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# von Wilmowsky: Warum Wurde Krupp Verurteilt?

Richard Arens

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Davis's admirable text on administrative law was published by West in the early fall of 1951. Its preface is dated April 1951 and both text and documentation are up to that date. It has 1024 pages, a good bibliography, and a list of about 2,000 cases. It costs \$8. The present volume, on the other hand, was published by the same publisher late in 1952 with a preface dated October 1952. But, as stated above, its coverage does not go beyond September 1950.<sup>6</sup> It has 518 pages, three separate indexes which make it hard to look up anything, no bibliography (hardly any writings, except official materials, of a date later than 1930 are cited anywhere), and it uses but 170 cases. The book costs \$12. Why did a publisher of West's reputation put it out?

REGINALD PARKER†

WARUM WURDE KRUPP VERURTEILT? By Tilo Freiherr von Wilmowsky. Stuttgart: Friedrich Vorwerk Verlag, 1950. Pp. 224. Dm. 7.80.

THE current revival of West German industry under traditional German industrial leadership gives timeliness to a German defense of the Krupp industrial empire, published as early as 1950.

In 1948, the Krupp leadership was imprisoned and stripped of its industrial assets upon conviction on charges of spoliation and mistreatment of slave-labor.<sup>1</sup> In 1951 both Krupp men and Krupp fortunes were released by executive fiat:<sup>2</sup> a United States High Commissioner voided the judgment of a military tribunal of American judges.<sup>3</sup>

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6. Thus the book fails to include the rulings of the Supreme Court in such recent administrative-legal landmarks as *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951); *Riss & Co. v. United States*, 341 U.S. 907 (1951). It also fails to discuss administrative aspects of the Internal Security Act and of the McCarran Immigration Act.

†Professor of Law, Willamette University.

1. See 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1449-54 (1950) (hereinafter cited as TRIALS OF WAR CRIMINALS). Deprivation of stolen property was specifically authorized by the original Nuremberg Charter. CHARTER OF INTERNATIONAL MILITARY TRIBUNAL, art. 28. A more general property forfeiture was authorized under the inter-Allied Control Council Law No. 10, art. II, § 3, which governed the subsequent proceedings.

2. N.Y. Times, Feb. 1, 1951, p. 1, col. 2.

3. Krupp's reprieve cannot be viewed as an isolated phenomenon in Germany under Allied auspices. "The very men who were the core of the cartel movement in Germany were the ones who brought Hitler to power. Now this same group of men has been returned to power. They have picked up where they left off." Testimony of J. S. Martin, former special assistant to the Attorney General, *Hearings before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess., Serial 14, Pt. 4A, 406 (1950). The composition of the present German management of the iron and steel industries in the American and British zones is "scarcely distinguishable from the old Stahlwerks-Verband." *Ibid.*

The initial conviction had evoked no widespread misgivings in the West. The amnesty, however, was accompanied by overwhelming British and French condemnation,<sup>4</sup> scattered expressions of misgivings which were muffled in the prevailing political climate in the United States,<sup>5</sup> and "victory" celebrations in Germany.<sup>6</sup>

*Warum Wurde Krupp Verurteilt?*, written by Tilo Freiherr von Wilmowsky, a Krupp relative and a one-time executive in Krupp's industries, who himself escaped prosecution by a hair's breadth,<sup>7</sup> epitomizes German industrial propaganda between Krupp's conviction and release.

## II

The book is clearly designed to help in the rehabilitation of German industry in Western eyes. It renders yeoman's service in this phase of German propaganda and deserves study, if only for that reason.<sup>8</sup> It is a tribute to the author's propagandistic skill that the entire pattern of his presentation should cater to the vagaries of the American scene.

The technique is carefully adapted to the character of the target area. Guilt is sown for Krupp's imprisonment by the literary creation of the prisoner in the image of a business respectability,<sup>9</sup> whose aura has been known to deter United States judges from ordering the imprisonment of otherwise respectable antitrust violators.<sup>10</sup> A further foundation for the immunity of the businessman from criminal prosecution is laid by ascribing wholesale political impotence to business,<sup>11</sup> preferably on a universal basis, but for this case, at least in the framework of the totalitarian state. The armor prepared for Krupp is then made impregnable by propounding the credo that a contrary assumption, ascribing large-scale political significance to the wealth function, constitutes the product of Marxist-Leninist indoctrination.

