FRANCIS LEWIS WELLMAN

THE ART OF CROSS-EXAMINATION

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The Art of Cross-Examination / With the Cross-Examinations of Important Witnesses in Some Celebrated Cases:

Содержание

Francis L. Wellman
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To my Sons
RODERIC and ALLEN
WHO HAVE EXPRESSED THEIR INTENTION
TO ENTER THE LEGAL PROFESSION
THIS BOOK
IS AFFECTIONATELY DEDICATED

"Cross-examination,—the rarest, the most useful, and the most difficult to be acquired of all the accomplishments of the advocate.... It has always been deemed the surest test of truth and a better security than the oath."—Cox.

PREFACE

In offering this book to the legal profession I do not intend to arrogate to myself any superior knowledge upon the subject, excepting in so far as it may have been gleaned from actual experience. Nor have I attempted to treat the subject in any scientific, elaborate, or exhaustive way; but merely to make some suggestions upon the art of cross-examination, which have been gathered as a result of twenty-five years' court practice, during which time I have examined and cross-examined about fifteen thousand witnesses, drawn from all classes of the community.

If what is here written affords anything of instruction to the younger members of my profession, or of interest or entertainment to the public, it will amply justify the time taken from my summer vacation to put in readable form some points from my experience upon this most difficult subject.

Bar Harbor, Maine,
September 1, 1903.

CHAPTER I
INTRODUCTORY

"The issue of a cause rarely depends upon a speech and is but seldom even affected by it. But there is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination."

This is the conclusion arrived at by one of England's greatest advocates at the close of a long and eventful career at the Bar. It was written some fifty years ago and at a time when oratory in public trials was at its height. It is even more true at the present time, when what was once commonly reputed a "great speech" is seldom heard in our courts,—because the modern methods of practising our profession have had a tendency to discourage court oratory and the development of orators. The old-fashioned orators who were wont to "grasp the thunderbolt" are now less in favor than formerly. With our modern jurymen the arts of oratory,—"law-papers on fire," as Lord Brougham's speeches used to be called,—though still enjoyed as impassioned literary efforts, have become almost useless as persuasive arguments or as a "summing up" as they are now called.

Modern juries, especially in large cities, are composed of practical business men accustomed to think for themselves, experienced in the ways of life, capable of forming estimates

and making nice distinctions, unmoved by the passions and prejudices to which court oratory is nearly always directed. Nowadays, jurymen, as a rule, are wont to bestow upon testimony the most intelligent and painstaking attention, and have a keen scent for truth. It is not intended to maintain that juries are no longer human, or that in certain cases they do not still go widely astray, led on by their prejudices if not by their passions. Nevertheless, in the vast majority of trials, the modern juryman, and especially the modern city juryman,—it is in our large cities that the greatest number of litigated cases is tried,—comes as near being the model arbiter of fact as the most optimistic champion of the institution of trial by jury could desire.

I am aware that many members of my profession still sneer at trial by jury. Such men, however,—when not among the unsuccessful and disgruntled,—will, with but few exceptions, be found to have had but little practice themselves in court, or else to belong to that ever growing class in our profession who have relinquished their court practice and are building up fortunes such as were never dreamed of in the legal profession a decade ago, by becoming what may be styled business lawyers —men who are learned in the law as a profession, but who through opportunity, combined with rare commercial ability, have come to apply their learning—especially their knowledge of corporate law—to great commercial enterprises, combinations, organizations, and reorganizations, and have thus come to practise law as a business.

To such as these a book of this nature can have but little interest. It is to those who by choice or chance are, or intend to become, engaged in that most laborious of all forms of legal business, the trial of cases in court, that the suggestions and experiences which follow are especially addressed.

It is often truly said that many of our best lawyers—I am speaking now especially of New York City—are withdrawing from court practice because the nature of the litigation is changing. To such an extent is this change taking place in some localities that the more important commercial cases rarely reach a court decision. Our merchants prefer to compromise their difficulties, or to write off their losses, rather than enter into litigations that must remain dormant in the courts for upward of three years awaiting their turn for a hearing on the overcrowded court calendars. And yet fully six thousand cases of one kind or another are tried or disposed of yearly in the Borough of Manhattan alone.

