ADVANCE SHEET– MARCH 5, 2021

President's Letter

In this issue, we try to relieve our readers' discouragement at the nation's recent politics by endeavoring to persuade them that matters have been worse.

Our first article is an excerpt from Charles Francis Adams' account of the Erie Railroad War, drawn from Chapters of Erie, on which he collaborated with his brother the historian Henry Adams. Charles Francis was himself a sometime railroad president. "In 1868 the popular English Fraser's Magazine wrote that 'in New York, there is a custom among litigants as peculiar to that city, it is to be hoped, as supreme within it, of retaining a judge as well as a lawyer.'" John Steele Gordon, *An Empire of Wealth: The Epic History of American Economic Power* (New York: Harper Perennial, 2005), 208.

Our judicial opinion is that in *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S.287 (1941) by the now seriously under-rated Justice Felix Frankfurter. Justices Black, Douglas and Reed dissented. Although Justice Frankfurter was no naif about labor relations, he had investigated the Bisbee Deportations and the Mooney-Billings trial of IWW leaders and was the principal draftsman of the Norris-La Guardia anti-injunction act, even he may not have known the full background of the Meadowmoor Dairies case, as amusingly recounted in P. Mejia, How the Capones Strong-Armed Their way Into the Dairy Business, Gastro Obscura, February 9, 2018, (https://www.atlasobscura.com/articles/al-ralph-capone-dairy-industry-milk-cheese).

Finally, we explore the work of a peace-maker in the modern culture wars, the late Simone Veil, a Holocaust survivor who was the health minister in the government of the conservative French President Valery Giscard D'Estaing, and later President of the European Parliament. We here present her speech introducing and explaining the first modern French abortion law, a carefully wrought compromise which survived for nearly fifty years until its repeal by the Hollande government shortly before it was overwhelmingly discharged from office.

George W. Liebmann

Did You Know That:

The Bar Library was founded in 1840 by George William Brown and is one of the oldest membership libraries in the country.

The Bar Library was one of the first, and possibly the first, private legal organization in Baltimore to accept African-Americans and women as members – Everett J. Waring becoming a member on April 29, 1886 and Etta Haynie Maddox on September 15, 1902.

A Congressional Medal of Honor recipient, the Honorable Charles Edward Phelps served on the Library's Board from 1876 to 1881.

Arthur W. Machen served on the Library's Board from 1856 to 1915, serving as President from 1874 to 1915. His son and grandson also served on the Board making the Machens the first family of the Bar Library.

With massive legal collections (all of which circulate) and access to expansive Westlaw databases (which may be accessed from your own laptops – affording the ability to cut and paste directly into your files), the Bar Library is one of the great values to practitioners in Baltimore and the surrounding counties. ***A Membership Just Makes Sense.*** Contact us at 410-727-0280 or at jwbennett@barlib.org.

Education In A Pandemic:
"Leading the Empowered University in a Time of Crisis"

On Tuesday, March 9, 2021, at 6:00 p.m., Dr. Freeman A. Hrabowski, President of UMBC (University of Maryland, Baltimore County) will present "Education In A Pandemic." The lecture will be presented by way of Zoom. We invite those that will be watching to participate by contributing their questions. Zoom is an interactive platform.

Dr. Freeman A. Hrabowski, President of UMBC (University of Maryland, Baltimore County) since 1992, is a consultant on science and math education to national agencies, universities, and school systems. He was named by President Obama to chair the President's Advisory Commission on Educational Excellence for African Americans. He also chaired the National Academies' committee that produced the report, *Expanding Underrepresented Minority Participation: America's Science and Technology Talent at the Crossroads* (2011). His 2013 TED talk highlights the "Four Pillars of College Success in Science."

Named one of the 100 Most Influential People in the World by *TIME* (2012) and one of America's Best Leaders by *U.S. News & World Report* (2008), he also received TIAA-CREF's *Theodore M. Hesburgh Award for Leadership Excellence* (2011), the Carnegie Corporation's *Academic Leadership Award* (2011), and the *Heinz Award* (2012) for contributions to improving the "Human Condition." More recently, he received the American Council on Education's *Lifetime Achievement Award* (2018), the University of California, Berkeley's *Clark Kerr Award* (2019), and the *UCSF Medal* from the University of California San Francisco (2020). UMBC has been recognized as a model for inclusive excellence by such publications as *U.S. News*, which for more than 10 years has recognized UMBC as a national leader in academic innovation

and undergraduate teaching. Dr. Hrabowski's most recent book, *The Empowered University*, written with two UMBC colleagues, examines how university communities support academic success by cultivating an empowering institutional culture.

If you would like to join us for what should be a fascinating evening, please e-mail me at **jwbennett@barlib.org** and I will forward the **Zoom Link** to you the week of the program. If technology is not your cup of tea, do not let that stop you. Zoom is incredibly easy to use and we will send you the very simple instructions to use Zoom should you need them. Stay safe and we hope to see you with us on March 9.

Time: 6:00 p.m., Tuesday, March 9, 2021.

CHAPTERS OF ERIE

By Charles Francis Adams, Jr.
and Henry Adams

GREAT SEAL BOOKS
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A Chapter of Erie

NOT a generation has passed away during the last six hundred years without cherishing a more or less earnest conviction that, through its efforts, something of the animal had been eliminated from the higher type of man. Probably, also, no generation has been wholly mistaken in nourishing this faith;—even the worst has in some way left the race of men on earth better in something than it found them. And yet it would not be difficult for another Rousseau to frame a very ingenious and plausible argument in support of the opposite view. Scratch a Russian, said the first Napoleon, and you will find a Cossack; call things by their right names, and it would be no difficult task to make the cunning civilization of the nineteenth century appear but as a hypocritical mask spread over the more honest brutality of the twelfth. Take, for instance, some of the cardinal vices and abuses of the imperfect past. Pirates are commonly supposed to have been battered and hung out of existence when the Barbary Powers and the Buccaneers of the Spanish Main had been finally dealt with. Yet freebooters are not extinct; they have only transferred their operations to the land, and conducted them in more or less accordance with the forms of law; until, at last, so great a proficiency have they attained, that the commerce of the world is more equally but far more heavily taxed in their behalf, than would ever have entered into their

wildest hopes while, outside the law, they simply made all comers stand and deliver. Now, too, they no longer live in terror of the rope, skulking in the hiding-place of thieves, but flaunt themselves in the resorts of trade and fashion, and, disdaining such titles as once satisfied Ancient Pistol or Captain Macheath, they are even recognized as President This or Colonel That. A certain description of gambling, also, has ceased to be fashionable; it is years since Crockford's doors were closed, so that in this respect a victory is claimed for advancing civilization. Yet this claim would seem to be unfounded. Gambling is a business now where formerly it was a disreputable excitement. Cheating at cards was always disgraceful; transactions of a similar character under the euphemistic names of "operating," "cornering," and the like are not so regarded. Again, legislative bribery and corruption were, within recent memory, looked upon as antiquated misdemeanors, almost peculiar to the unenlightened period of Walpole and Fox, and their revival in the face of modern public opinion was thought to be impossible. In this regard at least a sad delusion was certainly entertained. Governments and ministries no longer buy the raw material of legislation;—at least not openly or with cash in hand. The same cannot be said of individuals and corporations; for they have of late not infrequently found the supply of legislators in the market even in excess of the demand. Judicial venality and ruffianism on the bench were not long since traditions of a remote past. Bacon was impeached, and Jeffries achieved an immortal infamy for offences against good morals and common decency which a self-satisfied civilization believed incompatible with modern development. Recent revelations have cast more than doubt upon the correctness even of this assumption.[1]

[1] See a very striking article entitled "The New York City Judiciary" in the North American Review for July, 1867. This paper, which, from its fearless denunciation of a class of judicial delinquencies which have since greatly increased both in frequency and in magnitude, attracted great attention when it was published, has been attributed to the pen of Mr. Thomas G. Shearman, of the New York bar.

No better illustration of the fantastic disguises which the worst and most familiar evils of history assume as they meet us in the actual movements of our own day could be afforded than was seen in the events attending what are known as the Erie wars of the year 1868. Beginning in February and lasting until December, raging fiercely in the late winter and spring, and dying away into a hollow truce at midsummer, only to revive into new and more vigorous life in the autumn, this strange conflict convulsed the money market, occupied the courts, agitated legislatures, and perplexed the country, throughout the entire year. These, too, were but its more direct and immediate manifestations. The remote political complications and financial disturbances occasioned by it would afford a curious illustration of the close intertwining of interests which now extends throughout the civilized world. The complete history of these proceedings cannot be written, for the end is not yet; indeed, such a history probably never will be written, and yet it is still more probable that the events it would record can never be quite forgotten. It was something new to see a knot of adventurers, men of broken fortune, without character and without credit, possess themselves of an artery of commerce more important than was ever the Appian Way, and make levies, not only upon it for their own emolument, but, through it, upon the whole business of a nation. Nor could it fail to be seen that this was by no means in itself an end, but rather only a beginning. No people can afford to glance at these things in the columns of the daily press, and then dismiss them from memory. For Americans they involve many questions;—they touch very nearly the foundations of common truth and honesty without which that healthy public opinion cannot exist which is the life's breath of our whole political system.

I

The history of the Erie Railway has been a checkered one. Chartered in 1832, and organized in 1833, the cost of its con-

struction was then estimated at three millions of dollars, of which but one million were subscribed. By the time the first report was made the estimated cost had increased to six millions, and the work of construction was actually begun on the strength of stock subscriptions of a million and a half, and a loan of three millions from the State. In 1842 the estimated cost had increased to twelve millions and a half, and both means in hand and credit were wholly exhausted. Subscription-books were opened, but no names were entered in them; the city of New York was applied to, and refused a loan of its credit; again the legislature was besieged, but the aid from this quarter was now hampered with inadmissible conditions; accordingly work was suspended, and the property of the insolvent corporation passed into the hands of assignees. In 1845 the State came again to the rescue; it surrendered all claim to the three millions it had already lent to the company; and one half of their old subscriptions having been given up by the stockholders, and a new subscription of three millions raised, the whole property of the road was mortgaged for three millions more. At last, in 1851, eighteen years after its commencement, the road was opened from Lake Erie to tide-water. Its financial troubles had, however, as yet only begun, for in 1859 it could not meet the interest on its mortgages, and passed into the hands of a receiver. In 1861 an arrangement of interests was effected, and a new company was organized. The next year the old New York & Erie Railroad Company disappeared under a foreclosure of the fifth mortgage, and the present Erie Railway Company rose from its ashes. Meanwhile the original estimate of three millions had developed into an actual outlay of fifty millions; the 470 miles of track opened in 1842 had expanded into 773 miles in 1868; and the revenue, which the projectors had "confidently" estimated at something less than two millions in 1833, amounted to over five millions when the road passed into the hands of a receiver in 1859, and in 1865 reached the enormous sum of sixteen millions and a half. The road was, in truth, a magnificent enterprise, worthy to connect the great lakes with the great seaport of America. Scaling lofty mountain ranges,

running through fertile valleys and by the banks of broad rivers, connecting the Hudson, the Susquehanna, the St. Lawrence, and the Ohio, it stood forth a monument at once of engineering skill and of commercial enterprise.

The series of events in the Erie history which culminated in the struggle about to be narrated may be said to have had its origin some seventeen or eighteen years before, when Mr. Daniel Drew first made his appearance in the Board of Directors, where he remained down to the year 1868, generally holding also the office of treasurer of the corporation. Mr. Drew is what is known as a self-made man. Born in the year 1797, as a boy he drove cattle down from his native town of Carmel, in Putnam County, to the market of New York City, and, subsequently, was for years proprietor of the Bull's Head Tavern. Like his contemporary, and ally or opponent,—as the case might be,—Cornelius Vanderbilt, he built up his fortunes in the steamboat interest, and subsequently extended his operations over the rapidly developing railroad system. Shrewd, unscrupulous, and very illiterate,—a strange combination of superstition and faithlessness, of daring and timidity,—often good-natured and sometimes generous,—he ever regarded his fiduciary position of director in a railroad as a means of manipulating its stock for his own advantage. For years he had been the leading bear of Wall Street, and his favorite haunts were the secret recesses of Erie. As treasurer of that corporation, he had, in its frequently recurring hours of need, advanced it sums which it could not have obtained elsewhere, and the obtaining of which was a necessity. He had been at once a good friend of the road and the worst enemy it had as yet known. His management of his favorite stock had been cunning and recondite, and his ways inscrutable. Those who sought to follow him, and those who sought to oppose him, alike found food for sad reflection; until at last he won for himself the expressive *sobriquet* of the Speculative Director. Sometimes, though rarely, he suffered greatly in the complications of Wall Street; more frequently he inflicted severe damage upon others. On the whole, however, his fortunes had greatly prospered, and the outbreak

of the Erie war found him the actual possessor of some millions, and the reputed possessor of many more.

