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# In the District Court of the United States for the District of New Jersey. United States of America, petitioner, versus United States Steel Corporation and others, defendants : brief for the defendants John D. Rockefeller and John D. Rockefeller, Junior /

United States

Buffington.



No. 6214.

IN THE

# DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA,
*Petitioner,*

*versus*

UNITED STATES STEEL CORPORATION AND OTHERS,
*Defendants.*

## BRIEF FOR THE DEFENDANTS JOHN D. ROCKEFELLER AND JOHN D. ROCKEFELLER, JUNIOR.

MURRAY, PRENTICE & HOWLAND,
*Solicitors for Defendants Rockefeller,*
37 WALL STREET,
New York.

GE WELWOOD MURRAY,
*Of Counsel.*



C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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| UNITED STATES OF AMERICA, Petitioner, VERSUS UNITED STATES STEEL CORPORATION and others, Defendants. | No. 6214. |

**Brief for the Defendants John D. Rockefeller and John D. Rockefeller, Junior.**

This is a suit in equity brought by the United States against the United States Steel Corporation, a large number of "constituent" companies of the Steel Corporation, and certain individuals. It is brought under Section 4 of the so-called "Sherman Anti-Trust Law" and is intended to bring about a dissolution or disintegration of the Steel Corporation.

The main question in the case as a whole relates to the Steel Corporation itself. It is unnecessary in this brief to set forth or to discuss the multitudinous facts

charged in the petition or appearing in evidence as related to that main question. We are here concerned solely with the defendants Rockefeller.

The defendants Rockefeller were made parties in order that the Government might secure against them the relief provided for in the statute, that is, to prevent and restrain any contract, combination, or conspiracy by them in restraint of commerce, interstate or foreign, or monopolization by them of such trade or commerce, connected with or relating to the United States Steel Corporation or its operations. The only relief against the defendants Rockefeller asked for in the Government brief is that they be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out any of the unlawful combinations referred to.

There is no evidence that the defendants Rockefeller, at the time when suit was brought, were violating or threatening to violate the statute; on the contrary by direct stipulation with the Government it is in evidence that the defendants Rockefeller were not violating the statute or threatening to violate it and that they are not now violating or threatening to violate it; indeed, it is stipulated that at the time the petition was filed they had had no relation of management or control to the Corporation for at least a year and a half. The evidence shows that the defendants Rockefeller took no part in the promotion of the Steel Corporation, and that they have not violated the statute at any time. Their conduct and their attitude toward the Steel Corporation at the time the petition was

filed could not be more in accordance with the requirements of the statute both in its letter and in its spirit.

The issuance of an injunction under such circumstances is not warranted by the statute nor is it in accordance with the practice of courts of equity. An injunction as against these defendants should be refused and as against them the suit should be dismissed.

**Statement of Facts Relating to the Defendants John D. Rockefeller and John D. Rockefeller, Junior.**

(*a*) *The pleadings.* The petition charges that in February, 1901, the Steel Corporation was formed and incorporated and effected a consolidation of the Federal Steel Company, the Carnegie Company, the National Tube Company, the American Steel and Wire Company, the National Steel Company, the American Tin Plate Company, the American Steel Hoop Company, and the American Sheet Steel Company. The petition also charges, under the head of "Acquisitions subsequent to the original combination," that the Steel Corporation in April, 1901, acquired the stock of the company known as Lake Superior Consolidated Iron Mines and of the Bessemer Steamship Company (Petition, pp. 25, 26). Further, as a conclusion on the part of the pleader, the petition charges that the Steel Corporation and the several companies combining in February, 1901, and the Steel Corporation and the individual defendants

in the subsequent acquisition and control of Lake Superior Consolidated Iron Mines and other companies named, in what they did, as charged, entered into an agreement or combination in restraint of trade and commerce among the several states and with foreign nations within the meaning of Section 1, and a combination to monopolize a part of the trade or commerce among the several States and with foreign nations, within the meaning of Section 2 of the Anti-Trust Act.

In the petition much space is occupied with charges with respect to pools, agreements and combinations of other sorts, and a general charge is made that "by the aforesaid pools, agreements, meetings and acts the Corporation, the said several companies and individual defendants, in addition to the several unlawful agreements and combinations by which all of the companies and properties aforesaid were brought under one control, have combined or conspired in restraint of trade and commerce among the several states and with foreign nations within the meaning of Section 1, and to monopolize a part of the trade or commerce among the several states and with foreign nations within the meaning of Section 2, of the Anti-trust Act." But the defendants Rockefeller are not named nor is any act of theirs mentioned in connection with any such charges, alleged pools, agreements or other combinations.

The sole statement of fact in the petition with respect to the defendants Rockefeller relates to the sale of the stock of Lake Superior Consolidated Iron Mines and

of Bessemer Steamship Company to the Steel Corporation subsequent to the original combination (pp. 18, 25, 26), and charges that the defendants Rockefeller were largely interested in the Lake Superior Consolidated Iron Mines, and that "both of them participated in bringing about the combination and became members of the first Board of Directors of the Corporation."

The essential prayers of the petition, so far as concerns these defendants, are for a decree that the combinations described are unlawful, and that all acts done or to be done to carry out the same are in violation of the Anti-Trust Act; that the defendants be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same; that the Steel Corporation "and all of the elements composing it" be decreed to be illegal and in restraint of trade, and that the Corporation be dissolved; that each of the constituent companies be decreed to have been combined in restraint of trade and illegal and that each be dissolved; that it be decreed that the several individual defendants combined with other persons to restrain trade, and that each of them be enjoined from continuing to carry out the purposes of said combinations and, finally, that the defendants, enumerating them, and here including the defendants J. D. Rockefeller and J. D. Rockefeller, Junior, be permanently enjoined as before prayed. At the close of the case the Government, in its brief (Part II., pp. 403, 404), modifies its claim; it now makes no demand that Lake Superior Consolidated Iron Mines be condemned as itself a combination in

restraint of trade. The decree now sought for would be aimed at the Steel Corporation itself and would bring in the defendants Rockefeller only to perpetually enjoin them from doing any act in pursuance of or for the purpose of carrying out any unlawful combination related to the Steel Corporation itself.