This congestion is not wholly due to lack of judges, or that they are not capable and industrious men; but is largely, it seems to me, the fault of the system in vogue in all our American courts of allowing any lawyer, duly enrolled as a member of the Bar, to practise in the highest courts. In the United States we recognize no distinction between barrister and solicitor; we are all barristers and solicitors by turn. One has but to frequent the courts to become convinced that, so long as the ten thousand members at the New York County Bar all avail themselves of

their privilege to appear in court and try their own clients' cases, the great majority of the trials will be poorly conducted, and much valuable time wasted.

The conduct of a case in court is a peculiar art for which many men, however learned in the law, are not fitted; and where a lawyer has but one or even a dozen experiences in court in each year, he can never become a competent trial lawyer. I am not addressing myself to clients, who often assume that, because we are duly qualified as lawyers, we are therefore competent to try their cases; I am speaking in behalf of our courts, against the congestion of the calendars, and the consequent crowding out of weighty commercial litigations.

One *experienced* in the trial of causes will not require, at the utmost, more than a quarter of the time taken by the most learned inexperienced lawyer in developing his facts. His case will be thoroughly prepared and understood before the trial begins. His points of law and issues of fact will be clearly defined and presented to the court and jury in the fewest possible words. He will in this way avoid many of the erroneous rulings on questions of law and evidence which are now upsetting so many verdicts on appeal. He will not only complete his trial in shorter time, but he will be likely to bring about an equitable verdict in the case which may not be appealed from at all, or, if appealed, will be sustained by a higher court, instead of being sent back for a retrial and the consequent consumption of the time of another

judge and jury in doing the work all over again.[1]

These facts are being more and more appreciated each year, and in our local courts there is already an ever increasing coterie of trial lawyers, who are devoting the principal part of their time to court practice.

A few lawyers have gone so far as to refuse direct communication with clients excepting as they come represented by their own attorneys. It is pleasing to note that some of our leading advocates who, having been called away from large and active law practice to enter the government service, have expressed their intention, when they resume the practice of the law, to refuse all cases where clients are not already represented by competent attorneys, recognizing, at least in their own practice, the English distinction between the barrister and solicitor. We are thus beginning to appreciate in this country what the English courts have so long recognized: that the only way to insure speedy and intelligently conducted litigations is to *inaugurate a custom* of confining court practice to a comparatively limited number of trained trial lawyers.

The distinction between general practitioners and specialists is already established in the medical profession and largely accepted by the public. Who would think nowadays of submitting himself to a serious operation at the hands of his family

[1] In the Borough of Manhattan at the present time thirty-three per cent of the cases tried are appealed, and forty-two per cent of the cases appealed are reversed and sent back for re-trial as shown by the court statistics.

physician, instead of calling in an experienced surgeon to handle the knife? And yet the family physician may have once been competent to play the part of surgeon, and doubtless has had, years ago, his quota of hospital experience. But he so infrequently enters the domain of surgery that he shrinks from undertaking it, except under circumstances where there is no alternative. There should be a similar distinction in the legal profession. The family lawyer may have once been competent to conduct the litigation; but he is out of practice—he is not "in training" for the competition.

There is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. I am not speaking of that small minority of men in all walks of life who have been touched by the magic wand of genius, but of men of average endowments and even special aptitude for the calling of advocacy; with them it is a race of experience. The experienced advocate can look back upon those less advanced in years or experience, and rest content in the thought that they are just so many cases behind him; that if he keeps on, with equal opportunities in court, they can never overtake him. Some day the public will recognize this fact. But at present, what does the ordinary litigant know of the advantages of having counsel to conduct his case who is "at home" in the court room, and perhaps even acquainted with the very panel of jurors before whom his case is to be heard, through having already tried one or more cases for other clients before the same

men? How little can the ordinary business man realize the value to himself of having a lawyer who understands the habits of thought and of looking at evidence—the bent of mind—of the very judge who is to preside at the trial of his case. Not that our judges are not eminently fair-minded in the conduct of trials; but they are men for all that, oftentimes very human men; and the trial lawyer who knows his judge, starts with an advantage that the inexperienced practitioner little appreciates. How much, too, does experience count in the selection of the jury itself—one of the "fine arts" of the advocate! These are but a few of the many similar advantages one might enumerate, were they not apart from the subject we are now concerned with—the skill of the advocate in conducting the trial itself, once the jury has been chosen.