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4. See N.Y. Times, Feb. 8, 1951, p. 5, col. 3; *id.*, March 10, 1951, p. 3, col. 8; The World Today, Oct., 1952, p. 409.

5. Compare H.R. REP. No. 1456, 82d Cong., 2d Sess. 28 (1952), with the attitude expressed by Senator Joseph McCarthy in welcoming another aspect of the executive action of mass clemency which included the Krupp release. N.Y. Times, Feb. 1, 1951, p. 7, col. 2.

6. See, *e.g.*, N.Y. Times, Feb. 4, 1951, p. 8, col. 2 (champagne breakfast and reception for Krupp after release).

7. Pp. 7-8. See, also, reproductions of a letter from Gustav Krupp, defendant's father and predecessor in office, to von Wilmowsky, "concerning necessary future collaboration with the Nazi Party by Defendant Loeser in event he became a Krupp official," and of a letter from von Wilmowsky to Gustav Krupp concerning a prospective conference between Hitler and Gustav Krupp, 9 TRIALS OF WAR CRIMINALS, 347-8, 469.

8. A similar propaganda offensive in behalf of German industry was initiated after the conclusion of World War I. See, *e.g.*, DE GRUYTER, ZUM RUHREINERUCH (1923); KESSLER, GERMANY AND EUROPE (1923).

9. Pp. 29-33.

10. See DESSON, CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER 28 (1948).

11. Pp. 36-40. For a discussion of similar arguments in the United States on the political impotence of business, see ARNOLD, THE FOLKLORE OF CAPITALISM 193 (1937).

In such a context, Mr. Justice Jackson's view of the Krupp enterprise as "the focus, the symbol, and the beneficiary of the most sinister forces engaged in menacing the peace of Europe"<sup>12</sup> can be damned as an example of communist economic analysis and the Krupp prosecution itself as indistinguishable from communist subversion of the capitalist structure of the Western world.<sup>13</sup>

It is obvious that the main point of attack selected by the author is the "morality" of the infliction of criminal sanctions for business practices which by no stretch of the imagination can be made to resemble familiar patterns of customary crime.

The timing of the propaganda thrust appears equally felicitous. The issue posed is that of the status accorded to the exercise of ecopolitical power.<sup>14</sup> The answer, at least in the Western World, has heretofore been furnished in the increasing imposition of civil and criminal responsibility upon individual and group in the activities of the commercial enterprise.<sup>15</sup> It has thus become elementary to assume the capacity of business investment to contribute to national power and conversely the capacity of national power to contribute to business investment.<sup>16</sup> The trend of decision has shown clear-cut recognition of the power function of the business unit and has enforced its social responsibilities, not infrequently through the use of criminal sanctions.<sup>17</sup>

The issue concerning the status of contemporary ecopolitical power, however, is significantly posed by von Wilmowsky at a time of increased restiveness against public restrictions of private ecopolitical power in the United States.<sup>18</sup> The Krupp advocacy commands therefore a more respectful hearing than ever, sometimes from unexpected quarters.<sup>19</sup>

The United States response to continued German pressure highlighted by Tilo Freiherr von Wilmowsky's book, serves to raise the question whether

12. 1 TRIAL OF THE MAJOR WAR CRIMINALS, INT'L MILITARY TRIBUNAL 134 (1947).

13. Pp. 36-40.

14. The term "ecopolitical" is attributable to LASSWELL & KAPLAN, *POWER AND SOCIETY* 90-1 (1950): "Control over power on the basis of wealth is ecopolitical (economic-political) power exemplified in the purchase of votes or office."

15. See Comment, *Fifty Years of Sherman Act Enforcement*, 49 YALE L.J. 284 (1939); Note, *Aspects of Criminal Restraints on Acquisitive Conduct*, 38 COL. L. REV. 624 (1938).