In the spring of 1866 Mr. Drew's manipulations of Erie culminated in an operation which was at the time regarded as a masterpiece; subsequent experience has, however, so improved upon it that it is now looked upon as an ordinary and inartistic piece of what is called "railroad financiering," a class of operations formerly known by a more opprobrious name. The stock of the road was then selling at about 95, and the corporation was, as usual, in debt, and in pressing need of money. As usual, also, it resorted to its treasurer. Mr. Drew stood ready to make the desired advances—upon security. Some twenty-eight thousand shares of its own authorized stock, which had never been issued, were at the time in the hands of the company, which also claimed, under the statutes of New York, the right of raising money by the issue of bonds, convertible, at the option of the holder, into stock. The twenty-eight thousand unissued shares, and bonds for three millions of dollars, convertible into stock, were placed by the company in the hands of its treasurer, as security for a cash loan of $3,500,000. The negotiation had been quietly effected, and Mr. Drew's campaign now opened. Once more he was short of Erie. While Erie was buoyant,—while it steadily approximated to par,—while speculation was rampant, and that outside public, the delight and the prey of Wall Street, was gradually drawn in by the fascination of amassing wealth without labor,—quietly and stealthily, through his agents and brokers, the grave, desponding operator was daily concluding his contracts for the future delivery of stock at current prices. At last the hour had come. Erie was rising, Erie was scarce, the great bear had many contracts to fulfil, and where was he to find the stock? His victims were not kept long in suspense. Mr. Treasurer Drew laid his hands upon his collateral. In an instant the bonds for three millions were converted into an equivalent amount of capital stock, and fifty-eight thousand shares, dumped, as it were, by the cartload in Broad Street, made Erie as plenty as even Drew could desire. Before the astonished bulls could rally their faculties,

the quotations had fallen from 95 to 50, and they realized that they were hopelessly entrapped.[2]

The whole transaction, of course, was in no respect more creditable than any result, supposed to be one of chance or skill, which, in fact, is made to depend upon the sorting of a pack of cards, the dosing of a race-horse, or the selling out of his powers by a "walkist." But the gambler, the patron of the turf, or the pedestrian represents, as a rule, himself alone, and his character is generally so well understood as to be a warning to all the world. The case of the treasurer of a great corporation is different. He occupies a fiduciary position. He is a trustee,—a guardian. Vast interests are confided to his care; every shareholder of the corporation is his ward; if it is a railroad, the community itself is his *cestui que trust.* But passing events, ac-

[2] A bull, in the slang of the stock exchange, is one who endeavors to increase the market price of stocks, as a bear endeavors to depress it. The bull is supposed to toss the thing up with his horns, and the bear to drag it down with his claws. The vast majority of stock operations are pure gambling transactions. One man agrees to deliver, at some future time, property which he has not got, to another man who does not care to own it. It is only one way of betting on the price at the time when the delivery should be made; if the price rises in the mean while, the bear pays to the bull the difference between the price agreed upon and the price to which the property has risen; if it falls, he receives the difference from the bull. All operations, as they are termed, of the stock exchange are directed to this depression or elevation of stocks, with a view to the settlement of differences. A "pool" is a mere combination of men contributing money to be used to this end, and a "corner" is a result arrived at when one combination of gamblers, secretly holding the whole or greater part of any stock or species of property, induces another combination to agree to deliver a large further quantity at some future time. When the time arrives, the second combination, if the corner succeeds, suddenly finds itself unable to buy the amount of the stock or property necessary to enable it to fulfil its contracts, and the first combination fixes at its own will the price at which differences must be settled. The corner fails or is broken, when those who agree to deliver succeed in procuring the stock or property, and fulfilling their contracts. The *argot* of the exchange is, however, a language by itself, and very difficult of explanation to the wholly uninitiated. It can only be said that all combinations of interests and manipulations of values are mere weapons in the hands of bulls and bears for elevating or depressing values, with a view to the payment of differences.

cumulating more thickly with every year, have thoroughly corrupted the public morals on this subject. A directorship in certain great corporations has come to be regarded as a situation in which to make a fortune, the possession of which is no longer dishonorable. The method of accumulation is both simple and safe. It consists in giving contracts as a trustee to one's self as an individual, or in speculating in the property of one's *cestui que trust,* or in using the funds confided to one's charge, as treasurer or otherwise, to gamble with the real owners of those funds for their own property, and that with cards packed in advance. The wards themselves expect their guardians to throw the dice against them for their own property, and are surprised, as well as gratified, if the dice are not loaded. These proceedings, too, are looked upon as hardly reprehensible, yet they strike at the very foundation of existing society. The theory of representation, whether in politics or in business, is of the essence of modern development. Our whole system rests upon the sanctity of the fiduciary relations. Whoever betrays them, a director of a railroad no less than a member of Congress or the trustee of an orphans' asylum, is the common enemy of every man, woman, and child who lives under representative government. The unscrupulous director is far less entitled to mercy than the ordinary gambler, combining as he does the character of the traitor with the acts of the thief.

No acute moral sensibility on this point, however, has for some years troubled Wall Street, nor, indeed, the country at large. As a result of the transaction of 1866, Mr. Drew was looked upon as having effected a surprisingly clever operation, and he retired from the field hated, feared, wealthy, and admired. This episode of Wall Street history took its place as a brilliant success beside the famous Prairie du Chien and Harlem "corners," and, but for subsequent events, would soon have been forgotten. Its close connection, however, with more important though later incidents of Erie history seems likely to preserve its memory fresh. Great events were impending; a new man was looming up in the railroad world, introducing novel ideas and principles, and it could hardly be that the new

and old would not come in conflict. Cornelius Vanderbilt, commonly known as Commodore Vanderbilt, was now developing his theory of the management of railroads.

Born in the year 1794, Vanderbilt was a somewhat older man than Drew. There are several points of resemblance in the early lives of the two men, and many points of curious contrast in their characters. Vanderbilt, like Drew, was born in very humble circumstances in the State of New York, and like him also received little education. He began life by ferrying passengers and produce from Staten Island to New York City. Subsequently, he too laid the foundation of his great fortune in the growing steamboat navigation, and likewise, in due course of time, transferred himself to the railroad interest. When at last, in 1868, the two came into collision as representatives of the old system of railroad management and of the new, they were each threescore and ten years of age, and had both been successful in the accumulation of millions, —Vanderbilt even more so than Drew. They were probably equally unscrupulous and equally selfish; but, while the cast of Drew's mind was sombre and bearish, Vanderbilt was gay and buoyant of temperament, little given to thoughts other than of this world, a lover of horses and of the good things of life. The first affects prayer-meetings, and the last is a devotee of whist. Drew, in Wall Street, is by temperament a bear, while Vanderbilt could hardly be other than a bull. Vanderbilt must be allowed to be by far the superior man of the two. Drew is astute and full of resources, and at all times a dangerous opponent; but Vanderbilt takes larger, more comprehensive views, and his mind has a vigorous grasp which that of Drew seems to want. While, in short, in a wider field, the one might have made himself a great and successful despot, the other would hardly have aspired beyond the control of the jobbing department of some corrupt government. Accordingly, while in Drew's connection with the railroad system his operations and manipulations evince no qualities calculated to excite even a vulgar admiration or respect, it is impossible to regard Vanderbilt's methods or aims without recognizing

the magnitude of the man's ideas and conceding his abilities. He involuntarily excites feelings of admiration for himself and alarm for the public. His ambition is a great one. It seems to be nothing less than to make himself master in his own right of the great channels of communication which connect the city of New York with the interior of the continent, and to control them as his private property. Drew sought to carry to a mean perfection the old system of operating successfully from the confidential position of director, neither knowing anything nor caring anything for the railroad system, except in its connection with the movements of the stock exchange, and he succeeded in his object. Vanderbilt, on the other hand, as selfish, harder, and more dangerous, though less subtle, has by instinct, rather than by intellectual effort, seen the full magnitude of the system, and through it has sought to make himself a dictator in modern civilization, moving forward to this end step by step with a sort of pitiless energy which has seemed to have in it an element of fate. As trade now dominates the world, and railways dominate trade, his object has been to make himself the virtual master of all by making himself absolute lord of the railways. Had he begun his railroad operations with this end in view, complete failure would have been almost certainly his reward. Commencing as he did, however, with a comparatively insignificant objective point,—the cheap purchase of a bankrupt stock,—and developing his ideas as he advanced, his power and his reputation grew, until an end which at first it would have seemed madness to entertain became at last both natural and feasible.

Two great lines of railway traverse the State of New York and connect it with the West,—the Erie and the New York Central. The latter communicates with the city by a great river and by two railroads. To get these two roads—the Harlem and the Hudson River—under his own absolute control, and then, so far as the connection with the Central was concerned, to abolish the river, was Vanderbilt's immediate object. First making himself master of the Harlem road, he there learned his early lessons in railroad management, and picked up a

fortune by the way. A few years ago Harlem had no value. As late as 1860 it sold for eight or nine dollars per share; and in January, 1863, when Vanderbilt had got the control, it had risen only to 30. By July of that year it stood at 92, and in August was suddenly raised by a "corner" to 179. The next year witnessed a similar operation. The stock which sold in January at less than 90 was settled for in June in the neighborhood of 285. On one of these occasions Mr. Drew is reported to have contributed a sum approaching half a million to his rival's wealth. More recently the stock had been floated at about 130. It was in the successful conduct of this first experiment that Vanderbilt showed his very manifest superiority over previous railroad managers. The Harlem was, after all, only a competing line, and competition was proverbially the rock ahead in all railroad enterprise. The success of Vanderbilt with the Harlem depended upon his getting rid of the competition of the Hudson River railroad. An ordinary manager would have resorted to contracts, which are never carried out, or to opposition, which is apt to be ruinous. Vanderbilt, on the contrary, put an end to competition by buying up the competing line. This he did at about par, and, in due course of time, the stock was sent up to 180. Thus his plans had developed by another step, while through a judicious course of financiering and watering and dividing, a new fortune had been secured by him. By this time Vanderbilt's reputation as a railroad manager—as one who earned dividends, created stock, and invented wealth—had become very great, and the managers of the Central brought that road to him, and asked him to do with it as he had done with the Harlem and Hudson River. He accepted the proffered charge, and now, probably, the possibilities of his position and the magnitude of the prize within his grasp at last dawned on his mind. Unconsciously to himself, working more wisely than he knew, he had developed to its logical conclusion one potent element of modern civilization.

Gravitation is the rule, and centralization the natural consequence, in society no less than in physics. Physically, morally, intellectually, in population, wealth, and intelligence, all things

tend to concentration. One singular illustration of this law is almost entirely the growth of this century. Formerly, either governments, or individuals, or, at most, small combinations of individuals, were the originators of all great works of public utility. Within the present century only has democracy found its way through the representative system into the combinations of capital, small shareholders combining to carry out the most extensive enterprises. And yet already our great corporations are fast emancipating themselves from the State, or rather subjecting the State to their own control, while individual capitalists, who long ago abandoned the attempt to compete with them, will next seek to control them. In this dangerous path of centralization Vanderbilt has taken the latest step in advance. He has combined the natural power of the individual with the factitious power of the corporation. The famous "L'état, c'est moi" of Louis XIV. represents Vanderbilt's position in regard to his railroads. Unconsciously he has introduced Cæsarism into corporate life. He has, however, but pointed out the way which others will tread. The individual will hereafter be engrafted on the corporation,—democracy running its course, and resulting in imperialism; and Vanderbilt is but the precursor of a class of men who will wield within the State a power created by the State, but too great for its control. He is the founder of a dynasty.

From the moment Vanderbilt stepped into the management of the Central, but a single effort seemed necessary to give the new railroad king absolute control over the railroad system, and consequently over the commerce, of New York. By advancing only one step he could securely levy his tolls on the traffic of a continent. Nor could this step have seemed difficult to take. It was but to repeat with the Erie his successful operation with the Hudson River road. Not only was it a step easy to take, but here again, as so many times before, a new fortune seemed ready to drop into his hand. The Erie might well yield a not less golden harvest than the Central, Hudson River, or Harlem. There was indeed but one obstacle in the way,—the plan might not meet the views of the one

man who at that time possessed the wealth, cunning, and combination of qualities which could defeat it, that man being the Speculative Director of the Erie,—Mr. Daniel Drew.

The New York Central passed into Vanderbilt's hands in the winter of 1866–67, and he marked the Erie for his own in the succeeding autumn. As the annual meeting of the corporation approached, three parties were found in the field contending for control of the road. One party was represented by Drew, and might be called the party in possession, that which had long ruled the Erie, and made it what it was,—the Scarlet Woman of Wall Street. Next came Vanderbilt, flushed with success, and bent upon fully gratifying his great instinct for developing imperialism in corporate life. Lastly, a faction made its appearance composed of some shrewd and ambitious Wall Street operators and of certain persons from Boston, who sustained for the occasion the novel character of railroad reformers. This party, it is needless to say, was as unscrupulous, and, as the result proved, as able as either of the others; it represented nothing but a raid made upon the Erie treasury in the interest of a thoroughly bankrupt New England corporation, of which its members had the control. The history of this corporation, known as the Boston, Hartford, & Erie Railroad,—a projected feeder and connection of the Erie,—would be one curious to read, though very difficult to write. Its name was synonymous with bankruptcy, litigation, fraud, and failure. If the Erie was of doubtful repute in Wall Street, the Boston, Hartford, & Erie had long been of worse than doubtful repute in State Street. Of late years, under able and persevering, if not scrupulous management, the bankrupt, moribund company had been slowly struggling into new life, and in the spring of 1867 it had obtained, under certain conditions, from the Commonwealth of Massachusetts, a subsidy in aid of the construction of its road. One of the conditions imposed obliged the corporation to raise a sum from other sources still larger than that granted by the State. Accordingly, those having the line in charge looked abroad for a victim, and fixed their eyes upon the Erie.

As the election day drew near, Erie was of course for sale. A controlling interest of stockholders stood ready to sell their proxies, with entire impartiality, to any of the three contending parties, or to any man who would pay the market price for them. Nay, more, the attorney of one of the contending parties, as it afterwards appeared, after an ineffectual effort to extort black mail, actually sold the proxies of his principal to another of the contestants, and his doing so seemed to excite mirth rather than surprise. Meanwhile the representatives of the Eastern interest played their part to admiration. Taking advantage of some Wall Street complications just then existing between Vanderbilt and Drew, they induced the former to ally himself with them, and the latter saw that his defeat was inevitable. Even at this time the Vanderbilt party contemplated having recourse, if necessary, to the courts, and a petition for an injunction had been prepared, setting forth the details of the "corner" of 1866. On the Sunday preceding the election Drew, in view of his impending defeat, called upon Vanderbilt. That gentleman, thereupon, very amicably read to him the legal documents prepared for his benefit; whereupon the ready treasurer at once turned about, and, having hitherto been hampering the Commodore by his bear operations, he now agreed to join hands with him in giving to the market a strong upward tendency. Meanwhile the other parties to the contest were not idle. At the same house, at a later hour in the day, Vanderbilt explained to the Eastern adventurers his new plan of operations, which included the continuance of Drew in his directorship. These gentlemen were puzzled, not to say confounded, by this sudden change of front. An explanation was demanded, some plain language followed, and the parties separated, leaving everything unsettled; but only to meet again at a later hour at the house of Drew. There Vanderbilt brought the new men to terms by proposing to Drew a bold *coup de main,* calculated to throw them entirely out of the direction. Before the parties separated that night a written agreement had been entered into, providing that, to save appearances, the new board should be elected without

Drew, but that immediately thereafter a vacancy should be created, and Drew chosen to fill it. He was therefore to go in as one of two directors in the Vanderbilt interest, that gentleman's nephew, Mr. Work, being the other.

This programme was faithfully carried out, and on the 2d of October Wall Street was at once astonished by the news of the defeat of the notorious leader of the bears, and bewildered by the immediate resignation of a member of the new board and the election of Drew in his place. Apparently he had given in his submission, the one obstacle to success was removed, and the ever-victorious Commodore had now but to close his fingers on his new prize. Virtual consolidation in the Vanderbilt interest seemed a foregone conclusion.

