber as its purchasing agent to buy crude rubber, General Motors to inform the rubber company the quantity to be purchased and the price to be paid. It would then resell to the rubber company the rubber requirements for each succeeding month for the manufacture of tires. In such resale, General Motors was permitted to charge a mark-up of not to exceed 12½% over the original cost of the material. (4) United States Rubber was to bill the General Motors divisions for the tires supplied but was to do the billing at billing prices agreed upon with General Motors. These billing prices were on regular shipments to the divisions and the level of prices which the various car division buyers had been able to establish in the purchase of tires beyond the 50% cov red by the contract. After the divisions made payments on the basis of the billed price, United States Rubber was to make an adjustment between the billing price and the lower prices fixed by the formula.

On February 25, 1931 a supplemental letter agreement was executed wherein Oldsmobile, Oakland-Pontiac and GMC Truck Divisions agreed to purchase all their remaining requirements from United States Rubber, and Cadillac-[fol. 660] LaSalle agreed to purchase 15% additional. Buick and Chevrolet bought their remaining 50% elsewhere.

In July 1931 when the price of rubber was around six cents per pound, Tompkins and Wilson signed a modification of the 12½% mark-up providing that General Motors could resell up to ten cents a pound regardless of the 12½% limitation.

The provision regarding the billing arrangement was included so that the basic or ultimate price resulting from the contract could be kept "as confidential as possible." Tompkins testified that both Goodyear, which sold to Chrysler in substantial volume, and Firestone, which supplied Ford, also kept their prices secret, and that the same practice was followed by United States Rubber and Goodyear

in their contracts with Montgomery Ward and Sears, respectively.

An addendum to the 1931 contract provided that tires used by General Motors as spares would be priced at a specified amount above running tires. No extra price was to be charged for second spares or spares on exported cars. The Government concedes the allegations contained in ¶128 of the Amended Complaint relating to the price of spare tires is erroneous.

United States Rubber continued to sell tires to General Motors pursuant to contracts until 1942. After the original contract, new contracts were signed in 1932, 1933 and 1936. The 1932 contract adhered to the ABC pricing formula, the percentage of General Motors requirements, and also provided for the extra percentages reflected in the agreement of 1931. During the 1932 contract a patent license option agreement was made, providing that if General Motors desired to manufacture its own tires it would [fol. 661] be granted a non-exclusive license on United States Rubber's patents and applications relating to tire manufacturing processes and "know-how," providing General Motors continued to purchase 50% of its tire requirements. The license was never used by General Motors.

The 1933 contract executed May 22, 1933, effective January 1934, replaced the ABC price formula with a provision that prices to be charged General Motors should be no greater than the lowest price charged by the four largest manufacturers of tires—Goodyear, Firestone, Goodrich and United States Rubber. This change was made because of the increased stability of the rubber and cotton markets and the higher level of prices for those commodities.

In a separate concurrent agreement, United States Rubber agreed to give General Motors the following discounts on its annual volume of sales:

$10,000,000	$ 825,000	
11,000,000	940,000	
12,000,000	1,040,000	
13,000,000	1,200,000	
14,000,000	1,350,000	
15,000,000 and up	10%	(GTX 1141)

It was also provided that United States Rubber should not be required to furnish tires at prices which, after the discount, would not return its costs. The current billing price before the year end discount was measured by cost plus 10%.

The dollar sales figures for 1934 to General Motors totaled over sixteen million and General Motors was entitled to receive the maximum discount. United States Rubber and General Motors agreed on December 17, 1934 to fix the discount for 1934 at $500,000 or 2.8% on its 1934 sales.

[fol. 662] The 1933 contract was supplemented by an extra percentage letter agreement and for the first time United States Rubber received an additional 20% of Buick's business, Cadillac-LaSalle was increased to 20%, Pontiac and Oldsmobile declined to 30% and 40% respectively.

In 1934 the price and discount arrangements were modified and United States Rubber agreed that in the event General Motors purchased fifteen million or over and if the rubber company's profit exceeded 10% that General Motors would receive one-half of the amount of such profit exceeding 10% up to and including "an excess of 5%" which would make it possible for General Motors to receive a maximum discount of 10% on purchases of fifteen million or more. The discount paid after some negotiations on total purchases of $25,114,888 was $1,044,516.87, or 4% of the 1935 sales.

On August 1, 1936 another contract containing an automatic renewal clause was executed which lasted until May 8, 1942 when the United States entered World War II. The maximum discount provided was 3½% on sales of twenty-one million dollars. After the war General Motors resumed its purchases from United States Rubber on a non-contractual basis. Purchasing was done through orders and the percentages of business to be supplied the General Motors car divisions from March 1, 1949 to August 31, 1949 were: 64% of Buick, Oldsmobile, Pontiac, Cadillac and GMC Truck passenger tires, 50% Chevrolet passenger tires, 55% truck tires for Chevrolet and GMC Truck. The prices fixed by this order were subject to being lowered if General Motors bought from other suppliers at a lower price or if United States Rubber sold at a lower price elsewhere.

For the years 1934 through 1940, United States Rubber's profit attributable to sales of original equipment to General Motors was $9,737,000 and its net income was $45,764,000. [fol. 663] Wilson testified that United States Rubber's share of General Motors' business during the period 1931 to 1936 was about 55%; 1936-1942 it was about 60%-70%; and the years following the war 1946-1948 it was 55%-58% of General Motors needs. Throughout the years United States Rubber's sales to General Motors of tires for original equipment constituted a high percentage of its total sales of original equipment. General Motors also made purchases of tires from Goodrich and Firestone in the years 1946, 1947 and 1948 averaging approximately 20-23%. The Company's private brand unit sales have been greater in most years than its total original equipment sales.

Throughout the years Irenee du Pont viewed the tire business of United States Rubber as its most precarious branch and expressed his desire that this phase of its operations be dropped. He urged Davis in 1934 to sell this branch of its business, and testified that his views today are the same as those expressed at that time. Davis confirmed the fact that Irenee du Pont had made repeated suggestions for the rubber company to dispose of its tire business.

The Court finds that the evidence with respect to the original negotiation of the tire contract and United States Rubber's subsequent sales of tires and tubes to General Motors establishes that General Motors initiated discussions leading to that contract, entered into it, and has ever since continued to buy a substantial portion of its tires and tubes from United States Rubber for its own good business reasons—and for no other reason. The Government's contentions to the contrary are supported only by suspicion and conjecture.

Other Products

The Government concedes that du Pont sales to United [fol. 664] States Rubber are far greater than the purchases du Pont makes from United States Rubber.

Paint. On January 18, 1932 William Richter wrote to William Zintle, also a du Pont employee, and attached a letter from F. B. Davis to Lammot du Pont regarding a

41866 O—59——18

Pratt and Lambert can of paint which Lammot du Pont had seen being used in painting a building at United States Rubber. Davis assured Lammot du Pont the can contained du Pont paint because the contractor had been told "he could not have the contract unless he used du Pont paints" and stated that United States Rubber had a genuine interest in using and recommending du Pont products wherever possible. United States Rubber since 1929 has purchased more paint and maintenance paint from du Pont's competitors than from du Pont. The percentages of all paint purchased from du Pont in 1946, 1947 and 1948 were 31.1%, 34.5% and 25.3%.

Rayon. Rayon, first introduced to the rubber industry in 1936, was for a time produced only by du Pont. From 1936 to 1941 du Pont supplied almost 100% of United States Rubber's requirements of high tenacity rayon. During the war years the percentage of the rubber company's requirements declined since rayon was in short supply and subject to Government allocation orders. United States Rubber approached du Pont requesting a larger percentage of their total production or to increase their facilities for production, but du Pont refused to do either. The percentage of United States Rubber's requirements of rayon purchased from du Pont which was 100% in 1936 declined to 37.7% in 1946, 33% in 1947 and 27.3% in 1948. In 1946 and 1947 United States Rubber purchased more rayon from one du Pont competitor than it did from du Pont, and in 1948 it purchased more rayon from each of two du Pont competitors than from du Pont. United States [fol. 665] Rubber purchases of rayon constituted two-thirds of its total purchases from du Pont during 1946-1948. In the years 1942-1948 du Pont sold more high tenacity rayon to Goodyear Tire & Rubber than it did to United States Rubber.

Neoprene. Neoprene is a synthetic rubber manufactured only by du Pont. Tisdale testified that United States Rubber purchased neoprene from du Pont during and shortly after World War II, despite neoprene's odor and heaviness, only because natural rubber latex was unavailable. When natural rubber latex was again available, United States Rubber returned to its use. GRS and buytl are other synthetic rubbers and are cheaper than neoprene. Dry neo-

prene and other types of dry rubber are purchased by United States Rubber and are used to make products other than Lastex thread. Eliminating the abnormal purchase of neoprene in the making of lastex during the years natural latex was unavailable, United States Rubber obtained from du Pont only 11% of its total requirements of neoprene and competitive rubbers in 1948.

Dr. Tuley testified that the only significant test of price of rubber products was the relationship of price to the ultimate cost of the article to be produced. In addition, in making the table of competitive rubber products, United States Rubber did not use neoprene in the manufacture of some products, although its competitors did. He stated that only rubber which was used to make products directly competitive with those in which other companies used neoprene was included in USR 217.

Rubber Chemicals

Naugautuck Chemical Division of United States Rubber supplies its parent company with rubber chemicals as does [fol. 666] du Pont and other competitors of du Pont. Tisdale testified that this division of the rubber company is a self-sufficient operation and has to compete with outsiders for United States Rubber's business and maintains a sales and technical staff. United States Rubber pays no lower price to Naugautuck than to any other customer.

Wetting agents. These products constitute a small portion of United States Rubber purchases. Tisdale testified that these and other items were included in the survey made by Dr. Tuley because in the judgment of technical men they were competitive in use although du Pont does not make the same type. Dr. Tuley stated that more competitive products were studied than were included and as to those included "we established in each case that our use of them matched some commercial use of the du Pont product."

Terprene. United States Rubber purchases Terprene products, a small item in its total purchases, from naval stores industry. Du Pont does not manufacture this product. Exhibit USR 217 includes an item in that class manufactured by du Pont which has the same character as that manufactured in naval stores and turpentine industries and is sold in competition with those industries.

Diphenylamine. Du Pont is the only commercial producer of diphenylamine and United States Rubber purchases this product exclusively from du Pont. The Naugatuck Division of United States Rubber uses this material for a patented antioxidant, BLE, which it sells in competition with du Pont's product called the "Neozones". Next to rayon, this product constituted the largest dollar volume purchases made by United States Rubber from du Pont, being about 10% of its total purchases from 1946-1948.

[fol. 667] *Nylon.*

Nylon is patented and manufactured exclusively by du Pont. United States Rubber does not use the product in its truck or passenger tires for civilian use although its competitors do. In 1946 du Pont's total sales of nylon to United States Rubber were $617,000 and two years later increased to $895,000. In 1946, 1947 and 1948 Goodyear, Goodrich and Firestone purchased more nylon from du Pont than did United States Rubber.

The foregoing four products—rayon, diphenylamine, neoprene and nylon accounted for a great preponderance of United States Rubber's total purchases from du Pont. In 1948 these products accounted for over ten million dollars of the total purchases made by United States Rubber equalling $11,500,000, or 87%. Of all products required by United States Rubber and which were manufactured by du Pont, United States Rubber's purchases from du Pont constituted 36.5% in 1946, 31.9% in 1947 and 28.8% in 1948.

In the compilation of Exhibits USR 217 and GTX 1332 Dr. Tuley testified that a product purchased from a competitor of du Pont was not regarded as competitive unless it met certain tests, such as:

> "First, the composition of the material, its price in relation to related products; its availability; quality; du Pont's postion in regard to supply and their ability to deliver in the quantities required and at the time we required them; and particularly the critical test was whether there was an established commercial use for the du Pont product identical with our use of the product we had purchased from some other supplier." (Tuley 6661-2).

[fol. 668] In 1932 Lammot du Pont sent Davis a table of the purchases by du Pont from United States Rubber and its competitors, showing purchases from United States Rubber of $361,000 in 1930 and $204,000 in 1931. He said:

> "the purchases we make from United States Rubber Company are far larger than from any other rubber company." (GTX 1059)).

In 1935 he again wrote regarding purchase figures for 1933 and 1934 and commented that the 1934 purchases were less than those for 1933 from United States Rubber, whereas the Rubber Company's purchases for 1934 from du Pont were higher than in 1933 stating he thought that was due to the fact that the rubber company bought products which were raw materials, whereas

> "du Pont buys from U. S. Rubber substantially nothing, except products that are used as supply or small items in construction of machinery and equipment." (GTX 1060).

On January 19, 1938 E. R. Bridgwater of du Pont's Research wrote Ackart of du Pont's Engineering Department that local buyers at du Pont's various plants had told salesmen for rubber manufacturers other than United States Rubber that

> "they are unable to give them any business because they are instructed to place business with U. S. Rubber whenever possible." (GTX 1061).

He stated that the managers of the purchasing departments had been circularized and told to refrain from giving the impression that United States Rubber had any better chance of getting du Pont's business than any other rubber manufacturers and concluded:

> [fol. 669] "I do think it would be very helpful to us if you would ask all members of your department who contact rubber salesmen or engineers to so conduct their conversations as to convince the salesman that he has as good a chance of getting our business as anyone else and that our rubber goods are bought solely on the basis of price, quality and delivery. I realize, of

> course, that we do show preference to U.S. Rubber in certain instances but I think that's no one's business but ours, and it is, of course, a fact that we buy much less than half of our rubber goods from U.S.
>
> "Perhaps Mr. Hawkins would like to again remind all buyers on the Company that our rubber chemicals business need not suffer by reason of the fact that we buy much more from U.S. Rubber than from any other rubber manufacturer so long as they take pains to prevent any salesmen from getting the idea that it is our policy to give U.S. Rubber all the breaks and reporting that to his main office as an alibi for not getting du Pont business." (GTX 1061).

On February 26, 1947 L. D. Reed, Director of Trade Analysis Section of du Pont, in answer to Lammot du Pont's inquiry on trade relations with United States Rubber stated:

> "You will notice from this summary sheet that the purchase/sales relationship with United States Rubber would still be way out of line if we had purchased our entire requirements of industrial rubber commodities from them alone, which amounted to $1,264,348. In view of the other large sales which are made to competitors of United States Rubber, some recognition must be taken of this business, and the result is that rather insignificant purchases are made from the re- [fol. 670] mainder of the rubber industries listed, with the possible exception of Goodrich." (GTX 1062).

He explained that Goodrich sold a chemical which the Rubber Company did not make and made no similar product. He stated:

> "Goodyear Tire and Rubber are generally competitive with United States Rubber so far as rubber commodities are concerned, but they have not been successful in securing much of the business we have to give the rubber trade in rubber lined tanks. Just recently, they visited our office feeling that they were not being treated fairly in this respect, but were finally convinced that they had not been successful bidders and would

still have to sharpen their pencils. The other rubber companies do not engage in this type of endeavor." (GTX 1062).

The evidence relating to purchases and sales between United States Rubber and du Pont was, for the most part, introduced by the defendants. The Government has failed to show the existence of any agreement or understanding that each of these companies would prefer the products of the other and would decline to deal with competitors of the other. The Court finds that, in fact, each company has enjoyed freedom to buy as it pleased.

The Issue of Conspiracy

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. [fol. 671] 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 record discloses a number of instances in which various of the defendants have engaged in concerted action of one kind or another. For example, the syndicates that were formed to purchase du Pont stock in 1915, and United States Rubber stock in 1927; and the collaboration on the development of "Duco" and TEL. But concerted action does not necessarily constitute conspiracy or proof of conspiracy. It does so only if the object of the action is to restrain trade or commerce. The Court finds 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 aggegate, did restrain or intended to, or had the effect of, restraining or monopolizing trade and commerce. The Court bases this conclusion on both documentary and testimonial evidence of record and

upon the more detailed findings made in the earlier parts of this memorandum.

Conclusion

The Amended Complaint charges violations of both the Sherman and the Clayton Acts. Those Acts broadly condemn conspiracies, contracts, agreements, understandings, and acquisitions that result in monopoly or unreasonable restraints of trade. If the facts established the existence of a conspiracy or agreement to restrain or to monopolize [fol. 672] trade, or if the facts showed that a restraint of trade or monopolization had occurred, it would be necessary to determine as a matter of law whether the situation disclosed was condemned by the statutes. However, there is no need in this case to consider that question or to discuss legal principles or precedents because there has been no conspiracy to restrain or to monopolize trade and no restriction or monopolization of the market.

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

neither a conspiracy to restrain or to monopolize trade nor [fols. 673-674] a restraint or monopolization of trade make it unnecessary to consider the questions of law that would otherwise arise with respect to the Wilmington Trust Co. and the so-called "beneficiary" defendants, including the infants for whom guardians ad litem have been appointed.

It may be that a violation of the Clayton Act can be made out in the absence of an actual restraint of trade where it is established that there is a reasonable probability that a condemned restraint will result from an acquisition of stock. The acquisition challenged by the Government—du Pont's investment in General Motors—took place over thirty years ago. In those many intervening years the record discloses that no restraint of trade has resulted. Accordingly, the Court is of the opinion that there is not, nor has there been, any basis for a finding that there is or has been any reasonable probability of such a restraint within the meaning of the Clayton Act.

The Government has failed to prove conspiracy, monopolization, a restraint of trade, or any reasonable probability of a restraint, and for those reasons the Amended Complaint should be dismissed.

Walter J. LaBuy, Judge of the United States District Court.

[fols. 675-676] UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No. 49 C-1071

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, UNITED STATES RUBBER COMPANY, CHRISTIANA SECURITIES COMPANY, DELAWARE REALTY & INVESTMENT CORPORATION, PIERRE S. DU PONT, LAMMOT DU PONT, IRENEE DU PONT, ET AL., DEFENDANTS

FINAL JUDGMENT—December 9, 1954

This cause coming on for final disposition upon the pleadings and evidence, both oral and documentary, and the Court having heard the arguments, and considered the

briefs of counsel and having made and filed herein its memorandum of opinion on to wit December 3, 1954,

It is hereby, ordered, adjudged and decreed, that

1. Said memorandum of opinion be and the same hereby is adopted as the Court's findings of fact and conclusions of law herein, and said memorandum of opinion be and the same hereby is made a part of this judgment and decree by reference as such findings of fact and conclusions of law.

2. The amended complaint herein and the above entitled cause be and the same hereby are dismissed for want of equity.

3. Plaintiff take nothing by its suit and defendants and each of them go hence without day.

Dated December 9, 1954.

Enter:

Walter J. La Buy, Judge of the United States District Court.

Senator KERR. May I ask a question there, Mr. Chairman?

As I understand it, the Supreme Court had directed the district court to work out an equitable implementation to effectuate or bring about sufficient change to where the antitrust laws will not be violated.

Mr. LINDSAY. That is correct.

Senator KERR. And that the proposal before us of the divestiture is one that was made by the Justice Department to the district court as the suggestion of the Justice Department to implement the decision of the Supreme Court.

Mr. LINDSAY. That is correct.

Senator KERR. And that that is now pending before the district court and has not been put into the form of a judgment by the district court.

Mr. LINDSAY. That is correct also, Senator Kerr. Some of the details of just how the case stands at the moment, of course, could be handled more effectively by the Justice Department, and perhaps company representatives, than the Treasury.

It is my understanding that a variety of proposals have been made to the district court judge in Chicago and he has held hearings, and no decision has been made.

The CHAIRMAN. Will you begin at the beginning, Mr. Lindsay? I understand the Supreme Court reversed the district court——

Mr. LINDSAY. That is correct.

The CHAIRMAN. In its original decision.

Mr. LINDSAY. That is correct.

The CHAIRMAN. Would you start with the beginning of this litigation and carry it briefly down to date? Are you prepared to do it now?

Mr. LINDSAY. I could attempt to do it now, but I think it would be better if the Department of Justice gave you such a summary, or if could do it by memorandum for the record.

The CHAIRMAN. Will you see to it, then, that the full history is made a part of the record?

Mr. LINDSAY. Yes.

(The information referred to is as follows:)

HISTORY OF DU PONT-GENERAL MOTORS LITIGATION

As the Supreme Court's dissenting opinion summed up the early history of this litigation (353 U.S. 586, 608–609):

"In June 1949, the United States brought this civil action in the United States District Court for the Northern District of Illinois under § 4 of the Sherman Act and § 15 of the Clayton Act to enjoin alleged violations of §§ 1 and 2 of the Sherman Act, and § 7 of the Clayton Act. The amended complaint, insofar as pertinent to the issues here, alleged that Du Pont and General Motors have been engaged, since 1915, in a combination and conspiracy to restrain and monopolize interstate trade, and that Du Pont's acquisition of General Motors' stock had the effect of restraining trade and tending to create a monopoly. In brief, it was alleged that, by means of the relationship between Du Pont and General Motors, Du Pont intended to obtain, and did obtain, an illegal preference over its competitors in the sale to General Motors of its products, and a further illegal preference in the development of chemical discoveries made by General Motors. Appellees denied the charges.

"The trial of these issues took nearly 7 months. The District Court heard 52 witnesses, including most of the principal actors, and received over 2,000 exhibits. The evidence contained in the 8,283-page transcript of record covers in minute and intimate detail the facts bearing on the Government's charge that Du Pont,

by coercion, agreement, control, or influence, had interfered unlawfully with General Motors' purchasing and manufacturing policies."

After trial the district court found the Government had failed to prove its case and dismissed the U.S. complaint (126 F. Supp. 235). Reversing this decision the Supreme Court concluded (353 U.S. 586, 605–606):

"The fact that sticks out in this voluminous record is that the bulk of Du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to Du Pont by a stock interest. The inference is overwhelming that Du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.

"We agree with the trial court that considerations of price, quality, and service were not overlooked by either Du Pont or General Motors. Pride in its products and its high financial stake in General Motors' success would naturally lead Du Pont to try to supply the best. But the wisdom of this business judgment cannot obscure the fact, plainly revealed by the record, that Du Pont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics."

With such history in mind, the Supreme Court went on (id. at 607):

"The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute. We repeat, that the test of a violation of § 7 is whether at the time of suit there is a reasonable probability that the acquisition is likely to result in the condemned restraints. The conclusion upon this record is inescapable that such likelihood was proved as to this acquisition. The fire that was kindled in 1917 continues to smolder. It burned briskly to forge the ties that bind the General Motors market to Du Pont, and if it has quieted down, it remains hot, and, from past performance, is likely at any time to blaze and make the fusion complete."

Accordingly, the Supreme Court held (id. at 607–608):

"The judgment must therefore be reversed and the cause remanded to the district court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The district courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case' (*International Salt Co. v. United States*, 332 U.S. 392, 400–401)."[1]

The district court, at a prehearing conference, on remand, September 25, 1957, established a schedule for the parties to file proposed plans of relief. On October 25, 1957, the Government filed its plan calling for distribution of the General Motors stock to the Du Pont shareholders over a 10-year period. However, General Motors stock attributable to Christiana, Delaware, and the stockholders of Delaware, is to be sold, for their account, by a trustee during that 10-year period.

From May 14 through August 14, 1958, the defendants and stockholder amici curiae appointed by the court filed their proposals. Such proposals in essence provided that Du Pont would retain its equity in General Motors and merely pass through the vote pro rata to all their stockholders.

On September 26, 1958, the Government filed its comments on the proposals of all parties. The Government's position is that sections 7, 11, and 15 of the Clayton Act require divestiture. In any event, the United States urges that neither the retention of 23 percent of General Motors' equity by Du Pont, nor the voting power concentrated in the hands of those controlling Du Pont (65 persons, 38 husband and wife would control 8 percent of GM's vote) would restore competitive conditions.

Hearings on relief began on February 16, 1959. And on April 9 the parties rested. Judge LaBuy now has the matter under advisement.

The CHAIRMAN. Are there any further questions?

Senator BUTLER. Mr. Chairman, I would like to ask one question. Mr. Lindsay, you stated in the earlier part of your testimony that a company could accumulate an inordinately large surplus and then

---

[1] In the light of this holding, as the Supreme Court put it (id. at 588, footnote 5):

"In view of our determination of the case, we are not deciding the Government's appeal from the dismissal of the action under the Sherman Act."

make a distribution tax free to its stockholders under S. 200; is that correct?

Mr. LINDSAY. I don't think I intended to make that statement. I was discussing generally whether it is fair or not fair, proper or not proper to tax as an ordinary dividend—property distributions including securities—and I think I intended to point out that if we didn't do that a company could use its earnings and profits and surplus to purchase portfolio investments and distribute them to the stockholders tax free.

Senator BUTLER. Could it do that in view of section 102 of the Internal Revenue Code?

Mr. LINDSAY. Well, it wouldn't have to make inordinate accumulations. It could do it out of its annual earnings and profits, which would not necessarily run them into a problem with sections 531 or 102.

Senator BUTLER. Is it 531?

Mr. LINDSAY. I think as long as the earnings and profits are distributed out to the stockholders, the taxpayer would be in proper shape under 531, if profits are used to buy property and the property is distributed, the corporation would not be accumulating profits and we would not have a 531 problem.

Senator BUTLER. I felt that should be made clear in the record.

Mr. LINDSAY. Yes.

I might say generally this whole problem in this area of corporate splitups, distributions of property in large proportions to the stockholders, has had a long history. There has been a conflict between an attempt to make the tax law neutral, where it bears upon normal business transactions, if property continues to be in the corporation in one form or another, and an attempt to prevent tax avoidance.

Senator BUTLER. Don't you think there runs through all of the tax laws as presently written the theory that where property has been legally acquired, and then a distribution is forced, that the tax forgiveness be invoked?

Mr. LINDSAY. There is very substantial precedent for that.

Senator BUTLER. And, therefore, the property of a company that had been acquired 40 years in advance of any divesting order, may reasonably be assumed as pointed out by the Senator from Delaware, Mr. Frear, to have been legally acquired?

Mr. LINDSAY. It certainly is a, probably a fair——

Senator BUTLER. It is a fair assumption; isn't it?

Mr. LINDSAY. It is a fair assumption. I don't know that the court said it was illegally acquired. I think the court found that it probably was illegally held. [Laughter.]

Senator BUTLER. All right.

Senator CURTIS. Mr. Chairman.

The CHAIRMAN. Senator Curtis.

Senator CURTIS. Mr. Chairman, Mr. Lindsay, this presents some problems that are very new to me, and what I am about to ask may not be a case in point at all, but it would help my thinking.

In an ordinary situation, what can a corporation distribute to its stockholders other than a cash dividend that results in no tax?

Mr. LINDSAY. It can distribute to a stockholder its own stock as a stock dividend.

Senator CURTIS. In other words, a stock dividend or a stock split.
Mr. LINDSAY. Or there may be a reorganization exchange.
Ordinarily, a stock dividend or a stock split is clearly nontaxable. In the area of preferred stock there is a special rule. The receipt of it is not taxable, but when you sell it you may have ordinary income instead of a capital gain.
Ordinarily, a stock dividend is not taxed any more than a stock split is taxed unless there is a choice of receiving a cash dividend or a stock dividend and you say, "No, don't give me the cash; give me the stock." Then a stock dividend would be taxed.
Senator CURTIS. Because that would be construed as——
Mr. LINDSAY. Constructively received.
Senator CURTIS. It would be a constructive purchase?
Mr. LINDSAY. Yes.
Senator CURTIS. It would be construed that you got the cash?
Mr. LINDSAY. Got the cash and bought the stock.
Senator CURTIS. And bought the stock. But ordinarily, if a stockholder owns a given number of shares of stock in a corporation, and it splits 2 for 1, he has two pieces of paper to show his ownership for the same percentage ownership in the corporation.
Mr. LINDSAY. That is correct.
Senator CURTIS. How does a stock dividend differ from that?
Mr. LINDSAY. From a stock split? I would say they were very much alike.
Senator CURTIS. Yes. In other words, they give him an additional certificate for the same——
Mr. LINDSAY. Same investment.
Senator CURTIS. Same investment.
As it stands before this court decree, an owner of a share of stock in Du Pont was also a part owner in General Motors; isn't that correct?
Mr. LINDSAY. That is correct.
Senator CURTIS. Suppose the district court provided that they should give to each shareholder of Du Pont a certificate of stock in General Motors, so that instead of Du Pont owning General Motors, Du Pont's shareholders, as individuals, owned that amount. Would you distinguish that from a stock split?
Mr. LINDSAY. Yes, because there the corporation, Du Pont, is not issuing its own stock, additional shares of its own stock, but stock in another corporation.
Now, it is true that the shareholder of Du Pont indirectly has had an ownership, an interest in that investment, as he does in all of the other corporate property. Whenever you distribute property out of a corporation and there are earnings and profits behind that corporation, there is a dividend tax, unless some special exception applies, upon receipt of that property.
Senator CURTIS. Suppose there is a corporation that for sake of illustration we would say has a distribution function and a manufacturing function, but they are quite separate. They choose to sell the distribution portion of the business, and they pay that to the stockholders in cash; what tax applies, the ordinary rates?
Mr. LINDSAY. The ordinary dividend rate—unless it is a partial liquidation, as I understood your question. It may be a partial liquidation with a redemption, but ordinarily it would be a dividend, as

I understood your question. What they might do is transfer the distributing part of the business to a new corporation, another corporation, in exchange for all of the stock of the other corporation, or at least 80 percent of the stock of the other corporation, and then distribute that stock to the shareholders. If they owned the distributing part of the business and carried it on as an active business for at least 5 years, and it is to be continued as an active business, the distribution of stock would be tax free.

Senator CURTIS. That would be tax free?

Mr. LINDSAY. That would be tax free.

Senator CURTIS. Suppose the corporation took the cash they had received from the sale of their distributing end of the business, retained it in their manufacturing business, say they expanded or for some other purpose, the corporation would pay a capital gains tax but the stockholders would pay nothing if their certificates did not change; would that be right?

Mr. LINDSAY. If there was no distribution of any dividend, the stockholders wouldn't be affected. The corporation would pay a tax, and we may have a problem if it kept the cash and accumulated it without using it in the business—but the stockholders wouldn't pay any tax at that time.

Senator CURTIS. Now, distributions to stockholders in kind, and by that I mean other than additional stock certificates or cash, how are they treated?

Mr. LINDSAY. As a dividend. Distributions of any property other than stock in the distributing corporation would be a dividend.

Senator CURTIS. Didn't we have a case involving some of the liquor concerns where they issued to their stockholders the right to buy liquor stocks at a lower price, or to receive it free, or something of this sort? What was that?

Mr. LINDSAY. Yes, we did. That is the American Distilling Co. case. The question there was a tax to the corporation, I believe, as to whether or not it had made a sale and whether or not the corporation should be taxed.

Senator CURTIS. But the stockholder—what did the stockholder receive in that, do you recall?

Mr. LINDSAY. I think he received a right to purchase the whisky, which would have been a dividend.

Senator CURTIS. If he exercised that right——

Mr. LINDSAY. Yes.

Senator CURTIS. He received the right to purchase the liquor.

Mr. LINDSAY. I am not sure about that, that is just my recollection at the moment.

Senator CURTIS. Did we have a matter involving antitrust distribution in connection with some theaters a while back?

Mr. LINDSAY. There were considerable antitrust cases involving the theater industry.

Senator CURTIS. I mean a matter of dealing with the tax consequences before the Congress?

Mr. LINDSAY. There may well have been: I don't personally recall.

Senator CURTIS. Well, now, as I said, there are a number of very new problems in here, and I am openminded on the whole thing, but I want to get them straight.

Referring to the individual owners of Du Pont, and not Christiana Co. or Delaware Realty:

What is their position—how is their position different if they end up with a given number of shares of Du Pont and a given number of shares of General Motors, and they turn neither of them into cash? Aren't those certificates of stock evidences of the same ownership they had before the transaction took place?

Mr. LINDSAY. I think "yes" and "no." I answer it this way because it depends.

If all of the General Motors stock was distributed out in 1 year, by having General Motors stock and Du Pont stock the shareholders have no more than they had before; they have it in different forms.

If, however, the distribution is spread over many years, 10, 15, 20 years, perhaps Du Pont and I repeat, I don't know that they could or whether they would distribute the General Motors stock instead of the cash dividends they ordinarily would have have distributed, and would retain the amounts that they otherwise would have distributed as cash dividends. You would have Du Pont maintaining its full investment values by not having had to distribute its usual dividends, keeping them to expand its business, so the shareholder would have as large and as valuable a Du Pont Co., and also shares in General Motors stock.

Now, I hesitate to mention this because I really don't know that that could or would happen. But the longer the period of time the distribution will cover, the more likely that would be a possibility.

Senator CURTIS. What would be the situation if the district court orders divestment, and we will assume there were purchasers of the General Motors stock held by Du Pont, and they purchased it and paid the money to the Du Pont Corp. The transaction ended there; there was no distribution of that money to the stockholders. Then Du Pont Corp. would owe a capital gains tax, would it not?

Mr. LINDSAY. If it directly sold its shares, yes.

Senator CURTIS. That is all, Mr. Chairman.

Senator SMATHERS. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Smathers.

Senator SMATHERS. Mr. Lindsay, has the Treasury ever taken the position that the Congress should await a decision of the district court in its efforts to work out what the Supreme Court has directed, what we call equitable relief before the Congress? Has the Treasury taken that position at any time?

Mr. LINDSAY. The Treasury has not taken any particular position on that.

I imagine the committee may wish to consider whether to amend the law before the district court acts, or afterwards.

Perhaps, however, it is well, in light of the hearings and the general problem, to consider as a general proposition, not as a specific case, but as a general proposition, amendments to the tax law, in this area. And I would think if the Department of Justice believed and felt that some kind of an amendment was essential to make it easier to get courts to enforce divestitures, it should be considered.

But if the Department of Justice is not having trouble in the administration of the antitrust laws, I question whether we should now try to go into this matter.

Senator SMATHERS. Is there any indication, and I presume there is not, or is there any as to when the district court will make a decision in this particular case?

Mr. LINDSAY. I am not in position to state that; I just don't know.

Senator SMATHERS. Is it possible for the district court, under the direction of the Supreme Court to bring about equitable relief in the absence of the passage of a law of this nature by the Congress, for the district court to give ot the stockholders and to the Du Pont Co. particularly, relief of this character?

Mr. LINDSAY. No, sir.

Senator SMATHERS. That is all, Mr. Chairman.

The CHAIRMAN. Are there any other questions?

Senator WILLIAMS. Mr. Chairman, I would like to ask just a couple of questions.

Mr. Lindsay, as I understand it, under existing law this distribution would be taxable at full income rates.

Mr. LINDSAY. That is correct.

Senator WILLIAMS. Does the Treasury think that is fair, or do you think that, as charged, this would in effect be confiscation in certain instances?

Mr. LINDSAY. Let me put it this way:

If the fair market value of General Motors was not adversely affected by the distribution, I don't see why it is unfair to tax a property distribution in the same manner as a cash distribution. If the shareholder keeps it or sells it, assuming the same fair market value, he receives the equivalent of what would have been a cash distribution net after taxes.

If, under the surrounding circumstances, it could be clearly demonstrated—and I am no expert in this area—that there is a tremendous drop in the values progressively stimulated by sales because of the tax burden, then there may be a situation in which you would say that the dividend tax would appear to be unfair.

Senator WILLIAMS. That is an excellent answer, but I lost you at the third "if."

I would like to ask this question:

Do you recognize the need of any legislation in this field? Would you suggest that some type of legislation would be necessary in this field?

Mr. LINDSAY. I certainly think the problem merits intensive consideration.

As you know, the Ways and Means Committee has been taking up a study on the area of corporate adjustments and distributions, and it might be very helpful if in connection with that overall study a further study could be made of this problem as it fits into corporate splitups and distributions in general.

Senator WILLIAMS. What I was trying to establish is whether or not your expression of opposition to S. 200 was in effect against all legislation, or whether it was against that bill only, and whether or not you recognize that some modification thereof may be in order.

Mr. LINDSAY. Our position, consistent with our position several years ago in the Hilton Hotel bill, is that if some change in the tax law is deemed necessary by those charged with the responsibility of enforcing the antitrust laws, we think that consideration should be given to the partial liquidation treatment we have described here.

Senator WILLIAMS. Thank you.

The CHAIRMAN. Senator Douglas.

Senator DOUGLAS. Mr. Lindsay, I have the opinion of the Supreme Court in my hand here, and a rather hasty reading of it gives me the impression that one of the objections, perhaps the controlling objection of the Court to the holding of the stock in General Motors by the Du Pont Corp. and its affiliates was the possession of voting powers of that stock.

Is that true?

Mr. LINDSAY. I think that is, that may be true. I don't have the Supreme Court opinion before me.

Senator DOUGLAS. Suppose that Judge LaBuy does not order actual divestment of the stock, but merely the deprivation of voting privileges, this problem therefore would not arise.

Mr. LINDSAY. This problem would not arise; right.

Senator DOUGLAS. Well, this raises the question whether Congress should move prior to a decision of the court, and this was the point I think that Senator Smathers was making.

If we don't have this issue why should we torment ourselves with it?

Senator FREAR. I am not the witness but may I answer it? [Laughter.]

Mr. LINDSAY. I wish you would, Senator Frear.

Senator FREAR. In the first place, in the honest opinion of the junior Senator from Delaware, if such a decree were issued by the lower court, the Attorney General would, without doubt, appeal.

Senator DOUGLAS. How can you be sure of that?

Senator FREAR. Just as sure as you are, sir.

Senator DOUGLAS. I am not sure.

Senator FREAR. Neither am I. But I mean we can both make an assumption, Senator.

Senator DOUGLAS. I decline to go on that assumption.

Senator FREAR. Then I am going to take the same assumption you do.

Senator DOUGLAS. I am getting a little confused.

Senator FREAR. If I have confused the Senator from Illinois, that is the first time.

Senator DOUGLAS. But my point is——

Senator FREAR. I think it is well taken.

Senator DOUGLAS. I think if Judge LaBuy merely orders deprivation of voting rights, then this is not a real issue, is it, and why should we settle in advance issues which may not arise?

Senator FREAR. May I answer that one, Mr. Chairman?

I think that brings up an even more important question, because I believe the Senator from Illinois and the junior Senator from Delaware have been in accord on many instances about retroactive taxes; and unless this law or something similar is passed and the decision is not in favor of the stockholders, then the question is going to come up here and the Treasury could rightfully stand on the position they have been taking for many years and say that this is retroactive legislation.

Senator DOUGLAS. But if we have the Treasury's word for it——

(See subsequent letter by Mr. Lindsay amplifying his remarks on whether legislation modifying the tax consequences of proposed dis-

BEST AVAILABLE COPY

tributions by Du Pont or General Motors stock would be considered "retroactive" if enacted after the final decree ordering distribution on p. 297.)

Senator SMATHERS. In cases we have had here before with respect to FCC and Securities and Exchange cases, actually, was not that penalty put on the stockholders having to pay, we will say, ordinary income? That was a painful fact which brought Congress' attention to the need to bring about equity insofar as the shareholders and taxpayers were concerned.

In other words, had not somebody been hurt, actually, in fact, before the legislation came on, or the Antitrust Division came on, and recommended maybe relief?

Mr. LINDSAY. Yes; but I still think in those situations the legislation was prospective as to its effect on distribution. I may be wrong on that. You can have a fact frozen, but the results of that fact is in the offing. You could have a decree without the distribution having started; and if legislation were enacted providing that for all years from the year of enactment enforced distributions would be tax free, that legislation would be prospective, even though the underlying fact situation, the decree, occurred before the legislation was passed.

Senator SMATHERS. Well, very specifically, does the Treasury say now that this legislation is timely?

Mr. LINDSAY. The Treasury believes that it is quite appropriate to consider the problem in a public hearing. We did not feel that legislation was either so timely or so necessary as to make a recommendation that Congress consider this.

Senator SMATHERS. Well, in fact, as of this moment, has anyone thus far been injured?

Mr. LINDSAY. No, not in the context of this legislation. Nobody has had to pay a tax on a forced distribution in connection with this case.

Senator BUTLER. Mr. Chairman.

Do you mean by that statement that until the court has finally acted and there has been a loss that you would do nothing?

Mr. LINDSAY. I am not sure what you mean by that, Senator. The Internal Revenue Commissioner, of course, was asked to rule on what we would do if the distribution was made along the lines of the plan of the Department of Justice, and we said we would tax it as a dividend.

Senator BUTLER. But didn't you also say there was some element of confiscation in such a practice?

Mr. LINDSAY. I don't think I said that, Senator Butler. I pointed out circumstances under which there would not be, and circumstances under which there might be.

Senator BUTLER. Well, a little bit is as—but there is some confiscation.

Mr. LINDSAY. The fact a dividend tax must be paid on property distributed out of earnings and profits is not confiscation any more than the fact that a dividend tax has to be paid on cash is confiscation.

Senator BUTLER. Even though it is forced?

Mr. LINDSAY. Even though it is forced.

Senator BUTLER. So you would wait, then, until the court actually says there must be a divestiture in accordance with the plan of the Attorney General.

Mr. LINDSAY. The Treasury would cooperate with the committee in any action that seemed to be appropriate in light of the public hearings and the surrounding circumstances.

I think whether or not there is confiscation is a question of fact.

If people have to pay a dividend tax on a value of 50, and by the time they can turn around and sell the stock it is depressed because of other sales and forced sales to a value of 25, that to me probably would be confiscation, not because of the tax law but because of the surrounding circumstances, and maybe some change in the tax law, if you couldn't change anything else, would then be appropriate.

Senator BUTLER. What are the surrounding circumstances—the Supreme Court?

