THE ERIE CONTROVERSY.

Skirmishing Yesterday—Two Unsatisfactory Witnesses—A Discussion on the Privileges of Counsel.

In the matter of Jay Gould and others for contempt.—The examinations in the cases of the directors of the Erie Railroad Company, who are charged with violating the injunctions in the Schell suit, was resumed yesterday, before Judge BARNARD. The usual array of counsel was present, and besides the counsel, the array of spectators who pressed up to the railing that divides those within the bar and those without, and returned as often as the officers of the Court compelled them to be seated, showed the interest felt in the matter. Even the discussion on the subject of privileged communications (a dry matter supposed to be of interest exclusively to the profession) did not thin the crowd, who waited patiently till the last moment for what would turn up.

Mr. Belden, who had promised to be present, was there, but was not placed on the stand. Counsel proceeded to draw the commitments for him, but almost immediately the first witness was called.

Mr. William Heath was sworn in the several cases, and was examined by Mr. Clark, as follows:—I reside in New-York; my business is that of a broker; I presume I was in New-York on the 7th and 9th of March last; at least I don't remember being out of town; I presume I sold some Erie on the 9th of March as usual; I could not say with any precision what amount we sold; to the best of my recollection I did not sell any; my firm is Wm. Heath & Co.; my partner is James M. Ellis.

Q.—Did your firm sell any Erie stock on that day? Objected to.

Judge Barnard—If on the examination of the witness it shall be shown that he knows nothing about it, it will be stricken from the record.

Exception taken by Mr. Field as reversing the invariable order of evidence.

Mr. Fullerton retorted, saying that yesterday, in the examination of Mr. Belden, when he wanted to cast calumny upon persons who did not deserve it, he was perfectly willing to have hearsay evidence. He claimed that in important particulars this examination differed from a trial.

Mr. Field replied that vituperation and threats amounted to nothing. There had been no offer on his part to prove by Belden, any hearsay evidence. When they said a suit was brought in bad faith, he wanted to show that current report all over the city, justified the suit.

Judge Barnard—Do I understand the counsel to say that rumors upon the streets against any certain party is enough to warrant a suit being brought against him? [To the witness.] Answer the question. A.—The firm made sales of Erie stock that day. I believe between 30,000 and 40,000 shares; the stock was sold through other parties; I cannot name those other parties without referring to the books; I remember only one, Mr. Lippincott; I cannot remember any others, and am not positive as to him; I think he sold 3,000 shares; I think we did not sell that day upward of 40,000 shares; I cannot state positively; I think it was not nearer 50,000 shares; sold them on behalf of my principal, James Fisk, Jr.; he belongs to the firm of Fisk, Belden & Co.; I know Mr. Belden; I saw him on the stand yesterday; I know Mr. Fisk; did not know whether he was a director of the Erie Railway Company; do not get to know of my own knowledge.

Mr. Field—Then he does not know.

Mr. Clark—That is mere turbulence, mere fretting. [Laughter.] I have a right to sift that knowledge; I will, however, waive the question for the present. [Laughter.]

Judge Barnard commanded order in the Court, stating that it was not a theatre, and on a repetition of the irregularity, he would cause the court-room to be cleared.

