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.

713

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

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
JOHN F. DAVIS,
Assistant to the Solicitor General,
VICTOR H. KRAMER,
MARGARET H. BRASS,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (R. 289-466), is reported at 126 F. Supp. 235.

JURISDICTION

This suit was brought under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 4), and Section 15 of the Act of October 15, 1914, 38 Stat. 730, as amended (15 U.S.C. 25).

The judgment of the district court was entered on December 9, 1954 (R. 466-467), and the notice of appeal

was filed in that court on February 4, 1955 (R. 467-474). This Court noted probable jurisdiction of the appeal on October 10, 1955 (R. 474). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U.S.C. 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTIONS PRESENTED

1. Whether, on the facts found by the court below, E. I. du Pont de Nemours and Company controls General Motors Corporation through its stockholdings, amounting at all times since 1918 to at least 23%, in view of the understandings at the time of acquisition, the subsequent history of interlocking directorships and intercorporate relationships, and the wide distribution of the remainder of the stock.

2. Whether, irrespective of absolute control, there is an absence of arm's-length bargaining between du Pont and General Motors which induces illegal preferential treatment of du Pont over its competitors.

3. Whether the relationship between du Pont and General Motors, whether control or an absence of arm's-length bargaining, is a combination to restrain or to monopolize interstate trade in violation of Sections 1 and 2 of the Sherman Act.

4. Whether du Pont's acquisition of General Motors' stock violates the provisions of Section 7 of the Clayton Act forbidding stock acquisitions which may result in restraint of commerce or tend to create a monopoly.

STATUTES INVOLVED

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

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

The pertinent provision of Section 7 (as it read at the time the complaint was filed) of the Act of October 15, 1914, 38 Stat. 730 (15 U.S.C. [1946 ed.] 18), commonly known as the Clayton Act, are as follows:

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

STATEMENT

Nature of the Case and Proceedings Below

This is a civil suit instituted by the United States under Section 4 of the Sherman Act and Section 15 of the Clayton Act to enjoin alleged violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

The amended complaint (R. 191-264), so far as pertinent to the issues on appeal, [1] 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 these charges.

The case was tried before Judge Walter J. LaBuy from November 1952 until June 1953. Briefing and

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[1] The complaint was originally filed on June 30, 1949 (R. 37). It was amended on July 28, 1952 (R. 157), and again on January 16, 1953 (R. 180). In the earlier stages of the case, in addition to E. I. du Pont de Nemours and Company and General Motors Corporation, there were named as defendants, United States Rubber Company, various members of the du Pont family and three corporations through which it was alleged control over the manufacturing defendants was exercised (R. 38-40, 158-165). Many of the individuals were dropped from the case by the final amendment of the complaint before trial (R. 195-211). The United States has not asked for review of that part of the decision below finding no violation of the antitrust laws with respect to United States Rubber.

argument before the district court was completed in December 1953. The court's opinion finding against the Government on all charges issued on December 3, 1954, and an order dismissing the complaint was entered on December 9, 1954.

Du Pont's acquisition of stock in General Motors

The du Pont Company at the time of suit and for many years before that held 10,000,000 of the 44,000,000 outstanding shares of General Motors common stock (GTX 1307, R. 664, 5230).[2] The circumstances under which this holding was acquired are important to the issues of this case. As will be detailed below, at the time of original acquisition in 1918 Mr. William C. Durant, President of General Motors, was unquestionably in control of that company, holding through the agency of the Chevrolet Motor Company 450,000 out of 825,000 outstanding shares (GTX 122, 478, 3203, GTX 124, p. 6, R. 479, 3215). Mr. Durant agreed that du Pont should originally buy $25,000,000 of General Motors stock (later $50,000,000) and that the two should jointly control General Motors (GTX 124, R. 479, 3221: "With Mr. Durant we will have joint control of the companies.") Later in November 1920, du Pont bought out Mr. Durant's interest and contemporaneously acknowledged its control (GTX 1304, R. 664, 5225). At this time the percentage of outstanding shares held by du Pont reached its highest point (38%) and it was able to revamp the entire management. Du Pont retained

[2] GTX will be used to designate Government exhibits, DP for du Pont's, and GM for General Motors'. The record references which follow the numbers of the exhibits are first to the page where the exhibit was offered and then to the page where it appears in the Record.

the right to vote this stock until 1930 when it commenced a distribution of part of the stock to officers and directors of General Motors in the form of bonuses, a program completed in 1938 (GTX 273, R. 499, 3640). Since 1939 it has held about 23%. None of these essential facts is in dispute and most are specifically found by the court below (R. 297-306).

The significant details are as follows:

General Motors Company was organized in 1908 by Mr. William C. Durant, who had entered the automobile business in 1905 by forming the Buick Company. General Motors was a holding company for Buick, Oldsmobile, Cadillac, Oakland and others (GTX 124, R. 479, 3212; R. 797). In 1910, in connection with new financing, controlling stock was placed in a voting trust for 5 years and Mr. Durant stepped out as president in favor of Mr. C. W. Nash (GTX 124, R. 479, 3213; R. 797).

It was during this period that members of the du Pont management individually acquired their first interest in General Motors. Mr. Pierre S. du Pont, then President of the du Pont Company, purchased 2,005 shares for $135,092 in 1914 and 230 for $73,460 in 1915, a total of $208,552. (In 1916 and 1917, he increased his investment in General Motors and Chevrolet to a total of $2,003,814 (GTX 114, R. 477, 3188)). Mr. Irenee du Pont's net investment was 300 shares for $20,058.33. (By the end of 1917 he purchased additional Chevrolet stock bringing his investment up to $35,747.22.) (GTX 115, R. 477, 3189). Mr. John J. Raskob, Treasurer of du Pont, held a little less than 1,200 shares but the record does not show the amount of his investment (if

it were comparable to Mr. Pierre S. du Pont's, it would have been about $110,000) (GTX 120, R. 478, 3200).

At the termination of the voting trust in 1915, doubt existed as to whether Mr. Durant or the investment bankers controlled General Motors. Mr. Durant had formed Chevrolet and had been busy buying up General Motors stock (GTX 124, R. 479, 3214-3215; R. 803). At a meeting of the bankers and Mr. Durant in September, 1915, attended by Mr. Pierre du Pont and Mr. Raskob, it was agreed that Mr. du Pont, who was still President of du Pont, should become Chairman of the Board of General Motors, and should nominate as neutral directors three other men (GTX 116, R. 478, 3190). He selected Mr. Lammot Belin, his brother-in-law, Mr. John J. Raskob, Treasurer of du Pont, and Mr. J. A. Haskell, Director and Vice President of du Pont (GTX 116, R. 478, 3190; GTX 124, R. 479, 3213). Thereafter, in 1916, Mr. Durant, through Chevrolet, acquired a clear majority, 450,000 of the outstanding 825,000 shares of General Motors stock and in that year again took over the presidency (GTX 124, R. 479, 3215). The present General Motors Corporation was substituted for the General Motors Company in August 1917 (R. 806-7) and in that month both Mr. Pierre S. du Pont and Mr. John J. Raskob became members of the five-man Finance Committee (GTX 123, R. 478, 3205).

At that particular time the du Pont Company had a large sum of money it desired to invest. It had expanded its powder business many-fold because of the demands of World War I. Thus its capital structure had been doubled (DPX 76, p. 3, R. 782, 5780) by retention of part of its wartime profits of $232,000,000 (An-

swer of du Pont, Par. 38, R. 116). In 1917 its directors foresaw the necessity of finding some use for the increased capital, other than the explosives business which of necessity would diminish at the end of the war. Either the profits had to be distributed and the company revert to its prewar size or some new use for the capital had to be found in order to maintain dividends. Some $90,000,000 was involved of which $40,000,000 was invested in acquisition of companies manufacturing paints and varnishes, dyestuffs, organic chemicals and heavy chemicals (GTX 113, R. 477, 3156; GTX 124, R. 479, 3212). Du Pont had branched out into artificial leather through purchase of the Fabrikoid Company in 1910 (GTX 106, R. 476, 3062), and celluloid through purchase of the Arlington Company (GTX 109, R. 476, 3119; GTX 110, R. 476, 3120), and rubber coated fabrics through purchase of Fairfield Co. in 1916 (GTX 106, R. 476, 3062; GTX 107, R. 476, 3079). In 1917, it made large investments in Harrison Brothers, a paint and varnish manufacturer (GTX 113, R. 477, 3156).

At this juncture, Mr. Durant, president and controlling stockholder of General Motors, urged that the du Ponts substantially increase their investment (GTX 124, R. 479, 3215-6). In response Mr. Raskob, Treasurer of du Pont, worked out with Mr. Durant the acquisition of options on some 223,000 shares of General Motors stock (or its equivalent in stock of the then controlling company, Chevrolet) (GTX 124, R. 479, 3217). In collaboration with Mr. Pierre S. du Pont, President of du Pont (R. 922-925), Mr. Raskob drew up a prospectus for submission to the Finance Committee of du Pont and its directors, proposing the purchase of those 223,000 shares, plus 50,000 additional, the total to cost

about $25,000,000 (GTX 124, R. 479, 3208). It was contemplated that this purchase would put du Pont and Mr. Durant in joint control of General Motors. Mr. Raskob's report stated (GTX 124, R. 479, 3217-3222):

> The total outstanding voting stock of the enlarged General Motors Company would be approximately 1,080,000 shares, 50% or control of which would require ownership of 540,000 shares. With the above purchases, control could be summarized as follows:

Durant	280,000 shares
Du Pont	223,000 "
Total	503,000 "
Additional stock to be bought by Du Pont to make our investment $25,000,000.00, say	50,000 "
	553,000 "
Stock held by Wilmington people and Du Pont friends approximately	100,000 "
Total	653,000 shares

* * * * *

Summary

> Summarizing the above we have an opportunity to make a substantial investment in the motor industry with the following points in favor thereof:
>
> 1. With Mr. Durant we will have joint control of the companies.
>
> 2. We are immediately to assume charge and be responsible for the financial operation of the Company. This involves the direction of cash balances which will aggregate upwards of $25,000,000.00 and the handling of annual gross receipts aggregating $350,000,000.00 to $400,000,000.00. From a financial standpoint, I feel that a consolidation of the financial divisions of the Du Pont and General

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

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

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

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

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 Motors 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.

> During the past two years our Company has been doing big things. After the war it seems to me it will be absolutely impossible for us to drop back to being a little company again and to prevent that we must look for opportunities, know them when we see them and act with courage. If our fundamentals are sound, as they certainly seem to be in this case, the control of the General Motors Company will be a task worthy of the best there is in us and will I feel afford many opportunities to keep our important men occupied with big things after the war.

This purchase was approved by the Executive Committee and the Finance Committee on December 20, 1917 (GTX 126, R. 479, 3229) and by the Board of Directors on December 21, 1917 (DP 47, R. 817, 5616). The purchase was thereupon carried through and du Pont acquired 97,875 shares of General Motors and 133,690 shares of Chevrolet (GTX 128, R. 481, 3234).

Under an exchange plan between General Motors and Chevrolet, the Chevrolet stock turned out to be worth 1-1/7 shares of General Motors, totalling 152,788 —making du Pont's holdings 250,663 shares or 23.83% of the 1,047,417 shares outstanding (GTX 128, R. 481, 3235). Additional purchases in 1918 and 1919 brought the total up to 440,898 shares at a cost of $48,758,253 and a 28.74% holding of the stock (GTX 166, R. 483, 3380).

Immediately following the $25,000,000 investment in 1918, du Pont moved into the management. Mr. Raskob wrote to Mr. Durant making plans for an announce-

ment of the new "partnership" to the banking world, and suggesting the addition of Messrs. Barksdale, Irenee du Pont and H. F. du Pont to the Board of Directors (GTX 129, R. 479, 3244). On February 21, 1918, Mr. Irenee du Pont and Mr. Henry F. du Pont were in fact elected to the General Motors board (GTX 130, R. 479, 3247). Mr. Barksdale, a du Pont officer who had been on the board of Chevrolet (GTX 128, R. 481, 3238), was elected to the General Motors board in June of 1918 (GTX 133, R. 479, 3257). Mr. Haskell was elected to the Executive Committee and a Finance Committee of seven was picked with du Pont men holding five seats (GTX 130, R. 479, 3247). In March of 1918, Mr. Raskob reported to the Finance Committee of du Pont (GTX 128, R. 481, 3239):

> The financial management of General Motors Corporation is thrown very largely up to us and plans are under way to bring us into intimate contact with that end of the business.
>
> Through our connection on the Executive Committee we will be in close contact with the operating and sales end of the business.

The 1918 annual report of the du Pont Company states (GTX 125, R. 479, 3228):

> . . . . The interest of certain officers of the company in the motor field was engaged for many months prior to the making of an investment by the company. While there is no immediate relation between the explosive industry and the manufacture of motors, this investment was made in such a way as to give opportunity for our financial organization to be of service, and at the same time

increase greatly our financial strength. The large engineering and construction forces of our company, the development, legal and accounting department facilities, coupled with the demands of the motor industry for talent of that kind, has furnished a connecting link which seems desirable in all investments. The consumption of paints, varnishes and fabrikoid in the manufacture of automobiles gives another common interest. In entering this field it was necessary to make investment in a thoroughly developed property. This has been found in the General Motors Corporation, already equipped in a most thorough manner with technical men of experience for the proper conduct of its business. The officers of E. I. du Pont de Nemours & Company are fortunate in having secured a 27.6% interest in this corporation, as it now stands equipped with factories for producing all kinds of cars, tractors and trucks, together with the greater part of the accessories needed in their manufacture. We feel fortunate also in our partnership with Mr. William C. Durant, President of the General Motors Corporation, and the father and leader of the motor industry, not only in the United States but in the world. This alliance leaves the management and general conduct of the General Motors Corporation as heretofore, except that the responsibility for financial management is now shared by the officers of our company. The general function of the Du Pont interests is advisory only, though already there has sprung up an intimacy between the organizations that promises great benefit through the exchange of facilities and use

> of important men for specific duties to which they are particularly well adapted. [pp. 22-23]

It was during this period, early in the relationship, that Mr. Alfred P. Sloan, Jr. entered the picture. He was president of United Motors, an amalgamation of several manufacturers of automotive parts, which was allied with Durant or General Motors in some undefined way though not through stock ownership (GTX 124, p. 7, R. 479, 3216; GTX 132, R. 479, 3254). In the fall of 1918 he became vice president of General Motors and a member of the board of directors (GTX 177, R. 492, 3397).

It was in 1920, after J. P. Morgan & Company had participated in some new financing, taking up some 600,000 shares, that Mr. Stettinius a partner in J. P. Morgan & Comany, wrote to Mr. Pierre S. du Pont (GTX 145, R. 483, 3327):

> I need not tell you that however attractive General Motors may have been to us, it would not have received the support we have given it had it not been for your active connection with and interest in the Company.

It was discovered in November of 1920 that Mr. Durant was deeply in debt to brokers in the amount of $27,000,000 on margin accounts for which he had pledged his holdings of General Motors stock (2,600,000 shares) and also some 1,300,000 shares borrowed from du Pont (DP 50, R. 827, 5268). It appears that the stock had been declining on the market, that attempts by J. P. Morgan & Company to stabilize the market had failed and that Mr. Durant had overextended his resources in a vain attempt to maintain the market price (DP 50, R. 827, 5628). Writing on November 26, 1920, a

short time after these events occurred, Mr. Pierre S. du Pont described the almost frenzied activity which attended the formation of a corporation sponsored by du Pont and Morgan to issue $20,000,000 of bonds to redeem Mr. Durant's stock (DP 50, R. 827, 5628). In the end du Pont put up $7,000,000 additional cash, pledged some of its stock and credit and ended up in control of Mr. Durant's 2,600,000 shares at a cost of $20,000,000 (GTX 166, R. 483, 3375). (The agreement to take over this stock is found in GTX 154, R. 481, 3329.) The next year (1921) du Pont issued $35,000,000 of its own bonds to finance the purchase (GTX 166, pp. 12-13, R. 483, 3386-7). Du Pont then held 7,362,540 shares of General Motors, representing 35.8% of the total outstanding stock, at a cost of $75,581,259 (GTX 166, p. 15, R. 483, 3389).

Thus the "partners in ownership of General Motors stock" (DP 50, R. 827, 5628) ceased to be such and du Pont's Annual Report for 1920 (GTX 1304, R. 664, 5225) stated:

> During the latter part of November last, Mr. W. C. Durant, then President of the General Motors Corporation, requested that *we take over the management and control* of that corporation, advising that he desired to resign and sell his interest in the corporation in order to liquidate his personal indebtedness, which was very large and pressing. [Italics supplied]

As du Pont itself stated in its brief before the court below (p. 332):

> Unquestionably, 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.

Summarizing these events in a memorandum written in 1923, Mr. Raskob stated (GTX 235, p. 2, R. 483, 3496):

> In the year 1917 the Directors of the du Pont Company after very careful consideration accepted the invitation of Mr. W. C. Durant to become interested with him as partners in the control and management of General Motors Corporation. This involved our investing a substantial sum of money and taking over the direction of the financial management of the General Motors Corporation. Mr. Durant in turn agreed to assume responsibility for the Executive Management of the company.
>
> The management of the General Motors Corporation was carried along under this arrangement until the latter part of 1920 when Mr. Durant became so seriously involved financially that the du Pont Company much against its will was forced to take over Mr. Durant's personal common stock holdings in the General Motors Corporation, involving a net increase in the du Pont Company's investment in this security of upwards of 2,500,000 shares at a cost of upwards of $25,000,000.00, with the result that today we own 7,519,000 shares of General Motors Corporation common stock valued on our books at $. This gave the du Pont Company approximately 38% of the total common stock of the General Motors Corporation which is practical control and made it necessary to assume complete responsibility for the manage-

> ment. To properly assume this responsibility our Finance Committee called upon Mr. Pierre S. du Pont, Chairman of our Board, to take the presidency of the General Motors Corporation which he consented to do with the clear understanding that he was to occupy the position temporarily only, pending the time when a man capable of assuming the presidency permanently could be found or developed.

Moreover, in addition to its own direct holdings, du Pont could count on the support of friends so that in 1921 Mr. Raskob computed du Pont's "voting strength" at 10,900,000 shares of the 20,500,000 outstanding. (GTX 1345, R. 2813, 5347). He stated:

> As the Directors know we are now in control of the company and are completely responsible for its politics and management* * *.

In 1923, du Pont sold about 2,250,000 shares of General Motors to Managers Securities Company of which it held all the common or voting stock and which was formed as a method of providing special compensation for General Motors executives (*infra,* pp. 24-28). The stock of Managers Securities was to be sold to them on a delayed payment basis. Du Pont retained complete voting control of these shares until 1930 when the stock began to be disbursed and in fact controlled 26.86% of the voting stock of General Motors until the Managers was liquidated in 1938 (GTX 273, R. 499, 3640). Since then du Pont has held 10,000,000 shares (split to 20,000,000 in 1950 and increased to 63,000,000 in 1955 by an exercise of rights and a further split) amounting to about 23% (GTX 273, p. 2, R. 499, 3641).

As recently as 1944, Mr. E. H. Tinney, Secretary of Delaware Realty and Investment Company (R. 2675) (a corporation controlled by the du Pont family and holding directly and indirectly large amounts of the stock of du Pont, GTX 1303, R. 2675, 5221) addressed a memorandum to a committee of Delaware formed to consider liquidation, stating (GTX 1335, R. 2677, 5315):

> Delaware Realty, at least to some extent, facilitates control of the du Pont and General Motors industries. While liquidation would not eliminate this immediately, it would weaken it; more particularly so with the passage of time.

The basic facts relating to the acquisition of the General Motors stock and the resulting control during the early years were found by the District Court (R. 297-307).

Du Pont Representation on General Motors' Board and in Official Positions.

Immediately after Mr. Durant's departure from General Motors in 1920, Mr. Pierre S. du Pont was elected President (GTX 179, R. 492, 3404). The Executive Committee was reduced to four men, three of whom had previously been associated with du Pont (R. 1330). The Finance Committee continued to be dominated by du Pont (DP 56, p. 11, R. 836, 5663), Mr. F. Donaldson Brown, a du Pont officer making his initial appearance in the General Motors ranks (GTX 181, R. 483, 3408). Four out of five of the division managers were changed (DP 64, R. 861, 5713; R. 1502-3). Mr. J. A. Haskell, a du Pont man, became Vice President in Charge of Operations (GTX 178, R. 484, 3403). Mr. Alfred P. Sloan, Jr., who had been brought into the corporation at the time of the acquisition of control of United Motors, became a member of the Executive Committee

and a Vice President in Charge of the General Advisory Staff (GTX 178, R. 484, 3403). He went on the Finance Committee in 1922 (GTX 177, R. 492, 3397).

On April 24, 1923, Mr. Pierre du Pont informed the Finance Committee of his desire to resign the presidency of General Motors and of his recommendation that Mr. Sloan replace him. The committee approved (GTX 182, R. 486, 3412). Mr. du Pont then informed the Board of Directors and on May 10, 1923, Mr. Sloan was elected President of General Motors (GTX 177, R. 492, 3397).[3] Twelve days after this election, Mr. Sloan was elected a director of du Pont (GTX 184, R. 486, 3416; GTX 186, R. 486, 3421.[4] In 1926 he wrote

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[3] Mr. Pierre S. du Pont remained Chairman of the Board until 1929, a member of the Finance Committee until 1937 and a Director until 1944 (GTX 177, R. 492, 3397).

[4] Mr. Raskob expressed doubts of the wisdom of this move (GTX 185, R. 486, 3418):

> If the doing of this results in the important men in General Motors getting the idea that we are endeavoring to put the du Pont stamp on General Motors instead of recognizing it as a free and independent institution it will be unfortunate, because General Motors should stand on its own feet and never again have to look to the du Pont Company or anyone else for support. Any other policy will not result in a strong, well built institution.
>
> * * * * *
>
> Should the employes of General Motors resent the idea of the du Pont stamp and should the important men in the company feel slighted thru not being made partners it can only result in making Alfred's new position more difficult for him.
>
> Time is a factor of fundamental importance in all human problems and should be taken advantage of when it can be used without cost. We have done a splendid job in electing Alfred president of General Motors Corporation, because we have promoted a good man, a man who has demonstrated his fitness and ability for the position and principally because we have promoted a General Motors man, and I feel that the reaction throughout the entire organization has been splendid. Let us be careful now not to overdo the matter and secure an anti-climax. The element of time can be used here without

Irenee du Pont saying "you must recognize that I am essentially, or at least believe and hope I am, a member of the du Pont family" (GTX 704, R. 624, 4505).

On the Board of Directors du Pont has always had a substantial voice through at least five or six direct representatives (GM 10, R. 1031, 6572).[5] But the designation of the remaining directors as "management" or "other" does not negative their loyalty to du Pont. As to the management directors, originally they were employees of General Motors selected by du Pont when it was unquestionably and admittedly in control, through its stock ownership, its occupancy of the presidency and of a majority of the seats on the Board of Directors. (GTX 1345, R. 2813, 5347; GTX 181, R. 483, 3408; GTX 242, R. 493, 3542). These directors and officers, in effect self-perpetuating, continued to represent du Pont throughout the years. An example is Mr. Alfred Sloan, originally selected by Mr. Pierre du Pont (Raskob—"We have done a splendid job in electing Alfred president of General Motors * * *," GTX 185, R. 486, 3419), and avowedly faithful to du Pont.

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cost, for the reason that Alfred can be elected to the du Pont Board six months from now with every advantage that accrues thru taking this action now. At that time both he and we can more accurately determine whether it is the wise thing to do.

* * * * *

In the matter of partnership I think a great deal might be said along the line of a proper partnership, consisting of our group going into General Motors as partners with Alfred instead of bringing him into an institution that is foreign to him. Being a member of our Board with no substantial stock interest is quite far from a du Pont partnership. But this is quite apart from the main thought I have in mind, as outlined above.

[5] For some reason Mr. F. Donaldson Brown, former Director, Member of the Executive Committee and Treasurer of du Pont is listed in this exhibit in 1923 and again in 1942 as a "management" director. So also was Mr. Pratt.

As for the "outside" directors, the record is replete with contemporary evidence that du Pont was regularly consulted with respect to their selection (see e.g. GTX 140, R. 482, 3308; GTX 142, R. 482, 3317; GTX 129, R. 479, 3244; GTX 190, R. 487, 3426; GTX 196, R. 488, 3435; GTX 207, R. 489, 3468; GTX 220, R. 490, 3480; GTX 221, R. 490, 3482; GTX 1236, R. 490, 5181; GTX 1237, R. 490, 5183). Indeed it was apparently Mr. Carpenter, President of du Pont, who pressed upon Mr. Sloan in 1944 the election of more "outside" directors (GM 13, 1186, 6589).

A list of the officers and directors of du Pont and General Motors most frequently mentioned in this brief is shown in Appendix A, attached hereto, *infra,* pp. 150-153. The personnel of the General Motors Board of Directors and of its principal committees is shown in Appendix B, *infra,* pp. 154-163.