Mr. LINDSAY. Well, the surrounding circumstances would be, I suppose, the decree and the effect of the decree. Under the plan of the Department of Justice, some 20 million shares belonging to Christiana, or, after the distribution, belonging to Christiana and Delaware, and the stockholders of Delaware, would have to be sold over a 10-year period; meanwhile some 40 million shares would be distributed over a 10-year period to the public shareholders.

I haven't heard the testimony that may be forthcoming, but I suspect there is going to be a statement to the effect that this will very adversely affect the market value of the stock.

If the market value of the stock is particularly—is more affected by the tax, that is a surrounding circumstance, it seems to me.

The forced sale of the Delaware and Christiana stock is a surrounding circumstance, but in isolation as a matter of sheer tax policy, the fact that you tax property as a dividend is not confiscation.

Now, it is true that we have in the past drawn a distinction between involuntary distributions and voluntary distributions, and I do think there is a much stronger argument for relieving somebody from the burden of tax from an involuntary distribution than there is in the case of a voluntary distribution; but there is still a receipt of something that is worth money, and there is no hardship in paying a tax if the value will stand up, any more than there is in paying any tax.

Senator BUTLER. Even when the thing that they receive is something they already have and don't want to get?

Mr. LINDSAY. That is because of the structure of our tax on corporations. You can't take property out of a corporation from indirect ownership into direct ownership without accounting for the current tax earnings and profits and paying a dividend.

Senator BUTLER. I understand that.

Mr. LINDSAY. That is hard on everybody.

Then there are people who are forced to sell low-cost properties because they can't meet their medical bills. That is an involuntary conversion, in a sense, and we tax that.

The CHAIRMAN. Any further questions?

Senator McCarthy.

Senator MCCARTHY. I have a question, Mr. Chairman.

The Supreme Court decision contains this language, Mr. Lindsay:

We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of this section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly in any line of commerce.

That is the concept in its simplest terms. Wouldn't it be possible that the district court in Chicago might decide that not all of the General Motors stock, if they decide on divestment—that not all of it had to be disposed of or invested; that those in its incipiency might be disposed of?

They might say, "Dispose of half of what you have."

Mr. LINDSAY. I suppose it might be possible, Senator McCarthy, but I would prefer not to be in position of commenting.

Senator MCCARTHY. It would not be possible?

Mr. LINDSAY. I suppose it might be possible; I just don't know about it.

Senator MCCARTHY. What would be the effect of that if they did order divestment, say, of half?

Mr. LINDSAY. Without any change in legislation, I think again it would be an ordinary dividend.

Senator MCCARTHY. If they distributed it in the way of stock——

Mr. LINDSAY. Yes.

Senator MCCARTHY. To the Du Pont stockholders?

Mr. LINDSAY. Yes.

Senator MCCARTHY. And in the alternative they might dispose of it in the open market, might they not?

Mr. LINDSAY. If they disposed of it in the open market, it would be a capital gain for the company, and the proceeds, if distributed, would be ordinary dividends to the shareholders, subject to adequate earnings and profits behind it.

Senator MCCARTHY. It would be reflected in any capital gains if a stockholder in Du Pont should dispose of his stock in Du Pont?

Mr. LINDSAY. Yes.

Senator MCCARTHY. So there are three or four possibilities that might come out of this court action in Chicago——

Mr. LINDSAY. Yes.

Senator MCCARTHY. At this particular time?

Mr. LINDSAY. I would suppose.

Senator MCCARTHY. I have one more question.

In the case of the Hilton Hotel case, as I recall the action before the House Ways and Means Committee, it would require that they dispose of it, divestment was required, but in order to escape taxation the money which was acquired through the divestment had to be reinvested in hotels, I assume, or invested in some——

Mr. LINDSAY. Similar property.

Senator MCCARTHY. Similar property with the approval of the court.

Mr. LINDSAY. That is correct.

Senator MCCARTHY. Would it be possible to provide something of that kind with regard to this problem?

Mr. LINDSAY. I suppose the difficulty in context of the antitrust law is the requirement that the proceeds have to be reinvested in similar property. That is almost in conflict with the purpose of the sale in the first place.

Senator MCCARTHY. Then this comes to a point where it would be almost impossible for Du Pont to hold stock of any corporation that might use any product of Du Pont.

Mr. LINDSAY. That is correct.

Senator McCARTHY. Do they hold any other corporation that you are aware of?

Mr. LINDSAY. I am not sure.

Senator McCARTHY. All right.

That is all. Thank you.

Senator FREAR. May I make just one final comment, sir, in connection with the colloquy between you and the Senator from Maryland, Mr. Lindsay? As you know, the public buildings in the city are required to have fire extinguishers; they are not required to have fire extinguishers after the fire, but they have them before, and I think this legislation is needed before the difficulty arises, too; before the harassment is visited upon the stockholders and not afterward.

The CHAIRMAN. Senator Cotton.

Senator COTTON. I listened to Mr. Lindsay's statement, and then I was unavoidably called out for a few minutes, so if this has been asked you five times while I was out, I apologize for asking it again.

But when you came to the conclusion of your direct statement, you say:

> If on the basis of this hearing the committee determines that a change in the tax law should be made as an aid to antitrust enforcement, we would be pleased to cooperate with the committee in the development of appropriate legislation, which would provide adequate safeguards and protect the public interest.

Now, that leaves me a little bit up in the air. Does the Treasury, or you representing the Treasury, care to say whether you think, not what the committee thinks, but whether you think there is certain legislation, perhaps not this but certain legislation required in the interests of justice, or do you think no legislation is required?

Mr. LINDSAY. We have consistently taken the position in the area of antitrust law that unless the Department of Justice finds a change in the tax law essential, necessary, to facilitate divestiture, we would not recommend it. We took that position in connection with the Hilton Hotel bill that Senator McCarthy questioned me about a little while ago.

I understand the Department of Justice has stated their position on the bill, and has indicated they would like to see something that would facilitate antitrust enforcement; their having taken that position, we have recommended a solution that we think is fair and logical within the context of the tax law; namely, partial liquidation.

That may not be the best solution. I don't think it is a black and white situation. We do think probably something would be helpful. We would be happy to cooperate with the committee in trying to work out any solution that seems to be appropriate.

Senator COTTON. Thank you, Mr. Chairman; and thank you.

The CHAIRMAN. Senator Kerr.

Senator KERR. Mr. Lindsay, I want to express commendation for your statement and your attitude. I share the feeling that Senator Frear has expressed, that there is every evidence of the desire to help arrive at an equitable solution to what appears to be a very real and a very difficult problem.

It is in the light of that statement that I am going to ask just a very few questions.

If a stockholder in Du Pont on today has 100 shares of Du Pont, that represents a certain interest in everything that Du Pont owns; doesn't it?

Mr. Lindsay. Yes.

Senator Kerr. Including, let us say—well, we will find out exactly. How many shares of Du Pont stock are there; how many shares of Du Pont outstanding?

Mr. Lindsay. About 45. I have it written down.

Senator Kerr. The president of the company is here; maybe he will tell us.

Mr. Greenewalt. 45 million.

Senator Kerr. 45 million.

There are 63 million shares of General Motors owned by the Du Pont Corp.; is that correct?

Mr. Lindsay. Yes, sir.

Senator Kerr. So that each 100 shares of Du Pont in reality represents about 140 shares of General Motors.

Mr. Lindsay. That is correct.

Senator Kerr. Now, in equity, isn't the stockholder in the same position tomorrow if instead of the 100 shares of Du Pont he owns today, tomorrow he owns 100 shares of Du Pont and 148 shares of General Motors, assuming that in order for him to get into that position tomorrow Du Pont owns no General Motors?

Mr. Lindsay. He is almost in the same position.

Senator Kerr. Equitably.

Mr. Lindsay. He has split up his investment in two parts—two different parts.

Senator Kerr. But in reality, if the 63 million shares that Du Pont owns today in General Motors are by order of the court by involuntary divestiture, in the hands of the stockholders of Du Pont tomorrow, and no longer owned by Du Pont, that shareholder of 100 shares in Du Pont is to all intents and purposes equitably in the same position of the ownership tomorrow as he was today.

Mr. Lindsay. I will answer your question yes, Senator.

Senator Kerr, I would like to add this, however: That while that is true in equity, we have a structure of tax on which we rely for our revenues. In equity that stockholder owns the cash proceeds in that corporation indirectly. When the corporation puts the cash in his hands, then presumably he has a smaller investment, as compared to the situation if there was no distribution. There has been a change from indirect ownership to direct ownership, but we require him to pay a tax.

Senator Kerr. But that is the result of a voluntary action of the corporation, isn't it, in which he, as the result of a decision in which he participates?

Mr. Lindsay. Yes.

Senator Kerr. And the situation that we visualize if the Justice Department recommendation is carried out would be entirely different.

Now, let me ask you this question:

Let's say that today, or before this action was initiated, at a time when in the minds of management of Du Pont they either had a right to assume that their holdings in General Motors were entirely in accordance with the law, or certainly they had the right to presume it in view of the fact that it had not been challenged by the court, and that was 1949, as I understand it.

Let's assume that they had paid $100 a share for 33⅓ percent of X corporation, representing an investment, let us say, of $5 million,

and that instead of the action being brought against them to divest themselves of General Motors stock, it had been brought against them to divest themselves of the stock in X company, and that the decision and all proceedings were the same as have been had in this case, and now they were confronted with the necessity, if the district court implemented the recommendations of the Justice Department, to pass this $5 million worth of stock in X company out to their shareholders.

Let's say now they were confronted with the necessity of passing out this $5 million worth of stock in X company to their shareholders, and that its market value today is $100 a share; they then would be confronted with the situation actually of having to pay the ordinary tax income rates on an asset transferred to them by the corporation, which in reality represented no profit to the corporation, would they not?

Mr. LINDSAY. There would be no profit to the corporation.

Senator KERR. The corporation paid $100 a share for the stock.

Mr. LINDSAY. It is still worth $100.

Senator KERR. It is still worth $100, but no more. The shareholder who received one share of that stock, however, would have to pay tax on it as though it were profit, wouldn't he?

Mr. LINDSAY. Well, because any distribution of property by a corporation will be assumed to come first out of the current earnings and profits, and then the accumulated earnings and profits.

Senator KERR. But, in reality, the shareholder would have to pay ordinary income tax on a $100 piece of paper that represented profit neither to him, nor to the corporation, wouldn't he?

Mr. LINDSAY. It represents a profit to the shareholder.

Senator KERR. How could it represent a profit to him in view of the fact that the capital structure of his company was reduced by the extent of the amount transferred out to him?

Mr. LINDSAY. That ultimately leads you to the conclusion that any dividend distributed does not represent a profit, because every time a dividend is distributed the earnings of the corporation and its surplus are reduced.

Senator KERR. I don't think so. I know a little bit about corporate management, and the way they get cash to distribute is out of profits on transactions which they have had.

But here is a piece of paper which represents ownership in another corporation, acquired by the spending of cash on which it has made no profit. It still is in its portfolio; its value is unchanged; but because of the decision of the court it must pass it out to a shareholder, rather than keep it, and the shareholder receives it, which means that his ownership in the corporation from which he receives it has to be reduced in value by that extent.

Mr. LINDSAY. Perhaps I can make my point more clearly in the context of a voluntary transaction of this character.

If the corporation purchased 33⅓ percent, or whatever it was, of X company, and distributed out that stock to its shareholders, it is somewhat the same as if it distributed the cash out of earnings and profits to permit the shareholders to buy X company.

Senator KERR. To go a little further in the assumption, that the parent corporation didn't have that much profit, didn't have that much earnings in its surplus account.

Mr. LINDSAY. If it didn't have sufficient earnings and profits to cover the dividend, then the dividend wouldn't be taxed as a dividend. If there were no earnings and profits in the corporation, current or accumulated, it could distribute property without tax.

Senator KERR. You think there would be a difference between the two situations, that is, the one that we are talking about and the one that is real here?

Mr. LINDSAY. Well, the only difference that I see between the situation you are talking about under the Frear bill and the case you have cited me is that the magnitude of the transaction is different.

Senator KERR. The Supreme Court is not responsible for that.

Mr. LINDSAY. No, no. Secondly, the timing is different. You are talking about a rather recent acquisition rather than an old acquisition.

Senator KERR. Let's say it was an old acquisition; say that the acquisition was of equal time.

Mr. LINDSAY. Well, I would see no difference, then. In each case you are talking about the acquisition of stock which the court requires you to distribute; right?

Senator KERR. Yes.

Mr. LINDSAY. It is the same kind of a problem exactly.

Senator KERR. I take it that your position is that this is a problem that the Congress should attempt to solve by appropriate and equitable legislation.

Mr. LINDSAY. Yes, in view of the position taken by the Department of Justice that some legislation is necessary to facilitate antitrust enforcement.

Senator KERR. Let's say that then we act on that suggestion or recommendation, and prepare and pass legislation which would permit treatment of an item received on a capital gains basis.

Would you feel that that should be optional to the stockholder as to whether he treats it as a dividend or a partial liquidation? The thing you have in mind is the corporate stockholder on the one hand, and the individual stockholder on the other.

Mr. LINDSAY. I think if it were to be treated as a partial liquidation it would be treated consistently as a partial liquidation for all stockholders, corporate and individual alike.

Senator KERR. In other words, you think in order to relieve an individual stockholder of a harsh and unjust penalty, that you should place it on the corporate shareholders?

Mr. LINDSAY. I think it would be, bearing in mind that the legislation would be designed for similar problems, many problems, not just one particular case, although there is only one case that I know of now on the horizon. We ought to consider a consistent rule across the board, and not one that we will pick only if it helps the corporate shareholder.

Senator KERR. You are not in a rule that will help a corporate shareholder. The purpose of my question was to see——

Mr. LINDSAY. I understand, sir.

Senator KERR. Was to see it if it were not appropriate to consider providing relief to the taxpayer who is about to suffer a harsh penalty without at the same time imposing a similar harsh penalty upon a shareholder who under the present law is not about to receive it.

Mr. LINDSAY. I don't think an election would be appropriate.

Senator KERR. Then the result of that position is that, is it not a fact, that you have expressed a willingness to relieve the shareholder who is an individual of a harsh penalty which would be imposed upon him involuntarily by a decision of the court, but that you would not be willing for that relief to be given unless a proportionately harsh penalty were inflicted at the same time upon another who, in the operation under the law as it now exists, would not have the penalty if the Justice Department recommendation was carried out?

Mr. LINDSAY. If the Justice Department recommendation is carried out, the shares attributable to Christiana and Delaware would have to be sold anyway, by the trustee, for the accounts of Christiana and Delaware, so that even if they start off with a light dividend tax, they are going to have to wind up paying the capital gains tax anyway.

Now, it is true that the combination of the dividend tax such as it is, and the capital gains tax, would be a little less, but not appreciably less than the partial liquidation treatment which would tax the corpoı itate shareholders and the individual shareholders alike on a capital gain basis depending on the cost of their investment, of course, at the time of the distribution.

Senator KERR. Can an individual at this time elect to treat capital gain income either as capital gain or ordinary income?

Mr. LINDSAY. Well, he has certain things within his own control. If he wants the sale of stock of which he has recently acquired to be taxed as ordinary income, all he has to do is sell it within 6 months.

Senator KERR. Well, after holding it 10 years, he can still regard the income as ordinary income if it is more favorable to him than it would be if treated as a capital gain; can he not?

Mr. LINDSAY. No, he cannot.

Senator KERR. What is the principle that Congress felt they were recognizing when they passed the law taxing only 15 percent of intercorporate dividends?

Mr. LINDSAY. Double taxation of corporate profits.

Senator KERR. Do you think it is an equitable provision?

Mr. LINDSAY. The 15 percent, or rather the 85 percent dividends received deduction?

Senator KERR. Yes.

Mr. LINDSAY. Yes; I do.

Senator KERR. Do you think that it is not sufficiently equitable to let the corporate shareholder continue to have the benefit of it in case of an involuntary divestiture here?

Mr. LINDSAY. I think that if—looking at the transaction as a whole, and our tax structure—this be a partial liquidation, except for the fact there is no redemption, then it seems to me that it ought to be consistently treated as partial liquidation rather than carving out special rules depending on the shareholder.

Senator KERR. It is an involuntary liquidation.

Mr. LINDSAY. It is involuntary, I grant you that, Senator Kerr.

Senator KERR. And under present law, the corporate stockholder, by reason of an act of Congress, which the Congress itself thought it justifiable, and which you very appropriately told us you thought was justifiable, the corporate taxpayer is in a certain posture as having a certain exemption of taxation of certain revenue.

Now, do you think that it is equitable to pass an act which would take from him a part of that by reason of acts over which he had no control, and which he was unable to avoid?

Mr. LINDSAY. I think you have a real point, Senator Kerr, and I would like to think about it.

Senator KERR. I appreciate that very much, because it seems to me there is some equity there that should produce a reaction.

Just one moment now, Mr. Lindsay.

Until we do something, unless we do something, the shareholder in Du Pont is actually going to have to pay a tax on the receipt of an asset which, in reality, reduces the value of the stock he owned by the amount of the asset, doesn't he?

Mr. LINDSAY. Yes.

Senator KERR. Under the present law a landowner who loses title to property under eminent domain proceedings can reinvest his money in a similar asset without paying a tax on the profit from the one that is taken from him by condemnation, can he not?

Mr. LINDSAY. Yes.

Senator KERR. But neither Du Pont nor the shareholder in Du Pont could, under existing law, if this recommendation is carried out, could they?

Mr. LINDSAY. If the recommendation of the Department of Justice is carried out without any change in existing law, you mean?

Senator KERR. Yes.

Mr. LINDSAY. No, they could not. Let me say——

Senator KERR. While the divestiture under condemnation is not something that happens to the individual because he finds himself moving from a posture of not being in violation of law along to where he is, still it is just as painful to him, is it not?

Mr. LINDSAY. Yes, it is.

Senator KERR. Thank you very much.

The CHAIRMAN. Mr. Lindsay, in regard to the Christiana Co.: how many Du Pont shares does that company own?

Mr. LINDSAY. Twelve million shares.

The CHAIRMAN. Is the Delaware Co. in the same situation as the Christiana?

Mr. LINDSAY. One million two hundred.

The CHAIRMAN. Both of those companies are compelled to dispose of the General Motors stock attributable to them?

Mr. LINDSAY. Under the Justice Department plan, they would be.

The CHAIRMAN. You spoke of the Christiana Co. paying a capital gains tax. On what basis would they pay the tax?

Mr. LINDSAY. The difference between the cost and the amount received.

The CHAIRMAN. Thank you.

Senator KERR. You mean by that——

Mr. LINDSAY. I don't——

The CHAIRMAN. On what base would the stock——

Mr. LINDSAY. The stock received by Christiana and Delaware from Du Pont would come over at the basis of cost, which is an average cost of $2.10.

Senator KERR. Their cost would be the same as Du Pont's now is?

Mr. LINDSAY. In addition to that, Christiana owns some 500,000 shares of General Motors. I don't know what the cost is for those.

The CHAIRMAN. I am speaking of the other stock.

Mr. LINDSAY. That would be $2.10.

The CHAIRMAN. They would pay 15 percent on $2.10?

Mr. LINDSAY. That is correct.

The CHAIRMAN. But if they sold that stock, as they are required to do, they would pay a capital gains between the——

Mr. LINDSAY. $2.10.

The CHAIRMAN. What is it?

Mr. LINDSAY. $2.10.

The CHAIRMAN. And the price that they received for the stock?

Mr. LINDSAY. That is correct.

The CHAIRMAN. This would be 25 percent?

Mr. LINDSAY. Twenty-five percent.

The CHAIRMAN. If it is actually transferred and they had the option to either have it at the current price or the original cost, which is $2.10, I should think they would take the original cost.

Mr. LINDSAY. They must take it at cost.

The CHAIRMAN. But when they are required to sell it there would be a 25-percent capital gains tax on the difference between the $2.10 and the price they received.

Mr. LINDSAY. That is correct.

The CHAIRMAN. Does that apply to the Delaware Co. also?

Mr. LINDSAY. Yes.

Senator WILLIAMS. Would not the mathematics of that be that they would actually pay more tax under the capital gains provision than they would be if they took the dividends at the full market value?

Mr. LINDSAY. They pay more tax under the capital gain than they would under the dividend.

Senator WILLIAMS. Where it is taken into the Treasury at the $2.09, the capital gains computed from the $2 up to $50, the capital gains would be larger than it would be if it was taken in at a dividend of $50 with the 85 percent exclusion?

Mr. LINDSAY. That is correct; yes, sir.

Senator KERR. Let's say that Christiana received a million shares of this stock. They are not permitted to keep it, are they? Don't they have to pass it out to their stockholders?

Mr. LINDSAY. Well, the plan of the Department of Justice would have them sell it. Rather, all of the shares, the shares to be distributed to Du Pont and the shares to be sold for the account of shareholders of Du Pont, are to be deposited with a trustee, and the shares that would normally be distributed to Christiana and Delaware are required to be sold by the trustee in a 10-year period, if the Department of Justice plan is adopted.

The CHAIRMAN. Then the proceeds of the sale of that stock would go in the treasury of the Christiana Co., of course.

Mr. LINDSAY. Yes.

The CHAIRMAN. Is that a private holding company?

Mr. LINDSAY. I don't believe Christiana is a personal holding company; Delaware may very well be.

The CHAIRMAN. Would they be forced to pay out this cash on hand in dividends?

Mr. LINDSAY. No; other than the usual requirements of accumulations beyond the reasonable needs of business.

The CHAIRMAN. Are there any further questions?

(No response.)

The CHAIRMAN. Mr. Lindsay, we thank you very much.

Mr. LINDSAY. Thank you, Mr. Chairman.

(The following letter was subsequently submitted by Mr. Lindsay amplifying his remarks on whether legislation modifying the tax consequences of proposed distributions by Du Pont or General Motors stock would be considered "retroactive" if enacted after the entry of a final decree ordering the distribution:)

OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, June 4, 1959.

Hon. HARRY F. BYRD,
Chairman, Committee on Finance, U.S. Senate, Washington, D.C.

MY DEAR SENATOR BYRD: This is in response to your request for amplification of my remarks concerning a problem raised at the public hearing before your committee on S. 200. The question raised at the hearing on May 26, 1959, was whether legislation modifying the tax consequences of proposed distributions by Du Pont of General Motors stock would be considered "retroactive" if enacted after the entry of a final decree ordering the distribution of such stock.

As I indicated in my testimony before your committee, such legislation would not be considered retroactive by the Treasury if it were limited to distributions occurring after the date of enactment of the legislation. S. 200 by its terms applies to "distributions of divested stock * * * made after June 1, 1958." The date should be the date of enactment or possibly December 31, 1958, but the bill properly looks to the date of distribution rather than the date of the court decree. Generally, the Federal income tax is imposed upon the basis of an annual accounting period and the law in effect at the time an amount is realized by the taxpayer is the law which determines the taxability and classification of such amount as income. Since the proposed distributions would not result in the realization of income by shareholders of Du Pont until the date of distribution, a legislative modification of the tax classification of such distributions prior to the date of distribution would be prospective legislation.

In many instances, the Internal Revenue Code has been modified prospectively to affect the tax classification of amounts to be received in the future resulting from transactions which have occurred in the past. For example, section 72 of the Internal Revenue Code of 1954 enacted a new, and substantially different, system of rules for taxing amounts received by annuities. This amendment was made applicable to amounts received after the effective date with respect to annuity contracts previously purchased. There are many similar instances too numerous to mention.

Recently, the Senate passed a new life insurance bill which is, under the circumstances, properly applicable to 1958. Under the new bill, life insurance companies would be subject to tax on income accrued after the effective date, notwithstanding the fact that the companies were organized and made long-term commitments before the effective date.

In conclusion, the Treasury Department would not regard the legislation under consideration as being retroactive if it were enacted before distributions are made, notwithstanding the fact that the court decree may have been entered prior to the enactment of such legislation.

Sincerely yours,

DAVID A. LINDSAY,
Assistant to the Secretary.

The CHAIRMAN. The next witness is Mr. Crawford H. Greenewalt, the president of Du Pont.

Mr. Greenewalt, will you proceed, sir?

STATEMENT OF CRAWFORD H. GREENEWALT, PRESIDENT, E. I. du PONT de NEMOURS & CO.

Mr. GREENEWALT. Thank you, Mr. Chairman.

Mr. Chairman, I have a statement which I would like to read, if you have no objection.

The CHAIRMAN. Proceed, sir.

Mr. GREENEWALT. Mr. Chairman and gentlemen, I am very grateful for this opportunity to appear before the Finance Committee. I am not here because I have any qualifications as a tax expert, nor because the bill under consideration would have any direct bearing on the Du Pont Co. as a manufacturer of chemical products. I am here because due to a Supreme Court decision a conflict between antitrust policy and tax policy has created a harsh and inequitable situation affecting many thousands of people guilty of no wrong, a situation that can, and I believe should, be cured by legislation.

In the immediate case, some 251,000 beneficial holders of Du Pont common stock, on whose behalf I am appearing before you, are affected. But the holding of the Supreme Court, giving a new interpretation of section 7 of the Clayton Act, poses a clear threat to literally millions of stockholders of other corporations, corporations that have acquired stock of other companies and that may at some future time find themselves in the same position as does Du Pont today. Thus we are confronted with a question potentially affecting a very broad segment of the population.

The Department of Justice has proposed that the Du Pont Co. be compelled to divest itself of its 63 million shares of stock in General Motors Corp. Indeed, the Department of Justice, in a brief filed on April 30 with the U.S. District Court in Chicago, has urged that, as a matter of law, divestiture is the only remedy available to the court.

The Department of Justice proposed that the General Motors stock be distributed pro rata over a 10-year period to all holders of Du Pont common stock. However, shares allocable to certain stockholders (Christiana Securities Co., Delaware Realty & Investment Co., and the stockholders of Delaware Realty), which represent about one-third of the total, would be sold for their account by a trustee over a 10-year period.

It should be recognized at the outset that this proposal involves no tax on the Du Pont Co., and S. 200 would have no application to the company, per se.

The Commissioner of Internal Revenue has ruled that shares distributed under this proposal would be taxable to Du Pont stockholders as ordinary income.

The Supreme Court's 4–2 opinion made no mention of divestiture—it simply called for "equitable relief" to end a relationship between Du Pont and General Motors which, the Court concluded, created a "reasonable probability" that Du Pont might at some time in the future monopolize General Motors' purchases of paints and fabrics. Not only did the Court find no wrongdoing on the part of the stockholders, but it stated explicity:

> * * * that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including Du Pont's competitors * * *

So we have a situation where there is no finding of monopoly, intent to monopolize, restraint of trade, or conspiracy, and where there is a positive statement by the Supreme Court that the company's executives acted "honorably and fairly." By no possible stretch of the imagination could any wrongdoing be attributed to the company's stockholders under these circumstances. The stockholders are inno-

cent, but may, in the absence of remedial legislation, become innocent victims.

This, then, is the basic inequity—that innocent stockholders should be taxed under compulsion of a judgment for which they were in no way responsible.

This is not just a small number of stockholders, but more than 251,000 beneficial owners of common stock in the Du Pont Co. who are situated in every State in the Union, and who include some 50,000 Du Pont employees. Besides individuals and corporations, they include educational institutions, trustees, labor unions, charitable organizations, fraternal organizations, and insurance companies.

The taxation which would be inflicted upon them would be severe. In addition, there would be other severe financial consequences. Many Du Pont stockholders would have to sell all or part of the General Motors shares distributed to them to pay their taxes. Others would find it advantageous to sell their Du Pont stock to avoid receiving the distribution. This would introduce an additional penalty in erosion of market values of both stocks.

This is a complicated matter which I shall not attempt to go into in detail, as others are scheduled to testify before your committee on this subject. But the point I wish to make is that it has been estimated by competent financial authorities that a drop in market value of both General Motors and Du Pont would be in the range of 25 percent.

For the individual stockholder, the taxable income would be the full market value of the General Motors stock at the time of distribution, and the amount of tax would depend on the particular tax bracket of each stockholder, ranging from 20 to 91 percent, less 4 percent dividend received credit. At current market price of about $50 a share, this means that an individual stockholder in the lowest bracket would be taxed $8 on each General Motors share received. An individual in the highest bracket would pay $43.50 for each share received. It should be noted that the tax computation does not take into account the price at which the individual purchased his shares.

Under the present law, this aggregate tax burden on individual Du Pont stockholders would be very great. In a survey of Du Pont stockholders, Dr. Benjamin Tepping, of National Analysts, Inc., of Philadelphia, found that there are 251,774 individual beneficial owners of Du Pont common stock. Based on his survey, Dr. Tepping estimated that 231,183 of these individuals would be liable, over the 10-year period, for taxes totaling $778,050,000 to $1,016,030,000, assuming a market price range of $39.20 to $50.81 for General Motors stock.

To show what these figures mean to the individual, Du Pont called 17 individual stockholders as witnesses in the recent district court hearings. These witnesses, in the main, were selected from the many stockholders who wrote to the company to complain of the inequity of the Department of Justice proposal and to ask what they as individuals could do about it. They were in varying tax brackets, and held amounts of Du Pont stock ranging from 15 to 1,000 shares. Some said that if the Department of Justice plan were to be adopted, they would dispose of their Du Pont shares to avoid liability for taxes on General Motors shares received in a distribution. Others said they would be forced to sell at least part of the General Motors shares received in order to raise cash to pay the taxes that would be due on them. Others would hold both their Du Pont and General Motors

stocks and dig into other assets to pay the taxes. Still others were undecided as to what course to take. But all were disturbed by the very real problem that would arise under the present tax law in the event of a forced distribution of General Motors shares.

I should like at this time to offer the testimony of these stockholders as exhibit A to accompany my statement. Their testimony is brief; their problems are typical of those that a distribution under the present tax laws would bring to 251,000 individuals scattered through every State in the Union.

The CHAIRMAN. Without objection, the insertion will be made.

Senator KERR. Mr. Chairman, may I make a suggestion off the record?

(Discussion off the record.)

The CHAIRMAN. Without objection, it will be filed with the record.

(Exhibit A referred to will be found in the files of the committee.)

Mr. GREENEWALT. There is a further difficulty in the application of the tax law to the present case: its effect on the stockholders is not at all uniform. While this very heavy burden, which I have described, would be laid upon the individual shareholders, a tax-exempt organization such as a university or charitable institution would pay no direct tax at all, but would be hurt through the depressant effect upon values. For corporate stockholders, the taxable income would be measured by the cost of the General Motors stock to Du Pont which is substantially less than its current market value, and would be subject only to the intercorporate dividend tax.

While S. 200 would remove the inequity of an income tax on a compulsory distribution, it would not otherwise put the stockholder in a more favorable tax position than he is in today.

Under S. 200, no stockholder would be any better off financially. The 251,000 beneficial stockholders of Du Pont, including more than half of our 83,000 employees who work in 28 States, would merely have two pieces of paper instead of one representing the identical value. They would still be subject to capital gains tax when, like other citizens, they cashed in their stock certificates. They merely would not be subject to tax penalty so that antitrust policy could be carried out.

The CHAIRMAN. Mr. Greenewalt, how would the capital gains tax be figured?

Mr. GREENEWALT. There is an exhibit which I am going to refer to in a moment, sir, which gives that calculation.

They would be required, in event of a distribution, to allocate the cost of their Du Pont stock between the Du Pont and the General Motors stock. Thereafter, when they sold either stock, they would pay a tax on any gain measured from the cost allocated to the stock. This is explained in detail in exhibit B which I would like to file at this point with the committee, one sheet, sir.

The CHAIRMAN. Without objection, the insertion will be made.

(Exhibit B referred to is as follows:)

EXHIBIT B

Assume Mr. A purchased 10 shares of Du Pont common some years ago for $100 a share, or a total of $1,000. He receives in the distribution approximately 14 shares of General Motors stock. Immediately after the distribution, his Du Pont stock is worth $1,750 and his General Motors stock is worth $750.

The $1,000 cost basis would be divided between the Du Pont stock and the General Motors stock in the ratio of $750 to $1,750—or 30 percent to the General Motors, and 70 percent to the Du Pont. Thirty percent of $1,000, or $300, becomes the cost basis of the General Motors stock, or approximately $21.50 per share. Seventy percent of $1,000, or $700, becomes the cost basis of the Du Pont stock, or $70 per share.

Any sale of the General Motors stock at a price in excess of $21.50 per share, or of the Du Pont stock at a price in excess of $70 a share, will produce a taxable gain to the extent of the excess. Thus, if both the General Motors stock and the Du Pont stock were sold at one time, the taxable gain would be the same as it would have been if, in the absence of the distribution of General Motors stock, the Du Pont stock were sold at such time.

Mr. GREENEWALT. Under present law the stockholder cannot, except by death, escape the obligation to pay a capital gains tax. Under present law, however, he is free to meet that tax at such time and in such circumstances as suit his convenience. It is wholly inequitable to compel him, an innocent person, to pay this tax at a given time and in a given way.

The irony of the situation, it seems to me, is that the case runs against the Du Pont Co., yet the penalties would run not against the company, but against its stockholders. The company's operations would be unaffected by the decree. Historically, Du Pont has distributed the entire amount of dividends received from General Motors to its stockholders, less the intercorporate dividend tax. Dividends from the General Motors investment have not been used in the Du Pont Co.'s chemical business, so a diverstiture would not affect the company's operations or its future expansion.

Divestiture under the present tax laws would, as I have indicated, have serious consequences for Du Pont stockholders, who under no theory can be regarded as law violators. The Clayton Act is not punitive, but remedial, and there is no finding in the record of any monopoly or intent to monopolize, restraint of trade, or conspiracy. The Du Pont Co.'s investment in General Motors has been a matter of public record since its inception. The Federal Trade Commission and the Department of Justice made studies of the investment in 1927, but as a result of these studies neither agency made any criticism of Du Pont's interest in General Motors, no order was entered, and no suit was filed. While Du Pont made its initial investment in General Motors in 1917, there was no reason for any purchaser of Du Pont stock to suppose that the Clayton Act might be applicable to this acquisition before the Supreme Court made its ruling 40 years later.

I do not understand anyone seriously to dispute the fact that the Supreme Court made new law in its decision. The Supreme Court decision calls for "equitable relief" so far as the company is concerned; but it doesn't call for a pound of flesh from the stockholders.

To sum up, the problem here is one of equity to American citizens. The Du Pont Co. does not ask for legislation to permit it to distribute its General Motors stock to its stockholders. In fact, we are vigorously opposing this action in the courts. The distribution is demanded by the Department of Justice as a result of the Supreme Court's new interpretation of section 7 of the Clayton Act. If it is in the public interest to require divestiture in this case, and in many others which now may be brought, it is equally in the public interest to protect the rights of the innocent people who are involved. Only the Congress has power to correct the tax laws when inequities become apparent. The courts cannot do it.

This bill is aimed at the simple and very important objective of preventing injustice. It is aimed at preventing the fundamental injustice of punishing citizens who are innocent of any wrongdoings, by compelling them to take actions which subject them to taxes they would not otherwise be called upon to pay, and which other citizens are not required to pay.

There are ample precedents for this type of legislation, and they will be reviewed for you by witnesses better qualified than I to do so. For myself, let me close by saying that I can imagine no more worthy endeavor by the Congress of the United States than to protect American citizens against unfair and unjust treatment.

I believe S. 200 will accomplish this, and in simple justice, I commend it to you for your consideration.

Senator FREAR. Mr. Chairman, you asked a question of the president of the Du Pont Co., and exhibit B, I think, shows that.

The CHAIRMAN. It has been made a part of the record.

Are there any questions?

Senator KERR. Yes.

Mr. Greenewalt, you say:

> The stockholders are innocent, but may, in the absence of remedial legislation, become innocent victims.

Is it a fact that the penalty imposed upon them would be just as severe as though they had with deliberate and premeditated intent got themselves into the posture of having themselves violate the antitrust law?

Mr. GREENEWALT. That is correct, sir.

Senator KERR. So that if not for the first time in history, certainly in a situation which would be about as dramatic as any that you could think of, they would be required to suffer a penalty though entirely innocent and committed by the Supreme Court as being perfectly honorable and fair?

Mr. GREENEWALT. That is correct.

Senator KERR. As thought they had deliberately entered into a consipracy and been found guilty of the violation of the law?

Mr. GREENEWALT. That is correct.

The Supreme Court declared that the executives of both companies acted honorably and fairly.

Senator KERR. They are the representatives of the stockholders.

Mr. GREENEWALT. The only way in which you can blame stockholders in any action is that they did elect representatives that broke a law. In this case, since the executives broke no law and were innocent themselves, the stockholders must of necessity be so.

Senator KERR. That is all.

The CHAIRMAN. Are there any further questions?

Mr. FREAR. May I just ask one thing? What is the program, Senator?

The CHAIRMAN. The committee will meet tomorrow morning at 10 o'clock, and the first witness will be a representative of the Justice Department.

Mr. FREAR. Could I ask through the courtesy of the chairman that the president of the Du Pont Co. remain? There were two or three

members of the committee, Mr. Chairman, who wanted to question Mr. Greenewalt. Would it be possible that he may be called later?

The CHAIRMAN. Do you mean tomorrow?

Mr. FREAR. Yes.

Mr. GREENEWALT. I will be very glad to, sir.

The CHAIRMAN. At this point the Chair offers for the record a statement by Mr. G. Keith Funston, president of the New York Stock Exchange, who is unable to be here today.

(The statement of Mr. Funston follows:)

STATEMENT PRESENTED TO THE SENATE FINANCE COMMITTEE BY G. KEITH FUNSTON, PRESIDENT OF THE NEW YORK STOCK EXCHANGE, IN CONNECTION WITH S. 200

I am sorry that a prior commitment has necessitated my being out of the country at the time of your hearing on S. 200. I had hoped to express in person my strong conviction that this is sound legislation which should receive your favorable consideration.

The purpose of S. 200 is to protect investors from unjust taxation when they are compelled to take possession of stock as a result of a court or commission antitrust order of divestiture. The bill would not provide a tax exemption, or any sort of preferential treatment, since the stockholder would have to pay a tax on his actual capital gain when he sold the stock.

The Internal Revenue Service has ruled, in connection with the Du Pont-General Motors antitrust proceeding, that Du Pont stockholders would have to pay ordinary income taxes—at rates ranging from 20 to 87 percent—on the value of any General Motors stock distributed to them. This would saddle thousands of investors with an inequitable tax burden in a situation beyond their control. The purpose of S. 200 is to forestall this unjust tax penalty, not only in the Du Pont-General Motors situation, but in any similar cases in the future. My main concern is that these investors should be treated fairly. Congress should do everything it can to encourage a broad base of corporate ownership in this country. The success of that policy could be undermined if investors were not assured of fair and equal tax treatment.

Congress has made it clear, in other legislation, that the tax on a distribution of stock required by law is to be postponed until the recipient sells the stock. The policy was first established in 1938 with respect to stock distributions required by the Securities and Exchange Commission under the Public Utility Holding Company Act. Congress has insisted on the same treatment when involuntary distributions of stock by banks and radio stations are required under the Bank Holding Company Act and the Federal Communication Commission Act.

There is no essential difference between these situations and a compulsory distribution of stock through an antitrust decree. The problem arises simply because the judiciary has power, under the antitrust laws, to order a corporation to distribute the stock of another corporation to its own stockholders, but does not have power to grant the tax relief which Congress has insisted upon in similar cases. The obvious remedy is for Congress, through passage of S. 200, to apply the same principle of taxation to this situation as it has applied to others.

The Du Pont-General Motors proceeding provides a dramatic example of an inequity S. 200 would prevent. Each of nearly 200,000 Du Pont stockholders is now a part owner of the assets of the Du Pont Co., including the company's holding of General Motors stock. If the distribution of the General Motors stock is required, each Du Pont stockholder will have two certificates—one representing Du Pont shares, and one for his allocable share of General Motors stock. These two certificates would represent exactly the same ownership as the single certificate for Du Pont stock he now owns. It would be patently unjust to impose a tax penalty on the stockholder simply because he is compelled, as a result of an antitrust proceeding beyond his control, to take direct possession of property he already owns indirectly.

The Du Pont stockholders will not receive tax income which should be made subject to an income tax. Indeed, if there is a court-directed distribution of General Motors stock, a downward adjustment in the price of Du Pont stock must follow. There will be no gain to Du Pont stockholders to justify a tax.

When a stockholder sells either the General Motors or the Du Pont stock, he will realize a gain, or suffer a loss, on his original investment. If the stockholder is to be treated fairly, Congress should make it clear through S. 200 that there will be no tax obligation until the stockholder actually realizes a gain on his investment. A contrary result would discriminate against a particular group of investors.

In 1954, the Du Pont Co. had 133,997 common stockholders. By early 1959, the number had increased by 45 percent to a total of 194,343—a number exceeded by only 8 U.S. corporations. This represents a large group of stockholders and an impressive broadening of corporate ownership, by any standard. An unfair and widely publicized tax discrimination against this group of investors would make more difficult our task of encouraging investments in sound common stocks. It is also pertinent that a sizable number of these stockholders, in order to pay the tax, might be forced to sell the General Motors stock they received. To the extent that such tax sales depressed the market value of General Motors stock, there would be an entirely unwarranted injury to the more than 700,000 holders of General Motors stock.