The reinstalment of Drew was followed by a period of hollow truce. A combination of capitalists, in pursuance of an arrangement already referred to, took advantage of this to transfer as much as possible of the spare cash of the "outside public" from its pockets to their own. A "pool" was formed, in view of the depressed condition of Erie, and Drew was left to manipulate the market for the advantage of those whom it might concern. The result of the Speculative Director's operations supplied a curious commentary on the ethics of the stock exchange, and made it questionable whether the ancient adage as to honor among a certain class in society is of universal application, or confined to its more persecuted members. One contributor to the "pool," in this instance, was Mr. ——, a friend of Vanderbilt. The ways of Mr. Drew were, as usual, past finding out; Mr. ——, however, grew impatient of waiting for the anticipated rise in Erie, and it occurred to him that, besides participating in the profits of the "pool," he might as well turn an honest penny by collateral operations on his own account, looking to the expected rise. Before embarking on his independent venture, however, he consulted Mr. Drew, it is said, who entirely declined to express any judgment as to the enterprise, but at the same time agreed to loan Mr. —— out of the "pool" any moneys he might require upon the security usual in such cases. Mr. —— availed himself of the means

thus put at his disposal, and laid in a private stock of Erie. Still, however, the expected rise did not take place. Again he applied to Mr. Drew for information, but with no better success than before; and again, tempted by the cheapness of Erie, he borrowed further funds of the "pool," and made new purchases of stock. At last the long-continued depression of Erie aroused a dreadful suspicion in the bull operator, and inquiries were set on foot. He then discovered, to his astonishment and horror, that his stock had come to him through certain of the brokers of Mr. Drew. The members of the "pool" were at once called together, and Mr. Drew was appealed to on behalf of Mr. ——. It was suggested to him that it would be well to run Erie up to aid a confederate. Thereupon, with all the coolness imaginable, Mr. Drew announced that the "pool" had no Erie and wanted no Erie; that it had sold out its Erie and had realized large profits, which he now proposed to divide. Thereafter who could pretend to understand Daniel Drew? who could fail to appreciate the humors of Wall Street? The controller of the "pool" had actually lent the money of the "pool" to one of the members of the "pool," to enable him to buy up the stock of the "pool"; and having thus quietly saddled him with it, the controller proceeded to divide the profits, and calmly returned to the victim a portion of his own money as his share of the proceeds. Yet, strange to say, Mr. —— wholly failed to see the humorous side of the transaction, and actually feigned great indignation.

This, however, was a mere sportive interlude between the graver scenes of the drama. The real conflict was now impending. Commodore Vanderbilt stretched out his hand to grasp Erie. Erie was to be isolated and shut up within the limits of New York; it was to be given over, bound hand and foot, to the lord of the Central. To perfect this programme, the representatives of all the competing lines met, and a proposition was submitted to the Erie party looking to a practical consolidation on certain terms of the Pennsylvania Central, the Erie, and the New York Central, and a division among the contracting parties of all the earnings from the New York

City travel. A new illustration was thus to be afforded, at the expense of the trade and travel to and from the heart of a continent, of George Stephenson's famous aphorism, that where combination is possible competition is impossible. The Erie party, however, represented that their road earned more than half of the fund of which they were to receive only one third. They remonstrated and proposed modifications, but their opponents were inexorable. The terms were too hard; the conference led to no result; a ruinous competition seemed impending as the alternative to a fierce war of doubtful issue. Both parties now retired to their camps, and mustered their forces in preparation for the first overt act of hostility. They had not long to wait.

Vanderbilt was not accustomed to failure, and in this case the sense of treachery, the bitter consciousness of having been outwitted in the presence of all Wall Street, gave a peculiar sting to the rebuff. A long succession of victories had intensified his natural arrogance, and he was by no means disposed, even apart from the failure of his cherished plans, to sit down and nurse an impotent wrath in presence of an injured prestige. Foiled in intrigue, he must now have recourse to his favorite weapon,—the brute force of his millions. He therefore prepared to go out into Wall Street in his might, and to make himself master of the Erie, as before he had made himself master of the Hudson River road. The task in itself was one of magnitude. The volume of stock was immense; all of it was upon the street, and the necessary expenditure involved many millions of dollars. The peculiar difficulty of the task, however, lay in the fact that it had to be undertaken in the face of antagonists so bold, so subtle, so unscrupulous, so thoroughly acquainted with Erie, as well as so familiar with all the devices and tricks of fence of Wall Street, as were those who now stood ready to take up the gage which the Commodore so arrogantly threw down.

The first open hostilities took place on the 17th of February. For some time Wall Street had been agitated with forebodings of the coming hostilities, but not until that day was recourse

had to the courts. Vanderbilt had two ends in view when he sought to avail himself of the processes of law. In the first place, Drew's long connection with Erie, and especially the unsettled transactions arising out of the famous corner of 1866, afforded admirable ground for annoying offensive operations; and, in the second place, these very proceedings, by throwing his opponent on the defensive, afforded an excellent cover for Vanderbilt's own transactions in Wall Street. It was essential to his success to corner Drew, but to corner Drew at all was not easy, and to corner him in Erie was difficult indeed. Very recent experiences, of which Vanderbilt was fully informed, no less than the memories of 1866, had fully warned the public how manifold and ingenious were the expedients through which the cunning treasurer furnished himself with Erie, when the exigencies of his position demanded fresh supplies. It was, therefore, very necessary for Vanderbilt that he should, while buying Erie with one hand in Wall Street, with the other close, so far as he could, that apparently inexhaustible spring from which such generous supplies of new stock were wont to flow. Accordingly, on the 17th of February, Mr. Frank Work, the only remaining representative of the Vanderbilt faction in the Erie direction, accompanied by Mr. Vanderbilt's attorneys, Messrs. Rapallo and Spenser, made his appearance before Judge Barnard, of the Supreme Court of New York, then sitting in chambers, and applied for an injunction against Treasurer Drew and his brother directors, of the Erie Railway, restraining them from the payment of interest or principal of the three and a half millions borrowed of the treasurer in 1866, as well as from releasing Drew from any liability or cause of action the company might have against him, pending an investigation of his accounts as treasurer; on the other hand, Drew was to be enjoined from taking any legal steps towards compelling a settlement. A temporary injunction was granted in accordance with the petition, and a further hearing was assigned for the 21st. Two days later, however,—on the 19th of the month, —without waiting for the result of the first attack, the same attorneys appeared again before Judge Barnard, and now in

the name of the people, acting through the Attorney-General, petitioned for the removal from office of Treasurer Drew. The papers in the case set forth some of the difficulties which beset the Commodore, and exposed the existence of a new fountain of Erie stock. It appeared that there was a recently enacted statute of New York which authorized any railroad company to create and issue its own stock in exchange for the stock of any other road under lease to it. The petition then alleged that Mr. Drew and certain of his brother directors, had quietly possessed themselves of a worthless road connecting with the Erie, and called the Buffalo, Bradford, & Pittsburg Railroad, and had then, as occasion and their own exigencies required, proceeded to supply themselves with whatever Erie stock they wanted, by leasing their own road to the road of which they were directors, and then creating stock and issuing it to themselves, in exchange, under the authority vested in them by law. The uncontradicted history of this transaction, as subsequently set forth on the very doubtful authority of a leading Erie director, affords, indeed, a most happy illustration of brilliant railroad financiering, whether true in this case or not. The road, it was stated, cost the purchasers, as financiers, some $250,000; as proprietors, they then issued in its name bonds for two million dollars, payable to one of themselves, who now figured as trustee. This person, then, shifting his character, drew up, as counsel for both parties, a contract leasing this road to the Erie Railway for four hundred and ninety-nine years, the Erie agreeing to assume the bonds; reappearing in their original character of Erie directors, these gentlemen then ratified the lease, and thereafter it only remained for them to relapse into the rôle of financiers, and to divide the proceeds. All this was happily accomplished, and the Erie Railway lost and some one gained $140,000 a year by the bargain. The skilful actors in this much-shifting drama probably proceeded on the familiar theory that exchange is no robbery; and the expedient was certainly ingenious.

Such is the story of this proceeding as told under oath by one who must have known the whole truth. That the facts

are correctly set forth by no means follows. Indeed, many parts of this narrative are open to this criticism. The evidence on which it is founded may be sufficiently clear, but unfortunately the witnesses are not seldom wholly unworthy of credence. The formality of an oath may accompany plausible statements without giving to them the slightest additional weight. In this case the sworn allegations were made, and they implicated certain respectable men; it can only be said of them that their falsehood is not patent, and that they are thoroughly in character with other transactions known to be true. If the facts of the case were correctly stated, or had in them an element of truth, it is difficult to see what fiduciary relation these directors, as trustees, did not violate. However this may be, it is indisputable that the supply of Erie on the market had been largely increased from the source indicated, and Commodore Vanderbilt naturally desired to put some limit to the amount of the stock in existence, a majority of which he sought to control. Accordingly it was now further ordered by Mr. Justice Barnard that Mr. Drew should show cause on the 21st why the prayer of the petitioner should not be granted, and meanwhile he was temporarily suspended from his position as treasurer and director.

It was not until the 3d of March, however, that any decisive action was taken by Judge Barnard on either of the petitions before him. Even then, that in the name of the Attorney-General was postponed for final hearing until the 10th of the month; but, on the application of Work, an injunction was issued restraining the Erie board from any new issue of capital stock, by conversion of bonds or otherwise, in addition to the 251,058 shares appearing in the previous reports of the road, and forbidding the guaranty by the Erie of the bonds of any connecting line of road. While this last provision of the order was calculated to furnish food for thought to the Boston party, matter for meditation was supplied to Mr. Drew by other clauses, which specially forbade him, his agents, attorneys, or brokers, to have any transactions in Erie, or fulfil any of his contracts already entered into, until he had returned to the

company sixty-eight thousand shares of capital stock, alleged to be the number involved in the unsettled transaction of 1866, and the more recent Buffalo, Bradford, & Pittsburg exchange. A final hearing was fixed for the 10th of March on both injunctions.

Things certainly did not now promise well for Treasurer Drew and the bear party. Vanderbilt and the bulls seemed to arrange everything to meet their own views; apparently they had but to ask and it was granted. If any virtue existed in the processes of law, if any authority was wielded by a New York court, it now seemed as if the very head of the bear faction must needs be converted into a bull in his own despite, and to his manifest ruin. He, in this hour of his trial, was to be forced by his triumphant opponent to make Erie scarce by returning into its treasury sixty-eight thousand shares,—one fourth of its whole capital stock of every description. So far from manufacturing fresh Erie and pouring it into the street, he was to be cornered by a writ, and forced to work his own ruin in obedience to an injunction. Appearances are, however, proverbially deceptive, and all depended on the assumption that some virtue did exist in the processes of law, and that some authority was wielded by a New York court. In spite of the threatening aspect of his affairs, it was very evident that the nerves of Mr. Drew and his associates were not seriously affected. Wall Street watched him with curiosity not unmingled with alarm; for this was a conflict of Titans. Hedged all around with orders of the court, suspended, enjoined, and threatened with all manner of unheard-of processes, with Vanderbilt's wealth standing like a lion in his path, and all Wall Street ready to turn upon him and rend him,—in presence of all these accumulated terrors of the court-room and of the exchange, the Speculative Director was not less speculative than was his wont. He seemed rushing on destruction. Day after day he pursued the same "short" [3] tactics; contract after contract was put out for the future

[3] An operator is said to be "short" when he has agreed to deliver that which he has not got. He wagers, in fact, on a fall.

delivery of stock at current prices, and this, too, in the face of a continually rising market. Evidently he did not yet consider himself at the end of his resources.

It was equally evident, however, that he had not much time to lose. It was now the 3d of March, and the anticipated "corner" might be looked for about the 10th. As usual, some light skirmishing took place as a prelude to the heavy shock of decisive battle. The Erie party very freely and openly expressed a decided lack of respect, and something approaching contempt, for the purity of that particular fragment of the judicial ermine which was supposed to adorn the person of Mr. Justice Barnard. They did not pretend to conceal their conviction that this magistrate was a piece of the Vanderbilt property, and they very plainly announced their intention of seeking for justice elsewhere. With this end in view they betook themselves to their own town of Binghamton, in the county of Broome, where they duly presented themselves before Mr. Justice Balcom, of the Supreme Court. The existing judicial system of New York divides the State into eight distinct districts, each of which has an independent Supreme Court of four judges, elected by the citizens of that district. The first district alone enjoys five judges, the fifth being the Judge Barnard already referred to. These local judges, however, are clothed with certain equity powers in actions commenced before them, which run throughout the State. As one subject of litigation, therefore, might affect many individuals, each of whom might initiate legal proceedings before any of the thirty-three judges; which judge, again, might forbid proceedings before any or all of the other judges, or issue a stay of proceedings in suits already commenced, and then proceed to make orders, to consolidate actions, and to issue process for contempt,—it was not improbable that, sooner or later, strange and disgraceful conflicts of authority would arise, and that the law would fall into contempt. Such a system can, in fact, be sustained only so long as co-ordinate judges use the delicate powers of equity with a careful regard to private rights and the dignity of the law, and therefore, more than any which has

ever been devised, it calls for a high average of learning, dignity, and personal character in the occupants of the bench. When, therefore, the ermine of the judge is flung into the kennel of party politics and becomes a part of the spoils of political victory; when by any chance partisanship, brutality, and corruption become the qualities which especially recommend the successful aspirant to judicial honors, then the system described will be found to furnish peculiar facilities for the display of these characteristics.

Taking advantage of the occasion this system, so simple in theory, so complicated in practice, afforded for creating complications by obtaining conflicting orders from co-ordinate judges, the Erie party broke ground in a new suit. The injunction was no sooner asked of Judge Balcom than it was granted, and Mr. Frank Work, the Attorney-General, and all other parties litigant, were directed to show cause at Cortlandville on the 7th of March; and, meanwhile, Mr. Director Work, accused of being a spy in the councils of Erie, was temporarily suspended from his position, and all proceedings in the suits commenced before Judge Barnard were stayed. The moment, however, this order became known in New York, a new suit was commenced by the Vanderbilt interest in the name of Richard Schell; an urban judge cried check to the move of the rural judge, by forbidding any meeting of the Erie board, or the transaction of any business by it, unless Director Work was at full liberty to participate therein. The first move of the Drew faction did not seem likely to result in any signal advantage to its cause.

All this, however, was mere skirmishing, and now the decisive engagement was near at hand. The plans of the Erie ring were matured, and, if Commodore Vanderbilt wanted the stock of their road, they were prepared to let him have all he desired. As usual the Erie treasury was at this time deficient in funds. As usual, also, Daniel Drew stood ready to advance all the funds required—on proper security. One kind of security, and only one, the company was disposed at this time to offer,—its convertible bonds under a pledge of conversion.

The company could not issue stock outright, in any case, at less than par; its bonds bore interest, and were useless on the street; an issue of convertible bonds was another name for an issue of stock to be sold at market rates. The treasurer readily agreed to find a purchaser, and, in fact, he himself stood just then in pressing need of some scores of thousands of shares. Already at the meeting of the Board of Directors, on the 19th of February, a very deceptive account of the condition of the road, jockied out of the general superintendent, had been read and made public; the increased depot facilities, the projected double track, and the everlasting steel rails, had been made to do vigorous duty; and the board had, in the vaguest and most general language conceivable, clothed the Executive Committee with full power in the premises.[4] Im-

[4] This vote of the Board of Directors of the Erie Railway Company was the sole authority under which, without further consultation with the board, the stock of the road was increased four hundred and fifty thousand shares. It was worded as follows:—

"It being necessary for the finishing, completing, and operating the road of the company, to borrow money,

"*Resolved,* That under the provisions of the statute authorizing the loan of money for such purposes, the Executive Committee be authorized to borrow such sum as may be necessary, and to issue therefor such security as is provided for in such cases by the laws of this State; and that the president and secretary be authorized, under the seal of the company, to execute all needful and proper agreements and undertakings for such purpose."