From 1918 to 1937, du Pont was always directly represented on the Executive Committee (GM 21, R. 1196, 6608), first by Mr. Haskell (DP 56, R. 836, 5666), later by Messrs. Haskell, Pierre S. du Pont, and Raskob (DP 56, R. 836, 5666).[6] Mr. Donaldson Brown and Mr. Pratt were added in 1924, Messrs. Raskob and Pierre S. du Pont left in 1928 and 1929, and Mr. Lammot du Pont, then President of du Pont, came on in 1930 to remain until 1934. Mr. Brown stayed until the committee system was changed in 1937 (GM 21, R. 1196, 6608). In the General Policy Committee, 1937-1946, three du Pont representatives held seats: Messrs. Brown, Carpenter and Lammot du Pont. (GM 23, R. 1199, 6610). The absence of any direct du Pont representative in the more recent Operations Policy

[6] Mr. Raskob's original prospectus had stated (GTX 124, R. 479, 3222), "* * * and we will have such representation on the Executive Committee as we desire * * *."

Committee, set up in 1946, may be a reflection of Mr. Lammot du Pont's policy expressed to Mr. Sloan in 1942 (GTX 202, R. 485, 3461):

> Perhaps I should emphasize another point which comes to me; namely, the intentional reduction of what might be called "du Pont influence" in General Motors operations, other than the financial departments. I grant you that my main thought is something in the nature of bowing to the trend of the times, when that trend is not all to the good, but the trend must be recognized, *and in this case, the situation is such that no great harm will be done by "bowing."* [Italics supplied]

But obviously du Pont's influence went beyond its formal representation. For example in 1943 Mr. Sloan expressed to Mr. Lammot du Pont a strong desire to put Mr. Kettering on the Policy Committee. Mr. Sloan stated (GTX 205, R. 488, 3467):

> * * * As one of the largest stockholders—a man of tremendous capacity, especially along the lines on which our success or failure depends—he would, if he would take a broad interest in our problems, be, for many years to come, a useful contributor to the policy phase of the Corporation's activities.
>
> I thought if Walter, George and yourself thought well of it, I would discuss the matter with him. He might feel that he was not interested in matters so purely business and technical, outside of his own normal area. He might think otherwise. In any event, I really think he would be pleased to be included—almost any one would be.
>
> I would appreciate your reaction.

Mr. Lammot du Pont, at that time President of du

Pont, replied orally, "no" (GTX 205, R. 488, 3466). And that was the end of the matter.

On the Finance Committee, where du Pont considered itself particularly expert, it was not only represented; it consistently held an absolute majority, originally 7 out of 11 in 1923, and in 1937 eight out of fourteen (GM 22, R. 1198, 6609). And when the Committee was reconstituted in 1946, the old pattern was reestablished with four officers or directors from du Pont, namely, Mr. W. S. Carpenter (President), Mr. Donaldson Brown and Mr. A. B. Echols (in 1947) (members of the Finance Committee of du Pont) and Mr. Alfred Sloan (a director of du Pont) (GM 25, R. 1202, 6612).

Du Pont's attitude toward this committee was expressed in Mr. Lammot du Pont's statement as President of du Pont to Mr. Sloan as President of General Motors on December 24, 1928 (GTX 188, R. 485, 3423-3424):

> In regard to the Chairmanship of the Finance Committee, I feel that it is up to the du Pont Company to make a nomination, because it seems that du Pont has always assumed the responsibility for the financial direction of General Motors.

Du Pont's next president, Mr. W. S. Carpenter stated to Mr. Donaldson Brown in 1941 (GTX 1238, R. 485, 5185):

> The financial position of General Motors today is so strong that I think it is very easy for us to feel that the importance of the financial aspect may not be as critical as heretofore. On the other hand, it seems to me that never was there a time in the life of the great corporations of this country when this question was more important. * * *

He stated again (GTX 200, R. 484, 3449):

> It seems to me that, in the du Pont management for years back as well as in General Motors management, the activities and responsibilities have been divided into two parts; one, financial and the other, operating. The financial phase has not been merely an auxiliary of the operating department, it has been at least equal and often dominating in the considerations of major policy. Think back over the earlier days and consider the influence brought to bear on du Pont management when Pierre, Raskob and you were in charge of du Pont financial management. As a matter of fact you will recall that for years Pierre as Treasurer was the Chief Executive Officer of the Company, though to be sure he was also Acting President. Think of the long period of years in General Motors management when the influence of the financial side was so important, during the days of Pierre, Raskob, and later, yourself and the old Finance Committee.

All of these facts with respect to interlocking directors and officers are also not in dispute and were in substance found by the court below (R. 308-316).

Distribution of Stock to General Motors' Officers

In addition to its influence through directors, officers, and committees, du Pont also participated actively, through the medium of the so-called Managers Securities Plan, in a method of rewarding the officers and directors of General Motors for their service. At the time Mr. Pierre du Pont retired as president of General Motors in 1923, Mr. Raskob reported (GTX 235, p. 3, R. 483, 3497):

> Mr. du Pont feels that the best manner in which to attain the greatest success possible in the conduct of the affairs of the General Motors Corporation is for that Corporation to interest its principal men in the corporation as substantial stockholders or partners. He not only feels this very keenly, but feels too that the du Pont Company with its large and controlling interest in the General Motors Corporation has now a splendid opportunity to enhance the value of its own investment in the General Motors Corporation through giving to the General Motors Corporation an opportunity to interest its important employees as managing partners in this great enterprise.

Messrs. Raskob and Brown worked out and submitted to the Finance Committee of du Pont a plan whereby one-third (later changed to 30%) of du Pont's General Motors stock should be made available to the principal executives of General Motors, on the basis of purchase over a seven-year span (one-seventh down payment and the remainder to be paid out of dividends) (GTX 235, R. 3495). Under the plan, during the entire seven years (1923-1930) du Pont would retain voting power over all of the General Motors stock involved. The results, as foreseen in the beginning, were (GTX 235, p. 8, R. 3502):

> The net result of the foregoing plan is that the du Pont Company will sell to important and desirable General Motors partners one-third of its interest in General Motors Corporation common stock (which is less than the interest we acquired when we bought out our former partner—Mr. W. C.

> Durant) for $37,500,000.00. We will be in position to liquidate our entire indebtedness of $35,000,000.00 of 7½% notes created in order to finance this Durant purchase; will retain the same control of General Motors Corporation that we have today through controlling two-thirds of the stock of General Motors Securities Company with its 7,500,000 shares of General Motors Corporation common stock and will definitely tie up with us in the management and control of this huge investment the men in the General Motors Corporation who are definitely charged with the responsibility and success of the corporation.

The Board of Directors of du Pont agreed (GTX 244, R. 493, 3549) and the plan went into effect.

Although a committee of three was established to select the officials who should share in the bonus, it appears that the initial selection was made by Mr. Sloan and Mr. Pierre S. du Pont (GM 30, R. 1225, 6629). The original allotment was subject to revision by the Finance Committee of General Motors, which was controlled by du Pont representatives (GTX 244, R. 493, 3549).

The way the plan evolved, one share of Class B of Managers Securities, which was sold at the price of $25, became entitled to the dividends from, and eventually to the ownership of, 45 shares of General Motors (GTX 244, R. 493, 3549). (The Class A stock received 5% of General Motors earnings after first deducting 7% on invested capital. It was sold in a package with the Class B stock to the same General Motors employees). Thus as the value of General Motors stock increased the value of Class B stock of Managers Securities Company multiplied 45-fold. The follow-

ing table shows participation of the principal executives and their gains therefrom (GTX 259, R. 496, 3587):

	Class A	Class B	Cost of Class B stock	Value of Class B stock in 1926
Alfred Sloan, *President*	3,200	3,200	$80,000	$2,154,688
John J. Raskob, Chairman, Finance Committee	2,400	2,400	60,000	1,616,016[7]
H. H. Bassett, General Manager, Buick.	2,400	2,400	60,000	1,616,016
C. S. Mott, Vice Pres. in Charge of Car and Truck Group	2,400	2,400	60,000	1,616,016
Fred J. Fisher, Member, Executive Committee	1,720	1,720	43,000	1,158,144
Charles T. Fisher, Member, Executive Committee	1,720	1,720	43,000	1,158,144
Donaldson Brown, Vice Pres. in Charge of Financial Staff	1,600	1,600	40,000	1,077,344
John L. Pratt, Group Executive in Charge of Accessory Divisions	1,600	1,600	40,000	1,077,344

Moreover, as the plan worked out du Pont retained the voting control of much of the stock even after the termination of the plan and until final distribution of the stock in 1938 (GTX 273, R. 499, 3640.)

After the termination of this plan and a succeeding plan, under which the General Motors stock did not come from du Pont, the company returned to its old bonus system (R. 1228-9). The awards were at first subject to approval by the du Pont dominated Finance Committee (R. 1226-7). Moreover, the Bonus and Salary Committee of General Motors which has succeeded the Finance Committee in administering the bonus plan was at all times composed of a majority of du Pont-connected personnel (GTX 276, R. 496, 3679). Mr. Sloan's explanation of this is, "It just happened

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[7] In 1929, M. Raskob placed a value of $20,460,000 on his B Stock (GTX 262, R. 496, 3597). Mr. Raskob's exchange of his Class B Stock for General Motors stock in 1930 was the basis for one of the claims adjudicated against some of the directors of General Motors Corporation in *Winkelman* v. *General Motors Corporation*, 44 F. Supp. 960 (S.D.N.Y.). The suit was eventually settled on the payment of $4,500,000. *Winkelman* v. *General Motors Corporation*, 48 F. Supp. 500 (S.D.N.Y.).

that way" (R. 1380).

Again the facts connected with these plans are not in dispute, although the parties differ as to their significance.

Since 1938, when du Pont's holdings of General Motors stock were diminished by the sale of the Managers Securities holdings, it has held directly 10,000,000 of the 44,000,000 shares outstanding.[8] This is exclusive of the large blocks held by friends on whom du Pont could count in case of a contest (GTX 1345, R. 2813, 5347). The remaining shares are held by 436,000 stockholders, 92% of whom hold no more than 100 shares, and 60% of whom own no more than 25 shares (R. 304). Government exhibit No. 1307 (R. 664, 5230) gives a tabulation of the percentage of General Motors stock voted by du Pont at annual meetings from 1928 to 1949. It ranged from a high of 52% in the early years to a low of 30% in 1949.

Financially the General Motors investment has been of tremendous importance to du Pont. Although its original investment (excluding the Durant stock which

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[8] In 1936 a suggested increase in du Pont's holdings was abandoned, the General Counsel of du Pont reporting to Mr. Carpenter, then Vice President (GTX 1346, R. 2815, 5352):

> In considering the acquisition by du Pont Company of a further large stock holding in General Motors Corporation, which would increase our earnings from securities to a point in excess of one-half of our total earnings, and which would not only substantially increase the stock control of the latter by the former company, but would also apparently greatly strengthen the character of such control as a result of the managers of General Motors Corporation becoming important stockholders of du Pont Company, the Committee might well give attention to the legislative trend of recent years with respect to holding companies and various forms of intercorporate control, and consider whether or not such action on our part might direct critical public attention to the nature and potentialities of such a relationship between the two companies.

it sold without loss through the Managers Securities Plan) was less than $50,000,000, the market value of its General Motors holdings at the end of 1955 was $2,914,330,000 (New York Times, January 3, 1956, p. 98). It is carried on du Pont's 1955 balance sheet at the figure of $763,350,000 (Moody's Industrials, 1956, p. 1411). Its income in dividends from this investment in 1955 alone was $135,500,000 (*ibid.*). In recent years its income from General Motors stock has constituted about one-third of du Pont's income *(ibid.)*.

Intent to Influence Trade

As already noted (*supra,* p. 10), Mr. Raskob stated in the original prospectus laying the proposed acquisition before the du Pont management (GTX 124, R. 479, 3221):

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

In the very early days of the du Pont-General Motors relationship, when it was necessary to establish new purchasing habits, to lay the basis for the business relations which have persisted for the past 35 years, the intent to obtain the General Motors' business was freely expressed. Mr. Haskell, who had previously acted as vice president and sales manager of du Pont, was installed as vice president and member of the Executive Committee of General Motors and became the du Pont "liaison" man (R. 835-6, 940). Moving first on the artificial leather market, he held a conference in April, 1918, with General Motors officials on "Fabri-

koid matters" looking to "pave the way for perhaps a more general adoption of our material." (GTX 290, R. 501, 3782). His concern was not only to develop material suitable for replacing natural leather but also to "consider how best to get cooperation whereby makers of such of the low-priced cars as it would seem possible and wise to get transferred will be put in the frame of mind necessary for its adoption * * *". (GTX 290, R. 501, 3783).

Shortly thereafter the sales manager of the du Pont-owned "Arlington Works," manufacturer of pyralin (plastic sheeting), wrote to Mr. Coyne, Vice President in Charge of du Pont sales, relating a conference with the du Pont liaison vice president of General Motors, Mr. Haskell, saying (GTX 293, R. 502, 3786):

> I called upon Mr. J. A. Haskell this afternoon and had a very pleasant and satisfactory talk with him in regard to the requirements of General Motors Company for Pyralin sheeting.
>
> Mr. Haskell is in full agreement with my views which had previously been approved by you, viz., that we cannot afford to jeopardize our business with other Motor Companies by giving preferential treatment to the General Motors Company or to any of their units.
>
> I gave Mr. Haskell a synopsis, presenting what I believe to be the full and true facts regarding our relations with the various automobile manufacturers, and it is Mr. Haskell's opinion that a continuation of our present policy should result in our securing practically all of the business of the Gen-

> eral Motors Company without jeopardizing our relations with other manufacturers.
>
> Mr. Haskell makes the suggestion, which I consider a good one, that I advise him periodically as to the business shipped and business booked with the different motor branches, of General Motors, and also advise him what proportion of their business is going elsewhere. With this information in his possession, he will be able to keep in touch with the relations between the Arlington Works, and the General Motors Company, and will give me his suggestion at any time when the conditions indicate the need of special attention.

Mr. Haskell instituted a line of inquiries addressed to the manufacturing units in General Motors as to what du Pont products and what products of competitors were being used (GTX 296, 297, 298, 299, 300, R. 502-3, 3790-3801). Beside giving du Pont information as to where it must apply sales pressure, the inquiries acted as incentives to General Motors divisions to purchase du Pont products, since the officials felt called upon to explain outside buying (see e.g. GTX 300, 301, R. 503-4, 3798-3802).

In July of 1918 a vice president of the du Pont Fabrikoid Co. (artificial leather) wrote to Mr. Haskell (GTX 302, R. 504, 3803):

> If we are ultimately to furnish all, or the greater part, of the top material for the Chevrolet and General Motors cars would it not be well for

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

* * * * *

This letter is written to you because I am not quite sure just how we should go about getting action, but know that if you approve of the idea you will put it into the proper hands. If somewhat premature kindly disregard it.

With respect to the sale of rubber coated fabrics by the du Pont Fairfield division, Mr. A. Felix du Pont, Vice President of du Pont, reported to the du Pont Executive Committee in June, 1921 (GTX 417, R. 526, 3998):

The Sales Department is now securing for Fairfield nearly all the General Motors orders for rubber coated fabrics. With the community of interests which exist between that Corporation and our own, it would appear that some plan should be worked out whereby this condition should be made permanent and the profits from the manufacture of rubber coated fabrics retained within our organizations.

For instance, at date of writing, General Motors' actual production, all plants combined, is in the neighborhood of one thousand cars per day, consuming, very roughly, 16,000 yards of products which can be made at Fairfield. 16,000 yards per day would consume 64% of Fairfield's capacity. Entirely apart from the point of preventing profits

going outside, production of these goods would introduce a stabilizing element into that plant's operations which would be beneficial in every way and of course tend to reduce costs.

Two years ago we started a fixed program of giving the best product and catering generally to the wishes of General Motors units in an endeavor to overcome the latent resentment which we experienced at the outset against the partial obligation under which the General Motors units felt themselves to be with respect to using our goods. Both Sales and Production departments have concentrated upon our standing with General Motors; we believe that the object sought has been accomplished and that today Fairfield is "solid" with General Motors. In general, our reports are that our products are considered by the several General Motors units as equal or superior to those of competitors, and in addition we have at some slight increase in cost to ourselves, sent out our product in a form somewhat better adapted to the factory practices of the General Motors plants than have some of our competitors. Therefore the time appears to have arrived when we might capitalize this condition by some arrangement insuring to us all the General Motors' purchases which we can handle.

On pyralin it was reported in 1921 (GTX 419, R. 528, 4009):

Referring to your verbal inquiry and Mr. Pickard's letter of August 2nd, it is the opinion of our Pyralin Division Sales organization that we are

securing 100% of General Motors Pyralin Sheeting business, and have no basis for any complaint as regards co-operation, etc.

In August of 1921, Mr. Lammot du Pont wrote to Mr. Pierre du Pont, setting forth the proportions of General Motors business of paints, Fabrikoid, etc. taken by the various divisions, as follows (GTX 420, R. 528, 4010):

Mr. P. S. du Pont, Chairman,[9]
Board of Directors:

Some time ago you inquired whether General Motors was taking its entire requirements of du Pont products from du Pont. My understanding at that time was that they were not. I have made inquiry and find the situation at present is as follows: (O.K. means that du Pont is enjoying all the business in their respective lines. Where I specify "No reason," there appears to be no reason for General Motors withholding the business from us. Where I say "With good reason," there is a logical explanation).

	Paint and Varnish	Fabrikoid	Rubber Cloth	Transp. Pyralin
Cadillac	Very little No reason	O. K.	O. K.	O. K.
Buick	O. K.	O. K.	60%	O. K.
Olds	O. K.	Part No reason	O. K.	O. K.
Oakland	50% No reason	O. K.	Part With reason	O. K.
Chevrolet	O. K.	O. K.	O. K.	O. K.
Scripps-Booth	None	None	None	O. K.
Fisher Body	None			
G. M. Truck	O. K.	O. K.	O. K.	O. K.

[9] Mr. P. S. du Pont was at that time Chairman of the Board of both du Pont and General Motors. Mr. Lammot du Pont was a vice president of du Pont.

Sales Department seems to feel that the condition is improving and that eventually satisfactory conditions will be established in every branch, but they wouldn't mind seeing things going a little faster.

* * * * *

Vice-President.

LduP/MD

Mr. Pierre du Pont writing on the letterhead of General Motors Corporation and signing as President, replied (GTX 421, R. 529, 4012):

GENERAL MOTORS CORPORATION
224 West 57th Street
New York, N. Y.
Office of the President

August 23, 1921

Lammot du Pont, Vice President,
E. I. du Pont de Nemours & Company,
Wilmington, Del.
My dear Lammot:

Your letter of August 10th was received shortly before I left for my vacation. It would seem from your summary that the Flint paint and varnish and fabrikoid interests are doing pretty well with General Motors, Scripps Booth being the only division that does no business with these companies. However, Scripps Booth is a small part of the General Motors and may be disregarded for the present.

With the change in management at Cadillac, Oakland and Olds, I believe that you should be able to sell substantially all of the paint, varnish and fabrikoid products needed; especially is this true of Cadillac.

A drive should be made for the Fisher Body business. Is there any reason why they have not dealt with us?

Very truly yours,

(S.) P. S. DUPONT,
President.

1/*m

Mr. Pickard:

Please note for your information. This is the result of the data which you obtained for me. Can you answer the question in the last sentence?

L. DU PONT.

9/1/21

O.K. *Fisher in process. If no results in 60 days will let you know.*[10]

FWP

The suggestion that the General Motors business in fabrics manufactured by du Pont should be tied down by contract was made by Mr. R. R. M. Carpenter (brother-in-law of Mr. Pierre du Pont) in a letter dated October 1921 (GTX 403, R. 526, 3958):

Letterhead of
E. I. du Pont de Nemours & Company
Incorporated
Wilmington, Delaware
Executive Offices

October 7, 1921.

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[10] The references to change in management may have been to the division managers who were replaced by du Pont after it took over from Mr. Durant. (DP 64, R. 861, 5713).

Personal

Mr. P. S. du Pont, President,
General Motors Corporation,
Wilmington, Delaware.

Dear Pierre

Our File "General Motors"—Fabrikoid for General Motors—

We would like to present to the General Motors Company in the proper way the subject of entering into negotiations with us for the supplying of all of the artificial leather and rubber which they use, on some mutually advantageous basis.

* * * * *

From another point of view, if an arrangement could be made, especially at this time, whereby the du Pont Company could secure all of the artificial leather and rubber business, we could operate our plant, I believe, on a fairly economical basis, thus getting considerably lower costs (which the General Motors Company would secure the advantage from) and we would not be compelled to operate at a considerable loss all the time.

Without being familiar with all the little details, what I am afraid happens is that three or four different artificial leather companies are getting small dabs of the General Motors business, all of them running at small capacities. It seems uneconomical, from the general du Pont pocketbook point of view, not to be able to make some arrangements whereby we could run our artificial leather plants fairly full, and in the long run it would not cost

the General Motors Company any more money, if as much, as if they kept us on a competitive basis when the competition, owing to the circumstances, is not altogether a fair one.

* * * * *

Very truly yours,

R R M C

RRMC/R

The persuasion focused on divisions not utilizing du Pont products to the utmost is indicated by the ensuing correspondence between Lammot du Pont and the new general manager of the Cadillac division (GTX 442-446, R. 534-5, 4066-72) including a frank statement by Mr. Lammot du Pont on May 5, 1923, as follows (GTX 447, R. 535, 4073):

* * * * *

> We believe that Flint is making as good quality paint and varnish products as any competitor, and, in many cases, better quality. I feel that it is to the advantage of both General Motors Corporation and the du Pont Company to have GMC use the Flint products 100 per cent. * * *

At one point during this period of adjustment, du Pont agreed, though reluctantly, that General Motors should purchase 20% or 25% of its materials from competitors in order that it could follow out its policy of having at least two sources of supply (GTX 406, pp. 14-15, 407, 408, 410, R. 527-8, 3979-80, 3982-4). This program was embodied in a resolution of the General Motors Purchasing Committee formally adopted in 1923: "It was agreed that on an equally competitive

basis at least 25% of the business [leather substitute and rubber coated fabrics] should be placed with sources other than the du Pont Company" (GTX 412, p. 6, R. 528, 3986).

After Mr. Haskell's death in 1923, Mr. J. L. Pratt, an employee of du Pont from 1905 to 1919 (R. 1387-1392), succeeded in fact, if not in name, to his function of contact man with General Motors. He became a vice president of General Motors in 1922, a director in 1923, and a member of the Executive Committee in 1924 (GTX 177, R. 492, 3397). Mr. Pratt's views with respect to the du Pont-General Motors relationship are expounded in a letter to the general manager of a General Motors division written in January, 1926, as follows (GTX 340, R. 512, 3865):

> Dear Mr. Biechler:
>
> Please accept my thanks for your letter of January 21st in regard to the question of paint supplied to you by local paint companies and the situation as applying to the du Pont Company.
>
> 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 over-balances 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, 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.

There is no dispute as to the fact that these views were expressed, but only as to their significance.

Du Pont's Correspondence with Respect to the Use of Alcohol in General Motors Cars as an Antifreeze

In 1925, a du Pont vice president, H. Fletcher Brown, wrote to Mr. Alfred P. Sloan, President of General Motors, as follows (GTX 319, R. 507, 3832):

My dear Mr. Sloan:

As you probably know, this Company has joined with the Kentucky Alcohol Corporation in the formation of the Eastern Alcohol Corporation, which will manufacture industrial alcohol at Deep Water Point on the Delaware River.

My attention has been called to a news clipping from the New York Sun of November 11th in which the impression is given that glycerin has an advantage over alcohol as an anti-freeze mixture in automobile radiators. The sale of alcohol for this purpose is a very important item in the business of the Kentucky Alcohol Corporation, and presumably will be of similar importance to the new Corporation.

The Kentucky Alcohol Corporation inquires whether the General Motors Corporation is giving their official approval to publicity favoring glycerin rather than alcohol. If so, it is suggested that their attention be called to the advantages of alcohol and to the interest which the du Pont Company will have in the future in its manufacture and sale.

I shall be glad to have your comments.

Mr. Sloan replied (GTX 320, R. 507, 3833):

My dear Mr. Brown:

Replying to your letter of November 13th regarding the use of alcohol vs. glycerin as an anti-freeze mixture in automobile radiators, would state that the subject came up in the way of general information before our General Technical Commit-

tee the other day and, as I take it, the glycerin people have lined their situation up so that they apparently are able to offer something which compares, from the economic standpoint, fairly well with alcohol; at least that, as I recollect it, is the impression I took away from the meeting.

As a corporation, we do not usually take any position in matters of this kind; i.e., as a corporation we are concerned of course, with seeing that our cars give satisfaction and I think our position would be in this particular thing that although we would like to be helpful, yet we could not consistently refuse to say that glycerin was satisfactory if it was simply because friends of ours, like your good selves, were interested in the alcohol side of the argument. We must, of course, be guided by the facts in the case. Therefore, I do not see how we really could, unless we did something unusual, be very helpful in this particular situation.