It is important to note that there is a wide interest in both Du Pont and General Motors stock on the part of investors who are in modest circumstances. This can be illustrated by the fact that General Motors is the most popular stock, and Du Pont is the 24th most popular stock, in the monthly investment plan. In presenting this plan, our member firms have encouraged small investors who have provided for contingencies to put their extra funds to work by investing in sound common stocks. Thousands of individuals in modest circumstances are putting aside small amounts on a regular basis to purchase the securities of their choice. They are in effect buying stocks by the dollars' worth. These are investors—not speculators—who are purchasing an interest in American business because they have faith that as the Nation continues to grow there will be rewards in which they can share. The fact that the Du Pont and General Motors stocks rank so high on the monthly investment plan list is clear evidence that these new investors consider them to be prudent investments. In my judgment, it would be a serious mistake for Congress to ignore a tax situation, arising out of a technical defect in the law, which would put discriminatory burdens on these people.

For these reasons, I am convinced that S. 200 is distinctly in the public interest. It would prevent an unfair tax and, at the same time, eliminate a potential obstacle which would tend to discourage many people from becoming shareowners—a result which would be to their own and their country's disadvantage.

Senator FREAR. Mr. Chairman, with your permission, I submit for insertion in the record a letter from the Honorable Edward H. Levi, dean of the Law School of the University of Chicago.

The CHAIRMAN. It will be made a part of the record.

(The statement of Dean Levi follows:)

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., May 25, 1959.

Hon. J. ALLEN FREAR, Jr.,
Senate Office Building,
Washington, D.C.

DEAR SENATOR FREAR: You have asked me for the expression of my views on S. 200 which provides that for Federal tax purposes no gain or loss shall be recognized to stockholders because of receipt of divested stock when this distribution is pursuant to a proper order of a court, commission, or board in the enforcement of the Sherman or Clayton Act. In its present form S. 200 requires that the order of the court, commission, or board recite that "such divestment is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act, or both," and also recite "that nonrecognition of gain pursuant to section 1111 of the Internal Revenue Code of 1954 is required to reach an equitable judgment, decree, or order in such suit or proceeding."

In my view S. 200 adopts the correct principle of law and is in harmony with the spirit of the antitrust laws. The adoption of this correction in the Federal tax laws will help in the enforcement of antitrust policies. The same principle has been adopted in other similar areas of law such as the Public Utility Holding Company Act, the Bank Holding Company Act, distributions required by the

Federal Communications Commission, and in connection with reorganizations under the Bankruptcy Act. There seems to be no adequate reason why it should not be adopted for required antitrust divestitures.

Under the present tax law, where there is enforced divestiture, stockholders are in effect subjected to unintended and capricious penalties which are irrelevant both to the purposes of the tax law and the requirements of the antitrust laws. Even if the antitrust laws were supposed to be punitive, no one would select such penalties as appropriate. The penalties are unrelated to the amount of restraint of trade which may have been achieved. They are uneven, depending on factors which have nothing to do with antitrust. They fall on the wrong people. But the enforcement of appropriate antitrust relief is not supposed to be punitive. The wisdom of this principle is made all the clearer when relief is granted, as under section 7 of the Clayton Act, not because a monopoly has been created or because an acquisition actually has lessened competition; but rather because these consequences might occur in the future because this "may be" the effect. The hope of successful antitrust enforcement is that it will be accepted not as punitive but as good for American enterprise. A good case can be made out that where divestiture has taken place in the past, it has in fact been good for all, including the stockholders of the companies involved. Under the present tax situation, this would not be true.

Courts have been reluctant for understandable reasons to require divestiture. At best divestiture is an adventure into the unknown with uncertain consequences with respect to efficiency in many cases. It is an extreme step and the present unintended tax situation will make courts and interested parties less likely to take the step even when it is necessary to restore an industry to a position in harmony with the antitrust laws. In my judgment, the principle embodied in S. 200 should be adopted to make divestiture possible where needed.

Sincerely,

EDWARD H. LEVI.

The CHAIRMAN. Dean Eugene V. Rostow, Law School, Yale University, who had planned to testify, is unable to appear but has submitted his views on the bill in letter form. His letter will be incorporated in the record.

(The letter from Dean Rostow follows:)

YALE UNIVERSITY LAW SCHOOL,
New Haven, Conn., May 26, 1959.

HON. HARRY F. BYRD,
Chairman of the Senate Finance Committee,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR BYRD: I received a telegram from Mrs. Springer, the chief clerk of the Committee on Finance relative to testifying on S. 200, the Frear bill. Being unable to appear in Washington this week, I ask permission to send a written statement instead. This is the letter referred to in my telegram of May 25.

I favor the principle of S. 200 as an important forward step in antitrust policy. It should materially strengthen antitrust enforcement programs, by weakening the present conspicuous resistance to degrees of divorcement or divestiture; that is, to decrees which really bust trusts. I am by no means an expert on tax legislation, and express no opinion on the congruity of S. 200 with the main body of the tax law. Nor have I made the detailed studies of the record which would be necessary before reaching a conclusion as to the fairness and equity of the bill as it would affect the litigants in *United States* v. *E. I. du Pont de Nemours & Co.* Doubtless the bill could be improved by amendment; there are very few bills of which this observation could not be made. But I shall confine this brief comment to the broad purpose of the bill, the nonrecognition of gain or loss upon certain distributions of stock made pursuant to orders enforcing the antitrust laws, and not here examine the several alternative procedures through which this end might be sought.

In the perspective of the antitrust laws, the idea of S. 200 seems very similar to that of the corresponding provisions applicable to the Bank Holding Company Act of 1956, and the Public Utility Holding Company Act of 1956, and the Public Utility Holding Company Act of 1935. With regard to the policy of the Frear bill, the reasoning of Mr. Justice Douglas seems persuasive, in the presentation he made before this committee in 1938, when he was Chairman of the

Securities and Exchange Commission. At that time he was urging Congress to provide for the nonrecognition of gains or losses on compulsory distributions of stock under the Public Utility Holding Company Act. He regarded the bill as one to remove a tax barrier impeding the Commission's enforcement program, and a fair measure under the circumstances, taking into account the various interests involved.

Distinctions can be drawn between antitrust decrees and enforcement orders under the Bank and the Public Utility Holding Company Acts, and between antitrust decrees and other proceedings in which the principle of nonrecognition is accepted. In general, such distinctions turn on the theme of retroactivity; on the thought, that is, that the Holding Company Acts, and like statutes, made conduct illegal only prospectively, whereas antitrust violations are illegal from the time of their consummation. But such differences are not important for present purposes. Nonrecognition was provided in the past for the gains and losses in certain compulsory distributions not because the parties were (or were not) innocent of wrongdoing in those instances, but because the realization in such situations was not voluntary. From this point of view, the cases are the same. Furthermore, it would be impossible, as a practical matter, to distinguish antitrust decisions which make new law from those which could be deemed to apply settled law. Such distinctions have no meaning in the tradition of common law adjudication.

More affirmatively, I should hope that the policy of the tax laws would be at least neutral in the antitrust field. The tax laws, I'm sure we agree, should not be an independent force, distorting the impact on economic decisions of the business motives which lead firms to grow or to divide, in their quest for lower costs. Surely the tax laws should not encourage concentration, and discourage or even penalize deconcentration, especially when deconcentration is required by a court or Commission order.

It doesn't take much thought to conjure up ways in which the policy of S. 200 could be abused. But this objection applies to any reform, and especially to any tax reform. It should not be considered to paralyze prudent and well-considered action, otherwise desirable.

It may be deemed a paradox that a change favoring the antitrust remedy of divestiture should be occasioned in part by the circumstances of the Du Pont case. The paradox disappears when viewed in the light of history. Like many other basic American corporations, Du Pont responded constructively and creatively to an early antitrust decree of divorcement. Its development as a great modern chemical company was stimulated in part by the litigation of 1911, and its settlement in 1912.

Yours faithfully,

EUGENE V. ROSTOW.

The CHAIRMAN. We will be in recess until tomorrow morning at 10 o'clock.

(Whereupon, at 1 p.m., the committee recessed to reconvene at 10:15 a.m., Wednesday, May 27, 1959.)

DISTRIBUTIONS PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

WEDNESDAY, MAY 27, 1959

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to recess, at 10:15 a.m., in room 2221, New Senate Office Building, Senator Harry Flood Byrd (chairman) presiding.

Present: Senators Byrd, Kerr, Frear, Anderson, Gore, Talmadge, Hartke, Williams, Carlson, Bennett, and Cotton.

Also present: Elizabeth B. Springer, chief clerk and Colin F. Stam, chief of staff, Joint Committee on Internal Revenue Taxation.

The CHAIRMAN. At the request of Representative Robert W. Hemphill, of the Fifth Congressional District of the State of South Carolina, I am inserting in the record a statement by Mr. J. R. McComb, of Camden, S.C. Congressman Hemphill stated that a number of other interested citizens had contacted him also and he hoped the committee will give every consideration to the views expressed in the supporting statement of Mr. McComb.

(The statement referred to follows:)

STATEMENT OF J. R. MCCOMB, CAMDEN, S.C.

Gentlemen, I am here today at the invitation of Mr. Robert W. Hemphill, my representative from the Fifth Congressional District of the State of South Carolina. I am here as a private taxpaying citizen and as a small stockholder of the Du Pont Co. I might as well state now that I have worked for the Du Pont Co. for 29 years but my status as an employee has nothing to do with my presence here today. I am here to urge your favorable support of Senate bill No. 200, which if passed, would give tax relief to persons receiving stock on an antitrust divesture decree. Or, as I understand it, a person would not be forced to pay income taxes on capital investment until he is ready to sell it.

In my personal case most of my lifesavings is invested in Du Pont stock. Some of which I have acquired by purchase, some as part of my salary. I have considered the stock a good investment for my retirement. I knew the company was well managed and growing. I knew that by owning the Du Pont stock I also owned some General Motors but I never believed that my Government would by focing the distribution of Du Pont's General Motors holdings force me to pay income tax on what already belonged to me. I hope that in your consideration of this legislation you will give adequate thought to its eventual effect on the individual stockholders of all corporations.

For example, each share of Du Pont stock represents 1.38 shares of General Motors. At the current market value of $50 per share for General Motors this means that $50 times 1.38 or $69 would be taxable as dividend income. In the State of South Carolina a person in the 30 percent Federal income bracket will have to pay an additional 7 percent State income tax: 0.37 times $69 equals $25.53 for each share of Du Pont stock he owns. A person who has accumulated say 200 shares would have to raise $5,106 cash or sell his stock to pay his taxes. There is no way, of course, to measure the loss in value of both Du Pont

and General Motors stock due to the enforced selloff. This could be as bad as the direct tax.

I would like to make one last point: There is a current trend toward broad ownership of corporate stocks by our people in this country. This is healthy for our economic system and should be encouraged by our Government. However, both our corporations and our Government have a heavy responsibility to see that nothing happens to discourage the trend toward personal satisfaction through personal ownership and interest in our economic system. I believe Senator Frear's bill is aimed at preventing confiscatory-type taxation which if continued certainly does not encourage ownership of anything.

Thank you.

The CHAIRMAN. The committee will come to order.

The first witness this morning is Hon. Robert A. Bicks, Acting Assistant Attorney General of the Antitrust Division of the Justice Department.

Mr. Bicks, will you proceed, sir?

STATEMENT OF HON. ROBERT A. BICKS, ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, JUSTICE DEPARTMENT

Mr. BICKS. Mr. Chairman, Senators Frear, Anderson, Williams, Carlson, Bennett, and Cotton——

The CHAIRMAN. Do you have a copy of your statement?

Mr. BICKS. Senator Byrd, I have no written statement. However, I pray the Chair's leave to say a few words before standing questions. It might be helpful at the outset to put this Department's position in perspective.

The CHAIRMAN. Would it not be a good idea for you to read the Justice Department's letter to this committee?

Mr. BICKS. I had planned to do that in the course of my opening remarks, if I might, Mr. Chairman.

The CHAIRMAN. Go ahead.

Mr. BICKS. Throughout the past few years various Attorneys General have been pondering legislative proposals to improve the effectiveness of antitrust enforcement. Thus this Department has recommended legislation to help us find out about—to discover, if you will—significant mergers before they are consummated. I refer, of course, to the so-called premerger notification proposal.

Second, after we learn of a merger, we press for legislation to enable us to secure sufficient data so as to make an intelligent decision as to whether or not a merger, or any other business transaction, may violate the antitrust laws. I refer here to the so-called civil investigative demand proposal.

Third, after we find out about a business transaction, and after we secure enough facts to intelligently evaluate it, this Department may decide to proceed in court. And the United States may prevail in court. Should we prevail in court, relevant then are ways to improve antitrust remedies. Thus, some few years ago the Attorney General recommended, and the Congress enacted, a proposal to increase criminal fines from five to fifty thousand dollars. Proposals now pending before this committee, however, deal with the area of relief in civil antitrust cases.

Turning to problems of improving the effectiveness of antitrust relief in civil cases by removing any tax barrier to divestiture, I would

like, if I might, Mr. Chairman, to read from a portion of the letter addressed by Judge Walsh to you:

Congress has specified that a finding of violation under Clayton Act section 7 requires divestiture of properties illegally acquired.

And, in Sherman Act cases, courts are granted wide equity powers in their sound judgment, to order divestiture. For a "public interest served by such civil suits is that they affectively pry open to competition a market that has been closed by defendant's illegal restraints. If a decree accomplishes less than that, the Government has won a lawsuit and lost a cause."

Nevertheless, the courts may be reluctant to grant divestiture, deeming it harsh and an extraordinary difficult and expense undertaking. And, courts are obliged to consider, among other factors—

to quote from the Supreme Court opinion in the American Tobacco case—

a proper regard for the vast interests of private property which may have become vested as a result of the acquisition * * * without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.

Reflecting such concern, courts may tend increasingly to adopt the view in *United States* v. *Minnesota Mining & Manufacturing Co. et. al*, (90 F. Supp. 356 at 358), denying Sherman Act divestiture when substantial taxes would accrue, because—

* * * the Congress has been content to allow taxpayers who have been accumulating capital gains to postpone pretty much to their own convience the date when they realize those gains for tax purposes and make the appropriate accounting to the Internal Revenue officials.

In light of such precedents, appropriate alteration of present tax consequences could, as a general rule, increase the likelihood of divestiture relief—

and here I would like to depart from the text for a moment to submit a few facts and figures to you on just what our problem is in this field and why we are concerned about it.

Some years ago, the Attorney General appointed a committee consisting of practicing lawyers and economists in the antitrust field to recommend to him a variety of proposals to improve antitrust enforcement. I would like to refer you very briefly to some statistics and data gathered by that committee because they are quite helpful on this point.

On page 354 of the committee's report, after referring to the general Supreme Court policy which I just quoted, the committee notes, and I quote:

Applying this general policy over the 60-odd years of Sherman Act history, courts have in only 24 litigated cases entered decrees requiring divorcement, divestiture, or dissolution—

and I think it might be helpful if I submitted for your record a list of all those cases so you can see in historical perspective the dimensions of this problem and understand our concern about it today.

The CHAIRMAN. Without objection, that insertion will be made.

(The information referred to is as follows:)

Three of these involved so-called single-firm monopolies: *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945); *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943), affirmed per curiam 330 U.S. 806 (1947); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), affirmed per curiam 347 U.S. 521 (1954). Twenty involved a single combination of corporations united by common stock control in violation of section 1 or section 2 of the Sherman Act: *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904): *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911); *United States* v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127

(C.C.D. Del. 1911); *United States* v. *Union Pacific Railroad Co.*, 226 U.S. 61 (1912); *United States* v. *Lake Shore & M. S. Ry. Co.*, 203 Fed. 295 (S.D. Ohio 1912); *United States* v. *International Harvester Co.*, 214 Fed. 987 (D. Minn. 1914), petition for additional relief denied 10 F. 2d 827 (D. Minn. 1926); affirmed 274 U.S. 693 (1927); *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, (S.D.N.Y. 1916), appeal dismissed 249 U.S. 621 (1919), decree modified October 18, 1921; *United States* v. *Eastman Kodak Co.*, 226 Fed. 62 (W.D.N.Y. 1915), decree entered 1 D & J 477 (1916); *United States* v. *Reading Co.*, 183 Fed. 427 (C.C.E.D. Pa. 1910), affirmed 226 U.S. 324 (1912), modified 228 U.S. 158 (1913); *United States* v. *Reading Co.*, 253 U.S. 26 (1920); *United States* v. *Lehigh Valley Railroad Co.* 254 U.S. 255 (1920); *United States* v. *New England Fish Exchange*, 258 Fed. 732 (D. Mass. 1919); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (1945); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *United States* v. *Imperial Chemical Industries, Limited*, 100 F. Supp. 504 (S.D.N.Y. 1951), order on decree 105 F. Supp. 215 (S.D.N.Y. 1952); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947); *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950); *United States* v. *Besser Mfg. Co.*, 96 F. Supp. 304 (E.D. Mich. 1951), affirmed 343 U.S. 444 (1952). Only one case, the Paramount case, involved a combination of separate corporations not united by stock control: *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

Mr. BICKS. Our view is that an appropriately fashioned tax proposal, designed to eliminate tax barriers to antitrust divestiture, would serve the ends of effective antitrust enforcement. Let me touch briefly on the proposal which has been advanced in S. 200, and also refer in passing, if I may, to the proposal that Senator Frear adverted to, although I have seen no written amendment in his opening statement, the so-called 301 proposal.

Senator BENNETT. Mr. Chairman, before the witness proceeds, did you get a variety of proposals from the committee you appointed for the purpose?

Mr. BICK. No, sir. The committee was not appointed for the purpose of surveying the tax problem. It was the broader problem of antitrust administration. However, the data the committee gathered regarding the number of cases where divestitures were ordered would be of interest.

Senator BENNETT. Were there any proposals from the committee relating to the tax problem?

Mr. BICKS. There were not, Senator Bennett.

Senator BENNETT. Is the committee still in existence?

Mr. BICKS. It is not, Senator Bennett.

Senator BENNETT. It is not.

Mr. BICKS. To return to Judge Walsh's letter to Chairman Byrd:

> However, S. 200 does not seem an appropriate path to this enforcement goal. First, S. 200's nonrecognition benefits would apply equally to all divestiture cases regardless of when the acquisition attacked was consummated. This despite the fact that equities in favor of tax relief may loom larger where suit follows long after acquisition and, accordingly, the acquisition's illegality was perhaps not so evident when consummated.
>
> Second, under S. 200, the shareholder is relieved of all dividend income tax liability on account of the "divested" stock received. Only a capital gains tax may be due if and when either the "divested" or original stock is sold. Such absence of immediate tax incidence on antitrust divestitures could, in a few marginal mergers, perhaps tip the scales in favor of risking an acquisition otherwise doubtfully legal.

On this point I would like to make clear I am trying very hard not to overstate this, because I am not at all convinced myself that S. 200 would, apart from a few marginal cases, spur mergers that would not otherwise take place.

And third——

Senator GORE. Could I ask a question there, Mr. Chairman?

The CHAIRMAN. Yes.

Senator GORE. If I understand your point, it is that in your opinion it is possible, a possibility, that a few might be tempted to run the risk of antitrust violation by the knowledge that if they did become violators they would also become beneficiaries.

Mr. BICKS. Well, if they did become violators they could get out of it without tax loss; yes.

Senator GORE. And possibly beneficially?

Mr. BICKS. Senator, yes. I would point out, though, that to my own view a 301 approach meets that point and guards against that fairly well.

Senator GORE. I just wanted to get your point.

Mr. BICKS. That is absolutely a danger under S. 200.

Senator COTTON. Pardon me, what was it you said met that point?

Mr. BICKS. 301 proposal.

Senator WILLIAMS. What 301 proposal?

Mr. BICKS. I am referring to a proposal that Senator Frear adverted to only briefly in the course of his statement. I would like to develop that, if I may, in the course of my statement.

The CHAIRMAN. The record should show what 301 is.

Senator KERR. As I understand, Senator Frear put it into the record yesterday.

Senator FREAR. Yes; that was at the end of my statement, and 301 is the code number that you are using.

Mr. BICKS. Yes.

Senator KERR. That was the amendment that Senator Frear offered at the end of his statement yesterday. I think it would be well for the witness to explain it.

Mr. BICKS. Well, I have some difficulty in explaining the precise details—or commenting finally—since I have not seen the amendment as drafted.

Senator WILLIAMS. If you haven't seen it, how do you know it overcomes your objection? Because inherent in the 301 approach you say are the sort of built-in safeguards that meet this point?

Mr. BICKS. If I might just state briefly our problems with S. 200, and then touch briefly on the extent to which a 301 approach might meet those problems, I think it might be helpful——

The CHAIRMAN. Can you discuss it intelligently when you haven't read it?

Mr. BICKS. I think I can discuss the possibilities of an approach under that section.

The CHAIRMAN. You say you haven't even read the amendment to 301.

Mr. BICKS. Sir, I have read the section, but I haven't read Senator Frear's proposed amendment to it.

Senator KERR. That is a provision of the present code with which the witness indulged the presumption that the committee might be familiar.

The CHAIRMAN. I understand. I thank the Senator from Oklahoma.

[Laughter.]

Senator KERR. I mean he flatters us.

The CHAIRMAN. His mind works so much more quickly than mine that I have to ask you a few more questions.

Are you discussing the Frear amendment to S. 200?

Mr. BICKS. Sir, I would like in the course of my testimony to discuss three possible proposals:

S. 200 is essentially a nonrecognition of gain proposal. Under S. 200, assume a required antitrust stock distribution—no tax would be due on receipt. A capital gains tax would be due measured by an allocated basis if and when either the original or divested stock is sold.

The CHAIRMAN. In the interest of orderly presentation, the Chair would suggest we first discuss S. 200, and then if you want to discuss the Frear amendment, discuss that. It is rather confusing when you say you are discussing S. 200 and then talk about the amendment.

Mr. BICKS. Yes, sir.

S. 200 does not contain sufficiently specific safeguards to insure that benefits would only be available where necessary for effective antitrust relief. Thus, viewing this measure in the context of the pending Du Pont-General Motors proceeding, S. 200, as presently written, could enable the granting of nonrecognition benefits, not only to the Du Pont stockholders, but also to stockholders of Delaware and Christiana. The Government's divestiture plan there, however, would require that a trustee sell Du Pont's General Motors stock allocable to Christiana and Delaware and Delaware's stockholders.

Were distribution allowed to stockholders of Delaware and Christiana they would end up with roughly 8 percent of General Motors stock—a block several times larger than that held by any other group. Thus the goal of the entire relief proceeding might well be thwarted. Since S. 200 as presently written could enable such secondary distribution to stockholders tax free, it could tend to frustrate rather than further the very antitrust objectives which are the sole rationale for any such tax proposal.

In sum, this Department does not recommend enactment of S. 200. However, we are concerned with improving the effectiveness of divestiture as an antitrust remedy. To this end, we would welcome an opportunity to study any proposal which would aid antitrust enforcement, generally, but at the same time, insure that tax benefits could not in any case frustrate rather than further competitive objectives.

That is the substance of our report, Senator Byrd, on S. 200.

The CHAIRMAN. You are opposed to S. 200?

Mr. BICKS. We are, sir.

The CHAIRMAN. Now, it would seem to be proper for you to discuss the amendments suggested by Senator Frear.

Mr. BICKS. I will, sir. At the end of Senator Frear's statement yesterday at these hearings, he indicated that he had prepared a possible amendment to section 301 of the Internal Revenue Code. This sort of approach has, of course, been mentioned at various times——

Senator COTTON. Mr. Chairman, will you forgive me an interruption so that I can get something clear in my mind?

What you are going to discuss is not 301 with Senator Frear's amendments, but 301 with the Department of Justice suggested amendments; is that right?

Mr. BICKS. No, we are not suggesting any amendment.

Senator WILLIAMS. If I might interrupt, I think I can clarify it.

Senator Frear's amendment to S. 200, as I understand it, proposes that they tax at regular income rates that portion of the distribution which represented cost of the stock to the company, and in doing this he amends section 301 of the code.

Mr. BICKS. Precisely.

Senator WILLIAMS. And the rest of it would be taxed as capital gains when it is sold.

Mr. BICKS. Precisely.

Senator WILLIAMS. Now, you may proceed.

Senator COTTON. I understood he had not read it and could not discuss it. I merely wanted to make sure he could discuss it.

Senator WILLIAMS. That was the reason I mentioned it.

Senator FREAR. I am sure the witness is well prepared to answer any questions suggested to him.

Senator COTTON. I was not suggesting the witness was not well prepared, nor was I reflecting on him. I wanted to get in mind what he was discussing.

Senator FREAR. If there is any confusion, section 301 is a section of the Internal Revenue Code; not the amendment of the junior Senator from Delaware, but the effect of the amendment.

But I understood the witness to say he had not read the amendment. How can he discuss it intelligently if he has not read it?

Senator ANDERSON. Could I ask one question?

Did I understand the junior Senator from Delaware to say that his amendment is not necessarily to 301, but it affects 301? I am just trying to get clear in my own mind: Is it an amendment to section 301, or is it an amendment which would affect section 301?

Senator FREAR. May I just say this—you want me to answer it?

Senator ANDERSON. Yes.

Senator FREAR. I am not a tax expert and don't claim to be, but the Frear amendment to S. 200 is an amendment designed to take care of certain cases of involuntary divestiture.

The part I believe that is under observation at the moment is an amendment I offered at the conclusion of my remarks yesterday to S. 200, and that amendment affects section 301 of the code.

Senator ANDERSON. Thank you.

Senator KERR. Would the Senator yield—the Senator from Delaware?

Senator FREAR. Yes, if I can.

Senator KERR. As I understand it, section 301 is the provision of the code with reference to the handling of dividends of corporations; is it not, Mr. Stam?

Mr. STAM. Yes, as I understand the Senator's amendment, it adopts the same approach for the individual——

Senator KERR. In other words, it provides the same method for handling of this distribution which is already in the law with reference to similar distributions.

Mr. STAM. To corporate shareholders. It is already in the law with respect to corporate shareholders, and it adopts the same method with respect to individual shareholders.

The CHAIRMAN. Do I understand you to say you have not read the Frear amendment?

Mr. BICKS. I have not.

The CHAIRMAN. What were you proposing to do?

Mr. BICKS. I was proposing to be as helpful as I can by going through with the committee the various possibilities that we would consider in an effort to suggest——

The CHAIRMAN. You are not then going to discuss the Frear amendment?

Mr. BICKS. I just concluded discussing the Frear amendment.

The CHAIRMAN. How could you discuss it when you haven't read it?

Mr. BICKS. By the Frear amendment, I meant S. 200, Mr. Chairman.

The CHAIRMAN. I mean the Frear amendment to 301 that was offered yesterday.

Mr. BICKS. No, I do not propose to discuss that.

The CHAIRMAN. Are you discussing S. 200?

Mr. BICKS. That is right, and I concluded.

The CHAIRMAN. You oppose S. 200, and you are giving your reason for it?

Mr. BICKS. Yes.

The CHAIRMAN. Where do you go from here?

Senator GORE. You referred to S. 200 at the time as an amendment, when in fact it is a bill.

Mr. BICKS. Yes, it would amend the Internal Revenue Code.

Senator BENNETT. It is a bill to amend the code.

Senator GORE. Yes, I know, but you were speaking of an amendment to the proposal; I think that is where the confusion is.

Senator FREAR. I don't know whether I can clarify this, but it was stated, Senator Gore, at the opening of my remarks, that S. 200 in itself could not be acted upon because tax legislation originates in the House, and it was explicitly stated that S. 200, if action on this side was taken, would have to be an amendment to a bill that was passed upon by the House. Then, at the end of my conclusions yesterday, I suggested an amendment to S. 200, which is now before the committee, so I think we are conflicting in our views when we are talking about amendments. Maybe we should call it amendment A, or amendment B, or some other designation, to facilitate our efforts.

Senator ANDERSON. Why don't we call it the Frear bill, and the amendment to the Frear bill?

The CHAIRMAN. Why don't we call it S. 200?

Senator KERR. I wonder if I could pose the question, Mr. Chairman, if the witness—whom I believe to be a very able man, and one who is certainly able to give me pertinent and informative and valuable advice and information—if he would be permitted to read the amendment to S. 200 which the Senator from Delaware offered at the close of his statement yesterday.

Would that be in order? And then he would be relieved of any burden that might rest upon him in discussing that amendment, with which I know he is entirely familiar. With my limited knowledge, after Colin Stam said what he did, I have some familiarity with it, and this witness being an expert in it, after what Mr. Stam has said, I am sure has a general idea of what it is; but in order that the doubt as to what he knows about it might be removed, it would be possible that he would like to read the thing; and then if I wanted to ask him a question about it, he would be prepared to answer it.

The CHAIRMAN. I would suggest that he read it to the committee. The committee refers to the original Frear bill, referred to either as the original Frear bill or S. 200, and not as an amendment.

Senator COTTON. Mr. Chairman, I don't want to needlessly complicate this, but I have got back now to my original problem. It is my understanding that yesterday the Treasury came in and from their direct statement I was unable to tell exactly their attitude—whether

they thought something ought to be done about this or what. And when I asked the representative of the Treasury, he said they were going along—to paraphrase it; I don't want to be inaccurate—they were going along with the Department of Justice.

Now, the Department of Justice is here. It was my distinct understanding that this gentleman, for whom I have the most profound respect—and I am not trying to confuse him or make it difficult—said, one, that he had discussed S. 200: two, he was going to discuss 301; three, he said he hadn't read or wasn't too familiar with Senator Frear's amendment to 301, but he was going to discuss some amendments, some methods of taking care of the objections to S. 200 by amendments to 301.

So then I asked him, in order to make it clear, "You are not discussing Senator Frear's suggested amendment to his own bill under 301; you are discussing amendments suggested by the Department of Justice"; and he said, "Oh, no; the Department of Justice isn't suggesting anything."

So, simply in the interests of clarity, I still have the understanding he is about to present an approach in 301, which I am sure we are all interested in; but is it his approach, is it the Department of Justice's approach, is it Senator Frear's approach, or just what is it?

The CHAIRMAN. What is the witness proposing to present to the committee?

Mr. BICKS. I propose no more than to answer what I gathered from yesterday's transcript were some of the questions that were in the committee's mind, Senator Cotton. There is no question but that we believe there is a serious problem posed by tax barriers to the grant of prompt divestiture. Appropriate treatment of this problem could be of real benefit to antitrust enforcement. That is our basic position.

Second, one approach to the problem is reflected in S. 200. We have some problems with that approach, principally because we think the terms in which it is framed could harm rather than benefit the goal we seek.

Third, in the course of yesterday's hearing, there was another approach, just adverted to, the so-called 301 approach, not by the Department of Justice, but by Senator Frear. I presume he views this in a sense as an alternative to S. 200.

Simply to be helpful, I might comment on the possibilities of that approach, bear in mind, however, the limitations that the chairman has made clear, that we haven't seen the particular amendment, the particular phrasing. There have been various proposals discussed to amend 301, and there are certain advantages in amending that section rather than S. 200.

The CHAIRMAN. I thank you, and I follow you very clearly and right up to this last point. And I assume from your very last statement there are your own suggestions in endeavoring to be helpful to the commitee. But your suggestions as to this 301 approach—are they suggestions that represent the studied attitude of the Department of Jusice, or are they suggested by your for our assistance?

Mr. BICKS. They do not represent any studied attitude; they couldn't possibly, since the proposal was just referred to yesterday. I just thought the committee might be interested in some possibilities.

Senator COTTON. Thank you.

The CHAIRMAN. You are testifying as to your personal opinion?

Mr. BICKS. No, I am not. I am testifying to the extent to which a proposal, a possible proposal, could meet some of the objections that have been set forth to S. 200.

The CHAIRMAN. And it has the approval of the Attorney General?

Mr. BICKS. Yes.

The CHAIRMAN. And then has nothing to do, necessarily, with the Frear amendment?

Mr. BICKS. Correct, sir.

The CHAIRMAN. I think it is clear, sir. You may proceed.

Mr. BICKS. Senator Kerr, in your discussion with Mr. Stam, as you made clear present law requires an income tax measured by the fair market value of a divested stock dividend he might receive. An amendment to 301 might—instead—require an individual stockholder to pay an income tax measured solely by the acquired basis to the divesting corporation, a substantially lesser tax, in those instances at least where the acquisition attacked was long standing.

I would simply point out that that sort of proposal would go a long way toward meeting two, the first two, of the objections the Department of Justice had to S. 200. Let me try to explain why.

The first objection was that S. 200 would apply to all divestitures after mergers or other actions regardless of when they took place. I think all of us will agree that there is more equity in providing some sort of tax amelioration where the acquisition attacked was long standing, where at the time the acquisition took place perhaps its illegality was not so evident.

An amendment via 301 would provide primary relief in those areas. Because it is in those areas that the difference between acquired basis and present market value is likely to be largest.

The second objection we advance to S. 200 is in the marginal cases, as Senator Gore mentioned, where merging companies might know, even if sued and divestiture were ordered, the entire transaction might—under S. 200—be tax free. An approach via 301, however, would tend to meet that problem. To the extent that when a suit was brought a week or a month after a merger, the likelihood would be that the same or roughly the same tax would be due under a 301 approach as under present law. Viewing the large number of cases, there would not likely be as large a difference between the cost basis of the stock as bought by the divesting company and its fair market value. So you have sort of a built-in safeguard against the possibility of tax relief spurring marginal mergers.

I just thought those two——

Senator GORE. It might even in some cases be a premium.

Mr. BICKS. That is right; it might be higher.

Senator GORE. It might be a tax-free distribution, a means of achieving a tax-free distribution which might not in all circumstances be possible even with dissolution and distribution.

Mr. BICKS. Yes. That is all I had in mind, Mr. Chairman. I thought those two observations might be helpful.

Senator WILLIAMS. May I ask a question?

Mr. BICKS. Yes.

Senator WILLIAMS. Does the amendment Senator Frear offered to S. 200 yesterday overcome those two objections which you have just outlined? As you understand the amendment?

Mr. BICKS. Yes; I think it probably would. The third, of course, is by far the most important, however.

Senator WILLIAMS. Then, you believe that the amendment overcomes those two objections you have just outlined.

Mr. BICKS. They do.

The CHAIRMAN. The Chair would suggest that you prepare in writing a statement to the committee giving your opinion of the Frear amendment that was presented yesterday.

Mr. BICKS. We would be happy to, Senator.

(The statement referred to is as follows:)

COMMENTS ON SENATOR FREAR'S PROPOSAL TO PROVIDE TAX TREATMENT FOR INDIVIDUAL DU PONT SHAREHOLDERS ROUGHLY EQUIVALENT TO THAT PRESENTLY ACCORDED CORPORATE SHAREHOLDERS UNDER INTERNAL REVENUE CODE SECTION 301

Under existing law when a corporation (the "distributing corporation") distributed to its shareholders stock of another corporation (the "controlled" corporation) whose voting stock is at least 80 percent owned by the distributing corporation and the distribution otherwise meets the statutory requirements, provision is made for nonrecognition of gain to the shareholder-recipient. Otherwise individual shareholders receiving such distributed stock must report as a dividend, taxable at ordinary income tax rates, the fair market value of the distributed stock (to the extent of the distributing corporation's earnings and profits). On the other hand, corporate shareholders who receive such distributed stock under conditions not qualifying for nonrecognition of gain are taxed not on the fair market value of the distributed stock but on the original cost of the stock to the distributing corporation. And, in addition, unlike the individual stockholder, the corporate holder receives an intercorporate tax dividend credit of 85 percent. As a result, the maximum tax due from a corporate distributee is 7.8 percent (52 percent of 15 percent) of the original basis of the property held by the acquiring corporation.

Altering existing law, Senator Frear's proposal (set forth at pp. 129-130, transcript of hearings before Committee on Finance, May 27, 1959) would provide that on distribution of "divested" stock individual shareholders would pay an income tax measured, not by the fair market value of stock received, but rather by the cost basis of the "divested" stock to the distributing company.

This proposal would meet two of the three objections this Department raised to S. 200. As the Deputy Attorney General wrote this committee on May 25, 1959:

"* * * appropriate alteration of present tax consequences could, as a general rule, increase the likelihood of divestiture relief and simplify as well as speed effectuation of such remedy. However, S. 200 does not seem an appropriate path to this enforcement goal.

"First, S. 200's nonrecognition benefits would apply equally to all divestiture cases—regardless of when the acquisition attacked was consummated. This despite the fact that equities in favor of tax relief may loom larger where suit follows long after acquisition and, accordingly, the acquisition's illegality was perhaps not so evident when consummated.

"Second, under S. 200, the shareholder is relieved of all dividend income tax liability on account of the 'divested' stock received. Only a capital gains tax may be due—if and when either the 'divested' or original stock is sold. Such absence of immediate tax incidence on antitrust divestiture could, in a few marginal mergers, perhaps tip the scales in favor of risking an acquisition otherwise doubtfully legal.

"Third, and most important, S. 200 does not contain sufficiently specific safeguards to insure that benefits would only be available where necessary for effective antitrust relief. Thus, viewing this measure in the context of the pending General Motors-Du Pont proceedings, S. 200 as presently written could enable the granting of nonrecognition benefits, not only to the Du Pont stock-

holders, but also to stockholders of Delaware and Christiana. The Government's divestiture plan there, however, would require that a trustee sell Du Pont's General Motors stock allocable to Christiana and Delaware and Delaware's stockholders. Were distribution allowed to stockholders of Delaware and Christiana they would end up with roughly 8 percent of General Motors stock—a block several times larger than that held by any other group. Thus the goal of the entire relief proceeding might well be thwarted. Since S. 200 as presently written could enable such secondary distribution to stockholders tax free, it could tend to frustrate rather than further the very antitrust objectives which are the sole rationale for any such tax proposal."

This proposal would meet the first two of these three objections. For such approach might contain built-in safeguards. Where suit involves recent acquisition, this approach would likely spell lesser change in existing tax consequences. For, in such cases, the cost basis to the acquiring company would likely be more closely related to present market value. Thus, such amendment would not likely spur mergers of doubtful legality.

However, where an antitrust proceeding involves a long consummated acquisition, this proposal might alter tax consequences. In such instances there may well be a substantial appreciation in value of stock acquired between the time of acquisition and the time of divestiture. And it is in such instances where tax relief may be most appropriate. For it is here that courts may be most concerned with granting divestiture relief. And it is here that the original acquisition may have been made with lesser eye to its antitrust consequences.

Not removed by this proposal, however, would be our third objection to S. 200—the objection that such proposal might provide a tax benefit spur to a relief plan which could still leave the same ground in control of both Du Pont and General Motors. Thus, this proposal could still thwart rather than aid those very antitrust objectives which are the sole rationale for any such tax proposal. Unless it were amended to make sure that tax benefits could not be applied to spur a secondary passthrough of General Motors' stock by Delaware and Christiana to their shareholders, this Department would not recommend enactment of this proposal.

The CHAIRMAN. Have you got another point?

Mr. BICKS. No, sir; I am finished.

Senator KERR. I thought you said you had the third objection.

Mr. BICKS. The third objection—301 approach does not alter it.

Senator WILLIAMS. What was the third objection?

Mr. BICKS. The third objection would be that S. 200 as presently written would ease a tax-free distribution not only on the first level, in the Du Pont case to the many individual stockholders unaffiliated with Delaware and Christiana, but also a complete pass through tax free to the stockholders of Delaware and Christiana. This would leave in the hands of the people who control Du Pont what we feel would be control of General Motors—that is, 8 percent of General Motors stock. Thus we must argue against any tax proposal which would encourage such relief in the Du Pont-GM case.

Senator GORE. You say this is the most serious of the objections?

Mr. BICKS. This is by far the most serious of the objections, because if such was the end result our entire relief proceeding would be for naught.

However, this is a view quite obviously not held by the defendants in this case. I am sure they would argue that leaving 8 percent of General Motors stock in the hands of those who control Du Pont is not inconsistent with the purpose of the proceedings before the court now. So I don't think I should do anything more than state what is our view.

Senator GORE. But insofar as the revenue aspects are concerned, it would permit this tax-free distribution not only for Du Pont stockholders, but would also permit other corporations holding Du

Pont stock to pass through their corporate structure a tax-free distribution?

Mr. BICKS. Precisely, and that is our basic objection.

Senator GORE. How far would that go?

Mr. BICKS. There is no limit contained in the bill.

Senator GORE. As many interlocking corporations as might be involved could still pass through without tax?

Mr. BICKS. That is it, precisely, and I think there are basically different considerations involved in the first level pass through than in the second.

The CHAIRMAN. Mr. Bicks, have you finished your statement?

Mr. BICKS. I have.

Senator GORE. Could I just finish this one point?

In the case of Delaware and Christiana there is no court order, is that correct?

Mr. BICKS. There is no final court order in the case of anyone.

Senator GORE. I mean, are Delaware and Christiana involved directly in the divestiture litigation?

Mr. BICKS. They are.

The CHAIRMAN. Mr. Bicks, as I understand it, the Department of Justice has made certain recommendations to the district judge; is that true?

Mr. BICKS. We have, Mr. Chairman.

The CHAIRMAN. Are they available?

Before you answer that question, I would like to know what discretion has the district judge, what is the extent of his discretion in interpreting the decree of the Supreme Court?

Mr. BICKS. Our view is that the interrelation of the Clayton Act, sections 7, 11, and 15, require as a matter of law, that once an acquisition is found illegal under Clayton Act section 7 in a suit brought by the United States, the district judge orders divestiture. However, he has wide discretion as to the timing and form of divestiture.

The CHAIRMAN. He can determine the length of time over which the divestment would occur?

Mr. BICKS. That is true.

The CHAIRMAN. He could make it 50 years if he chose?

Mr. BICKS. Could he make it more than 10 years if he chose?

The CHAIRMAN. Or 20 years, or 25 years?