The law referred to was Subdivision 10 of Section 28 of the General Railroad Act of 1850, which authorized the railroad companies to which it applied "to borrow such sums of money as may be necessary for completing, finishing, and operating the road"; to mortgage their roads as security for such loans; and to "confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company, at any time, not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt."

It was an open question whether this law applied at all to the Erie Railway Company, the amount of the capital stock of which was otherwise regulated by law; the bonds were issued and sold, not as bonds, but with a distinct pledge of immediate conversion into stock, and as an indirect way of doing that, the direct doing of which was clearly illegal; finally, as a

mediately after the Board of Directors adjourned a meeting of the Executive Committee was held, and a vote to issue at once convertible bonds for ten millions gave a meaning to the very ambiguous language of the directors' resolve; and thus, when apparently on the very threshold of his final triumph, this mighty mass of one hundred thousand shares of new stock was hanging like an avalanche over the head of Vanderbilt.

The Executive Committee had voted to sell the entire amount of these bonds at not less than 72½. Five millions were placed upon the market at once, and Mr. Drew's broker became the purchaser, Mr. Drew giving him a written guaranty against loss, and being entitled to any profit. It was all done in ten minutes after the committee adjourned,—the bonds issued, their conversion into stock demanded and complied with, and certificates for fifty thousand shares deposited in the broker's safe, subject to the orders of Daniel Drew. There they remained until the 29th, when they were issued, on his requisition, to certain others of that gentleman's army of brokers, much as ammunition might be issued before a general engagement. Three days later came the Barnard injunction, and Erie suddenly rose in the market. Then it was determined to bring up the reserves and let the eager bulls have the other five millions. The history of this second issue was, in all respects, an episode worthy of Erie, and deserves minute relation. It was decided upon on the 3d, but before the bonds were converted Barnard's injunction had been served on every one connected with the Erie Road or with Daniel Drew. The 10th was the return day of the writ, but the Erie operators needed even less time for their deliberations. Monday, the 9th, was settled upon as the day upon which to defeat the impending "corner." The night of Saturday, the 7th, was a busy one in the Erie camp. While one set of counsel and clerks were preparing affidavits and

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matter of fact, the proceeds of these bonds were not used for "completing, finishing, or operating the road." As a matter of law the question is of no interest outside of New York, and is as yet undecided there. Of the good faith and morality of the transaction but one opinion exists anywhere.

prayers for strange writs and injunctions, the enjoined vice-president of the road was busy at home signing certificates of stock, to be ready for instant use in case a modification of the injunction could be obtained, and another set of counsel was in immediate attendance on the leaders themselves. Mr. Groesbeck, the chief of the Drew brokers, being himself enjoined, secured elsewhere, after one or two failures, a purchaser of the bonds, and took him to the house of the Erie counsel, where Drew and other directors and brokers then were. There the terms of the nominal sale were agreed upon, and a contract was drawn up transferring the bonds to this man of straw, who in return gave Mr. Drew a full power of attorney to convert or otherwise dispose of the bonds, in the form of a promissory note for their purchase-money; Mr. Groesbeck, meanwhile, with the fear of injunctions before his eyes, prudently withdrew into the next room, and amused himself by looking at the curiosities and conversing with the lawyers' young gentlemen. After the contract was closed, the purchaser was asked to sign an affidavit setting forth his ownership of the bonds and the refusal of the corporation to convert them into stock in compliance with their contract, upon which affidavit it was in contemplation to seek from some justice a writ of *mandamus* to compel the Erie Railway to convert them, the necessary papers for such a proceeding being then in course of preparation elsewhere. This the purchaser declined to do. One of the lawyers present then said: "Well, you can make the demand now; here is Mr. Drew, the treasurer of the company, and Mr. Gould, one of the Executive Committee." In accordance with this suggestion a demand for the stock was then made, and, of course, at once refused; thereupon the scruples of the man of straw being all removed, the desired affidavit was signed. All business now being finished, the parties separated; the legal papers were ready, the convertible bonds had been disposed of, and the certificates of stock, for which they were to be exchanged, were signed in blank and ready for delivery.

Early Monday morning the Erie people were at work. Mr. Drew, the director and treasurer, had agreed to sell on that

day fifty thousand shares of the stock, at 80, to the firms of which Mr. Fisk and Mr. Gould were members, these gentlemen also being Erie directors and members of the Executive Committee. The new certificates, made out in the names of these firms on Saturday night, were in the hands of the secretary of the company, who was strictly enjoined from allowing their issue. On Monday morning this official directed an employee of the road to carry these books of certificates from the West Street office of the company to the transfer clerk in Pine Street, and there to deliver them carefully. The messenger left the room, but immediately returned empty-handed, and informed the astonished secretary that Mr. Fisk had met him outside the door, taken from him the books of unissued certificates, and "run away with them." It was true;—one essential step towards conversion had been taken; the certificates of stock were beyond the control of an injunction. During the afternoon of the same day the convertible bonds were found upon the secretary's desk, where they had been placed by Mr. Belden, the partner in business of Director James Fisk, Jr.; the certificates were next seen in Broad Street.

Before launching the bolt thus provided, the conspirators had considered it not unadvisable to cover their proceedings, if they could, with some form of law. This probably was looked upon as an idle ceremony, but it could do no harm; and perhaps their next step was dictated by what has been called "a decent respect for the opinions of mankind," combined with a profound contempt for judges and courts of law.

Early on the morning of the 9th Judge Gilbert, a highly respected magistrate of the Second Judicial District, residing in Brooklyn, was waited upon by one of the Erie counsel, who desired to initiate before him a new suit in the Erie litigation, —this time, in the name of the Saturday evening purchaser of bonds and maker of affidavits. A writ of *mandamus* was asked for. This writ clearly did not lie in such a case; the magistrate very properly declined to grant it, and the only wonder is that counsel should have applied for it. New counsel were then hurriedly summoned, and a new petition, in a fresh name, was

presented. This petition was for an injunction, in the name of Belden, the partner of Mr. Fisk, and the documents then and there presented were probably as eloquent an exposure as could possibly have been penned of the lamentable condition into which the once honored judiciary of New York had fallen. The petition alleged that some time in February certain persons, among whom was especially named George G. Barnard, —the justice of the Supreme Court of the First District,— had entered into a combination to speculate in the stock of the Erie Railway, and to use the process of the courts for the purpose of aiding their speculation; "and that, in furtherance of the plans of this combination," the actions in Work's name had been commenced before Barnard, who, the counsel asserted, was then issuing injunctions at the rate of half a dozen a day. It is impossible by any criticism to do justice to such audacity as this: the dumb silence of amazement is the only fitting commentary. Apparently, however, nothing that could be stated of his colleague across the river exceeded the belief of Judge Gilbert, for, after some trifling delays and a few objections on the part of the judge to the form of the desired order, the Erie counsel hurried away, and returned to New York with a new injunction, restraining all the parties to all the other suits from further proceedings, and from doing any acts in "furtherance of said conspiracy";—in one paragraph ordering the Erie directors, except Work, to continue in the discharge of their duties, in direct defiance of the injunction of one judge, and in the next, with an equal disregard of another judge, forbidding the directors to desist from converting bonds into stock. Judge Gilbert having, a few hours before signing this wonderful order, refused to issue a writ of *mandamus,* it may be proper to add that the process of equity here resorted to, compelling the performance of various acts, is of recent invention, and is known as a "mandatory injunction."

All was now ready. The Drew party were enjoined in every direction. One magistrate had forbidden them to move, and another magistrate had ordered them not to stand still. If

the Erie board held meetings and transacted business, it violated one injunction; if it abstained from doing so, it violated another. By the further conversion of bonds into stock pains and penalties would be incurred at the hands of Judge Barnard; the refusal to convert would be an act of disobedience to Judge Gilbert. Strategically considered, the position could not be improved, and Mr. Drew and his friends were not the men to let the golden moment escape them. At once, before a new injunction could be obtained, even in New York, fifty thousand shares of new Erie stock were flung upon the market. That day Erie was buoyant,—Vanderbilt was purchasing. His agents caught at the new stock as eagerly as at the old, and the whole of it was absorbed before its origin was suspected, and almost without a falter in the price. Then the fresh certificates appeared, and the truth became known. Erie had that day opened at 80 and risen rapidly to 83, while its rise even to par was predicted; suddenly it faltered, fell off, and then dropped suddenly to 71. Wall Street had never been subjected to a greater shock, and the market reeled to and fro like a drunken man between these giants, as they hurled about shares by the tens of thousands, and money by the million. When night put an end to the conflict, Erie stood at 78, the shock of battle was over, and the astonished brokers drew breath as they waited for the events of the morrow. The attempted "corner" was a failure, and Drew was victorious,—no doubt existed on that point. The question now was, could Vanderbilt sustain himself? In spite of all his wealth, must he not go down before his cunning opponent?

The morning of the 11th found the Erie leaders still transacting business at the office of the corporation in West Street. It would seem that these gentlemen, in spite of the glaring contempt for the process of the courts of which they had been guilty, had made no arrangements for an orderly retreat beyond the jurisdiction of the tribunals they had set at defiance. They were speedily roused from their real or affected tranquillity by trustworthy intelligence that processes for contempt were already issued against them, and that their only chance

of escape from incarceration lay in precipitate flight. At ten o'clock the astonished police saw a throng of panic-stricken railway directors—looking more like a frightened gang of thieves, disturbed in the division of their plunder, than like the wealthy representatives of a great corporation—rush headlong from the doors of the Erie office, and dash off in the direction of the Jersey ferry. In their hands were packages and files of papers, and their pockets were crammed with assets and securities. One individual bore away with him in a hackney-coach bales containing six millions of dollars in greenbacks. Other members of the board followed under cover of the night; some of them, not daring to expose themselves to the publicity of a ferry, attempted to cross in open boats concealed by the darkness and a March fog. Two directors, who lingered, were arrested; but a majority of the Executive Committee collected at the Erie Station in Jersey City, and there, free from any apprehension of Judge Barnard's pursuing wrath, proceeded to the transaction of business.

Meanwhile, on the other side of the river, Vanderbilt was struggling in the toils. As usual in these Wall Street operations, there was a grim humor in the situation. Had Vanderbilt failed to sustain the market, a financial collapse and panic must have ensued which would have sent him to the wall. He had sustained it, and had absorbed a hundred thousand shares of Erie. Thus when Drew retired to Jersey City he carried with him seven millions of his opponent's money, and the Commodore had freely supplied the enemy with the sinews of war. He had grasped at Erie for his own sake, and now his opponents derisively promised to rehabilitate and vivify the old road with the money he had furnished them, so as more effectually to compete with the lines which he already possessed. Nor was this all. Had they done as they loudly claimed they meant to do, Vanderbilt might have hugged himself in the faith that, after all, it was but a question of time, and the prize would come to him in the end. He, however, knew well enough that the most pressing need of the Erie people was money with which to fight him. With this he had now fur-

nished them abundantly, and he must have felt that no scruples would prevent their use of it.

Vanderbilt had, however, little leisure to devote to the enjoyment of the humorous side of his position. The situation was alarming. His opponents had carried with them in their flight seven millions in currency, which were withdrawn from circulation. An artificial stringency was thus created in Wall Street, and, while money rose, stocks fell, and unusual margins were called in. Vanderbilt was carrying a fearful load, and the least want of confidence, the faintest sign of faltering, might well bring on a crash. He already had a hundred thousand shares of Erie, not one of which he could sell. He was liable at any time to be called upon to carry as much more as his opponents, skilled by long practice in the manufacture of the article, might see fit to produce. Opposed to him were men who scrupled at nothing, and who knew every in and out of the money market. With every look and every gesture anxiously scrutinized, a position more trying than his can hardly be conceived. It is not known from what source he drew the vast sums which enabled him to surmount his difficulties with such apparent ease. His nerve, however, stood him in at least as good stead as his financial resources. Like a great general, in the hour of trial he inspired confidence. While fighting for life he could "talk horse" and play whist. The manner in which he then emerged from his troubles, serene and confident, was as extraordinary as the financial resources he commanded.

Meanwhile, before turning to the tide of battle, which now swept away from the courts of law into the halls of legislation, there are two matters to be disposed of; the division of the spoils is to be recounted, and the old and useless lumber of conflict must be cleared away. The division of profits accruing to Mr. Treasurer Drew and his associate directors, acting as individuals, was a fit conclusion to the stock issue just described. The bonds for five millions, after their conversion, realized nearly four millions of dollars, of which $3,625,000 passed into the treasury of the company. The

trustees of the stockholders had therefore in this case secured a profit for some one of $375,000. Confidence in the good faith of one's kind is very commendable, but possession is nine points of the law. Mr. James Fisk, Jr., through whom the sales were mainly effected, declined to make any payments in excess of the $3,625,000, until a division of profits was agreed upon. It seems that, by virtue of a paper signed by Mr. Drew as early as the 19th of February, Gould, Fisk, and others were entitled to one half the profits he should make "in certain transactions." What these transactions were, or whether the official action of Directors Gould and Fisk was in any way influenced by the signing of this document, does not appear. Mr. Fisk now gave Mr. Drew, in lieu of cash, his uncertified check for the surplus $375,000 remaining from this transaction, with stock as collateral amounting to about the half of that sum. With this settlement, and the redemption of the collateral, Mr. Drew was fain to be content. Seven months afterwards he still retained possession of the uncertified check, in the payment of which, if presented, he seemed to entertain no great confidence. Everything, however, showed conclusively the advantage of operating from interior lines. While the Erie treasury was once more replete, three of the persons who had been mainly instrumental in filling it had not suffered in the transaction. The treasurer was richer by $180,000 directly, and he himself only knew by how much more incidentally. In like manner his faithful adjutants had profited to an amount as much exceeding $60,000 each as their sagacity had led them to provide for.