The defendants Rockefeller might have demurred. They preferred, as was their right, to introduce verified answers reviewing their whole relation to the subject matter in controversy. But in these answers they also pleaded that they were not proper parties (Article Fourth of each answer).

(*b*) *The proofs.* It has appeared in proof that the company known as Lake Superior Consolidated Iron Mines (in which defendant J. D. Rockefeller had a 25/29ths interest) owned a considerable group of iron ore properties in the State of Minnesota; that the company owned the stock of the Duluth, Missabe and Northern Railway, a mining road extending from Duluth into the Missabe mining region, and that the defendant J. D. Rockefeller owned the stock of the Bessemer Steamship Company, which owned a fleet of ore carrying vessels on the Great Lakes. Something is said in the proofs and more in the Government brief of events tending to show that prior to the organization of the Steel Corporation this Mining Company purchased a large amount of ore property on the Missabe Range in Minnesota, and hinting at relations of the Company with other companies having interests on the Missabe Range.

After the Steel Corporation was formed and the combination made, if combination there was, the promoters of the Steel Corporation, through Mr. J. P. Morgan, opened a negotiation with Mr. J. D. Rockefeller for the purchase from him of his interest in the Lake Superior Consolidated Iron Mines and the Bessemer Steamship Company. There is no assertion that these purchases were included in the original scheme for the organization of the Steel Corporation. The petition (pp. 17–23) states the properties included in the Plan and mentions the acquisition of Lake Superior Consolidated Iron Mines and Bessemer Steamship Company only under the head of "Acquisitions subsequent to the original combination" (Petition, pp. 25, 26), and nothing further is the present claim of the Government (Government brief, Part I., pp. 373, 374). To the same effect is the evidence (Testimony of E. H. Gary, Record, pp. 4747 and 4748; Testimony of Robert Bacon, p. 5526). The circular of April 2, 1901, of J. P. Morgan & Co. making the offer to stockholders of Lake Superior Consolidated Iron Mines refers to the organization of the Steel Corporation as already complete; it states that the Morgan circular of March 2, 1901 (which had not included the Rockefeller properties), "having been accepted by more than ninety-eight per cent. of the holders of stock in the several companies therein mentioned, the Plan proposed in said circular has become operative" (Defendants' Exhibits, Vol. II., pp. 224). It was after the completion of the original scheme, and after Judge Gary had mentioned the matter to Mr. Morgan

a second time, that Mr. Morgan called on Mr. Rockefeller and that a negotiation was opened which was followed up by Mr. Frick on behalf of the Steel Corporation, and which later resulted in the purchase by the Steel Corporation of the Rockefeller ore and vessel properties (Testimony of Gary, Record, pp. 4747 and 4748).

The essential facts with respect to the relation of the defendants Rockefeller to the Steel Corporation are set forth in two stipulations between the Government and defendants Rockefeller; the first of these, dated February 28, 1913, is found in the Record, Vol. IX., at page 3688; the second of them, dated February 6, 1914, is found in the Record, Vol. XXVIII., at page 12059. As these two stipulations contain nearly everything that relates to the defendants Rockefeller in the whole of this voluminous record, they are for convenience printed in full as an appendix to this brief.

From the first stipulation and the petition it appears that the defendant J. D. Rockefeller, owning all of the stock of the Bessemer Steamship Company and twenty-five-twenty-ninths of the stock of the Lake Superior Consolidated Iron Mines, sold the Bessemer Company for $8,500,000 cash (Government Petition, p. 26, where it is stated—"Its properties were acquired in 1901 by the Corporation for $8,500,000 in cash") and his Lake Superior Company's stock on the basis of $48,000,000 for the total stock of that company; that after the agreement of sale had been made it was arranged between Mr. Rockefeller and J. P. Morgan

& Company acting for the Steel Corporation that the price paid for Mr. Rockefeller's stock would be paid and discharged by delivering to him stock of the Steel Corporation on the following basis: For each share of Lake Superior Company's stock 1.35 shares of preferred stock of the Steel Corporation, and 1.35 shares of common stock of the Steel Corporation, and that at that time the market price in New York for Steel Corporation stock was eighty-three per cent. for preferred and thirty-eight per cent. for common.

This was the whole of the original transaction between the defendant J. D. Rockefeller and the Steel Corporation. He sold and it bought certain property. The price was bargained for in dollars; it was paid partly in cash and, by subsequent agreement, partly in stock of the Steel Corporation taken at current market quotations. Thus far in this narrative the defendant J. D. Rockefeller has parted with all relation to his former property and has acquired no relation whatever to the Steel Corporation save as a stockholder holding a small fraction of the stock of that company.

From the second stipulation it appears that the later relations of the defendants Rockefeller to the Steel Corporation were of the most limited description. Both of them were elected directors of the Steel Corporation; the defendant J. D. Rockefeller remained such until February 2, 1904, a trifle less than three years, during which period he was not a member of any committee and never attended a meeting of the Board. He then resigned.

The defendant J. D. Rockefeller, Junior, was never a member of any committee, and resigned as a director March 1, 1910. Furthermore, and most significantly, it is stipulated by the Government "that neither of the said defendants since their respective resignations as aforesaid has had part in the management of the affairs of said Steel Corporation."