Witness continued—I was employed on the day the sale was made; I forget the date it was immediately before I sold it; I cannot say what date nor what day of the week it was, and cannot associate it with anything to enable me to say; I have entries which will show; I have a book-keeper; his name is Henry Hooper; I have no means of stating what day we made the sale except from knowledge obtained from the book; don't recollect where I was when employed; must have been employed between 10 and 3; cannot state the hour; cannot say whether the stock was sold in the stock board or the outside board; it must have been either one or the other; I mean the open board; it meets at 10 and 1 and keeps till 3; does not open between the regular boards; it has regular hours; I did not receive certificates from Mr. Fisk; do not know of my own knowledge whether we made the delivery of the stock we sold; I presume that we delivered it; don't know from whom we received them, if we did deliver them; don't know who received the money, or any of it; don't know whether we received checks; don't know what books would show; have nothing to do with the books; Mr. Hooper has charge of them; neither member of the firm knows about the books; saw none of the certificates; the cashier makes delivery of stock; his name is Charles E. Quincy; he is in town; I cannot give the dates of the certificates; I did nothing with the proceeds; cannot say what the firm did; do not know whether they are yet in our possession; sold the stock at various prices; I think from 75 to 84; the gross amount of sales in money I do not know; will amount to upward of $2,000,000; I can figure it—about $3,000,000, I should say; do not know whether we have the certificates in our possession, of my own knowledge; do not know from any information I have received; have never asked the question; have had not the slightest curiosity on the subject; we keep bank accounts in the Fourth National Bank, and Bank of New York, and no other; the checks are signed by me; Mr. Ellis is also authorized to sign checks; don't know whether I have signed checks for these certificates; I signed them all in blank; the cashier has charge of them; the cashier, Mr. Quincy, could tell better; do not know the system in our office; know Mr. Drew and Mr. Groesbeck; no one but Mr. Fisk was a party to my employment; cannot recollect whether I saw Mr. Drew on that day; nothing passed between us relative to the sale; do not know where Mr. Fisk is; I last saw him about a month ago in Taylor's Hotel, Jersey City; do not know whether any one was with him; do not know whether we have made an account of the sales; any one of the clerks would know: their names are Mr. Quincy, Mr. Hooper, Mr. Wm. C. Rice, Mr. C. W. Preston and Mr. Frank Darling, that is all; cannot say whether our sales affected the price of Erie in the market; do not know whether the price fell; do not know where any of our books are now; do not know whether any books have been destroyed; have no knowledge on the subject.

To Mr. Pierrepont—I did not sell any myself; I was present.

Re-direct—Mr. Lippincott is the only one I can remember beside myself, who sold; do not recollect his selling more than 5,000 shares; do not know whether the books will show; cannot tell who was present.

Mr. Field—You just answered that you were.

Witness—I did not understand the question.

Mr. Field—You were asked if you were present.

Witness—I was attending the Stock Board all day, and was passing in and out; cannot say that I was present when a single share was sold.

Mr. Field moved to strike out witness' testimony in reference to the sale of stock.

Motion denied until the books should be produced.

Witness—I do not know whether my partner employed others; I ordered various brokers to sell; Mr. George H. Morse, my assistant, sold some; I cannot tell whether I limited the price; I think part were limited, and cannot say whether part were or were not; I know Mr. Lapsley; think he sold 5,000 shares; his place of business is in Broad-street; his name is C. W. Lapsley; he is alone in business; not in a firm; I cannot recall any other persons; I instructed Mr. Lapsley personally; I know Mr. Rogers; think he did not sell any; could not identify any of the certificates; do not think I ever saw one of them.

Mr. James M. Ellis recalled.

Judge Barnard suggested that somebody of the witness' firm be allowed to leave the Court to attend to the business of their house.

Mr. Fullerton—I should judge they all forgot all about their business when they got here.

Mr. Pierrepont—I ask that Mr. Heath be allowed to go to attend to his business until the books are brought.

Judge Barnard asked Mr. Fullerton for his consent.

Mr. Fullerton—I consent to nothing. Mr. Heath has not, by his course, commended himself to my favorable consideration.

The question was argued by Mr. Pierrepont, who was replied to by Messrs. Fullerton and Davis.

Judge Barnard—I direct Mr. Heath to go to his office and return with his books at 2 o'clock.

Mr. Pierrepont objected to the witness being compelled to bring voluminous books, which are in daily use and whose absence would seriously interrupt business, claiming that memoranda taken from the books would be competent and sufficient evidence.

Mr. Fullerton insisted on the books being brought.

Mr. Field asked by what authority Mr. Heath was required to bring his books, he not having been summoned to produce papers. If Mr. Heath would take his advice he would do no such thing.

Mr. Heath, having in the meantime left the court-room, Mr. Fullerton suggested that if Mr. Field wished to volunteer such mischievous advice, he might follow him, and would probably overtake him before he got to Wall-street, if his speed was good enough.