The useless lumber of conflict, consisting chiefly of the numerous judges of the Supreme Court of New York and their conflicting processes of law, must next be disposed of. Judge Gilbert was soon out of the field. His process had done its work, and the Erie counsellors hardly deigned upon the 18th, which was the day fixed for showing cause, to go over to Brooklyn and listen to indignant denunciations on the part of their Vanderbilt brethren, as, with a very halting explanation of his hasty action, Judge Gilbert peremptorily denied the

request for further delay, and refused to continue his injunction. It is due to this magistrate to say, that he is one of the most respected in the State of New York; and when that is said, much is implied in the facts already stated as to his opinion of some of his brother judges. Judicial demoralization can go no further. If Judge Gilbert was out of the fray, however, Judge Barnard was not. The wrath and indignation of this curious product of a system of elective judiciary cannot be described, nor were they capable of utterance. They took strange forms of expression. At one time he sent all the papers relating to the alleged conspiracy down to the grand jury, and apparently sought thereby to indicate that he courted an investigation. The prosecuting attorneys, however, better instructed in the law, seem to have doubted whether a matter which was the proper subject for a legislative impeachment could satisfactorily be brought before a petty jury on an indictment, and did not pursue the investigation. Then, at a later day, the judge mysteriously intimated that the belief of both the counsel and the affiants in the truth of the charges contained in the complaint before Judge Gilbert was then a matter of investigation before a criminal body, to see whether or not it constituted perjury. Finally, a heavy collection of counter-affidavits purified the judicial skirts from their taint, but not until fresh and more aggravated grounds for indignation had presented themselves. It is unnecessary to go into the details of the strange and revolting scenes which the next few months witnessed in the rooms of the Supreme Court. They read like some monstrous parody of the forms of law; some Saturnalia of bench and bar. The magistrate became more partisan than were the paid advocates before him, and all seemed to vie with one another in their efforts to bring their common profession into public contempt. Day and night detectives in the pay of suitors dogged the steps of the magistrate, and their sworn affidavits, filed in his own court, sought to implicate him in an attempt to kidnap Drew by means of armed ruffians, and to bring the fugitive by violence within reach of his process. Then, in retaliation, the judge openly

avowed from the bench that his spies had penetrated into the consultations of the litigants, and he astonished a witness by angrily interrogating him as to an affidavit reflecting upon himself, to which that witness had declined to make oath.[5] At one moment he wept, as counsel detailed before him the story of his own grievances and the insults to which he had been subjected, and then again he vindicated his purity by select specimens of pothouse rhetoric.[6] When the Vanderbilt counsel moved to fix a day on which their opponents should show cause why a receiver of the proceeds of the last over-

[5] *Question by the Court to Mr. Belden.* Did not Mr. Field send you, two or three days ago, an affidavit filled with gross abuse of me, and you declined to sign it?

Witness (producing a paper). This is the affidavit. I said I would rather not sign it. . . . .

Question by Mr. Field. Did you show that affidavit to Judge Barnard?

A. I did not.

Q. How, then, did he learn of its being sent to you?

Judge Barnard. He does not know, and never will in this world. I am now doing as other people have been doing; I have been followed by detectives for four or five weeks all over the city, and now I am following others. . . . .

Q. Was it not stated openly to you, in a law office below Chambers Street, that you must prevent, at all hazards, Judge Barnard from hearing this case?

A. In hearing which case, Judge? I do not know which case you refer to.

Q. The case before me. . . . .

Q. When you were present at the Metropolitan Hotel, did not one of the counsel, who was there, when he heard the complaint read, say that it was a shame to put Judge Barnard in as a defendant, and did not Dudley Field say, that by doing so he could frighten him off the bench and overawe the balance?

A. I do not remember anything of it.

Q. See if one of the counsel did not tell you that it was a shame to put him in as one of the defendants, and whether another of the counsel did not tell you that that was the only way to scare him off the bench, and that you could overawe the balance of the judges?

A. I don't remember anything being said about overawing any one.

[6] "In this wide city of a million or a million and a half of inhabitants, where a man can be hired for five dollars to swear any man's life away, there is not one so base as to come upon this stand and swear that I had anything to do with any conspiracy."

issue of stock should not be appointed, the judge astonished the petitions by outstripping their eagerness, and appointing Vanderbilt's own son-in-law receiver on the spot. Then followed a fierce altercation in court, in which bench and bar took equal part, and which closed with the not unusual threat of impeaching the presiding judge.[7] When Mr. John B. Haskin

[7] The matter before the court, regarding the bail of the contumacious directors, being disposed of, Mr. Clark, of the Vanderbilt counsel, rose and referred to another matter, which proved to be no less than an application for an order appointing a receiver of all the property, amounting to millions of dollars, which had been issued in violation of the injunction.

Mr. Field. This is an *ex parte* application and we do not care anything about it. The worse you make the case the better it will be in the end.

Mr. Rapallo. I ask your honor to make this order returnable on Monday morning.

The Court. I do not think it necessary to wait till Monday morning. You had better have it returnable forthwith.

Mr. Clark. We ask that that paper (the order to show cause instantly) be served upon Mr. Diven, who is now in court [. . .].

The order was then served on an individual director then in court, and Mr. Clark moved the appointment of the receiver.

Judge Barnard. Is there any objection to this application?

Mr. Field sat smiling in his chair, which was tipped back on its rear legs, and looked composed in the extreme, but made no response to the inquiry of the judge.

The Court. Draw up an order appointing George A. Osgood receiver of this fund, with security in the sum of $1,000,000, and requiring these defendants to appear before a referee in regard to the matter.

Mr. Field (rising). The court will understand that this was *ex parte.*

Mr. Clark. We have given notice, and therefore this is not *ex parte.*

Mr. Field. There has been no notice given; there has been no service. This is *ex parte,* and now if any one will enter that order, I want to see him do it.

Mr. Fullerton (excitedly and earnestly). I dare enter that order, and will do it with your honor's permission.

Mr. Field. May it please the court, there have been no papers submitted in this case, and no affidavits presented on which this order is made. You have made it upon blank paper, and in complete absence of any regular proceeding whatever. I wish to say, however, that just so sure as this proceeding is being taken in this form, a day of reckoning will as surely come, when these parties will have to answer before some one for this action.

Mr. Fullerton (in a decidedly animated tone). Let that day come, and

was placed upon the stand, there ensued a scene which Barnard himself not inaptly characterized the next day as "outrageous and scandalous, and insulting to the court." Upon this occasion the late Mr. James T. Brady seemed to be on the verge of a personal collision with the witness in open court; the purity of the presiding magistrate was impugned, his venality openly implied through a long cross-examination, and the witness acknowledged that he had himself in the course of his career undertaken for money to influence the mind of the judge privately "on the side of right." All the scandals of the practice of the law, and the private immoralities of lawyers, were dragged into the broad light of day; the whole system of favored counsel, of private argument, of referees, and of unblushing extortion, was freely discussed.[8] On a subsequent

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there will be a reckoning that you will have to bear, and so will every one of those men who have been engaged in this transaction.

[8] John B. Haskin was called as the next witness for the people, and examined by Mr. Clark, and testified that he was an attorney at law, and had practised about twenty-six years.

Question by Mr. Clark. Were you ever employed by Mr. Dudley Field, professionally, prior to the 1st of March, or since?

A. I was applied to by Mr. Dudley Field, the attorney for Mr. Gould, on the 5th or 6th of March last, to accept a retainer in this Erie Railroad controversy, which I declined. I had never previous to that time been employed or requested to act as counsel by Mr. Field.

Mr. Brady, "on his own responsibility," objected to this line of examination; but after some discussion it was admitted, and the witness continued:—

Mr. Dudley Field, on the morning of the 5th or 6th of March, called at my office, and desired to retain me as counsel in this Erie controversy. I asked him on which side, and he said, "The Drew side." I asked him before whom, and he said, before Judge Barnard. I replied that my intimacy had been very great with Judge Barnard, and that I supposed he thought my influence as associate in this case would assist his side of the litigation.

Q. What further was said?

A. He said that he desired me to accept a retainer in the case, and said that if I would do so, it might be the means of avoiding serious trouble which would take place in the legislature, as I was Judge Barnard's friend, and if I would get that injunction modified I might, as his friend, prevent the terrible consequences which would result in this fight which was to

day the judge himself made inquiries as to a visit of two of the directors to one gentleman supposed to have peculiar in-

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take place, as Judge Barnard would be impeached; I then left him, and went into another office. In a short time Dudley Field came back, and handed me this book [producing a book], with his written modification of the injunction, as I believe, in his own handwriting, saying, "If you will get that signed by Judge Barnard, I will give you five thousand dollars; if that sum is not sufficient, I will make it more." I declined the offer; and having occasion to go to the City Hall to see Judge Barnard, I went, and met him at the Astor House, where he had gone with some friends,—John R. Hackett, Mr. Thomson, one of the directors of the Erie Railroad Company, and some others whom I do not recollect. I told him incidentally of this application to me, and he said: "Dudley Field must be a dirty fellow to apply to you for this modification in this way, for he applied to me in court this morning for this same modification, and I refused to grant it."

Q. Did you see Dudley Field again?

A. I did not see him again.

Q. Did you accept the retainer?

A. I did not accept the retainer or undertake the service.

. . . . . .

Cross-examination by Mr. James T. Brady.

Q. Well, Mr. Haskin, have you ever in your life been applied to by anybody, to use your influence, personally or professionally, with Judge Barnard, to accomplish any result whatever?

A. Yes, sir; I think I have.

Q. Personally?

A. Yes.

Q. Professionally?

A. Yes.

Q. To influence his action as a judge?

A. Well, no; not that.

Q. What, then?

A. Well, in cases where there were great interests at stake, to point out to him certain objects that were entitled to consideration.

Q. Did you ever agree or undertake to influence his action as a judge?

A. I might have done so on the side of right. What do you mean, sir?

Mr. Brady. O well, you will understand what I mean, sir. Have you never in all your life used your influence with Judge Barnard to induce him to make a decision in favor of some person in litigation whose cause you espoused?

A. I don't recollect any case of that kind.

Q. Will you swear that you have never done so?

fluence over the judicial mind, and evinced great familiarity with the negotiations then carried on, and even showed some

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A. I won't swear I didn't, because I might have done it in some case in the number of years I have been acquainted with him.

Q. Did you ever receive any kind of reward, directly or indirectly, for using any species of influence, or promising to use any species of influence, with Judge Barnard, or control or direct his action in any respect whatever?

A. I have never received anything; no, sir, except my legitimate fees, which I have received in references and so forth.

. . . . . .

He then asked him about his connection with the Christy will case.

Witness said he was general counsel in that.

Q. How did you earn your fee?

Witness. I will not answer; it is none of your business; it is impertinent.

Mr. Clark interposed, and said it was irrelevant.

Mr. Brady. I want to show that Mr. Haskin received a fee for his influence with the judge to gain a decision at the General Term.

Mr. Haskin said there was a suit pending about the matter.

Mr. Brady repeated that when he went into the case he knew the hostility with which he would be met. He was prepared for it. He had known some of the men a great many years, and he had hitherto kept still. He would repeat the question about the Christy will case.

Witness. I refuse to answer; it is none of your business.

Witness further on gave some testimony as to what he said to Judge Barnard about the Merchants' Express Company case before that judge last summer; he (witness) was not a counsel in it, but when on a fishing excursion last summer he was talking with the court about the law of the case. He told the judge there were some cases in which a judge could not afford to do a favor for a friend; I knew you were in the case, Mr. Brady; I told Judge Barnard that the newspapers were all down on the express monopoly.

Mr. Brady. Did you tell Judge Barnard in what cases a judge could afford to do a favor for a friend! You say you told him there were some in which a judge could not do a favor.

A. I did not say there were any.

. . . . . .

The next day it was supposed that Mr. Field would be examined and the court-room was crowded. Judge Barnard, however, declined to proceed any further, and ordered the evidence of the previous day to be stricken from the record. He further stated that he had already been busily engaged during the day in the other court-room, and did not intend to sit here to gratify impertinent curiosity. . . . . In regard to the examination of Mr. Field, he (Mr. Field) could make his affidavit *ex parte,* and would have

disposition to extend the inquiry indefinitely into periodical literature.[9] Nor were the lawyers in any way behind the judge.

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the same publicity given to his testimony as had been given to that taken yesterday.

Mr. Brady said he appeared this afternoon exclusively to attend to the examination of Mr. Field. Of course he had had no notice on his side of the case that there had been any conference between his honor and other eminent gentlemen as to what course should be taken. He had come to take charge of Mr. Field's case, and as regards whatever had happened, he took the whole responsibility of it. It belonged to him exclusively,—every question, every suggestion,—as it would also belong to him hereafter. He simply asked now that Mr. Field have the opportunity to be heard in the matter publicly, as the other witnesses had been.

Mr. Clark, in reply, said that he would give Mr. Brady a promise that, if he lived, he (Mr. Brady) should have the opportunity of examining Mr. Field before a referee, if they could agree upon a gentleman who should be acceptable.

. . . . . .

Judge Barnard, in reply to Mr. Field, who asked for the appointment of a referee, said that he had made the only order in the case he would make today, and that the matter would now stand adjourned until Thursday next, at three o'clock, P. M.

No affidavit of Mr. Field was ever taken, and the subject was allowed to drop.

[9] *Question by the Judge to Mr. Belden.* Do you know whether James Fisk, Jr., and William H. Marston, went in a carriage to John J. Crane's house and offered him $50,000 to vacate this injunction; and did you hear from a director of the Erie Railroad that the Executive Committee had allowed that sum to be paid?

Answer. No one of the directors told me this; but I think I heard something of the kind. I can't tell from whom I heard it; there were numerous reports flying about at the time.

. . . . . .

Judge Barnard. I haven't [addressing counsel] ruled the question out simply because I want to know whether I am fit to sit on the bench or not; if I have been engaged in a conspiracy, I am unfit to sit here.

Mr. Field said the question would open new evidence that had already been ruled out.

Judge Barnard. It was ruled out because I intend to have this "North American Review" [holding up the book] put in evidence, which contains an article about me, written by a clerk in your office. I intend to have this whole matter ferreted out.

At one moment they would indulge in personal wrangling, and accuse each other of the grossest malpractice, and the next, favor each other with remarks upon matters, more pointed than delicate. All this time injunctions were flying about like hail-stones; but the crowning injunction of all was issued, in reference to the appointment of a receiver, by Judge Clerke, a colleague of Judge Barnard, at the time sitting as a member of the Court of Appeals at Albany. The Gilbert injunction had gone, it might have seemed, sufficiently far, in enjoining Barnard the individual, while distinctly disavowing all reference to him in his judicial functions. Judge Clerke made no such exception. He enjoined the individual and he enjoined the judge; he forbade his making any order appointing a receiver, and he forbade the clerks of his court from entering it if it were made, and the receiver from accepting it if it were entered. The signing of this extraordinary order by any judge in his senses admits of no explanation. The Erie counsel served it upon Judge Barnard as he sat upon the bench, and, having done so, withdrew from the court-room; whereupon the judge immediately proceeded to vacate the order, and to appoint a receiver. This appointment was then entered by a clerk, who had also been enjoined, and the receiver was himself enjoined as soon as he could be caught. Finally the maze had become so intricate, and the whole litigation so evidently endless and aimless, that by a sort of agreement of parties, Judge Ingraham, another colleague of Judge Barnard, issued a final injunction of universal application, as it were, and to be held inviolable by common consent, under which proceedings were stayed, pending an appeal. It was high time. Judges were becoming very shy of anything connected with the name of Erie, and Judge McCunn had, in a lofty tone, informed counsel that he preferred to subject himself to the liability of a fine of a thousand dollars rather than, by issuing a writ of *habeas corpus,* allow his court "to have anything to do with the scandal."