While the defendants Rockefeller were not formally examined as witnesses, the Government has had the benefit of a searching of their consciences by means of the elaborate verified stipulation of February 6, 1914. From this second stipulation we gather that the only further relation of these defendants to the Steel Corporation was as investors. They personally had no relation to the management and their investments give no hint of management. Acquiring a quantity of stock in April, 1901, the defendant J. D. Rockefeller had sold all of it, both preferred and common, by July 8, 1908, and for some time thereafter owned no stock of the Steel Corporation. His present holding is but 7,101 shares of preferred and 23,700 shares of common stock out of 3,602,811 shares of preferred and 5,083,025 shares of common stock, representing less than one-fifth of one per cent. of the outstanding preferred stock and less than one-half of one per cent. of the outstanding common stock, and he does not now own and has not within ten years past owned any stock in any of the forty or more constituent companies of the Steel Corporation named in the Government Petition (pp. 40, 41, 42, 43, 44, 45 and 46), and he owns the investment bonds of the Steel

Corporation and of a few of its constituent companies set forth in the short table appearing in the stipulation. The holdings of the defendant J. D. Rockefeller, Junior, have been and are entirely negligible (see Stipulation).

It thus appears, through the conclusive stipulation of the Government, that neither of these defendants has, at any rate since March 1, 1910, had part in the management of the affairs of the Steel Corporation or had any such stock or bondholding as to indicate the slightest control by vote or otherwise over the affairs of the Corporation.

At the close of the case for the Government the defendants Rockefeller duly moved for non-suit as against them (Record, page 3766), and now at the close of the whole case they renew that motion.

## ARGUMENT.

### POINT I.

**The defendants Rockefeller are not violating the law or threatening to violate it and were not violating it or threatening to violate it when the suit was begun. Failing proof of such violation or threatened violation no decree can be entered against them.**

(*a*) The Anti-Trust Act is a criminal statute and should be interpreted as such even although the proceeding in question is in chancery. In *Northern Se-*

*curities Company vs. United States*, 193 U. S., see page 401, the Court said, through Mr. Justice HOLMES:

> "The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction."

There are numerous other cases to the same effect.

(*b*) The case at bar is brought under Section 4 of the Anti-Trust Act. Other sections provide for punishment for past offences; this one provides for restraint of a continuing offence; other sections provide for the past, this for the future. We quote from Section 4:

> "The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty * * * to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited * * * Pending such petition and before final decree the Court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The language is wholly preventive and prospective; and this accords with the fundamental idea of an injunction. The Supreme Court has said:

> "The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already."
>
> *Lacassagne vs. Chapius*, 144 U. S., see p. 124;

and this Court has so held in a proceeding under Section 4.

> "There can be no injunctive relief granted unless it tends to restrain some specific future or continuing violation of the act."
>
> *United States vs. Reading Co.*, 183 Fed., see p. 459.

There is no Anti-Trust case where the bill was not dismissed as against individual defendants not shown to have real connection at the time of the filing of the bill with the continuance of the combination or restraint of trade complained of. The cases show that it is not enough that a defendant had relation to the combination at the time of its inception; he must be shown to have a relation of management or control at the time of the filing of the petition. Injunctions were granted against individual defendants in the Northern Securities case, the Oil case, the Tobacco case, the Harvester case, but in each of these the Court found that the individuals in question were themselves principal actors and in the Tobacco case, for instance, found that the corporations were merely

corporate forms for the activities of the individuals in question, and it being shown that the corporations were continuing the combination the individuals were enjoined.

(c) On the other hand, in the cases where there was failure of the Government to show participation by the individuals in question in the continuance of the combination at the time of the commencement of the suit, the Government has failed as against them; even although it had been shown that the individuals joined in the original conspiracy, it was enough that they had retired from it and were not now continuing in it. A conspirator may retire from a conspiracy, and not be responsible for the continuance of it by others. In *United States vs. Kissel*, 218 U. S., 601, at pp. 607, 608, the Court said, by Mr. Justice HOLMES:

> "When the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, there is a continuing conspiracy."

In *Ware vs. United States*, 154 Fed., 577, the Circuit Court of Appeals (Judge SANBORN writing), said (p. 579):

> "There is a *locus penitentiae* after the performance of each overt act and a presumption of the innocence of the defendant, and if, after the performance of the first overt act, a de-

> fendant abandons the design of the conspiracy, and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy without the conscious participation of the defendant ought not to charge, and cannot charge him with the offense, because they fail to evidence his intent to violate the law within the three years."

To the same effect is *United States vs. Raley*, 173 Fed., 159 (see p. 167).

(*d*) In the most recent and most important Anti-Trust cases it has been held that the bill will be dismissed wherever there is a failure of proof that the defendants in question were at the time of the filing of the bill engaged in the operation or carrying out of the combination. In *Standard Oil Co. vs. United States*, 221 U. S., 1, it was said by Mr. Chief Justice WHITE, writing for the Court, p. 45 :

> "The bill was dismissed as to all other corporate defendants, thirty-three in number, it being adjudged by section 3 of the decree that they 'have not been proved to be engaged in the operation or carrying out of the combination.' "

A marginal note indicates the dismissed defendants. The decree referred to, entered in the Circuit Court, is printed substantially in full in 173 Federal, p. 197, and an examination of the full record of the case shows

that there were no other pertinent recitals than those printed in the Federal Reporter.