If your good selves or the Kentucky Alcohol Corporation could give us any technical information which would be helpful in developing any facts which would enable us to deal with the matter on its merits in favor of alcohol, then of course that would be an entirely different matter. I would suggest that perhaps that might be possible and there might be something that we had overlooked in our analysis of the situation.

There is one very important consideration which it appears to me has got to be dealt with and that is, I am informed that when alcohol is used it has a very bad reaction on the Duco finish. Of course, in view of the fact that we use Duco practically exclusively, it means that it has a bad effect on all our cars, wherever it is used. That in itself would

appear to almost place us in a position where we would have to perhaps not intentionally, but through necessity and in our interests as well as yours, favor glycerin as against alcohol.

Will you kindly think the above points over and advise me further regarding same.

Then Mr. Pratt wrote in the following January (GTX 321, R. 508, 3835):

* * * * *

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

Again in April he wrote (GTX 325, R. 508, 3840):

* * * * *

As pointed out in my letter to Mr. LaMotte, glycerin and Ethylene Glycol solutions are more satisfactory from an engineering standpoint on account of the effect on Duco paint, as alcohol when it boils over ruins the paint; also because it permits the engine to operate at more normal temperature. With the present fuels the temperature of boiling water seems to be more satisfactory for engine operation. Years ago when commercial gasoline was more volatile the operating temperature of 160 to 170 was considered the best operating temperatures. Today most engineers feel that 200 to 212 Fahrenheit is more satisfactory for operating temperatures.

Mr. Sloan wrote to the Chevrolet Motor Co. the following fall, suggesting modification of the endorsement of glycerin (GTX 326, R. 509, 3842):

* * * * *

> Regarding your instruction book, frankly, I would suggest that when opportunity presents itself, you cut out the words "are to be preferred" in the second paragraph under "Winter Driving" and simply state the facts. It seems to me that if we indicate a preference we are discriminating against some manufacturers and distributors and all that sort of thing, all of whom are potential users of General Motors products. It is all very well, I believe, to state that alcohol evaporates and glycerine doesn't; that alcohol is likely to cause damage and glycerine is not; that alcohol is much cheaper and glycerine is much more expensive. Let us submit all that to our users, but let them judge which is most preferable after listening to the facts. Don't you think that is the best way to do it? * * *

He received an immediate reply acceding to those instructions (GTX 327, R. 509, 3844):

> We have eliminated the paragraph expressing preference for glycerin as an anti-freeze solution from our instruction book in the issue just going to press.
>
> I am asking Mr. W. J. Davidson to bring the matter of a uniform statement on "doped fuels" in the instruction books of all divisions of the Corporation before the Technical Committee.
>
> This in answer to your note of August 23rd.

After du Pont itself engaged in the manufacture of

ethyl alcohol (GTX 328, R. 509, 3845), General Motors reversed its position and, on the basis of a report recommending "Alcohol-water solutions for any class of service", suggested the use of that anti-freeze (GTX 331, R. 510, 3850).

But when some divisions, Cadillac in particular, did not change their instruction books, du Pont wrote (GTX 332, R. 510, 3851):

> As shown by Exhibit "A", some of your Divisions are recommending the use of glycerin in preference to alcohol. These two letters have been photostated by Procter & Gamble who produce glycerin, and are bound in a booklet containing various advertising matter which is placed in the retail dealers' hands to promote the sale of their glycerin. It does not require much sales effort to sell glycerin when the owner of a Cadillac car is shown a statement from the manufacturer, namely, the Cadillac Motor Car Company, telling him to use glycerin.

In the enclosed memorandum it was stated (GTX 333, R. 510, 3857):

> The particular feature I want to bring out is that all automobile manufacturers in their instruction book to the car owner, will find it decidedly to their interests to advocate that alcohol be used for anti-freeze and make no mention of glycerin or any other mixtures. The instructions should imply that a car owner using any anti-freeze mixture other than alcohol will do so at his own risk. This will relieve the automobile manufacturer from any "come-back" from the owner because alcohol will

not do any damage and if the owner should let his motor freeze, he has no claim nor can he become dissatisfied with his car because of his own carelessness to protect same against cold weather.

And again on November 19, 1926 (GTX 334, R. 510, 3859):

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

In the end, du Pont prevailed and, writing in December, 1926, Mr. Phelps of the du Pont Development Department stated (GTX 335, R. 511, 3860):

> Referring to our previous correspondence regarding the use of glycerin vs. alcohol for anti-freeze. We were much pleased to find that the Cadillac Motor Car Company, who advocated the use of glycerin last year, have now been compelled to alter their statement in this matter and in their new "Operator's Manual" on pages 38 and 39, recommend that only alcohol be used for anti-freeze.
>
> We also attach a circular letter which shows that the Buick Motor Company recommends alcohol in preference to glycerin.

> It therefore appears that all of the General Motors units manufacturing automobiles should profit by the experience of the Cadillac and Buick companies and should recommend, in their instruction books, that only alcohol be used. What we had in mind was that if the Cadillac and Buick found that alcohol is best for anti-freeze, it would then be consistent for the Chevrolet, Oakland and Oldsmobile to recommend in their instruction books to the owner that alcohol be used in the radiators. It will be of much interest to us to learn the position which the Chevrolet, Oakland and Oldsmobile companies take relative to the use of alcohol in preference to glycerin for anti-freeze.

Mr. Sloan in a letter to Mr. Pratt summarized a statement adopted by General Motors for its instruction books which deliberately slanted the General Motors anti-freeze instruction in favor of alcohol (GTX 337, R. 511, 3862):

> I believe you know that at the last meeting of the General Technical Committee a decision was reached to the effect that we would put in all our instruction books, in such a way as each Engineering Department thought best, a statement setting forth the advantages and disadvantages of both materials, particularly pointing out that under certain conditions glycerin was unsatisfactory but that if those conditions were not present and it was used strictly in accordance with the manufacturer's recommendation, there was no objection to its use.

Du Pont-General Motors Relations With Respect to Tetraethyl Lead

Another example of the utilization of the du Pont-General Motors combination to influence trade is found in the development of tetraethyl lead as an anti-knock additive to gasoline. The trial court has made very extensive findings with respect to this matter (R. 405-426) with which we have no basic quarrel until it arrives at its conclusion (R. 425-426). We believe the conclusion overlooks much of significance in what it has previously stated.

Without restating the entire history of the discovery and its development, which are accurately reflected in the district court's opinion, a brief summary will suffice.

Mr. Kettering, a director of General Motors, who had commenced research on engine "knock" in 1912 or 1913, pressed it more vigorously in collaboration with Dr. Midgley and other General Motors scientists after 1918. (R. 1525-1527). As early as 1919, before the discovery of lead as an anti-knock chemical, the assistant to the President of General Motors wrote to du Pont concerning the latter's interest in "marketing" the chemical yet to be discovered (GTX 599, R. 612, 4296):

> 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 the mechanical equipment indicated above without charge for the purpose of this investigation.

Before tetraethyl lead was selected, Mr. Kettering believed aniline might solve the problem and Dr.

Midgley, after a conference with du Pont (GTX 602, R. 612, 4300), wrote (GTX 601, R. 612, 4298):

> 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.
>
> The first phase of this program would consist in one of the General Motors Companies marketing an aniline injector thru the ordinary channels of accessory dealers. The Du Pont Company would simultaneously put aniline in small quantities, such as pints, or quarts, or perhaps, gallons, which could be sold in conjunction with the injector.
>
> A further working out of this program would comprise the sale of aniline in bulk by the Du Pont Company thru some satisfactory distributing agency, such as has been suggested by the Standard Oil Company, who could give aniline national distribution, similar to lubricating oil, selling same in bulk at the filling stations.

The projected aniline production was abandoned when Dr. Midgley reported to du Pont the discovery of a far more efficient anti-knock product (DP 97, R. 884, 5867):

> * * * I know you will be interested in hearing that we have recently discovered an antiknock material which is twenty-four times as strong as aniline, volumetrically. The material looks very, very practical, and I feel sure that this is going to radically change our previous plans, obsoleting the injector; in fact, obsoleting the use of aniline, or

> coal tar products, in any way, shape, or form, except, possibly, as carbon removers.

The use of tetraethyl lead was discovered in December 1921 (R. 1542). It was first reported to du Pont in a letter from Mr. Pierre du Pont to Mr. Irenee du Pont, then President of du Pont, in March, 1922 (GTX 610, R. 612, 4302). It was immediately assumed that du Pont would perform the manufacturing of the product, Mr. Pierre du Pont stating (GTX 610, R. 612, 4303):

> In order to make this program effective, a plant of 100 gallons daily capacity should be erected. The next step in the program would be to try to introduce the dope as a commercial article supplied with the gasoline. It would require about 4,500,000 gallons per annum to dope the entire gasoline supply.
>
> Kettering would like to take up the question of manufacture with the du Pont company representatives at an early date.

This was three weeks before patent application was made (GM 246A, R. 1546, 7330) on April 15, 1922. General Motors itself dropped out of the production end almost from the beginning as is reflected by a report from the General Motors Research Corporation to the General Motors Executive Committee in September 1922 (GTX 615, R. 613, 4309):

> In view of the satisfactory progress that is being made on the production program and of certain problems incident to the use of lead compounds as antiknock materials, it has been decided to drop production, as well as research on production here. Production will be continued at the duPont Com-

> pany, and research on methods of production will be actively continued at the Massachusetts Institute of Technology. The research work at this laboratory will be concentrated on the solution of the spark-plug and exhaust-valve troubles that have been experienced in the use of lead compounds as antiknock materials.

This took place before any contract had been completed.

The final contract for manufacture by du Pont for General Motors was formally executed by Mr. Irenee du Pont, President of du Pont, and Mr. Pierre S. du Pont, President of General Motors, on October 6, 1922 (GTX 618, R. 613, 4312). Distribution started on a trial basis in three Ohio cities in February and June, 1923 (GTX 773, R. 632, 4672) and immediately it was tremendously successful. Originally General Motors distributed through Standard Oil of N. J. (GTX 620, R. 613, 4319), Standard of Indiana (GM 76, R. 1561, 6761), Standard of Louisiana (GM 78, R. 1564, 6779) and Gulf (GM 80, R. 1565, 6800).

At this stage, Standard Oil Company of New Jersey developed and patented a method of production much less expensive than that in use (GTX 621, R. 613, 4333). Mr. Sloan, who had become President of General Motors in January, 1924, wrote to Mr. Irenee du Pont, President of du Pont, about whether Standard should be permitted to share in the manufacture of tetraethyl lead (GTX 622, R. 614, 4338):

> I feel, and have held right along, that in view of the fact that we are in the development stage we should not in any way discuss with these people anything to do with the manufacture of tetra ethyl lead. I question whether it will be good business

> from our standpoint for them to manufacture tetra ethyl lead and at the same time have such a large slice of the distribution on same. I do not say that I fear we will not get a square deal, but that naturally comes into my mind. Anyway, I do not think it is constructive. I feel that in the final analysis the duPont Company can manufacture the material at the lowest cost plus a reasonable return and that under such a consideration there would only be a manufacturer's profit in it for the Standard Oil Company and that they could employ their capital to equal, if not better, advantage in their own business than in the manufacture of tetra ethyl lead and that our permitting them to get into that manufacture will be a disturbing influence and would throw an uncertainty on the whole situation that would not be constructive. If it develops that these people have a process which, due to the nature of same, it should be cheaper from the standpoint of manufacture, I personally would much rather obtain a license from them, pay for it and get the duPont Company to use it in reducing the cost than I would to deal with the Standard Oil Company as a manufacturer.

Du Pont agreed that General Motors should not deal with Standard (GTX 623, R. 614, 4340) and General Motors turned Standard down as a manufacturer (GTX 624, R. 614, 4342). Five months later du Pont suggested that Standard limit its production to a 100-gallon plant (GTX 660, R. 616, 4363). Mr. Sloan sided with du Pont in this view (GTX 661, R. 616, 4365):

> For psychological reasons we should permit the Standard Oil Company of N. J. 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 it will give them a means to work out their viewpoint which certainly can do us no damage when we approach if from the bigger way.
>
> Any further thought of developing any real production other than under the auspices of the du Pont Company will be deferred until some later time.

General Motors adopted this approach despite the fact that du Pont had fallen behind in its deliveries (GTX 657, R. 616, 4360).

Later Mr. Sloan expressed an interest in protecting du Pont's investment by a price "which is safe to the du Pont Company and reflects a reasonable return on the capital employed," rather than in bringing down the price (GTX 664, R. 617, 4372).

In August of 1924, General Motors and Standard agreed to establish a separate corporation, the Ethyl Company, 50% owned by each, to hold the anti-knock patents of each, present and future, and to market the product (GTX 668, R. 618, 4383). Ethyl was to purchase lead on the open market, but was to honor the existing du Pont contract running to November 30, 1924 (GTX 673, R. 618, 4434), although it was also agreed that Standard might enter the manufacturing end.

After the Standard manufacturing experiment terminated in a fatal lead poisoning epidemic in Novem-

ber, 1924 (GTX 773, pp. 28-9, R. 632, 4690-1), there was a temporary shutdown of production, and the idea that du Pont would thereafter be the sole manufacturer was reaffirmed (GTX 710, R. 625, 4530). The shutdown in production resulted in claims of du Pont against Ethyl for failure to accept deliveries according to the production schedule contracted for (GTX 773, pp. 35-36, R. 632, 4697; GTX 679, R. 619, 4456). Mr. Sloan, as President of General Motors, half owner of Ethyl, was in a conflicting position since his relations with du Pont were antagonistic to his company's investment in Ethyl. However, against the interest of Ethyl (and Standard and General Motors) he clearly sided with du Pont (GTX 680, R. 619, 4459). Ultimately du Pont got what it wanted ($1,820,000 on a claim of $1,922,000 and the manufacturing plant (GTX 773, pp. 35, 36, R. 632, 4697-8)). When a new contract for the supply of all of Ethyl's needs of lead was entered into in 1926, it differed from the 1924 contract in that du Pont did not obligate itself to turn over to Ethyl discoveries and inventions relating to anti-knock fuels (GTX 773, pp. 58-59, R. 632, 4720-1).

In 1926, Ethyl did enter into a contract for lead from American Research Laboratories (GTX 773, p. 40, R. 632, 4702). Mr. Irenee du Pont objected vigorously (GTX 711, R. 625, 4532). It was cancelled (GM 270, R. 1631, 7416).[10a]

The 1926 contract was renewed in 1928 and 1929 (GTX 745, R. 628, 4559; GTX 747, R. 628, 4570). In 1930, when the management of Ethyl foresaw the time when the basic patents would expire, it attempted to

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[10a] He was also against getting lead from England (GTX 708, R. 625, 4526). Ethyl and General Motors entered into a cartel and pooling arrangement with I. G. Farben to protect against competition from Germany (GTX 723, R. 628, 4556).

contract with du Pont so that it could acquire some of du Pont's manufacturing know-how prior to that date. Mr. Sloan wrote to Mr. Lammot du Pont as follows (GTX 751, R. 629, 4586):

> I mentioned this to Mr. Webb and thought there would be no harm in mentioning it to you so that everything could be done to throw protection around such processes as you are developing. It also seems very essential that the manufacturer be confined to one source of supply. I am sure that the du Pont Company and the Ethyl Gasoline Corporation can work together with such satisfaction and with such confidence in one another that no thought can be given to anything different than a single source of supply. If the present source of supply was not the du Pont Company I should feel that our future, after the expiration of our patent, was rather hazardous because, naturally, Ethyl Gasoline Corporation per se can make no contribution to the picture beyond the establishment of the idea, which it has done—I am sure you will agree with me—very successfully, unless it is protected by the exclusive use of tetraethyl lead as applied to anti-knock purposes.

The 1930 contract provided for an exchange of patents and manufacturing processes in 1938 (GTX 752, R. 629, 4588).

Although du Pont, as a seller, was interested in a high price and Ethyl, as a buyer, in a low price, Mr. Sloan, whose company owned half of Ethyl, still sided with du Pont in price negotiations (GTX 704, R. 624, 4505).

The fear of competition in manufacturing was expressed in the opening paragraph of an extensive re-

view of the Ethyl business prepared by a du Pont employee in 1936 (GTX 773, R. 632, 4665):

> Evidences have for some time been apparent of a renewed desire on the part of the Standard Oil Company of New Jersey to go into the manufacture of tetraethyl lead. Since February 26, 1930, all basic contracts between the du Pont Company and the Ethyl Gasoline Corporation have contained a provision obligating each party, as of January 1, 1938, to disclose fully to the other all technical information which it shall then possess relating to such manufacture, and to license the other under its patents. In these circumstances, we have been directed to make a comprehensive review of the facts attending the origin and development of the present large business in the manufacture and marketing of tetraethyl lead, in order to determine, apart from the present contract position, what special grounds may exist on which the du Pont Company's desire to continue producing the entire tetraethyl lead requirements of the Ethyl Gasoline Corporation can be supported.

Mr. Irenee du Pont's approval of this document indicates an adoption of this report. (GTX 775, R. 632, 4762). Finally, in 1938, agreement was reached whereby until 1945 (later 1948) du Pont would continue to manufacture as Ethyl's agent on a fee basis, but would prepare Ethyl for manufacturing itself after 1948 by operating a new plant in its behalf and turning it over to Ethyl in 1948; thereafter, du Pont and Ethyl were both to manufacture and market tetraethyl lead independently (GTX 798-801, 803, R. 635-6, 4830-4899).

All in all, du Pont's financial reward was generous (GTX 834, R. 638, 4974). In 1924-1927, while Ethyl lost $2,700,000, du Pont made $2,600,000. In 1928 through 1937 du Pont made $40,000,000 while General Motors and Standard took $30,000,000 each in dividends and General Motors $19,000,000 in royalties. In 1938-1947, the profits were (GTX 834, R. 638, 4974):

TETRAETHYL LEAD
THE DISTRIBUTION OF PROFITS
(In thousands of dollars)

Year	Ethyl Net Sales	Ethyl Net Income	Royalties Paid to General Motors	Ethyl Dividends Paid to General Motors	Ethyl Dividends Paid to Standard Oil	Du Pont Tetraethyl Profits [1]
1938.....	49,805	11,746	2,845	5,000	5,000	4,783
1939.....	64,363	18,483	4,412	8,500	8,500	5,534
1940.....	81,674	20,508	4,335	8,750	8,750	6,902
1941.....	88,356	19,181	3,408	8,500	8,500	6,509
1942.....	61,972	9,118	1,446	2,513	2,513	3,942
1943.....	81,943	11,765	2,151	4,688	4,688	3,918
1944.....	97,928	12,854	2,182	4,875	4,875	3,853
1945.....	105,464	15,366	1,775	4,125	4,125	3,800
1946.....	76,132	13,285	1,606	3,300	3,300	3,948
1947.....	91,481	10,059	78	1,950	1,950	2,784

[1] Does not include profits derived from supply of materials used in production of tetraethyl lead and ethyl fluid.

Thus, the total du Pont profit before the patents ran out was $86,000,000 and after that it has continued to manufacture ethyl with about one-third of the total production facilities.

Du Pont-General Motors Relations with Respect to Refrigerants

The district court gives the facts accurately and in some detail concerning the discovery and development of refrigerants used by Frigidaire Corporation of the General Motors family and other manufacturers of electric refrigerators (R. 426-432). For the purpose of this presentation the following facts will suffice.

In 1928, Dr. Midgely of General Motors discovered the refrigerant which was denominated "Freon 12" (GTX 883, pp. 7-8, R. 647, 5068-9). Originally the inventor and early experimenters, and the President of Frigidaire wanted to manufacture the new product themselves (GM 233, R. 1484, 7295; GTX 838, R. 638-639, 4975). However, in August 1930, du Pont and Mr. Pratt for General Motors worked out a plan to turn the invention over to a jointly owned corporation, Kinetic Chemicals, Inc., for manufacture and sale of Freon (GTX 842, R. 639, 4979; GTX 850, R. 641, 4992). This company was 49% owned by General Motors, 51% by du Pont. Article 7 of this agreement reads (GTX 850, R. 641, 4994):

> * * * it being further agreed that future chemical developments (other than those relating to "said products") originating in the laboratories of General, 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, then General shall be free to dispose of the same elsewhere.

This resulted from Mr. Pratt's agreement (GTX 842, R. 639, 4979):

> Name of Company: We do not think the name of the company should be tied up solely with fluorine. We take this position because of the possibilities of other chemicals being developed in General Motors laboratories which we might desire to manufacture in this proposed company and which might have no relation whatever to fluorine.

> Purpose: We recognize from the DuPont standpoint the necessity for limiting the kinds of chemicals manufactured in which the new company should embark. From General Motors' standpoint I think it would be satisfactory to have the purpose of the new company to manufacture fluorine with a fluorine atom substituted for at least one hydrogen atom of halogenated methane or ethane. In addition I would like to see the charter provide that the company could manufacture any chemicals that might originate in the laboratories of General Motors Corporation, and exclude any chemicals that originated in the DuPont developments except DuPont developments that flowed out of General Motors developments.

He explained the paragraph in a letter to Mr. Lammot du Pont saying (GTX 899, R. 652, 5130):

> This clause was placed in the Kinetic agreement because we wanted to remove from some of our organization the temptation of attempting to build up within General Motors an independent chemical manufacturing activity, and to place any developments along chemical lines in an organization in which we have confidence from the standpoint of their ability to carry on chemical manufacturing processes.

Subsequently the legal departments of both du Pont and General Motors decided the clause was unenforceable (GTX 886, R. 648, 5104) and it was cancelled (DP 133, R. 1814, 5945).

Du Pont-General Motors Relations with Respect to Fabrics and Paint

We have already referred to the early report in 1921 on the General Motors' use of du Pont products made (GTX 420, R. 529, 4010, *supra,* p. 34). It was then suggested that, with changes in the management of some of the divisions, a larger share of the market could be obtained (GTX 421, R. 529, 4012).

The next general survey included in the record was made for the year 1926, as reported by Mr. Lammot du Pont to Mr. Pierre S. du Pont and Mr. J. S. Raskob (GTX 460, R. 537, 4100). It showed that in artificial leather and coated fabrics, only relatively minor purchases were made from competitors of du Pont by all divisions of General Motors except Fisher Body. All paint purchases, except those by Fisher, were made from du Pont.[11]

Du Pont's own exhibits show sales of artificial leather and rubber coated cloth for 1926 to Chevrolet, Buick, Cadillac, Oldsmobile and Oakland of $1,623,000. (DP 250, 259, 260, 263, 265, R. 2204, 2216, 2221, 2224, 2229, 6161, 6170, 6171, 6175, 6177). That is 89% of the total of sales to these divisions on the basis of total sales by other manufacturers as disclosed in Government exhibit 460 (R. 537, 4100).

There is a sharp dispute as to the accuracy of Government exhibits 1391 and 1392 (R. 2933, 5426-7) which purport to demonstrate that du Pont in 1946 sold to General Motors 74.5% of its requirements for fabrics ($2,032,000 out of $2,728,000) and in 1947 60% ($3,573,-

[11] It is noteworthy that du Pont's relationship with General Motors made it unnecessary for it to compete pricewise (GTX 467, 468, R. 541, 4121-2).

000 out of $5,966,000). By including additional sales by other suppliers, du Pont claims the correct percentages were 52.3% for 1946, and 38.5% for 1947 (DP. 569, R. 3005-7, 6527). The district court resolved this dispute in favor of appellees finding the correct percentages to be 40-50% (R. 404). Although du Pont also disputes the Government's claim that the evidence shows 63.8% of such sales in 1948 (GTX 1351, 1354, 1357, R. 2890, 5358, 5368, 5378), the record certainly supports a finding that the du Pont share of the market was maintained in that year. Du Pont's own exhibits show sales of $3,511,000 in 1948 and $3,744,000 in 1949 (DPX 297, 307, 311, R. 2266, 2276, 2283, 6231, 6243, 6251).

Sales in the paint and finish field present a similar pattern. In December, 1924, du Pont got a contract to supply all of General Motors requirements for Duco for the first half of 1925 (GM 166, 167, R. 1128, 7156, 7159), excepting Fisher Body. This was followed by a similar contract for the second half of 1925 with Fisher taking 50% of its requirements (GM 179, R. 1139, 7181). The same type of contract was entered into in 1926 (GM 184, R. 1141, 7190). In 1927, 1928, 1929, 1930 and 1931 (GM 187-190, R. 1143-4, 7212-27) a "sellers make" contract gave slightly less protection. But Chevrolet bought 100% from du Pont (GTX 503, R. 598, 4171), as did Pontiac (R. 1925) and Buick (R. 1926). Fisher, Cadillac and Olds were not so faithful (R. 1923, 1925, 1926).

This advantage of du Pont's continued to the date of the complaint. In 1946, General Motors bought $14,864,000 of all types of paint; du Pont supplied $10,430,000 or 70% (GTX 1400, R. 2930, 5431). And

in 1947, General Motors purchased $26,470,000 in all; du Pont supplied $18,938,000 or 71.55% (GTX 1400, R. 2930, 5431).