Mr. Field called attention to the impropriety of Mr. Fullerton's remarks, and Mr. Fullerton replied that he hoped to see a reform in Mr. Field in matters of courtesy.

The examination of Mr. Ellis was then resumed as follows:

I am a member of the firm of William Heath & Co.; have heard the testimony of last witness; recollect the sale he spoke of; don't remember whether I sold any; think I can swear positively that I did not; do not know who sold it; do not know of any person; heard no instructions by Mr. Heath to any one; was not present; know certificates were received by our firm; the receiving stock clerk, Charles E. Quincy, received them; do not know from whom they were received; think I was present when they were delivered, but cannot swear to this particular stock; don't remember the time; it was a very busy day; presume he did receive them; couldn't swear from whom he received them; they were delivered by some boys.

Q.—Who gave this stock to your firm? A.—You have not yet identified the stock; I have heard nothing about what stock you mean; my recollection is that the firm sold certificates that day representing thirty or forty thousand dollars in stock; the firm received the certificates; don't know as to these particular certificates.

Q.—Were you present when those certificates were given to your firm? A.—I understand this is a sale of certain certificates, which must have been signed, numbered, &c.; when they are identified I may be able to answer your question, and I may not be able.

The question was modified, and the witness proceeded as follows: There were deliveries made in our office; the stock was brought in by boys, and came from whatever houses the boys came from; boys were coming in all day; boys brought in those certificates; don't refer to *any* one boy; don't know who they were; boys must have brought in some of them and put in the stock through a place in the desk to Mr. Quincy who received them; did not receive any stock from Mr. Fisk; do not think they delivered any on that day; on the following day stock was sent in from Smith, Gould, Martin & Co.; cannot answer as to the amount; it was brought in by boys; I bought some; got it from either Mr. Smith or Mr. Martin; cannot tell the amount; it was received for delivery; to whom I didn't know; had no instructions; the firm had sold large quantities of Erie stock as was testified to by Mr. Heath.

Mr. Field here objected to that course of examination as being hearsay evidence.

Mr. Fullerton remarked that it seemed necessary to refresh the witnesses' memory.

Mr. Field submitted that it was not proper to so address a witness who seemed willing to answer.

Mr. Fullerton repeated what he had said. If the witness had a certificate of character from the counsel he might put it to what use he would, he might need it before he got through.

Judge Barnard—If any such language was addressed to the witness, it is wrong.

Mr. Fullerton—The witness is trying to evade me; I might as well speak out the truth.

Witness—That is not the truth; I have sought to evade nothing.

Several questions of privilege were then submitted to the Court, when Mr. Clark objected to that system of catechising the Court.

Judge Barnard remarked to Mr. Clark that the Court was able to take care of itself.

Mr. Clark insisted that the object of the witness was to evade the truth, defeat the ends of justice, and delay the trial.

Mr. Field again claimed that such language was derogatory.

Judge Barnard—If they have said so, it was wrong, and they would consider themselves rebuked.

Mr. Fullerton replied: Then we are rebuked.

Witness stated that the proceedings in yesterday's trial had been published in the newspapers, and he presumed these would be; and as statements derogatory to his character had been made, that they should be stricken out and not published as a part of the record.

The question was then repeated by the stenographer—"Had your firm sold that stock," &c.? A.—I do not know; presume they have; the books will show; I received them from Smith, Gould, Martin & Co., to deliver them to our receiving-clerk; he had informed me that certain Erie stock, which we had promised to receive from them, was there; did not know what it was to be brought for; understood about it; can't tell exactly the amount received from Smith, Gould, Martin & Co.; the arrangement, I think, was to take two or three thousand shares; know I took one lot; do not know who gave instructions for the sale or gave no instructions; none were given in my presence; can't answer whether the firm declined any of this stock which I brought from Smith, Gould, Martin & Co.; did not receive pay for it; presume we received pay for part; don't know what was done with the proceeds; for the stock of Smith, Gould, Martin & Co., I took a check in; the amount I don't remember; probably from $155,000 to $160,000; it was a check of our firm upon the Fifth National Bank; don't know whether the firm purchased the stock; know it was arranged for me to take this check and bring the stock; don't know further than that what the arrangement was between our house and Smith, Gould, Martin & Co.; know they were to deliver and we were to pay; don't know why; may have ideas what the transaction meant; will not testify to ideas; took no check to Fisk, Belden & Co.; the only house I went to to receive Erie stock that day was Smith, Gould, Martin & Co.'s; received none from Fisk, Belden & Co.; can't tell the date, or whether it was Saturday or Monday; they were new certificates; don't know to whom issued, or whom powers of attorney were signed; it is not my practice to keep accounts of numbers; it is the practice of my firm; Mr. Quincy knows all about it; can't tell you the names of the books; the firm has a receipt and delivery book, and a transfer book; I make no entries; have seen entries in both of those books; can only testify as to the general practice of the office; will answer if I am instructed to, otherwise I will not.