When the public realizes that a good trial lawyer is the outcome, one might say of generations of witnesses, when clients fully appreciate the dangers they run in intrusting their litigations to so-called "office lawyers" with little or no experience in court, they will insist upon their briefs being intrusted to those who make a specialty of court practice, advised and assisted, if you will, by their own private attorneys. One of the chief disadvantages of our present system will be suddenly swept away; the court calendars will be cleared by speedily conducted trials; issues will be tried within a reasonable time after they are framed; the commercial cases, now disadvantageously settled out of court or abandoned altogether, will return to our courts to

the satisfaction both of the legal profession and of the business community at large; causes will be more skilfully tried—the art of cross-examination more thoroughly understood.

CHAPTER II
THE MANNER OF CROSS-EXAMINATION

It needs but the simple statement of the nature of cross-examination to demonstrate its indispensable character in all trials of questions of fact. No cause reaches the stage of litigation unless there are two sides to it. If the witnesses on one side deny or qualify the statements made by those on the other, which side is telling the truth? Not necessarily which side is offering perjured testimony,—there is far less intentional perjury in the courts than the inexperienced would believe,—but which side is honestly mistaken?—for, on the other hand, evidence itself is far less trustworthy than the public usually realizes. The opinions of which side are warped by prejudice or blinded by ignorance? Which side has had the power or opportunity of correct observation? How shall we tell, how make it apparent to a jury of disinterested men who are to decide between the litigants? Obviously, by the means of cross-examination.

If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, "to tell the truth, the whole truth, and nothing but the truth," and if all advocates on either side had the necessary experience, combined with honesty and intelligence, and were

similarly sworn to *develop* the whole truth and nothing but the truth, of course there would be no occasion for cross-examination, and the occupation of the cross-examiner would be gone. But as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.

The system is as old as the history of nations. Indeed, to this day, the account given by Plato of Socrates's cross-examination of his accuser, Miletus, while defending himself against the capital charge of corrupting the youth of Athens, may be quoted as a masterpiece in the art of cross-questioning.

Cross-examination is generally considered to be the most difficult branch of the multifarious duties of the advocate. Success in the art, as some one has said, comes more often to the happy possessor of a genius for it. Great lawyers have often failed lamentably in it, while marvellous success has crowned the efforts of those who might otherwise have been regarded as of a mediocre grade in the profession. Yet personal experience and the emulation of others trained in the art, are the surest means of obtaining proficiency in this all-important prerequisite of a competent trial lawyer.

It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-

matter itself; an extreme caution; and, above all, the *instinct to discover the weak point* in the witness under examination.

One has to deal with a prodigious variety of witnesses testifying under an infinite number of differing circumstances. It involves all shades and complexions of human morals, human passions, and human intelligence. It is a mental duel between counsel and witness.

In discussing the methods to employ when cross-examining a witness, let us imagine ourselves at work in the trial of a cause, and at the close of the direct examination of a witness called by our adversary. The first inquiry would naturally be, Has the witness testified to anything that is material against us? Has his testimony injured our side of the case? Has he made an impression with the jury against us? Is it necessary for us to cross-examine him at all?

Before dismissing a witness, however, the possibility of being able to elicit some new facts in our own favor should be taken into consideration. If the witness is apparently truthful and candid, this can be readily done by asking plain, straightforward questions. If, however, there is any reason to doubt the willingness of the witness to help develop the truth, it may be necessary to proceed with more caution, and possibly to put the witness in a position where it will appear to the jury that he could tell a good deal if he wanted to, and then leave him. The jury will thus draw the inference that, had he spoken, it would have been in our favor.