General Motors' automotive sales constituted from 35% to 45% of the entire industry for the past ten years.[12]

The percentages of du Pont sales of fabrics to General Motors as compared with its sales to the entire automotive industry, so far as disclosed in the record, are as follows:

1922—Bulk of du Pont's sales of all fabrics to General Motors (GTX-404, p. 3, R. 526, 3963).

1923—Du Pont Fabrics Department dependent upon General Motors market (GTX-406, p. 15, R. 527, 3980).

1925—58 per cent of du Pont's rubber-coated sales to automotive industry went to General Motors (January-November) (GTX-1368, R. 2819, 5399).

1926—74 per cent of du Pont's rubber-coated sales to automotive industry went to General Motors (January-November) (GTX-1368, R. 2819, 5399).

1927—81 per cent of du Pont's rubber-coated sales to automotive industry went to General Motors (January-September) (GTX-492, p. 5, R. 541, 4149).

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

1938....	42%	1942....	.....	1946....	36.3%	1950....	45.6%
1939....	42%	1943....	.....	1947....	38.5%	1951....	41.8%
1940....	45%	1944....	.....	1948....	38.8%	1952....	40.3%
1941....	45.3%	1945....	35%	1949....	42.7%	1953....	44.7%
						1954....	49.9%
						1955....	48.8%

1928—82 per cent of du Pont's rubber-coated sales to General Motors (January-June) (DP-278, p. 2, R. 2243, 6205).

1929—75 per cent of du Pont's Teal, an uncoated combined fabric, to General Motors (DP-286, R. 2256, 6218).

50 per cent of du Pont's rubber-coated sales to General Motors (January-June) (DP-278, p. 2, R. 2243, 6205).

1930—85 per cent of du Pont's Teal to General Motors (DP-286, R. 2256, 6218).

1931—80 per cent of du Pont's Teal to General Motors (DP-286, R. 2256, 6218).

1932—39 per cent of du Pont's Teal to General Motors. Total Teal sales greatly limited (DP-286, R. 2256, 6218).

1933—55 per cent of du Pont's Teal to General Motors. Teal sales total less than 26,000 yards (DP-286, R. 2256, 6218).

1939—77 per cent of du Pont's pyroxylin-coated sales to General Motors. (Total du Pont sales figure taken from GTX-1380, R. 2825, 5413; sales to General Motors taken from GTX-1344, p. 1, R. 2846, 5340).

1940—87 per cent of du Pont's pyroxylin-coated sales to General Motors. (Sources same as above.)

1941—89 per cent of du Pont's pyroxylin-coated sales to General Motors. (Total du Pont sales figure taken from GTX-1381, R. 2825, 5414; sales to General Motors taken from GTX-1344, p. 1, R. 2846, 5340).

1947—80 plus per cent of all du Pont's automotive fabrics to General Motors (GTX-1384, R. 2825, 5418).

1948—80 plus per cent of all du Pont's automotive fabrics to General Motors (GTX-1384, R. 2825, 5418).

1949—Nickowitz admitted that, from 1946 onward, General Motors accounted for 80 per cent of all du Pont's automotive sales (R. 2171-2).

With respect to paints, it appears that in recent years du Pont has been dependent on General Motors for a market for Duco. The record shows that neither Chrysler nor Ford uses it (R. 2011). In figures, du Pont sold $13,400,000 in 1941, of which only 7% went to General Motors competitors. In other words, 93% of du Pont sales went to a manufacturer producing about 45% of the cars. (GTX 1387, R. 2919, 5422). In 1947, the same exhibit shows 83% as against 17% to others though General Motors held but 38% of the automobile manufacturing field (GTX 1387, note C, R. 2919, 5422).

Special Problem with Fisher Body Corporation

Although General Motors had acquired 60% stock control of Fisher Body Corporation in 1919 for $27,600,000 (GTX 139, R. 480, 3301), a voting trust had been established and actual management was retained for five years by the Fisher brothers (GTX 428, 429, R. 530-1, 4029, 4032). Therefore du Pont's control of General Motors was insulated from Fisher Body and it was forced to sell on merit in competition with other manufacturers.

As early as 1921, it appeared to du Pont that it was not getting its share of Fisher Body business (GTX 420, R. 529, 4010). Mr. Pierre du Pont indicated (GTX 421, R. 529, 4012):

> "A drive should be made for the Fisher Body business. Is there any reason why they have not dealt with us?"

In October 1922, Mr. Lammot du Pont wrote to the president of Fisher Body Corporation, Mr. Fred Fisher, as follows (GTX 434, R. 532, 4054):

> I note the fact that Flint Varnish & Color Works is not getting any substantial amount of business in paint or varnish from the Fisher Body Corporation.
>
> In view of the stock ownership relations between Fisher Body Corporation, Flint Varnish & Color Works, General Motors Corporation and du Pont Company, it would seem that Flint Varnish & Color Works should enjoy a large part, if not all, of Fisher Body's paint and varnish business, unless there is some good reason for not having it.

Again in December 1922, he wrote (GTX 437, R. 533, 4059):

> On October 20th I wrote you in regard to the fact that Flint Varnish & Color Works was not getting any substantial amount of business in paint or varnish from the Fisher Body Corporation. I am sorry that oversight has caused me to not take this matter up further again; for I have received no reply from you to my letter of October 20th and fear that same may have gone astray, and

thus a month or more delay has been caused by my oversight.

I am enclosing copy of my previous letter.

It seems to me that this matter is of extreme importance, for I am sure that Flint Varnish & Color Works goods are the equal of, or superior to, any goods on the market, and therefore should be used by Fisher Body Corporation in any event. The close stock relationship of the companies makes it appear almost ridiculous that no business should be done between Flint and Fisher. [13]

The same problem arose as to selling fabrics to Fisher (GTX 450, 451, 452, R. 536, 4078-81). As Mr. Pratt reported later to Harrington of du Pont (GTX 456, R. 537, 4095):

As you have probably sensed, the Fisher Body outfit is pretty difficult to deal with and I hardly know how to advise you to approach them on this subject.

I am expecting to be in Detroit next week and if Fred Fisher is back from California I will try to feel him out on this subject and may be able to get some leads that would indicate whether or not it is possible for you to work along the lines you have in mind. I will advise you when I have been able to develop anything.

Efforts persisted and in 1924, Mr. P. S. du Pont wrote (GM 32, R. 1232, 6658):

* * * Interesting two members of the Fisher family directly in General Motors will have a very

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[13] It was at about this time that Mr. Fred Fisher was elevated to the Executive Committee of General Motors (GTX 435, 436, R. 532, 4056, 4058).

> 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 criticise each other, without good result. Hereafter the Fishers will better understand General Motors problems and difficulties and, I think, General Motors men will better appreciate the Fisher problems.

Still in 1925, when General Motors was using Duco, Fisher was using a pyroxylin finish manufactured by Forbes Varnish Company (GTX 453, R. 536, 4082). And there were also problems in selling fabrics to Fisher (GTX 454, p. 7, R. 537, 4090).

Pressure through use of special discounts was indicated in a report to the du Pont Executive Committee (GTX 454, p. 4, R. 537, 4087):

> 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.

Eventually the island of resistance was undermined through the purchase of the minority interest of Fisher Body in 1926, making it 100% controlled (GTX 505, 506, 507, R. 598, 4173-8). But the Fisher brothers became very large General Motors stockholders (GTX 505, R. 598, 4173), and as Mr. P. S. du Pont pointed out, a large stockholder exercises a lot of power (R. 938).

By 1947 and 1948, however, Fisher Body was just another department of General Motors, buying 65.5% of its fabrics from du Pont in 1947 and 68% in 1948 (GTX 1350, 1351, R. 2890, 5356-9).

Opinion of the Court Below

The opinion of the court below reviewed the evidence in great detail. Almost all of the facts stated above are set forth in that opinion or are not in dispute. Where there is dispute on primary facts, it centers about figures for particular years which cannot materially affect the conclusion. It is not until the court reaches its conclusions from the underlying facts that we believe it errs.

With respect to the issue of control by du Pont over General Motors, the Court found that the original stock 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." (R. 301.) With respect to voting power the court noted that "the du Pont block of stock represented over 51% of the stock at certain of the meetings" but stated that it was "entirely conjectural whether or not du Pont by its stock ownership could control if there had been a contest." (R. 322-323.) It found no exercise of control either through interlocking officers and directors or by

means of the bonus plans (R. 316, 321.) It concluded that "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." (R. 322.)

With respect to du Pont's intentions at the time it acquired the General Motors stock, in addition to the findings on investment just stated, it also specifically found 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." (R. 302.)

Dealing with specific items of trade the court concluded that both paints and fabrics were purchased by General Motors purely on the basis of merit and not in response to restraints (R. 396, 405). Similarly with respect to tetraethyl lead the court concluded that there were no improper pressures by du Pont on General Motors (R. 426).

The Court's final conclusion on the Sherman Act phase of the case was, "When read as a whole the record supports a finding, and the Court so finds, that there has not been, nor is there at present, a conspiracy to restrain or to monopolize trade and no limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont and United States Rubber, no limitation or restraint upon the freedom of General Motors to deal with its chemical discoveries, no restraint or monopolization of the General Motors market * * *." (R. 465.)

With respect to the alleged violation of the Clayton Act, the court recognized that in the absence of actual restraint "a reasonable probability that a condemned restraint will result" may be sufficient. However, the court found that no restraint had developed in the thirty years since the stock was acquired and that this disproved the existence of any such reasonable probability.
(R. 466.)

SUMMARY OF ARGUMENT

Introduction

The gist of the Government's case is that du Pont acquired control of General Motors with the specific purpose and effect of obtaining an illegal preference with respect to General Motors' purchases of materials. The consequence of the relationship has been that du Pont has enjoyed a noncompetitive advantage over its competitors in dealing with General Motors. To put it another way, du Pont achieved, through its purchase of a controlling stock interest and the corollary influence on the General Motors' management, and not because of lower prices or superior quality or service, power over a substantial part of General Motors' trade, a position of superiority *vis-a-vis* its competitors for such trade.

The restraint of trade thus imposed is of the classic type which this Court has recognized in Sherman Act cases almost from the beginning; the commercial relations between the restrainer and the restrained are governed not by the economic laws of free competition but by an external influence which determines the route in which such trade shall flow. The antitrust laws are violated by any such interference with competition regardless of the means adopted to make the restraint effective. In this case the restraint was

made possible through an intercorporate relationship, the heart of which was the ownership by du Pont of 23% (or more) of the stock of General Motors. It is for this reason that control, which is not of itself an element of the statutory prohibition, is so important to this particular violation. We do not contend that it is illegal for one corporation to buy a controlling interest in another; we do argue that a combination to restrain or to monopolize trade is not insulated from the Sherman and Clayton Acts because it is based upon stock control. It is the purpose and effect of such control, in the economic context of the trade and commerce involved, which determines whether a violation of law exists.

The district court did not reach this problem. In the very beginning of its opinion it erred in adopting an improper standard for determining "control" by requiring the government to prove the equivalent of 51% stock interest (R. 322). Building on this false foundation, the court considered the rest of the record out of context, treating all transactions and communications as though they took place between strangers. We shall show that the same facts when viewed in the light of the control factor cease to be ordinary arm's-length business dealings, as found by the court, and become examples of the imposition of illegal restraint. In short, we ask this Court to reappraise the undisputed facts in the light of the background which actually existed.

I

Du Pont's Relationship with General Motors Constitutes a "Combination" Within the Language of the Sherman Act.

The Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade or commerce among the several states. The complaint in this case alleges

both a "combination" and a "conspiracy." However, on the whole, the court below treated the Government's case as though only a conspiracy were charged, requiring proof of a common intent between the du Ponts and the officers and directors of General Motors. But the Government's case is broader—in essence it is that by entering into and fostering the relationship with General Motors, du Pont created a "combination" in restraint of trade regardless of conspiratorial agreement between du Pont and General Motors. At the trial the Government also attempted to establish the existence of a conspiracy, as such. The district court found as a fact that the evidence failed to establish such a conspiracy. We will not press that issue here, but will rely only on the facts which support the Government's case on the basis of a "combination."

In arguing that there was an unlawful "combination" in restraint of trade, it is not necessary for the Government to show, nor do we suggest, that all details of General Motors' business activity have been dictated by du Pont, nor even that du Pont has had power to impose its will under every circumstance. It is obvious that all corporate management is subject to some limitations so long as there is a single outside stockholder. Rather, the existence of a combination is evidenced by the fact that whenever a business judgment was required in a situation in which du Pont was in competition with other suppliers, the stock interest cut across normal competition and resulted in a preference being given to du Pont. Thus it was inevitable that, in the long run, du Pont received preference not on the basis of competitive merit, or on the basis of what was to General Motors' economic advantage, but rather be-

cause of du Pont's 23% stock holding. This has been not merely a potential, but an actual, restraint upon the free play of competition and a combination of the type which the Sherman Act has made illegal.

A. *Du Pont's stock ownership of General Motors, in the absence of other substantial holdings, places it in control.*

At the beginning of the relationship between du Pont and General Motors, it was the frank and avowed intention of both Mr. Durant and du Pont to control General Motors, Mr. Durant to be responsible for operations and du Pont for financial policies. This was carried out and unquestionably du Pont did in the early days share in control of General Motors.

Later, in 1920, when du Pont bought out Mr. Durant, sole control was vested in du Pont. This too was admitted at that time. It was in this period, up to 1930, that du Pont consolidated its position by its selection of the management. The General Motors administrators, whom the court below treated as independent men, were selected, promoted, and rewarded by du Pont.

So the question really is, has anything happened to terminate a control relationship which admittedly existed? This is not a situation where du Pont as an outsider acquired its present interest in opposition to an existing management. On the contrary, inertia, the continuation of the status quo, or, in more concrete corporate terms, the power inherent in management to maintain itself, worked in harness with the continuing stock interest to continue du Pont control.

At the time suit was brought du Pont owned outright, and still owns today (not counting individual holdings,

or holdings by friendly interests), 23% of General Motors stock. The income from that stock constitutes about one-third of du Pont's net earnings. This is an important and significant factor in the welfare of the du Pont stockholders. The duty of management is to make this investment as profitable as possible; it would indeed be subject to criticism if it failed to exercise the responsibility which goes with so considerable a stock position and so important a source of income.

Although du Pont has consistently voted for the directors included in the management proxy solicitation and has supported all measures proposed to the stockholders by the management, the evidence makes it clear that this was not from blind acceptance of General Motors' policies or decisions, but because, instead, the discussion and the differences, where they cropped up, took place off-stage before the management proposals were put forward.

The quorum for stockholder meetings of General Motors is 30%. Ordinarily about 70% of the voting stock has been present either in person or by proxy (GTX 1307, R. 664, 5230). Du Pont's percentage of this vote has varied from a low of 29% to a high of 52%. Thus, purely from a mathematical standpoint the vote cast by du Pont has come close to, and sometimes has passed, an absolute majority. And significantly no other single stockholder or group of stockholders has ever had more than a minuscule percentage of the vote.

Du Pont has had direct representation on the board of directors ever since it made its initial investment. The management directors plus du Pont representatives have constituted a majority of the board at all times. See Appendix B, pp. 154 to 163, *infra*. The designation of directors as "management" is misleading unless it be understood that listed among them are

men who were long associated with du Pont and introduced into the General Motors management by du Pont.

Du Pont representatives have held an exceptionally large proportion of the places on the finance committee. The operations committee has been largely management-controlled.

Mr. Pierre du Pont was president of General Motors from 1921 to 1923, Chairman of the Board from 1917 to 1929. Mr. Lammot du Pont was Chairman of the Board from 1929 to 1937. Mr. Sloan was advanced to the presidency when there was admitted du Pont control and has ever since been a leading spirit in the affairs of the company. Other chief executives, such as Messrs. Knudsen and Wilson, could not have held office without the approval of du Pont. Special compensation to officers of General Motors in the form of very large bonuses has been allotted or approved by committees on which du Pont representatives predominated.

Later we shall see how this relationship has borne fruit in business preferences. For the present we merely note that the control was sufficient to insure business preferences to the extent that du Pont felt it good policy to obtain such preferences.

All this adds up to practical working control. Control is not an abstract, theoretical conception. Its existence depends upon the actual facts. Nor is it an absolute term, requiring proof of ownership of a majority of the outstanding stock, or the imposition of commands as though a majority of the stock were in hand. *United States* v. *Union Pacific Railroad Co.*, 226 U. S. 61, 95; *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 307; *North American Co.* v. *Securities and Exchange Commission*, 327 U. S. 686, 693. Courts recognize that a substantial minority, in the absence of

large opposition holdings, can exercise control. *Morgan Stanley and Co.* v. *Securities and Exchange Commission,* 126 F. 2d 325, 328 (C. A. 2). Where there are added to this the interlocking directorates, the long recognized relationships, and the tremendous financial incentive shown here, the presence of control is established. *American Gas & Electric Co.* v. *Securities and Exchange Commission,* 134 F. 2d 633 (C. A. D. C.), certiorari denied, 319 U. S. 763; *Pacific Gas and Electric Co.* v. *Securities & Exchange Commission,* 127 F. 2d 378 (C. A. 9), affirmed, 139 F. 2d 298, 324 U. S. 826. See Berle and Means, *The Modern Corporation and Private Property* (1932) 80.

B. *Even if the court below should be sustained in its finding of absence of control, du Pont's stock ownership in General Motors nevertheless resulted in a relationship which subjected many of the latter's actions to influence by du Pont.*

The court below held that du Pont was not able to act as would a majority stockholder (R. 322). Assuming for present purposes that this is so, it does not negative du Pont's power to make its influence felt in many matters.

The record abounds with illustrations of the deference paid by General Motors to the interests of du Pont. Du Pont was, as it should have been, represented on the General Motors Board of directors. The appointment of outside directors was fully discussed between the two corporations. Problems of organization and business policy were explored. Du Pont did not hesitate to exercise its influence when purchases from it by General Motors could be advanced.

All this suggests that there was at the very least a special relationship between the two corporations which

was built upon the stock interest maintained without a break since 1918. In a negative mode of expression it can be described as an absence of arm's-length bargaining. This relationship, even assuming it was not sufficiently strong to enable du Pont to impose its will on General Motors, was ever present to influence General Motors in the direction of giving du Pont preference over its competitors. Wherever there was room for a business judgment as to whether materials should be purchased from du Pont or from another, it was inevitable that du Pont's stock holdings and its long-continued intimate connection with top management would work in du Pont's favor.

II

The du Pont-General Motors Combination Is One Which Is Prohibited by the Sherman Act.

The "control" (which in this part of the brief will be used as a short-hand expression to cover the power of du Pont, based on its stock holdings, interlocking directorate, and historic relationship, to influence business judgments of General Motors) of du Pont over General Motors is both a "combination" in restraint of trade and a "combination" to monopolize trade, in violation of Sections 1 and 2 of the Sherman Act.

Violation of the two sections will not be treated separately. It is submitted that, with respect to the conduct here concerned, a violation of one section constitutes a violation of the other. The du Pont-General Motors combination in restraint of trade was also a combination to monopolize that same trade. See *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), pp. 5-12.

The pertinent legal question here is whether the acquisition of the power to influence General Motors

to purchase du Pont products and to assign to du Pont the commercial exploitation of General Motors' chemical discoveries constitutes a combination of the type condemned by the Act. There can be no doubt that by acquiring the power to prevent competitors from selling their products to General Motors, du Pont interposed itself between its competitors and business which otherwise they would have been in a position to compete for on the basis of price, quality and service. If there is control, there is an ability to limit purchases from these competitors. The decisions of this Court hold that a combination having this effect is in violation of the law, either if it was formed with the intent and purpose of restraining competition, or if its natural and inevitable effect is to restrain trade. The latest and most explicit expressions of these views are found in *United States* v. *Yellow Cab,* 332 U. S. 218, and *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131. But they have their origin in *Standard Oil Company of New Jersey* v. *United States,* 221 U. S. 1, *United States* v. *American Tobacco Co.,* 221 U. S. 106, and *United States* v. *Reading Co.,* 253 U. S. 26.

From contemporaneous written evidence in this case, it appears that an essential purpose of the purchase of General Motors stock was to sell du Pont products to General Motors. This appears not only in the original, Raskob-du Pont report (GTX 124, R. 479, 3208), but in annual reports and in correspondence. Of course, du Pont was concerned with receiving an income from its $50,000,000 investment, but its purchase was clearly not dictated, as would have been an investment company's, by safety, rate of return, and prospect of growth and appreciation. This was but natural since du Pont was not an investment company. Obtaining

the trade preference was a very important factor to du Pont. The court's contrary finding is apparently bottomed on the assumption that the Act was not infringed unless du Pont intended to direct General Motors department heads to shift their orders to du Pont products. Consciousness that the combination would, by and large, give du Pont the edge and would deflect trade to it from competitors, stamps the combination with illegality, at least if the intended result has been achieved. Patently that consciousness was present, and patently the results have been those anticipated.

But even on the court's findings on specific purpose and intent, there remains the legal effect of the natural and inevitable consequences of the combination. No specific purpose or intent need be proved where a course of conduct will inevitably lead to a restraint of trade. So long as human activity is influenced by personal interest, the management of General Motors must tend to lean toward du Pont whenever a reasonable choice exists; without instructions, without any communication or guidance, General Motors will prefer its associates over strangers. Its officers could ill afford to risk giving offense to du Pont when not only their positions, but extremely generous special compensation depended upon the continuing good will of du Pont. Thus, competitors are in the same position as those referred to in *Associated Press* v. *United States,* 326 U. S. 1, 10—they "have a hard road to travel."

If, as we believe, the combination is one which is by its nature in restraint of trade, the volume of the trade actually restrained is immaterial (except as it buttresses or undermines the conclusion as to the nature of the combination). It is too well established to require extensive citation that a combination in restraint

of trade or a power to monopolize, when coupled with an intent to do so, is in violation of the Sherman Act without regard to exercise of the restraint or of the monopolistic power. As this Court said in an early case, *Uniter States* v. *Reading Co.*, 253 U. S. 26, at 57:

> Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.
>
> That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act, has been frequently held by this court.

III

The Evidence Shows that Restraint of Competition and Monopolization Has Occurred.

We have already seen that in the early days of the relationship, when it was necessary to initiate new purchasing habits, (habits which have persisted for more than 35 years), the intent to use the control relationship to achieve a preferred position in supplying General Motors with essential materials was frankly and clearly expressed. The statements of objective found in the early exchanges are missing in recent years, but the telltale statistics to which we refer below indicate that the silence was the result either of a conscious effort to avoid trouble, or of a relationship so well established that it was no longer necessary to press it. Indeed, once the pattern of trade was established, it became self-perpetuating. There has been no change in the established relationship or in du Pont's intent.

Du Pont discovered that the instruction books for General Motors cars suggested that purchasers use a glycerin anti-freeze manufactured by a competitor. Du Pont was interested in a competing fluid, ethyl alcohol. Correspondence at a high level ensued, and one by one the General Motors car divisions changed the tone of their instructions, until eventually they clearly steered car owners in the direction of the du Pont product. All this without regard to merit.

Intrinsically more important is the history of the development of the gasoline additive, tetraethyl lead, used to avoid engine knock in high-compression motors. The basic invention was made by General Motors' scientists, primarily Dr. Midgely, and it was immediately recognized that the discovery was of great economic value. The product, tetraethyl lead, was then available only on a laboratory scale, and a manufacturing industry had to be built from scratch. Du Pont was not manufacturing any tetraethyl lead at this time.

General Motors and du Pont claim that the handing over of this extremely valuable business to du Pont was done on the basis of merit alone, and the lower court so found. We submit that the record shows that du Pont obtained this business without regard to competitive considerations because of its relationship with General Motors. Thus, Mr. Pierre du Pont, as President of General Motors, alerted his other company, du Pont, to the discovery before patent application had been filed. Even before a contract was made, du Pont commenced manufacture. There is not a word in the record indicating that General Motors approached any other chemical company at that time.

Later, Standard Oil Company of New Jersey discovered and patented a far more economical process for manufacturing the basic ingredient. Working from the strength of this position, it acquired a 50% interest with General Motors in a new corporation, the Ethyl Corporation, formed to distribute the product. But even with this independent element in the picture, du Pont retained its exclusive position as manufacturer. The General Motors men in the Ethyl Corporation management sometimes seemed more anxious to protect du Pont than Ethyl.

Eventually, as the patent protection for the invention was drawing to a close and Ethyl Corporation seemed to have little function left, it did contract with du Pont to be introduced to the production end and, since 1948, has been producing tetraethyl lead in plants formerly constructed and operated by du Pont.

The manufacture of tetraethyl lead has produced $86,000,000 for du Pont, which is slightly larger than the dividends received by either General Motors or Standard Oil from the Ethyl Corporation. Whether or not it has given full value for its return, the significance of the history is that a substantial restraint on trade resulted from the control relationship and du Pont took for itself profits which would otherwise have gone to General Motors. This particular restraint has ended, but the fertile ground from which it sprouted still exists.