The result of this extraordinary litigation may be summed up in a few words. It had two branches: one, the appoint-

ment of a receiver of the proceeds of the hundred thousand shares of stock issued in violation of an injunction; the other, the processes against the persons of the directors for a contempt of court. As for the receiver, every dollar of the money this officer was intended to receive was well known to be in New Jersey, beyond his reach. Why one party cared to insist on the appointment, or why the other party objected to it, is not very apparent. Mr. Osgood, the son-in-law of Vanderbilt, was appointed, and immediately enjoined from acting; subsequently he resigned, when Mr. Peter B. Sweeney, the head of the Tammany ring, was appointed in his place, without notice to the other side. Of course he had nothing to do, as there was nothing to be done, and so he was subsequently allowed by Judge Barnard $150,000 for his services. The contempt cases had even less result than that of the receivership. The settlement subsequently effected between the litigants seemed also to include the courts. The outraged majesty of the law, as represented in the person of Mr. Justice Barnard, was pacified, and everything was explained as having been said and done in a "Pickwickian sense"; so that, when the terms of peace had been arranged between the high contending parties, Barnard's roaring by degrees subsided, until he roared as gently as any sucking dove, and finally he ceased to roar at all. The penalty for violating an injunction in the manner described was fixed at the not unreasonable sum of ten dollars, except in the cases of Mr. Drew and certain of his more prominent associates; their contumacy his Honor held too gross to be estimated in money, and so they escaped without any punishment at all. Probably being as well read a lawyer as he was a dignified magistrate, Judge Barnard bore in mind, in imposing these penalties, that clause of the fundamental law which provides that "no excessive fines shall be imposed, or cruel or unusual punishments inflicted." The legal profession alone had cause to regret the cessation of this litigation; and, as the Erie counsel had $150,000 divided among them in fees, it may be presumed that even they were finally comforted. And all this took place in the court of that State over

which the immortal Chancellor Kent had once presided. His great authority was still cited there, the halo which surrounds his name still shed a glory over the bench on which he had sat, and yet these, his immediate successors, could

"On that high mountain cease to feed,
And batten on this moor."

MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, ET AL. *v.* MEADOWMOOR DAIRIES, INC.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 1. Argued December 13, 16, 1940.—Decided February 10, 1941.

1. A State is at liberty under the Fourteenth Amendment to use injunctive powers vested in its courts for the prevention of violence by labor unions in industrial disputes. P. 292.
2. And where the controversy is attended by peaceful picketing and by acts of violence, and the violence has been such that continuation of the picketing will operate coercively by exciting fear that violence will be resumed, an injunction by a state court forbidding the picketing as well as the violence does not infringe the Fourteenth Amendment. P. 294.
3. The master in the state court found "intimidation of the customers . . . by the commission of the acts of violence," and the supreme court of the State justified its injunction against picketing because picketing, "in connection with or following a series

of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character." *Held* that it is not for this Court to make an independent valuation of the testimony before the master or to substitute its judgment for that of the state court resolving conflicts in the testimony or its interpretation. P. 294.

4. In determining whether acts of violence accompanying an industrial controversy were attributable to a labor union rather than to irresponsible outsiders, a state court is not confined to the technicalities of the laws of agency. P. 295.
5. The present decision does not bar resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence. P. 298.
6. *Thornhill* v. *Alabama,* 310 U. S. 88, and *Carlson* v. *California,* 310 U. S. 106, distinguished. P. 297.

371 Ill. 377; 21 N. E. 2d 308, affirmed.

CERTIORARI, 310 U. S. 655, to review a decree directing a permanent injunction against acts of violence and picketing by a labor union.

Mr. Abraham W. Brussell, with whom *Messrs. Joseph A. Padway* and *David A. Riskind* were on the brief, for petitioners. *Mr. Myron D. Alexander* entered an appearance.

The due process clause of the Fourteenth Amendment protects all persons against action by a state judiciary that tends to deprive them of their constitutional right to free speech. *Brinkerhof Trust Co.* v. *Hall,* 281 U. S. 673; *Ex parte Virginia,* 100 U. S. 339, 347; *Gelpcke* v. *Dubuque,* 1 Wall. 175, 207; *Muhlker* v. *New York & Harlem Railroad Co.,* 197 U. S. 544, 570; *Hovey* v. *Elliott,* 167 U. S. 409, 419, 444; *Murray* v. *Hoboken Land,* 18 How. 272, 276; *Powell* v. *Alabama,* 287 U. S. 45.

Some state courts have squarely decided that an injunction to restrain peaceful picketing, i. e., carrying of

banners in an industrial controversy, violates the constitutional guaranties. *Vulcan Detinning Co.* v. *St. Clair,* 315 Ill. 40, 46–47; *Illinois Malleable Iron Co.* v. *Michalek,* 279 Ill. 221; *Schuster* v. *International Assn. of Machinists,* 293 Ill. App. 177, 193; *Lietzman* v. *Broadcasting Station WCFL,* 282 Ill. App. 203, 214, 218; cf. *Beaton* v. *Tarrant,* 102 Ill. App. 124, 129. See, also, Beckner, Labor Legislation in Illinois, p. 51 (1929); *Ex parte Lyons,* 27 Cal. App. 70.

Other cases holding that the constitutional guaranties of freedom of speech preclude a state court from enjoining "publication" or "utterances" by picketing in connection with an industrial controversy involving a strike or a boycott, are: *Marx & H. Clothing Co.* v. *Watson,* 168 Mo. 113; *Ex parte Tucker,* 110 Tex. 335; *Truax* v. *Bisbee Local,* 19 Ariz. 379; *Re Heffron,* 79 Mo. App. 639; *Lindsay & Co.* v. *Montana Fed. Labor,* 37 Mont. 264; *Richter Bros.* v. *Journeymen Tailors' Union,* 24 Ohio L. J. 189; *Riggs* v. *Cincinnati Waiters' Alliance,* 5 Ohio N. P. 386; 8 Ohio S. & C. P. § 565.

State courts have held ordinances or statutes prohibiting peaceful picketing, in terms like the prohibitions of the injunction in the case at bar, invalid as violative of free speech. *People* v. *Harris,* 104 Colo. 386; *Reno* v. *Second Judicial Dist.,* 95 P. 2d 998; *Denver Truck Lines* v. *Perry,* 101 P. 2d 436, 444. Cf., *Julie Baking Co.* v. *Graymard,* 152 Misc. 946; 247 N. Y. S. 250, 251–252; *Rossmar* v. *United Kosher Butchers,* 163 Misc. 331; 298 N. Y. S. 343–344; *Bernstein* v. *Retail Cleaners,* 31 Ohio N. P. 433, 436; *Individual Store Owners* v. *Pennsylvania Treaty Stores,* 33 Pa. D. & C. 100, 101.

The decisions of this Court interpreting and applying the constitutional guaranties of free speech preclude a state court from enjoining labor union members and workmen from carrying on the public streets banners

or placards conveying to the public information concerning an industrial controversy in which they have a substantial economic interest. *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *State,* 307 U. S. 147; *Thornhill* v. *Alabama,* 310 U. S. 88; *Carlson* v. *California,* 310 U. S. 106.

See *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota,* 283 U. S. 697, 716.

The state court's attempted justification of the abridgment of the right of union members to speak freely and disseminate information concerning the controversy between the plaintiff and the union is inconsistent with the *Thornhill* case. Cf., *Schenck* v. *United States,* 249 U. S. 47; *United States* v. *Carolene Products,* 304 U. S. 144, 152; *Schneider* v. *State,* 308 U. S. 147, 161.

The constitutional right to free speech may not be abridged by the state court on the ground that the carrying of the banner has been preceded by acts of violence. *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Iron Molders Union* v. *Allis Chalmers Co.,* 166 F. 45; *Fenske Brothers* v. *Upholsterers Union,* 358 Ill. 239; *People* v. *Young,* 188 Ill. App. 208, 212, 213; *Henrici Co.* v. *Alexander,* 198 Ill. App. 568; *Wise Shoe Co.* v. *Lowenthal,* 266 N. Y. 264; *Warner* v. *Lilly Co.,* 265 U. S. 526, 532; *Borderland Coal Co.* v. *Gasway,* 278 F. 56; *Baillis* v. *Fuchs,* 283 N. Y. 133; *May's Furs* v. *Bauer,* 282 N. Y. 331.

Petitioners' constitutional right to free speech can not be lost through "unlawful acts of violence" by irresponsible and unauthorized third persons. *Johnson* v. *Zerbst,* 304 U. S. 458, 464.

Messrs. Donald N. Schaffer and *Roy Massena* for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The supreme court of Illinois sustained an injunction against the Milk Wagon Drivers Union over the latter's claim that it involved an infringement of the freedom of speech guaranteed by the Fourteenth Amendment. Since this ruling raised a question intrinsically important, as well as affecting the scope of *Thornhill* v. *Alabama,* 310 U. S. 88, and *Carlson* v. *California,* 310 U. S. 106, we brought the case here. 310 U. S. 655.

The "vendor system" for distributing milk in Chicago gave rise to the dispute. Under that system, which was fully analyzed in *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products,* 311 U. S. 91, milk is sold by the dairy companies to vendors operating their own trucks who resell to retailers. These vendors departed from the working standards theretofore achieved by the Union for its members as dairy employees. The Union, in order to compel observance of the established standards, took action against dairies using the vendor system. The present respondent, Meadowmoor Dairies, Inc., brought suit against the Union and its officials to stop interference with the distribution of its products. A preliminary injunction restraining all union conduct, violent and peaceful, promptly issued, and the case was referred to a master for report. Besides peaceful picketing of the stores handling Meadowmoor's products, the master found that there had been violence on a considerable scale. Witnesses testified to more than fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large

measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told "to join the union"; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men.[1] In the light of his findings, the master recommended that all picketing, and not merely violent acts, should be enjoined. The trial court, however, accepted the recommendations only as to acts of violence and permitted peaceful picketing. The reversal of this ruling by the supreme court, 371 Ill. 377; 21 N. E. 2d 308, directing a permanent injunction as recommended by the master, is now before us.

The question which thus emerges is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familiar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is

[1] It would needlessly encumber the reports to quote in detail the evidence thus summarized. The curious may turn to the record in the case.

to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.

The starting point is *Thornhill's* case. That case invoked the constitutional protection of free speech on behalf of a relatively modern means for "publicizing, without annoyance or threat of any kind, the facts of a labor dispute." 310 U. S. 100. The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the workingman's means of communication.

It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force.

In this case the master found "intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence," and the supreme court justified its decision because picketing, "in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character." It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state

through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. Cf. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436.

These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. And in exercising its power a state is not to be treated as though the technicalities of the laws of agency were written into the Constitution. Certainly a state is not confined by the Constitution to narrower limits in fashioning remedies for dealing with industrial disputes than the scope of discretion open to the National Labor Relations Board. It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of *respondeat superior. International Association of Machinists* v. *Labor Board,* 311 U. S. 72, 80; *Heinz Co.* v. *Labor Board,* 311 U. S. 514. To deny to a state the right to a judgment which the National Labor Relations Board has been allowed to make in cognate situations, would indeed be distorting the Fourteenth Amendment with restrictions upon state power which it is not our business to impose. A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club.

We have already adverted to the generous scope that must be given to the guarantee of free speech. Especially is this attitude to be observed where, as in labor controversies, the feelings of even the most detached minds may become engaged and a show of violence may make still further demands on calm judgment. It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence. Nor may a state enjoin peaceful picketing merely because it may provoke violence in others. *Near* v. *Minnesota,* 283 U. S. 697, 721–22; *Cantwell* v. *Connecticut,* 310 U. S. 296. Inasmuch as the injunction was based on findings made in 1937, this decision is no bar to resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence. In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. According to the best practice, a judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties. But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees. See *Fox River Co.* v. *Railroad Comm'n,* 274 U. S. 651, 655; *Long Sault Development Co.* v. *Call,* 242 U. S. 272, 277. We are here concerned with power and not with the wisdom of its exercise. We merely hold that in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power. That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy. Com-

pare *Busch Jewelry Co.* v. *United Retail Employees' Union,* 281 N. Y. 150; 22 N. E. 2d 320, and *Baillis* v. *Fuchs,* 283 N. Y. 133; 27 N. E. 2d 812.

To maintain the balance of our federal system, insofar as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the states. Such an adjustment requires austere judgment, and a precise summary of the result may help to avoid misconstruction.

(1) We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell* v. *Connecticut,* 310 U. S. 296; *American Federation of Labor* v. *Swing, post,* p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill* v. *Alabama, supra,* so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. "We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger." 310 U. S. 105.[2] We would not strike down a statute which author-

[2] See also this statement in the *Carlson* opinion: "The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted." 310 U. S. 113.

ized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.

(2) The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of course we would not sustain such a ban. The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo. Compare *Nann* v. *Raimist,* 255 N. Y. 307; 174 N. E. 690. Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert. If an appropriate injunction were put to abnormal uses in its enforcement, so that encroachments were made on free discussion outside the limits of violence, as for instance discussion through newspapers or on the radio, the doors of this Court are always open.

(3) The injunction which we sustain is "permanent" only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not

the last say. They must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers* v. *Florida,* 309 U. S. 227. Since the union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here.

(4) A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution.

Affirmed.

A Life

A Memoir

SIMONE VEIL

Translated by Tamsin Black

Haus Publishing
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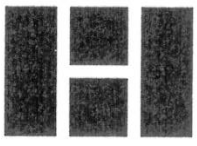

Speech given on 26 November 1974 in the National Assembly

Mr President
Ladies and Gentlemen

If today I am appearing on this platform as Minister of Health, as a woman and a non-parliamentarian, to propose to French representatives a major change to the law on abortion, believe me, it is with a profound sense of humility before the enormity of the problem and the profound significance it has for all French men and women, and I am fully aware of the seriousness of the responsibilities we are going to assume together.

But it is also with the greatest conviction that I shall support a proposal that has long been considered and debated by the entire government, a proposal which, in the terms of the President of the Republic himself, has as its object to 'end a state of chaos and injustice and bring a measured and humane solution to one of the most difficult problems of our time.'

If the government is able today to present this proposal to you, it is thanks to all those among you (you are many and from every background) who, over several years, have

laboured to propose new legislation that is more suitable to social consensus and to the current situation of our country.

It is also because M. Messmer's government took the responsibility of submitting an innovative and courageous proposal to you. All of us remember the remarkable and moving speech given by M. Jean Taittinger.

Finally, it is because, in a special commission chaired by M. Berger, many deputies spent long hours interviewing the representatives of every branch of thought, as well as leading experts on the subject.

However, there are those who still ask: is a new law really necessary? For some, things are simple: a repressive law exists, all we need do is enforce it. Others wonder why Parliament needs to settle the problem now: everyone knows that since it was introduced, and particularly since the beginning of the century, the law has always been harsh but that it has seldom been applied.