Mr. Fullerton—Well, let us have some instructions. It is about time for another objection. [Laughter.]

Witness—The general practice of the office is to take the numbers, but very often it is not done; in the transfer and receipt and delivery books the numbers are not put down, as far as my observation goes.

Cross-examined by Mr. Pierrepont—Our business in February and March last was quite large; there was a vast number of transactions in Erie and other stock, which did not relate to this stock; the usual mode of delivering was by boys; in all respects the business was done in the ordinary form; frequently do not enter the numbers; remember we did not take numbers of *some of this stock* from Smith, Gould, Martin & Co.; some days within that time our transactions amounted to $1,000,000 or $2,000,000 per day; it is impossible, of course, to keep run of all these things; that is the reason why I cannot remember any more definitely; Hath's why I cannot remember any more definitely; Hath's business is simply buying and selling stocks; I buy and sell gold and borrow and lend money all day long; we are out-door men; the cashier and book-keeper run the machine in the office; this business is all crowded between the hours of half-past nine and five; have not tried to suppress any testimony, and the other day only refused because the referee would not instruct me.

Re-direct examination resumed—Our general practice is to record numbers; in this case it wasn't done; we had so much to do we couldn't take the numbers; don't know how many came in one batch; got the Erie stock and delivered it to the receiving clerk; can swear to a lot of two thousand; can't say whether that was the batch of which we couldn't get the run of the numbers; can't say whether we have the means of ascertaining.

The witness was then dismissed.

The clerk stated that Gen. Diven, in his testimony, mistook the name of the boy whom he mentioned, calling him George, while his name was John.

Jonathan W. Dillon was the next witness called, and having been identified by Gen. Diven as the boy mentioned in his testimony of Monday, was sworn in the several cases, and testified as follows:

Am employed by the Erie Railway Company in the Secretary's office; recollect the Saturday before I brought up the book to Mr. Diven's house; went there on Sunday; Mr. Hilton requested me to go in the office of the Erie Railway Company; Mr. Smith, a clerk to the Secretary, Mr. Otis, and myself were there, and no one else to my knowledge.

Q.—What request was made you?

Objected to by Mr. Field as hearsay, and objection sustained.

Witness—Mr. Hilton gave me some instructions; went to the transfer office, on Pine-street, on Sunday morning; Mr. Hilton and his brother were there; no one else was there; no Directors were there; never went there on a Sunday before; then I went to Mr. Diven's house, taking a certificate book, which I think I could identify; I identify the book numbered 63,001 to 63,250 as the one I took; it was wrapped up and addressed; gave it to Mr. Diven at his house; he gave me another book; can't say for certain this is the one; have an impression that it is; brought one of these to Mr. Diven, and brought down the other; gave it to Mr. Hilton on Sunday, at Pine-street, in the middle of the day, somewhere between half-past 11 and 1 o'clock; Mr. Hilton, his brother and I were there, no one else; was not there either the day before or the day after; do not know when the books were closed.

The witness, on being again shown the book, explained that he took to Mr. Diven the book numbered 63,251 to 63,500, and brought back the one numbered 63,001 to 63,250.

The cross-examination of the witness was then commenced by Mr. Pierrepont.

Witness explained how he had become confused in his former testimony as to the books, and, after the books were correctly numbered and put in evidence by the counsel, the witness was dismissed.