We shall not repeat the details of the Kinetic Chemical development. It is not dissimilar in its basic elements. General Motors discovered a new refrigerant. Du Pont was invited to participate in its manufacture, to its great profit. Here, even more boldly than in the antiknock picture, was expressed the philosophy that to

the controlling stockholder belong the spoils of General Motors' inventions.

On an overall basis, du Pont's effort to corral the bulk of General Motors business has been outstandingly successful. By 1926, du Pont was selling 89% of the imitation leather and rubber covered fabrics bought by Chevrolet, Buick, Olds, Cadillac and Oakland. In 1946 and 1947 it sold approximately 40-50%. In the paint field du Pont in the 1920's sold all, except the Fisher body requirement, by contract. Chevrolet, Pontiac and Buick continued to use du Pont duco exclusively. In the later years du Pont supplied 70% of General Motors' paint requirements in 1946 and 71.55% in 1947.

Du Pont claims, and the lower court found, that these purchases were the result of the merits of the du Pont products in competition with others. However, there are indications that this cannot be so. In the statement above we summarize portions of the record that show that over many years and in many products du Pont sold the giant share of its products manufactured for the automobile industry to General Motors (*supra*, pp. 62-64). The percentage of some du Pont's products sold to General Motors amounted to 80% and even 90% of its total production. It is obvious therefore that du Pont has been dependent upon General Motors for the success of the automotive part of its business. If equally large sales had been made to other automobile companies, who in the aggregate produced 55-65% of the cars, it would appear that such sales not being inspired by control must have been made on merit. But the fact that the great bulk of du Pont's sales go to the one company controlled by it over a long period of years is a clear indication that the sales were not made solely on merit.

The history of du Pont's efforts to sell its products to the Fisher Body Corporation are another refutation of the argument that the products were sold on merit only. When du Pont first bought its stock interest in General Motors, Fisher Body was not fully a member of the General Motors family since a voting trust gave its management, the Fisher brothers, a large measure of independence. One aspect of this independence was a reluctance to buy from du Pont regardless of quality or price. Thus sales to Fisher Body fell far behind sales to other divisions of General Motors. The efforts to overcome this resistance were carried on at the highest levels without success. It was not until the voting trust was terminated and the minority stock interest acquired that sales to this branch of General Motors became satisfactory.

In short, the combination of du Pont and General Motors was intended to, and did indeed, eliminate competition for General Motors' business in favor of the former.

IV

Du Pont's Acquisition of General Motors' Stock Constitutes a Violation of Section 7 of the Clayton Act.

Section 7 of the Clayton Act (15 U. S. C. 18, *supra*, p. 3) deals specifically with stock ownership. "No corporation engaged in commerce shall acquire * * * any part of the stock * * * of another corporation engaged also in commerce, where the effect of such acquisition may be * * * to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." It was adopted by Congress in 1914, in an attempt to deal with specific antitrust problems brought to its attention in an address by President Wilson to a joint session on Janu-

ary 20, 1914. Among these problems he referred specifically to the intercorporate relationship between sellers and buyers (House Doc. No. 625, 63rd Cong., 2d Sess.)

One imporant distinction between the Clayton Act and its predecessor is the reduced burden of proof required to establish violations of the later statutes. By its explicit language it is sufficient that the effect of a stock purchase *"may be"* to restrain trade or "may be" to "tend to create" a monopoly. Moreover, under this Act, there is no issue as to whether the du Pont stock holdings in General Motors constitute control; it is sufficient that the effect of the stock purchase may be to restrain trade or to create a tendency to monopoly. Nor is intent an issue under the Clayton Act once it is established that the purchase does not fall within the exception for "investment" only. Mr. Raskob and his successors made it abundantly clear that they had no intention of sitting back and waiting for dividend checks, but that they intended to participate actively in the management of the corporation.

Appellees would limit the application of Section 7 of the Clayton Act to situations where a company buys stock in a competitor; that is, horizontal integration. This is reading a limitation into the law which is contrary to its terms and evident purpose. In other words appellees would limit Section 7 to direct restraints on competitors through horizontal integration in spite of the fact that competitors can be restrained equally effectively, if indirectly, through vertical integration. The President's address, the language of the Act, and its early interpretation in *Aluminum Company of America* v. *Federal Trade Commission,* 284 Fed. 401 (C. A. 3), certiorari denied, 261 U. S. 616, are all to the contrary.

Nor does it aid appellees to assert that the primary purpose of Section 7 of the Clayton Act was to eliminate abuses at the time they arose; that is, when the stock acquisition occurred. Assuming this is so, in situations where the entire picture may not be apparent at the time of purchase, the Government is certainly not intended to be powerless when the violation becomes evident. Moreover, it would not follow that the Government is barred because it did not act promptly. On the contrary, this Court has held that the Government cannot be estopped by the laches of its agents. *United States* v. *California,* 332 U. S. 19, 40.

It is submitted that this case appears to be a prime illustration of using the Clayton Act to catch restraints which might escape the Sherman Act. That was the expressed intention of Congress to which the court below paid scant regard when it implied that since in thirty years there had been no violation of the Sherman Act there could be none of the Clayton Act.

ARGUMENT

I

Du Pont's Relationship with General Motors Constitutes a "Combination" Within the Language of the Sherman Act.

A. *Stock ownership by one corporation in another may be one type of combination within the meaning of the Sherman Act.*

The language of the Sherman Act is broad in order to encompass any and all types of contract or combination in restraint of trade among the states. As this Court stated in *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 at 359-360:

> As a charter of freedom, the Act has a generality and adaptability comparable to that found

> to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.[14]

In the early days there was some doubt that it covered stock acquisition as such.[14a] But the majority opinion in *Northern Securities Co.* v. *United States,* 193 U.S. 197, and other later cases have established beyond doubt that control through the acquisition of stock may be a "combination" under the Act. *United States* v. *Union Pacific R. Co.,* 226 U.S. 61; *United States* v. *Reading Co.,* 253 U.S. 26; *United States* v. *Lehigh Valley Railroad Co.,* 254 U.S. 255; *United States* v. *Southern Pacific Co.,* 259 U.S. 214. Cf. Stimson, *Trusts,* 1 Harv. L. Rev. 132, 133.

B. *The court below failed to apply a proper standard in its finding on "control".*

The court below categorically found that du Pont does not "control" General Motors (R. 322-3). In attacking this conclusion the government must establish

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[14] Jefferson had thought that a prohibition against monopolies should be included in the Bill of Rights. Boyd, *The Papers of Thomas Jefferson,* Vol. XII, pp. 438, 440 (Letter to James Madison, Dec. 20, 1787). See Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. of Chicago L. Rev. 221, 226.

[14a] In *Northern Securities Co.* v. *United States,* 193 U.S. 197, Mr. Chief Justice White stated in dissent at 368-369: "But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. * * * Can it in reason be maintained that to prescribe rules governing the ownership of stock within a State in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?"

either that the court below adopted an incorrect test of the meaning of "control" or that it decided the issue without reasonable support in the record. We believe that both burdens can be met.

In the context of this case, "control" is not a term of art; the word is not used in the Sherman Act. Rather it is here used as a shorthand designation of a relationship by which one corporation influences the free action of another so as to result in an unlawful restraint of trade.[15] Specifically, we are concerned here with a power in du Pont to direct the business policies of General Motors so as to gain for itself an economic advantage over its competitors. We are not talking of absolute power, since the corporate laws of Delaware and the rights of minority stockholders and creditors impose a limitation on arbitrary action.

It is abundantly established that in order to have control of a corporation in this sense, it is not necessary to hold a majority of its voting securities. In many cases it has been held that in large, publicly-owned corporations the ownership of a sizeable minority suffices.[16] Thus this Court stated in *United States* v. *Union Pacific Railroad Co.*, 226 U. S. 61, at 95-96:

> But it is said that no such control was in fact

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[15] The Securities and Exchange Commission has defined the term "control" for the purposes of the Securities Act of 1933, where it is used but not defined (15 U.S.C. 77(b)(11)), as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. 230, 405 (f). See also 17 C.F.R. 240.12b-2(f) and 260.0-2(f), for similar definitions of the term as used in the Securities and Exchange Act of 1934 and the Trust Indenture Act of 1939.

[16] This was specifically recognized by the Committee reporting the Securities Act of 1933 and the Securities and Exchange Act of 1934. H. Rep. No. 85, 73d Cong., 1st Sess. (1933) 14; H. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 26.

> obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction per cent. which was afterwards somewhat increased and diminished until about 46% of the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is ample to show that, distributed as the stock is among many stockholders, a compact, united ownership of 46% is ample to control the operations of the corporation.

Again in *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, at 307-308, it said:

> * * * We have not said, nor do we perceive any ground for saying, that the Constitution requires such an inquiry to be limited to those cases where common control of the two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, as the statute recognizes, there are other methods of control of a corporation than through such ownership. Common management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry.

And see *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, which sustained a Federal Communica-

tions Commission order that a one-third holding was enough to constitute control.

The Second Circuit has suggested that a 20% holding is generally sufficient for control, *Morgan Stanley & Co.* v. *Securities and Exchange Commission,* 126 F. 2d 325, at 328, 333:

> * * * Second is the relationship between Columbia Gas & Electric and United, which owns 19.6% of Columbia's voting stock. Although petitioner argues that the mere fact of Columbia's status as a "subsidiary company" within the definition of § 2(a)(8), 15 U.S.C.A. § 79b(a)(8)—as owning 10% of the stock—is not controlling, we think there is little need to discuss this point. Columbia has never carried through any attempt to have the Commission find that it is within the exceptions of § 2(a)(8); and in the absence of such action by Columbia, the Commission is warranted in relying on the statutory definition of a subsidiary company. Furthermore, the 20% holding of United is the largest block of voting securities; and there is supporting evidence in the record showing various connections between United and Columbia. We are not unaware that much less than a majority of stock is frequently sufficient for purposes of control, and we see no reason to contest the legislative view that 10% may be sufficient.
>
> * * * I think we can take judicial notice of the fact that the ownership of twenty per cent of the voting power of a company makes the owner "liable" to have practical control. * * *

Again in *Electric Bond and Share Co.* v. *Securities and Exchange Commission,* 92 F. 2d 580 (C.A. 2), affirmed,

303 U.S. 419, the same court, in discussing the Public Utility Holding Company Act, stated at 590-591:

> * * * A 10 per cent. stock ownership creates a presumption of control. The act provides (section 2 (a) (8), 15 U.S.C.A. §79b (a)(8), that the Commission upon application shall declare a company not to be a subsidiary company if it finds that it in fact is not controlled by the holding company. By section 2(a)(7), 15 U.S.C.A. §79b (a)(7), any company that is prima facie a holding company under the act can rebut the presumption by showing that in fact it does not control subsidiary utility companies. The presumption provided for is neither arbitrary nor unreasonable as Congress could find upon the report of the Federal Trade Commission. Practical control is often exercised and retained, through the ownership by those who are already in managerial control of a substantial minority of the voting power. The majority stock is not necessary for control. United States v. Union Pac. Ry. Co., 226 U.S. 61, 95, 96, 33 S. Ct. 53, 57 L. Ed. 124.

See also *Gratz* v. *Claughton,* 187 F. 2d 46, 49-50 (C.A. 2), certiorari denied, 341 U. S. 920:

> * * * We take judicial notice that an effective control over the affairs of a corporation often does not require anything approaching a majority of the shares; and this is particularly true in the case of those corporations whose shares are dealt in upon national exchanges.

It is not suggested that these cases stand for the proposition that control automatically follows from

some fixed percentage of stock ownership. Various additional factors play a part. The fact that other holdings are scattered is of prime importance, since it is obvious that a 23% holding would lose out to a unified holding of 51%.[17] Many of the cases refer to this factor. The Court of Appeals for the District of Columbia Circuit emphasized it in *American Gas & Electric Co.* v. *S. E. C.*, 134 F. 2d 633, 639, certiorari denied, 319 U.S. 763.[18] Some emphasize the percentage of stock voted at stockholders meetings. *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145; *Public Service Corp. of New Jersey* v. *S. E. C.*, 129 F. 2d 899 (C.A. 3) at 901-2, certiorari denied, 317 U.S. 691; *Pacific Gas & Electric Co.* v. *S. E. C.*, 127 F. 2d 378 (C.A. 9), affirmed 139 F. 2d 298, 324 U.S. 826.[19] Very important is the historic relationship of the companies, including the existence of interlocking officers or directors. If a management has been installed by the parent company, its loyalty can often be depended on long after the percentage of outstanding stock has decreased. As this Court stated in *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686 at 693:

> * * * Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious

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[17] It is stated by Berle and Means in *The Modern Corporation and Private Property* (1932) at page 80, "The larger the company and the wider the distribution of its stock, the more difficult it appears to be to dislodge a controlling minority."

[18] The court there upheld a finding by the Securities and Exchange Commission of "controlling influence" although the next twenty-six holders of the American Gas when combined held more stock than American did. There is no such concentration of holdings of General Motors stock to challenge du Pont.

[19] GTX 1307 (R. 664, 5230) indicates that du Pont has cast over 30% of the votes counted at recent stockholders meetings except for 1949 when it cast 29.9%. In the twenties, and even as late as 1936, du Pont cast over 50% of the votes.

> modes of control. See *Southern Pacific Co.* v. *Bogert,* 250 U.S. 483, 491-492; *Natural Gas Co.* v. *Slattery,* 302 U.S. 300, 307-308. Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships. *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 145-146. In light of the extensiveness of North American's holdings of the securities of its subsidiaires and the penetration of local managements with men of North American background, the Commission was justified in treating North American as possessing domination over its subsidiaries or the power to dominate them when and if necessary.

Certainly it is not an answer to assert that the acquisition of stock is solely for "investment."[20] Indeed the very fact that a substantial percentage of a corporation's income is derived from its stockholdings in another imposes some added duty on it to shepherd and protect its investment. This has been cited as a factor in determining the presence of control. *American Gas and Electric Co.* v. *Securities and Exchange Commission,* 134 F. 2d 633, 640 (C.A. D.C.), certiorari denied, 319 U.S. 763.

And this Court dealing with an assertion that only an "investment" was involved in North American's holdings stated in *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 692-3:

> North American claims that its sole and continuous business has been that of acquiring and

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[20] The exception from Section 7 of the Clayton Act for investments will be treated at p. 145, *infra.*

holding for investment purposes stocks and other securities of the subsidiaries, its relationship being essentially that of "a large investor seeking to promote the sound development of his investment." Active intervention on North American's part in the activities of these companies, it is true, has been of a limited character. Operations and operational policies, the Commission found, have been left entirely to the local managements. Nor has North American sold these subsidiaries any supplies or engineering service. This lack of active intervention, however, is indecisive. It appears to have resulted in large part from North American's satisfaction with the local managements of the subsidiaries and from the fact that the local managements have often included men selected by or historically related to North American. See Detroit Edison Co. v. Securities & Exchange Commission, 119 F. 2d 730, 734-735; Pacific Gas & Electric Co. v. Securities & Exchange Commission, 127 F. 2d 378, 383-384. The Commission was thus warranted in considering the harmonization of local policies with those of North American as a fact, the absence of conflicts making affirmative action by North American unnecessary. But it does not follow that North American's domination of its system was any less real or effective.

The court below took into account none of these factors; on the contrary it seems to have proceeded on the basis that, in order to control, du Pont must have conducted itself as though it held a majority of the General Motors stock. (R. 322) It placed much weight on testimony by Mr. Sloan that in case of a proxy fight du Pont might not succeed (R. 322-3).

Now, if anything is clear in this field, it is that less than 50% of the stock of a large corporation may constitute control. A stockholder as substantial as du Pont need not give orders to the management in order to make its influence felt. The daily policies and management of a company are ordinarily shaped by the awareness of, and consideration for, the interests of so substantial a stockholder which is in a position, if necessary, to exert whatever power it has. Mr. Pierre S. du Pont expressed this very idea when referring to the substantial stockholdings of the minority holder in Kinetic Chemicals, Inc. (R. 938). And as other contemporary exhibits also demonstrate, this consciousness was not merely a top-level matter, but permeated the operating levels (GTX 301, 339 and 417, R. 504, 511, 526, 3802, 3864, 3999).

As to the possible outcome of a proxy fight for control, of course Mr. Sloan could not give assurance of the outcome since many factors not capable of being weighed in a hypothetical case enter into a proxy fight.[21]

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[21] Mr. Sloan's apprehension would be reduced by an examination of the files of the Securities and Exchange Commission with respect to recent proxy fights. In the past three years there have been only two examples of management, representing as much as 23% of the stock, being turned out in a proxy fight. In these cases, involving the New York, New Haven & Hartford Railroad, and the Detroit & Cleveland Navigation Co., the opposition held 14.7% and 16.8% of the stock. No conceivable combination in opposition to du Pont holds any such percentage of General Motors stock. In the most publicized proxy fight in recent years where the management lost, the New York Central Railroad Co., management controlled but 1.6% of the stock, while Mr. Young held 17.4%. The following table, taken from Securities & Exchange Commission records, shows the results of the most important proxy fights for control in the last three years:

	Percent of total votes initially controlled by each party		Directors Elected		
	Management	Opposition	Management	Opposition	Date of Meeting
1. Chicago, South Shore & South Bend R. R.	4.614	5.426	9	0	3/25/54
2. Lehigh Valley Coal Corp.	3.544	.960	0	6	4/ 6/54
3. Decca Records, Inc.	1.869	1.637	5	0	4/13/54
4. New York, New Haven & Hartford R. R.	27.941	14.677	10	11	4/14/54
5. Detroit & Cleveland Navigation Co.[a]	27.481	16.755	2	3	4/20/54
6. Minneapolis & St. Louis R. R. Co.[b]	5.118	12.772	4	7	5/11/54
7. Great American Industries	1.707	1.420	9	0	5/25/54
8. New York Central R. R.	1.646	17.369	0	15	5/26/54
9. Associated General Utilities Co.[c]	24.667	12.954	7	0	6/ 9/54
10. Airway Electric Appliance Co.	5.643	33.723	0	4	11/15/54
11. F. L. Jacobs Co.[d]	10.634	.270	2	0	12/20/54
12. A. M. Byers Co.[e]	5.052	14.255	1	2	1/27/55
13. Automatic Washer Co.	4.182	8.437	0	7	3/22/55
14. Chicago, South Shore & South Bend R. R.	5.015	5.964	9	0	3/31/55
15. Boston & Maine R. R. Co.[f]	1.410	26.472	0	19	4/13/55
16. Montgomery Ward & Co.	1.377	4.890	6	3	4/22/55
17. The Locke Steel Chain Co.	15.383	9.727	7	0	12/ 6/55
18. A. M. Byers Co.	42.317	7.851	2	1	1/26/56
19. Fairbanks Morse & Co.	44.728	14.310	7	4	3/28/56
20. Jack Waite Mining Co.	.448	1.151	..	..	4/10/56
21. R. Hoe & Co. (Class A)[g]	6.925	8.426	0	3	4/13/54
(Common)	1.038	3.290	0	2	4/13/54
22. Seiberling Rubber Co.	18.720	20.815	11	4	4/23/56
23. Reo Holding Co.	.312	14.027	1	6	5/17/55
24. Alaska Juneau Gold Mining Co.	.468	1.445	3	4	5/22/56
25. Virginia-Carolina Chemical Corp.	1.263	9.819	0	6	7/18/56
26. Consolidated Royalty Oil Co.[h]					
27. Thermoid Co.[i]					

[a] Management's total does not include a bloc of 43,700 shares belonging to "Associates of Kolowich." This figure overlaps to some unknown degree with the 60,825 shares belonging to Kolowich's family, which have been included in Management's total.

[b] The four seats management won were unopposed because the opposition only ran a slate of 7 out of a Board of 11.

[c] A court fight over the results of this election resulted in a settlement whereby the opposition was given one seat and management retained 6.

[d] Only 2 of 6 directors are elected each year.

[e] Only 3 of 9 directors are elected each year. However a majority of the total outstanding votes can elect a full slate of 9.

[f] Opposition controlled votes do not include 135,000 listed as "customers of certain brokerage firms." If included opposition had 42.883% initially, consisting of 352,760 votes.

[g] The Class A and Common Stock of R. Hoe & Co. elect separate directors.

[h] File on 1954 proxy fight not available from S.E.C.

[i] S.E.C. file subpoenaed by Federal District Court in S. D. N. Y. and not available. Proxy fights in 1955 and 1956.

But, the outcome of a possible future proxy fight is not an appropriate test of control. *American Gas & Electric Co.* v. *Securities & Exchange Commission,* 134 F. 2d 633, 639 (C.A. D.C. 1943), certiorari denied, 319 U.S. 763. If the management of General Motors be considered as a group apart from the du Pont control, as the court appeared to do (R. 321),[22] it is certain that it could not be so sure of defeating du Pont in a proxy battle that it would willingly invite such a contest. The management's power to attract votes would come from its status as management with credit for the success of the enterprise and from its control of the proxy machinery. Du Pont, with its concentrated security holdings, its vast prestige, efficient organization and powerful financial connections, could attract an indeterminate number of independent votes. It is idle to speculate which group would succeed. It is sufficient that du Pont would be a formidable opponent with a very substantial likelihood of success in such a contest. This insures avoidance by the management of any action displeasing to du Pont. Thus, if they be separate, management and this very substantial stockholder have worked together to avoid conflict and will undoubtedly do so in the future if du Pont is allowed to retain its General Motors stock.[23] Plainly, therefore, if "control" need be established to have a "combination" under the Sherman Act, the court below used improper standards and, on a sound basis of evaluation, control exists.

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[22] In connection with U. S. Rubber, Mr. Pierre du Pont wrote Mr. Lammot du Pont Copeland in 1947 (GTX 1057):

> I do not fear the result of the management group being in the majority. If such fear is real, we should change the management.

[23] See Berle and Means in *The Modern Corporation and Private Property* (1932) at page 89.

C. *It is sufficient to establish a "combination" that the relationship with General Motors gives du Pont an edge over its competitors, whether or not power to command is present.*

The antitrust laws do not speak in terms of "control". They forbid any "combination" in restraint of trade. Although none of the antitrust cases deals specifically with this issue,[24] it seems that the acquisition of a preferred position over competitors through the purchase of a substantial minority interest falls as much within the prohibition of the statute as would the acquisition of control through the purchase of a greater interest. Let it be assumed, for example, that Corporation A purchases a sufficient interest in Corporation B so that, everything else being equal, Corporation B will prefer A over its competitors. At the same time, A has not a sufficient interest to impose its will on B in other matters. B is free to act as it desires, but, because of A's stock holdings, gives it preference. That, we submit, is but another type of "combination" in restraint of trade.

Although this type of combination is not specifically dealt with in the antitrust laws, neither is absolute control, and Congress in other contexts has recognized it as an unhealthy situation requiring regulation, even though less than control is involved. For example, in the Public Utility Holding Company Act, the Commission is empowered to regulate the relations between a holding company and its affiliates (Sec. 12(g), 15 U.S.C. 79 l (g)). Congress defined affiliate as a com-

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[24] As is pointed out above, p. 86, *supra*, this Court in *Appalachian Coals Inc.* v. *United States*, 288 U.S. 344, at 359-60, emphasized the general applicability of the Act to every type of combination.

pany owning 5% of the stock of another company, an officer or director of a company, or "any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to such specified company that there is liable to be such an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon affiliates of a company." 15 U.S.C. 79b(a)(11). It was under this section and rules adopted pursuant thereto that the Commission proceeded in denying Morgan Stanley underwriting fees in connection with an offering of securities of Dayton Power & Light in *Morgan Stanley & Co.* v. *S. E. C.*, 126 F. 2d 325 (C.A. 2). The Second Circuit upheld the Commission's finding of affiliation based not upon stock holdings but historic relationships and banking tradition.[25] And this Court recognized the importance of the same sort of relationship in *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300. There, in passing upon the right of the Illinois Public Utilities Commission to demand information from an affiliate of a regulated company (under the statute a

[25] Actually the statutory definition of "subsidiary" recognizes this concept of a relationship something short of control but more than pure investment since it includes, as subsidiaries, companies "subject to a controlling influence." 15 U.S.C. 79b (8). The Securities and Exchange Commission and the courts have considered this phrase as more inclusive than outright control. See *Detroit Edison Company* v. *Securities & Exchange Commission*, 119 F. 2d 730, 738-39 (C.A. 6, 1941), certiorari denied, 314 U.S. 618; *Public Service Corporation of New Jersey* v. *Securities and Exchange Commission*, 129 F. 2d 899, 902-3 (C.A. 3, 1942) certiorari denied, 317 U.S. 691.

company holding 10% or more of its stock), this Court said at 307:

> This Court has often recognized that the reasonableness of the price at which a public utility company buys the product which it sells is an appropriate subject of investigation when the resale rates are under consideration, and that any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price.