Mr. BICKS. I think he could, but I think if he went much beyond that, we would have another appeal to the Supreme Court.

The CHAIRMAN. In other words, if he went beyond the 10 years there would be an appeal to the Supreme Court?

Mr. BICKS. Substantially, yes.

The CHAIRMAN. What other discretion does he have besides the time?

Mr. BICKS. I think the manner of how the stock is to be sold or distributed, or——

The CHAIRMAN. Can he have a variable distribution over 10 years, or would it have to be uniform?

Mr. BICKS. It could certainly be variable. You mean to take into account stock market prices?

The CHAIRMAN. I mean the amount to be distributed.

Mr. BICKS. Yes.

The CHAIRMAN. Ten years is 10 percent a year.

Mr. BICKS. Yes.

The CHAIRMAN. Could he make it 5 percent the first year, and a little more the next year?

Mr. BICKS. He certainly could.

The CHAIRMAN. Assuming he could get the 100 percent in 10 years?

Mr. BICKS. He could.

The CHAIRMAN. But your recommendation was on the average basis of 10 percent a year?

Mr. BICKS. Correct.

The CHAIRMAN. He would have discretion for variations?

Mr. BICKS. He certainly would.

The CHAIRMAN. What other discretion would he have?

Mr. BICKS. I would say you have hit the two primary ones, Senator.

The CHAIRMAN. He would have discretion with regard to the sale of the Christiana stock?

Mr. BICKS. Yes.

The CHAIRMAN. The Delaware stock?

Mr. BICKS. I think our same position, the same area of discretion would exist.

The CHAIRMAN. Could he determine over what length of time stock allocable to Christiana would be sold?

Mr. BICKS. He could.

The CHAIRMAN. What was your recommendation?

Mr. BICKS. Ten years.

The CHAIRMAN. Ten years?

Mr. BICKS. Yes, sir.

The CHAIRMAN. If he made it 15 years, would that be offensive to the Department?

Mr. BICKS. I would prefer not to comment on the sort of decree from which we would appeal, Mr. Chairman. However, you may be interested in how we arrived at the figure.

The CHAIRMAN. How did you arrive at 10 years?

Mr. BICKS. Well, the two principal problems that have been advanced in terms of equities here are, first the tax burden to individual stockholders that would stem from immediate divestiture and, second, possible stock market consequences that would stem from the required sale—all at once—of the General Motors stock allocable to Delaware, Christiana, and the stockholders of Delaware.

First, view the 10-year period in terms of the dividends to individual stockholders. Ten years would give the Du Pont management the opportunity to substitute completely a stock dividend each year for its present money dividend, and leave the individual taxpayer in roughly—and I say roughly—the same position at the end of 10 years as if he had received money dividends each year.

In short, the amount he would receive each year by way of a stock dividend, if the Du Pont management decided to substitute a stock dividend for its present cash dividend, would be roughly equal to his 10-year cash dividend. So his tax position might not be changed. I say "roughly," because actually it would take slightly more than 10 years. But that depends on an assumption of continued current dividend.

The CHAIRMAN. What discretion does the district judge have with regard to the first stock—what discretion does he have before any stock is distributed?

Mr. BICKS. You mean how long——

The CHAIRMAN. How long, in your judgment, could it be deferred?

Mr. BICKS. I think there would be a wide area of flexibility provided——

The CHAIRMAN. In other words, that is left in the discretion largely of the district judge?

Mr. BICKS. I would say so, sir, Mr. Chairman.

The CHAIRMAN. Does the Justice Department have in mind a date when the first distribution should become effective?

Mr. BICKS. I believe we recommended a prescribed number of days after our plan was adopted, if it is to be adopted. I don't recall the precise number of days when it was to start going into effect, but we did envisage, as you point out, a comparatively regular distribution over the 10-year period.

The CHAIRMAN. You did not recommend any specific date in the distribution of the stock?

Mr. BICKS. I don't believe so; no.

The CHAIRMAN. That will be left largely in the discretion of the judge?

Mr. BICKS. That is correct, Mr. Chairman.

The CHAIRMAN. I think that is all.

Senator ANDERSON. May I ask a question?

Senator FREAR. May I just clear up one point, if I may?

Did I understand you to say, Mr. Bicks, that it was practically incumbent upon the judge of the district court to order divestiture?

Mr. BICKS. Senator Frear, our view of the law is, to repeat, once a violation is found under Clayton Act section 7 in a suit brought by the United States intended that divestiture relief is mandatory. However, that view of the law is sharply contested. The defendants in this case have disagreed and have registered their disagreement.

Senator FREAR. And of course they have also proposed a plan that would satisfy the Supreme Court without divestiture, by placing it in the hands of trustees by passing the voting on to the stockholders, leaving nothing as far as the violation of section 7 of the Clayton Act is concerned in the hand, or remaining in the hands of the Du Pont Co.

Mr. BICKS. Well, now, you are getting on the exact dispute that is subjudice now, and you have stated what the Du Pont plan is; I have stated what the Government plan is. I think we ought to fairly well leave——

Senator FREAR. I think you have stated your position a little better than I have, and I don't want to give you that advantage. I want to be on the same ground with you, and I would like it thoroughly understood that there is a means by which the district court can satisfy what the Supreme Court has told them without divestiture.

Mr. BICKS. Yes, that is Du Pont's position.

Senator FREAR. Thank you.

Senator WILLIAMS. If I understood you correctly, you almost endorsed that position. You might not have intended it.

Mr. BICKS. I said, "Yes, that is Du Pont's position."

Senator WILLIAMS. No, I don't mean that. In your statement, as I understood it, you said the Department of Justice was concerned with the tax liability that would be generated as a result of this decision.

Mr. BICKS. Well, we were certainly concerned about it and took it in mind in formulating our plan.

Senator WILLIAMS. And your primary plan of the suit was to take control of the stock away from certain individuals in the company, is that correct?

Mr. BICKS. Yes, to break Du Pont's control over General Motors.

Senator WILLIAMS. You wanted to break the control, and it was not the ownership of the stock but control and voting power with which you were concerned, is that right?

Mr. BICKS. Well, our position is that you can't separate the two, Senator. But now we are really, Senator, arguing the very issue that is before Judge LaBuy.

Senator WILLIAMS. The reason I raise that point is that as I followed your argument, I took it that your major objection to the whole proposition was the fact that they may have 8 percent of remaining control and that it would be their ability to vote the stock with which you were concerned; and I just wondered how far apart you were.

Mr. BICKS. We are substantially far apart, Senator. Our position is that influence can stem from actions other than voting; that the community of financial interest between the largest chemical company and the largest auto company will itself produce competitive distortions.

Senator WILLIAMS. Even though it were blocked over in a separate nonvoting trust?

Mr. BICKS. Yes, that is our position, Senator.

Senator FREAR. Excuse me, if that is followed——

Senator WILLIAMS. I have just one other question.

If you are concerned with the tax liability of these individuals, and if you are not satisfied with the nonvoting trust, but you are going to insist that it be sold, what alternative do you propose to overcome your third objection? You must have something in mind, because as I understand in the beginning you said that the existing law was wrong.

Do you think something should be done?

Mr. BICKS. No, Senator; I am sorry I didn't make my position clear.

Our position in favor of serious consideration of changing existing law is not rooted in considerations of tax inequity. Rather it is prompted by considerations of improving enforcement effectiveness.

Our position regarding the tax inequity is that our plan is not inequitable from a tax point of view. If this sort of bill were enacted, however, our plan could be put into effect immediately without any tax problem. That is the advantage of the Du Pont-GM case. Now there is going to be a 10-year period. However, if there were no tax consequencies, I don't think there would be as much dispute as to the appropriate relief in this case and relief could be achieved much more quickly and smoothly.

Senator WILLIAMS. Do you have any suggestion whatever that you could make to the committee that would overcome your objections?

Mr. BICKS. Frankly, I don't know enough about the tax laws, Senator, to propose one right here, but I really would welcome the chance to consider anything that people who know more about the tax laws can propose.

Senator WILLIAMS. In the absence of such knowledge, how can you state that that which has been proposed would not do the job?

Mr. BICKS. I am terribly fearful that it would probably frustrate the goal that from our point of view, at least, the Supreme Court sought to achieve.

Senator ANDERSON. May I ask a question, Mr. Chairman?

The CHAIRMAN. Yes.

Senator ANDERSON. We have two lines of work here, we have to vote bills out here and vote on the floor, but we also have to write letters to our constituents.

I wonder how you would tell me to answer a letter I have from a woman who lives in my State, married to a well-to-do cattleman, who was for 25 years a teacher in a fine eastern school. She has gone out to New Mexico and she has some Du Pont stock. Because of her husband's income being a large income, if she gets this stock in the fashion that has been proposed, it will it will virtually confiscate the savings of her 25 years of teaching. She has to take it as ordinary income. She writes me and wants to know what I am going to do about it.

What would you tell her if you were in my place? [Laughter.]

Mr. BICKS. Senator, I am not clear enough as to the exact tax bracket situation.

Senator ANDERSON. Let me say——

Mr. BICKS. Suppose we did this—let me answer it this way——

Senator ANDERSON. Let me say she would pay at least 75 percent in taxes because her husband already has an income of $100,000. But this is her property. This is her sole and separate estate that she is a little proud of because she saved it over the long years as a schoolteacher.

Now, she gets, because of the acts of somebody, she had no responsibility for the acts of General Motors or Du Pont, she gets it but it comes to her in such a fashion that she has to give 75 percent of it back to the Government.

I just wonder if you——

Mr. BICKS. How I would answer?

Senator ANDERSON. How you would say it was fair.

Mr. BICKS. I would say "Under the Government's proposed plan, there is left with the Du Pont management the possibility of complying with the plan and distributing the stock in such a manner, my dear constituent, so as not to alter your tax consequences."

Senator ANDERSON. I don't so understand it.

Mr. BICKS. If Du Pont's management should decide each year for the next 10 or 11 years to (instead of declaring a money dividend) put out a dividend in the form of General Motors stock roughly equal to the money dividend, our plan would be complied with, and her tax would the same.

Senator ANDERSON. Then you would come out to the same result in the Fraser bill and if so, why don't we do it right at once?

Mr. BICKS. I don't follow the Senator.

Senator ANDERSON. I thought the bill would permit this at once without taxes. Why do you object to the Frear bill?

Mr. BICKS. Not without taxes, Senator, but the same tax she would pay now with our plan.

Senator KERR. In other words, his proposal is to let the hand be quicker than the eye. [Laughter.]

Senator ANDERSON. That is what it sounds like.

Senator KERR. And let her get her dividend rather than in the form of expendable cash with that which he had to earn it still doing so, in the form of that which had been earning expendable cash dividend, so that actually she would be living out of her principal rather than out of the income from it, and as she did so, pay the same high tax that you have referred to, and what they would do would bring about a situation where she would have happen to her in 10 years that which you are trying to avoid having happen to her in 1 year.

It reminds me of the story of the boy that cuts the dog's tail off an inch at a time instead of all at once so it won't be so painful to him. [Laughter.]

Senator ANDERSON. I think I have an answer to my question, and I think I would let Senator Kerr write the letter.

But I do feel it is a definite problem, because it arises all the time, particularly out of these situations where it is the sole and separate property in a mutual property estate. She is going to lose, as I read the thing, the amount of money that she has saved.

I am not nearly as worried about what happens to Delaware and Christiana, whatever they are, as I am about what happens to this person, because I happen to know her. I regret to say she is politically unsound; she votes for the wrong party. [Laughter.]

But most cattlemen have that affliction in my part of the country. But she is a fine, fine woman, and I would like to be able to write her a comforting letter.

I don't see why it is better to do this in 10-year installment basis than to go ahead and say that this is no fault of hers and therefore she ought to be allowed to receive the full amount of what has been her life savings.

Mr. BICKS. Well, understand, we would have no objection—our third objection would not apply to that situation.

Senator ANDERSON. Any person who has got Du Pont stock.

Mr. BICKS. Other than Delaware-Christiana stockholders.

Senator ANDERSON. Then a private individual has Du Pont stock, you don't mind them getting it without tax?

Mr. BICKS. No; that is right, from an antitrust point of view. I think the Treasury people may have something else to say.

Senator ANDERSON. You can't divide this house?

Mr. BICKS. No.

Senator WILLIAMS. Would you care to comment on the Treasury's suggestion?

Mr. BICKS. Senator, I really would like to see it specifically drafted. Let me tell you why: there are various possibilities of how the basis could be allocated. This is the point that Senator Kerr threw out in his questioning yesterday. Does this apply to corporations, as it does individuals. That really would make quite a significant difference. I would like to see a specific draft.

Senator WILLIAMS. Will you talk with the Treasury Department concerning their proposal and submit to the committee a definite recommendation in connection therewith?

Mr. BICKS. We will certainly endeavor to.

(The information referred to is as follows:)

JUSTICE DEPARTMENT COMMENTS ON TREASURY DEPARTMENT PROPOSAL

As we understand this proposal, a capital gains tax would become due at the time of distribution based on the difference between the allocated basis of "divested" stock and its fair market value at the time of distribution. Beyond that, this proposal would presume that a distribution within 5 years of acquisition had as its purpose the distribution of earnings and profits. Thus, such distribution, as under existing law, would be taxed at regular dividend rates. Finally, removed from existing law would be the right of any corporate distributee to treat such distribution as a dividend value at the basis of the stock to the distributing corporation.

Under this approach, assuming that longstanding stockholders of the distributing corporation have a lower basis for their shares than stockholders who recently acquired their stock, the longstanding stockholders will pay a substantially greater tax than the recent stockholders.

Thus, where violation may have been less evident at time of acquisition, as may well be true when the acquisition occurred many years ago, partial liquidation would impose the heaviest tax upon longstanding stockholders. Accordingly, in those cases where tax barriers to effective disvestiture may loom largest, partial liquidation treatment might well afford least help to antitrust enforcement.

Finally, most important, partial liquidation, as proposed would apply equally to the stockholder who, upon distribution, was still left with control of the merging companies. This would mean—in the Du Pont case—that this proposal might aid a decree which permitted GM stock to pass through to stockholders of Delaware and Christiana. And the same group that controls Du Pont would end up with 8 percent of GM's voting stock.

Senator FREAR. Mr. Chairman, may I just be permitted one short period of time?

I gathered from you, Mr. Bicks, in your answer to the senior Senator from Delaware's question, that the only way to avoid any influence by members of the Du Pont family on General Motors is to kill them off. I don't think you want to be that drastic in your recommendations. [Laughter.]

Mr. BICKS. Senator, I hardly think that is a fair version of my position.

Senator FREAR. Well, what is your version of it?

Mr. BICKS. Our position is that any secondary pass through which S. 200 would enable would leave the stockholders of Christiana and stockholders of Delaware with 8 percent of General Motors. This would not serve those purposes of equitable relief which we are obliged to seek under Clayton Act section 7.

Senator FREAR. In other words, the effectiveness of that would be to reduce from 23 percent to 8 percent, but you still think that is sufficiently large amount to be effective in control of General Motors?

Mr. BICKS. That is right. To really, I think, make clear and candid my response to your question, I think I want to point out that under our plan, even if it went into effect, very many individual Du Ponts would have substantial holdings of General Motors. Even if our plan was adopted in toto, I think individual Du Ponts would still end up with, I am not sure whether it is 2 or 2.5 percent of General Motors, which is probably still larger than any other individual holdings.

Senator FREAR. We are pretty near getting down to the point I raised.

Mr. Bicks. No, it isn't. We are not objecting to that. We do say that when you get up to 8 percent, which is roughly three times more than any other holder has got, you are at least raising the potential of significant control.

Let me, to run the other side. The Du Pont position, of course, is why do we assume that that 8 percent is going to be voted cohesively? Why is that any different from 8 percent held by any other large block? Why do we assume, that that 8 percent will be voted as a unit to exert some influence and control? And that is what the argument is. If we are wrong in assuming that the 8 percent is potentially control; pass through would fully serve competitive goals. But that is the issue before the district court.

Senator Frear. Well, Mr. Bicks, I can go along with some of that. However, under the SEC regulations it is permissible for the General Motors Corp. to extract proxies from their stockholders, and if they don't send them in, why, they probably have 15 or 20 or even 50 percent on some instances that they can exercise as they so desire.

All we are doing is saying that poor little people here in Delaware with 8 percent are going to be denied what General Motors in Detroit with 50 percent can do. You don't have to answer that.

Mr. Bicks. Thank you, Senator. [Laughter.]

Senator Frear. May I just go through a few questions, Mr. Chairman, while we have Mr. Bicks here?

Mr. Bicks, I understand the Department of Justice, as you have already stated here very adequately, is involved in litigation with the Du Pont Co. before the Federal District Court in Chicago, and I have no desire, honestly, to ask you any questions which would be improper in view of the pendency of this legislation or litigation.

If you believe that any of the questions that I put to you might be improper in this respect, I hope you will tell me.

First, let me ask you: Do you know of any area of the law other than antitrust in which a divestiture required by governmental action results in the imposition of taxes?

Mr. Bicks. I do not.

Senator Frear. Will you take the case of a public stockholder of Du Pont who purchased his stock sometime after 1917, when Du Pont first bought into General Motors. Would such a stockholder have had any reason to believe that Du Pont holding of General Motors stock would be declared illegal in 1957, and might be ordered divested by that same or by some Federal court?

Mr. Bicks. Senator, I can't answer that question directly. Because what you are asking me to do is put myself in a position of a lawyer to a stockholder 30 years ago, and predict what the development of antitrust law is going to be during that 30-year period, and I guess the answer you would get would vary about as widely as the number of people you asked.

Senator Frear. I only asked for an answer within reason. I don't want you to expose yourself, but would it be reasonable that somebody who bought his stock in 1920 would say that the Federal court in 1957 is going to declare this holding by the Du Pont Co. illegal?

Mr. Bicks. I don't think so.

Senator Frear. Right.

Would the enactment of a bill such as S. 200 aid in the proper enforcement of the antitrust laws? I think much of this is forthrightly

affirmative as far as pages 2 and 3 of the letter of Judge Walsh is concerned. I think that is already a matter of record.

Referring to the footnote on page 3 of Mr. Walsh's letter, which you read, is it a fair statement to say that your position before this committee is substantially the same as that of Mr. Justice Douglas when as Chairman of the SEC he appeared before this committee in 1938 with respect to the Public Utility Holding Act tax amendment?

Mr. BICKS. Senator Frear, first I would not adopt the language of Mr. Justice Douglas. Second, I think our situation is different to some extent. Third, however, we were addressing ourselves essentially to the same problem.

Senator FREAR. Would a tax provision similar to those contained in the Public Utility and Bank Holding Company Acts which would permit distribution to be made tax free to shareholders be more or less helpful in the enforcement of the antitrust laws than a provision which provided that a distribution should be treated as a partial liquidation?

Mr. BICKS. Well, in answer to your question, may I assume that your first alternative, the nonrecognition alternative is amended to bar secondary distribution such as the one I am concerned with? If it is, then the answer to your question is "Yes."

Senator FREAR. The letter from Mr. Walsh enumerates three objections, and I think you have said that two of those objections we have probably an area of agreement on. It is the third objection, the pass through to which the Department has and continues to have serious objection.

Mr. BICKS. That is our most serious one.

Senator FREAR. But you still think, as I understood your answers to certain questions given before, that there is perhaps an area whereby the Justice Department and the Treasury Department can reach agreement.

Mr. BICKS. Well, certainly on the first and second points I think your 301 approach met them. On your third point, I think as long as any tax proposal would ease a pass through to Delaware and Christiana, we don't have agreement.

Senator FREAR. Then our difference is strictly percentage, isn't it?

Mr. BICKS. Yes, sir; it is.

Senator FREAR. Just to clarify one thing, I think this has already been stated, but I offer it once more:

Assume with me that the courts have ordered a company to distribute the stock which it holds in another company, and that the courts have found that there is no antitrust need for directing that the stock distributed to an affiliated company should be sold;

Assume instead that the judgment of the courts is that the stock distributed to the affiliated company should, in turn, be further distributed to the stockholders of that company:

Do I understand it to be your view that the stockholders of the affiliated company should be required to pay the full tax even though the other stockholders of the distributing corporation would have to pay no tax?

Mr. BICKS. Senator, you can't divorce that general question from the context of the particular dispute over the plans. I would like to answer your question quite directly in the context of the General Motors-Du Pont case. We are not urging that this committee deter-

mine the issue before the court. We are not trying, in short, to argue our case here or win it here rather than Chicago.

We are saying two things: First, if this committee enacts a tax proposal which permits such secondary distribution, a perhaps fair implication to a court might be that in this committee's judgment such secondary distribution might accord with antitrust objectives. And that is a judgment which we can't share.

Second, our position is that a prime rationale for any one of the tax proposals that have been passed is to improve enforcement effectiveness. Not only would such secondary distribution here not improve enforcement effectiveness, but to the contrary, at least in our view, it would thwart the goal of the antitrust proceedings.

That is as direct an answer to your question as I can give.

Senator FREAR. Now, there is a difference of opinion, as was brought out in the testimony yesterday, as to the duty and the obligations of the members of this committe and of Congress regarding statutes, and, I think, we convinced at least some that the decision of the Supreme Court in this instance amounts to the same thing as new law, which we have established in the Bank Holding and the Public Utility Holding Company Acts.

Of course, I recognize that in your position you might not be perfectly clear on that, but anyhow, in the second thing, when we pass through charitable institutions they are going to be assessed tax, whereas if they got it directly they would be tax-free.

You are going to make Christiana pay a tax to the people who own Christiana stock who are tax-exempt, or charitable organizations.

Mr. BICKS. Senator, I think you are right. I can't comment on your first point. But if I may, I would like to comment on your second.

Senator FREAR. You may.

Mr. BICKS. And that is that we have long made clear that we are willing to amend our plan to permit charitable institutions which are holders of Christiana to exchange their Christiana for Du Pont stock. They could then take directly, and be in the same position to receive, any tax benefits or the benefits of any tax proposal that the Congress may adopt.

Senator FREAR. All right, now, Mr. Bicks, when you give this plan that has been requested by the Senator from Delaware, I hope you will be as charitable otherwise as you are to charitable institutions. [Laughter.]

Does the Department of Justice feel that legislation along the lines of S. 200 should be considered by Congress at this time, or that all action should be deferred until the courts have rendered a decision in the pending Du Pont case?

Mr. BICKS. We certainly have no objection to consideration now.

Senator FREAR. Thank you, Mr. Chairman, and you, Mr. Bicks. I appreciate your forthright answers.

Senator BENNETT. Mr. Chairman, may I ask a question largely for my own information?

Like many of my colleagues on the committee I am not a lawyer. You are apparently of the opinion that if these companies hold approximately 8 percent of the General Motors stock, that would create a situation in which they might possibly exercise undue control.

So if the program goes through and they are required to divest, is your feeling that thereafter they might not acquire any General Motors stock in the open market? Does the divestiture put them in a position always of being unable to acquire General Motors stock?

Mr. BICKS. No, it does not.

Senator BENNETT. So then they can legally accomplish a situation which you figure is illegal in the present situation?

Mr. BICKS. No, Senator. May I spell out my answer to that?

Senator BENNETT. Yes.

Mr. BICKS. We propose no injunction against individuals, individual Du Ponts, or any other individuals.

Senator BENNETT. Against Christiana or Delaware?

Mr. BICKS. Yes, we do against Christiana-Delaware and Du Pont Co. reacquiring. So this really gets back to my answer to Senator Frear. It is only the cohesiveness with the ownership via the corporate form and recent banding together, via the corporate form, that gives us trouble.

Senator BENNETT. Then your simple answer is that your divestiture program would, in effect, be a permanent injunction against the acquisition of General Motors stock by Du Pont or Christiana?

Mr. BICKS. And Delaware.

Senator BENNETT. By Delaware.

Mr. BICKS. I don't believe we have sought a permanent injunction, but for a substantial period, yes.

Senator BENNETT. Even though they bought it in the open market at the full market price?

Mr. BICKS. Yes.

Senator BENNETT. That is all, Mr. Chairman.

The CHAIRMAN. Mr. Bicks, would the Justice Department consider asking the Federal judge to make operative his decision 1 year after the announcement? Congress would then have a clear picture of what the situation is, and any legislation that would be required would not have to be retroactive.

Mr. BICKS. May I answer your question in two ways:

First, I think that question stems in part from the point raised by Senator Douglas, and Senator Smathers, and Senator Frear yesterday—why torment ourselves with this now when in a sense we have a problem that is not yet ripe, and a problem we may not have to face?

The CHAIRMAN. Don't you think that would be a fair thing to do? Here is something that involves the distribution of $3,250 million. The Congress is now asked to take action without knowing what the final decision is going to be. It would seem to me to be proper and right that due notice be given to the stockholders, the country, and to the Congress. There are members of this committee, as you heard yesterday, and there will be Members of Congress that are not willing to take action when we don't know what the decision of the Court is going to be. We only know what the Department of Justice has recommended.

Mr. BICKS. That is true.

The CHAIRMAN. We don't know whether the judge will adopt it or not adopt it, or whether the judge will adopt some other plan, which may of course result in another appeal to the Supreme Court and further litigation.

Mr. BICKS. Yes, it may.

The CHAIRMAN. It is my firm judgment that a year's postponement in a matter involving this gigantic sum—nothing like this has ever occured before in the history of the United States—would be the fair and just thing to do. It couldn't result in any harm to anybody that I could see. Do you think so?

Mr. BICKS. Senator, as you stated, you can't say that I disagree with what you say. I don't have our——

Senator ANDERSON. Do you agree?

Mr. BICKS. I would like to take another look at our plan. As I recall, there is a substantial period between the announcement and its operative effect, but our——

The CHAIRMAN. It would have to be a sufficient time. Congress may be in recess, from August to January. We would have a chance to look at it and take such action as may be deemed proper.

Now, we are asked to act more or less in the dark, and you admit there is a problem.

Mr. BICKS. Yes.

The CHAIRMAN. There is no doubt about that, a very serious one. It does seem to me the Justice Department should cooperate to the extent at least of asking that the decision not be made operative until adequate time is given after the decision is made for Congress to act.

Would you transmit that to the Attorney General?

Mr. BICKS. I will, Mr. Chairman.

The CHAIRMAN. And see what the reaction is.

Mr. BICKS. May I respond a little more fully to that? I certainly will, and I will respond to you very quickly. But I think it is in a sense unfortunate to view the merits of this proposal, this quite significant issue, solely in terms of what a district court may do in Chicago, because our position is that this proposal, or some similar proposal, has merits beyond what the district court may do. And with such a proposal on the books now, perhaps the entire issue which is before the district court could be resolved much more expeditiously and more smoothly by the parties themselves.

The CHAIRMAN. The point I wanted to make clear, and I think you should give recognition to, is that those adversely affected by this decision will be greatly prejudiced if they are compelled to ask for retroactive taxation, which may be possible if no action is taken by Congress at this session, and a decision by the court that becomes operative before Congress meets again; it is much more difficult for Congress to pass retroactive taxation than to meet a current existing situation.

Senator WILLIAMS. At the same time you could then come before us and testify more freely than you can now with the case pending.

The CHAIRMAN. And testify about what the court has done. Nobody knows yet what that will be.

Senator BENNETT. Mr. Chairman, it seems to me there is an even additional risk in this. If the decision of the court, regardless of what the decision of the court will be, isn't it almost a foregone conclusion that one or the other side will take it back to the Supreme Court? Aren't we maybe years away from the actual imposition of this tax?

Would you like to comment on that?

Mr. BICKS. You may be years away, but all the prime thrust of the Department of Justice's position is that, regardless of what happens in Chicago, this is a significant problem that Congress might well wish to consider. And second, congressional consideration of this problem now might avoid much of the dislocation that would stem even with a 1-year waiting period, as Senator Byrd has suggested, from any district court decision in Chicago.

Senator WILLIAMS. Is there any possibility this case can get back to the Supreme Court whereby they can reverse themselves and uphold the original decision of the lower courts?

Mr. BICKS. I would think not, Senator Williams, but I couldn't say there is no possibility.

The CHAIRMAN. You are referring to the Supreme Court, aren't you? [Laughter.]

Senator WILLIAMS. They could do it, could they not? They did do it once on another case. Could that not possibly be the result?

Mr. BICKS. Possibly.

Senator WILLIAMS. In that event there would be no problem.

Mr. BICKS. Well, there would still be a substantial problem in cases other than this.

Senator WILLIAMS. That is right.

Mr. BICKS. Our concern with this really is in terms of broad enforcement considerations, not this particular case.

Senator WILLIAMS. I recognize that.

Senator ANDERSON. Didn't I hear you say, or did I misunderstand you, if the tax problem could be gotten out of the way, as the Frear bill proposes, or something like that, if you didn't have that worry that the question of the antitrust features of it could probably be solved very simply?

Mr. BICKS. It would be certainly more simple than it is now.

Senator ANDERSON. Then we would serve a useful purpose by passing a bill like this?

Mr. BICKS. Very much so; I couldn't agree more with you.

Senator KERR. Well, the problem is very real, isn't it, Mr. Bicks, this problem is very real?

Mr. BICKS. Extremely.

Senator KERR. And it is very apparent, and as it now exists it is an impediment in the path of the expeditious enforcement of the antitrust law.

Mr. BICKS. It certainly is.

Senator KERR. And therefore the Justice Department has made it clear that they think Congress should adopt a constructive approach to the solving of this problem.

Mr. BICKS. Precisely.

Senator KERR. Now.

Mr. BICKS. Yes.

Senator KERR. You believe in the principle of protection of the rights of innocent purchasers which is now broadly and widely recognized by the law, don't you?

Mr. BICKS. Yes, sir.

Senator KERR. The Supreme Court stated very specifically in the decision that there was nothing whatever reprehensible in the operation or in the behavior of any of the officers either of Du Pont or General Motors, didn't they?

Mr. BICKS. Roughly, sir.

Senator KERR. I thought it was said pretty smoothly. [Laughter.] I thought it was rather explicit, didn't you?

Mr. BICKS. Yes, Senator.

Senator KERR. Under those circumstances, and in light of your answer to a question a while ago, at least as I understood it, which was that nobody could have known in 1919 of the possibility of this judicial interpretation in 1947, wasn't that the gist of what you said a while ago, or was that consistent with what you said a while ago?

Mr. BICKS. I believe, Senator, what I said was that a man could still be reasonable and not have predicted what happened.

Senator ANDERSON. You lost me there.

Senator KERR. That is language which I understood, and frankly, I did not think that my statement of its intent here was inconsistent with it.

Mr. BICKS. That is right.

Senator KERR. That is correct, isn't it?

Mr. BICKS. Yes.

Senator BENNETT. Could a man have been reasonable and predicted it?

Senator KERR. Well——

Mr. BICKS. Senator, I think that is what lawyers get paid for.

Senator KERR. The answer to that question is neither the affirmative or negative, is not a necessary corollary to an affirmative answer to the question which I asked him. [Laughter.]

Senator WILLIAMS. I have here the excerpt from the court's statement.

Senator KERR. I would be glad to have it, Senator, put it in. However, the witness, after having refreshed his memory, said that my statement of what the court did was correct.

Senator WILLIAMS. That is all right.

Mr. BICKS. That is very fair.

Senator KERR. Yes.

Then certainly with reference to these stockholders of Du Pont, we are dealing with people in a category of innocent purchasers, aren't we?

Mr. BICKS. Certainly, other than Delaware and Christiana; yes. I mean most of them. I think most of the stockholders other than Delaware and Christiana are fairly recent purchasers.

Senator WILLIAMS. Is there an exception made in the court's statement to the effect that there had been no wrongdoing?

Mr. BICKS. Pardon me?

Senator WILLIAMS. Here is the excerpt. I would like to read it. This quote was incorporated in the statement of Mr. Greenewalt yesterday:

> Not only did the Court find no wrongdoing on the part of the stockholders, but it stated explicitly "* * * that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including Du Pont's competitors."

Mr. BICKS. That is correct.

Senator WILLIAMS. No exceptions made to it.

Mr. BICKS. That is absolutely correct, sir.

Senator WILLIAMS. Were exceptions made in any of the Court's decisions?

Mr. BICKS. No.

Senator WILLIAMS. Yet you are making an exception here today.

Mr. BICKS. No; I wouldn't say I was making an exception. I would say that our job is to recommend a plan that is designed to remedy the competitive evil which the Supreme Court found. Second, any plan, in our judgment at least, that leaves in those who control Du Pont 8 percent of General Motors, offers no promise of such remedy. I would focus not on the so-called penal or punitive aspects which Senator Kerr's question seemed to imply, but rather on the more civil prophylactic remedy for the future. This is the obligation which the Supreme Court has imposed on us.

Senator KERR. I was not seeking to find a solution that would permit a continuation of the situation of which you complain at all.

Mr. BICKS. Yes.

Senator KERR. I was merely trying to outline the premise of what seems to me to be the situation before us, which is that in my judgment we are dealing with people who, by any interpretation of the facts, must be considered as innocent purchasers without either intent or thought of violation of the antitrust laws, and certainly clothed with every element of that identity insofar as the stockholders are concerned.

Do you agree with that?

Mr. BICKS. I think that your statement certainly touches on considerations of equity to the great bulk of Du Pont stockholders that have given us great concern, and have caused us to try to draft the plan we did.

Senator KERR. And I have not inaccurately described their posture before this Congress, have I?

Mr. BICKS. I think if you had, we wouldn't have gone the 10-year route which we have.

Senator KERR. Then you don't think I have, do you?

Mr. BICKS. No; I do not.

Senator KERR. The Justice Department does not have any responsibility in the formulation or in operating its farflung authority, in meeting its farflung responsibility of creating revenue to the Treasury of the United States except in those cases assigned to it by the Internal Revenue Department?

Mr. BICKS. Or our claim cases, I guess, handled by——

Senator KERR. Or some other appropriate agencies of the Government?

Mr. BICKS. Certainly not in the antitrust laws, no.

Senator KERR. Your sole objective in this litigation was enforcement of the antitrust laws?

Mr. BICKS. That is right. To promote the sort of free enterprise competition we support.

Senator KERR. And you have told us that you feel you can meet the responsibility which is yours and the sole responsibility which is yours in this litigation, by effectuating the application of the antitrust law and not by becoming an instrumentality of collection of great revenue for the Treasury Department?

Mr. BICKS. That is right.

41866—59——22

Senator KERR. And you so advised the Treasury?

Mr. BICKS. Yes.

Senator KERR. And you have left up to them more or less the responsibility of bringing suggestions here to meet what you believe to be a desirable objective of an equitable solution of this problem for these stockholders, is that correct?

Mr. BICKS. Yes, sir.

Senator ANDERSON. Will the Senator from Oklahoma permit me to break in here?

Senator KERR. Yes.

Senator ANDERSON. That is what I thought was the most interesting part of the discussion this morning. I was unfortunately detained in a European atomic matter yesterday and didn't get in on all of this. That is what struck me in your testimony, that you are trying to get rid of this antitrust situation that you are responsible for.

Mr. BICKS. This and others.

Senator ANDERSON. You didn't go into it as a revenue-producing device primarily, but it was an attempt to break up something in restraint of trade.

Mr. BICKS. Precisely.

Senator ANDERSON. And anything we do that helps to divorce this financial problem from it contributes to the things you started when you went into it in the beginning.

Mr. BICKS. Precisely, Senator, providing nothing in the bill prevents it.

Senator KERR. Providing the solution does not create another identical problem.

Mr. BICKS. Exactly.

Senator KERR. And that is your posture before this committee?

Mr. BICKS. Exactly.

Senator KERR. And that is the attitude of the Justice Department?

Mr. BICKS. Exactly, sir.

Senator KERR. That is all.

The CHAIRMAN. Here is a letter that Mr. Walsh signed:

> In sum, this Department does not recommend enactment of S. 200. However, we are concerned with improving the effectiveness of divestiture as an antitrust remedy. To this end, we would welcome an opportunity to study any proposal which would aid antitrust enforcement generally, but at the same time, insure that tax benefits could not in any case frustrate rather than further competitive objectives.

So you do have an interest in it.

Mr. BICKS. Quite right; yes; we do, Senator.

Senator CARLSON. Mr. Chairman, right on that point, if I may, following Senator Anderson's suggestion, as I get your statement this morning you would be pleased, or the Department would be, if we took action soon; isn't that correct?

Mr. BICKS. Yes; I think we have several pending cases, besides this, the resolution of which might be aided by removal of tax barriers to divesture.

Senator KERR. Your whole program of objectives would be helped and expedited if we did take action soon?

Mr. BICKS. Yes.

The CHAIRMAN. But would those proposals also be injured by the postponement of the effective date for a year or some other reasonable amount of time?

Mr. BICKS. I don't understand, Senator, which——

The CHAIRMAN. The effective date is now 90 days after the decision. I am suggesting that it should be made a year.

Mr. BICKS. Yes, I think that the longer—I don't mean not take back our suggestion and take it up with the Attorney General, which I certainly will. But I would point out that the longer we wait the longer the delay is, the longer——

The CHAIRMAN. But you are not waiting. When the decision is made, everybody knows what it is.

Mr. BICKS. Yes, but the longer the status quo is left——

The CHAIRMAN. And the operation of it is postponed for a year.

Mr. BICKS. Yes.

Senator KERR. But the decision of the district court, Senator, has not been made.

The CHAIRMAN. I understand that. I asked him, Senator Kerr, to present the suggestion to the Attorney General, and I made it not as a committee request, but as a personal request, as to whether he would agree to recommend that this be effective a year after the decision is rendered and made. Is that objectionable?

Mr. BICKS. Not at all, sir. You will receive a very prompt reply.

(The information referred to follows:)

THE CHAIRMAN'S SUGGESTION THAT THE UNITED STATES AMEND ITS PLAN TO POSTPONE ANY REQUIRED SALE OR DISTRIBUTION FOR 1 YEAR AFTER ENTRY OF A FINAL JUDGMENT

At present, the Government's proposed relief plan (art. VI) specifies:

"Beginning 90 days after the date of entry of this final judgment and on each anniversary date thereafter, for a total of 10 years, the trustee shall distribute to holders of Du Point common stock, other than Christiana, Delaware, and the stockholders of Delaware, one-tenth of the proportionate shares of General Motors stock. As to the proportionate shares allocable to Christiana, Delaware, and the stockholders of Delaware, the trustee shall dispose of such shares in accordance with article VII hereof."

And article VII of the proposed judgment, after providing for options to Du Pont holders (other than Christiana, Delaware, and the stockholders of Delaware) to buy GM stock which must be sold each year, directs:

"The trustee * * * to sell [subject to prevailing market conditions] any of the shares of General Motors stock allocable to Christiana, Delaware, and the stockholders of Delaware, and the General Motors stock deposited by Christiana and Delaware with the trustee, with respect to which the options to purchase are not exercised by Du Pont common stockholders. Such sale shall be made within 1 year after the date of expiration of such options * * *."

In sum, then, the Government's proposed plan would require a distribution to Du Pont's stockholders of General Motors stock 90 days after the judgment became effective. And sale of GM stock, allocable to Christiana, Delaware, and stockholders of Delaware, would be required "within 1 year" after the judgment.

In the context of the Government's recommended plan, we would not feel it advisable to put off the first distribution until 1 year after the date of entry of the final judgment. As one witness (who also testified for Du Pont at the court relief hearing) put it (Senate Finance Committee hearings, May 27, 1959, R. pp. 236–237):

"Mr. LENZ. Well, frankly, I am a little bit concerned even by the 90-day delay, Senator Frear. I think the longer period that ensues between the final court decision and the divestiture action or the placing of the stock in the hands of the trustee, the distributions, and then the forced sales, the shorter period the

better, because we are going to have a considerably difficult chaotic market period, and here, as I view it, particularly with reference to the Du Pont shareholders who may find it advisable to sell the stock on a capital gains basis rather than wait and receive the distributions.

"The longer the period lasts the more cumulative the effect. It is better, generally, in matters——

"The CHAIRMAN. You think they ought to make it operative in 24 hours, do you?

"Mr. LENZ. If the mechanics, Senator Byrd, could be worked out perfectly a much shorter period, I think, would be preferable, say, 30 days. I think there must be some proper time period to get all the mechanics worked out."

Moreover, 2 years have already passed since the Supreme Court's decision in this case. Relief hearings have just been concluded. Any decision by the district court is yet to come. Even after such decision still possible might be further appeal. In these circumstances, we could not agree to any added delay in effectuating that relief needed to remedy the violation found by the Supreme Court.

In fact, one reason this Department favors appropriate legislation to remove tax barriers to divestiture is that the time needed to effectuate relief here could be shortened, and shortened considerably [2]—rather than deferred. More broadly, need for such appropriate legislation stems not only from this case, but from anticipated benefits to our overall enforcement program.

However, regarding the Government's plan, the United States has made clear that it would consider most seriously any alternative plan to effectuate divestiture promptly. Thus, were Du Pont to propose a plan requiring complete divestiture in less than 10 years, but postponing any initial distribution for a year while avoiding any undue market upset, we would be pleased to consider it most seriously.

The CHAIRMAN. You are giving 90 days now.

Mr. BICKS. Yes.

The CHAIRMAN. I think in simple justice it should be longer because if those affected by this decision have to ask for retroactive taxation remedies, they would be at a great disadvantage, because there is a disinclination on the part of Congress to adopt any retroactive taxation measures.

Senator WILLIAMS. Might I ask one other question here?

Do you recognize and recommend some type of legislation dealing with this problem? Is that correct?

Mr. BICKS. Some type, yes.

Senator WILLIAMS. Some type of legislation?

Mr. BICKS. Yes.