16. Classic recognition of such interdependences has been accorded by such presumably non-Marxist publications as papal encyclicals. See, e.g., *ENCYCLICAL LETTER OF HIS HOLINESS, POPE PIUS XI, QUADRAGESIMO ANNO* (National Catholic Welfare Conference ed. 1935).

17. See, e.g., REP. ATT'Y GEN. (1950); *id.* (1938).

18. See, e.g., the Republican Party campaign platform for 1952, N.Y. Times, July 11, 1952, p. 8, and discussion of the National Association of Manufacturers' demands for business immunity from public control in ARNOLD, *THE FOLKLORE OF CAPITALISM* 71 *et seq.* (1937).

19. See, e.g., Kronstein, Book Review, 53 COL. L. REV. 139, 143 (1953). Professor Kronstein's present position appears in strange contrast to his earlier attitude. Kronstein & Leighton, *Cartel Control: A Record of Failure*, 55 YALE L.J. 297, 334 (1946).

the trend toward the increased enforcement of the social responsibilities of private power units has been reversed under the impact of recent policy developments. It seems plain that the author's appeal for the German industrialists is addressed with particular urgency to the business interests, familiar with the embarrassment of the enforcement of public control measures through criminal and other sanctions in the United States.<sup>20</sup> This reviewer suggests that the changing complexion of the United States' political elite has endowed such appeals with a compelling quality which might not have been encountered in the past. It seems strangely coincidental that Krupp's ultimate immunization from criminal sanctions in post-war Germany should be paralleled by the increasing business immunizations through lack of effective antitrust prosecutions in the post-war United States.<sup>21</sup>

### III

The first part of von Wilmsowsky's work embodies a panegyric on the lives and fortunes of generations of Krupps. To all intents and purposes, religion and business seem indistinguishable under the Krupp ménage, depicted as dominated by such Krupp dicta as: "morality and rectitude must animate all our activities."<sup>22</sup>

The Krupp family's sense of "morality" and "rectitude" was expressed, according to the author, in ethical business practices, widespread philanthropy and political neutrality. Illustrations are provided in short order. We are told of the Krupp record of flawless productivity for peaceful use,<sup>23</sup> Krupp investments in housing developments for their workers,<sup>24</sup> and the "correctness" of Krupp loyalty to every national government.<sup>25</sup> Quite ingenuously, the author bases his "finding" of Krupp's political neutrality on the "impartiality" with which Krupp armaments were put at the service of all German governments indifferently. Specific business policies, in such a context, he assures us, were dictated in each case by the "categorical imperative" of obedi-

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20. See REPPY, NATIONAL CONFERENCE ON THE RELATION OF LAW AND BUSINESS (1st Sess. 1931) (specific emphasis on the antitrust laws). For a treatment of American-German cartel arrangements, see STOCKING & WATKINS, CARTELS IN ACTION (1948).

21. See Levi, *The Anti-Trust Laws & Monopoly*, 14 U. OF CHL. L. REV. 153, 183 (1947).

"The International Steel Cartel carried out openly for over 10 years, and its component parts are now carrying out covertly, a policy which can only be described as the diametric opposite of the Marshall plan and of President Truman's point 4. Powerful American firms participated in that effort to stifle and control economic development, and these same firms are now participating in the establishment of the same kind of unofficial economic foreign policy for the United States while our Government is trying to move in the opposite direction. In doing so these American firms are violating the antitrust laws. . . ." *Hearings, supra* note 3, at 359.

22. P. 19 (translation supplied).

23. P. 18.

24. Pp. 20-21.

25. Pp. 23-4.

ence to national authority.<sup>26</sup> Subject to all of the duties of German citizenship, the Krupps are pictured as inexorably accepting governmental orders under both physical and moral constraint.<sup>27</sup> Presented in this light the Krupps seem deliberately miscast for the role of war criminals.

It is in the expectation of facing an increasing number of sympathetic listeners that the Baron delivers himself of the second part of his disquisition. This is devoted to the issues posed by the trial itself. Here he proceeds to attack the substantive law, the procedure and the sufficiency of proof.