In the decree thus printed, section 1 adjudicates that in and prior to 1899 there were twenty corporations engaged in commerce among the states, etc.; that since the year 1890 the defendants named in section 2, "have entered into and are carrying out a combination," etc.; "that this combination or conspiracy is a combination or conspiracy in restraint of trade," etc.

Section 2 decrees that certain named defendants "united with the Standard Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it"; that certain named corporations "have entered into and became parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined * * * and are continuing to monopolize," etc.

Section 3 decrees that the defendants Argand Refining Company and thirty-two others "have not been proved to be engaged in the operation or carrying out of the combination, and the bill is dismissed as against each of them."

The injunctive relief granted by subsequent sections is confined to the defendants named in Section 2.

In the Tobacco case, *United States against American Tobacco Co.*, 221 U. S., 106, the Supreme Court reversed that part of the decree below which had dis-

missed the petition as to certain individual defendants. It is clear that the Supreme Court considered that the individual defendants were leading actors not only in the establishment but also in the present continuance of the combination, although in the part of the opinion referring to this particular matter (p. 185) the Court does not stop to amplify the reasons which led it to that conclusion. In fact, the individual defendants, James B. Duke and others, were, at the time the petition was filed, the principal officers, directors and agents of the Tobacco Company. It is so charged in the petition (Record in Tobacco case in U. S. Supreme Court, Vol. I., p. 11) ; the assignments of error upon which the Government secured reversal of this part of the decree below charge as error the failure and refusal " to find and declare that each and every defendant had entered into and is now a party to contracts * * * in restraint of trade and commerce among the several states," etc. (Record in Tobacco case, Vol. I., p. 339); and the evidence showed that James B. Duke, for instance, had been President of the Tobacco Company from the beginning and was such at the time of the filing of the petition (Record in Tobacco case, Vol. IV., p. 331), and the like is true of all the other individual defendants.

The Oil case was decided May 15, 1911; the Tobacco case was decided May 29, 1911. Soon afterward, June 21, 1911, was decided the Powder Trust case, *United States against E. I. du Pont de Nemours & Co.*, 188 Fed., 127. The opinion was written by Circuit Judge LANNING, and concurred

in by Circuit Judges GRAY and BUFFINGTON. It was there expressly decided that relief will be granted against an individual defendant only when the defendant is proved to have been violating the law or threatening to violate it when suit was brought; and this notwithstanding earlier participation in the combination. The opinion first states the doctrine and then applies it to the detailed circumstances of several different defendants, and dismisses the bill as to all of the fifteen defendants in question. The Court said (pp. 129, 132, 133):

> "The case, as we view it, is to be decided upon evidence about which there is practically no dispute. Our task is by a study of unimpeached documentary and other evidence to ascertain (1) what were the relations of the defendants when this suit was commenced; (2) whether those relations are inimical to the law; and, if so, (3) what the relief shall be. That task will be simplified if, in the first place, we determine which of the defendants are clearly shown to have had no connection at the time of the commencement of this suit with any combination or conspiracy of the nature described in the petition; for, as the only relief we can grant in this proceeding is injunctive, the petition must be dismissed as to any defendant who was not violating the law, or threatening to violate it, when the suit was commenced. One may be indicted for a former connection with a combination or conspiracy violative of the anti-trust act; but, after he has in good faith withdrawn from such a combina-

tion or conspiracy, he is no longer a subject of the injunctive power of a court of equity.

* * * * *

" Henry A. du Pont is one of the individual defendants. Previous to 1902 he had frequently represented E. I. du Pont de Nemours & Co. at the meetings of the Gunpowder Trade Association. In 1902 he sold the major part of his interest in that company to other members of the du Pont family, though he acted for a time thereafter as an officer of two of the du Pont corporations. In June, 1906, more than a year before this suit was begun, he resigned all his official positions in the defendant corporations, and since that time has had neither real nor nominal connection with the management of any of the defendant corporations, or with any trade agreement or combination concerning the manufacture or sale of explosives of any kind. His stockholdings in the defendant corporation, after February, 1902, were comparatively small, and as, after June 8, 1906, he was not a director or officer in any of them, and took no part in the management of any of them, he cannot be held individually responsible for the unlawful acts, if any there were, of any corporation of which he was a stockholder. It was impossible for him alone to dominate the business of any of the defendant corporations. There is no evidence that he attempted to do so, or that, after June 8, 1906, he had any connection, direct or indirect, with the shaping of policies or the management of the business of any of them. At the time of commencing this suit he was doing

nothing, nor was he threatening to do anything, which furnishes the subject-matter of injunctive relief as against him.

" Henry F. Baldwin is another individual defendant, who, it is alleged by the United States, was, at the time of the filing of the petition, a director of one of the du Pont companies and one of the managers of its business. By his answer Baldwin avers that he was a director of the company mentioned for some time previous to June 14,1907, but that on that day he resigned, and has not since been a director of, or in any way interested in the management or control of, any of the defendant corporations. There is no proof that his answer is incorrect, or that any injunction should be granted as against him.

* * * * *

" For the reasons stated, we think it is clear that the petition should be dismissed as to the following fifteen defendants: Aetna Powder Company, Miami Powder Company, American Powder Mills, Equitable Powder Manufacturing Company, Austin Powder Company, King Powder Company, Anthony Powder Company, Limited, American E. C. & Schultze Gunpowder Company, Peyton Chemical Company, Henry A. du Pont, Henry F. Baldwin, California Powder Works, Conemaugh Powder Company, Metropolitan Powder Company, and E. I. du Pont Company of August 1, 1903."