Senator WILLIAMS. S. 200 has been before the Congress close to a year. You have had copies of it.

Mr. BICKS. Yes.

Senator WILLIAMS. You are opposed to it?

Mr. BICKS. Yes, Senator.

Senator WILLIAMS. Do you have any recommendation to offer? Don't you think you have the responsibility to have such a recom-

---

[2] Underscoring the competitive importance of prompt effectuation of Du Pont-General Motors relief are the views of a mechanical consultant, end-use development section, Sales Division, Du Pont (proposed Government Trial Exhibit No. 236, excluded as evidence), by the Court in the relief hearing, but included in the record as an offer of proof, that—

"There are three fundamental reasons why plastics are important in the automotive industry today and why they will grow in importance in years to come. First, plastics offer the designer a number of useful properties, in various combinations, not available in any other class of materials. Second, the raw materials needed to manufacture plastics are in ample supply to meet any foreseeable requirements. Third is the simple element of economics."

With such factors uppermost, he noted:

"The idea of a 'plastic automobile' seems to appeal to the imagination of the general public. I think a poll would show that most people visualize the car of the future as being made from plastic, and I think they are right. The only real question is how far away is the future."

mendation rather than just come down and say that that which is proposed is no good? You admit we should do something, but apparently you don't know what.

Mr. BICKS. Senator, I would like to be able to make some proposal. But I think in all candor we have got—at least I wouldn't be meeting my responsibility to this committee if I gave any assurance that I, based on my antitrust enforcement experience, am competent to say that of a hundred possibilities, we have considered them all, and these two, three, or four are worthy of serious consideration. I don't think our special competence in the antitrust field warrants our giving any assurance to this committee that we have the precise answer in the tax field, and we know just what this committee should do.

Senator WILLIAMS. How soon could we get an answer from you in connection with the Treasury's recommendations of yesterday?

Mr. BICKS. Partial liquidation?

Senator WILLIAMS. Yes.

Mr. BICKS. I think we could do it very promptly, sir. We shall also try to have some kind of meeting of the minds of those who are interested in this problem—to canvass all the proposals and be able to report more fully on all of them. That is what I thought Senator Byrd asked in the beginning. But we will be happy to comment specifically on Treasury's proposal.

Senator WILLIAMS. I think you could do both.

Mr. BICKS. Yes, sir.

(The Justice Department report on the amendment to S. 200 proposed by Senator Frear appears on p. 317; the Justice Department report on the proposal by the Treasury Department appears on p. 325; the committee clerk was subsequently advised by Mr. Bicks on June 18 that the Justice Department declined to submit further recommendations as suggested by Senator Williams.)

Senator BENNETT. May I ask a question, Mr. Chairman?

Was the language of S. 200 discussed with the Department of Justice before it was finally drafted?

Mr. BICKS. Not with me, Senator. I don't know if it was with anybody else. I can't speak for the activity of——

Senator BENNETT. Is it not a fact that it not only was discussed but some of the language in S. 200 came as a result of suggestions from the Department of Justice?

Mr. BICKS. Not from me, sir.

Senator BENNETT. Would you like to find that out and answer that question for the committee?

Mr. BICKS. I will, Senator.

(The information referred to is as follows:)

Approximately 1 year ago, at the invitation of Mr. Colin Stam, George D. Reycraft and Eugene J. Metzger of the Antitrust Division staff discussed with Mr. Stam and members of his staff a draft prepared by Mr. Stam's staff of legislation substantially identical to S. 200. At that time, Mr. Reycraft expressed the view that any legislation of the type proposed should contain language requiring that its provisions become operative only if the judgment, decree, or order—

(1) Recites that such divestment is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act, or both; and

(2) Recites that nonrecognition of gain is required to reach an equitable judgment, decree, or order in such suit or proceeding.

Language substantially identical to that proposed was included in S. 200.

However, Messrs. Reycraft and Metzger were acting as staff technicians and expressed no policy view on the wisdom of S. 200—or, for that matter, the need for any proposal. And furthermore, not discussed at that meeting was the so-called secondary passthrough problem—particularly in the context of the pending Du Pont-General Motors proceeding. It is S. 200's impact on that problem which forms a principal basis for this Department's objection to that measure.

Senator ANDERSON. I want to say to the witness he has been helpful to me. I recall when Senator Bridges offered an amendment on the floor on a tax bill that attacked this problem I objected to it, and I think I was the only Senator that spoke against it. I felt this was a matter that ought to be explored by the committee, and I am trying to find out what attitude I ought to take, and I am very much helped by your assurance it would help the antitrust features of this if we get the financial features out of the way.

Mr. BICKS. Senator, that is the basis of our whole interest in this part of our program to improve antitrust effectiveness.

As I began my presentation this morning, I explained the Attorney General's proposals first, to find out violations via premerger notification; second, to get data to determine whether or not to sue; third, his recommendations to upgrade criminal penalties; and fourth, to make more effective civil relief. We are anxious to find some means of improving the effectiveness of divestiture as an enforcement remedy. And that is the basis of our interest.

Senator WILLIAMS. As I understand it, what you want is a law not dealing with this case alone, but with all cases from here on.

Mr. BICKS. Right. A proposal to help our broad antitrust enforcement program.

Senator WILLIAMS. Yes.

The CHAIRMAN. If you make recommendations, will that be done in conjunction with the Treasury?

Mr. BICKS. I am inclined to think Treasury would be much more competent than we would. But we must, of course, consult with them.

The CHAIRMAN. Have you consulted up to date?

Mr. BICKS. We have tried to, Senator.

The CHAIRMAN. Have you had a meeting of minds as to what should be done yet?

Mr. BICKS. Not precisely, Senator.

The CHAIRMAN. When do you think you would have such?

Mr. BICKS. We will endeavor to move quite quickly.

Senator WILLIAMS. Did Treasury discuss this proposal with you before they suggested it?

Mr. BICKS. Just very briefly, but I have never seen it worked out in detail. And Senator Kerr's questions pointed out some of the ambiguities in it. So I really can't comment on it until I see it amplified.

Senator BENNETT. Mr. Chairman, if I may ask a question, isn't part of the problem here that neither Treasury nor Department of Justice has reached the point yet where one will take the leadership?

As I understand it, Treasury's testimony was yesterday that they would be glad to work with the Department of Justice; and now you say you will be glad to work with Treasury. Who is going to step in and take this problem over?

Mr. BICKS. Senator, I can be no more direct than I have been about our interest in this problem. We are certainly concerned with im-

proving the effectiveness of our enforcement program. However, I must be candid about the limitations of our knowledge. We cannot assure this committee that we know of every possible tax approach to this problem. Because we do not. I think the initiative in suggesting numerous proposals should come from Treasury or your Joint Committee on Internal Revenue Taxation. We will be glad to comment on how each of the proposals would work out. But I do not think, because of our own lack of knowledge here, we should be put in the position of canvassing the entire range of tax possibilities. We just are not experts in that field.

Senator BENNETT. You are saying flatly that it is Treasury's responsibility; you are willing to help them, but you are not willing to take the ultimate responsibility of bringing recommendations to us, are you not?

Mr. BICKS. I do not believe so, Senator; I do not believe so.

Senator BENNETT. We then come back, if we are dependent on the administration for recommendations, where are they going to come from?

Mr. BICKS. I think they should come from Treasury and Justice. And I think we ought to get together and work them out.

Senator BENNETT. Well, the comment is made that Treasury said, "We will follow the Department of Justice," and now you say, "We think Treasury should do it."

How are you going to get together, and who is going to come up with these suggestions?

Mr. BICKS. I think our working people ought to sit down together immediately and start. As to who comes up with proposals, I assume that is as much a matter of this committee's pleasure as our judgment.

I think there is no question that when we do come up with them both of us ought to be responsible for them.

Senator BENNETT. And you ought to stand together on them.

Mr. BICKS. Yes, to the extent we can, and if we are not together we ought to inform the committee.

Senator BENNETT. That is right.

That is all, Mr. Chairman.

Mr. BICKS. As we have tried to do today.

Senator KERR. I would like for the president of the Du Pont Co., if he has any observations to make at this point, in view of their pertinency, to do so with reference to this suggested period of delay by the district court in the event the district court decided to adopt the recommendations of the Justice Department.

Does the president of the company feel that that would create any problems to management or would it be just as good one way as another?

STATEMENT OF CRAWFORD H. GREENEWALT, PRESIDENT, E. I. du PONT de NEMOURS & CO.—Resumed

Mr. GREENEWALT. I am not sure—shall I come up here?

The CHAIRMAN. Mr. Greenewalt.

Mr. GREENEWALT. I must say as I followed this discussion, I am not quite sure I understand your proposal.

Are you saying, Senator Byrd, in asking your question that a delay in the implementation of the decision of any court of final jurisdiction would not introduce retroactivity into the pending legislation?

The CHAIRMAN. I was suggesting that in this particular case, the Justice Department's 90-day recommendation to the judge, be changed to a year. I suggest this so that if legislation is not enacted in this Congress—and nobody knows what will happen with it; it has not even begun in the House; and the House has to originate legislation of this character—those who are seeking relief will not be under the disadvantage of having to ask for retroactive legislation.

Mr. GREENEWALT. Well, do I understand you to say, sir, that if the court in Chicago decides with the Government, but that the implementation of that decision be delayed for a year——

The CHAIRMAN. It is now 90 days.

Mr. GREENEWALT. Yes.

The CHAIRMAN. That is in the recommendation of the Justice Department.

Mr. GREENEWALT. Do I understand you to say that delay would not introduce the feature of retroactivity in Senator Frear's legislation?

The CHAIRMAN. It would not introduce the feature of retroactivity so far as legislation by Congress is concerned, because within a year, if Congress desires to do anything about it, they can enact legislation. Is that clear? I mean, the retroactivity is in connection with the passage of a law by Congress.

Mr. GREENEWALT. Quite frankly, the thing that I am fearful of is this question of retroactivity.

Now, I understand the situation you are assuming is that Judge LaBuy in Chicago decides for the Government, let us say, that divestiture is mandatory in this case, but that the implementation of that decision is delayed for a year? It would seem to me, although I am a complete innocent in the law, that that would almost inevitably imply that the legislation passed would have to be retroactive since it would be passed after the court in Chicago had handed down its decision.

Am I wrong or have I misunderstood you, sir?

The CHAIRMAN. The decision would have been handed down. But it would not be in effect. I would not think it would be retroactive in actuality.

Mr. GREENEWALT. Frankly, sir, the thing that disturbs me is the element of retroactivity.

As I understand it, the situation we assume is that Judge LaBuy, in due course, perhaps in a few months, perhaps longer than that, will hand down a decision holding for the Government.

Senator KERR. And that decision will have been finalized by whatever action the Supreme Court needs to take to make it so.

Mr. GREENEWALT. Well then we have a decision requiring divestiture.

Senator KERR. Yes.

Mr. GREENEWALT. And it would be my understanding that any legislation passed after that decision had been handed down would have implicit in it the feature of retroactivity because the decision has been handed down.

The CHAIRMAN. It was not my purpose to suggest that the pending legislation not be enacted.

Senator KERR. He would rather have the Congress remove the basis for the execution than to have it forgiven; either prevent or postpone it, but eliminate it—certainly after the decision had been made.

Mr. GREENEWALT. Well, the feature that really concerns me—let me make my statement positively rather than on an iffy basis—the thing that really concerns me is this: I am fully aware of the fact that retroactive legislation presents difficulties.

This is, frankly, the reason why I, for our stockholders, would press for prompt action by the Congress simply to avoid the question of retroactivity.

The thing I am fearful of is if the Judge, backed, perhaps, by the Supreme Court, holds for the Government in this litigation, that any legislation passed thereafter will be held to be retroactive. And this is the aspect of it that I do not like.

Senator WILLIAMS. As I understand what Senator Byrd was suggesting, it was not that we stop considering this bill, but that we proceed. And that if we can reach an area of agreement between the Congress and the Departments whereby legislation would be enacted, good.

But in the event there is no action taken at this session and during the interim, the court rendered its decision, and the Supreme Court upheld it, it could then become effective prior to Congress' reconvening next year. If they had an effective date 1 year after such decision, it would eliminate from the minds of Congress and Treasury questions with respect to retroactivity. It was just a point of legislative procedure in Congress that the chairman was trying to get around.

Mr. GREENEWALT. I think, Senator, you would have to answer that question rather than I.

Senator WILLIAMS. If there were such an undertsanding between the Departments, Congress, and all parties concerned, we would remove from this field the question of retroactivity.

Mr. GREENEWALT. Well, as I say, I am afraid you will have to answer that question. My own view as a layman would be that the decision of the court of final jurisdiction was the critical point, and not the beginning of the actual distribution. But if that is not correct, I would certainly yield.

The thing I wish to say is——

Senator KERR. Let me say that, as a man with a very limited experience in the practice of the law, I would not avoid agreeing that your conclusion is the inescapable one. For whatever comfort it may be to you as a layman, that is the opinion of one very mediocre lawyer. [Laughter.]

Mr. GREENWALT. Well, frankly, sir——

Senator GORE. Mr. Chairman, I think we ought to pause for a moment. This is the first time I ever heard him admit any semblance of mediocrity. [Laughter.]

Senator KERR. I would much rather admit it and then try to let action refute it than to have others make the accusation and try to overcome it. [Laughter.]

Mr. GREENEWALT. Let me admit with complete frankness I am not a lawyer at all, mediocre or otherwise.

Senator KERR. Well, for one who is not a lawyer I must say you made what I believe to be an accurately legal deduction in that.

Mr. GREENEWALT. Perhaps the Department of Justice will give me a job.

Senator KERR. If that is all they ever give me, I will be very happy. [Laughter.]

Senator BENNETT. You mean, Senator, if they let you go to work for them and not go to work on you.

Senator KERR. That is certainly one interpretation that would not be inconsistent with what I said.

[Laughter.]

Senator BENNETT. Mr. Chairman, it seems to me our trouble here is the difference in the application of the word "retroactivity."

It is true that action after a decision of the court is retroactive, but I am sure the chairman, in referring to retroactivity, thinks of it in the narrower field, in the sense that you are applying a tax to a period that has already passed; and in a sense you are both correct in your assumption.

Mr. GREENEWALT. I was merely bowing to those wiser in that field than I.

I wish to state positively that the thing I would be fearful of is the retroactive effect of any legislation that is passed. Now you can define the critical point at which retroactivity commences.

Senator BENNETT. For your purposes, you are concerned with retroactivity in the general sense. The chairman is concerned with it in the narrow sense.

The CHAIRMAN. The practical sense.

Senator BENNETT. He is facing a situation in which we might be called upon to develop a tax plan to apply to a period which had already passed.

The CHAIRMAN. When distribution has already been made.

Senator WILLIAMS. If there had previously been an agreement among the Congress and the company and the courts of the effective date of 1 year, none of us would be able to argue retroactivity in enacting the legislation.

Mr. GREENEWALT. If that is so, I would certainly have no objection.

The CHAIRMAN. Independent of the retroactivity feature, I think they ought to have a year in this gigantic operation.

Senator GORE. May I ask a question?

The CHAIRMAN. Senator Gore.

Senator GORE. Mr. Greenewalt, is there any reason why the Du Pont Co. could not make the decision to effectuate this distribution without a court order?

Mr. GREENEWALT. No. We are free, as a corporation, to distribute any property we have at any time. Is that what you are getting at?

Senator GORE. Yes.

Mr. GREENEWALT. The reason, of course, that we do not do it, that we could not even consider it in terms of the interests of our stockholders, is the tremendous tax penalty that would be imposed on the stockholders.

Senator GORE. Why not try to fix this, in a discussion of the period, whether retroactive or not—it is within the power of the corporation to make this distribution?

Mr. GREENEWALT. It is, indeed.

Senator GORE. And if it chose to do so, there would be no possibility of stockholders having such income as is distributed to them treated other than ordinary income?

Mr. GREENEWALT. That is correct.

Senator GORE. That brings up the basic point that gives me the greatest worry about this bill—that is, the differentiation with respect to the causes of the decisions of corporations.

Corporations may make decisions for distribution for various reasons—involuntary, voluntary, and varying degrees of both—and yet this bill would set up a priority for an involuntary distribution under these particular circumstances.

I do not quite see how the decision of a corporation, whether vouuntary or involuntary, can follow through or can properly be carried through, to a different taxpayer, who is the stockholder, under our whole concept of corporations and corporation law. The corporation is a different entity. How can you justify treating differently the distribution of a corporation, which distribution is made voluntarily, and a distribution by a corporation which is made as a result of a court order, or other kind of circumstances that would induce, perhaps, an involuntary distribution?

Mr. GREENEWALT. Did you say voluntary or involuntary?

Senator GORE. Involuntary.

Mr. GREENEWALT. Well, sir, I think that——

Senator GORE. Isn't that the basic question here?

Mr. GREENEWALT. Frankly, I do not think it is. I think that the——

Senator GORE. With me it is.

Mr. GREENEWALT. Well, the point here, I say, centers around the word "compulsion."

Most of us are able to take our own course in taking any action that we choose. We may do it in our own time and at our own pleasure. The tax consequences are there, but we can choose the time at which we wish to become subject to them.

In the present case, the point is that the Du Pont Co. is forced to make a distribution——

Senator GORE. I understand that.

Mr. GREENEWALT. And its shareholders are, in accordance with that distribution, forced to receive stock and to pay a tax on that receipt even though the entire transaction is against their will; and the corporation is forced to make a distribution which it has no wish to make and which, under the present tax laws, I doubt that it would ever make.

Senator GORE. I understand the circumstances which you describe, but you have not responded to my question, which is: How does the—and how can the—decision of a corporation, whether voluntary or involuntary, be carried through either to the hurt or the benefit of an entirely different person, the stockholder, unless you provide the law which gives them that benefit?

Mr. GREENEWALT. Now, it seems to me the point I was making, in response to your question, Senator, is that the key to this whole problem seems to be—it seems to me is in the word "compulsion."

Now, the question has been asked several times during these hearings——

Senator GORE. If I may point this up; I agree that is the key word on which this plea is made, but I would say that the basic decision, so far as I can see it, is the justification for giving favorable treatment to a distribution, on the one hand, and unfavorable treatment to distribution on the other.

The individual stockholder has no part in the decision of the corporation unless he has the deciding vote at a meeting of stockholders—and that is a rare, rare thing.

Mr. GREENEWALT. I suspect, sir, that if the Du Pont Co. had ever voluntarily distributed the General Motors stock and had put its stockholders under the burden of this tax—that the management of the Du Pont Co. would have lasted only until the next annual meeting.

Senator KERR. You do not mean to say that the stockholders feels that the management has any responsibility to look after his economic welfare? [Laughter.]

Mr. GREENEWALT. I certainly do.

Senator KERR. And that he even might feel it so strongly as to want a change in the management if they did that which, if continued, would result in the liquidation of their company and the confiscation of the assets by the Government. You think you have got a set of stockholders that would resent a situation of that kind? [Laughter.]

Mr. GREENEWALT. As I said to Senator Gore, Senator Kerr, I think that had the Du Pont Co. at any time in recent years simply distributed the General Motors stock to its stockholders and subjected them to tax, I suspect the management would have lasted only until the next annual meeting.

Senator KERR. If your bylaws have any provision whereby a call of stockholders can be made for other management, I think your statement is decidedly on the conservative side.

Mr. GREENEWALT. I am afraid you are right, sir.

But, Senator Gore, if I might continue to answer your question—because I think this word "compulsion" is an important one, I think, as was brought out several times in these hearings—no one was able to suggest any case outside of the antitrust laws where a compulsory act did not have the tax consequences forgiven.

For example—and this case is not different from the one before this committee—if you have built a house and it has increased in value over a period of years and they are going to run a State highway through your property and your house is condemned, so that involuntarily you are required to dispose of that house—it is my understanding that according to the law any tax to which you are subject on the increase in value of your property is forgiven.

Senator KERR. In the event that you reinvested it in similar property over a certain period of time, forgiveness is not automatic.

Mr. GREENEWALT. This is an element of compulsion under which the tax is forgiven.

Senator KERR. There are numerous cases in which the taxpayer has access to a sanctuary—and I think that is a situation—the one you mentioned, is it not, Mr. Stam?—that the forgiveness is not automatic, but is coupled with the reinvestment of the proceeds.

Senator GORE. In a home.

Senator KERR. As provided by the law.

Mr. STAM. In some situations we defer the tax until the property gets out in the form of cash. In distribution situations, that is generally the result.

Senator KERR. I understand, but in the case mentioned by the witness——

Mr. STAM. Was he referring to involuntarily——

Senator KERR. He referred to where a man's home was condemned for the right-of-way of a highway, and, receiving the payment awarded him, he had a profitable transaction.

Now, I just want the record to be clear as to when that tax liability accrues and under what circumstances it can either be postponed or forgiven.

Mr. STAM. It can be postponed because of the compulsion that is involved——

Senator KERR. Yes.

Mr. STAM (continuing). Which we call something like an involuntary conversion. He is forced to do that and, therefore, we do not get any tax at the time he is forced to make the sale. But he postpones the recognition of gain until some time later when the property that he gets, when he acquires substantially identical property——

Senator KERR. In other words, he must acquire substantially similar property——

Mr. STAM. Within a certain time.

Senator KERR. Within a certain time in order to postpone the effectiveness of the tax.

Mr. STAM. Yes.

Mr. GREENEWALT. You see, Senator, that is really the case here.

Senator GORE. Let me give you another case.

Mr. GREENEWALT. The Du Pont Co.——

Senator GORE. Suppose I own a building which is not my home, but a business property, and I have made the mistake of endorsing a rather large note which I am called upon to pay, in consequence of which I must sell my building, on which sale I realize a sizable profit. Would not that be compulsion of a sort?

Senator KERR. No, because you could borrow money on the building and not sell it.

Senator GORE. That might or might not be the case. My debt might be as large as the entire value of the building, and I might not be able to get a loan of a hundred percent.

Wouldn't that be compulsion of a sort?

Mr. GREENEWALT. Yes, but not compulsion under a law of the Government. It seems to me that there is another differentiation here, the transaction——

Senator GORE. Wait a minute, the law of the Government. I would have to argue with you there. Under the laws under which we operate, I would be required to pay my debts.

Mr. GREENEWALT. Yes.

Senator GORE. And in consequence of that requirement I might be forced by circumstances to dispose of a building, from the sale of which I would realize a profit, and even though the entire proceeds would be required to satisfy the debt as a result of my mistake in endorsing the note, I would nevertheless be incurring a tax liability.

Senator KERR. Would the Senator yield?
Senator GORE. Yes.
Senator KERR. Forgive me for interrupting you there. There is no law requiring you to sign a note.
Senator GORE. There is no law requiring me to buy Du Pont stock either.
Senator KERR. There is a law that protects you in the ownership of it to where they are not required to voluntary pass out to you, as a stockholder, their portfolio of investments at a time which would result not only in reducing their working capital and earning capacity but also at a time when it would result in what they would regard and you would feel is a confiscatory tax by the Government by reason of your having received it.
Senator GORE. There is not a law that requires any distribution whatever.
Mr. GREENEWALT. If I might make this statement, sir, I think that the difference is this: If the value of a property has increased over a period of time, which is your presumption, as certainly it has for many Du Pont stockholders, should they ever dispose of that property they will have a capital gains tax to pay on their profits.
The bill that is before you gentlemen does not relieve those taxes in any way. They would still have a capital gains tax to pay at any time they disposed of the property.
So that the point is you sell your building on which you have a profit, you pay a capital gains tax on whatever that profit is.
When any Du Pont stockholder with or without S. 200 disposes of his asset in the company he pays a capital gains tax on it under any circumstances.
Senator KERR. He would have to do that even if that was required to have him pay that note.
Mr. GREENEWALT. Precisely. If he has bought his Du Pont stock on tick, and it goes down, but he has a profit, and he has to sell it to pay the note he is subject to that tax.
The difference here, of course, is that there is a wholly different tax, ordinary income tax, which is imposed upon him, which he had no expectation that he would ever have to pay.
Whether or not S. 200 passes, he will have to pay the capital gains tax when he disposes of the asset.
Senator GORE. All right.
Let me ask you another question. Suppose that XY Corp. in the State of Kentucky owns 1,000 shares of Du Pont stock.
If this distribution is made without the passage of legislation what would be the tax on XY Corp.?
Mr. GREENEWALT. Well, my understanding is that the tax on XY Corp. would be based, first of all, on the cost of the General Motors to the Du Pont Co. which averages about $2.10 a share.
That would be treated as a dividend from the Du Pont Co. to the XY Corp. and would be taxed at the intercorporate dividend rate, which is 15 percent of 52 percent, or about 7.8 percent or so.
Senator GORE. So it would be something in the order of 16 cents a share?
Mr. GREENEWALT. That is correct: that is my understanding of the law.
Senator GORE. All right.

So XY Corp. would receive 1,000 shares on which it would owe a tax of $1,600.

Mr. GREENEWALT. $160, I believe.

Senator GORE. It is better than I thought; that is right, $160. That shows why I am a Senator and you are president of Du Pont Co. [Laughter.]

Mr. GREENEWALT. I have no slide rule.

Senator GORE. One reason, I say.

Now, if this XY Corp., then having 1,000 shares of this stock which you have distributed to it, on which it has paid a tax of $160, then decides to make a distribution to its stockholders, what would be the tax situation?

Mr. GREENEWALT. Well now, I think I know this, but I am subject to correction by Mr. Stam.

As I understand it, the distribution by the XY Corp. would be treated as a dividend to the shareholders of the XY Corp., and the tax would be based on the fair market value of the stock. It would be taxed at ordinary income rates, to the extent that it was not in excess of the accumulated surplus of the XY Corp.

Mr. Stam nods his head.

Senator GORE. All right now, if this bill were passed what would be the situation?

Mr. GREENEWALT. My understanding is that if the bill is passed and the XY Corp. is required—you see, under the situation you set up the XY Corp. is under no compulsion to distribute the General Motors stock that it has received.

Senator GORE. That is right.

Mr. GREENEWALT. Under those circumstances the tax would be as I have recited. With S. 200 the tax circumstances would be precisely the same.

Senator GORE. S. 200 would not change that?

Mr. GREENEWALT. No.

The only way, as I understand the situation—Senator Frear will correct me if I am wrong——

Senator GORE. That was not the testimony of the Justice Department.

Mr. GREENEWALT. Well, the Justice Department was speaking, I think, of a particular holding corporation.

Senator GORE. May I just interrupt to ask, aren't you the gentleman who testified?

Mr. BICKS. Yes, I am, Senator.

Senator GORE. What is your answer to the question?

Mr. BICKS. The same as Mr. Greenewalt's.

Senator GORE. Then the distribution of XY Corp. would not be affected at all by S. 200?

Mr. BICKS. Unless they are defendants in a suit.

Mr. GREENEWALT. Not at all.

Senator GORE. Then you misunderstood my question this morning or I misunderstood your answer.

Mr. GREENEWALT. My understanding is that if the XY corporation were made a defendant under the antitrust laws, and if the XY corporation were held guilty by virtue of its holding of the General Motors stock and were required to distribute that stock to its stockholders, then S. 200 would apply; but if XY corporation simply re-

ceived the stock and then wished to declare it out to its shareholders, it would be taxed in accordance with the present law, and S. 200 would have no effect whatever on it.

Senator GORE. As you understand it, S. 200 only affects the corporations which are defendants in the litigation?

Senator KERR. And compelled to divest under the judgment of a court of final jurisdiction.

Senator GORE. Under the decree.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. Greenewalt.

(Mr. Greenewalt subsequently submitted the following supplemental statement for the record:)

SUPPLEMENTAL STATEMENT OF CRAWFORD H. GREENEWALT

During the course of the hearings on S. 200, the representative of the Department of Justice expressed opposition to that feature of the bill which would apply to successive distributions as distinguished from primary distributions under antitrust decrees. This supplemental statement will be limited to comments on this aspect of the bill.

The bill as now drafted would apply to distributions of property by any corporation which was ordered to do so by a court in an antitrust proceeding where the appropriate findings were made by such court. Thus if corporation A held stock in corporation B and corporation B were ordered to distribute property to its stockholders, including corporation A, the provisions of S. 200 would extend to a further distribution of such property by corporation A if (1) corporation A was a party to the proceeding and was subjected to a decree requiring such further distribution and (2) the court found that such further distribution and the nonrecognition of taxable income was necessary to achieve an effective and equitable result.

As applied to the Du Pont case the situation would be as follows: Christiana and Delaware each hold stock in the Du Pont Co. and Delaware holds stock in Christiana. Both Christiana and Delaware are parties to the proceeding. If the court should order the Du Pont Co. to distribute the General Motors stock to its stockholders, including Christiana and Delaware, and also order Christiana and Delaware to distribute the General Motors stock so received to their stockholders, and in each instance the appropriate findings were made by the court, each distribution under S. 200 could be made without immediate taxable effect upon the stockholders of each of the three companies.

In the Du Pont litigation the Department of Justice has taken the position that the General Motors stock distributable to Christiana and Delaware should be sold for their account rather than distributed to their stockholders. The basis for this position is the claim that a further distribution to the stockholders of Christiana and Delaware would be ineffective from the Department's point of view, since it would leave in the hands of such stockholders a sizable aggregate interest in General Motors, the two corporations together holding approximately 30 percent of the stock of the Du Pont Co. or approximately an 8-percent interest in General Motors. Christiana and Delaware, on the other hand, have strongly disputed the Department's position both on the facts and the law. The issue as to the necessity of special relief against these two companies is therefore now under advisement by the court.

As we understand it, the Department has suggested that Congress should not pass legislation which would permit a tax-free distribution to the stockholders of Christiana and Delaware because if it did so the court might enter such a decree contrary to the desires of the Department and contrary to its duty, as the Department sees it, under the antitrust laws. In other words, the Department has asked the Congress to restrict the remedial legislation because of its feal that the courts, including the Supreme Court, will not agree with its views as to the disposition of this particular case.

The Department has taken the position that some form of remedial tax legislation would be helpful in the effective enforcement of the antitrust laws by eliminating a barrier to distributions which would otherwise be desirable. The Department cannot now say that all so-called secondary distributions would be undesirable under the antitrust laws and yet it is suggesting that the existing

tax barrier to such distributions should be retained because it thinks this particular distribution would be undesirable and because it has no confidence that the lower court and the Supreme Court will agree with its views in this regard.

Certainly the Department, in favoring legislation which would give tax relief in primary distributions, is not representing that distributions in all such cases would be adequate under the antitrust laws. No more should it ask Congress to prejudge the appropriateness of such distributions on secondary levels. These questions should be left for determination through the normal judicial channels.

In short, if the courts agree with the position of the Department of Justice, Christiana and Delaware will be required to have the stock sold, and S. 200 will have no application. On the other hand, if the courts disagree and, instead, order that the stock received by Christiana and Delaware should be distributed to their respective stockholders, there is no reason in policy why those stockholders should be treated differently from all other stockholders to whom the stock is distributed.

The CHAIRMAN. The next witness is Mr. Roswell Magill, of the American Bar Association.

Mr. BICKS. Am I excused?

The CHAIRMAN. Thank you very much, Mr. Bicks.

Mr. BICKS. Thank you.

STATEMENT OF ROSWELL MAGILL, REPRESENTING SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION

Mr. MAGILL. Thank you, Mr. Chairman.

In view of time limitations, I think that the best I can do is to read the statement which, I believe, has been given to the members of the committee.

You will observe the statement which I am presenting consists of two parts.

I shall read the first part. The second part shows the additions and changes in the Frear bill which the American Bar Association committee deemed desirable.

My name is Roswell Magill, and I am a partner in the law firm of Cravath, Swaine & Moore of New York City. I appear as chairman of a special committee appointed by the section of antitrust law of the American Bar Association to draft amendments to the Internal Revenue Code to provide expressly for corporate divestitures pursuant to antitrust decrees. Our committee worked with a special committee appointed by the section of taxation of the American Bar Association. We desire to submit for your consideration a draft of amendments to the Internal Revenue Code of 1954 providing for nonrecognition of gain or loss in the case of certain corporate exchanges or distributions required under the antitrust laws. That draft, which I am submitting herewith, has been approved by the Board of Governors of the American Bar Association on May 18, 1959, for submission to the Congress.

(The document referred to follows:)

EXCHANGES AND DISTRIBUTIONS IN OBEDIENCE TO ORDER UNDER THE ANTITRUST LAWS

Resolved, That the American Bar Association recommends to the Congress that the Internal Revenue Code of 1954 be amended to provide for nonrecognition of gain or loss with respect to certain exchanges and distributions in obedience to orders under the antitrust laws; be it further

Resolved, That the association proposes that this result be achieved by adding to subtitle A, chapter 1, subchapter O of the Internal Revenue Code of 1954 a new part, part IX, comprising sections 1111 to 1115, inclusive, and by amending section 1223; and be it further

Resolved, That the section of antitrust law and the section of taxation are directed to urge the following amendments or their equivalent in purpose and effect upon the proper committees of Congress:

Section 1. That subtitle A, chapter 1, subchapter O of the Internal Revenue Code of 1954 be amended by adding the following new part:

"PART IX—EXCHANGES AND DISTRIBUTIONS IN OBEDIENCE TO ORDER UNDER THE ANTITRUST LAWS

"Sec. 1111. Exchanges of property for stock in obedience to order under the antitrust laws.
"Sec. 1112. Distribution of stock in obedience to order under the antitrust laws.
"Sec. 1113. Allocation of earnings and profits in certain corporate transfers and separations.
"Sec. 1114. Definitions.
"Sec. 1115. Nonapplication of other provisions.

"SEC. 1111. EXCHANGES OF PROPERTY FOR STOCK IN OBEDIENCE TO ORDER UNDER THE ANTITRUST LAWS.

"(a) GENERAL RULE.—If a corporation (referred to in this part as the 'transferor corporation') subject to an antitrust order (as defined in section 1114(a)) transfers property in obedience to such order to another corporation (referred to in this part as the 'acquiring corportaion') solely in exchange for stock of the acquiring corporation, whether or not the acquiring corporation is a controlled corporation (as defined in section 1114(c)), then no gain or loss shall be recognized to the transferor corporation upon such exchange.

"(b) ASSUMPTION OF LIABILITY.—The fact that the acquiring corporation assumes a liability of the transferor corporation or acquires from the transferor corporation property subject to a liability, shall be disregarded in determining whether the exchange is solely for stock of the acquiring corporation.

"(c) BASIS OF STOCK TO TRANSFEROR CORPORATION.—The basis to the transferor corporation of the stock of the acquiring corporation acquired in an exchange to which subsection (a) applies shall be the basis of the property transferred in exchange therefor.

"(d) BASIS OF PROPERTY TO ACQUIRING CORPORATION.—The basis to the acquiring corporation of property acquired in an exchange to which subsection (a) applies shall be the same as it would be in the hands of the transferor corporation.

"(e) ACQUISITIONS TO AVOID FEDERAL INCOME TAX.—This section shall not apply to a transfer of property acquired in pursuance of a plan one of the principal purposes of which was to avoid Federal income tax on the transfer.

"SEC. 1112. DISTRIBUTION OF STOCK IN OBEDIENCE TO ORDER UNDER THE ANTITRUST LAWS.

"(a) EFFECT ON DISTRIBUTEES.—

"(1) GENERAL RULE.—If a corporation (referred to in this part as the 'distributing corporation') distributes to a shareholder, with respect to its stock, solely stock which is divested stock (as defined in section 1114(b)), then no gain or loss shall be recognized to (and no amount shall be includible in the income of) such shareholder with respect to the receipt of such divested stock.

"(2) NON PRO RATA DISTRIBUTION, ETC.—Paragraph (1) shall be applied without regard to the following:

"(A) whether or not the distribution is pro rata with respect to all of the shareholders of the distributing corporation, and

"(B) whether or not the shareholder surrenders stock in the distributing corporation.

"(3) DISTRIBUTIONS TO AVOID FEDERAL INCOME TAX.—Paragraph (1) shall not apply to any distribution if the divested stock was acquired by the distributing corporation in pursuance of a plan one of the principal purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both (but the mere fact that either corporation has accumulated earnings and

profits shall not be construed to mean that one of the principal purposes of the transaction is the distribution of the earnings and profits of either corporation, or both).

"(b) BASIS OF STOCK TO DISTRIBUTEES.—If, by reason of subsection (a), gain or loss is not recognized with respect to the receipt of divested stock, then, under regulations prescribed by the Secretary or his delegate—

"(1) if the divested stock is received by a shareholder without the surrender by such shareholder of stock in the distributing corporation, the basis of such divested stock and of the stock with respect to which it is distributed shall, in the distributee's hands, be determined by allocating the adjusted basis of the stock with respect to which the distribution was received between such stock and the divested stock received; or

"(2) if the divested stock is received by a shareholder in exchange for stock in the distributing corporation, the basis of the divested stock shall, in the distributee's hands, be the same as the adjusted basis of the stock exchanged therefor, except that if the shareholder retains stock of the distributing corporation, such basis and the basis of the retained stock shall be allocated among the shares of divested stock and retained stock.

"(c) CROSS REFERENCE.—For determination of the period for which the taxpayer has held divested stock received in a distribution to which subsection (a) applies, see section 1223(1).

"SEC. 1113. ALLOCATION OF EARNINGS AND PROFITS IN CERTAIN CORPORATE SEPARATIONS.

"In the case of a distribution under section 1112 of stock in a controlled corporation, proper allocation with respect to the earnings and profits of the distributing corporation and the controlled corporation shall be made under regulations prescribed by the Secretary or his delegate.

"SEC. 1114. DEFINITIONS.

"(a) ANTITRUST ORDER.—For purposes of this part, the term 'antitrust order' means a judgment, decree or other order of a court or of a commission or board in a suit or other proceeding under the Sherman Act (26 Stat. 209; 15 U.S.C. 1-7, as amended) or the Clayton Act (38 Stat. 730; 15 U.S.C. 12-27, as amended) to which the United States or such a commission or board is a party.

"(b) DIVESTED STOCK.—For the purposes of this part, the term 'divested stock' means stock, including stock of an acquiring corporation acquired in an exchange to which section 1111(a) applies, which is the subject of an antitrust order which

"(1) directs a corporation owning stock of another corporation to divest itself of such stock by distributing it to shareholders of the distributing corporation (or requires such divestiture as an alternative to other action by any person),

"(2) specifies the stock to be divested, and

"(3) recites that such divestiture is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act, or both.

"If a corporation that receives divested stock is directed (or required as an alternative to other action by any person) by an antitrust order to distribute in turn such stock to its stockholders, the term 'divested stock' shall include stock so distributed, whether or not such corporation is a party to the suit or proceeding in which such order is issued.

"(c) CONTROLLED CORPORATION.—For purposes of this part, the term 'controlled corporation' means a corporation with respect to which at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock is owned or acquired by the distributing corporation immediately prior to a distribution under section 1112.

"SEC. 1115. NONAPPLICATION OF OTHER PROVISIONS.

"If a transfer described in section 1111 or a distribution described in section 1112 is within any of the provisions of this part and may also be considered to be within any of the other provisions of this subchapter or subchapter (C) (sec. 301 and following, relating to corporate distributions and adjustments), then the provisions of this part only shall apply."

SEC. 2. That the table of parts for subtitle A, chapter 1, subchapter O be amended by adding thereto the following:

"PART IX. Exchanges and distributions in obedience to order under the antitrust laws."

SEC. 3. That section 1223 be amended by striking out the "and" at the end of section 1223(1)(A), by substituting ", and" for the period at the end of section 1223(1)(B), and by adding thereafter the following new subparagraph:

"(C) a distribution to which section 1112 applies shall be treated as an exchange."

SEC. 4. These amendments shall be effective with respect to exchanges and distributions in obedience to antitrust orders in suits or proceedings in which the judgment, decree or order is issued, and the exchanges or distributions are made, after ________________, 19____.

Mr. MAGILL. Perhaps I might add that the premise on which we worked is essentially the premise, I think, which Mr. Bicks has expressed, and which is also brought out in the letter which he presented from the Attorney General on page 2, the quotations from Mr. Justice Douglas.

I think the most important premise on which we worked is that the tax law should not operate as a barrier to frustrate policy decisions which are made by the Congress in other areas.

All of you will remember, I believe, that during the twenties the general policy of the Congress was to facilitate corporate readjustments and reorganizations, and at that time the so-called reorganization and exchange provisions came into the internal revenue laws to permit corporate readjustments without the immediate imposition of an income tax.

Later on, in the administration of President Roosevelt, the general policy was to cause the division of great public utility holding companies, and the distribution of their stockholdings to individual shareholders. At that time it so happens that I worked with Mr. William O. Douglas, who was then Chairman of the Securities and Exchange Commission, on supplement R, as it was then, of the Internal Revenue Code, to facilitate the carrying out of the corporate policy for the breakup of these large public utility holding companies and, as has been brought out before you in these hearings, the purpose then was, as Mr. Justice Douglas brings out in his statement, to facilitate the entering of such orders by enabling these distributions to be made without the incidence of a serious tax on the shareholders who received the distributions.

With that interposition, I would like to go on with my statement.

The changing pattern of judicial and administrative interpretation of the antitrust laws has led, and will continue to lead, to many enforced corporate divestitures of stock or property. Under the present code, such divestitures are not specially provided for, although similar distributions pursuant to orders of the Securities Exchange Commission, in the course of the liquidation of public utility holding companies, or transactions required by the Federal Communications Commission under certain circumstances, may be made free from tax. In many cases the property or stock ordered to be divested was acquired by the corporation in the belief that such acquisition would not violate the antitrust policies of the United States. The shareholders who are affected have often had no part whatever in the acts complained of. In most cases they had no knowledge of the possible

impact of the antitrust laws. The serious tax burdens which would be incurred upon divestitures operate to discourage voluntary compliance through consent decrees. Where parties are guilty of wrongdoing, the present antitrust laws make adequate provision for criminal and civil penalties. The additional impact of the internal revenue laws in these situations, in our opinion, is unnecessary and unjust.