So, how have things changed, why must we intervene? Why not uphold the principle and continue only to enforce the law in exceptional cases? Why sanction a criminal practice and thus create the danger of encouraging it? Why legislate and thus protect an irresponsible society and foster individual egoisms instead of rekindling a moral code of civic responsibility and rigour? Why risk exacerbating a declining birth rate that is dangerously under way, instead of promoting a generous and constructive family policy that would enable all mothers to give birth and raise the children they have conceived?

Because everything tells us that that is not how the question presents itself. Do you think that this government and the previous one would have decided to produce a proposal and submit it to you if they had thought that another solution was still possible?

We have reached a point when, in this matter, the authorities can no longer shirk their responsibilities. Everything proves it: the studies and surveys conducted over several years, the hearings of your commission and the experience of other European countries. And most of you sense this, for you know that there is no stopping clandestine abortions and that we cannot apply the harsh measures of a criminal law to which all the women would be liable.

So why not continue to close our eyes? Because the current situation is bad. I shall go further and say that it is deplorable and drastic.

It is bad because the law is openly flouted, worse, it is ridiculed. When the difference between the offences committed and those that are prosecuted is such that it is no longer meaningful to talk of punishment, it is the respect citizens have for the law and thus the authority of the state that are called into question.

When doctors in their surgeries break the law and let it publicly be known; when before prosecuting, the courts are asked to refer each case to the Minister of Justice; when the welfare departments of public organisations provide women in distress with the information necessary to help them terminate a pregnancy; when for the same purpose, charter trips abroad

are openly organised, then I say that we are in a state of chaos and anarchy that cannot go on.

But, you will say to me, why has the situation been allowed to deteriorate so far, why put up with it? Why not respect the law?

Because if doctors, if welfare officers, if even some citizens get involved in illegal acts, that is because they feel they have no choice; sometimes against their own personal convictions, they find themselves in real-life situations that they cannot ignore. Because, faced with a woman determined to terminate her pregnancy, they know that by refusing their advice and support, they are driving her to solitude and anxiety and to an act perpetrated in the worst conditions that puts her at risk of being permanently maimed. They know that if that woman had money, if she knew how to obtain the information, she would go to a neighbouring country or even to certain clinics in France where she could, without incurring any risk or punishment, terminate her pregnancy. And these women are not necessarily the most immoral or the most feckless. There are 300,000 of them every year. They are the ones we rub shoulders with every day and whose distress and tragedies we mostly know nothing about.

It is this state of chaos that must be ended. It is this injustice that must cease. But how is this to be done?

I say with my full conviction: abortion must remain the exception, the last resort for situations that are hopeless. But how can we accept it and keep it as the exception, without society appearing to encourage it?

I should like to start by sharing with you my conviction as a woman (I apologise to this almost exclusively male Assembly): no woman lightly resorts to abortion. You only need listen to what women will tell you.

It is always a catastrophe and it will always remain a catastrophe.

That is why, if the proposal I am introducing to you takes account of the actual existing situation, if it allows for the possibility of a termination of pregnancy, it is in order to control it and, as far as possible, to dissuade the woman.

We think, therefore, that we are responding to the wish, conscious or unconscious, of every woman who finds herself in this agonising situation that has been so well described and analysed by some of the personalities whom your special commission interviewed during the autumn of 1973.

Currently, who is bothered about the women who find themselves in this situation of distress? The law casts them not only into disgrace, shame and solitude, but also into anonymity and the fear of prosecution. They are forced to hide their condition and, too, they often find nobody to listen to them, enlighten them and offer them support and protection.

Among those who are fighting today to have a repressive law changed, how many are there who have taken the trouble to help these women in their distress? How many are those who have overcome their feelings about what they see as a fault and have shown single young mothers the understanding and moral support they so badly needed?

I know that they exist and I shall refrain from generalising.

I know about the action of those who felt the full weight of their responsibilities and did everything in their power to help these women come to terms with their motherhood. We will help their initiatives; we will appeal to them to help us guarantee the social consultations provided by the law.

But concern and help, when they exist, are not always enough to dissuade. Of course, the difficulties the women face are sometimes not as serious as they think. Some of them can be played down and overcome; but others remain, and some women therefore feel driven to a situation from which the only way out is suicide, the ruin of their family stability or disaster for their children.

That, alas, is the most common situation, far more common than the so-called 'abortion of convenience'. If that were not the case, do you think that so many countries, one after the other, would have been led to reform their legislation on the matter and admit that what was severely punished yesterday is henceforth legal?

Therefore, because it is aware of a situation that is intolerable for the state and unjust in the eyes of most people, the government has rejected the easy way, which would have consisted in not interfering. That would have been irresponsible. Instead, it is assuming its responsibilities and submitting to you a proposal to bring a solution to the problem that is at once realistic, humane and, at the same time, just.

There will doubtless be those who think that we have only concerned ourselves with the interests of the woman, and that the proposed legislation has been produced from this

standpoint alone. Nothing is said about society or rather the nation, about the father of the unborn child and still less about the child itself.

I do *not* think this is an individual matter that only concerns the woman and that the nation is not at issue. This problem concerns her first and foremost, but from different points of view that do not necessarily call for the same solutions.

It concerns the nation surely because France must be young with a buoyant population growth. Might not such a law, adopted in the wake of legislation to liberalise contraception, entail a major drop in the birth rate, which has already started worryingly to decline?

That is neither a new fact nor a change peculiar to France: there has been a fairly steady decline in the birth and fertility rates since 1965 in all European countries whatever their laws on abortion or even contraception.

It would be risky to look for simple causes to such a general phenomenon. No explanation can be given at national level. We are dealing with a fact of civilisation that is revealing about the times we live in and that obeys complex rules we know little about.

We cannot conclude from demographic studies conducted in many foreign countries that there is a demonstrable correlation between changes to the abortion laws and changes in birth and especially fertility rates.

It is true that the example of Romania seems to contradict this observation, since the Romanian government's decision at the end of 1966 to review non-repressive provisions adopted

ten years earlier was followed by an explosion in the birth rate. However, what is not said is that a no less spectacular decline occurred subsequently, and it is essential to note that in a country where no form of modern contraception exists, abortion has been the principal means of birth control. The brutal intervention of a restrictive law explains, in this context, a phenomenon that has remained rare and temporary.

Everything suggests that adopting this legislation will have little effect on the birth rate in France. Legal abortions will in fact replace clandestine abortions after a short-term period of possible oscillations.

Nevertheless, if the decline in birth rate is unrelated to the state of the law on abortion, it is still a worrying phenomenon, and it is the urgent duty of the authorities to react.

One of the first meetings of the planning council which the President of the Republic will chair will be devoted to a survey of all the problems of French demographic trends and methods for slowing a worrying change for the future of the country.

As for the family agenda, the government considered this a separate problem from the law on abortion and it was therefore deemed inappropriate to associate the two problems in the legislative discussion.

That does not mean that it does not see it as extremely important. On Friday, the Assembly will consider a proposal to considerably improve childcare benefits and so-called 'orphan' benefits, which are mainly intended for the children of single mothers. This proposal will, in addition, reform the maternity

benefits system and the conditions of awarding loans to young households.

For myself, I am about to submit a range of proposals to the Assembly. One of them involves encouraging the initiatives of family workers by providing for their intervention in social welfare. Another has as its objective to improve the conditions of the functioning and financing of maternal centres, where young mothers in difficulties are received during their pregnancy and in the first months of the life of their child. I intend to make a special effort in the fight against sterility, by ending the obligation to pay for all consultations for this problem. Again, I have tasked INSERM* with conducting a research initiative, from 1975, on the problem of sterility, which drives so many couples to despair.

With the Keeper of the Seals, I am preparing to draw conclusions from the report which your colleague, Mr Rivierez, a parliamentary envoy, has just written on adoption. To answer to the wishes of so many people who are hoping to adopt a child, I have decided to set up a High Council of Adoption which will be charged with submitting all useful suggestions on the problem to the authorities. Finally and above all, the government has publicly pledged, through the voice of Mr Durafour, to start negotiations in the coming weeks with family organisations for a progress contract to be agreed on with the family representatives on the basis of

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suggestions put to the Consultative Council of the Family which I chair.

As all demographers stress, the important thing is to change the image French people have of the ideal number of children per couple. This objective is infinitely complex and the discussion on abortion cannot be limited to financial measures that are necessarily temporary.

For many of you, the second absence in the proposed legislation is no doubt the absence of the father. Everyone must feel that the decision to terminate a pregnancy cannot be taken by the woman alone but also by her husband or partner. Personally, I hope that this is always the case in practice and I approve of the commission having suggested a change to this end; but, as the commission has fully understood, it is not possible to lay down a legal obligation on this matter.

Finally, the third absence is surely the new life which the woman carries. I refuse to enter into scientific and philosophical discussions about a problem which the commission's interviews have demonstrated to be insoluble. No one now disputes that, in strictly medical terms, the embryo definitively bears all the potential of the human being it will become. But it is still only potential, a fragile link in the transmission of life with numerous vicissitudes to overcome before it is born.

Remember that, according to the WHO, 45 per cent of conceptions terminate naturally in the first two weeks and that, out of a hundred pregnancies at the start of the third week, a quarter will be lost as a result of natural phenomena.

The one certainty we can rely on is that a woman only becomes fully aware that she is carrying a living being that will one day be her child when she notices the first signs of this life. And, with the exception of deeply religious women, it is the difference between that potential being for which the woman does not yet feel any deep emotion, and the child at the moment of its birth that explains that some women, who would be utterly horrified at the monstrous idea of infanticide, resign themselves to the possibility of an abortion.

How many of us, faced with the case of a loved one whose future would be irreparably compromised, have not felt that principles must sometimes go by the board?

Obviously, it would not be the same if this act were genuinely perceived as a crime like others. Some of the most determined opponents to this legislation accept that there are no more prosecutions and they would be less vehemently opposed to a proposal that was restricted to ending criminal prosecutions. They themselves perceive, therefore, that this is an act of a particular nature or, at least, an act that requires a specific solution.

The Assembly will forgive me for dwelling on this question. You can all tell that this is an essential point, probably the very basis of the debate. It needs to be dealt with before we consider the contents of the bill.

In drawing up the proposal which the government submits to you today, it has set itself a threefold objective: to make a law that can be properly enforced; to make a law that is a deterrent; and to make a law that protects.

This threefold objective explains the economy of the proposal.

Firstly, it is a law that can be enforced.

A detailed study of the methods and consequences of the definition of cases in which abortion would be authorised reveals insuperable contradictions.

If these conditions are defined in precise terms (for example, the existence of serious threats to the woman's physical or mental health, or in cases of rape or incest that are verified by a judge), it is clear that the change to legislation will not achieve its aim when these criteria are properly respected, because the proportion of terminated pregnancies for such motives is low. Moreover, proving whether possible rapes or cases of incest were genuine would raise practically insoluble problems in the timeframe appropriate to the situation.

If, on the other hand, the definition given is broad (for example, the risk for mental health or psychological stability, or the difficulty of physical or psychological living conditions), it is clear that the doctors or commission responsible for deciding whether these conditions are met would have to base their decision on criteria too imprecise to be objective.

In such systems, the permission to terminate a pregnancy is in practice only given according to the personal ideas of the doctors or commissions that deal with abortion and it is the women who are least able to find the most understanding doctor or the most lenient commission who will still find themselves in a hopeless situation.

To avoid this injustice, permission in many countries is

given virtually automatically, which makes such a procedure pointless, at the same time as it leaves alone those women who do not want to incur the humiliation of appearing before an authority they regard as a tribunal.

Now, if current legislation needs to be changed, it is in order to end clandestine abortions, which are most often performed on women who, for social, economic or psychological reasons, believe themselves to be in such a situation of distress that they have decided to terminate their pregnancy no matter what the conditions. That is why, by refusing a more or less ambiguous, more or less vague situation, the government has deemed it preferable to confront the facts and acknowledge once and for all that the ultimate decision can only be taken by the woman.

If the decision is left to the woman, does this not contradict the second objective of the proposal, to deter abortion?

It is no paradox to maintain that a woman who is entirely responsible for her action will be more inclined to reconsider accomplishing it than the woman who feels that the decision has been taken for her by other people.

The government has chosen a solution that clearly places the responsibility with the woman, because this solution is a greater deterrent than permission from a third party, which would be, or would soon become, hypocritical.

What is essential is for the woman not to have to exercise this responsibility in solitude or anguish.

While it avoids instituting a procedure that could discourage her from resorting to it, the proposal thus envisages

various consultations that must lead her to appreciate the full seriousness of the decision she intends to make.

The doctor can play a capital role here, on the one hand, by giving the woman complete information about the medical risks of terminating a pregnancy, which are now well known, and above all the risks of premature births of her future children, and on the other hand, by making her aware of the problem of contraception.

This dissuasive and advisory task is the privilege of the medical profession, and I know I can rely on the doctors' experience and sense of humanity to try to establish, during this exceptional consultation, the dialogue of trust and care which the women seek, sometimes even unconsciously.

The proposed legislation next envisages a consultation with a welfare organisation, whose mission is to listen to the woman, or to the couple when there is one, to let her express her distress, to help her find assistance if this distress is financial and to make her aware of the reality of the obstacles that stand, or that appear to stand, in the way of the child's reception. In this way, many women will learn during this consultation that they can give birth anonymously and freely in hospital and that the adoption of their child may be one solution.

It goes without saying that we want these consultations to be as diversified as possible and that, above all, the organisations that specialise in helping young women in trouble can continue to receive them and give them the help that will encourage them to change their plans. All these interviews will naturally take place one-to-one, and it is clear that the

experience and psychology of the persons who attend to the women in distress have the potential to be a major factor in providing the support that might make them change their minds. They will additionally constitute another opportunity for reminding the woman of the problem of contraception and the need, in future, to use contraceptive measures in order never to have to take the decision to terminate a pregnancy, should the woman not want to have a child. Information about birth control (which is the best method of dissuading her from aborting) seems so important to us that we have made it an obligation, on pain of administrative closure, for the establishments where abortions are performed.

These two interviews, together with a mandatory eight-day period for consideration, seemed necessary to make the woman understand that this is not a normal or banal act but a serious decision that cannot be taken without first fully considering the consequences and which should be avoided at all costs. It is only after this full understanding and if the woman has not withdrawn her decision that the abortion can take place. This operation must not, however, be performed without strict medical guarantees for the woman herself, and that is the third objective of the bill: to protect the woman.

Firstly, the pregnancy can only be terminated early, because it would be too dangerous to expose the women to the intrinsic physical and psychological risks of terminating a pregnancy after the end of the tenth week following conception.

Secondly, the termination of pregnancy can only be performed by a doctor, as is the rule in all the countries in

which the law on this matter has been changed. But it goes without saying that no doctor or medical auxiliary will ever be bound to participate.

Lastly, for the sake of the woman's safety, the operation will only be authorised in a hospital environment, public or private.

It should be emphasised that respect for these provisions, which the government deems essential and which remain sanctioned by the relevant penalties provided in Article 317 of the Criminal Code in force, implies a serious change which the government intends to implement. It will bring an end to practices that have recently received embarrassing publicity and which will no longer be tolerated once women can legally resort to operations performed in proper conditions of safety.