Again this Court has recognized that an antitrust violation occurs even where competitors are not absolutely excluded if they are given "a hard road to travel." *Associated Press* v. *United States,* 326 U.S. 1, 10. In this case, even assuming the absence of control, competitors of du Pont were certainly provided with a very hard road to the General Motors' market.

D. *Whatever the degree of control, du Pont has established a relationship with General Motors which insures it a preferred position over its competitors in all business dealings with General Motors.*

All of the factors recognized by the courts as establishing "control", or preventing arm's length bargaining, are markedly present in this case. Du Pont holds a very substantial block of General Motors stock, namely 23%. The other holdings are widely scattered, the remaining stock being divided among some 436,510 stockholders, 92% of whom hold no more than 100 shares and 60% of whom hold no more than 25 shares

(R. 304). Du Pont's stock, which it has held continuously since 1918, constitutes an even larger percentage, between 30% and 51%, of the stock voted at annual meetings (GTX 1307, R. 664, 5230).

Du Pont's stock interest was acquired with the open intent of sharing with Mr. Durant in the control of General Motors (GTX 124, R. 479, 3208).[26] As the court below recognized, this aim was achieved (R. 303). Later, when du Pont bought out Mr. Durant's interest and held 38% of the stock, it alone held control (GTX 235, R. 483, 3496; GTX 1345, R. 2813, 5347). Although the court below did not specifically find that control existed in this period (1920-1930) the particular findings it did make can lead to no other conclusion (R. 307).[27]

Control tends to perpetuate itself both through personnel and the machinery of proxy solicitations so that a heavy burden falls on one who seeks to establish that control has been lost when a corporation has continued along the even tenor of its way without a shadow of a proxy fight and with no attempt whatever to change the established management. Du Pont, as the record

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[26] "1. With Mr. Durant we will have joint control of the companies.

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"* * * it is the writer's belief that ultimately the Du Pont Company will absolutely control and dominate the whole General Motors situation * * *.

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"* * * the control of the General Motors Company will be a task worthy of the best there is in us * * *."

[27] The fact that earlier explicit expressions of intent to control and of the accomplishment of this intent have not been repeated in recent years may be due in part to a consciousness that "control" might become an issue in antitrust litigation. Some evidence of this is to be found in GTX 202, R. 485, 3461; GTX 1346, R. 2815, 5352.

shows, has been persistently busy in the general management of General Motors through its designated representatives on the Board, through officers originally selected by it, through its financial stewardship and through its advisory position. There is evidence that in some instances du Pont received and used to its advantage inside financial information prepared for the directors of General Motors (GTX 134, 135, R. 480, 3263, 3266). Du Pont's influence was far greater than the power to veto action or to control annual meetings, though it had this too; it was a positive power to influence action. Nor does it do to assert that perhaps there was control over financial policy, but not over purchasing practice (GM brief below, pp. 10-11). It is not possible to compartmentalize such authority—it exists or it doesn't exist. To be sure it can be exercised selectively; but that is not the issue since it is clear that it is the existence of a combination, not the use made of it, which is decisive.[28]

Subtle methods were used to make this control effective without the necessity of orders from above.[29] Thus it is highly significant that over the years du Pont took

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[28] In *Northern Securities Co.* v. *United States*, 193 U.S. 197, Mr. Justice Harlan, speaking for the Court, stated at 327: "The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected." See also *United States* v. *Reading Co.*, 253 U.S. 26, 57; *United States* v. *Union Pacific Railroad Co.*, 226 U.S. 61, 88.

[29] In *American Gas and Electric Co.* v. *Securities and Exchange Commission*, 134 F. 2d 633 (C.A. D.C. 1943), certiorari denied, 319 U.S. 763, Judge Rutledge quoted the Commission with approval at 642:

> Under some circumstances "controlling influence may spring as readily from advice constantly sought as from command arbitrarily imposed." *Manchester Gas Co.*, 1940, 7 S.E.C. 57, 62.

a most particular interest in the special compensation plans for officers and executives.[30] Placing an ex-du Pont employee in a strategic position on the joint purchasing committee, suggesting, or vetoing, the appointment of a particular individual to the board of directors, these are instances of what this Court referred to in stating that, "Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command." *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 693.

On the basis of the foregoing, we submit that the court below erred, first, in adopting a rigid and unrealistic concept of what constitutes sufficient corporate control to establish a combination under the Sherman Act and, second, in overlooking the many admitted facts which lead inevitably to the conclusion that control existed. The court below seems to have relied principally on protestations of innocence which were merely the conclusions of interested parties on an issue which it was the duty of the court to resolve; it treated as unimportant or as of secondary importance the very elements which this Court and the courts of appeals have time and time again considered as the prime indicia of control.

II

The du Pont-General Motors "Combination" Is One Which Is Prohibited by the Sherman Act.

In this portion of the brief we shall use the word "control" as a shorthand way of expressing the rela-

[30] The amount of the bonuses was so large that the difference between receiving one or not was in some cases the difference between financial independence for life or not. See page 27, *supra*. Mr. Raskob specifically recognized that the effect of the first plan

tionship dealt with in the last section of the brief, without intending to differentiate between absolute power to command on the one hand and absence of arm's-length bargaining on the other. It is our position that, if a combination is in restraint of trade, it constitutes a prohibited combination regardless of the degree of control.

As to the issue of the interstate nature of the trade involved, namely the trade of General Motors, the trade of competitors of du Pont with General Motors, and du Pont's own trade, there is no dispute. Physically the manufacturing facilities of du Pont and General Motors are so widely distributed that interstate shipments are constantly involved. Appropriate allegations are made in the complaint (¶23, R. 217) and admitted in the answers (D.P. ¶23, R. 113; GM ¶23, R. 140).[31] Regardless of the nature of that commerce, the fact that the trade blocked by the combination would have been largely interstate (Complaint, ¶24, R. 217) gives additional support to the federal jurisdiction. See *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 314.

Insofar as this case is concerned, we shall not attempt any fine distinction between violation of Section 1 and

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would be to "tie up with us in the management and control of this huge investment the men in the General Motors Corporation who are definitely charged with the responsibility and success of the corporation." (GTX 235, R. 483, 3502.)

[31] According to the Fortune Directory of the 500 Largest U.S. Industrial Corporations, July 1956, p. 2, General Motors ranked first in sales and second in assets among all United States industrial corporations while du Pont ranked fourth in assets and tenth in sales. General Motors in 1955 became the first corporation to earn over a billion dollars in annual net income (New York Times, February 3, 1956, p. 1). Both companies far outstrip their competitors in their respective fields (GTX 1205, R. 658, 5150).

Section 2 of the Sherman Act. Our emphasis will be to show that there is a combination in restraint of trade in violation of Section 1 of the Act. As the Act has been interpreted, proof of such a combination may equally establish a combination to monopolize under Section 2. Under the reasoning of this Court in *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 60, the two sections overlap in this type of case. And in many cases that have followed, combinations to exclude competitors have been held violative of both sections. *United States* v. *American Tobacco Co.,* 221 U.S. 106; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173; *Associated Press* v. *United States,* 326 U.S. 1; *United States* v. *Griffith,* 334 U.S. 100, 106; *United States* v. *Paramount Pictures,* 334 U.S. 131. And see Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) pp. 7-8, 11-12. For all practical purposes it makes no difference since the relief asked can be as completely justified if it is held that there is a violation of Section 1 only. Further exploration of the distinctions between Section 1 and 2 would therefore seem unnecessary.

A. *This Court has held that a combination controlling a significant portion of a market to the exclusion of competitors violates the Sherman Act if the combination was formed for that purpose or if the restraint on competitors is a necessary or probable result.*

Assuming that Point I above has been established, we have a situation in which du Pont has acquired a preference in selling to General Motors its requirements for paints, fabrics, plastics and other products manufactured by du Pont and a concurrent preference in developing and marketing chemical discoveries re-

sulting from General Motors research.[32] This is a captive market as truly as one which is achieved by exclusive dealing contracts such as those passed upon by this Court in *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, or by tie-ins with patent licensing as in *International Salt Co.* v. *United States,* 332 U.S. 392. See *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594 at 608-609. It is even more of a captive market than was achieved by the long-term contracts, induced through providing capital, involved in *United States* v. *National City Lines,* 186 F. 2d 562 (C.A. 7), certiorari denied, 341 U.S. 916.[33] There is now no doubt that to limit competition by such devices is violative of the Sherman Act. And the question here

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[32] Commentators on the administration and interpretation of the antitrust laws have labeled combinations of the type to which du Pont and General Motors are parties as "vertical integration". See Hale, *Vertical Integration,* 49 Col. L.Rev. 921, 921-923; Adelman, *Integration and Antitrust Policy,* 63 Harv. L. Rev. 27, 27-29; Bork, *Vertical Integration and the Sherman Act,* 22 Univ. of Chicago L. Rev. 157. The label does not help except as a quick method of classifying the type of case involved; it may confuse rather than solve the issue of legality. As this Court stated in *United States* v. *Columbia Steel Co.,* 334 U.S. 495, at 525: "It seems clear to us that vertical integration, as such without more, cannot be held violative of the Sherman Act. It is an indefinite term without explicit meaning."

[33] That case is in some ways very close to the instant case. Various suppliers, Firestone, Standard Oil of California, Phillips, Mack, and General Motors, provided capital, through the purchase of preferred stock, to two holding companies which used it to purchase control of a large number of transportation companies. These then entered into long-term exclusive dealing contracts to purchase supplies from the manufacturers. As in the present case, manufacturers were buying a protected market. The jury, although acquitting on the count alleging violation of Section 1 of the Sherman Act, found the defendants guilty on the Section 2 count, and the verdict was upheld on appeal.

is whether the achievement of the same result through the device of stock combination, rather than contract or patent monopoly or tie-in, is equally illegal. In *American Tobacco Co.* v. *United States,* 328 U.S. 781, this Court stated at 809 that it is not "the form of the combination or the particular means used but the result to be achieved that the statute condemns."

The element of restraint of trade through the acquisition of control of markets, or sources of supply, appears in Sherman Act cases almost from the beginning. There were factors of vertical integration in *Standard Oil Co.* v. *United States,* 221 U.S. 1,[34] and in *United States* v. *American Tobacco Co.,* 221 U.S. 106 [35] although there were also factors of horizontal integration of even greater importance. Again in *United States* v. *Reading Co.,* 226 U.S. 324, this Court showed great concern for the fact that the same interests which controlled all of the transportation facilities from the area involved also owned 75% of the supply of anthracite coal (pp. 340-341). See also *United States* v. *Lehigh Valley R. Co.,* 254 U.S. 255.

It was an even more significant factor in *United States* v. *Corn Products Refining Co.,* 234 Fed. 964 (S.D. N.Y.) appeal dismissed, 249 U.S. 621, where the court condemned an attempt by a syrup manufacturer to force its supplies on candy manufacturers by purchasing a candy factory which it threatened to use in

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[34] The defendants there produced or purchased crude petroleum, transported it by pipeline, refined it, and marketed the products.

[35] The defendants had acquired control of suppliers of tinfoil and licorice, and also a chain of some 400 retail stores.

competition.[36] And such methods were one of the chief bases for complaint in *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E.D. Pa.) where the manufacture and operation of sleeping cars were ordered separated. And see *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 79 (C.A. 7).

These cases show that acquiring control of a supplier, or customer, is illegal where the acquisition is made with the purpose of hindering competitors from dealing freely with the controlled business. As this Court said in *United States* v. *Reading Company*, 253 U.S. 26 at 57:

> Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by a deliberate, calculated purchase for control.

This brings us to the recent cases in this Court. The first of these is *United States* v. *Yellow Cab Co.*, 332 U.S. 218. There the United States had alleged the formation of a combination by a manufacturer of taxicabs whereby it had gained control of very substantial percentages of the companies operating taxicab service in Chicago, Pittsburgh, Minneapolis and New York City. It was alleged that this control was obtained for the purpose of excluding competing manufacturers of taxicabs from selling to the operating companies. The defendants moved for dismissal on the ground that no violation of the Sherman Act was

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[36] Later in *United States* v. *Aluminum Co.*, 148 F. 2d 416, 436-438 (C.A. 2) the court indicated that the defendant there had used its control of both ingot manufacturing and rolling plants as a "squeeze" on sheet manufacturers.

alleged. After Judge La Buy had granted this motion, this Court upheld the complaint stating (at pp. 226-227):

> Nor can it be doubted that combinations and conspiracies of the type alleged in this case fall within the ban of the Sherman Act. By excluding all cab manufacturers other than CCM from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act. *Associated Press* v. *United States,* 326 U.S. 1, 18-19, and cases cited. In addition, by preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce.

If this ruling be applied to the facts of the du Pont-General Motors combination, it cannot be doubted that a combination effected to exclude du Pont competitors from competing for General Motors' trade must equally be held a violation of the Sherman Act.[37]

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[37] The *Yellow Cab* case came back to the Supreme Court after the lower court on remand found that the defendants had no specific intent to restrict the market, and this Court upheld the dismissal of the complaint on that basis. *United States* v. *Yellow Cab Co.,* 338 U.S. 338. The majority opinion treats the case as one requiring proof of a conspiracy (p. 339). On this basis, the intent of the parties was a material element of the offense. In this case we do not urge reversal of the court below's finding that no conspiracy existed. As pointed out above (*supra,* p. 72, *infra,* p. 113) we

rest our case here solely on the ground that du Pont formed a *combination* in violation of law. On this issue specific intent need not be proved. When a corporation, consciously and with total awareness of what it is doing and of its effects, enters into a combination which must inevitably result in restraints on its competitors, it should not be able to escape the consequences of its action by hiding behind lack of intent. As this Court stated in *United States* v. *Griffith*, 334 U.S. 100 at 105-106 and 108:

> It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. *United States* v. *Patten*, 226 U.S. 525, 543; *United States* v. *Masonite Corp.*, 316 U.S. 265, 275. To require a greater showing would cripple the Act. As stated in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432, "no monopolist monopolizes unconscious of what he is doing." Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co.* v. *United States*, 196 U.S. 375, 396:
>
> > "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267,272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."
>
> And see *United States* v. *Aluminum Co. of America, supra*, pp. 431-432. And so, even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act.

* * * * *

* * * Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has com-

The position stated in *United States* v. *Yellow Cab Co.*, 332 U.S. 218, was restated and emphasized in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131. The Court was there considering the action of the district court in refusing to order divestment of theatres by the major producer-distributor defendants. The lower court, while limiting the acquisition of additional theatres, refused to order divestment. This Court pointed out (1) that "monopoly" need not be nation-wide but is prohibited in "any part" of trade or commerce, (2) that specific intent to monopolize was unnecessary where monopolization was a necessary consequence, and (3) that the existence of power to monoplize constituted a violation without proof of its exercise. (pp. 172-173)

In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, the combination involved was found not to be in violation of the Sherman Act. The case is important here only because of the reasoning by which it was held that the particular combination was not prohibited.

The facts of the case, insofar as they are important here, are that the United States Steel Company purchased the facilities of a west coast steel company engaged in fabricating steel sheets and forms. One of the avowed purposes of the purchase was to acquire an outlet for sheet steel manufactured by a subsidiary of

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petitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. *United States* v. *Patten, supra*, p. 543.

United States Steel Company. It is noteworthy that the acquired business was merely a step in the preparation of steel for ultimate use, not a separate line of manufacture. All three companies involved were generically steel companies. After quoting from and approving its statements in *Yellow Cab* and *Paramount,* 334 U.S. 495, 523, the Court went on to analyze the effect of the purchase and concluded that it could not "unreasonably restrict the opportunities of the competitor producers of rolled steel to market their product". 334 U.S. 495, 527. Since the Court had specifically recognized that it would inevitably result that the purchased company would turn to United States Steel for its supply of rolled sheet (p. 523), thus excluding competitors from those sales, this must mean that in view of the nature of the industry, such restriction is not "unreasonable." In other words, the purchase was only a reasonable expansion of an existing business. This could never be said of du Pont's purchase of General Motors.

So, we submit, the ultimate conclusions to be drawn from these cases is that violation of the Sherman Act may result when a manufacturer forms a combination with an outside interest which is a consumer of its product for the purpose of gaining a preference on that trade or where, whatever its intent, the probable or inevitable result will be to restrain the trade of its competitors. The apparent exception of the steel case is not a real exception (or, in any event, an exception which is significant here), since there the acquisition was only a reasonable expansion of the existing business.

B. *Du Pont formed the combination with General Motors with the intention of getting a preference in the trade of General Motors.*

Much of the difference between the parties in the court below centered on whether there was an agreement between du Pont and General Motors to give the former preference in trade relations. At that time the Government sought to establish not only a combination but also a conspiracy. The existence of an agreement was urged in that connection. The court below found that the evidence failed to establish the existence of such an agreement (R. 361, 405, 465). Wherever the truth may lie, we shall not press that particular issue here since, for the relief asked, it is sufficient to establish a combination in restraint of trade, by which we mean a restraint imposed by force of the relationship rather than one arising from express agreement.

In order to establish a violation of the Sherman Act it is not ordinarily essential to prove a conscious or calculated intent to impose illegal restraints; it suffices that the defendant intentionally follows a line of conduct the natural consequence of which is such restraint. As is pointed out above (fn. 37, *supra*, p. 110) "no monopolist monopolizes unconscious of what he is doing" (*United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (C.A. 2)). See also *United States* v. *Paramount Pictures*, 334 U. S. 131, 173; *United States* v. *du Pont & Co.*, 351 U. S. 377, 392.

Nevertheless, though proof of intent may not be essential, it is highly significant. In a very early case this Court pointed out that if intent and power to monopolize were present, then proof of restraint was

unnecessary. Thus in *United States* v. *Reading Co.*, 253 U. S. 26, the Court stated at page 57:

> Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.
>
> That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act, has been frequently held by this court.

And much more recently in *United States* v. *Griffith*, 334 U.S. 100, at 107:

> Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of Section 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 811, 814.

But intent, in the sense here used, does not mean evil purpose; it merely means a conscious effort to accomplish the prohibited end. In *United States* v. *National City Lines*, 186 F. 2d 562 (C. A. 7), certiorari denied, 341 U. S. 916, the court said (at p. 571):

> Of course, it may well be that defendants did not intend affirmatively to violate the law, but it seems quite evident that they did intend, by making their mutually concerted investments in City Lines' stock conditional on the execution of exclusive requirements contracts in their favor, to

> join forces in making investments in consideration of the several exclusive contracts and thus, by their united and concerted action, to exclude their competitors from a market composed of the City Lines defendants and their operating subsidiaries, present and future, and, thus, that they intentionally performed acts which inevitably led to violation of Section 2 of the statute.

Most significant with respect to the intention of du Pont to preempt General Motors' trade to the exclusion of its competitors is the written record made in the early days when the relationship was fresh. At that time buying habits had not been established and all parties were groping their way to discover just how the new partnership would work.

The most important early document was the report of Mr. Raskob to the Finance Committee of du Pont proposing the initial purchase of General Motors stock (GTX 124, R. 479, 3208). This report was originally drafted by Mr. Raskob, discussed item by item with Mr. Pierre du Pont (R. 810, 922-925), revised and reviewed again (R. 923), and finally submitted to the Finance Committee. The document is important not only because of the care expended on its preparation and the high positions of the persons preparing it, but because it was the basis for the investment of $25,000,000, later increased to $50,000,000, by du Pont (GTX 126, R. 479, 3229). It amounts in fact to a prospectus of du Pont's intent. And this was the document in which it was stated (GTX 124, R. 479, 3221):

> Our interest in the General Motors Company will undoubtedly secure for us the entire Fabri-

koid, Pyralin, paint and varnish business of those companies, which is a substantial factor.

This was not a chance incidental remark; it was one of the numbered paragraphs in the summary of reasons for making the purchase. The best that the defendants can do with this contemporaneous document is to say that the trade factor did not seem very important to them (R. 815, 870). This is not enough. With this memorandum as a basis, first the Finance Committee and then the Board of Directors of du Pont authorized the purchase.

And the trade factor, whatever the du Pont memory at the time this suit was tried (R. 815, 870), was of sufficient importance to the management of du Pont so that their annual report to stockholders in both 1918 and 1919 called attention to this very point in reporting the acquisition (GTX 1409, 125; R. 479, 5511, 3228).[38]

At no time during the early days after the purchase was this important advantage far from the surface. After the stock had been acquired and du Pont had moved into the top echelon of management, the trade motivation for the purchase was implemented by the appointment as "liaison" man of Mr. John Haskell, who had previously acted as a du Pont vice president, sales manager, and member of the Executive Committee of du Pont (R. 835-836, 940).[39]

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[38] In the 1917 report it was stated "The motor companies are very large consumers of our Fabrikoid and Pyralin as well as paints and varnishes." In the 1918 report it was stated, "The consumption of paints, varnishes and fabrikoid in the manufacture of automobiles gives another common interest."

[39] After Mr. Haskell's death in 1923 (DP 56, R. 836, 5656) he was replaced by Mr. J. L. Pratt (R. 1419).

The record shows an early report from Mr. Haskell (R. 501) to the du Pont vice president in charge of sales concerning a conference by Mr. Haskell with General Motors officials dealing with "Fabrikoid matters" (GTX 290, R. 501, 3782). He reported a suggestion to "pave the way for perhaps a more general adoption of our material." Mr. Haskell's concern was not only how best to develop materials suitable to replace natural leather (the kind of competition which builds American industry) but also "how best to get cooperation whereby makers of such of the low priced cars as it would seem possible and wise to get transferred will be put in the frame of mind necessary for its adoption" (the kind of interference with competition which the Sherman Act was designed to eliminate).

In the same spirit a Mr. Burckel, sales manager of the du Pont-owned Arlington works, manufacturers of pyralin (trade name for a du Pont product), wrote to the same du Pont sales manager, stating that it was Mr. Haskell's opinion that du Pont would, by continuing its sales policy, get all of General Motors' business in pyralin and that Mr. Haskell suggested a continuing check on what was being sold to General Motors and what General Motors was buying elsewhere (GTX 293, R. 502, 3786; *supra*, pp. 30-31).

Mr. Haskell then instituted a series of inquiries of General Motors' general managers as to what du Pont products were being used and what competitive products (GTX 296, 297, 298, 299, 300, R. 502-503, 3790-3801). This not only gave du Pont information as to areas in which to make sales efforts, but the process of making inquiries and requiring explanations acted of itself as an incentive to buy from du Pont and avoid

the necessity of justifying another course (GTX 300, 301, R. 503-504, 3798-3802).

A report from H. Felix du Pont, vice president, to the Executive Committee in 1921, clearly links sales to the stock interest, with the emphasis on profits to du Pont (GTX 417, R. 526, 3998; *supra,* p. 32).

When the Cadillac division dared to show some independence in its purchasing policy, pressure was applied by a series of inquiries and suggestions by a top du Pont official GTX 442-446, R. 534-535, 4066-4072). Mr. Lammot du Pont, vice president of du Pont, was certainly 50% sincere in stating:

> I feel that it is to the advantage of both General Motors Corporation and the du Pont Company to have GMC use the Flint products 100 per cent. [GTX 447, R. 535, 4073.]

In October of 1921, Mr. R. R. M. Carpenter of du Pont wrote to his brother-in-law, Mr. P. S. du Pont, as president of General Motors, with respect to supplying the latter with artificial leather as follows (GTX 403, R. 526, 3959):

> Without being familiar with all the little details, what I am afraid happens is that three or four different artificial leather companies are getting small dabs of the General Motors business, all of them running at small capacities. It seems uneconomical, from the general du Pont pocketbook point of view, not to be able to make some arrangements whereby we could run our artificial leather plants fairly full, and in the long run it would not cost the General Motors Company any more money, if as much, as if they kept us on a

> competitive basis when the competition, owing to the circumstances, is not altogether a fair one.
>
> * * * * *

This well illustrates the official attitude on competition.

Another example is given by a rather extended correspondence with reference to sales to Fisher Body Corporation. It should be noted that Fisher was not at this time as completely subject to du Pont domination as the other parts of General Motors since the Fisher Body Corporation, although subject to stock control, was still under the management of the Fisher brothers (GTX 423, R. 529, 4015). Nevertheless, the weight du Pont gave to its relationship to General Motors speaks for itself. The correspondence started with a report in August, 1921, to Mr. Pierre S. du Pont from Mr. Lammot du Pont (as du Pont vice president) showing no business from Fisher Body (GTX 420, R. 528, 4010).

Replying on the letterhead of the president of General Motors, Mr. Pierre S. du Pont stated (GTX 421, R. 529, 4012, *supra,* p. 35):

> With the change in management at Cadillac, Oakland and Olds, I believe that you should be able to sell substantially all of the paint, varnish and fabrikoid products needed; especially is this true of Cadillac.
>
> A drive should be made for the Fisher Body business. Is there any reason why they have not dealt with us?[40]

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[40] The references to changes in management may have been to replacements in General Motors division general managers instituted after Mr. Durant left the corporation and du Pont took over full control (DP 64, R. 861, 5713).

The use of the word "us" could indicate a primary concern by the president of General Motors with du Pont rather than General Motors.