In recognition of such defects in the present tax law, the Treasury, the Department of Justice, and various bar association groups have been studying the problem for some time. Various proposals for nonrecognition of gain or loss in antitrust divestiture cases have been advanced. One of these is S. 200, introduced by Senator Frear of Delaware. The proposal of our committee includes the substance of the Frear bill, namely, that there should be no recognition of gain or income where a corporation is required under the antitrust laws to distribute to its shareholders stock of another corporation.

As an economic reality, the position of the individual shareholder who receives such divested stock has been changed very slightly. Before divestiture, he was already a stockholder once removed in the corporation whose stock is distributed to him. After divestiture, his indirect holding becomes direct. If the distribution of stock is held taxable as a dividend to the extent of its full value, the stockholder must find somewhere a substantial sum of money to pay an entirely unanticipated tax; although he received no funds out of which to pay the tax, and would naturally regard himself as possessing the same stock investment which he had before divestiture.

We have tried to hedge the proposed relief with all necessary safeguards to prevent tax avoidance. The relief is not available where the exchange or distribution provides cash, or property other than stock, with which to pay the tax. It applies only to divestitures made pursuant to an antitrust order of a court, commission, or board, in a proceeding to which the United States, or such commission, or board, is a party. It is limited to such situations where the antitrust order directs such divestment, specifies the stock to be divested, and recites that such divestiture is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act or both. Where stock in a controlled corporation is distributed to shareholders, a proper allocation with respect to the earnings and profits of the distributing corporation and the controlled corporation must be made under regulations prescribed by the Secretary of the Treasury. Appropriate provisions for the allocation of the shareholder's tax basis between the old and new stock insure that tax will be paid upon gain realized on ultimate disposition by the shareholder of all or a part of his holdings. As an overall safeguard, the proposed amendment contains provisions prohibiting relief in situations where a primary purpose is tax avoidance.

In other words, our aim is to postpone but not to eliminate the tax, to postpone it until the time when the shareholder has some money with which he can pay the tax obtained through the disposition of his investment.

Apart from minor technicalities, the amendments proposed by our committee differ from S. 200 in two respects:

(1) Section 1111 of our draft grants relief when a corporation transfers property solely in exchange for stock of an acquiring cor-

poration. The Frear bill is limited to a situation in which one corporation is ordered to distribute to its stockholders stock held in another corporation. A study of antitrust cases shows that a great many antitrust decrees require the defendant corporation to divest itself of operating assets, e.g., *United States* v. *Paramount Pictures, Inc.*, 85 F. Supp. 881 (S.D.N.Y. 1949) (movie producers ordered to divest themselves of theaters); *United States* v. *Lucky Lager Brewing Co.*, 1958 Trade Cases 69,160 (Utah 1958) (defendant ordered to dispose of regional facilities); *United States* v. *Hilton Hotels Corp.*, 1956 Trade Cases 68,253 (N.D. Ill. 1956) (defendant ordered to dispose of regional facilities); *United States* v. *H. P. Hood & Sons, Inc.*, 1952–53 Trade Cases 67,404 (Mass. 1952) (defendant ordered to dispose of regional facilities); *United States* v. *Kansas City Star*, 1957 Trade Cases 68,857 (W.D. Mo. 1957) (newspaper ordered to sell radio facilities). We know of no reason why relief should be restricted to divestiture cases involving distributions of stock. The same considerations apply where a corporation is required to transfer property to another corporation solely in exchange for a stock interest in such other corporation. Particularly would this be true if the transferor corporation were then required to distribute such stock to the shareholders. Our proposal would prevent recognition of gain in the case of such involuntary exchanges of property for stock. Here again appropriate basis provisions insure the taxation of any gain ultimately realized upon sale of the stock received without recognition of gain.

(2) Section 1111(d)(2)(D) of the Frear bill gives relief only when the divestiture decree recites that nonrecognition of gain, under the applicable provisions of the code, is necessary to reach an equitable judgment. Our proposed amendment omits such a requirement. That provision gives the courts no clear standard of what is equitable to guide them. We fear further that the tax treatment might tend to become an item of bargaining in antitrust settlement negotiations. The withholding of a favorable finding by the court might be utilized as an additional penalty for the violation, and would in any event have that effect.

S. 200 and our proposed amendments are confined to divestitures under Federal antitrust laws, leaving for further consideration divestitures under the laws of the States, foreign countries, and international compacts. The relief proposed deals only with divestitures by corporations and does not concern antitrust divestitures by individuals since the types of cases covered by the proposed amendments would not be likely ever to arise in the case of individuals.

Congress in the past has granted tax relief in analogous situations, and I believe these already have been brought before the committee.

Section 1071 of the Internal Revenue Code provides for the nonrecognition of gain or loss on a sale or exchange of property made to effectuate policies of the Federal Communications Commission. Sections 1081–1083 provide rules for the nonrecognition of gain or loss on exchanges or distributions in obedience to orders of the SEC. Section 1101 provides for the nonrecognition of gain or loss on distributions pursuant to the Bank Holding Company Act of 1956. Section 1033 provides rules for the nonrecognition of gain when property is subject to involuntary conversion such as theft, seizure, requisition, or condemnation, or having a road run through your house.

The Frear bill and our proposed amendments proceed on a premise similar to that of existing legislation, namely, that an involuntary exchange or distribution ordered by an agency of the Government and not resulting in receipt of cash or its equivalent is not a proper occasion for the recognition and taxation of income or gain to the recipient.

Thank you.

The CHAIRMAN. Thank you very much, sir.

The committee will adjourn until 3:30 this afternoon.

(Whereupon, at 12:35 p.m., the committee took a recess until 3:30 p.m., the same day.)

AFTERNOON SESSION

The CHAIRMAN. The meeting will come to order. The Chair has been informed that Mr. Winthrop Lenz has to catch a plane, so we will ask Mr. Lenz to come forward.

Will you proceed, sir?

STATEMENT OF WINTHROP LENZ, VICE PRESIDENT, MERRILL LYNCH, PIERCE, FENNER & SMITH INC.

Mr. LENZ. My name is Winthrop C. Lenz. I am vice president in charge of the corporate buying department in the underwriting division of Merrill Lynch, Pierce, Fenner & Smith Inc., a securities investment firm which is engaged in practically all phases of the securities business. Merrill Lynch, as our firm is generally known, is the largest securities commission firm and is one of the 10 largest securities underwriting firms measured by business written over the past 5 years. The firm last year accounted for approximately 14 percent of the public round lot trading on the New York Stock Exchange and for approximately 21 percent of the odd lot trading. We have around 425,000 customers.

A substantial number of these 425,000 customers own Du Pont and General Motors stock. For example, we have registered in our name more than 2,500,000 shares of General Motors common stock, which we hold for more than 25,000 customers. A large number of these customers are people of modest means. I am appearing here today in support of S. 200 because we at Merrill Lynch do not want to see the stockholders of General Motors or the stockholders of Du Pont get hurt by the current antitrust case which is now pending in Chicago.

In March of this year I testified in that case, before Judge LaBuy, as an expert witness called by the Du Pont Co. My testimony was directed to the market consequences of the judgment which the Department of Justice has proposed that the court should enter in that case.

The fact which emerged most clearly from my study in preparation for my testimony was that a substantial part of the adverse market consequences which would occur in both Du Pont and General Motors stock could be traced back, directly, to the tax consequences of the forced distributions and to the forced sales which the Government proposed. Were the tax law to be changed as it is proposed to be changed in S. 200, virtually all of the adverse market consequences

arising out of the forced distributions would disappear. Now of course I do not know whether the court in Chicago will enter the judgment that the Government has proposed, but we would like to see the threat of a depressed market, which that judgment represents, removed from the picture. S. 200 will help considerably.

The committee, I think, would be interested in knowing the nature of that threat, and something of its magnitude. I can best supply that information, I think, by summarizing my testimony before Judge LaBuy.

Let me first state in summary from the substance of the Department of Justice proposal. It would have the court enter a judgement that would divest the Du Pont Co. over a period of 10 years of the 63 million shares of General Motors stock which it owns. Divestiture would be accomplished by having Du Pont, and Christiana Securities Co., which is a large stockholder of Du Pont and which also owns 535,500 shares of General Motors stock, transfer the shares of General Motors which each owns to a trustee. Each year the trustee would distribute approximately 4,300,000 shares to Du Pont stockholders. Each year also the trustee would sell approximately 2 million shares. These latter are the shares of General Motors owned by Du Pont that are allocable to Du Pont stockholders whom the Government believes should not receive General Motors shares—Christiana Securities Co., Delaware Realty & Investment Corp., and stockholders of the Du Pont Co. who are also stockholders of the Delaware Co. These Du Pont stockholders would get the cash proceeds of the stock sold on the market by the trustee.

My study of this proposal and of the markets for common stock and for the shares of General Motors and Du Pont in particular has led me to the conclusion that if it is put into effect without a change in the present tax laws there will be a serious impact on the market prices of both General Motors and Du Pont stock during the 10-year period.

You gentlemen are aware, of course, that the Commissioner of Internal Revenue has ruled that the shares of General Motors distributed to the stockholders of Du Pont Co. will be taxed at ordinary income rates, so individual Du Pont stockholders will pay an income tax at rates ranging from 20 to 91 percent less the 4 percent dividend received credit depending upon their tax bracket, on the market value of the General Motors stock they receive at the time of the distribution. Corporate stockholders of Du Pont will also pay at income tax rates, but the effective tax rates for corporations is very much less.

In essence, therefore, the proposal of the Department of Justice contemplates that each year for 10 years aproximately 4,300,000 shares of General Motors will be distributed to the Du Pont stockholders, and approximately 2 million shares will be sold by the trustees.

The sales by the trustee will not, however, be the only sales. It is my judgment that a minimum of 1 million of the 4,300,000 shares which are distributed annually by the trustee will also be offered for sale. The individual Du Pont stockholders who will receive the General Motors shares, at least to some extent, will find it necessary or desirable to sell them in order to secure cash with which to pay the income taxes upon the distribution. These sales will not be made in any organized way. They will take place, by and large, at or around the time of the distribution for the reason that the income tax to the Du

Pont shareholder will be based on the market value of the General Motors stock at the time it is distributed. This selling by the Du Pont shareholders receiving General Motors stock will itself have a substantial impact on the market price of General Motors stock.

In addition to these sales, the trustee will be offering for sale the 2 million shares which he must sell. I have assumed that the trustee's sales will be carefully planned and efficiently conducted, but the fact remains that the sale of the trustee's 2 million shares will, in itself, have a substantial depressing effect on the market for General Motors stock, and will accentuate the impact on the market price caused by the offerings made by the Du Pont stockholders.

Taken together, the trustee's sales and the sales by Du Pont stockholders will add to the supply of this stock a minimum of 3 million shares annually during the 10-year period in which the judgment is carried out. The magnitude of such an increase in the supply of this stock becomes apparent when it is compared with the approximately 9,170,000 and 8,711,000 shares of General Motors that were traded on all U.S. stock exchanges in the years 1956 and 1957.

The increased demand for General Motors stock necessary to absorb this increased supply can be created only by a substantial reduction in the market price below that at which General Motors stock would otherwise be selling. My consistent experience, in the years I have been in the securities business, has been that an increase in the supply of a stock has the effect of depressing the market price of that security below what it would otherwise have been, and for a substantial period during and following the offerings. This is the way the law of supply and demand usually works in a free auction market.

There is no exact formula by which the adverse impact on the price of a stock can be computed in advance since many factors enter into the price at which it will sell. Here, however, the sales by the trustee under the judgment proposed by the Government, as well as the sales by the Du Pont stockholders to whom the trustee will distribute General Motors stock annually, will recur each year for 10 years. They will thus have a much more depressing effect than that of any prior offerings of large amounts of stock with which we in the securities industry are acquainted. In addition, investors who might otherwise buy General Motors stock will know that the annual sales are going to be made during the 10-year period; they will accordingly refrain from buying except at bargain prices, and this will have a further depressing effect upon the market price.

Based upon all the foregoing factors, I testified at the hearing in Chicago that were the Government's proposed judgment to be ordered by the court, the market price of General Motors stock would be decreased below that at which it would otherwise be selling by between 20 and 30 percent. This depressing effect would persist for most of the 10-year period.

In reaching my conclusion, I have not tried to evaluate another factor which could be of equal or even greater importance. This is the likelihood that present stockholders of General Motors might themselves decide to sell because of their unwillingness to retain a stock which would be depressed in price for a period of 10 years. Were even a small percentage of the approximately 218 million shares of General Motors stock held by General Motors stockholders other than

Du Pont and Christiana to be offered for sale, the effect on the market price of General Motors would be even more drastic.

So far as concerns Du Pont stock, the market consequences would be equally severe, but for somewhat different reasons.

If the court were to order the judgment proposed by the Department of Justice, many Du Pont stockholders would offer their shares for sale. They would do this, in my judgment, because they would recognize that they would be better off to do so, if their capital gains tax would not be too large, because they could avoid in that way the substantial income taxes they would be required to pay were they to wait and receive the shares of General Motors in the annual distributions. Of course, some Du Pont stockholders who might be interested in selling their Du Pont stock would incur such large capital gains taxes on the sale that they would not sell. But for a substantial number of Du Pont stockholders it would be financially advantageous to pay capital gains taxes rather than the income taxes at the much higher rates. The increased supply of Du Pont stock on the market resulting from these offers to sell by shareholders who decide to pay capital gains taxes would have a depressing effect on the market price for Du Pont stock. The effect would be accentuated by the inherent nature of the stock itself. Du Pont stock is relatively high priced, appeals to a limited class of investors, and is traded on the New York Stock Exchange in relatively small volume. Accordingly, it would require much less of an increase in the supply of stock to produce a serious decline in price than with the case of General Motors stock.

The depressing effect of the increase in the supply of Du Pont stock offered for sale, however, will be further accentuated by a simultaneous decrease in demand. Individual investors, particularly those in higher tax brackets, who do not presently own Du Pont will be most unwilling to purchase a stock which over a period of years will return them a part of their capital on which they will have to pay taxes at ordinary income rates. Corporate investors, who would incur a relatively low income tax on the General Motors stock distributed, would be reluctant to purchase Du Pont stock until the full impact of the offerings for sale and selling by Du Pont stockholders have been felt, or until the market price of the stock becomes absurdly low.

I testified at Chicago that were the Government's proposed judgment to be ordered by the court, the combination of the increase in the supply of Du Pont stock offered for sale and the decrease in the demand for the stock would cause a pronounced impact on the market price so that the stock would sell well below the price at which it would otherwise be selling. This impact might well be as much as 25 to 30 percent and might persist for a substantial part of the 10-year period during which the judgment is to be carried out.

It has been suggested to this committee by a representative of the Treasury Department that the tax hardships arising out of the judgment proposed by the Department of Justice in the Du Pont case could be eliminated if Du Pont, over a period of years, were to pay out General Motors stock in lieu of its usual cash dividend. I seriously doubt whether the Du Pont management would regard any such program as feasible. I do feel quite certain, however, that if

the company should embark upon any such program the market values of both Du Pont and General Motors stock would suffer drastically.

In the conclusions I have stated above I have assumed that the General Motors stock would be paid out by Du Pont over and above the usual cash dividend. If Du Pont shareholders were to receive no cash and only General Motors stock as dividends, the amount of such stock that would be offered for sale by Du Pont stockholders would greatly increase. The selling pressure on General Motors might well be twice as great as I have estimated above. The reason for this is that a great many investors must use their dividends to meet current expenses such as rent, hospital bills, and tuition. Accordingly, many Du Pont stockholders would be forced to sell all or practically all of the General Motors stock received as a dividend if their only dividend from Du Pont consisted of General Motors stock. Moreover, many small stockholders would receive so few shares of General Motors that they would sell rather than retain three or four shares. It cannot be assumed, therefore, as the Treasury representative suggested, that the market value of General Motors would remain level in the event Du Pont eliminated its cash dividend and paid out only General Motors stock over a period of years.

The value of Du Pont stock would also be appreciably reduced if Du Pont were to eliminate cash dividends and pay dividends only in General Motors stock for a period of years. Most investors dislike stocks that do not pay cash dividends, and this factor alone would serve to reduce the attractiveness of Du Pont. If Du Pont were to pay dividends only in stock it would immediately lose its classification as a high-grade investment. Also many investors might question the ability of the Du Pont Co. to invest profitably and legally the $3 billion in cash that it would accumulate that would otherwise be paid out in dividends. The combination of these factors would probably result in Du Pont selling considerably lower than it would otherwise sell.

The tax laws, as they are now written, would impose heavy penalties on innocent investors, since none of the stockholders of General Motors or Du Pont have been found to have violated any law. I hope that you will consider favorably this bill, S. 200, which will eliminate the harsh tax penalty which these people now face.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Lenz. Any questions?

Senator FREAR. Yes, sir.

The CHAIRMAN. Senator Frear.

Senator FREAR. Mr. Lenz, you are appearing as an expert, are you not?

Mr. LENZ. Yes, sir.

Senator FREAR. What is the average number of shares now sold on the stock exchange of General Motors stock?

Mr. LENZ. Senator Frear, about 7,600,000 shares, if my memory serves me correctly, were traded last year in General Motors.

Senator FREAR. And according to your statement there would be at least an additional 3 million shares put on the market each year?

Mr. LENZ. That is correct, sir.

Senator FREAR. Does the stock market follow the commodity market in respect to supply and demand, generally?

Mr. LENZ. Well, I would think the commodity market would be a lot more volatile in certain respects, because the margin requirements are so much less, and because in a commodity market, when you get near the termination date, you either have to pay up or pick up the commodity. So that there is frequently more speculation in the commodity markets than in the stock market.

Senator FREAR. I am not asking you to testify as an expert on commodities, but suppose the average market in commodities in this country would take 100 million bushels of apples a year and we put 130 million bushels of apples a year on the market, what do you think the price of apples would be? [Laughter.]

Mr. LENZ. I hesitate to answer that question directly, Senator Frear. [Laughter.]

The CHAIRMAN. You certainly would have to consume more apples.

Mr. LENZ. I think the law of supply and demand carries through to the stock market.

Senator FREAR. I could see the chairman was not asleep.

The CHAIRMAN. People would be much more healthy. [Laughter.]

Mr. LENZ. Yes.

Senator FREAR. If the effect on the market was as you predict, and it would have a depressing effect of approximately 30 percent on the selling price of General Motors, what effect would that have on the income to the Treasury?

As I take it now, if the stocks are not sold, or if the 63 million shares of General Motor stock are not sold, it would have no depressing effect. But if they do have to abide by what the Government is asking the court to do in these extra shares, and they are put on the market, and they are sold at a lower price, if they bought General Motors at $50 and sold at $30, there is a revenue effect, is there not?

Mr. LENZ. Definitely.

Senator FREAR. In other words, the stockholder would be able to take that loss between $50 and $30——

Mr. LENZ. Correct

Senator FREAR. And apply it to his income in certain respects.

Mr. LENZ. That is correct.

Senator FREAR. He may not be able to take it all in 1 year.

Mr. LENZ. It may be a carryover.

Senator FREAR. It would be a carryover.

So, therefore, he added a carryover in the 10-year period of distribution; could you see any more disastrous effect than you have quoted in your statement?

Mr. LENZ. Well, I think the major problem, as far as General Motors is concerned, Senator Frear, has to do with the shareholders of General Motors that are not directly involved in this case in Chicago, the holders of 218 million shares, roughly; that is over and above the 63 million involved in the distributions and in the forced sales.

There are—we do not know the exact number, but probably—somewhere in the neighborhood of a million and a half or 2 million shareholders of General Motors.

If you look through the nominees and the beneficiaries and also through the stock in firm names in the brokerage business where the brokers hold stock on behalf of customers you will find that the

amount which is involved is probably about double of the 700,000 figure that is generally used—that is what you will see.

Now, all firms in our business, I feel, have a duty to all their customers to explain as carefully as they can when a decision is made in this case, what the consequences of that decision will be.

In our own case, if the court upholds the Government, we are bound to give in detail our version of the consequences that will take place, and we feel that those consequences will be disastrous; we will, therefore, be forced to recommend to those holders to liquidate their holdings of General Motors, those that are able to do so.

The only people who would probably not follow out such a program will be those who can afford to wait through a long period and not be too troubled about the temporary disastrous financial loss which they have on paper, until they consummate the transaction.

So that the amount of stock that may be for sale here from these other outside independent General Motors stockholders, as I call them, may be substantially in excess of what we have already indicated in my summary.

Senator FREAR. If your predictions come true of the depressed market on General Motors stock, would it have any effect on other stocks on the exchange?

Mr. LENZ. Well, that is a rather hard question.

I do not necessarily feel that there may be too much of an adverse effect on other stocks. Most situations are on an individual basis, but there will be some adverse effect. I would not think it would be too substantial, and I think it would be very brief.

I mean the market could be upset for a matter of days as a result of a decision in favor of the Government, where the public will know that there will be a lot of forced sales, and sales by others who anticipate a decline.

Senator FREAR. Of course, every seller—for every seller there has to be a buyer, and the immediate effect on a depressed market is what tax advantage they can get from selling stocks less than they purchased them; they are going to take on the returns; that is quite obvious, is it not?

Mr. LENZ. That is quite obvious; yes, sir.

Senator FREAR. In your testimony, in the last paragraph, on that page, beginning with—

> Individual investors, particularly those in the higher tax brackets who do not presently own Du Pont will be most unwilling to purchase a stock which over a period of years will return them a part of their capital to which they have to pay taxes at ordinary income rates.

I do not think I quite clearly understand what you mean by that statement.

Mr. LENZ. Well, I think that has been brought out before here. Actually, indirectly the holder now of each share of Du Pont has an ownership indirectly in 1.38 shares of General Motors, so that if S. 200, or some equivalent legislation were passed, they would end up with their proportionate share of each, although those holdings would then be direct instead of indirect in the case of General Motors.

So that, as I view it, the payment of a current income tax on the General Motors stock is definitely and directly, in effect, a capital levy, a levy on part of property already owned.

Senator FREAR. Do you believe that the pendency of the Government proposal before the court in Chicago has had any adverse effect on the market value of General Motors and Du Pont?

Mr. LENZ. I do. I can amplify that a little bit. It is necessary to know the individual circumstances surrounding different securities, perhaps, to answer this question propertly. I think I can elaborate on that question in certain respects.

I might say this, that during the court hearings in Chicago, when there was an intimation on March 4, that both the Treasury and the Justice Department were in back of tax relief in this particular case or in any cases which would cover this particular case, that the markets for the two stocks began to improve, and that improvement has continued since that time.

The average shareholder or investor definitely feels (and we are in touch with a great many thousands of them) that there will be relief in this case either of a tax nature or by the court, or perhaps, both, and the stocks, perhaps, are consequently selling today higher than they would be if neither of these things took place.

But, specifically, in the case of General Motors, I checked up again this morning to refresh my memory. General Motors closed at the end of last year at 49½. It closed yesterday at 50⅞. So that there was an increase in value of 2.77 percent during that period; whereas Chrysler moved up from 51¼ to 68⅜, which is 33.42 percent; and Ford from 50⅜ to 71¾ or 42.43 percent.

Now, if we look at the pattern we find that General Motors from this 49½ price at the close of December 31, 1958, moved down during the court hearings when more people realized what the impact would be, to around the 45 level, and has since recovered only to slightly above the price at which it closed at the end of last year.

Now, the stocks of the other two companies during this same period when General Motors declined during the court hearings, both of them moved up quite substantially and have continued to move up.

I realize the circumstances surrounding Chrysler and Ford are different in many respects from General Motors. They are both more marginal in certain respects, and have a smaller capitalization, and the earnings can fluctuate more violently.

But the fact that General Motors has gone up less than 3 percent, with Chrysler over 33, and Ford over 42, is completely out of keeping with past markets except when unusual circumstances surround a stock such as General Motors.

I would think under normal circumstances anyone in our business would anticipate that General Motors, at the very worst, would have gone up by half of the increase in the price or percentage which Chrysler moved up during that period.

The CHAIRMAN. Do you attribute all of that to the court decision?

Mr. LENZ. I attribute a great deal of it to the decision, Senator Byrd; yes, sir.

There are other circumstances, but all these companies are having a good year. General Motors is the premier company in this industry, and, generally, when the automobile companies are having a good year this is a stock which the average investor seeks to place his money in.

Now not as many of them are doing it at this time nor are they aggressively biddir.g up the price.

The CHAIRMAN. What was the price of General Motors when the decision was first rendered as compared to now?

Mr. LENZ. I am sorry, Senator Byrd, I do not have all that data with me here today.

The CHAIRMAN. What was Du Pont? Have you got any figures on Du Pont?

Mr. LENZ. Recent figures on Du Pont?

The CHAIRMAN. As compared with what is it, the 30th of December? What was the year you used?

Mr. LENZ. Yes, I do have those figures. I might also explain that a little bit.

Du Pont is about—I might say this first: With reference to this point, I have to get my paper here a moment. There is an item which appeared on the Dow Jones News Ticker, and also in the Wall Street Journal dated March 4, of the current year which was to this effect. The heading was: "A Bill To Waive the Tax on Court Directed Stock Distributions Gains Support. Both the Treasury and Justice Department are said to take a favorable view of the measure to excuse shareholders from tax on stock received under a court order in antitrust cases."

I might add that item came out in the middle of these particular hearings.

The CHAIRMAN. What was Du Pont stock, and that same comparison you have just given us?

Mr. LENZ. Yes, sir; I will give you that.

Du Pont stock closed December 31, 1958, at $213.75.

The CHAIRMAN. What is it now?

Mr. LENZ. It closed yesterday (on the same date I used before) at $254. That is an increase of 18.83 percent.

Now, however, I looked at a few other chemical stocks. The increase is better than two of them which, you might say, have some comparison, but not as good as two others.

Allied Chemical in this same period was up 24.57 percent; Dow 14.2; Monsanto 25.71; and Union Carbide 15.60.

The CHAIRMAN. You think the decision had a more adverse effect on General Motors or on Du Pont?

Mr. LENZ. I think the knowledge, as far as the Du Pont holders are concerned as to the tax consequences, the capital gains problem versus the current income problem on the Motors they receive, is not as well known to the average holder or to the average investor as General Motors.

But I wanted to go one point further, Senator Byrd, and say this: That Du Pont is regarded in our industry as the outstanding company in the chemical field, and would ordinarily be entitled, in our judgment and in my opinion, to a higher increase than is indicated here, because the earnings for the current year indicate an increase of some 24 to 25 percent over last year, so that the increase in the price of the stock to date has only reflected part of what the improvement of the earnings appears to be.

Senator WILLIAMS. You were in the process of telling about the notice that came over the ticker on March 4, and I do not believe you had finished your statement.

Mr. LENZ. Du Pont moved up during that particular day of the announcement. I happened to be in Cleveland that day, and in our office there, and noticed unusual activity, and our manager came in mentioning from time to time—there was no explanation of the strength in the stock at that date until we located this item on the ticker which came out pretty much, Senator Williams, in the form that it appeared in the Wall Street Journal.

It closed—it moved from $217 at the opening of that date to close at $223, after having risen to as high as $225.75.

The CHAIRMAN. What was it that came over the ticker?

Mr. LENZ. A little item, Senator Byrd, that said something to this effect: "A bill to waive the tax on court directed stock distributions gains support. Both the Treasury and Justice Department are said to take a favorable view on the measure to excuse shareholders from tax on stock received under a court order in antitrust cases."

The CHAIRMAN. I wonder whe. e they got that information?

Mr. LENZ. I do not know, sir. That is not my department. [Laughter.] It was effective, at any rate.

The CHAIRMAN. There was no announcement made by the Justice Department or by the Treasury. It was just a rumor, was it not?

Mr. LENZ. I guess so.

The CHAIRMAN. And the Finance Committee, by calling the hearing, was responsible for the advance of Du Pont stock?

Mr. LENZ. It might be true.

The CHAIRMAN. I did not know we were that important. [Laughter.]

Mr. LENZ. I am sure you are.

The CHAIRMAN. Any further questions?

Senator FREAR. I have one more.

In the Government's proposal to the court it does not propose any forced sales of Du Pont as it does of General Motors, does it?

Mr. LENZ. That is correct, Senator Frear.

Senator FREAR. In the comparisons you have been making?

Mr. LENZ. It does not; that is the added factor, of course.

Senator FREAR. Yes.

If the court in Chicago, following up what the chairman mentioned this morning to the representative of the Justice Department, if the court in Chicago were to adopt the Government's proposal, if it is accepted, but suspended its going into effect for a period of 1 year, would the values of General Motors and Du Pont be apt to suffer during that year?

Mr. LENZ. Well, frankly, I am a little bit concerned even by the 90-day delay, Senator Frear. I think the shorter the period that ensues between the final court decision and the divestiture action or the placing of the stock in the hands of the trustee, the distributions, and then the forced sales, the better, because we are going to have a considerably difficult chaotic market period, and here, as I view it, particularly with reference to Du Pont shareholders who may find it advisable to sell the stock on a capital gains basis rather than wait and receive the distributions.

The longer the period lasts, the more cumulative the effect. It is better, generally, in matters——

The CHAIRMAN. You think they ought to make it operative in 24 hours, do you?

Mr. LENZ. If the mechanics, Senator Byrd, could be worked out perfectly a much shorter period, I think, would be preferable, say, 30 days. I think there must be some proper time period to get all the mechanics worked out.

Senator WILLIAMS. Did I understand you to say that you think the 10-year period too long?

Mr. LENZ. No, sir. I said only the period between the court order and the actual consummation of the transaction, the first transaction, the distributions, and then the forced sales.

Senator WILLIAMS. Do you think it would be better for the first distribution to follow 3 days from the time of the order?

Mr. LENZ. Yes, sir, if the mechanics could be worked out in a shorter period of time.

I would rather have the bad impact in a shorter period so that we could get some relief at least in the case of Du Pont.

Senator FREAR. Mr. Lenz, don't you think the people who might have to sell the stock would view this over a long-range period of 10 years rather than a 30-day period?

Mr. LENZ. Well, I do not think so in the case of the Du Pont holders, Senator Frear.

I think the Du Pont holder has got to make up his mind fairly soon. As a matter of fact, I think that what will take place is that as soon as there is a court order the astute people will begin to move right away, they will have to protect themselves because once the selling starts it might snowball, and the first one out may be the man out at the best price. So, consequently, speed is of the essence.

The CHAIRMAN. You think that people would start selling the stock before it would actually get the distribution?

Mr. LENZ. Yes, sir; the Du Pont.

The CHAIRMAN. Selling DuPont stock?

Mr. LENZ. Yes, sir; on the capital gains basis. I believe that will be true in many cases, Senator Byrd.

The great problem in that respect, however, is that I think all the people who have studied this case in our field feel that there will be several million shares of Du Pont for sale on this basis, whereas the annual volume of trading in Du Pont only measures 800,000 shares a year.

So that there may be a great many offerings for sale that could not be consummated because you will not have enough buyers to take up the stock, except at very, very drastic bargain prices.

Senator WILLIAMS. Is there doubt in the minds of many in the brokerage circles as to whether or not this distribution is going to go into effect?

Mr. LENZ. There is great doubt, Senator Williams, that the plan will be approved in its present form.

Now, people can be fooled in that respect, naturally. But I think that the average investor, at least the ones that we have talked to, and the ones we have discussed this with, all feel that there will be some kind of remedial tax legislation to relieve them of the burden of the current income tax for this huge capital levy, as I call it, and also

that there will be other modifications in the plan, as such, of a beneficial nature as far as the stockholders are concerned.

This has been true, and I think Sumner Emerson of the Morgan, Stanley firm, who testified in the court in Chicago, found from checking with 28 separate firms that that was the feeling in those particular firms.

The CHAIRMAN. In other words, those firms feel that the recommendations of the Justice Department will not be adopted by the Federal judge; is that right?

Mr. LENZ. Tht is correct, Senator Byrd.

The CHAIRMAN. What is the basis for that?

Mr. LENZ. Only because they feel it so bad that it has to be improved. [Laughter.]

The CHAIRMAN. I do not exactly follow you.

Mr. LENZ. Well, Senator Byrd, let me say this, sir. If our firm, in particular, felt that the Justice Department's proposals were going to be adopted, we would have taken quite some time ago a rather negative attitude on both General Motors and Du Pont, which we have not done so far.

Now, we can be wrong. We have been wrong in many cases in the past.

The CHAIRMAN. I want to say in the presence of the president, Mr. Greenewalt, that in my judgment Du Pont is one of the best run, best conducted corporations in the world and, naturally, the people look forward to the future of the Du Pont Co. as a growth company, regardless in my judgment, of whether it disposes of this General Motors stock or not.

It is a growing company, and I imagine the people, investors, took that into consideration.

Mr. LENZ. I think that would be correct.

The CHAIRMAN. For that reason the Du Pont stock has gone up. I say the Du Pont Co., independent of selling General Motors stock, in my judgment, Du Pont has tremendous opportunities and a great growth future.

Mr. LENZ. I agree, Senator Byrd.

The CHAIRMAN. And I imagine that the investors are not going to entirely look upon Du Pont from the standpoint of this involuntary distribution of the General Motors stock. It may be a factor.

Mr. LENZ. I think that one of the primary reasons why a great many people who are stockholders of Du Pont feel that there will be a change in the Government proposal and, perhaps, tax relief is they have had such tremendous success as a stockholder of Du Pont that they expect the company to be able to perform miracles.

The CHAIRMAN. I do not underrate the problem that confronts you.

Mr. LENZ. Senator Byrd, I think a great many investors have a long memory, and they recall in the case of the public utility holding companies, they were scared of something that never took place.

This has happened to them several times, and they are, therefore, hardened to it, and they feel again in this case that it will not take place. I think that is a factor.

The CHAIRMAN. In other words, they have confidence in the judge.

Senator FREAR. I would say they have a little confidence in the Congress. [Laughter.]

I wonder if the chairman of the committee would entertain a question from the junior Senator from Delaware to the chairman.

The chairman has paid a high compliment, and I think justifiably and rightfully so, to the management of the Du Pont Co., and I know his memory is sufficiently long, that perhaps General Motors would not have been in the position in the United States and the world today that they are had they not had some of that managerial power transferred to them back many years ago, for which Du Pont is well known.

I am sure he would want to pay the same respects to those people as he has to those of today.

I just want to give you the opportunity of paying respect to the management of the Du Pont Co. back there in those earlier days. [Laughter.]

The CHAIRMAN. Then you admit that the Du Pont Co. had a direct management in General Motors?

Senator FREAR. Yes, sir. [Laughter.]

The CHAIRMAN. I do not think we ought to go into that at this time.

Senator FREAR. I am not trying to dispute that back in those days when they asked Du Pont for some help that they got it in a managerial way, and it certainly has proven to be the point.

Then, my next question is, if that be true, do you agree with the Supreme Court's decision in the General Motors case?

The CHAIRMAN. I do not; and I do not agree with a lot of the other decisions either. [Laughter.]

Senator FREAR. I am very charitable to the chairman; I would like to have that in the record.

The CHAIRMAN. It is in the record.

Senator FREAR. Mr. Lenz, personally I appreciate your testimony and the observations you made to my questions.

Mr. Chairman, those are all the questions I have.

The CHAIRMAN. Are there any other questions?

Mr. LENZ. Thank you.

The CHAIRMAN. Thank you very much, Mr. Lenz.

Mr. LENZ. Thank you, sir.

The CHAIRMAN. The next witness is Mr. John Dane, U.S. Chamber of Commerce.

STATEMENT OF JOHN DANE, JR., REPRESENTING THE CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. DANE. Mr. Chairman and gentlemen, my name is John Dane, Jr,. and I am a partner in the law firm of Choate, Hall, & Stewart in Boston.

I am appearing before you today as a member of the U.S. Chamber of Commerce Committee on Taxation and on behalf of the chamber to discuss the Frear bill, S. 200.

I have sitting at my left Mr. J. Kirk Eads, who is the manager of the national chamber's taxation and finance department.

I have a prepared statement which I would like to ask permission at this time to have incorporated in the record. I will not read it directly.

The CHAIRMAN. Without objection, the insertion will be made in the record.

Mr. DANE. I will not read directly from this statement, and I will try very briefly to cover the material which there is in the statement. In some cases I will not follow exactly the same order, and in those cases I will try to let you know so that you can see from where I am taking my material.

Twelve years ago, in 1947, in testimony before the House Ways and Means Committee, a witness for the national chamber predicted that just the type of problem which we have been discussing at so much length over the last 2 days here would arise.

Again in 1954 in testimony on what was then H.R. 8300 which, I think, turned into the Internal Revenue Code of 1954, in 1956 in a special statement directed to the Joint Committee on Internal Revenue Taxation, and in 1958 in a supplemental statement to the House Ways and Means Committee, the chamber emphasized the need for corrective legislation in this area.

So this is the fifth time, Mr. Chairman, in 12 years that the national chamber has called the attention of congressional committees to the hardship that may result from a divestiture decree pursuant to an antitrust proceeding.

In other words, we saw the situation as it has arisen, and we are glad now to support S. 200 which, we feel, is a very effective piece of remedial legislation.

I think any witness who appears before you to testify in behalf of remedial legislation should be able to sustain a burden of proof on three specific points. Of course, before you can have remedial legislation there must be some injury, some injustice which is being inflicted.

Secondly, the remedy which he asks for must be consistent with the general philosophy and spirit of the Internal Revenue Code; in other words, I do not think a witness can come before you gentlemen and ask for something which is entirely different from what has ever been done before for other taxpayers in somewhat similar situations.

Finally and, perhaps, most importantly, I think the proponent of any remedial legislation must show you that his suggestion will benefit not only the group primarily affected but the entire economy of the country; and it is our belief, Mr. Chairman, that S. 200 meets all three of these tests.

Taking the most important one first, and that is the test of its effect on the economy of the country, we feel that this bill is necessary because the present provisions of the Internal Revenue Code hamper the efficient and equitable administration of the antitrust laws.

Secondly, we feel that these present provisions of the code in that they require the inclusion in ordinary income at the highest possible bracket of the full fair market value of anything distributed pursuant to a divestment decree, we feel that is grossly unfair to any stockholders who receive such a distribution.

Finally, we feel that the remedy which is proposed under the bill of Senator Frear, and that is the deferment of recognition of gain until the divested shares are sold, has many precedents under the tax law and is an appropriate remedy under the circumstances.

I do not think it can be repeated too often that we are not dealing here with a tax exemption measure; we are dealing with a deferment measure.

Now, let me take up, first of all, the material in the prepared statement concerning the proposition that the enactment of this bill is necessary if a serious injustice is not to be done to the persons who receive distributions pursuant to divestiture decrees.

The basic vice of the present law, gentlemen, is that it requires the recognition of taxable income under circumstances when the taxpayer in question has received no economic gain, when there has been no increase in his net worth.

It seems to me that the proposition is just as simple as that. Let us bring it into sharper focus by a specific example. As our testimony is directed to no particular situation, but to all situations which may arise in connection with divestitures under the antitrust laws, I am going to refer to corporations A and B.

Let us suppose that A, over a period of years, has acquired a substantial stock of corporation B, and that subsequently the Justice Department determines that this ownership by A of the B stock is an anticompetitive practice, and Justice seeks and secures a court decree requiring corporation A to divest itself of that stock.

Let us suppose at the time divestiture is ordered, that 10 percent of the value of the A or parent stock results from its stock ownership in corporation B.

We cannot have a tax problem without an individual taxpayer, and let us call him Mr. X, and he owns a hundred shares of this corporation A stock, and prior to the divestiture decree the shares are worth $100 per share, or his aggregate investment is worth $10,000.

As a result of the divestiture decree, Mr. X is going to receive B stock, which is worth $1,000. This amount, under the present tax law, he will have to add to his taxable income and have it taxed at the highest bracket.

If he is a single man with no dependents, and let us suppose he has a salary on the outside of $10,000, he is going to have to pay a tax of $340 as a result of his receipt of the stock under the divestiture decree.

Now, when Mr. X prepares his tax return, and he is the average taxpayer, he is going to be very surprised and shocked at his predicament. He is going to say, "What have I got after this decree that I did not have before it? How much richer am I?"

Before the decree he is going to say he had an indirect interest in the corporation B stock. After the decree, after the divestiture, he has it directly.

The value of his A shares will have gone down by substantially the same amount as the value of the B shares which he has received. I do not know how successful other tax lawyers and tax attorneys are going to be, but if Mr. X comes to me, I do not feel at all confident in being able to persuade him of the equity of the tax laws under this situation.

Now, it may possibly be objected that this might be unfair to Mr. X in the normal situation, but there is some taint attached to owning stock of a corporation which loses an antitrust suit and, therefore, its stockholders ought to be penalized.

Well, there is not much support, Mr. Chairman, for that line of thinking in the Supreme Court's cases. In the Hartford-Empire case, they said the divestiture remedy was remedial, it was not penal.

In the Timken Roller Bearing case, the concurring opinion of Chief Justice Vinson and Mr. Justice Reed, said that "divestiture is a remedy to restore competition and not to punish those who restrain trade."

It is going to be very hard for me, as a tax practitioner, to persuade Mr. X when he comes into my office that competition is going to be very successfully restored by forcing him to pay a tax at his highest rate on this B stock which has been paid over to him.