While admitting Krupp's use of the slave labor and foreign industries seized by Nazi conquest,<sup>28</sup> the author nevertheless maintains that Krupp's innocence is as white as snow. In his view, conviction is barred by the defense of necessity.<sup>29</sup> The necessity is defined as that of a war emergency which constrained the Krupp industry to avail itself of varying forms of slave labor and foreign industrial machinery according to the dictates of an all-powerful State:

"There was no more escape from this pattern of governmental coercion for the entrepreneur than for the laborer."<sup>30</sup>

Krupp enterprises are thus made to appear puny in the path of the Leviathan. Business management disclaims any significant effect upon government.

Beyond this, the following defects, among others, are ascribed to the substantive law governing the counts of the indictment for which convictions were procured. The Baron declares, for example, that the spoliation count, charging the Krupp defendants with the plunder of occupied territory lacked substantive force: the court failed to recognize that technological advances in a "total war" required the granting of greater latitude to the permissible scope of belligerent operations and that therefore what may well be "plunder" in the nineteenth century may constitute a legitimate form of economic warfare in the twentieth.<sup>31</sup> He declares further that the count on the exploitation of forced labor included elements of *ex post facto* legislation because the Rules of War laid down by the Hague Convention did not explicitly proscribe the mere use as forced labor of civilian populations of conquered countries.<sup>32</sup>

On procedural grounds, the author charges violations of basic decencies at the expense of the defense, such as the indefinite detention of defendants before trial without benefit of habeas corpus,<sup>33</sup> inclusion of evidence in the trial record

26. Pp. 25-9. Drew Middleton commented perceptively: "The Krupp family has maintained a democratic attitude toward money—they will take it from anyone. . . ." N.Y. Times, Feb. 18, 1951, § 6, p. 24.

27. Pp. 29-32.

28. Pp. 90-196.

29. Pp. 143, 145, 166-8.

30. P. 143 (translation supplied).

31. Pp. 96-9.

32. Pp. 130-5.

33. P. 41.

through the use of judicial notice,<sup>34</sup> hearing of witnesses in the absence of defendants' counsel,<sup>35</sup> and an unseemly haste in the trial of the case.<sup>36</sup>

He complains as well of the insufficiency of proof on both spoliation and slave labor counts. His complaint is general. Isolated instances of mistreatment, for example, he suggests should not be allowed to give rise to the conclusion of a pattern.<sup>37</sup> Rarely does he attack testimony directly. When he does, his illustrations of evidentiary insufficiency appear odd indeed. Thus he peremptorily designates as "senseless" an Hungarian Jewess' eye-witness account of physical brutalities perpetrated by supervisors in Krupp industries.<sup>38</sup> One wonders why.

It is hardly surprising that the conclusion which the author urges on his reader is that a gross miscarriage of justice has taken place on all scores.

#### IV

Von Wilmowsky's assertion concerning Krupp's political neutrality is belied by the facts. The Krupps had made public boast of their circumvention of the Treaty of Versailles' armaments restrictions after World War I.<sup>39</sup> Alfried Krupp became a sponsoring member of the SS in 1931.<sup>40</sup> The Krupps furnished vital and enthusiastic financial backing for Hitler since early 1933.<sup>41</sup>

The dividends in war contracts for the Third Reich had come thick and fast. Prizes multiplied in the war years.<sup>42</sup> Thus, for example, the Krupp concern acquired Jewish property—seized forcibly for the use of German appointed "administrators"<sup>43</sup>—and dismantled French plants for shipment to Germany.<sup>44</sup> It made frequent and insistent application for allocation of forced labor to its enterprises.<sup>45</sup> It established penal camps for the refractory,<sup>46</sup> maintained a bare subsistence level for its foreign labor,<sup>47</sup> and stressed the need for the severity of their treatment in its directives.<sup>48</sup>

34. P. 57.

35. Pp. 62-3.

36. P. 62.

37. Pp. 190-2.

38. Pp. 190-1.

39. "At the time [1919] the situation appeared almost hopeless. . . . I wanted to and had to maintain Krupp, in spite of all opposition, as an armament plant. . . . Without arousing any commotion, the necessary measures and preparations were undertaken. . . . Even the Allied snooping commissions were duped." See 9 TRIALS OF WAR CRIMINALS 263-4 (extract from article written by Gustav Krupp in 1942).