Mr. Lammot du Pont wrote to the president of Fisher Body, Mr. Fred Fisher, in October, 1922, asking an explanation (GTX 434, R. 532, 4055, *supra,* p. 65):

> Would it be imposing upon you to ask your assistance toward Flint securing a portion, or all, of Fisher Body Corporation's paint and varnish business? The assistance I ask is a frank statement of the respects in which the above statement of conditions is incorrect, or, if that statement is correct, statement of why Flint should not have the business, so that such reason may be overcome if it is within our power.

He followed this with another letter to the president of Fisher Body in December, 1922, stating (GTX 437, R. 533, 4059, *supra,* p. 65):

> It seems to me that this matter is of extreme importance, for I am sure that Flint Varnish & Color Works goods are the equal of, or superior to, any goods on the market, and therefore should be used by Fisher Body Corporation in any event. The close stock relationship of the companies makes it appear almost ridiculous that no business should be done between Flint and Fisher.

Again he wrote in January of 1923 to Mr. Laurence Fisher as follows (GTX 441, R. 533, 4064):

> I have just had a conversation with Mr. Sohlinger [apparently a du Pont officer or employee in the paint corporation] today and tried to impress upon him the importance of making the Flint

products satisfactory. It is important to us not only in order to acquire and keep the Fisher business, but in order to put us in position to furnish the best quality to our other principal customer; namely, General Motors Corporation.

* * * * *

In our conversation I asked Mr. Sohlinger if he would not call on you again and go into this matter further; for, as you know, I feel that it is of the very greatest importance that we should straighten out all difficulties with the Flint products and have them used throughout by Fisher Body Company.

And finally at the end of January, 1933, he wrote to Mr. Laurence Fisher (GTX 443, R. 534, 4067):

Thanking you again for the trial of these products which you promised, I am

Yours very truly,

——— ———,

Vice-President.

LduP/MD

To be sure, du Pont was not always successful in acquiring 100% of the General Motors market. In artificial leather, for example, General Motors determined in February of 1923 that it should have two sources of supply and du Pont seemed to agree to a surrender of 20% of the business, feeling certain that it could retain the remaining 80% (GTX 406, pp. 13-15, R. 527, 3978-3980). Mr. Pierre S. du Pont was not at all happy about this "foolish business" but de-

cided not to "interfere" (GTX 408, 410, R. 528, 3983, 3984). It is certainly highly revealing that the General Motors Purchasing Committee should formally adopt a resolution: "It was agreed that on an equally competitive basis 25% of the business [leather substitutes and rubber-coated fabrics] should be placed with sources other than the du Pont Company" (GTX 412, p. 6, R. 528, 3986). This suggests the converse: "It was agreed that without a competitive basis, 75% of the business should be placed with the du Pont Company." But still the du Pont officers pressed for more (GTX 413, R. 528, 3987).

One of the most moderate statements was that of Mr. Pratt, the du Pont contact man who succeeded Mr. Haskell in the General Motors organization, on January 23, 1926 (GTX 340, R. 512, 8865, *supra,* p. 39):

> * * * 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 over-balances 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, 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.

About the best that the defendants have been able to do with the voluminous record of the purposes of the relationship is to label the evidence as "stale" or as "ancient" (Du Pont brief below, pp. 41, 233, 439). This is an attempt to make a weakness out of a real element of strength in this evidence. It is important that these letters are contemporaneous with the advent of control, coming before the letterwriters became cautious as to the wisdom of displaying their underlying motives or perhaps, by a process of autopersuasion, became convinced of the essential purity of their original intentions.

The fact that these statements of intent have not been explicitly repeated in later years, would be important only if there were some evidence that the intent changed (Cf. *United States* v. *Oregon Medical Society,* 343 U. S. 326; *United States* v. *Imperial Chemical Industries,* 100 F. Supp. 504 (S.D. N.Y.)). As we shall show below, the sales figures in recent years show no change in practice which would indicate a change in intent. The absence of written evidence in recent years must therefore be due to some factor other than a change of heart. There are other possible reasons. Perhaps the high command awoke to the effect on its legal position of such frank statements of position (Cf. GTX 202, 1346, R. 485, 2815, 3461, 5352) or perhaps, the relationship having been firmly steered in the right direction, the

occasion for pointing the way ceased. Buying habits firmly established no longer had to be imposed from above. Some of appellees' witnesses, who had taken part in the chronicled events appeared on the witness stand and denied any knowledge of intent to restrain trade. But these denials appear little more than interpretations after the fact by principals accused of antitrust violations. The individuals involved, feeling with deep sincerity that they are and have been honorable men, could hardly look back on their actions in any other way.

This Court has previously dealt with a conflict between contemporaneous written documents and the testimony of interested witnesses in *United States* v. *Gypsum Co.*, 333 U.S. 364, 395-396:

> The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous.

And as Judge Learned Hand stated in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D. N.Y.) appeal dismissed, 249 U.S. 621, at 978:

> The officers of the Corn Products Refining Company apparently had a custom of communicating with each other by typewritten unsigned memoranda. Apparently it was often difficult for them to interview each other personally, and the affairs of the company were discussed between them by means of these memoranda with the utmost frankness. The documents were never intended to meet the eyes of any one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony.

Or as was stated by the trial court in *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N.D. Ohio) affirmed in part, 323 U.S. 386, at 553:

> In many cases the court is required to rely upon inferences derived from circumstantial evidence, so meager is the record before the court; in many cases the court must rely upon inferences from some direct as well as circumstantial evidence and arrive at its conclusions accordingly; in this case, the men who planned and directed the proceedings under scrutiny, from 1916 down to the time of the filing of the complaint herein, left behind them numerous exchanges of letters and many memo-

> randa executed contemporaneously with the happening of the main events and designed for the information of their contemporaries, their boards of directors, or for their successors in office. It is hard to imagine a case in which a court would have more first-hand information *of what the parties did and intended* than in the case at bar. These documents indisputably make a case that sustains the Government's contention that the defendants have violated and are now violating Sections 1 and 2 of the Sherman Act * * *. [Emphasis supplied.]

Here the court does not have a case of scattered admissions by minor employees; these were the carefully considered plans of the "elder statesmen." *United States* v. *General Electric Co.*, 82 F. Supp. 753, 845 (D. N.J.).

Moreover, that trade relations were the underlying motive for the purchase, rather than merely a profitable investment for $50,000,000, alone accords with the facts of the situation. Du Pont was not an investment trust; it did not engage in investing its capital in other peoples' enterprises to reap the rewards of a stockholder. Instead, it was, and is, an intensely aggressive and efficient manufacturing concern producing and selling its wares in the most profitable market obtainable. It would not accord with its general role for it to accept with respect to General Motors the inactive role of absentee proprietor. Rather, as Mr. John J. Raskob said, here was "a task worthy of the best that is in us and will I feel afford many opportunities to keep our important men occupied with big things after the war." (GTX 124, R. 479, 3222).

C. Apart from specific intent, the inevitable result of du Pont's purchase was that it would receive trade preference over its competitors.

Human nature being what it is, it is hard to conceive of General Motors' officials being so disinterested in their own business future as to be unaware of, or indifferent to, the desirability of pleasing the big stockholder. They were part of the du Pont family (GTX 704, R. 624, 4505) and the natural thing was to lean toward du Pont whenever a reasonable choice existed. Therefore, even if we assume, contrary to all of the evidence reviewed above, that du Pont did not wish General Motors to play favorites to its own advantage, it was inherent in the relationship that such would be the result.

This Court has recognized that an antitrust defendant must be chargeable with the results which will inevitably flow from a course of conduct consciously adopted by it. In *United States* v. *Griffith*, 334 U.S. 100, it is stated at 108:

> * * * Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.

Therefore, though it is urged that a specific intent to restrain trade is clearly established in the record, the Government's case will stand even if the Court should go no further than accepting the admitted facts concerning the relationship which were found by the court below. On the basis of those facts alone it was inevitable that General Motors would favor du Pont over all competitors.[41]

III

Restraint of Trade and a Monopolization of General Motors Business Has Resulted from the du Pont-General Motors Combination.

In arguing that restraint has resulted, we do not ask this Court to retry the case. (See Rule 52, Federal Rules of Civil Procedure.) We do attack the lower court's ultimate findings that the combination has not influenced the trade relations between du Pont and General Motors. Our dispute with the lower court is over its conclusionary findings, not its determination of what events took place. There is little dispute with du Pont and General Motors as to what happened, but only as to what the admitted events signify legally, i.e., in terms of violation of the antitrust laws.

In the task of referring this Court to sufficient of the evidence to make clear our contentions, without sub-

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[41] Congress undoubtedly had in mind the very great probability that such results would flow from large stock holdings when, in the Public Utility Holding Company Act, it defined control in terms of 10% stock ownership, and then required dissolution of holding company systems without proof that the particular systems to be dissolved had engaged in the abuses found by Congress to be inherent in the very existence of holding companies. See Sections 2(a)(7) and 11(b) of the Public Utility Holding Company Act, 15 U.S.C. 79b (a)(7) and 79k (b).

merging the Court in thousands of pages of record, we are aided by the fact that it will not be necessary to reexamine every phase of the relationship on which the evidence bears. The preferential treatment shown in the examples which will be presented is in itself determinative, whether or not these examples are, as we believe, illustrative of the record as a whole.

A. *Specific instances demonstrate the imposition of restraints on trade.*

It is the position of the defendants, sustained by the court below, that du Pont's relations with General Motors were merely those of an independent manufacturer competing with others to sell to General Motors on the basis of price and quality, unaffected by the stock investment. Wherever du Pont was successful, according to this view, it was merely a result of superior products, lower price, or more effective salesmanship. Before examining the overall results of du Pont's efforts to capture General Motors' business, it is worthwhile to review the record with respect to several particular products. These examples prove that du Pont did not deal at arms length.

1. *Anti-freeze*

In 1925 ethyl alcohol came into competition with glycerin and ethylene glycol (marketed by Union Carbide Company under the trade name "Prestone") as antifreeze mixtures (GTX 319, R. 507, 3832). Du Pont was interested in the market for alcohol, which it was beginning to manufacture, and became concerned over inroads into the market by the new products (GTX 319, 322, 328, 330, R. 507-510, 3832, 3836, 3845, 3847). Gen-

eral Motors on the basis of tests believed Prestone was the most satisfactory of anti-freeze mixtures (GTX 321, 323, R. 508, 3835, 3837), and some of the instruction books for use of General Motors cars so stated under the heading "Winter Driving" (GTX 332, 334, R. 510, 3851, 3859). Du Pont persisted in a series of letters to General Motors, pointing out its interest in alcohol, the draw-backs of other mixtures and the desirability of recommending the latter (GTX 332-335, R. 510-11, 3851-60). A du Pont vice president suggested (GTX 319, R. 507, 3832):

> The Kentucky Alcohol Corporation inquires whether the General Motors Corporation is giving their official approval to publicity favoring glycerin rather than alcohol. If so, it is suggested that their attention be called to the advantages of alcohol and to the interest which the du Pont Company will have in the future in its manufacture and sale.

Thereafter, both Chevrolet, Buick, and Cadillac, the first named on instructions from Mr. Sloan, eliminated the stated preference for glycerin (GTX 326, 327, 335, R. 509, 511, 3842, 3844, 3860). Mr. Sloan finally worked out a weasel-worded set of instructions which could be expected to lead the reader to use alcohol (GTX 336, 337, R. 511, 3861, 3862). Thus pressure from du Pont had changed General Motors from a straight recommendation for glycerin to either a straight recommendation for alcohol or a twisted paragraph intended to accomplish that result. This in spite of the fact that General Motors itself actually preferred, and for years thereafter continued to merchandise, glycerin (R. 2946). Moneywise this is a small matter, but an illuminating one.

2. *Tetraethyl lead*

Even more significant are the disclosures with respect to the discovery, development, and marketing of a gasoline anti-knock additive known as tetraethyl lead, marketed as "Ethyl". The trial court's findings on this subject (R. 405-426) go into the matter in great detail. We have no basic quarrel with its statement until it arrives at its conclusions (R. 425-6) where we believe it overlooked the significance of much that had gone before.

The basic invention was made by General Motors scientists, primarily Dr. Midgely working under Mr. Kettering (R. 1542-1543). It was immediately recognized that the discovery was of immense economic value (GTX 610, R. 612, 4303). However, the product, tetraethyl lead, was then available only on a laboratory scale and a manufacturing industry had to be built from scratch (GTX 773, R. 632, 4667; GTX 774, R. 632, 4735). Du Pont was not manufacturing tetraethyl lead at this time, nor anything allied to it.

General Motors and du Pont assert that the handing over of this extremely valuable business to du Pont was done on the basis of business judgment and the lower court so finds (R. 426). However, we submit that the record shows that du Pont's inside influence with General Motors secured this business without any regard whatsoever for its abilities in comparison with its competitors.

Even before Dr. Midgley had made the basic discovery, as early as 1919, the assistant to the President of General Motors had written to du Pont with respect to marketing the chemical yet to be discovered to make undesirable fuels into usable products (GTX 599, R.

612, 4296). And again, still before the discovery of the utility of lead as an anti-knock agent, when it was believed that aniline might prove successful, Dr. Midgley, wrote to du Pont assuming that they would manufacture the substance (GTX 601, R. 612, 4298, *supra,* p. 49).

When the final discovery was made, it was immediately reported by Mr. Pierre S. du Pont, President of General Motors, to Mr. Irenee du Pont, President of the du Pont Company with these two statements: "The development looks very promising" and "Kettering would like to take up the question of manufacture with the du Pont Company representatives at an early date." (GTX 610, R. 612, 4303). This was three weeks before patent application was made on April 15, 1922 (GM 246A, R. 1546, 7330). What chance did any other possible manufacturer have against this President du Pont of General Motors working with President du Pont of du Pont?

General Motors itself dropped out of the production picture almost from the beginning, even before a contract with du Pont was completed (GTX 615, R. 613, 4308), it being assumed that du Pont would pick up where General Motors left off. Du Pont set up a plant to manufacture tetraethyl lead and shipped the product to General Motors (GTX 774, R. 632, 4735-6). The first contract for supplying tetraethyl lead was formally executed by Mr. Irenee du Pont, President of du Pont and Mr. Pierre S. du Pont, President of General Motors on October 6, 1922 (GTX 618, R. 613, 4312). It provided for General Motors demands for a year. The record indicates that all negotiations for a contract were with

du Pont; not even Standard Oil of New Jersey, which had long been interested in the project, was considered as a supplier.

Shortly after distribution of Ethyl gasoline commenced, Standard Oil of New Jersey discovered and patented a manufacturing process which materially reduced the cost of production (GTX 621, R. 613, 4333). With this as a wedge, it attempted to force its way into the manufacturing field. Mr. Sloan, who had succeeded to the General Motors presidency, wrote to Mr. Irenee du Pont about this, making it very clear that he shared the du Pont point of view that no one should encroach upon that field (GTX 622, R. 614, 4337). Du Pont, of course, was in full agreement (GTX 623, R. 614, 4340) and Standard was rejected as a possible manufacturer (GTX 624, R. 614, 4342).

Working from the strength of its new patented process Standard did get grudging assent to putting into production a small 100 gallon plant for experimental purposes (GTX 661, R. 616, 4365). But at the same time, Mr. Sloan was urging du Pont itself greatly to expand its production through construction of an enlarged plant (GTX 661, R. 616, 4365).

In August of 1924, General Motors and Standard of New Jersey established a jointly-owned corporation, the Ethyl Corporation, to hold the anti-knock patents and to market the product (GTX 668, R. 618, 4383). Although it was stated that Ethyl was to purchase lead on the open market (after honoring General Motors' current contract with du Pont) and could even buy from Standard itself, actually it never bought any material amount from any one but du Pont (GTX 673, R.

618, 4434). And in negotiations Sloan seemed more interested in protecting du Pont than in getting a favorable price on lead (GTX 664, R. 617, 4371).

Later developments in the relationship carry out this pattern. Where there was a temporary shutdown in production following the Bayway disaster, with some resulting claims by du Pont against Ethyl (GTX 773, R. 632, 4697), Mr. Sloan, against the interests of General Motors, the 50% owner of Ethyl, sided with du Pont. (GTX 680, R. 619, 4459). Still it was agreed that du Pont should be the sole supplier of lead "now or in the future" (GTX 710, R. 625, 4530). When production was resumed yearly contracts with du Pont were entered into (GTX 773, pp. 58, 59, R. 632, 4720-1).

The way Mr. Sloan worked in harmony with du Pont is nowhere better illustrated than in a letter to Mr. Lammot du Pont, dated April 18, 1930, dealing with the desirability of perpetuating the patent monopoly and continuing du Pont's exclusive supplier status (GTX 751, R. 629, 4585).[42] It is odd that although it was du Pont as the seller that should have been in-

[42] This letter read in part:

My dear Lammot:

Mr. Webb came in to see me yesterday to discuss various matters regarding the operating problems facing Ethyl Gasoline Corporation and among other things we discussed the relations with the du Pont Company. There is one phase of those relations that I simply want to mention to you so that you may have it in mind.

While the fundamental patent on which Ethyl Gasoline predicates its business has twelve years yet to run, and while it is not at all unlikely and, in my personal opinion, is probable that through research ways and means will be developed to control the anti-knock qualities of the fuel which will require a reappraisal of tetra-ethyl lead so far as its future contribution to the picture is concerned, nevertheless we should, of

terested in a high price, and Ethyl, as a buyer, in a low one, that Mr. Sloan sided again with du Pont in price negotiations (GTX 704, R. 624, 4505).

As the patents were running out, Ethyl worked its way into the manufacturing field, but du Pont has remained in the business and at the time of the suit was one of the two manufacturers of tetraethyl lead for use in gasolene. It is noteworthy that du Pont profits from this field of endeavor were in the neighborhood

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course, do everything that we can to so protect our position so that in the event that tetra-ethyl lead has a real place for an indefinite future, we should place ourselves in a position where we can carry on as near as possible to the way we are carrying on at present so far as an exclusive privilege is concerned.

Altho I am not specifically advised, I take it that through the experience that your organization has already had and will continue to have in the manufacture of tetraethyl lead itself that processes, perhaps patentable and perhaps otherwise, will be developed around which could be built a picture which would serve, in principle, to prolong the exclusive privilege that Ethyl Gasoline now has beyond the life of the fundamental patent.

I mentioned this to Mr. Webb and thought there would be no harm in mentioning it to you so that everything could be done to throw protection around such processes as you are developing. It also seems very essential that the manufacturer be confined to one source of supply. I am sure that the du Pont Company and the Ethyl Gasoline Corporation can work together with such satisfaction and with such confidence in one another that no thought can be given to anything different than a single source of supply. If the present source of supply was not the du Pont Company I should feel that our future, after the expiration of our patent, was rather hazardous because, naturally, Ethyl Gasoline Corporation per se can make no contribution to the picture beyond the establishment of the idea, which it has done I am sure you will agree with me very successfully unless it is protected by the exclusive use of tetra-ethyl lead as applied to anti-knock purposes.

* * * * *

Very truly yours,
Alfred P. Sloan Jr.

APSJr./K

of $86,000,000 (GTX 834, R. 638, 4974). Meanwhile, General Motors and Standard Oil had each received 82 millions in dividends and General Motors an additional 43 millions in royalties. But it is not so much the amount, as the fact that du Pont diverted this income from General Motors to itself by reason of its control relationship, that is important here.

3. *Kenetic Chemicals*

That the ethyl story did not result from chance is confirmed by the history of the development of a refrigerant "Freon 12", discovered by the same Dr. Midgley who discovered ethyl. (GTX 883, pp. 7-8, R. 647, 5068-9). Here the inventor and his associates and the president of Frigidaire (the General Motors corporation which was chiefly interested) wanted to manufacture the new product themselves (GM 233, R. 1484, 7295; GTX 838, R. 638, 4975). In spite of this, Mr. Pratt, for General Motors, worked out with du Pont a plan to turn the invention over to a new corporation to be formed, 51% owned by du Pont and 49% by General Motors (GTX 842, 850, R. 639, 641, 4979, 4992).

Perhaps more significant than the manufacture of "Freon 12" was Art. 7 of this contract which provided in part (GTX 850, R. 641, 4994):

> * * * it being further agreed that future chemical developments, (other than those relating to "said products") originating in the laboratories of General, 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, then General shall be free to dispose of the same elsewhere.

This provision was foreshadowed in a letter from Mr. Pratt, suggesting that new chemical discoveries by General Motors should be turned over to the du Pont controlled corporation, but that du Pont should keep sole control of its own discoveries (GTX 842, R. 639, 4979).

Later it was explained in a letter from Mr. Pratt to Mr. Lammot du Pont, Chairman of the du Pont board of directors as follows (GTX 899, R. 652, 5130):

> This clause was placed in the Kinetic agreement because we wanted to remove from some of our organization the temptation of attempting to build up within General Motors an independent chemical manufacturing activity, and to place any developments along chemical lines in an organization in which we have confidence from the standpoint of their ability to carry on chemical manufacturing processes. * * *

In view of this explicit expression of the General Motors understanding of the perquisites of du Pont, there is no room left for the lower court's findings that these manufacturing contracts were awarded on the basis of merit alone.

This kind of limitation, this type of restraint on free competition, is well-recognized as a violation of the Sherman Act.[43]

This Court stated in *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211, at 244-245:

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[43] As is pointed out above (*supra* p. 59), the parties themselves later came to the conclusion that the clause was unenforceable (GTX 886, R. 648, 5104) and cancelled it (DP 133, R. 1814, 5945).

> We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce.

Cf. *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 406-7; *Timken Roller Bearing Company* v. *United States,* 341 U.S. 593; *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S.D. N.Y.), affirmed, 332 U. S. 319.

B. *Du Pont has been successful in obtaining the giant share of the General Motors' market in products produced by it.*

As early as 1921, du Pont's efforts to capitalize on its investment were proving productive (GTX 420, R. 528, 4010). Mr. Lammot du Pont's report to Mr. Pierre S. du Pont, showed that General Motors was buying from du Pont 100% of its requirements of

pyralin (except for those of Fisher Body) a good percentage of fabrikoid and rubber cloth, and a somewhat less favorable proportion of its paints and finishes.

A second general survey made in 1926, and reported again by Mr. Lammot du Pont to Mr. Pierre S. du Pont (and Mr. Raskob) shows the dollar amounts of competitors' products being currently purchased (GTX 460, R. 537, 4100). The weak spot in the picture as before, although after several years of complete control, was Fisher Body Corporation, which as explained elsewhere, maintained a modicum of independence. Minor amounts of rubber-covered cloth were purchased by some of the car divisions from competitors but the situation as to fabrikoid and paints was entirely satisfactory. Du Pont's own exhibits for 1926 show sales to Chevrolet, Buick, Cadillac, Oldsmobile and Oakland of $11,623,000 (Du. 250, 259, 260, 263, 265, R. 2204, 2216, 2221, 2224, 2229, 6161, 6170, 6171, 6175, 6177), that is 89% of the total General Motors' purchases in these fields.

Skipping to a period closer to the time of the complaint, the court below found that du Pont sold General Motors 40-50% of its upholstery and trim requirements in 1946 and 1947, amounting in the latter year to $3,573,000 (R. 404; GTX 1392, R. 2933, 5427).

Sales in the paint and finish field present a similar pattern. In the twenties there was a period when, except for Fisher Body Corporation, du Pont had a contract to provide all of General Motors' requirements for pyroxylin (GM 166, 167, 179, 184, R. 1128, 1139, 1141, 7156, 7159, 7181, 7190). Even without such a contract, Chevrolet bought 100% from du Pont (GTX 503, R. 598, 4171) as did Pontiac (R. 1925) and Buick (R. 1926).

This advantage of du Pont's continued up to the date of the complaint. In 1946, when General Motors bought from all sources $14,864,000 of paint, du Pont supplied $10,430,000, or 70%. (GTX 1400, R. 2930, 5431). In 1947 General Motors purchased $26,470,000 in all; du Pont supplied $18,938,000, or 71.55% (GTX 1400, R. 2930, 5431).[44]

Du Pont protests that it is the excellence of its products and service which sells its goods, not its influence with the General Motors' management. The court below accepted this explanation. But we are not reduced to the profitless field of using bare accusation against bare denial. Year after year an overwhelming proportion of du Pont's automotive products have been sold to General Motors. For example, in 1940 and 1941, 87% and 89% respectively of du Pont's pyroxylin-coated fabrics (artificial leather) went to General Motors (GTX 1380, 1381, 1344, R. 2825, 2846, 5413, 5414, 5340). In 1947 to 1948 more than 80% of its automobile fabrics were sold to General Motors (GTX 1384, R. 2825, 5418; R. 2171-2). The same was true with Duco, the proportion sold to General Motors running as high as 93% in 1941 (GTX 1387, note A, R. 2919, 5422). In 1947 it was 83% (GTX 1387, R. 2919, 5422). During all this period General Motors was itself manufacturing 35% to 45% of the automobiles produced in the United States.[45] Du Pont has not been able

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[44] The effect of this situation on competitors is illustrated by the reaction of the Flint Varnish and Color Works when du Pont made its first investment in General Motors. Its president, Mr. Mountain, immediately concluded that his company was about to lose one of its best customers (GTX 277, R. 499, 3696). He sold out to du Pont (GTX 280, R. 499, 3721).