The facts with respect to the defendant Henry A. duPont are more extreme than anything that can be asserted by the Government against the defendants Rockefeller. Colonel duPont was a member of the

Delaware partnership of E. I. duPont de Nemours & Company existing prior to the combination of 1902. That partnership had long been in combination with other firms and corporations through the medium of the Gunpowder Trade Association. Colonel duPont had "frequently" represented his firm at meetings of the Association (188 Fed., 134). This firm, in which he continued a partner, continued its relation of combination with others through the so-called "Fundamental Agreement" of December, 1889. The "principal parties" were his firm and two corporations (p. 137), and these continued in active operation of the combination (pp. 138, 139). Colonel duPont was an incorporator and director of the Delaware Company of E. I. duPont de Nemours & Company, formed in 1899, which further continued the combination. In 1902 another corporation of the same name was formed. "For thirty years trade agreements had been in existence, in every one of which the duPonts were active parties" (p. 140) * * * "The Association of manufacturers of powder and other explosives had probably never been stronger than it was in February, 1902, when the change in the management of the duPont works took place. It had for years arbitrarily fixed prices in different parts of the United States, waging a disastrous warfare against competitors until they were coerced into terms satisfactory to the Association or brought into the Association" (p. 140). At this time Colonel duPont sold "the major part of his interest to other members of the duPont family", who continued as members of the combination. He himself, after the

formation of the latest phase of the combination and his sale of the major part of his stock, continued to act for some years as an officer of two of the duPont corporations.

When suit was brought he was still a stockholder, although his holdings were comparatively small. The decisive facts were that "more than a year" before suit was brought he resigned all official positions in the defendant corporations and since that time had had neither real nor nominal connection with the management or with trade agreements or combinations. "It was impossible for him alone to dominate the business. There is no evidence that he attempted to do so, or that at the time suit was brought, he had any connection with the shaping of policies," etc. The Court concluded that "at the time of commencing this suit he was doing nothing, nor was he threatening to do anything, which furnishes the subject matter of injunctive relief as against him."

In the case at bar the most that can be asserted against the defendants Rockefeller is this: In March, 1901, J. D. Rockefeller owned twenty-five-twenty-ninths of an ore company and all of a steamship company; he had no relation to the organization of the Steel Corporation; he simply sold to it his ore and vessel interests, receiving payment partly in cash and, ultimately, partly in stock; he was a nominal director of the Steel Corporation for three years, retiring seven years before the filing of the Government petition, and has not held more than one-half of one per cent. of the Corporation's

stock. J. D. Rockefeller, Jr., had no relation to the organization of the Steel Corporation; he sold it nothing; was a director until March 24th, 1910, a year and a half before the filing of the Government Petition; his interest in the Steel Corporation is negligible. The Government stipulates "that neither of the said defendants since their respective resignations as aforesaid has had part in the management of the affairs of said Steel Corporation."

In the recent Harvester case—*United States vs. International Harvester Company*, 214 *Fed.*, 987—all the defendants were enjoined on the ground that they were all participating in the combination at the time the suit was brought. Judge SANBORN, in a dissenting opinion, urged that none of the defendants was violating the statute at the time the suit was brought; he thought that although a combination may originally have been formed in violation of the statute it conducted its business thereafter with such fairness and so encouraged competition that no violation of the statute was continuing when the petition was filed. A sharp distinction exists between a defendant who is still party to the original combination at the time the bill is filed, whatever may be the manner in which its business is then conducted, and a defendant who at the time the bill is filed is not a party to or participating in the combination in any manner: the former is the Harvester case; the latter is our case. We are not called upon to inquire into the manner in which the Steel Corporation was conducting its business at the

time the bill was filed. In truth, the defendants Rockefeller were not parties to the original combination, if any; but even if it could be held that they were, it is indisputable that they had withdrawn from it, and that when the bill was filed they had no relation to the Steel Corporation or to its operation in the trade.

In determining the disposition to be made of the petition as to the defendants Rockefeller, the nature of the offense aimed at by the statute, as set forth in sections 1 and 2, and the remedy provided by section 4 are vital considerations. Contract, combination, or conspiracy in restraint of trade or commerce, or monopolization of trade or commerce, are the offenses denounced by the statute. A double remedy is afforded for the violation of the statute. The penal remedy refers only to past action and with it we are not concerned. The civil remedy refers to future action and rests wholly upon Section 4.

A decree for dissolution of the Steel Corporation is not applicable to the defendants Rockefeller as they have no power over the corporate defendants, and have no authority to participate in the dissolution of the corporate defendants if a decree for that purpose were entered.

A decree restraining the conduct of the defendants Rockefeller themselves is the remedy, if any, applicable to those defendants, and it is the remedy prayed for in the petition. An injunction, if issued, in effect would direct the defendants Rockefeller to depart from their present conduct and to cease their present violation or threatened violation of the statute. The

[Insert on page 24, at close of first paragraph.]

Since the printing of this brief, a decision has been handed down, October 13, 1914, in the Steamship case (United States v. Hamburg-American Steamship Line, *et al.*) by the United States District Court for the Southern District of New York, Circuit Judges LACOMBE, COXE, WARD and ROGERS sitting and concurring. While denying the main contention of the Government, the Court orders an injunction against the use of "fighting ships," with the important qualification that the bill is dismissed as against defendants who had retired from the "fighting ship" agreement before the filing of the bill. Judge LACOMBE, writing for the Court, said :

> "The Allan Line and Canadian Pacific Line withdrew from the 'fighting ship' agreement before the bill was filed. As to both these defendants the bill is dismissed. As to the other defendants injunction will issue against the continuance of the 'fighting ships.'"

[Insert at end of page 25.]