Similarly, the government is determined strictly to apply the new provisions that will replace those of the law of 1920 pertaining to propaganda and publicity. Contrary to certain rumours, the proposal does not forbid giving out information about the law and about abortion; it forbids encouraging abortion by random methods because this encouragement remains inadmissible.

The government will show the same firmness about not allowing abortions to produce scandalous profits; the hospital fees and costs must not exceed ceilings agreed by the administrative decision in accordance with the law on prices. With the same concern and to avoid the abuses recorded in some countries, foreign women will have to fulfil conditions of residence to have their pregnancy terminated.

I should like finally to explain the option taken by the

government and which some people have criticised about non-reimbursement for a termination of pregnancy by the healthcare system.

When one knows that dentistry, non-mandatory vaccinations and prescription glasses are not or are only minimally reimbursed by the healthcare system, how could it be acceptable to reimburse a termination of pregnancy? Given the general principles of the French healthcare system, termination of pregnancy, when not for medical reasons, does not need to be covered. Should an exception be made to this principle? We do not think so, because we deemed it necessary to emphasise the seriousness of an act that must remain the exception, even if, in some cases, it involves a financial cost to the women. What is essential is that no woman should be prevented by lack of funds from requesting a termination of pregnancy, when this is necessary. That is why medical aid has been provided for, for the most destitute.

It is also essential to make the distinction between contraception, which, when women do not want to have a child, must be encouraged by all means and for which reimbursement by the healthcare system has just been decided, and abortion which society tolerates but which it will neither cover nor encourage.

Seldom do women not want children; maternity is part of their life's mission and women who have not known this joy suffer profoundly. However, while the child that is born is rarely rejected and, with its first smile, brings its mother the greatest joy she can know, certain women feel incapable

of bringing their child the emotional stability and concern it needs, because of tremendous difficulties at some point in their life. They will then do everything to avoid it or not keep it. And no one can stop them. But if a few months later the emotional or material situation of their lives change, those same women will be the first to desire a child and become perhaps the most caring of mothers. It is for these women that we want to bring an end to backstreet abortions, which they would resort to at the risk of remaining barren or else deeply harmed.

I am coming to the end of my address. I have deliberately chosen to explain the general philosophy of the proposed law rather than the details of its provisions, which we will examine at leisure during the discussion of the clauses.

I know that some of you will feel morally unable to vote for this bill or for any law that removes abortion from prohibition and illegality.

I hope I have at least convinced you that this bill is the fruit of an honest and thorough examination of every aspect of the problem and that, if the government has taken the responsibility of submitting it to Parliament, it is not before having assessed the immediate effect as well as the future consequences for the nation.

I offer you just one proof: the government proposes to use a totally exceptional procedure in matters of legislation and limit application of this law to five years. Thus, in the event that in the course of this period the law you have approved no longer seems appropriate to demographic change or medical

progress, Parliament will have to take another decision in five years' time, to account for these new data.

Others are still unsure. They are aware of the distress of too many women and should like to help them; but they fear the effects and consequences of the law. To them, I want to say that, if the law is general and therefore abstract, it is made to be applicable to individual, often agonising situations; that if it no longer forbids, it does not create a right to abortion and that, as Montesquieu said, 'The nature of human laws is to be subject to all the accidents that occur and to vary as men's wills change, whereas the nature of the laws of religion is never to vary. Human laws enact about the good, religion about the best'.

It is in this spirit that, for a decade, thanks to the president of your commission of laws, with whom I had the honour of collaborating when he was Keeper of the Seals, our prestigious Civil Code has been rejuvenated and transformed. Some people feared at the time that by taking formal note of a new image of the family, we were contributing to its deterioration. That was not the case and our country can take pride in a civil law that is more just, more humane and more appropriate to the society we live in.

I know that the problem we are tackling today involves questions that are infinitely more serious and which upset individual consciences far more. But in the final analysis, this is also a problem that concerns society.

Lastly, I should like to say this: during the discussion, I shall support this bill on the government's behalf without reservations and with my full conviction. However, no one can feel a

profound sense of satisfaction about supporting such a proposal – the best possible one in my opinion – on such a subject. No one has ever disputed, the Minister of Health less than anyone, that abortion is a failure when it is not a tragedy.

But we can no longer turn a blind eye to the 300,000 abortions which, every year, mutilate the women of this country, which flout our laws and which humiliate and traumatise the women who resort to them.

History tells us that the great debates that have at times divided the French later appear as a necessary step in the creation of a new social consensus adapted to the tradition of tolerance and moderation of our country.

I am not someone who fears the future.

Young generations often surprise us, sometimes because they differ from us; we ourselves raised them differently from the way we were raised. But this youth is courageous, capable of passion and sacrifices like other people. Let us trust them to preserve the supreme value of life.

Paris, 26 November 1974

LEGAL SPECTATOR & MORE

Jacob A. Stein

KEEP YOUR BIG MOUTH SHUT

Many years ago, I brought a client to the office of Charlie Ford, then one of Washington's leading criminal lawyers. As Charlie droned on to the alleged wrongdoer a mechanical warning about the dangers of discussing the case with anyone, absolutely anyone, my eyes wandered around the office.

It was not an orderly place to conduct business. Here and there were small calendars of years gone by bearing the insignia of bail bondsmen. In a dusty corner, yellowed and outdated pocket-parts for *Corpus Juris Firstum* or *Secundum* teetered, one on the other. Old file folders filled the nooks and crannies. On one wall were pictures of distinguished and obviously influential people who, judging by their attire, died before I was born. There was one unique artifact that caught my eye—a large mounted fish on a back wall. Beneath it were these words: *If I Had Kept My Big Mouth Shut, I Wouldn't Be Here.*

Sometime later I asked Charlie to give me the history of the mounted fish. He said it was a gift from a part-time criminal who had a superb instinct for self-preservation and who liked to repeat that there are no deaf and dumb people in jail.

If you were to drop by my office today, you would see that I have my own fish. Every now and then an alleged defendant, as he sits in my office narrating his troubles, lets his gaze wander over to the fish on the wall and the telling inscription beneath it. He is thinking if he had kept his big mouth shut, he wouldn't be paying lawyers.

As a young lawyer watching my elders perform, I was duly impressed with lawyers like Charlie Ford. Charlie, despite his fish's admonition of silence, was a table pounder and a screamer. When he made his closing arguments, his voice rang throughout the courthouse. This was a natural reflection of his personality. He was a buoyant, self-confident man. Charlie loved to talk, and the talk overflowed throughout the courtroom. On reflection, his advocacy assayed out at 20 percent high-grade bombast, 50 percent persuasive argument, and the remainder the customary legal platitudes. He had many imitators, myself included.

Lloyd Paul Stryker, the renowned New York trial lawyer whose book *The Art of Advocacy* is still worth reading, was another great talker and screamer. I made a trip to New York in the late 1940's to see him perform. Stryker was not just a screamer. He was a vigorous denouncer of evil wherever it had the presumption to appear against his client of the moment. If Stryker made an occasional mistake in cross-examination, he just continued on and talked his way out of it or examined so long that nobody could recall it. His last bravura performance was in defense of Alger Hiss at Hiss's first trial, which ended in a hung jury.

In time I gave up the idea of becoming a screamer. Among other disabilities, I did not have the required energy. I sought an alternative based on the principle that less is more.

I discovered my role model in the career of an active trial lawyer who was already elderly when I first met him. He continued a full trial practice with a remarkable record of successes until shortly before his death at 86. It was all the more remarkable because he spoke in a voice so soft he could hardly be heard. It was said that you had to hug him to hear him. Not only was he soft of voice—he said little. No extra words.

The innate character of some people serves them best in either youth or maturity; at one of those times, the character and the age complement each other. This was true of my role model. His natural talent for circumspect silence perfectly matched his mature years.

His career was well over before the Federal Rules of Evidence were adopted, but he anticipated Rule 403, which states that evidence may be excluded if it is a waste of time or is the needless presentation of cumulative evidence. In accordance with that rule, he wasted no time, and he rarely presented needless cumulative evidence. It is an approach that takes courage. The impulse is to put on every witness who can help. He did not do that. He believed one good witness is enough. Cumulative witnesses may end up impeaching the single good one.

The concept of brevity found in Rule 403 reflects the words of the Tao, the ancient Chinese philosophical work that teaches the eloquence of silence and the virtue of simplicity. It is filled with such raisins of mystical wisdom as "He who knows does not speak and he who speaks does not know." A commentator described it as the first enunciated philosophy of camouflage in the world.

My education in the rewards of keeping my mouth shut has been gradual. Of course, I am still learning. Several lessons stand out.

Some years ago, I was to appear before a federal judge in a foreign jurisdiction. I called a friend, who knew the venue, to take counsel on local custom. I was told that, in the words of my informant, "The judge likes to chew on whoever is at the lectern." My friend reinforced the advice with this anecdote: He and his brother (now a federal judge) were representing a defendant in a hopeless criminal case before the jurist in question. When the government rested, my friend told his brother to stand up and move for judgment of acquittal. The brother asked, "What is the basis for the motion?" The reply was, "There is no basis but do it anyway. And sit down right away." The motion was duly made. The prosecutor grabbed the lectern and started up with a long reply. When the judge's catechism of the prosecutor was over, three counts of the indictment were out of the case. The rule of decision seemed to be whoever talks most loses.

When my turn came to speak before this judge, I said, following instructions, I submitted on the papers but I had no objection to my opponent's addressing the court. Well, my opponent did address the court—and then the chewing began. The judge found fault with every fact and principle of law my opponent mentioned.

I have learned that there are judges who turn against whatever is said, as kites rise against the wind. A presentation may commence as a winner in the first five minutes, grow doubtful in the next five minutes, and then untangle completely because the judge comes up with a question counsel did not expect and cannot answer.

Joseph Welch, chief counsel for the Army in the 1954 McCarthy hearings, said that those hearings were where "I gained

stature as a public figure by keeping still." The tapes show that Joseph Welch said nothing until he had just the right moment to speak. His silence provided the frame for the attack on Sen. Joseph McCarthy that contributed to McCarthy's downfall. On the other hand, McCarthy could not keep his mouth shut. McCarthy's comment that gave Welch his opening was an unnecessary interruption. To say the right thing at the right time, a lawyer must keep still most of the time.

There are several apocryphal stories about the one question too many on cross-examination. First is the defendant's lawyer who asked the witness whether he saw the defendant bite off the plaintiff's ear. The witness said he didn't. Then this:

> Lawyer (proudly): Then tell us how you know my client bit off the plaintiff's ear.
>
> Witness: I saw your client spit it out.

In another such story, the defense lawyer wishes to establish that the plaintiff did not complain of injuries at the scene of the train wreck and therefore his present complaints are contrived:

> Defense lawyer: You now claim you were injured in the train wreck?
>
> Plaintiff: Yes.
>
> Defense lawyer: Did you complain at the scene?
>
> Plaintiff: No.
>
> Defense lawyer (again, proudly): You didn't complain because you were not hurt, isn't that so?
>
> Plaintiff: No. I didn't complain because the wreck caused a horse to break its leg. A man took out a gun and shot the horse. He then turned towards me and said "Anyone else around here who got hurt?"

I was told of a criminal case in which an extensive cross-examination resulted in a conviction. When the judge asked the defendant if he had anything to say before the imposition of sentence, the defendant replied, "Yes, Your Honor, in sentencing me, please take into consideration the incompetence of my lawyer."

If I have persuaded you that less may be more, and you wish to experiment with a strategy of silence, you will find that the world suddenly looks different. Instead of a lawyer looking for a chance to speak, you will be a lawyer in search of opportunities to remain silent.

Opportunities to say little occur in appellate practice. In his excellent work *Briefing and Arguing Federal Appeals*, Fritz Wiener has this to say:

> It may be, of course, that the appellant's case is so completely devoid of merit that you, representing the appellee, will never be called upon or that you will be told by the presiding Judge, as you move toward the lectern, "the Court does not desire to hear further argument." In that event, it is better to accept victory gracefully than to attempt to inflict your eloquence on the tribunal. And there may be instances where it will be desirable, on behalf of the appellee, to say little or nothing.
>
> For example, in one case petitioner's lawyer took such a battering from the court that it was obvious to everyone that the judgment below would be affirmed. Counsel for the respondent [Fritz tells me it was Paul Freund] arose, bowed, and said "If the Court please, I must apologize for an error in our brief. At page 39, second line from the bottom, the citation should be to 143 Federal Second and not to 143 Federal." He

> paused until the members of the court noted the correction, paused again when they looked up, toyed with his watch chain, and proceeded: "Unless there are any questions, I will submit the respondent's case on the brief"—and sat down. I have it on excellent authority that it was one of the most effective arguments ever heard by that court.

You will find that a good lawyer says nothing when he has nothing to say. A mature lawyer can watch his opponent make a mistake and still remain silent. You will not be one of those who will hear a judge say to you: "Counsel, I've just ruled in your favor. If you keep on talking, you may convince me to change my mind."

Despite your best intentions, there will be occasions when logorrhea threatens. You must say something, but you know you shouldn't. You have something that *must* be heard. Lord Chesterfield in his letters to his son warns against thinking that because something interests you it will interest others. He tells of a bore who, whenever there was a lapse in the conversation, would yell, "What was that? Did you hear that gunshot?" followed by, "Now that we are talking about guns ..." and off he goes about his obsession, his gun collection.

When we think about it, much of our own lawyer-talk follows the same pattern. We are obsessed with our cases and our clients. It is painful to let pass an opportunity to describe a clever turn of events that our skill triggered. Let it go. Nobody in the game is interested in the victories of a competitor. If you wish to engage interest, speak of a great loss, a case where you turned down a million and there was a defendant's verdict. That gets attention from brethren at the bar. The rest of the blather—con-

trived to set up the autobiographer as a prince of the forum—is best left unsaid.

I can provide the names of two people who might inspire you to keep your mouth shut when there is a compulsion to speak. Each, in his own way, made a substantial contribution to human progress.

First there is Alexander Fleming, one of the discoverers of penicillin. Fleming's biographer said that Fleming responded with vast reservoirs of silence to all questions that conveyed flattery or sought personal information.

Then there is Mahatma Gandhi. He started his career as a working lawyer, trying to get cases and trying to win them. He left the legal profession, not to go into real estate and shopping center development but to pursue other interests. He did community service even though it was not part of a plea bargain requiring Gandhi to plead guilty to one count of price-fixing. Gandhi's biographers tell us he obeyed a self-imposed one-day-a-week of silence. Nothing could make him talk during his silent day—not even the possibility of picking up a good corporate client.

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of *Legal Spectator* from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the *Legal Spectator*, originally appeared in the *Washington Lawyer*, the *American Scholar*, the *Times Literary Supplement*, the *Wilson Quarterly*, and the ABA Litigation Section's publication. I want to thank Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the *Advance Sheet*.