40. *Id.* at 37.

41. See reproduction of documentary evidence from Krupp files concerning the Krupp leadership in organizing industrialist support for Hitler in 1933. *Id.* at 338-45.

42. The record establishes the unmistakable Krupp effort to effect large-scale business expansion for profit during the war years. See, *e.g.*, *id.* at 491.

43. See, *e.g.*, *id.* at 506-12.

44. *Id.* at 632-5.

45. *Id.* at 687-9, 713-5, 730-1, 740, 1132-4, 1137-9, 1161-2, 1211.

46. *Id.* at 1031-9.

47. *Id.* at 874-5, 905, 1109-11, 1147.

48. *Id.* at 885-92.

The independence of Krupp action was maintained in both Nazi victory and disaster. When it suited their purpose the Krupps gave freely of their effort to the Nazi cause. Nazi victory saw the Krupps as a mainstay of Nazi power. Dramatic proof of the interaction of Nazi power and industrial practices was furnished by a prosecution witness who had visited the Krupps at their home during a radio broadcast which was reporting on the German military offensive in the West in 1940:

"[T]here must have been some news which was to the effect that in Holland the situation had so consolidated that there was a possibility that outstanding members of the economy would be able to travel there . . . the tension of these gentlemen grew perceptibly; . . . and now the . . . gentlemen . . . pointed to certain places in Holland . . . One said, . . . 'Here is village B; there is Mueller; he is yours, and there is Mr. Schmidt, or Huber, or somebody, he has two plants, well, we will have him arrested', and so it went on . . . the executives and the factory owners were mentioned by name and from the fact that it was said, 'this one is yours, that one is yours, that one we will have arrested—he has two factories,' from that I had to conclude that these were industrial installations and some sort of industrial plants."<sup>49</sup>

When it suited their purpose at other times the Krupps, just as freely, withheld their support from their government. Nazi disaster saw the Krupps reducing their financial contributions to the war effort in violation of the then existing law. As explicitly admitted by a defense witness, Krupp officials had no sooner sensed the impending German defeat than they sought the perpetuation of the Krupp financial power beyond the war years in defiance of Nazi authority. As early as 1943, incurring the technical risk of concentration camp internment or worse, the Krupp management embarked upon a policy of gradual but systematic sale of German government bonds worth 200 million Reichsmarks. German government bonds worth only 68 million marks remained unsold by the Krupps by the end of the war.<sup>50</sup>

It is difficult, under these circumstances, to retain an impression of the Krupps as the impotent playthings of an all-powerful State.

The cavils at the substantive law, procedure and sufficiency of proof do not fare any better under examination.

The defense of "necessity" is patently inapplicable to the facts of the case under both Civil and Common Law.<sup>51</sup>

In the matter of spoliation, it suffices to note the unique area within which von Wilmowsky endows the tribunal with the right of judicial legislation. He

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49. *Id.* at 500.

50. Testimony of defense witness Schroeder, *id.* at 870-3. See particularly this witness's responses to questions by Judge Anderson. *Id.* at 872-3.

51. The defense of necessity was rejected by the tribunal, *id.* at 1445. See HALL, *PRINCIPLES OF CRIMINAL LAW* 377-426 (1947); BAUDRY, *LA FORCE MAJEURE EN DROIT PÉNAL* (Lyon 1938).

demands judicial innovation which would allow human destructiveness, and denies innovation which would curtail this destructiveness. It is thus that a defense formulation of a new concept of "spoliation" is welcomed and a prosecution formulation of a new concept of "aggressive war" is spurned.<sup>52</sup>

His protest that the finding of guilt for the exploitation of forced labor is vitiated by retroactivity is not based on fact. The Rules of the Hague Convention were explicit.<sup>53</sup> They had been effectively sustained against similar attack, before the Krupp trial, in the analysis furnished in the judgment of the International Military Tribunal in the proceedings against Goering *et al.*<sup>54</sup>