The recent legislation (Clayton Anti-Trust Act of October 15, 1914, Section 5), giving entirely new evidential value to decrees in government anti-trust cases, would apply to a decree in favor of the Government in this suit and, especially in connection with Section 4 of the same Act and Section 7 of the Sherman Act, providing for triple damage suits, adds a new and grave objection to a decree against an individual defendant except in cases where the facts clearly warrant it and present or imminent acts of the defendant certainly demand it.

evidence establishes conclusively that the defendants Rockefeller were not violating or threatening to violate the statute at the time the suit was begun, and that they are not violating or threatening to violate the statute at the present time. The evidence informs the court that an injunction against the defendants Rockefeller is completely unnecessary, and that their conduct is entirely in accordance with the requirements of the statute.

An injunction will not issue merely because it has been asked for and if issued may not injure the defendants. In *Teller vs. United States*, 113 Fed., 463, Judge ADAMS, writing for the Circuit Court of Appeals in the Eighth Circuit, in disposing of the argument that the injunction if issued would not injure the defendant, said:

> "It is not sufficient that such an order will do no harm. It should at least be made to appear that it would do some good."

Cited with approval in *Weir vs. Winnett*, 155 Fed., 824, 827.

In considering the same question in *International Register Co. vs. Recording Fare Register Co.*, 151 Fed., 199, 202, Judge TOWNSEND, speaking for the Circuit Court of Appeals of the Second Circuit, said:

> "It is not sufficient ground for an injunction that obedience to it will not hurt defendants. Nor is it any answer to the assignments of error by the defendants that 'there is nothing in the injunction that would interfere with an honest man conducting his business unhindered by any restriction'."

## POINT II.

**The defendants Rockefeller were not parties to the promotion of the United States Steel Corporation. The Plan for assembling certain plants was originated and carried out by others. After the Plan had been consummated, John D. Rockefeller at the request of the Steel Corporation sold his ore and vessel properties and the Steel Corporation purchased and paid for them. It was a sale of property to the Corporation by an outsider.**

(*a*) Something is said in the Government brief (Part I., p. 351, ff.) of the considerable interest of the defendants Rockefeller in ore properties prior to the organization of the Steel Corporation in 1901, and of alleged relations of what the Government brief calls the "Rockefeller interests" with other "interests." But even if these assertions and intimations were true they would in no sense be comparable with the relation found by the Court to have existed between Henry A. du Pont and the Powder combination, and we perceive that all of this assertion amounts to nothing when we discover (*a*) that the Government in its brief does not even ask for a decree adjudging the Rockefeller companies to have been combinations or that they had entered into combinations in restraint of trade, and (*b*) that every conceivable relation of the defendants Rockefeller to these companies ceased in 1901 upon the sale to the Steel Corporation.

(*b*) The defendants Rockefeller were not promoters

of the United States Steel Corporation. They did not conceive the idea of bringing the properties together; they were not consulted as to the properties to be assembled or purchased, nor as to the method or price of acquisition, nor as to the capitalization or organization of the Corporation; they did not aid in any manner in bringing the properties together under the Plan either by negotiation for purchase or otherwise; they were not parties to any syndicate or underwriting agreement; in no way did they aid in the flotation of the securities of the Steel Corporation; they received no profits from any syndicate or underwriting agreement. Other persons were the promoters and conceived and carried out the plan. Judge Gary in his testimony reviews with much detail the manner in which these properties were assembled (Record, pp. 4747–4749); he names the persons who actively took part in the work, and he describes the properties which were considered necessary to the consummation of the Plan; the defendants Rockefeller are not included among those persons and their properties are not included among those properties; Judge Gary's evidence clearly shows that the defendants Rockefeller were outsiders. The Plan contemplated the assembling of certain plants and after this had been consummated the Corporation decided to obtain, if possible, certain additional ore and vessel properties belonging principally to John D. Rockefeller. The sale of the Rockefeller properties was negotiated as a cash transaction; only later was it agreed that stock should be taken and only for a part of the property; the vessel prop-

erty was paid for in cash; the ore property in stock. John D. Rockefeller as an outsider, at the request of the Steel Corporation, sold his properties to it; he sold them without condition of any kind as to their use, or as to the future business policy of the purchaser; there was no agreement of any kind between the seller and the purchaser after the sale of the property and payment for it. This was a sale in substance as well as in form; if John D. Rockefeller by this sale became a party to the combination, if combination there was, then every person who sold property to the Steel Corporation in 1901 by virtue of such sale became a party to the combination.

While John D. Rockefeller became a director of the Steel Corporation, it was no condition of the sale that he should be made a director, and in fact he never attended a meeting and was not a member of a committee at any time; he was at most a nominal director, and resigned more than seven years before suit was brought.

John D. Rockefeller, Junior, became a director of the company; he, however, had sold no property; his stockholding was trifling, and his only relation to the company was that of director, which position he resigned a year and a half before the filing of the Government petition.

## Recapitulation.

### I.

### Pleadings.

No cause of action is alleged.

(*a*) 1901.—In a general omnibus clause it is stated, but as a conclusion only, that defendants Rockefeller participated in the alleged combination in 1901, but no fact is pleaded to sustain this conclusion. It is pleaded that the Steel Corporation acquired from the defendants Rockefeller the stock of the Lake Superior Company and of the Bessemer Company; that payment was made partly in cash and partly in stock of the Steel Corporation, and that defendants Rockefeller became members of the first Board of Directors. This pleading is quite consistent with the fact that defendants Rockefeller were vendors, not promoters.

(*b*) 1911.—Even if the facts pleaded showed that defendants Rockefeller were in 1901 not vendors but participants in the Plan, there is complete failure to allege facts showing that defendants Rockefeller continued a relation of management or control in the Steel Corporation when the Government bill was filed in October, 1911. It cannot be presumed as matter of pleading that facts alleged to have existed in 1901 continued to exist in 1911.