[45] Moody's *Industrials* gives the figures from year to year. The lowest was 1945 when General Motors sold 35%, the highest 1950, when General Motors sold 45.6%.

to build up a comparable demand for its products among the producers accounting for more than half the industry, the half which is not under obligation by reason of stock ownership. Yet those automobile manufacturers are certainly interested in buying the best products at the lowest price with a maximum of service. The very fact that over a long span of years the great bulk of du Pont automotive sales have gone to the one company connected to it by a stock interest is a clear indication that the stock relationship, as well as merit, promoted sales.

The record contains a further refutation of appellee's defense. This concerns du Pont's attempts to sell its products to Fisher Body Corporation in competition with other paint and fabric manufacturers at a time when the management of Fisher Body retained a measure of independence. Although General Motors acquired 60% of Fisher Body stock in 1919 for $27,600,000, a voting trust had been established and actual management was retained by the Fisher Brothers (GTX 428, 429, R. 530, 4029, 4032). Therefore, in the 1920's, when du Pont bought out its partner, Mr. Durant, and was in unquestioned control of General Motors, Fisher Body was insulated from du Pont's control by the voting trust and du Pont was forced to sell to it on merit, in competition with other manufacturers.

As early as 1921 it became apparent to the du Pont management that though they were selling to General Motors, they were not getting their share of Fisher Body business (GTX 420, R. 529, 4010). There can be no doubt they wanted that business; Mr. Pierre S. du Pont wrote, "A drive should be made for the Fisher Body business. Is there any reason why they have not

dealt with us?" (GTX 421, R. 529, 4012). This was important since Fisher manufactured all the closed car bodies for General Motors and the industry was shifting from open to closed cars (GTX 506, R. 598, 4175).

We have reviewed above the course of this drive (*supra,* pp. 119-121). On the very highest level the persuasive powers of du Pont were brought to bear and the Fishers were enticed as closely as possible into the family. Still in 1925, when General Motors was using Duco, Fisher was using a pyroxylin finish manufactured by Forbes Varnish Company (GTX 453, R. 536, 4082). And with fabrics sales were also unsatisfactory (GTX 454, p. 7, R. 537, 4090).

The record for 1926 (GTX 460, R. 537, 4101) shows that Fisher Body alone still resisted.

Then du Pont worked out the scheme whereby discounts to General Motors on its large purchases depended on swinging the Fisher Body business to du Pont (GTX 492, p. 4, R. 541, 4148). And so, eventually, the voting trust being dissolved and the Fisher Brothers being bought out (GTX 505, 506, 507, R. 598, 4173-8), by 1947 and 1948, Fisher Body was just another department of General Motors buying 65.5% of its fabrics from du Pont in 1947 and 68% in 1948 (GTX 1350-1351, R. 2890, 5356-9).

The lesson of the Fisher Body story is that du Pont sold to them, at least, not on the basis of merit, but on the basis of control. The picture is particularly clear because of the comparison with contemporaneous sales to other divisions of General Motors.

Summing up this portion of the brief, the record appears to demonstrate that after du Pont acquired

its General Motors interest with the intent of buying a market it proceeded to capitalize on its position by going after that market; and that it has been immoderately successful in its endeavor, selling year after year vast quantities of goods because its relationship with General Motors acted to attract trade regardless of other economic considerations.

IV

Du Pont's Acquisition of General Motors Stock Constitutes a Violation of Section 7 of the Clayton Act.

Section 7 of the Clayton Act (15 U.S.C. [1946 ed.] 18) *supra*, p. 3, specifically forbids stock acquisitions which may result in a restraint on commerce or may tend to create a monopoly. "No corporation engaged in commerce shall acquire * * * any part of the stock * * * of another corporation engaged also in commerce where the effect of such acquisition may be * * * to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce."[46]

When Congress enacted this law in 1914, it was very clear from the reports in both houses that it was intended to expand the limitations of the Sherman Act, not constrict them. H. Rep. No. 627, 63d Cong., 2d Sess. (1914) p. 17; S. Rep. No. 698, 63d Cong., 2d Sess. (1914), p. 1. Section 7, which originally appeared as Section 8 of the bill, was intended to pinpoint the application of the antitrust laws to relationships arising from stock ownership. Specifically it made illegal acquisitions the effect of which might be (a) to lessen

[46] All parties are agreed that 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).

competition between competitors, (b) to restrain commerce, or (c) to create a monopoly. In all three situations, the Act uses language prohibiting the acquisition where "the effect of such acquisition may be" to accomplish the undesirable result. This language, it has been stated, was used advisedly to impose a less stringent burden of proof than was required by the Sherman Act, to include cases where there was a probability of restraint rather than an accomplished restraint. See *Standard Fashion Company* v. *Magrane-Houston Company,* 258 U.S. 346, 356-357; *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, 298; *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 311-12.[47]

Although, as the preceding portions of this brief are designed to demonstrate, the combination here involved falls within the prohibitions of Sections 1 and 2 of the Sherman Act, it is also clearly comprehended by Section 7 of the Clayton Act. Here we have no question at all of control; the law is explicit that the ownership of any part of the stock of a corporation which may restrain commerce or may tend to create a monopoly is prohibited. Therefore even if du Pont's 23% of General Motors' voting stock could be outvoted, the influence it carries with it, until it is outvoted, is sufficient since it has been used to channel General Motors' purchases to du Pont. It is not necessary to retell the instances which illustrate this restraint. As we have seen, the end result has been that General Motors purchases a very large proportion of its needs of products manufactured by du Pont and

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[47] See also 51 Cong. Rec. 16002, where Senator Clinton, explaining the agreement in conference, stated that the clause "where the effect may be" means "where it is possible for the effect to be."

almost all of du Pont's total production of such materials. (*supra,* pp. 138-143).

In another way, proof under the Clayton Act is simpler. The court below found that there was no intent on the part of du Pont to impose restraints on General Motors (R. 302). This, it considered, was important under the Sherman Act. Under the Clayton Act, however, the only pertinence of intent is in connection with the exception provided for purchases for investment only (15 U.S.C. [1946 ed.] 18, ¶ 3):

> 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.[48]

To be sure, in the sense that du Pont wanted a return on its $50,000,000 it was an investor, but it is hardly consistent with the purposes of the Act to include within the exception a purchase wherein it was openly contemplated that the purchaser would at least share in the management generally and be primarily responsible for the corporation's financial affairs (GTX 124, R. 479, 3221-2). Even the decision of the Court of Appeals for the Third Circuit which gave a broad interpretation to the exception in *Pennsylvania Railroad Co.* v. *Interstate Commerce Commission,* 66 F. 2d 37, affirmed, 291 U.S. 651, did not contemplate such a purchase as this where part of the return came to the purchaser not *qua* stockholder but *qua* supplier of

[48] It was explained by the Senate Manager after the conference compromised the House and Senate versions of the bill, that this exception was included in order not to interfere with the investment programs of savings banks, insurance companies and universities. 51 Cong. Rec. 14466.

paints and fabrics. If the "investment" exception were broad enough to encompass the present case, it would swallow the entire Act.

In the court below, appellees argued that Section 7 of the Clayton Act was inapplicable because it prohibited stock acquisitions only where there was competition between the purchaser and the corporation whose stock was purchased (DP brief, pp. 453-4).[49] Certainly this is not supported by the wording of the Act which uses the language of competition only with respect to the first of the three prohibitions in the section. In the second two clauses, which are here specifically involved, no such limitation occurs. That this omission was not inadvertent is supported by the legislative history of the Act. The direct impetus for the framing of the Act was an address delivered by President Wilson to a joint session of Congress on January 20, 1914 at which time he stated (House Doc. No. 625, 63d Cong., 2d Sess.):

> Address of the President of the United States
> Before the Joint Session of Congress,
> Tuesday, January 20, 1914
>
> (House Doc. No. 625, 63d Cong., 2d Sess.)
>
> * * * * *
>
> We are all agreed that "private monopoly is indefensible and intolerable," and our programme

[49] The purchase of General Motors stock undoubtedly had the incidental result, and may have been for the purpose, of stifling competition before it could arise. Other automobile manufacturers have engaged in the production of their supplies in varying degrees, the Ford Motor Company going deeply into that field (R. 1963, 1992-3, 2113, 2172; GTX 1376, 1384, 1386, R. 2823, 2825, 2826, 5407, 5418, 5420). There is concrete evidence that du Pont's ownership of General Motors stock deterred the management from expanding into the chemical field (GTX 899, R. 652, 5130). In

is founded upon that conviction. It will be a comprehensive but not a radical or unacceptable programme and these are its items, the changes which opinion deliberately sanctions and for which business waits:

> It waits with acquiescence, in the first place, for laws which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public service bodies—as in effect result in making those who borrow and those who lend practically one and the same, *those who sell and those who buy but the same persons trading with one another under different names and in different combinations,* and those who affect to compete in fact partners and masters of some whole field of business. Sufficient time should be allowed, of course, in which to effect these changes of organization without inconvenience or confusion. [Italics added.]

Obviously President Wilson felt that the intercorporate relationships which required correction existed between buyers and sellers as well as between competitors. And one of the very earlier cases arising under Section 7 itself dealt with a situation where the corporation whose stock was purchased was not a competitor of the purchasing corporation, *Aluminum Company of*

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particular products, such as tetraethyl lead (*supra,* p. 131) and Freon (*supra,* p. 136); it was excluded from manufacture even though its scientists were responsible for the basic inventions. And there were long negotiations looking to a general agreement limiting General Motors' activity in the chemical field, abandoned only when it proved unnecessary to formalize the practice (GTX 579-580, R. 609, 4261, 4265).

America v. *Federal Trade Commission,* 284 Fed. 401 (C.A. 3), certiorari denied, 261 U.S. 616.[50]

Nor does the appellee's argument that the Clayton Act was intended to apply only at the commencement of a relationship, when stock is first acquired, prevent its application here. There is no question but that Congress did intend to give the government authority to eliminate the prohibited stock relationships before they worked their evil. *Swift and Co.* v. *Federal Trade Commission,* 8 F. 2d 595, 597 (C.A. 7), reversed, 272 U.S. 554; *Pennsylvania Railroad Co.* v. *Interstate Commerce Commission,* 66 F. 2d 37, 39 (C.A. 3), affirmed, 291 U.S. 651; S. Rep. No. 698, 63d Cong., 2d Sess. (1914), p. 1. But it does not follow that, having failed to move against the relationship early, the Government is barred from moving later on. In fact, in situations where the violation is not apparent at the time of purchase, the Government must have been given authority to proceed when the picture became clear. Moreover, it is well established that the Government cannot be barred by failure of its agents to act. *United States* v. *California,* 332 U.S. 19, 40.

The importance of the Clayton Act argument to this case is not only cumulative, i.e. that du Pont has violated not one act but two, but, more important, that the Clayton Act here supports the Sherman Act to catch violations which might otherwise slip through. The court below, having found no restraint of trade and no monopolization under the Sherman Act, decided

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[50] It is clear that Section 7, as amended in 1950 (64 Stat. 1125), the amendments not being applicable to this case, now applies to vertical integration as well as horizontal. The House Report makes specific reference to this effect of the amendment, stating that "it has been thought by some that this legislation applies only to the so-called horizontal mergers" (H. Rep. 1191, 81st Cong., 1st Sess. (1949) p. 11).

almost *a fortiori* there was none under the Clayton Act. This was error. It is clear that the essential purpose of the 1914 Act was to meet specific situations not explicitly forbidden in the earlier legislation and to impose a less stringent burden of proof. Since the Government asserts the court below was in error in finding no violation of the Sherman Act, it follows that we urge that it compounded the error in refusing to find violation of the Clayton Act.

The application of the Clayton Act is also significant in pointing the way for relief. Divestment of the du Pont stock holdings in General Motors is essential to cure the Clayton Act violation. Since the very essence of the violation is the stock interest, the remedy must include the elimination of that relationship.[51]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the cause remanded for entry of a decree granting appropriate relief.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
JOHN F. DAVIS,
Assistant to the Solicitor General.
VICTOR H. KRAMER,
MARGARET H. BRASS,
Attorneys.

AUGUST 1956.

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[51] Since Christiana Securities Company and Delaware Realty & Investment Company, which are controlled by the du Pont family, hold approximately 30% of the stock of E. I. du Pont de Nemours and Company (GTX 1303, R. 2675, 5221) adequate relief will require more than merely a distribution of General Motors stock to du Pont stockholders.

APPENDIX A

Summary of Directorships and Offices in General Motors Corporation and E. I. Du Pont de Nemours & Co. Held by Individuals Mentioned Above

BARKSDALE, H. M.

Du Pont —Director, 1916–1918
Finance Committee, 1916–1918
Vice-President, 1915–1918

General Motors —Director, June to November 1918
Finance Committee, June to November 1918

BELIN, LAMMOT

General Motors —Director, 1915–1916
Member of Executive Committee, 1915

BROWN, DONALDSON

Du Pont —Director, 1918 to date
Finance Committee, 1920 to date
Executive Committee, 1918–1921

General Motors —Director, 1920 to date
Financial Policy Committee, 1937 to date
(Vice-Chairman, 1937–1946)
Administration Committee, 1942–1945
Policy Committee, 1937–1946
Executive Committee, 1924–1937
Finance Committee, 1921–1937 (Chairman, 1929–1937)

CARPENTER, R. R. M.

Du Pont —Director, 1915 to 1948
Finance Committee, 1919–1921
Executive Committee, 1915–1919 and 1925–1931
Vice-President, 1917–1945

CARPENTER, WALTER S., Jr.

Du Pont —Director, 1919 to date
Chairman, January 1948 to date
President, 1940 to January 1948
Finance Committee, 1921 to date
Executive Committee, 1919 to January 1948

General Motors —Director, 1927 to date
Financial Policy Committee, 1946 to date
Policy Committee, 1937–1946
Finance Committee, 1927–1937

COPELAND, LAMMOT DU PONT

Du Pont —Director, 1942 to date
Finance Committee, 1943 to date
General Motors —Director, 1944 to date

COYNE, WILLIAM

Du Pont —Director, 1917–1932
(Member of Executive Committee in Charge of Sales)

CURTICE, HARLOW H.

General Motors —President, 1953 to date
Executive Vice-President, 1948–1953
Vice-President, 1940–1948
Director, 1940 to date

DU PONT, HENRY BELIN

Du Pont —Director, 1934 to date
General Motors —Director, 1938 to date

DU PONT, H. F.

Du Pont —Director, 1915 to date
Finance Committee, 1916–1943
General Motors —Director, 1918–1944
Finance Committee, 1918–1937

DU PONT, IRENEE

Du Pont —Director, 1915 to date
President, 1919–1926
Finance Committee, 1915–1916
Executive Committee, 1915–1919 and 1921–1926
General Motors —Director, 1918–1938
Finance Committee, 1918–1937

DU PONT, LAMMOT

Du Pont —Director, 1915–1952
Chairman, 1940 to January 1948
President, 1926–1940
Finance Committee, 1918–1945
Executive Committee, 1915–1940
General Motors —Director, 1918–1946
Chairman, 1929–1937
Policy Committee, 1937–1946
Executive Committee, 1930–1934
Finance Committee, 1918–1937

DU PONT, PIERRE S.

Du Pont —Director, 1915 to 1952
Chairman, 1919–1940
President, 1915–1919
Finance Committee, 1915 to 1952

General Motors —Director, 1917–1944
Chairman, 1917–1929
President, 1921–1923
Executive Committee, 1921–1929
Finance Committee, 1917–1937

DURANT, WILLIAM C.

General Motors —Director, 1908–1921
President, 1908–1910 and 1917–1921
Executive Committee (Chairman), 1918–1921
Finance Committee, 1917–1921

ECHOLS, ANGUS B.

Du Pont —Director, 1927 to date
Finance Committee, 1929 to date

General Motors —Director, 1944 to date
Financial Policy Committee, 1947 to date

FISHER, FRED J.

General Motors —Vice-President, 1925–1934
Director, 1921–1934

FISHER, LAWRENCE P.

General Motors —Director, 1924 to date
Vice-President, 1925–1944

FISHER, WILLIAM A.

General Motors —Vice-President, 1927–1942
Director, 1927–1942

GREENEWALT, CRAWFORD H.

Du Pont —President, 1947 to date
Vice-President, 1945–1947
Director, 1942 to date

HASKELL, J. A.

Du Pont —Director, 1915–1923
Vice-President, 1915–1923

General Motors —Director, 1917–1923
Vice-President, 1918–1923
Executive Committee, 1918–1923
Finance Committee, 1918–1923

KETTERING, CHARLES F.

General Motors —Vice-President, 1921–1947
Director, 1920 to date

KNUDSEN, WILLIAM S.

General Motors —President, 1937–1940
Vice-President, 1924–1933
Executive Vice-President, 1933–1937
Director, 1924–1940 and 1945–1948

PRATT, JOHN L.

Du Pont —Employee, 1905–1908, 1909–1918, 1918–1919

General Motors —Director, 1923 to date
Vice-President, 1922–1937
Financial Policy Committee, 1946 to date
Executive Committee, 1924–1937

RASKOB, J. J.

Du Pont —Director, 1915–1946
Finance Committee, 1915–1944
Executive Committee, 1915–1918

General Motors —Director, 1917–1946
Vice-President, 1918–1929
Executive Committee, 1921–1928
Finance Committee, 1917 to August 1928, and
May 1929 to 1937

SLOAN, ALFRED P., Jr.

Du Pont —Director, 1923 to date

General Motors —Director, 1918 to date
Chairman, 1937 to 1956
Vice-President, 1918–1923
President, 1923–1937
Financial Policy Committee, 1946 to date
Administration Committee, 1937–1945
Policy Committee, 1937–1946
Executive Committee, 1918–1937
Finance Committee, 1922–1937

WILSON, CHARLES E.

General Motors —President, 1941–1953
Acting President, 1940–1941
Executive Vice-President, 1939–1940
Vice-President, 1929–1939
Director, 1934–1953

(APPENDIX B)

Exhibit GM 10 (R. 6572-5)

GENERAL MOTORS CORPORATION
BOARD OF DIRECTORS

May 10, 1923

*Management	*du Pont	*Others
Day	P. S. du Pont	Bishop
Mott	Haskell	Kaufman
McLaughlin	Raskob	McGowan
Sloan	H. F. du Pont	McMaster
Bassett	I. du Pont	Baker
Smith	L. du Pont	Prosser
Brown		Stettinius
Kettering		Woodin
Swayne		Woolley
Hannum		Young
Hardy		
Rice		
Pratt		
Page		
Mooney		
F. J. Fisher		

"Management" includes retired executive personnel.

"Du Pont" indicates directors nominated by E. I. du Pont de Nemours and Company.

GENERAL MOTORS CORPORATION

BOARD OF DIRECTORS

December 31, 1942

Management	*du Pont*	*Others*
Mott	P. S. du Pont	Bishop
McLaughlin	Raskob	McGowan
Sloan	H. F. du Pont	*Whitney
Smith	L. du Pont	
Brown	*Carpenter	
Kettering	*H. B. du Pont	
Pratt		
*L. P. Fisher		
*Bradley		
*Grant		
*Hunt		
*Schumann		
*Wilson		
*Coyle		
*Curtice		
*Donner		
*E. F. Fisher		

"Management" includes retired executive personnel.

"Du Pont" indicates directors nominated by E. I. du Pont de Nemours and Company.

GENERAL MOTORS CORPORATION

BOARD OF DIRECTORS

June 6, 1949

Management	*du Pont*	*Others*
Mott	*Brown	Whitney
McLaughlin	Carpenter	*Douglas
Sloan	H. B. du Pont	*Mellon
Kettering	*Echols	
Pratt	*Copeland	
L. P. Fisher		
Bradley		
Grant		
Hunt		
Schumann		
Wilson		
Coyle		
Curtice		
Donner		
E. F. Fisher		
*Archer		
*Johnson		
*Evans		
*Goad		
*Kunkle		
*Burke		
*Godfrey		

"Management" includes retired executive personnel.

"Du Pont" indicates directors nominated by E. I. du Pont de Nemours and Company.

GENERAL MOTORS CORPORATION

BOARD OF DIRECTORS

February 1, 1953

Management	*du Pont*	*Others*
Mott	Brown	Whitney
McLaughlin	Carpenter	Douglas
Sloan	H. B. du Pont	Mellon
Kettering	Echols	*Alexander
Pratt	Copeland	*Clay
L. P. Fisher		*Compton
Bradley		
Grant		
Hunt		
Schumann		
Curtice		
Donner		
E. F. Fisher		
Johnson		
Evans		
Goad		
Kunkle		
Godfrey		
*Gordon		
*Kindl		
*Klingler		
*Osborn		
*Skinner		

"Management" includes retired executive personnel.

"Du Pont" indicates directors nominated by E. I. du Pont de Nemours and Company.

Exhibit GM 21 (R. 6608)

GENERAL MOTORS CORPORATION

EXECUTIVE COMMITTEE

May 10, 1923

Haskell
Sloan
P. S. du Pont
Raskob
F. J. Fisher
Mott

1924

Haskell deceased September 9, 1923.
Bassett, Brown, C. T. Fisher, L. P. Fisher and Pratt added September 25, 1924.

1926

Bassett deceased October 17, 1926.

1928

Raskob resigned August 9, 1928.

1929

P. S. du Pont resigned February 7, 1929.
Knudsen and Smith added May 9, 1929.

1930

L. du Pont added February 6, 1930.

1934

F. J. Fisher and L. du Pont resigned February 5, 1934.
Bradley added August 6, 1934.
C. T. Fisher resigned November 5, 1934.

1935

Grant, Hunt, Mooney and Wilson added August 5, 1935.

May 3, 1937

Sloan
Brown
L. P. Fisher
Pratt
Knudsen
Smith
Bradley
Grant
Hunt
Mooney
Wilson

Exhibit GM 22 (R. 6609)

GENERAL MOTORS CORPORATION
FINANCE COMMITTEE

May 10, 1923

P. S. du Pont	L. du Pont
Raskob	Baker
H. F. du Pont	Prosser
I. du Pont	Stettinius
Haskell	Brown
Sloan	

1924

Haskell deceased September 9, 1923.
F. J. Fisher and Whitney added September 25, 1924.

1925

Stettinius deceased September 3, 1925.
Morgan added September 30, 1925.

1927

Carpenter added February 10, 1927.

1928

Raskob resigned August 9, 1928.

1929

Raskob and Mott added May 9, 1929.

1933

Bradley added November 6, 1933.

1934

F. J. Fisher resigned November 5, 1934.

May 3, 1937

P. S. du Pont	Brown
Raskob	Sloan
H. F. du Pont	Whitney
I. du Pont	Morgan
L. du Pont	Carpenter
Baker	Mott
Prosser	Bradley

Exhibit GM 23 (R. 6610)

GENERAL MOTORS CORPORATION
POLICY COMMITTEE

May 3, 1937

Bradley
Brown
Carpenter
L. du Pont
Knudsen
Sloan
Smith
Whitney
Wilson

1940

Hunt added August 5, 1940.
Knudsen resigned September 3, 1940.

June 3, 1946

Bradley
Brown
Carpenter
L. du Pont
Sloan
Smith
Whitney
Wilson
Hunt

Exhibit GM 24 (R. 6611)

GENERAL MOTORS CORPORATION
OPERATIONS POLICY COMMITTEE

June 3, 1946

Archer
Bradley
Coyle
Curtice
Donner
Evans
Goad
Hunt
Wilson

1948

Kunkle added June 7, 1948
Burke and Godfrey added August 2, 1948.

1949

Kunkle resigned March 1, 1949.
Archer off August 10, 1949.
Hunt resigned September 30, 1949.

1950

Burke resigned December 9, 1950.
Coyle resigned December 31, 1950.

1951

Gordon, Kindl, Klingler, Osborn added January 1, 1951.
Skinner added January 8, 1951.

January 1953

Wilson resigned.

February 1, 1953

Bradley
Curtice
Donner
Evans
Goad
Godfrey
Gordon
Kindl
Klingler
Osborn
Skinner

Exhibit GM 25 (R. 6612)

GENERAL MOTORS CORPORATION
FINANCIAL POLICY COMMITTEE

June 3, 1946

Bradley
Brown
Carpenter
Donner
Pratt
Sloan
Smith
Whitney
Wilson

1947

Smith deceased September 28, 1947.
Echols added December 1, 1947.

1949

Carpenter resigned June 6, 1949.
Copeland added June 6, 1949.

1950

Alexander added December 4, 1950.

1951

Curtice added January 8, 1951.

1952

Pratt resigned January 7, 1952.
Clay added January 7, 1952.

January 19, 1953

Wilson resigned.

February 1, 1953

Bradley
Brown
Donner

Sloan
Whitney
Echols
Copeland
Alexander
Curtice
Clay

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