What about the procedural objections raised by von Wilmowsky? A point by point rebuttal of the Baron's charges has been effectively provided by Telford Taylor, U.S. Chief of Counsel for War Crimes at the time of the Krupp case.<sup>55</sup> One is startled by the arrogance and dishonesty of some of von Wilmowsky's allegations. It seems strange to hear the author's insistence on habeas corpus for the benefit of the Nazi elite when this process was unknown in Germany throughout the Hitler regime. The length of the trial (from December 8, 1947 to June 30, 1948) provides the best answer to the charge of haste. The scope of affidavit evidence was not without legal precedent in continental Western Europe,<sup>56</sup> and was, as stated by Telford Taylor, exploited far more widely by the defense than the prosecution.<sup>57</sup> The inclusion of evidence in the trial record through the use of judicial notice, could not, if American experience has any significance,<sup>58</sup> be said to have worked to the disadvantage of the defendants in this case. No evidence appears in the record of any hearing of witnesses in the absence of defendants' counsel, as charged by von Wilmowsky. Telford Taylor states that he knows of "no basis" for such a charge.<sup>59</sup> The reader has his choice of believing the record and Telford Taylor or Tilo Freiherr von Wilmowsky.

Complaints concerning an insufficiency of credible evidence appear specious, in that even defense witnesses confirmed prosecution claims,<sup>60</sup> and incriminating documents from Krupp's files provided the major basis of decision.<sup>61</sup> The

52. Pp. 77-9, 92-102.

53. See Hague Regulations of Land Warfare, articles 46-56 of Annex to Hague Convention IV, Oct. 18, 1907, 36 STAT. 2277, 2306 (1909). See also KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 75 (1935).

54. 22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, INT'L MILITARY TRIBUNAL 460-3 (1949).

55. Taylor, *The Krupp Trial: Fact v. Fiction*, 53 COL. L. REV. 197 (1953).

56. See DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL ET DE LEGISLATION PÉNALE COMPARÉE, 793 (Paris 1947).

57. Taylor, *The Krupp Trial: Fact v. Fiction*, 53 COL. L. REV. 197, 204 (1953).

58. See Dession, *The Trial of Economic and Technological Issues of Fact: II*, 58 YALE L.J. 1242, 1248-50 (1949).

59. Taylor, *The Krupp Trial: Fact v. Fiction*, 53 COL. L. REV. 197, 205 (1953).

60. See 9 TRIALS OF WAR CRIMINALS 1185-7 (1950).

61. See Opinion and Judgment of Military Tribunal, 9 TRIALS OF WAR CRIMINALS 1327-1449 (1950).

correlation between the Baron's assertions and the facts of the situation appears negligible.

## V

It is characteristic of the trend of the times that the carefully worded judgment which was handed down by the American judges in the Krupp Case should weigh less heavily with an American High Commissioner than the arguments of the type propounded by the Baron.

There, by grace of one branch of American government, goes Alfried Krupp, returning to the management of the industry he loved so well, as mindless of politics as ever.<sup>62</sup>

Somewhat uneasily this reviewer cannot help remembering the munitions maker, portrayed by George Bernard Shaw, who exclaimed:

"Government of your country! Be off with you, my boy, and play with your caucuses and leading articles and historic parties and great leaders and burning questions and the rest of your toys. I am going back to my counting-house to pay the piper and call the tune."<sup>63</sup>

RICHARD ARENS†

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62. A recent agreement with the Western powers under which Krupp is pledged to sell his holdings in the coal, iron and steel industries by a certain date, in return for which the Allies will lift all remaining controls on his other industrial enterprises, is unlikely to change the present picture. It is significant that the full operative effect of the agreement is explicitly deferred until 1960. N.Y. Times, Feb. 22, 1953, p. 1, col. 5. There is a dearth of German enterprises with the available financial resources to effect a purchase. Wall Street Journal, Sept. 25, 1952, p. 8, col. 4. And, even if any sale were consummated, Krupp would retain obvious financial power to buy his way back.

63. Act III, *Major Barbara*, THE WORKS OF BERNARD SHAW 321 (1930).

†Member, District of Columbia Bar.