On the face of the bill, therefore, it does not appear that defendants Rockefeller were participants in the Plan of February, 1901, nor that, even if they were

such participants, they continued a relation of management to the Steel Corporation at the time the petition was filed in October, 1911.

## II.

### The Proofs.

The Government has offered no proof of any violation of the statute by the defendants Rockefeller.

(*a*) 1901. The evidence and the stipulations with the Government establish that the defendants Rockefeller had no part in the formation of the Steel Corporation; they were not consulted as to capitalization, organization, properties or prices; the Plan had been consummated before any offer was made to them. The transaction when effected was not only in form but in very substance a sale. Defendant J. D. Rockefeller was an outsider; he merely sold his property to the Steel Corporation. J. D. Rockefeller, Junior, was not even a vendor, much less a promoter.

(*b*) 1911. There is absence of proof that defendants Rockefeller were participating in the management of the Steel Corporation or in any alleged combination in October, 1911, when the Government petition was filed. More, there is positive proof by stipulation to the contrary! It is stipulated with the Government that, at least since March, 1910, defendants Rockefeller have had no part in the management of the Corporation and that the largest stockholding of J. D. Rockefeller at any time since March, 1910, has been less than one-fifth of one per cent. of the preferred stock

and less than one-half of one per cent. of the common stock. The stockholding of the defendant J. D. Rockefeller, Junior, has been negligible. J. D. Rockefeller has never had any relation to the management, save that from 1901 to 1904 he was a merely nominal director; J. D. Rockefeller, Junior, ceased to be a director a year and a half before petition filed.

It was well said by this Court in the Powder case:

> "As the only relief we can grant in this proceeding is injunctive, the petition must be dismissed as to any defendant who was not violating the law or threatening to violate it when the suit was commenced."

## POINT III.

**The petition should be dismissed as to the defendants Rockefeller.**

MURRAY, PRENTICE & HOWLAND,
Solicitors for Defendants John D. Rockefeller and John D. Rockefeller, Junior.

GEORGE WELWOOD MURRAY,
Of Counsel.

# APPENDIX.

## Stipulations Between the United States Government and the Defendants Rockefeller.

### First Stipulation—Record, Vol. IX., p. 3688.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

| | |
|---|---|
| UNITED STATES OF AMERICA, Petitioner, vs. UNITED STATES STEEL CORPORATION, ET AL., Defendants. | No. 6214. |

**Stipulation.**

It is stipulated by and between the petitioner and the defendants John D. Rockefeller and John D. Rockefeller, Jr., that in March, 1901, John D. Rockefeller, owning about twenty-five twenty-ninths of the capital stock (represented by trustees' certificates) of Lake Superior Consolidated Iron Mines, at which time that company had outstanding capital stock of the par value of $29,424,594, reached an agreement with J. P. Morgan & Company, acting for United States Steel Corporation, to sell the stock in said company then

owned by him to J. P. Morgan & Company, acting for said Steel Corporation, for a price reckoned on the basis of $48,000,000.00, for the total outstanding stock of said company; that thereafter, and on March 15, 1901, it was agreed between John D. Rockefeller and J. P. Morgan & Company, acting for said Steel Corporation, that said price for Mr. Rockefeller's stock would be paid and discharged by delivering to him stock of the United States Steel Corporation, as follows:

> For each share of stock (par value one hundred dollars) of the Lake Superior Consolidated Iron Mines 1.35 shares of the Preferred stock of the United States Steel Corporation, and 1.35 shares of the Common stock of the United States Steel Corporation;

that at that time the market price in New York City for said stock of the Steel Corporation was eighty-three per centum for preferred stock and thirty-eight per centum for common stock, and that John D. Rockefeller made it a condition of his sale of any of his stock that said Steel Corporation should immediately offer the same terms to all other stockholders of Lake Superior Consolidated Iron Mines.

New York, February 28, 1913.

J. M. Dickinson,
Henry E. Colton,
Barton Corneau,
Special Assistants to the Attorney-General.

Murray, Prentice & Howland,
Attorneys for the Defendants John D. Rockefeller and John D. Rockefeller, Jr.

**Second Stipulation—Record, Vol. XXVIII., p. 12059.**

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

| | |
|---|---|
| UNITED STATES OF AMERICA, Petitioner, AGAINST UNITED STATES STEEL CORPORATION, ET AL., Defendants. | No. 6214. |

**Stipulation.**

It is Stipulated between the petitioner and the defendants John D. Rockefeller and John D. Rockefeller, Junior, as between the Petitioner and said defendants in the above cause, and for no other purpose, as follows :

(1) That on April 6th, 1901, both said defendants were elected directors of the United States Steel Corporation ; that on February 2nd, 1904, the defendant John D. Rockefeller resigned as a director of said Corporation and that his resignation was then accepted ; that defendant John D. Rockefeller had not attended any meeting of the Board of Directors of said Corporation and was never a member of any committee of the said Board.

(2) That on March 1, 1910, the defendant John D. Rockefeller, Junior, resigned as a director of said Steel Corporation; that his resignation was then accepted and that he was never a member of any committee of the said Board.

(3) That neither of the said defendants, since their respective resignations as aforesaid, has had part in the management of the affairs of said Steel Corporation.