Martin E. Greene was the next witness. He testified: Am in no business; was at the Fifth-avenue Hotel on the evening of the 7th of March last; saw Mr. Groesbeck there; he applied to me to take $5,000,000 worth of stock; cannot give you his exact language; he said Mr. Drew wished to sell me $5,000,000 worth of the convertible bonds of the Erie Railway Company, holding me harmless in the transaction.

Q.—What was the proposition made you? A.—I have not the full scope of the question; would prefer it, if your question were more specific and not so comprehensive; I have just stated his proposition made to me at that time; nothing as to price and terms was said, except that he could dispose of them to other persons, but wanted to sell them to one he could rely upon; no terms and price were stated; then went to Mr. Drew's house to Groesbeck; on arriving there went into the dining-room with Mr. Drew, and had an interview with Mr. Drew and Mr. Groesbeck; Mr. Drew repeated to me his wish to sell.

Mr. Field interrupted and objected to hearsay evidence.

The Court ruled that the witness should give the language as near as he could.

Witness resumed—I think Groesbeck spoke first in reference to it, and Mr. Drew said yes, he wished to sell me some stock; don't recollect what Mr. Groesbeck said; don't recollect whether allusion was made to the previous offer; Mr. Drew knew very well what I was there for.

Objected to as before, and the same ruling made.

Witness resumed—I cannot tell what each person said; think Mr. Drew said "yes," he wanted to sell me $5,000,000 worth of stock, holding me harmless in the transaction; think Mr. Groesbeck repeated the offer in substance, after which Mr. Drew said "Yes;" I asked Mr. Drew at what price; he said 77 cents on the dollar; think nothing was said about terms; Mr. Drew said he would indemnify me for loss; nothing was said about the stock of the Erie Railway Company; nothing was said about how I was to pay; asked Mr. Drew if he had a right to sell these bonds; he said he had; had purchased them at the office of the Erie Railway Company, and that half an hour afterward he was served with an injunction; nothing, I think, was said about stock, and nothing about the source from which the money was to come to pay for these bonds; I saw Mr. Gould as he came out of the room; I mean Mr. Gould the director; Mr. Drew then proposed we should go to Mr. Field's house on the north side of Gramercy Park; Mr. Drew, Mr. Gould, Mr. Groesbeck and myself started to go there, and went there; saw there Mr. Field and Mr. Belden, whom I know by sight; it was the Mr. Belden who has been here as a witness; they were the only ones whom I recognized; this was about ten P. M.; my interview with Groesbeck was about nine P. M.

Q.—State what was said at Mr. Field's house.

Objected to by Mr. Pierrepont, upon which a long argument ensued.

Mr. Pierrepont raised his objection in order to protect the conversation between Mr. Drew and Mr. Field, which was professional intercourse. This private conversation, in a private room, with a private counsel they cannot call out. The conversation at the hotel they can get, and the conversation at Mr. Drew's they can get, but not this, however willing the witness may be. If all the parties were dead but one, that one, even then, could not reveal what was so said. There was a relationship of counsel and client between Mr. Drew and Mr. Field.

Mr. Clark—I claim it was a conspiracy going on and no consultation, but one of them happened to be a lawyer.

At this point a recess was announced for ten minutes by Judge BARNARD, who stated that the counsel on resuming the case must prepare to meet these questions: First—Whether any relation of counsel existed between the witness and Mr. Field. Second—Whether if an attorney gives his client criminal advice it is protected.

After the intermission, Mr. Pierrepont resumed, stating as conceded facts, that Mr. Field was counsel for Mr. Drew; was not for Mr. Greene; that the interview was sought by Mr. Drew in Mr. Field's private room.

Mr. Clark—It is not conceded that it was a consultation between attorney and client, it was a combination for concocting means of safely evading your Honor's injunction.