Mr. X is also going to wonder why, if there was a violation of the antitrust laws, the penalty should be on him as a stockholder rather than on the corporation.

His perplexity is going to be increased if the violation in his case resulted from the inability of the corporation's management or its counsel to foresee how the antitrust laws would be interpreted sometime in the future, particularly in view of the fact that this interpretation has changed over the years.

Mr. X's tax problem are not going to be confined to this additional amount which he must bring into his return as income; they are going to include the problem of raising cash to pay the tax, and he probably will have to sell some of this stock which has been distributed to him in order to raise this cash, and when he comes to sell it, as has been pointed out to you so well by the previous witness, he is going to find a great many other people in just exactly the same situation who are trying to sell this stock to raise cash to pay these taxes, and the B stock, which was worth $1,000 when he received it, and which will be included in his tax return at $1,000, may well be worth $900 or $950 when he comes to sell it.

So much for the inequity which is being imposed on individual stockholders as a result of the operation of the Internal Revenue Code's provisions at present in connection with stock received pursuant to divestiture decrees.

I want to move on to the material which is covered on page 2 of the prepared statement, and the proposition that the adoption of this bill is necessary to the proper enforcement of the antitrust laws.

I think to put this proposition in proper perspective we have got to realize that we are dealing only with civil antitrust actions, and with the equitable remedy of divestiture or divestiture through a consent decree.

The purpose of granting the relief, equitable relief, in the form of divestiture, is to restrain anticompetitive practices and to eliminate excessive concentrations of economic power.

It is not a penalty imposed for criminal action by antitrust defendants. There are severe penal sanctions in the antitrust laws to cover that type of situation.

All we are trying to do, all the court is trying to do, in a divestiture decree is to restore competitive conditions.

The willingness with which a judge will order divestiture is, I think, going to depend in large measure upon a large number of factors, and one of those factors is going to be the tax situation of the stockholders who had no part in the action which led to the antitrust proceeding.

I think a very clear indication of how judges will think along these lines appears in the opinion of Judge Wyzanski in the antitrust proceeding involving the Minnesota Mining and Manufacturing Co.,

which is reported at 96 Federal supplement at page 356, and I will only read one sentence in that where he says, and I am quoting:

No one would argue that to run a company into a tax liability not thought necessary under the revenue laws serves an antitrust purpose.

That is the end of the quotation from Judge Wyzanski.

Finally, in connection with this aspect of the problem of the enforcement of the antitrust laws, I think we should all bear in mind that at the time when the Sherman and Clayton Acts were passed, income taxation of individuals was, for all practical purposes, nonexistent. It did not have the bite which it has today, and if the Internal Revenue Code is allowed to be an additional penalty to the stockholders of antitrust defendants, we must also bear in mind that was a penalty which certainly was not considered at the time when the original draftsmen of the Sherman Act and the Clayton Act were drafting those acts, and at the time when those acts were passed by the Congress.

Finally, Mr. Chairman, may I come to the third point which appears on page 10 of the prepared statement, that the remedy which is being sought in S. 200 is consistent with the basic philosophy of the Internal Revenue Code as applied in other areas.

Those other areas are cases where gain or loss is not recognized, it is postponed in transactions which the taxpayer has not voluntarily entered into, or which he has entered into not only not voluntarily but in compliance with a regulatory statute or to carry out certain economic policies which are deemed to be desirable.

I do not want to take your time to go over all the various different situations in the Internal Revenue Code where this principle of deferment of gain is recognized.

But I think I can say, without contradiction, that in every other place in the code, where a taxpayer has entered into an involuntary transaction or where he has been forced to receive property as a result of a divestiture decree, as in the bank holding company law, in each one of those cases no gain is currently recognized, but it is postponed until such time as the property which has been transferred to him in this involuntary transaction is subsequently sold.

Thank you very much.

The CHAIRMAN. Thank you very much. Are there any questions?

Mr. DANE. Thank you, sir.

(The prepared statement of Mr. Dane follows:)

TESTIMONY OF JOHN DANE, JR., FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES BEFORE THE SENATE FINANCE COMMITTEE ON S. 200

I am John Dane, Jr., partner in the law firm of Choate, Hall & Stewart, Boston. I appear today on behalf of the Chamber of Commerce of the United States as a member of its committee on taxation to discuss the Frear bill, S. 200.

Twelve years ago, in 1947, in testimony before the House Ways and Means Committee, a chamber witness predicted that the type of situation S. 200 is intended to deal with would arise to plague us. Again in 1954, in testimony on H.R. 8300; in 1956 in a special statement directed to the Joint Committee on Internal Revenue Taxation; and in 1958 in a supplemental statement to the House Ways and Means Committee, the chamber emphasized the need for corrective action.

The situation we foresaw has now arisen and has resulted in the introduction of S. 200, which the national chamber supports.

In considering any proposal for corrective action in this situation three tests should be made.

It should, first of all, be established that a particular group or class of taxpayers is suffering, or is about to suffer, a serious injustice under the present law. Secondly, it should be established that the relief suggested is consistent with the general philosophy and spirit of the other provisions of the Internal Revenue Code. And finally it should be established that the effect of the proposed relief provision will be to benefit not only the group primarily affected but also the people of the country as a whole.

We believe that S. 200 meets all of these tests. Putting the most important consideration first, we believe that the economy of the country would be benefited by the adoption of this bill because the present provisions of the code can hamper the efficient and equitable administration and enforcement of the antitrust laws. We believe that the Internal Revenue Code, requiring as it does that any distributions made pursuant to an antitrust decree be included in full in taxable income, is grossly unfair to the stockholders who receive such distributions. And, finally, we believe that deferment of the recognition of such income, as provided in the bill, until the time when the shares distributed are sold has many precedents in our tax law and is consistent with the general theories of taxation underlying the Internal Revenue Code.

The adoption of the bill is necessary to the proper enforcement of the antitrust laws

In order to set the relationship of this proposed bill to the enforcement of the antitrust laws in proper perspective, it is first necessary to point out that the bill provides for deferment of taxable income only in the case of civil actions where the court has invoked the equitable remedy of divestiture or where divestiture has been made a part of a consent decree. The purpose of granting relief in the form of divestiture is to restrain anticompetitive practices and to eliminate concentrations of economic power. Divestiture, in short, seeks to establish optimum competitive conditions. Divestiture is not the penalty imposed by a court in a criminal antitrust case where the management of a corporation is found guilty of having deliberately embarked upon a program of acquisition or expansion clearly in violation of the antitrust laws. Severe penal sanctions are provided for such conduct.

To remove this unjust result will facilitate the entry of appropriate judicial decrees in furtherance of the antitrust laws, so that no court need ever hesitate to order divestiture because of concern over the tax penalty on stockholders.

It should be borne in mind that the tax penalty imposed on stockholders as a result of divestiture is not one which was contemplated by the antitrust statutes themselves. Indeed at the time the Sherman and Clayton Acts were passed, income taxation was, for all practical purposes, nonexistent.

Further, to remove this tax inequity should facilitate the negotiation of consent judgments in situations where corporate management may prefer to work out such a judgment rather than to contest a Justice Department charge of antitrust violation.

In such a situation the corporate management involved in antitrust proceedings would quite properly have great reluctance to consent to a decree which would impose crippling taxes on their shareholders. They could well feel that if such a tax burden is to be imposed on the shareholders, by whose favor they hold their positions, it must be done by decree of the court, even though that may involve long and costly litigation.

In other areas, Congress has taken into account the fact that the tax laws must not work at cross purposes with vital regulatory legislation. Three years after the enactment in 1935 of the public utility holding company bill which was directed against undue "growth and extension of holding companies," Congress amended the tax law to defer the recognition of taxable income on receipt of distributions made in connection with the simplification and integration of public utility holding company systems. This amendment was found necessary because the Securities and Exchange Commission had encountered difficulty in its enforcement program on account of the tax consequence of any divestiture order. Similarly, when the Federal Communications Commission has required a sale "in pursuance of the policy of eliminating common ownership of directly competing radio facilities," the recognition of any gain on such sale is deferred under the present provisions of the Internal Revenue Code.

Perhaps the closest analogy lies in the Bank Holding Company Act where bigness, monopoly, and concentration of power were the targets. In many ways this act represent a specific application of the general policy of the antitrust laws to a single industry.

The tax relief granted in the Bank Holding Company Act which permits stockholders in banks subject to the act to receive distributions of securities owned by such banks without immediate recognition of taxable income is the closest possible precedent for the present bill. The following colloquy on the floor of the House evidences the congressional intent in this connection:

"Mr. SPENCE (of the Banking and Currency Committee). Mr. Chairman, what does this bill attempt to do? It does not say to these organizations, 'You must dump your securities on the market. You must sell them at a loss.' It says to the holding companies, 'You must divest yourself of either the voting shares of the banks or divest yourself of the stock in unrelated businesses.' And divestment only means distribution. There is a provision in the bill that when this stock is distributed there shall be no gain and no tax consequence to the shareholder or to the bank holding company. We attempt to make it easy for them to do a legitimate business. They can elect to be either a bank holding company or a holding company engaged in nonbanking business."

"Mr. COOPER (of the Ways and Means Committee). The gentleman is correct; in other words, it means simply that as people are being required by law to dispose of certain assets this tax provision provides they shall not be taxed because they are complying with the law" (Congressional Record, June 13, 1955).

The enactment of the bill is essential if serious injustice to persons receiving distributions pursuant to divestiture decrees is to be avoided

The basic vice of the present law relating to the tax consequences of the receipt of distributions pursuant to a divestiture decree is that it requires the recognition of taxable income when the recipient has received no economic gain—no increase in his net worth. It is just as easy as that. Let us bring the issue into sharper focus by taking a very simple example. Corporation A, over a period of years, has acquired a substantial block of the capital stock of corporation B. Subsequently the Department of Justice determines that the ownership by corporation A of the corporation B stock is an anticompetitive practice and seeks and secures a court decree requiring corporation A to divest itself of such stock. At the time when the divestiture is ordered, 10 percent of the market value of corporation A's stock is attributable to its holdings of the stock of corporation B.

Let us further assume that Mr. X owns 100 shares of corporation A which shares, prior to the divestiture decree, were worth $100 a share or an aggregate of $10,000. As a result of the divestiture decree, Mr. X will receive stock of corporation B worth $1,000 but he will have to add this amount to this taxable income and have it taxed at his highest bracket. If Mr. X is a single man with no dependents and has other income consisting of a salary of $10,000 a year, he will have to pay an additional Federal income tax of $340 as a result of this receipt of the corporation B stock.

When Mr. X prepares his tax return, he is going to be very surprised and shocked at his predicament. He is going to ask, what do I have after the divestment decree that I did not have before? How much richer am I? Before the decree he had an indirect interest in the corporation B stock virtue of his stock holdings in corporation A and that now he owns his pro rata share of such corporation B stock outright. The value of his corporation A shares have gone down by the amount of the value of the corporation B shares which have been distributed to him and he is further going to say that as you put value in the pocket marked "B" you take it out of the pocket marked "A" but that you never make any money by shifting coins from one trousers pocket to the other.

I don't know how successful other tax practitioners may be but if Mr. X came to me I do not feel confident that I could give him any satisfactory explanation of the equity of the operation of the tax law in his particular case.

Now it may be objected that while this might be very unfair to Mr. X in a normal situation, there is some taint attached to owning stock of a corporation which loses an antitrust suit, and therefore, he should be penalized.

Supreme Court decisions do not seem to support this point of view. On the contrary, the Court has said that equitable relief in antitrust cases—and divestiture is a form of equitable relief—"is remedial, not penal" (*Hartford-Empire Co.* v. *The United States*, 323 U.S. 386, 435 (1945)). It has also

been said that "divestiture is a remedy to restore competition and not to punish those who restrain trade * * *." Chief Justice Vinson and Mr. Justice Reed concurring in *Timken Roller Bearing Co. v. U.S.* (341 U.S. 593, 603 (1951)).

It will be hard to convince Mr. X that it helps to restore competition to force him and his fellow stockholders to pay a tax at their highest rate merely because they now own their proportionate interest in the corporation B stock directly rather than indirectly.

Furthermore, if there is to be any tax penalty for violation of the antitrust laws, Mr. X will find it hard to see why this should fall on him rather than on the corporation itself. His perplexity will doubtless be increased if the violation in his case resulted from the inability of the corporation's management or its counsel to foresee accurately the development of administrative theories and the course of judicial interpretation, both of which are and have been constantly changing. He will also find it hard to understand why different classes of stockholders of corporation A will be treated differently. Individual stockholders such as Mr. X must pay a tax on 100 percent of the fair market value of the corporation B stock distributed pursuant to the divestiture decree. However, corporate stockholders of A will only be required to pay a tax on 15 percent of the fair market value of such stock and tax exempt stockholders such as schools, colleges, and hospitals will not be required to pay any tax at all.

The tax problems of persons like Mr. X who are stockholders in corporations which have been subject to a divestiture decree, are not confined to the fact that there must be included in taxable income an amount equal to the fair market value of any stock received pursuant to the divestiture decree. Such stockholders must discharge the resulting tax liability in cash and this means, in many cases, that they must sell some of the stock received in order to do so. If only a single stockholder had this problem it would be one thing, but the fact is that many stockholders of the corporation whose shares have been distributed may be seeking to sell some of their shares at or about the same time. This could well depress the market so, in Mr. X's case, the stock, which was worth $1,000 when he received it and which must be included in his taxable income at that amount, may be worth, for example, only $900 when he comes to sell it. To the extent that a stockholder's loss in such a situation exceeds $1,000, he cannot, under the present provision of the Internal Revenue Code, use it to offset other income, such as income recognized as a result of the receipt of the stock itself. He can only use such loss to offset capital gains if he is fortunate enough to have any.

Any diminution of the market value of stock being distributed pursuant to a divestiture decree has widespread repercussions. In the case which we have been discussing, only 10 percent of the stock of corporation B was owned by Corporation A and distributed by it to its stockholders. However, if any substantial number of the recipient corporation A stockholders put large amounts of such corporation B stock on the market at the same time, it is not only going to decrease the value of the corporation B shares held by other corporation B stockholders but it is going to drastically curtail the ability of corporation B itself to go into the security markets and raise additional equity capital.

Enactment of the proposed bill will be completely consistent with the basic philosophy of the Internal Revenue Code in other areas

Congress has, in many instances, provided that the recognition of taxable income or gain shall be deferred if the transaction giving rise to such income or gain was not voluntarily entered into by the taxpayer or was required to effect the compliance with regulatory statutes or to carry out certain economic policies considered to be desirable. For instance:

(1) Sections 371-372: These sections provide for the nonrecognition of gain or loss on transactions carried out under court supervisions in receivership, foreclosure, or similar proceedings, or in any proceeding under section 77B or chapter X of the National Bankruptcy Act.

(2) Section 1033—Involuntary conversion: In order to prevent a taxpayer from being taxed on profits from a disposition of property which is forced upon him, section 1033 provides for the nonrecognition of gain where property which is seized or condemned is converted into other property similar or related in service or use; when the property is converted into money, gain is recognized only to the extent that the money exceeds the cost of replacement property.

(3) Section 1034—nonrecognition of gain from sale or exchange of residence: To encourage building of new homes, gain on the sale of a residence is taxed only to the extent that the sales price of the old residence exceeds the cost of a new residence which is purchased or built within a specified time.

BEST AVAILABLE COPY

(4) Section 1054.—Nonrecognition of gain or transfer of obsolete vessels to Maritime Commission: In order to facilitate the construction of new vessels, section 1051 (through reference to sec. 510 of the Merchant Marine Act) provides for the nonrecognition of gain on the transfer of an obsolete vessel to the U.S. Maritime Commission. The basis of a new vessel is the same as the basis of the obsolete vessel exchanged, increased by the additional cost of the new vessel and decreased in the amount of loss recognized on the transfer.

(5) Section 1071. Nonrecognition of gain on sale or exchange to effectuate policies of the Federal Communications Commission: This section provides for "involuntary conversion treatment" of property disposed of pursuant to the FCC requirement that common ownership of directly competing radio facilities be eliminated as a condition to renewal of licenses to broadcast.

(6) Sections 1081–1083. Nonrecognition of gain or loss on exchanges or distributions in obedience to orders of the Securities and Exchange Commission: These sections provide for the nonrecognition of gain or loss for certain exchanges or distributions pursuant to orders of the SEC.

(7) Section 1101. Nonrecognition of gain on distributions by bank holding companies pursuant to the Bank Holding Company Act of 1956: This section provides for the nonrecognition of gain when bank holding companies distribute to their shareholders the stock or assets of nonbanking businesses pursuant to the requirement of the 1956 Bank Holding Company Act.

(8) Section 1321. Involuntary liquidation and replacement of LIFO inventories: This section provides for tax relief where the taxpayer has been forced to liquidate his inventory for unusual reasons such as "disruption of normal trade relations between countries."

(9) Section 1331. Limitation of tax on war loss recoveries: This section provides that if property which the taxpayer had deducted as a war loss is later recovered, the recovered fair market value is taxed only to the extent that a deduction resulted in reducing the prior year's tax.

The CHAIRMAN. Our next witness is Andrew J. Dallstream.

STATEMENT OF ANDREW J. DALLSTREAM, ATTORNEY AT LAW, CHICAGO, ILL.

Mr. DALLSTREAM. I am Andrew J. Dallstream, and I am engaged in the general practice of law as senior partner in the law firm of Dallstream, Shiff, Hardin, Waite & Dorschel, of Chicago, Ill.

In the course of my 40 years of practice, my firm has had its share of antitrust cases, public utility holding company divestments, railroad and other corporate reorganizations.

I believe I have had considerable experience in dealing with tax questions in connection with these various types of matters, both with and without special relief provisions, such as are mentioned hereafter.

My particular interest in the subject matter of S. 200 at the present time relates to the Du Pont-General Motors case which is now pending before Judge Walter J. LaBuy of the U.S. District Court for the Northern District of Illinois, upon remand from the U.S. Supreme Court to determine the equitable and appropriate remedy for the violation of section 7 of the Clayton Act which the Supreme Court found to have resulted from Du Pont's acquisition of 23 percent of the stock of General Motors.

Judge LaBuy appointed me as amicus curiae with respect to the interests of Du Pont shareholders, and I was directed by the court to investigate the situation, to study the various plans which were proposed by the litigants, and to offer my own plan and to make my recommendations to the court.

The first thing I would like to stress with all possible emphasis, is the fact that I am not speaking for Judge LaBuy, and what I may say here today does not necessarily represent his views. My duties

and activities, however, as amicus curiae have given me a particular familiarity with and interest in the problem of taxes in relation to antitrust enforcement, but my role of amicus obviously does not authorize me to speak on behalf of, and I do not speak for, the court.

I also wish to point out that I do not represent nor am I speaking for the Du Pont Co., Christiana Securities Co., General Motors Corp., or Delaware Realty, all defendants in the Du Pont case.

My interest is limited solely to the representation of the Du Pont stockholders, as such, which arises by virtue of my appointment as amicus curiae.

Immediately upon my appointment as amicus curiae I began intensive studies of the legal and factual background of the case in order to be in position to make my own recommendations and to comment upon the recommendations of others. In this connection, I held a series of regional conferences in five major cities with stockholders and representatives of the stockholders of Du Pont for the purpose of discussing the entire question of the necessary and appropriate remedy under the mandate of the Supreme Court. Included among the stockholders represented at these conferences were large individual and corporate holders, bank trustees, investment trusts, investment bankers, investment advisers, insurance companies, educational institutions, and charitable foundations.

In addition, I have had a considerable volume of correspondence and many individual conferences with Du Pont stockholders—both large and small. As a result of these conferences and this correspondence, I have become impressed by the great hardship that would be visited upon the many stockholders of Du Pont by a decree that would require Du Pont to distribute its present holdings of General Motors stock.

For example, a lady who holds a few shares wrote:

> I am a retired Foreign Service staff officer, living modestly on an insufficient annuity, augmented by dividends from small holdings of Du Pont stock which represents savings. I am not a stock dabbler. I share some family responsibility. I have never owned an automobile nor acquired the habit of installment purchases. My lifetime savings have been invested in two companies the composition of which I regard as made up of men of unquestioned integrity who would not resort to unethical practices. With this information about myself, you will, I am sure, understand my attitude in this matter and my reason for writing you at such great length to protect my interests.

This is one of the letters I received from many, many shareholders from whom I inquired about their plight.

A major source of hardship to stockholders would be the tax burden that would fall on them—not on the corporate defendants but on their individual stockholders—under a plan of divestiture such as the Antitrust Division is proposing in this case. Under the official tax ruling obtained from the Commissioner of Internal Revenue, the compulsory distributions proposed by the Antitrust Division would be immediately taxable as ordinary dividends to the stockholders of Du Pont. This mean that—even though the economic effect of the distributions would be merely to divide each stockholder's investment into its component parts, like changing a $10 bill for two $5 bills—each noncorporate stockholder would pay income taxes equal to from 20 percent to 91 percent (depending on individual tax brackets and subject to dividend received credit) of the market value of the General Motors shares when received.

That means that this net tax of approximately 16 to 87 percent will be visited upon these individual shareholders even though, as I see it, they may have merely exchanged their $10 bill into two 5's.

I want to point out at this point that, perhaps, there has been some confusion, as I have listened to this testimony, about what really happens here.

Du Pont has had approximately one-third of its earnings from the General Motors shares, and if there is a divestiture, Du Pont's earnings will be reduced by one-third, and it will have only two-thirds of the earning power which it has had before.

The CHAIRMAN. What is the percentage of assets of Du Pont, as carried on the books, and this General Motors stock?

Mr. DALLSTREAM. I did not hear you, Senator.

The CHAIRMAN. I say, this is carried on the books of Du Pont stock as $1 billion, is it not?

Mr. DALLSTREAM. Approximately so, yes. It is carried on the books, I think, at well its cost is $2.10, and I am not sure, but I think they have been writing that up to correspond each year to the book value of the shares of—the book value on the shares of General Motors.

The CHAIRMAN. At what are the General Motors shares carried on the books?

Mr. GREENEWALT. It is approximately the book value of the General Motors stock per its own books.

The CHAIRMAN. What does it amount to?

Mr. GREENEWALT. About $14 a share, I believe.

The CHAIRMAN. What is the total figure?

Mr. GREENEWALT. About $1 billion.

The CHAIRMAN. $1 billion?

Mr. GREENEWALT. Yes.

The CHAIRMAN. Now, the stock is actually worth over $3 billion?

Mr. GREENEWALT. Yes, sir; that is right.

The CHAIRMAN. $3,250 million.

Mr. GREENEWALT. On the market.

Mr. DALLSTREAM. But that stock has been contributing one-third of the earnings.

The CHAIRMAN. What proportion does the $1 billion, Mr. Greenewalt, have to the total assets of the company?

Mr. GREENEWALT. About a third, I would say.

The CHAIRMAN. In other words, the dividend payment comes proportionately to the assets of the General Motors included in the total assets of Du Pont?

Mr. GREENEWALT. Just about.

The CHAIRMAN. One-third in each case?

Mr. GREENEWALT. Very roughly.

Mr. DALLSTREAM. Well, it can easily be seen as a result of that, that the distribution of this stock has none of the earmarks of a distribution of corporate earnings.

If you distribute corporate earnings which are not needed in the conduct of the business, the business goes on as before, and it is worth just as much as it was before, except on liquidation value.

It produces just as much earnings and has just as great market value based upon its earnings.

Now, in the Du Pont case, the minute that this distribution is made, you have taken one-third of the earning assets away from this com-

pany, one-third of its earnings, and it may reasonably be expected we have taken away at least one-third of its market value, and that is not the case in a distribution of cash dividends or of unneeded assets, and in that case the corporation remains with the same earnings power and the same value as before.

It was testified at the hearing before Judge LaBuy on the basis of a comprehensive and careful survey of the stockholders of the Du Pont Co., that the average tax rate at which the more than 230,000 individuals who hold Du Pont stock directly or beneficially would pay taxes upon a distribution of the General Motors shares would be approximately 57 percent.

I may say to you, sir, that early in the game, after I had finished my talks with the stockholders around the country, I estimated approximately 60 percent, and I feel that figure which was prepared by Mr. Tepping by the use of samplings, is a clearly accurate figure.

The total additional tax payable by these individuals upon such a distribution would be, assuming General Motors shares have a market value of $50 per share when distributed, approximately $1 billion as has been testified.

This tax burden, which is apart from the taxes that would be indirectly payable by the many stockholders, beneficiaries, and policyholders of the corporations, investment trusts, mutual funds, and insurance companies holding Du Pont stock, does not just fall on the large stockholders.

I think it will be clear that this tax does not fall only upon large stockholders but upon small stockholders, as well.

Of the over 225,000 holders of 500 shares or less, they would have a tax burden of over $300 million or an average of more than $1,000 for each individual holder, and, of these, the more than 200,000 individuals holding 100 shares or less would have a tax burden averaging more than $600 for each individual holder.

Furthermore, there would be additional losses to stockholders resulting from the drop in market prices caused by the large volume of sales of Du Pont and General Motors stock that would undoubtedly be made by Du Pont stockholders in order to mitigate the tax consequences or to raise cash with which to pay taxes.

Senator WILLIAMS. Might I add that computation is not for each of the 10 years, is it?

Mr. DALLSTREAM. That is for the 10 years, those tax amounts.

Despite this rather clear evidence of the staggering tax burden that would be placed upon Du Pont stockholders by a distribution of the General Motors shares, the Antitrust Division has taken the position that divestiture is a mandatory remedy in the pending case.

I believe this points up clearly the dilemma that confronts the antitrust courts in this and many other cases. On the one hand, a court having found an antitrust violation must frame a decree that will restore competitive conditions, which sometimes can best, or perhaps only, be accomplished by divestiture—as the Antitrust Division contends is true in the Du Pont case.

On the other hand, it is equally well established in the cases that the decree must be remedial, not punitive, and must reflect proper regard for interests of private property that have become vested in private investors without any guilty knowledge or any intent to be-

come participants in the unlawful activities. But in some cases—of which the Du Pont case is a particularly good example because the acquisition in question took place 40 years ago and a whole new generation of investors have become involved—in some cases, I say, it may be simply impossible for the antitrust courts to order divertiture without at the same time imposing a grave and even unconscionable hardship on the innocent investors of the corporations involved and often on many other innocent persons who are in no way connected with the defendant companies.

The only valid and proper solution, I believe, is for Congress to enact legislation similar to the pending bill—legislation that will permit the courts to order divestiture whenever it is necessary or appropriate to do so without at the same time imposing a staggering tax burden on innocent stockholders. It should be emphasized that the pending bill does not relieve any shareholder from paying, or prevent the Government from collecting, a single dollar of taxes that would be payable or collectible in the absence of the antitrust decree. If the pending legislation were enacted, a stockholder of Du Pont, for example, would continue to pay income taxes on dividends from Du Pont and General Motors and would pay a capital gains tax on any gain realized from the sale of either Du Pont or General Motors shares. In short, the bill would merely postpone the realization of gain until such time as the General Motors shares are voluntarily sold, which would be the situation in the absence of the antitrust case. Thus, this bill would merely get away from the present illogical and arbitrary result of taxing the compulsory transaction of divestiture—the forced splitting of the Du Pont share into its two component parts—as if it were a voluntary realization of income.

I would like to particularly deal with this criticism which has been made of this bill as possibly affording tax relief to those who have been adjudged wrongdoers.

I think it was made clear this morning by Mr. Bicks that he admitted there was no wrongdoing in this case, but that he wanted to be sure that S. 200 did not relieve wrongdoers.

I think we must remember that a court of equity has traditionally been bound by the rule that they will never grant equitable relief to a wrongdoer.

This bill has built into it a provision that requires the court to find that before the benefits of S. 200 can be availed of by anyone, the court must have entered a finding that not only was the relief appropriate to carry out the antitrust objectives, but it must have been equitable relief. And I do not think we need to worry in this case that any court is ever going to avail itself of the provisions of S. 200 if he cannot conscientiously and honorably and honestly enter that finding that it is equitable—it is an equitable remedy that is being applied, and that this is a case in which the provisions should be awarded because it would constitute equitable relief.

Courts of equity just have not aided wrongdoers. As applied to the Du Pont case, however, it must be borne in mind that the bill would afford no relief whatever to the Du Pont Co., but it could afford relief to the several hundred thousand persons directly or beneficially owning Du Pont stock. Further, there has been no finding whatever of wrongdoing in the Du Pont case. The lower court

found the acquisition to have been lawful and proper. The Supreme Court did not disturb that finding, but held merely that, more than 30 years after the acquisition, the position General Motors had achieved in the automobile industry through natural growth had reached the point where there was an incipiency or probability of monopoly of the market for automotive fabrics and finishes. Few laymen, lawyers or judges would have anticipated the novel holding of four members of the Supreme Court that an acquisition, though lawful when made, could become unlawful 30 years thereafter as a result of a mere change in the economic conditions of the companies involved.

The CHAIRMAN. Does the Frear bill provide clearly that any involuntary distribution would be exempt from taxation?

Mr. DALLSTREAM. No, sir. There is a provision in the Frear bill that requires the court to enter several findings, among which is that it is necessary to grant equitable relief so that the provisions of the bill are permitted to be availed of. So that the court may order divestiture in any antitrust case, but not make that finding, and in that case the tax, as it stands today, would be the tax which the recipient would normally have to pay.

Senator WILLIAMS. Would there be any possibility that if this bill were enacted, that the court could determine that even this case was not applicable and not eligible for the benefits of this bill?

Mr. DALLSTREAM. It is perfectly possible.

The CHAIRMAN. What court are you speaking of, the Supreme Court, or district court?

Mr. DALLSTREAM. I think the district court is going to have to enter the order, but if the district court refused to enter the order——

The CHAIRMAN. The Supreme Court will not make the decision that you speak of, will it?

Mr. DALLSTREAM. No, they will not have to make it.

I would like very much to call the committee's attention to—particularly to the language of Senator Frear's bill in that regard, because I think it is quite clear that even in the Du Pont case the court could refuse as to any of the distributions that were ordered.

The CHAIRMAN. I did not understand that the relief the Frear bill would give or attempt to give, would be subject to the approval of the Federal court.

Senator FREAR. No, they have to make these findings.

Mr. DALLSTREAM. The following are required to be found by the court: (1) "That such divestment is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act, or both"—That means you cannot have one that is just friendly to the parties. The court must find it is necessary and appropriate.

(2) "That nonrecognition of gain pursuant to section 1111 of the Internal Revenue Code of 1954 is required to reach an equitable judgment, decree, or order in such suit or proceeding."

The CHAIRMAN. The court thinks that will be equitable?

Mr. DALLSTREAM. The court has to determine what is equitable.

The CHAIRMAN. But the Supreme Court has already acted, has it not?

Mr. DALLSTREAM. It has.

The CHAIRMAN. And they required the divestment?

Mr. DALLSTREAM. No, I do not think they did. But let us assume they did.

The CHAIRMAN. It is a little like going in through the back door But the effect is that they required the divestment of—the distribution of this stock.

Mr. DALLSTREAM. The thing I want to make clear is that if Judge La Buy orders divestment, and he does not make the determination under subdivision (D)——

The CHAIRMAN. Do you mean to say then that the judge does not necessarily have to order that the Du Pont Co. dispose of Genera Motors stock?

Mr. DALLSTREAM. I have always contended that, and I still feel that way, but I have been wrong before. I did not think that four members of the Supreme Court were going to decide the earlier case the way they did, and make some new law in this country.

The CHAIRMAN. I thought it was an accepted fact that while the district judge had discretion on how to require this distribution, he would have to carry out the spirit of the decision, or whatever you may call it, and compel the Du Pont Co. to divest itself of the Du Pont stock.

Mr. DALLSTREAM. That is the contention of the Department of Justice, and they may be right. I do not think they are.

The CHAIRMAN. Do you agree with that, or disagree?

Mr. DALLSTREAM. I disagree.

Senator FREAR. The Supreme Court has not ordered divestiture.

Mr. DALLSTREAM. The Supreme Court has referred this to Judge LaBuy to enter an appropriate order.

The CHAIRMAN. Let me ask you, Does Judge LaBuy have absolute authority to do as he pleases in regard to this?

Mr. DALLSTREAM. No, sir, I do not think he has.

The CHAIRMAN. Can he issue an order saying that there will be no divestment?

Senator FREAR. Subject to appeal.

Mr. DALLSTREAM. Subject to appeal, and being reviewed by the Supreme Court, I think he can enter any order that he thinks is equitable and appropriate to carry out the mandate of the Supreme Court to do away——

Senator FREAR. The Supreme Court would reverse it unless he ordered a disposition of the stock of General Motors.

Mr. DALLSTREAM. Yes; and, of course, what I am afraid of, representing the stockholders, Mr. Chairman, is that the Supreme Court might this time make their decision without giving any discretion at all to the judge and any chance to work anything out unless we have this legislation before the decision is made.

Senator FREAR. The President of Du Pont would like to say something.

Mr. GREENEWALT. Senator, the controversy is this: The Department of Justice holds that as a matter of law divesture is mandatory. This is their argument, their pitch, if you want to call it that, and they have entered briefs before Judge LaBuy to that effect.

Our counsel take very strongly the opposite view, and say that Judge LaBuy has complete discretion to frame a decree that grants equitable relief.

That is really the argument that is being contested hotly before the court.

The CHAIRMAN. Don't you think we had better look to Judge LaBuy to work this out?

Mr. GREENEWALT. Well, everything is fine if he decides our way, and if the Supreme Court supports him.

The CHAIRMAN. Do you think there is a possibility that he will decide there is no divestment made mandatory by the decision of the Supreme Court?

Mr. GREENEWALT. If our eminent counsel are correct, this is certainly so; there is certainly such a possibility—that he may decide that divestiture is not necessary. But the whole trust of the argument before the court in Chicago is the Department of Justice persuading him, as they persuaded you this morning, that divestiture is mandatory under the Clayton Act.

We take the position that it is not. Judge LaBuy has the question before him.

The CHAIRMAN. Judge LaBuy, in the first instance ruled that it was not a violation of the antitrust laws?

Mr. GREENEWALT. That is correct.

The CHAIRMAN. Therefore, there should be no divestment. Thereafter the Supreme Court reversed his decision, did they not?

Mr. GREENEWALT. They reversed his decision to this extent—not completely, by any means.

As a matter of fact, they sustained a very large portion of his decision. They simply said that under their own interpretation of the Clayton Act that there was a probability of a restraint of trade.

This is a completely new interpretation of the Clayton Act made by the Supreme Court in reversing Judge LaBuy. What they said in their opinion was that the case was remanded to Judge LaBuy for equitable relief. They said nothing about divestiture. The word "divestiture" does not appear, I believe, anywhere in their opinion.

The CHAIRMAN. What reason have you to think—you have been greatly concerned about this—that Judge LaBuy will require divestiture?

Mr. GREENEWALT. We do not know what he is going to do, frankly. The question is this: The legal question that has been presented to Judge LaBuy is, first, the position of the Department of Justice who maintain quite stoutly and with a great many words that Judge LaBuy has no discretion and must order divestiture.

We take the position that he need not order divestiture, and he has ample discretion. How he will decide that I do not know. If he decides in our favor, the Government has the privilege of appeal to the Supreme Court. So, one has to consider not only what Judge LaBuy will decide, but what the Supreme Cort will decide on appeal.

So that the question is really an open one. We do not really know whether divestiture will be ordered or not.

The CHAIRMAN. Has Judge LaBuy given any indication, however, that he thinks it is not mandatory?

Mr. GREENEWALT. None whatever. He has maintained complete silence throughout all the hearings. He will speak in due course.

The CHAIRMAN. In other words, it is not a closed issue.

Mr. GREENEWALT. No.

Senator FREAR. Mr. Chairman, was not the opinion of the Supreme Court and the dissenting opinion of the two Justices made a part of the record yesterday?

The CHAIRMAN. I believe it was.

(The Supreme Court decision appears on p. 29.)

Senator FREAR. Fine, thank you.

Mr. DALLSTREAM. The effect of this legislation, it seems to me, is eminently fair and reasonable. The objective of antitrust remedies is to prevent the creation or continuance of forbidden restraints. This antitrust objective may, in some circumstances, require distribution of a security holding so that a stockholder's investment is involuntarily split into two parts, but it does not require involuntary realization of tax liability.

Next I want to point out that I think it has been very clear in all the congressional history that Congress has never manifested any intent, so far as I am aware, to impose a special tax liability on shareholders in an antitrust case.

In other words, antitrust laws are not revenue measures and should not be used as such, and revenue laws are not antitrust enforcement measures and should not be used as such.

The pending bill will not defeat the purposes of the tax laws because it will not deprive the Treasury Department of any revenue which it would receive apart from the intervention of an antitrust decree or divestiture.

On the other hand, the bill certainly would not hamper, but would clearly foster, effective antitrust enforcement because it would permit divestiture to be used freely as an appropriate remedy without worrying about fortuitous and frequently calamitous tax consequences.

This type of legislation is not, of course, without precedent. In a number of other instances Congress has removed the tax barrier that prevented either the courts or the regulatory agencies from effectively enforcing law dealing with the evil of undue corporate concentration. Thus, legislation similar to the pending bill has been enacted with respect to distributions ordered by the Securities and Exchange Commission pursuant to the provisions of section 11 of the Public Utility Holding Company Act of 1935 (I.R.C., secs. 1081–1083) (characterized by Professor Loss of the Harvard Law School as a "specialized type of antitrust law"); with respect to distributions ordered by the Federal Reserve Board pursuant to the provisions of section 4 of the Bank Holding Company Act of 1956 (I.R.C., secs. 1101–1103); and with respect to distributions ordered by the Federal Communications Commission when necessary or approprate to effectuate the policies of the Commission with respect to the ownership and control of radio broadcasting stations (I.R.C., sec. 1071). In all of these cases, tax relief legislation has facilitated the administration of the regulatory law, and at the same time the Government has dealt equitably and fairly with public investors without in any way creating a tax loophole. Mr. Justice Douglas, when he was Chairman of the Securities and Exchange Commission and the leading exponent of the divestiture policy of the Public Utility Holding Company Act, concisely and effectively

put the case for legislation to prevent tax consequences from creating an arbitrary obstacle to enforcement of divestiture, as follows:

> * * * our big job at the Commission is to put the private utility house in order. We think we can do it, and we think we can do it expeditiously and constructively if this tax barrier is removed * * *. We down at the Commission do not desire to put the gun at the head of a utility company and say, "transfer these" and then to have another branch of the Federal Government collect $2 million or $1,000, or $250,000 as the result of doing what we are forcing it to do (hearings on H.R. 9682, before the Committee on Finance of the U.S. Senate, 75th Cong., 3d sess., pt. IV, Mar. 30, 1938, at p. 73).

I am not going to go any further with my prepared statement, but I would like to clear up two or three very important things that have come up in the course of these hearings. I will do so very quickly.

It has been suggested that other acts of Congress providing for nonrecognition of gain where divestiture is required by governmental action are not controlling precedents for the enactment of S. 200.

It has been stated that the other acts of Congress, such as the Public Utility Holding Company Act and the Bank Holding Act have been passed at the same time or within a few years after the substantive legislation was first enacted.

On the other hand, it is pointed out that the antitrust laws have been in effect since 1890.

I find this asserted difference very unconvincing. While it is true that the antitrust laws have been on the books for many years, their interpretation by the courts, both as to what constitutes a violation and as to what is an appropriate remedy, creates new laws just as effectively as through Congress itself has legislated in each case rather than the courts.

It has been suggested in the record here that to treat the distribution of General Motors shares as a taxable dividend—I think I covered that point on the fact that it is very different from the cash dividend.

Senator FREAR. May I ask you this question: Do you think the decision of the Supreme Court made in June of 1957, had the effect of new law?

Mr. DALLSTREAM. Absolutely. I do not think any lawyer, layman, writer on the subject in any substantial number of years before would ever have conceived that such an interpretation of the Clayton Act could possibly be reached, and I think if you have any doubt about it, if you will read the dissenting opinion of Judge Burton, that you will be thoroughly convinced. It is a very vigorous dissent, and I think clearly states the situation.

Mr. Chairman, there is one other point I would like to try to attempt to clear up which has some importance, and which has come up during these hearings.

In the Du Pont situation only about 60 percent of the distribution would be taxable if it were distributed all at once, and I hope that situation is clear to you.

In other words, the accumulated earnings and profits of the Du Pont Co. which form the only basis for a tax here amount to about 60 percent of the value of the stock being distributed, so that if we

distributed all tomorrow at one time only about 60 percent of the distribution would be taxable.

Apparently the Department of Justice recognized clearly the terrific market and economic impact of a single distribution, and so they have extended this over a period of 10 years, which has the effect of making it all taxable.

It may well be that despite the severe economic consequences a single distribution, part of which would be a return of capital, would result in such depressed market prices of the General Motors shares, that the total loss would be substantially more than it is here.

This illustrates the plight of the court in trying to be fair to the public interest and also fair to the shareholders in the distribution without tax relief.

Now despite the fact that Du Pont has distributed all of its General Motors income over the recent years and has had a very liberal dividend policy, it has been required over recent years to retain a portion of its earnings from its chemical business, to put them back into the chemical side of its business to build additional plants in order to afford more employment and build up the national economy.

Yet it is that investment in these additional chemical plants which they have had to take out of earnings, despite a liberal dividend policy, that creates the basis for this tax, not the increase in value of the General Motors shares.

It invested what is now the equivalent of $2 a share 40 years ago in General Motors, and it has made no further investment since that time except to maintain its interests through one exercise of rights.