(4) That by July 8, 1908, the defendant John D. Rockefeller had sold all of the stock, preferred and common, of said Steel Corporation received by him in 1901 upon his sale of stock of Lake Superior Consolidated Iron Mines referred to in the Stipulation in this suit, made between the Government and the defendants Rockefeller, dated February 28, 1913, and on that day, July 8, 1908, and for some time thereafter, he owned no stock of said Steel Corporation, either preferred or common; that on March 1, 1910 (the date of the resignation of his son as a director, hereinafter referred to) he owned 7,101 shares, and no more, of the preferred stock of the said Corporation, and 18,101 shares, and no more, of its common stock; that at present he owns 2,200 shares, and no more, of preferred stock of said Corporation, and 200 shares, and no more, of its common stock; and that the largest number of shares of such stock he has owned in the period intervening between March 1, 1910, and the present time is 7,101 shares of preferred stock and 23,700 shares of common stock, out of a present outstanding issue of about 3,602,811 shares of said pre-

ferred stock and about 5,083,025 shares of said common stock.

That the defendant, John D. Rockefeller, does not now own, and has not within ten years past owned any stock in any of the concerns enumerated as constituent or subsidiary concerns of said Steel Corporation on pages 40, 41, 42, 43, 44, 45 and 46 of the Government Petition in this suit; and that said defendant does not own any of the bonds of said Steel Corporation or said constituent or subsidiary concerns, except as follows, which he now holds:

| | |
|---|---|
| U. S. Steel Corporation collateral trust bonds of 1951, of the face value of..... | $1,398,000 |
| U. S. Steel Corporation sinking fund 5 per cent. bonds, of the face value of..... | 429,000 |
| Union Steel Co. 1st mortgage bonds of 1952, of the face value of..... | 650,000 |
| Tennessee Coal, Iron and Railroad Co., general mortgage 5 per cent. bonds of 1951, of the face value of..... | 400,000 |
| Illinois Steel Co., debentures of 1940, of the face value of..... | 500,000 |
| Indiana Steel Co., 1st mortgage bonds of 1952, of the face value of ..... | 500,000 |
| Duluth, Missabe and Northern Railway Co. Consolidated 1st mortgage bonds, of the face value of..... | 145,000 |
| First Divisional bonds, of the face value of ..... | 966,000 |
| General Mortgage bonds, of the face value of ..... | 956,000 |

(5) That in April, 1901, the defendant John D. Rockefeller, Junior, owned 900 shares, and no more, of preferred stock of said Steel Corporation, and 7,400 shares, and no more, of common stock of said Corporation; that on March 1, 1910, when he resigned as a director of said Corporation, he owned none of the stock thereof, either preferred or common and owns none at the present time; that the largest number of shares of stock of said Corporation he has owned is 6,700 shares of such preferred stock and 21,500 shares of such common stock; that during 1906 and 1907 he acquired $15,000, face value, U. S. Steel Corporation Sinking Fund Bonds; that he never owned a greater amount of bonds of said Corporation and owns none at the present time; that he has not within ten years past owned any stocks or any bonds of any of the constituent concerns of said Steel Corporation enumerated on page 40 of the Government petition in this suit, nor of any of the subsidiary companies enumerated on pages 41, 42, 43, 44, 45 and 46 of said Government petition.

New York, February 6, 1914.

J. M. Dickinson,
Henry E. Colton,
Special Assistants to the Attorney-General.
Murray, Prentice & Howland,
Solicitors for the Defendants John D. Rockefeller and John D. Rockefeller, Jr.

STATE OF NEW YORK, }
County of Westchester, } ss. :

JOHN D. ROCKEFELLER, being duly sworn, says that the statement of facts contained in the foregoing Stipulation, so far as it relates to him, is true.

JOHN D. ROCKEFELLER.

Sworn to before me, this 18th day of February, 1914.

FREDERICK F. BRIGGS,
Notary Public.

[SEAL.]

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STATE OF NEW YORK, }
County of New York, } ss.:

JOHN D. ROCKEFELLER, JUNIOR, being duly sworn, says that the statement of facts contained in the foregoing Stipulation, so far as it relates to him, is true.

JOHN D. ROCKEFELLER, JR.

Sworn to before me, this 17th day of February, 1914.

HARRY P. FISH,
Notary Public,
New York County No. 1097,
Register No. 5105.

[SEAL.]

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

IN THE

# United States District Court

FOR THE DISTRICT OF NEW JERSEY.

THE UNITED STATES

vs.

THE UNITED STATES STEEL CORPORATION, *et al.*

ON MOTION FOR PRELIMINARY INJUNCTION.

## MEMORANDUM.

*Per Curiam*

The Government asks us to restrain the principal defendant and all its subsidiary companies from destroying books and papers, but without describing them except in very general terms. No evidence is offered that such destruction is threatened, and it need hardly be said that evidence is essential before any man may be either accused or convicted of what would be in substance a criminal interference with the course of justice. The motion is supported almost wholly by the fact that after certain prosecutions in the southern district of New York came to an end, a number of papers belonging to the American Steel & Wire Company that had been furnished by the company to the Government for use in such

prosecutions and had been returned to its possession were destroyed by one of its officers. While we are satisfied that this destruction was without evil intent, the fact remains that the destruction *did* take place, and we see no reason why (so far as the Steel & Wire Company is concerned) the present order should not be continued. But it is not shown that the other defendants were in any respect connected with this act, and (so far as they are concerned) without evidence we cannot grant the present petition. It must therefore be refused, except as to the Steel & Wire Company, but the Government has leave to make a similar motion at any time in the future, if counsel shall regard such a step as necessary or desirable.

UNITED STATES OF AMERICA,
District of New Jersey, } ss:

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original Memorandum, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the Seal of the said Court, at Trenton, in said District, this Thirteenth day of May nineteen hundred and twelve.

[SEAL]

GEORGE T. CRANMER,
Clerk District Court, U. S.
By C. S. CHEVRIER,
Deputy.