Mr. Pierrepont continued—It was a plain legal principle that all this was sacredly protected, neither client nor counsel could reveal, nor any party in a relation that brought him in to take advantage of the advice of counsel could reveal it. If Mr. Greene could evade it the rule was gone; there could be no confidence between client and counsel. The rule was on grounds of public policy in order to avoid scandal. A lawyer is not allowed to reveal what his client has confided to him even should he afterward quarrel with him. So client cannot reveal such interviews on similar grounds. Counsel here read from Greenleaf on Evidence. He wished to state that if the evidence were admitted, nothing injurious to Mr. Field would be elicited; but they desired, so far as might be, to exclude scandal and keep the door shut against it. Mr. Pierrepont continued to read from Greenleaf on Evidence, and to comment on cases to show how wide this privilege was. It could not be violated in order to show that there was a conspiracy. The rule was absolute, and if they could compel the client to reveal such communications on the idea that there *might* be a conspiracy, and it should turn out that there was none, the mischief would be done. Mr. Greene was, for the purposes of this consultation, Mr. Field's client.

Mr. O'Conor replied that Mr. Drew, as it appeared, had entered into a contract with Mr. Greene, and had, for his own convenience, taken him to Mr. Field's. There he was present at an interview, not being servant, clerk or agent of Mr. Drew, nor clerk, interpreter, agent or client of Mr. Field. The consultation takes place in his presence, and on this basis of fact they had heard argument as to the sacredness of the privacy of private consultations between client and counsel; but the other side forgot that neither counsel nor client was called on to disclose facts, only a third person whom Mr. Drew saw fit to have present. No privilege could be pleaded. If persons chose to consult their lawyers in the open street in a loud voice, so that everyone could hear, that was not protected so far as the hearers were concerned. Privacy consisted in the exclusion of all persons but the attorney and client. The admission of a single person beyond those strips off the privacy. It is not true that a party can meet to plot and plan whatever they choose without being compelled to reveal it, merely because one of their number holds the parchment of an attorney. If so, the profession would receive some strange acquisitions. The consultation, too, must relate to legal proceedings *in esse*, or contemplated. He quoted cases in support of his views, the privilege extended to interpreters *ex necessitate*. He claimed that there was no privacy in the matter, and that they might, therefore, if they chose, call Mr. Field. He instanced this by the evidence which was sometimes called for of attorneys before Commissioners in equity.

Mr. Burrill replied on behalf of the Drew party, showed that the very claim that this was a conspiracy, showed that this consultation related to proceedings in a suit actually pending. The main question was, was this a private consultation, or was the privacy lost by the admission of Greene. The limitation was when persons were brought in who were in no way connected with the transaction. But Mr. Greene was connected with the matter. The rule was not confined to the case of private consultation. The cases that seemed to limit it to that were the cases where the counsel was as much the counsel of one as the other, and they were not connected. Mr. Greene was brought in, not as a disinterested person, but at Mr. Drew's suggestion. If a quarrel were to arise between Mr. Drew and Mr. Greene in which this interview was pertinent, and Mr. Drew called on Mr. Field to testify, the opposing counsel would be the first one to invoke the rule. If Mr. Greene's evidence were admitted, it might be necessary for them to contradict it, and the only way of contradicting it would be to place Mr. Field on the stand, and thus compel him to be counsel to give evidence as to professional confidences.

Judge Barnard decided that Mr. Field not being counsel for Mr. Greene, and Mr. Drew not being concerned in these proceedings, that the evidence was not privileged. It made no difference whether four persons or four hundred persons were present as to a question of privilege. That the objection was overruled, but it being late, he would adjourn the matter to this morning.

THE ALLEGED CONTEMPT OF JAY GOULD—BAIL GIVEN IN THE SUM OF $50,000, AND THE WRIT OF HABEAS CORPUS DISCHARGED.

The *habeas corpus* proceedings in the Common Pleas, which were adjourned over from last week by Judge Barrett, came up again to-day, and, after some informal discussion by counsel, it was finally arranged that the bond in the sum of $50,000 required by the order of Judge Barnard should be executed, and the writ discharged. An affidavit was read, which, taken with those previously produced, the Court said, exonerated Mr. Gould from any suspicion of having intended any contempt of court. The bond having been executed in the required sum, with Daniel S. Miller and Henry N. Smith as sureties, the writ was discharged.