The CHAIRMAN. What is the enhancement of the value of the General Motors stock?

Mr. DALLSTREAM. As to most of it, from about $2 and——

The CHAIRMAN. I mean how much is it in dollars?

Mr. DALLSTREAM. From $2.10 to $50.

The CHAIRMAN. What was the purchase price? What was the total amount?

Mr. DALLSTREAM. The cost was $132 million of all the shares.

The CHAIRMAN. $132 million?

Mr. DALLSTREAM. They are now worth something around three—three and a quarter billion.

The point I want to make is that it is not the increase in the value of that stock that creates the tax. It is the fact that chemical earnings have had to be reinvested in chemical properties to carry on the chemical business.

To those who point out that the Du Pont stockholder may sell all his Du Pont stock and pay a capital gains tax rather than the GM shares, I want to point out very clearly that I do not think he will find anybody he can sell them to.

Those shares are going to have a built-in tax liability, and I ask each of you here today if you were offered Du Pont shares that I own after a decree of the kind the Government wants, what would you pay me for them?

The CHAIRMAN. Have you got any to offer? [Laughter.]

Mr. DALLSTREAM. You would certainly not pay me any more than what you thought they were worth, less all of the tax liability, so I have got to cut down the price of my Du Pont shares for the tax liabil-

ity in addition to paying my capital gains. I want to point out that every stockholder must pay taxes on the market value of his General Motors stock when distributed.

Whereas the selling that will take place is estimated to drive the price down to a figure estimated in the hearings before Judge LaBuy of as high as 25 to 35 percent, and I think it is quite reasonable to assume that the high-bracket shareholders who sell that stock may very well, having paid taxes on it on one basis, and having sold it at a lower basis, not even get their money back, and certainly as to the shareholders in the low brackets, what seem to be low brackets, may really be high brackets, because when he sells he will have to add the market loss on top of his tax loss.

I would like to close with just one reference to something that was said this morning.

This 8-percent figure is unchallenged in this record, about who would receive these shares of stock distributed from Christiana.

You cannot reach 8 percent without resorting to some perfectly fantastic assumptions, including taking everybody who is a blood descendant and all the persons they have married, and the people that they married who have inherited from them, and following it down and, in effect, taking everybody in the Du Pont bloodlines and everybody who ever married a Du Pont, and all of their relatives who ever inherited from them, to reach that 8 percent.

I think the realistic figure to talk about here is the fact that there is probably about 3 percent of this General Motors stock that will upon distribution be in the hands of people who are in what I would call the modern Du Pont family, who have an active interest in the affairs of the Du Pont Co., and it is getting down to where it is a pretty small figure.

Now there is a great deal of stock in trusts. Those trusts are, for the most part, for minors, and those trusts have been added in to get that 8 percent figure; whereas they have trustees that are banks.

If Judge LaBuy feels at all in this case that there are any of these people who ought not to be exercising such influence as merely casting their vote at the annual meeting can bring about, he certainly can restrict their voting.

If he feels that there is any reason why any person should not get their stock, he can pass the stock to them with a provision that they must sell it within a period of time.

But I want you to think for a minute in this Christiana situation about all of the corporations, charitable institutions, and all that hold this stock.

Christiana has been a very popular company for Harvard University and the University of Chicago and various charities and pension funds and institutions to invest in because it has sold at a little less than its liquidation value at all times and therefore has been a very attractive investment for them.

Now these people all want to get this General Motors stock, and they certainly do not want any built-in tax liability in getting it, and it seems to me that we have a problem here of being awfully sure that, first, this legislation does not prevent the court, if he thinks it is proper and fair and equitable, from seeing that the stock which would go to Christiana is passed through to its shareholders; and if there is any

reason why there should be anything done here which would prevent stock from falling into the wrong hands, I think we can trust the court to do it, and if he does not do it, I am sure the Supreme Court will do it, sir. Thank you very much.

Senator FREAR. I really think, Mr. Chairman, that if some Sunday the members of this committee wanted to take the report and recommendations of Mr. Dallstream dated August 1958 and read them, they would have an enlightening experience.

Mr. DALLSTREAM. I should not think we would want to burden the record with it, but if you would like to have it as an exhibit I should be glad to offer it.

The CHAIRMAN. We would file it with the record. I will certainly be glad to read it myself.

(The document referred to will be found in the files of the committee.)

Mr. DALLSTREAM. I wonder if I might, in closing, read a very short letter that Judge LaBuy read at the conclusion of this case:

U.S. District Judge WALTER LABUY,
Chicago.

YOUR HONOR: Noting a news clipping of February 17, could you stand taking a peek at one of the fragments of the Du Pont Co.? For that is what we are, hundreds of thousands of little fragments beside those big money interests that you associate normally with the companies. I am an old lady of 75, retired on dividend income. Last year's total was $3,622.76, a booming year. During the depression the same holdings brought in a little over $900, and could again if another one hit.

One of my last year's dividends was 26 cents semiannually, gospel truth, 13 cents a share on two. Others are $1.70, $2.63, $2.50, $3, $3.50, and so forth, quarterly. Then $5, $6, $7.50, and so on. Du Pont pays me $114—one of my two biggest. But can it, if a split up calamity knocks the value of it in General Motors, and perhaps the whole market? If they give the shareholders the stock, two big taxes take chunks of it. Here in Massachusetts, which is death on anyone with stocks—giving us less exemption than others, then taking a straight 6 percent in income taxes—you can picture the field day on the little fragments. Now don't get sorry for me. I am not sorry for myself. If I were any happier I would go straight up in the air. I lived through the $900 period and probably will again. I have a tiny home at the end of a cliff where the worst storm tides come over the seawall and porch and the door sills of my house, and I love every minute of it with my dear old scow that I navigate under my own power.

The CHAIRMAN. It is a very appealing letter.

Mr. DALLSTREAM (continuing):

I am just scrawling this because I honestly believe a man in your position wants to see the whole picture, of even the fragments. Take it in spirit that I toss it, not using busy moments to reply. Respectfully and sincerely.

I wonder, Mr. Chairman, if I might also ask each of the members of the committee to put themselves in Judge LaBuy's shoes. I suppose he ought to take judicial notice of the proceeding down here It is a matter of public record.

I wonder what he is going to think when he hears about the state in which it is suggested that we leave this situation, that he can go ahead and render his decision and then Congress will look at it afterward. Would you make that decision in the light of expecting congressional relief or not expecting it? [Laughter.]

The CHAIRMAN. The last witness is Mr. William Jackman, president of Investors League, Inc. Mr. Jackman, will you come forward and present your statement.

STATEMENT OF WILLIAM JACKMAN, PRESIDENT, INVESTORS LEAGUE, INC., NEW YORK CITY

Mr. JACKMAN. Thank you, Mr. Chairman.

My name is William Jackman. I am president of Investors League, Inc., with national headquarters at 234 Fifth Avenue, New York, N.Y. The Investors League is a nonprofit, nonpartisan, voluntary membership organization of thousands of individual investors, small and large, residing in every State of the Union.

Mr. Chairman and members of the Committee on Finance, on behalf of our many investor members, I wish to thank you for the privilege of appearing before this committee for the purpose of presenting the viewpoint of American investors on S. 200, Senator Frear's bill to amend the Internal Revenue Code of 1954 so as to provide for nonrecognition of gain or loss upon certain distributions of stock made pursuant to orders enforcing the antitrust laws.

Enactment of S. 200 will correct a serious inequity in our present tax laws.

There are hundreds of business corporations, large and small, which own stock in other business enterprises. Generally speaking, if such companies distribute this stock to their own shareholders, the distribution is considered as a dividend and is taxed as ordinary income.

When legislation in the public interest is enacted which compels corporations to make such stock distributions, imposition of an ordinary income tax thereon is obviously unfair and inequitable and has so been recognized by Congress in several important precedents.

The Public Utility Holding Company Act, passed in 1938, provided such companies divest themselves of subsidiaries in obedience to orders of the Securities and Exchange Commission. Congress promptly took action to declare that such distributions were not taxable as ordinary income.

In 1956 Congress followed this precedent and wrote it into the Bank Holding Company Act to cover involuntary stock distributions arising from that legislation.

The simple principle recognized by such legislation is that there is no "income" involved in simply exchanging one piece of paper for two pieces of paper—that there is no more and no less pie if the pie is merely sliced. To impose a tax on involuntary stock distributions would be no tax on income, but would be a discriminatory confiscation of capital.

Millions of investors, large and small, have placed their savings at risk by ownership of stock of hundreds of corporations which own stock in other corporations. They, nor corporate managements, have any way of knowing when the courts or some Government agency may order such distribution under our antitrust laws.

Antitrust laws have been on our statute books for many years. They seem to be so worded that they can be interpreted quite differently by different public servants at different times. There seems to be no way of telling at what time ownership by a corporation of stock of another company may constitute a "monopoly." Times and conditions change. So do attitudes of courts and enforcement agencies. Certainly the investor, the man whose savings create jobs for other men, should not be left at the mercy of such uncontrollable vagaries.

An important case in point is the Du Pont-General Motors case in which the Justice Department is seeking, among other things, to force Du Pont to distribute to Du Pont shareholders the stock they own in General Motors. The Du Pont Co. is requesting a different approach, but for the purposes of this presentation, let us review what would happen to Du Pont's 200,000 shareholders in the event the Justice Department plan should be ordered into effect:

The Du Pont Co. has owned with immunity for many years 63 million shares of General Motors stock. This is equivalent to 1.38 shares of General Motors stock for each share of Du Pont stock. General Motors stock is now selling around $51 a share. Under present law the holder of Du Pont stock would receive 1.38 shares of General Motors stock now worth around $70, for each share of Du Pont he owns. His ordinary income tax would be from $14 to $63, depending on his tax bracket, for each share of Du Pont he owns. Obviously such a tax could be nothing other than confiscation of capital. It bears no relation whatsoever to the company's earnings.

And mind you, gentlemen, there are over 200,000 direct owners of Du Pont stock, 48,500 of whom are Du Pont rank and file employees. In addition, over 1 million shareholders of investment companies, mutual funds and the like, own nearly one-half million shares of Du Pont.

If S. 200 is not passed, and if the Justice Department plan should become effective, a dangerous precedent will be set that could harm many millions of investors in other companies, as well as Du Pont, which might be required to make such divestments, and create a shocking blow to incentive to invest in corporate industry.

It is unfortunate that Senator Frear's bill is identified in the minds of some people as a bill for the benefit of members of the Du Pont family. There is no mention of Du Pont in S. 200. There has been no court directive yet issued to compel the distribution in this case. S. 200 would apply to all corporations where distributions of stock are made compulsory by court or Government agency edict.

The bill is not designed to prevent dissolution of monopolies. It is designed to protect the interests of the millions of innocent little people whose interests become jeopardized through no fault of their own.

We know the Treasury Department could use the tax money involved but these gentlemen surely must realize that such a collection, even if legal, would be immoral.

We are not here to plead the cause of corporate management as such. We are here soley to ask for equitable treatment for the millions of investor shareowners of American industry from every walk of life whose savings provide the only source of job opportunity for all Americans.

I wish to emphasize the serious inequity that failure to enact promptly S. 200 would impose upon some three-quarters of a million of innocent shareholders of General Motors stock alone.

Under the Justice Department plan, certain Du Pont family-controlled investment corporations would receive in distribution 20 million shares of General Motors which under present law would be taxable at the rate of only 7⁸⁄₁₀ percent. These companies would be compelled by order to sell these 20 million shares of General Motors over a period of years. Many of the other 200,000 stockholders of

Du Pont might have to sell General Motors stock in order to pay their taxes of from 20 percent to 90 percent.

Markets on the stock exchange are governed largely by supply and demand. Reasons why people sell stock are varied. Some may think the stock too high in price. Some might have to sell it to raise cash to buy a home, to pay hospital bills, to pay for college education, to settle an estate, to pay taxes—and for other such reasons. Such sales of General Motors stock last week, for instance, totalled some 190,000 shares which other investors were willing to buy. When we add to this normal trading volume a huge amount of stock that must be sold, the supply becomes much greater than the demand and the tendency is for the market to decline seriously and a lot of innocent holders of General Motors who never owned Du Pont, and for various personal economic reasons had to sell, would be hurt by the lower price they would have to take for their stock.

And just who are these 750,000 shareholders of General Motors? They may be classified approximately as follows:

529,000 individuals (of whom 227,000 are men and 302,000 are women)
139,000 joint tenants
31,000 trusts and estates
1,300 banks and bank nominees
500 brokers
3,800 corporations and partnerships (including mutual investment companies, etc.)
400 insurance companies
200 libraries and cultural organizations
400 fraternal organizations
1,100 churches and religious organizations
400 hosuitals and medical and health organizations
1,100 charitable and benevolent organizations
700 employee benefit funds and trusts
9,700 custodians for minors
30,300 unclassified

Ownership of our major corporations probably follows a similar pattern and we can readily see that when the investors interests are at stake, the welfare of millions of people are at stake and these are the people who as individuals, in one degree or another, provide from their savings, on a part-time basis or otherwise, the capital needed to provide jobs for our vast American working force.

It is gratifying to know that Congressman Fulton of Pennsylvania has introduced in the House of Representatives H.R. 6653, a bill identical to S. 200, which has been referred to the Committee on Ways and Means. This should facilitate speedy passage of this legislation when immediate preventive relief is so badly needed.

Gentlemen, I thank you.

The CHAIRMAN. Thank you, gentlemen for being here. We have obtained a great deal of information.

Senator FREAR. Mr. Chairman, may I ask that the record be held open for a few days in order that Justice and the Treasury Department and any others that may want to bring in material can be permitted to do so.

The CHAIRMAN. Without objection.

The hearing is adjourned.

(By direction of the chairman, the following is made a part of the record:)

WILMINGTON, DEL., *May 28, 1959.*

Hon. J. ALLEN FREAR, Jr.,
U.S. Senator, State of Delaware,
Senate Office Building, Washington, D.C.

DEAR SENATOR FREAR: I am now 75 years old and have been retired 10 years. During 42 years of industrial employment, I endeavored to accumulate shares in growth companies having a diversity of products, such as Du Pont, to insure an income during the twilight of life.

The twilight has come and with it the sad news that my income will be reduced by the contemplated action of the Government taxing as a dividend the shares of General Motors to be returned to me by reason of the Supreme Court's decision that Du Pont must divest itself of the shares of that company.

I consider this proposal unjust and unfair. It is a penalty on thrift, a threat to security in old age, and a severe blow to stockholders, who are not guilty of violating any law.

When I purchased shares in Du Pont, I considered I owned my pro rata share of its assets, including shares of General Motors. If now it is considered unlawful for Du Pont to own General Motors shares, I want my shares of General Motors returned to me, free of tax and without curtailment of any of the voting rights or other privileges of that stock.

If the GM shares are returned to me free of tax, I do not contemplate selling them and I would have the same assets and dividends as I now have in Du Pont shares. If the Tax Department imposes a tax on the spun-off GM shares, I fear I will have to sell Du Pont shares to avoid the heavy tax liability.

At my age it comes hard to contemplate a lifetime plan for security threatened by a confiscatory tax on assets. It is unfair, unjust, and against good public policy.

It is quite simple, Senator. I bought assets; I did not violate the law; I incurred no penalty, and I want my assets returned in full value.

There is precedent, Senator, for this suggested action. In the 1920's we owned shares in the North American Co., and when it, with other firms, was found to have violated the Utilities Holding Act, it was ordered to unscramble its assets. North American returned to us our pro rata share of its assets in the form of shares of stock of the several companies in its portfolio.

There was no tax imposed. The Government considered the transaction a return of assets.

I do not consider that my plea is for special tax relief. There are overriding considerations which make the contemplated taxation bad public policy. While there are over 200,000 Du Pont shareholders, no doubt there are over 1 million shareholders in companies which may be ordered to divest themselves of certain shares as Du Pont has been. The effect would be far reaching and of serious consequences.

It was indeed a pleasure, Senator, to note that you saw the void in the tax law which made the proposed taxation possible. We thank you for your action and commend you for the prompt introduction of remedial legislation. This certainly was an attempt to establish a sound public policy.

Yours truly,

JAMES T. POWER.

SALT LAKE CITY, UTAH, *January 27, 1959.*

Senator FREAR,
Senator from Delaware,
Senate Office Building,
Washington, D.C.

DEAR SENATOR FREAR: I have noted that you have introduced a bill to relieve Du Pont common shareholders from paying income tax on General Motors stock, should it have to be distributed under court order; and as a small stockholder in Du Pont, I should like to thank you and to tell you I think this is very fine.

It would, of course, be very unfair and discriminatory for the Federal Government to tax, as ordinary income, the distribution of General Motors stock to Du Pont shareholders.

It would be as though the Government were taking away from you something that was rightfully yours and, upon giving it back, levying a tax upon something that you already own. The distribution of this General Motors stock is in no sense a windfall.

To cite an analogy, it would be as though the Government were to take a man's automobile away from him and then before giving it back to force him to pay a tax for getting the car back.

The over zealous Federal Government trustbusters cannot really hurt the Du Pont family per se, nor even General Motors or Du Pont corporation; but they could seriously, and unfairly, hurt the small Du Pont shareholder.

I hold 30 shares of Du Pont common stock, and I will say that I worked very hard and saved very faithfully to be able to buy this stock 5 shares at a time. I was frugal and saved my money and went without things—when other people were perhaps squandering theirs—in order that I might have a share in our American free enterprise system.

I am proud to be a small part of a company such as Du Pont which is built upon our American system of free enterprise and free initiative.

It seems very unfair that a small shareowner such as myself—and there are many other thousands just like me—should be unjustly and unfairly penalized for their thrift and for their faith in the American way of life.

Thank you again, and I sincerely hope that your bill shall pass. I know that the many other thousands of small Du Pont stockholders join me in thanking you.

Sincerely,

HOWARD J. TRACY.

FAIRFAX, VA., *April 15, 1959.*

Senator J. ALLEN FREAR, Jr.,
Finance Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR FREAR: Thank you very much for the copy of Senate bill 200, 86th Congress, 1st session, which your staff very kindly forwarded to me at my request.

Many of our citizens are intensely interested in the bill. However, may I take a few minutes to tell you why I am so concerned in the passage of this particular proposal.

My husband is a retired Regular Army officer with almost 40 years of active service including combat duty in World War I, World War II, and the Korean conflict. We are just an average family with two children (8 and 9 years of age, respectively), and we are currently paying for our home in Fairfax County, Va. Our income is my husband's retired pay plus a small income on investments which I inherited by direct transfer from my father's estate. This included 100 shares of Du Pont stock (at 94) plus 50 shares of General Motors stock purchased in September 1953. This GM stock now totals 159 shares by using right of purchase and a stock split. Our sole purpose for having conservative-type stocks and our Government savings bonds is to assure sufficient money for our now small children to receive adequate care and education in case we are not living.

It would be a very excessive tax burden for us to accept by forced court order additional General Motors stock as dividends instead of as long-term capital gains. Further, the potential serious impact on our family's financial situation if this bill does not pass is paralleled by the hundreds of other similar small stockholders who have invested in these same stocks (or mutual funds) over a long period of time purely for the purpose of supplementing their retirement income or whatever social security benefits that may accrue to them.

I hope that Senate bill 200 will become law.

Sincerely,

SARAH A. COLLIER
Mrs. William A. Collier.

WILMINGTON, DEL., *May 22, 1959.*

Subject: Senate bill No. 200.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
U.S. Senate, Washington, D.C.

DEAR SIR: I am writing to request your support of Senator Frear's bill No. 200 which as you know is intended to make possible the distribution of corporate stock investments in antitrust cases, without penalty to the recipients and disruption of the market.

I am 53 years old. My wife and I have worked hard to educate our childre and we must soon face retirement. Most of what we have been able to save i invested in a few shares of Du Pont stock, much of which is pledged as collatera on a loan.

We are not prepared to face the tax penalty or the loss in value resulting fron dumping large blocks of stock on the market. Senator Frear's bill will let us keep our investment and not subject us to losses or tax penalties until we actuall liquidate our holdings.

Congress acted wisely to protect the small investor under similar circumstances in connection with the Bank Holding Company Act (1956) and the Public Utility Holding Company Act (1938). I am sorely reminded of the latter, since it ruine a 15-year career for me in the public utility business, although my investment losses were not severe.

If you could persuade the Congress to grant some mercy to hundreds of thousands of small investors (particularly those of us who are in our twilight years) by passage of Senate bill No. 200, it might facilitate the court's predicament in resolving the Du Pont-General Motors case with justice.

Sincerely,

DEAN C. STEELE.

STATEMENT ON S. 200, 86TH CONGRESS, 1ST SESSION

The Committee on Taxation, the Association of the Bar of the City of New York, New York, N.Y.

Our comments set forth herein are confined to technical aspects of S. 200, as distinguished from matters of policy upon which we express no opinion.

1. The definition of "divested stock" includes at section 1111(d)(2)(D) the unique requirement that the divesting judgment, decree, or order recite that nonrecognition of gain under section 1111 is required in order to reach an equitable judgment, decree, or order. This provision seems undesirable because (*a*) the persons issuing the order, for example, the Federal Trade Commission, may not be qualified to make such determination; and (*b*) the statute provides no standards to serve as a guide for the determination of whether the judgment, decree, or order is equitable. Elimination of the provision need not remove all protection in view of section 1111(a)(3), discussed in the next succeeding paragraph.

2. Section 1111(a)(3) provides that section 1111(a)(1) shall be inapplicable if one of the principal purposes of the "transaction" is tax avoidance. By the reference to section 1111(a)(1), which relates to the distribution, the word "transaction" may be interpreted to refer only to the distribution of the divested stock rather than its acquisition, even in cases in which a divesting order might have been contemplated at the time of the acquisition. Although we are not advancing a recommendation on the policy question, we assume that careful consideration will be given to whether the acquisition or the distribution should be the significant tax avoidance factor. On the one hand, a corporation may invest its earnings and profits in an acquisition with the thought that a divesting order may permit it to make a distribution in kind to ts shareholders; here, the acqusition has a tax avoidance purpose. On the other hand, where a corporation has made an acquisition for entirely sound business reasons, and the divesting order requires either a sale or a distribution to shareholders, the corporation's decision to distribute to shareholders may be primarily tax motivated. The bill and the committee report should carefully describe the transactions which are intended to be tax free and those to which tax freedom is to be denied to prevent tax avoidance.

3. If the purpose of the distribution alone is to be significant, we wish to note that section 1111(a)(3) omits the following language of section 355(a)(1)(B) of the 1954 Internal Revenue Code: "(but the mere fact that subsequent to the distribution stock or securities in one or more of such corporations are sold or exchanged by all or some of the distributees * * * shall not be construed to mean that the transaction was used principally as such a device)."

We are not sure whether the absence of this language in section 1111(a)(3) is intended to have any significance. Consideration should be given to adding the language of code section 355(a)(1)(B) to the bill, or to stating in the committee report that it is not intended to be included.

Section 1111(a)(3) substitutes for the language quoted from code section 355(a)(1)(B) a clause stating that the mere existence of earnings and profits

shall not be determinative. Presumably, although this is not entirely clear, the reference is to the existence of earnings and profits at the time of the distribution. This should be clarified; moreover, the committee report might well state that the inclusion of this parenthetical clause creates no inference to the contrary in code section 355.

4. The bill makes no provision for a tax-free exchange at the corporate level. This could be significant where the divested property is other than stock. Consideration should be given to whether it would be desirable to permit a tax-free exchange of the property for stock or, possibly, securities in another corporation not controlled by the transferor. Such a provision appears in section 1081 (relating to exchanges or distributions in obedience to SEC orders), which is even broader in permitting tax-free exchanges of property for other property. If such a provision is adopted here, consideration might also be given to whether it should be elective.

5. Section 1111 is also inapplicable to the situation where property other than stock is distributed. While a property distribution may be an unusual situation, there may be situations where the distributing corporation is required to divest itself of convertible debentures or warrants, either with or without stock. Or it may be desirable to distribute stock and debentures of a corporation in exchange for stock and debentures of the distributing corporation. Such a broadening of the bill to permit a tax-free distribution in such cases would be consistent with the policy and the provisions of code section 355.

6. The bill contains no provisions dealing with "boot," i.e., a distribution of property other than that permitted to be distributed tax free. It is not clear what policy reasons there are against treating such a distribution of "boot" in the same manner as is provided in code section 356. If there are none, it is suggested that this should be accomplished by a reference to section 1111 in section 356 with a cross-reference to section 356 at the end of section 1111.

7. The definition of controlled corporation in section 1111(c)(2) does not indicate how long control must antedate the distribution. Compare section 355(a)(1), which refers to control immediately before the distribution. The language of section 355(a)(1) should be brought over to section 1111(c) in order to cover the case in which the distributing corporation newly incorporates a particular business in order to distribute the stock of the new corporation. This would permit, among other things, appropriate allocation of earnings and profits in such a case.

8. Section 1111(b)(1) refers to suits or other proceedings brought by the United States or an authorized Commission or Board under the "Sherman Act * * * and the Clayton Act." Since antitrust suits or proceedings are sometimes brought exclusively under one of the two acts, the reference should be to the Sherman Act, the Clayton Act, or both.

9. Several changes are recommended in the interest of achieving drafting uniformity:

(*a*) Section 1111(a)(1) provides for nonrecognition of gain or loss and noninclusion in income in the case of defined divestments. It thus covers cases in which, in the absence of the provision, gain or loss would be recognized on a distribution which is treated as an exchange and also cases in which a distribution would otherwise be taxed as a dividend. However, section 1111(b) refers only to cases in which gain or loss is not recognized, and section 1111(d)(1)(D) only to nonrecognition of gain. If the latter provisions are retained (see our comments in pars. 2 and 10(b)), they could be more closeely geared to the language of section 1111(a)(1).

(*b*) With one exception, the words "distributed," "distribution," and "distributing" are used to describe the transactions to be covered. However, section 1111(c)(1) refers to a "distribution or exchange." Consistency would require that the words "or exchange" be eliminated.

10. Several provisions of the bill would seem to require amendment of other provisions of the Internal Revenue Code in order to incorporate those provisions and integrate section 1111 into the code:

(*a*) Section 1111(c)(2) is the same definition of control as appears in code section 368(c). It is suggested that code section 368(c) be amended to include a reference to section 1111(c)(1), that section 1111(c)(2) be eliminated, and that a cross-reference to code section 368(c) be added at the end of section 1111.

(*b*) Section 1111(b), relating to basis of property acquired in distributions, is the same rule as is provided in code section 358. It is suggested that code section 358 be amended to include a reference to section 1111, that section 1111

(b) be eliminated, and that a cross reference to code section 358 be added . the end of section 1111.

(c) Section 1111(c), relating to allocation of earnings and profits, is the sam rule as is provided in code section 312(i) in the case of section 355 distribution However, in the case of section 1111 distributions, the allocation is to be mad only w. re the stock to be divested constitutes stock of a "controlled" corpor tion. It is suggested that code section 312(i) be amended to include a referenc to section 1111 "in the case of a distribution or exchange of stock in a controlle corporation", that section 1111(c) be eliminated, and that a cross-reference t code sec. 312(i) be added at the end of section 1111. (If this suggestion ' adopted, our suggestions in par. 10(a) above could be disregarded, because cod sec. 368(c) is by its terms applicable to code sec. 312.)

11. Section 1111(a)(4), relating to a distribution involving gift or compensa tion, should be eliminated and restated merely as a cross-reference in the sam manner as is done in code section 351.

12. Section 3 of the bill would make the amendments applicable with respect t distributions made after June 1, 1958. However, section 1111(d)(2) would, in defining the term "divested stock," limit the application of the amendments t distributions pursuant to judgments, decrees, or orders entered after June 1, 1958. With respect to these effective date provisions, the following suggestions are made:

(a) The reference to the effective date should be eliminated from section 1111(d)(2) and section 3 of the bill made the only effective date provision. In this connection, it should be decided whether the date of the distribution or th date of the judgment, decree or order should be controlling, but there should be no need to refer to both. The best drafting technique would be to make the amendments applicable only with respect to taxable years ending after June 1, 1958 (or whatever substitute date is finally adopted), but only with respect to distributions made after that date (or to judgments, decrees, or orders entered after that date if the date of entry is to be the criterion).

(b) If the bill is to be made retroactive to June 1, 1958, or to some other past date, its retroactive application may adversely affect the tax consequences of transactions which have already taken place, including transactions in closed years. For example, the bill might deny the recognition of loss in a past distribution, or it might deny an attractive intercorporate dividends received deduction. In other cases, it might remove a gain transaction from a loss period and postpone it to a subsequent profit period. For this reason, we recommend that it should be elective with respect to distributions made after the effective date but prior to the date of enactment.

Respectfully submitted.

James B Lewis, Chairman, D. Nelson Adams, R. Palmer Baker, Jr., William L. Cary, John F. Costelloe, Henry W. de Kosmian, Victor E. Ferrall, Richard H. Garner, Francis A. Goodhue, Jr, Maurice C. Greenbaum, Richard Kilcullen, Daniel C. Knickerbocker, Jr., Saul Duff Kronovet, William B. Landis, Jr., O. Carlysle McCandless, Winthrop R. Munyan, James P. Murtagh, Richard G. Powell, James Q. Riordan, Sidney L. Roberts, Donald Schapiro, Secretary, Gerald Silbert.

Dated: June 3, 1959.

JERSEY CITY, N.J.,
March 23, 1959.

HON. CLIFFORD P. CASE,
Senate Office Building,
Washington, D.C.

DEAR SENATOR CASE: Thank you for your letter of March 17, regarding the Frear bill (S. 200) to make involuntary distributions of property nontaxable. I am gratified to learn that you intend to make a careful study of it.

This bill means a great deal to me. I am approaching compulsory retirement in abo... 6 months and it just happens that my retirement investments are centered in Du Pont and General Motors stocks. I shall need all the investment income I can get just to meet the demands of daily living.

The Government could not have found a better way to destroy the security of my retirement. If its plan for the sale and distribution of 63 million shares of General Motors stock over a 10-year period were adopted, I would be forced to sell 75 percent of my Du Pont stock to avoid having part of my investment returned to me as a taxable dividend. It is expected by experts that about

7 million shares of Du Pont would be sold for this and similar reasons, so I would have to work fast even to get my cost out of it before the price declined.

My General Motors investment would be hit even harder. If I held on to it, the general opinion is that I could reasonably expect that the price would be depressed for 10 years. This is two-thirds of my expected life at age 65. If I sold it I would have to pay a capital gains tax out of the proceeds, thus reducing my future dividends and growth of investment.

The sale of either or both stocks would solve little for then I would face the almost insoluble problem of what to buy and when. What was a good investment in 1956, 1955, or 1957 is not necessarily a good investment in 1959 and a mistake can seldom be retrieved. For example, the price of General Electric stock did not recover its 1929 price for 25 years; American Telephone & Telegraph is still 70 points below its 1929 high. There are many similar cases.

The Frear bill only lets me keep what I already own. Since it has already been done in certain other involuntary distributions, this sets no precedent.

Sincerely,

HENRY L. PAYTE.

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS,
New York, N.Y., June 2, 1959.

Hon. HARRY FLOOD BYRD,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

DEAR SENATOR BYRD: We are writing to furnish your committee with our views on S. 200 which would permite a tax-free distribution of stock to shareholders when such distribution is made pursuant to an order enforcing the antitrust laws. We believe that the bill should be reported favorably.

At this time, a distribution made pursuant to an order enforcing the Sherman Act or the Clayton Act receives no special consideration for income tax purposes and its tax effects are determined generally under section 301 of the Internal Revenue Code. Unless the distribution qualifies under the strict requirements of section 355, the shareholder receiving the stock may have to pay tax computed as ordinary income rates on the fair value of the stock received.

In many instances, this results in a penalty on those shareholders who were passive participants in the activities which gave rise to the court order. Most stockholders in the modern publicly held corporation which has run afoul of the antitrust laws do not actively participate in setting corporate policy. These policies are set by the management of the corporation. While it is true that management continues in office at the sufferance of the shareholder, it is difficult to believe that the millions of individuals who own a few shares of common stock are actively reviewing corporate policy and on the alert for possible violations of Federal antitrust laws.

In view of the complexity of those laws, it is unreasonable to suggest that this inactivity of shareholders is improper. The antitrust laws are stated in fairly broad terms and it is quite difficult to determine that an act will be a violation in the absence of a specific precedent. Undoubtedly the increased use of the consent decree reflects this uncertainty in the meaning of the law on the part of all parties concerned in an antitrust proceeding. If the active participants have difficulty in interpreting the law, the average shareholder cannot be blamed for his acquiescence in management's activities which may give rise to an antitrust order.

The antitrust laws already have provisions for the assessment of damages and fines for violations. The present income tax treatment of distributions pursuant to an antitrust order has the effect of imposing an additional charge for a violation of the law and in amounts that vary in importance depending on the circumstance in each case. If it is believed that the present provisions for damages and fines which may be imposed for antitrust violations are insufficient, then these provisions should be strengthened.

Congress has recognized the desirability of postponing the tax consequences in several other situations where a taxpayer is required to dispose of property as a result of governmental action. The nonrecognition of gain or loss in the case of a distribution of stock made pursuant to an antitrust order would be consistent with the policies expressed in a number of other provisions of the Internal Revenue Code.

For example, the Federal Communications Commission is empowered to require the disposition of property in order to carry out its policies. Under such

circumstances, section 1071 provides for the nonrecognition of gain which ma; be realized. Until recently it was possible for taxpayers to use this provisio so as to receive an unintended benefit. Thus, taxpayers who deliberately vio lated the law were able to obtain a tax advantage. While this was not desir able, the basic policy underlying the provision was appropriate. An amend ment made by the Technical Amendments Acts of 1958 (Public Law 85-866 sec. 48) was directed at this problem in order to make 1071 available only t the innocent taxpayer who has not deliberately violated the law.

In a similar manner, the tax relief which is provided by S. 200 would not b available to corporations which deliberately violate the antitrust laws. Pro posed section 1111(d)(2)(D) of the bill makes it clear that the order whic requires the distribution also must recommend the nonrecognition of gain. It is doubtful that such a recommendation would be made where the court did no consider it appropriate under the facts and circumstances of the case. This would seem to provide adequate protection against a rash of corporate acquisi tions and at the same time would permit a greater degree of equity than would a statutory presumption based upon the length of the holding period of the property distributed. This would facilitate enforcement of the antitrust law and encourage speedy settlement of cases.

There are additional situations under the Internal Revenue Code which sup port the view that S. 200 is consistent with previously expressed congressional policies. The Securities and Exchange Commission may order a sale, exchange or distribution of stock in order to simplify a public utility holding company system. The exchanges and distributions which would be necessary to comply with such an order are compulsory rather than voluntary and Congress has pro vided in section 1081 that no gain or loss shall be recognized under such circumstances.

Section 1101 is another illustration. Under the Bank Holding Company Act of 1956 ownership or control of nonbanking companies generally is prohibited. The Board of Governors of the Federal Reserve System is permitted to certify that a distribution of stock in a nonbanking company has been made in order to carry out this requirement of the Bank Holding Company Act. In this event, gain to the shareholder is not recognized.

We respectfully urge that your committee report favorably on S. 200.

Respectfully,

WALLACE M. JENSEN,
General Chairman, Committee on Federal Taxation.
THOMAS J. GRAVES,
Chairman, Subcommittee on Determination of Taxable Income.
LESLIE MILLS,
Chairman, Subcommittee on Corporations and Stockholders.

NEW YORK, N.Y., *May 15, 1959.*

Hon. HARRY BYRD,
Senate Finance Committee, Washington, D.C.

DEAR SENATOR BYRD: While attendance at annual meetings, representing as a public duty without compensation, independent shareholders will keep me from the hearings on the Frear bill for the relief of shareholders when antitrust decrees are involved, I ask that my comments be noted on the record of the hearings of May 26 and 27.

While we often disagree at these meetings with the Du Pont management on many issues, such as executive compensation, the absence of the right of cumulative voting, insufficient option protection, etc., on this issue the public shareholder interest and corporate democracy alike can only benefit from the enactment of such legislation.

Anything which encourages the passing of stock into the hands of the public citizens instead of in compact blocks of voting control should be encouraged by the Congress.

The precedent of the Utility Holding Company Act legislation is an excellent one to serve as a model and this measure asked for by Senator Frear most certainly will accomplish not only at Du Pont but when it happens elsewhere.

Thank you for your courtesy in inserting this letter into the public record of the hearings.

Sincerely yours,

LEWIS D. GILBERT.

DENVER, COLO., *May 18, 1959.*

Re Frear bill

HON. HARRY FLOOD BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

MY DEAR SENATOR BYRD: I would like to present this letter in support of the above bill on which hearings have been scheduled on May 26 and 27.

Some of the reasons why the bill should be passed are outlined in a letter I addressed to the Wall Street Journal, as per copy attached.

Disregarding a number of devious reasons for and against the bill, your committee should not lose sight of the simple arithmetic involved.

Even if he receives another piece of paper in the form of a General Motors stock certificate, a Du Pont stockholder will be in exactly the same position in which he was before. He has two pieces of paper instead of one, representing the same equity. No gain will be realized until stock of either Du Pont or General Motors has been sold. Why should income tax be paid on the mere receipt of a piece of paper, as long as there is neither an increase in the underlying equity, nor a gain measurable in money?

I would appreciate your making my representations a part of your record. I am a small stockholder owning five shares of Du Pont stock. I am not asking for the General Motors stock certificate. But if it is sent to me and my equity in my Du Pont stock is reduced correspondingly, it would be most unfair if I were taxed as long as I am still holding the same equity and have not realized any capital gain or other money income.

Very sincerely yours,

HERBERT V. MUELLER.

DENVER, COLO., *May 18, 1959.*

EDITOR, THE WALL STREET JOURNAL: I am a small stockholder of Du Pont Co., owning five shares. As such I read with considerable interest your Washington report (your May 15 issue) on the hearings scheduled by the Senate Finance Committee on the bill sponsored by Senator Frear "to give tax relief to persons receiving stock under an antitrust divestiture decree."

While it is conceded that the tax burden on Du Pont stockholders in the event of a G.M. stock distribution would be severe under present income tax rulings, it is stated that the Frear bill (which would exempt a stockholder from income tax on the G.M. stock received until he sells it) "faces a rough road."

The arguments against the bill seem far fetched and inequitable in the extreme. As a simple matter of arithmetic, why should I pay a tax on the receipt of an additional piece of paper? If a G.M. stock certificate is distributed to me as a stockholder of Du Pont, the value of my equity has not increased by one penny. I merely hold two stock certificates instead of one, and the two together will be equal in value to the former one certificate.

Nobody objects to the payment of an income tax on capital gain realized. But as long as I do not wish to sell either the Du Pont stock, or the G.M. stock, no gain has been realized.

It is stated that "Du Pont has violated the Federal antitrust laws," so its stockholders must be punished. Considering the complexity of the problems involved in most antitrust suits of this nature, such "violation" of the law as determined by the court is at best a technical one, and not an intentional one calling for punishment.

It is also stated that some Senators fear the political consequences of supporting a bill that could be interpreted as designed primarily to give relief to some of the Nation's largest concerns. Of course everything can be misinterpreted by anyone at any time. But a bill that merely postpones income tax liability of a small stockholder until he has realized a gain from the sale of his equity can hardly be correctly interpreted as giving tax relief to either Du Pont or G.M.

Very truly yours,

HERBERT V. MUELLER.

COMMERCE AND INDUSTRY ASSOCIATION OF NEW YORK, INC.,
New York, N.Y., June 9, 1959.

Re S. 200—Frear approved

HON. HARRY FLOOD BYRD,
Chairman, Committee on Finance, U.S. Senate, Washington, D.C.

DEAR SENATOR BYRD: Commerce and Industry Association has reviewed and approves S. 200, which would provide for a deferment of taxes payable by

stockholders with respect to distributions of stock in compliance with cour mandate in an antitrust case, and we request that this letter be included in the record of the public hearings on the measure which your committee opened on May 26.

The bill would alleviate the tax impact of a final decision in an antitrust case, such as the recent Du Pont case, requiring one corporation to dispose of stock held by it in another. Under present law, if the defendant corporation is ordered to sell the stock the corporation may realize a taxable gain, and if the defendant corporation is ordered to distribute the stock to its stockholders, the stockholders will receive a taxable dividend.

These adverse tax results follow even though the transaction is involuntary and ordered by the court. Furthermore, so far as the stockholder receiving such a distribution is concerned, he has not received an ordinary dividend but has been forced to split his original investment in the stock of defendant A into an investment in the stock of corporations A and B.

The bill would permit stockholders of such a defendant in an antitrust case to receive a distribution of stock ordered by the court without being treated as a dividend for tax purposes. It would require them (the stockholders) to divide the cost of their investment between the old stock and the stock distributed, thus deferring any accounting for gain or loss until one stock or the other was sold. The bill would not permit the defendant corporation to sell such stock without paying a tax on the gain. The amendment would apply only to stock distributions ordered by the court in antitrust cases and would not apply to a transaction in which one of the principal purposes is the distribution of corporate earnings.

The merit of the bill is that it would avoid imposing large tax liabilities on stockholders of such a defendant corporation because of an involuntary transaction pursuant to court decree and would recognize that, as a practical matter, such stock distribution does not amount to the receipt of dividend income but is, in substance, a mere division of a continuing investment.

For the foregoing reasons Commerce and Industry Association approves S. 200 in form and principle and urges your favorable action.

Sincerely,

THOMAS JEFFERSON MILEY,
Executive Vice President.

(Whereupon, at 5:20 p.m., the committee adjourned subject to the call of the Chair.)

×