But suppose the witness has testified to material facts against us, and it becomes our duty to break the force of his testimony, or abandon all hope of a jury verdict. How shall we begin? How shall we tell whether the witness has made an honest mistake, or has committed perjury? The methods in his cross-examination in the two instances would naturally be very different. There is a marked distinction between discrediting the *testimony* and discrediting the *witness*. It is largely a matter of instinct on the part of the examiner. Some people call it the language of the eye, or the tone of the voice, or the countenance of the witness, or his manner of testifying, or all combined, that betrays the wilful perjurer. It is difficult to say exactly what it is, excepting that constant practice seems to enable a trial lawyer to form a fairly accurate judgment on this point. A skilful cross-examiner seldom takes his eye from an important witness while he is being examined by his adversary. Every expression of his face, especially his mouth, even every movement of his hands, his manner of expressing himself, his whole bearing—all help the examiner to arrive at an accurate estimate of his integrity.

Let us assume, then, that we have been correct in our judgment of this particular witness, and that he is trying to describe honestly the occurrences to which he has testified, but has fallen into a serious mistake, through ignorance, blunder, or what not, which must be exposed to the minds of the jury. How shall we go about it? This brings us at once to the first important factor in our discussion, the *manner* of the cross-examiner.

It is absurd to suppose that any witness who has sworn positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People as a rule do not reflect upon their meagre opportunities for observing facts, and rarely suspect the frailty of their own powers of observation. They come to court, when summoned as witnesses, prepared to tell what they think they know; and in the beginning they resent an attack upon their story as they would one upon their integrity.

If the cross-examiner allows the witness to see, by his manner toward him at the start, that he distrusts his integrity, he will straighten himself in the witness chair and mentally defy him at once. If, on the other hand, the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly be induced to enter into a discussion of his testimony in a fair-minded spirit, which, if the cross-examiner is clever, will soon disclose the weak points in the testimony. The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him. They are willing to admit his *mistakes*, if you can make them apparent, but are slow to believe him *guilty of perjury*. Alas, how often this is lost sight of in our daily court experiences! One is constantly brought face to face with lawyers who act as if they thought that every one who testifies against their side of the case is committing wilful perjury. No wonder they accomplish so little

with their CROSS-examination! By their shouting, brow-beating style they often confuse the wits of the witness, it is true; but they fail to discredit him with the jury. On the contrary, they elicit sympathy for the witness they are attacking, and little realize that their "vigorous cross-examination," at the end of which they sit down with evident self-satisfaction, has only served to close effectually the mind of at least one fair-minded juryman against their side of the case, and as likely as not it has brought to light some important fact favorable to the other side which had been overlooked in the examination-in-chief.

There is a story told of Reverdy Johnson, who once, in the trial of a case, twitted a brother lawyer with feebleness of memory, and received the prompt retort, "Yes, Mr. Johnson; but you will please remember that, unlike the lion in the play, I have something more to do than *roar*."

The only lawyer I ever heard employ this roaring method successfully was Benjamin F. Butler. With him politeness, or even humanity, was out of the question. And it has been said of him that "concealment and equivocation were scarcely possible to a witness under the operation of his methods." But Butler had a wonderful personality. He was aggressive and even pugnacious, but picturesque withal—witnesses were afraid of him. Butler was popular with the masses; he usually had the numerous "hangers-on" in the court room on his side of the case from the start, and each little point he would make with a witness met with their ready and audible approval. This greatly

increased the embarrassment of the witness and gave Butler a decided advantage. It must be remembered also that Butler had a contempt for scruple which would hardly stand him in good stead at the present time. Once he was cross-questioning a witness in his characteristic manner. The judge interrupted to remind him that the witness was a Harvard professor. "I know it, your Honor," replied Butler; "we hanged one of them the other day."[2]

On the other hand, it has been said of Rufus Choate, whose art and graceful qualities of mind certainly entitle him to the foremost rank among American advocates, that in the cross-examination of witnesses, "He never aroused opposition on the part of the witness by attacking him, but disarmed him by the quiet and courteous manner in which he pursued his examination. He was quite sure, before giving him up, to expose the weak parts of his testimony or the bias, if any, which detracted from the confidence to be given it."[3] [One of Choate's *bon mots* was that "a lawyer's vacation consisted of the space between the question put to a witness and his answer."]

Judah P. Benjamin, "the eminent lawyer of two continents," used to cross-examine with his eyes. "No witness could look into Benjamin's black, piercing eyes and maintain a lie."

Among the English barristers, Sir James Scarlett, Lord Abinger, had the reputation, as a cross-examiner, of having outstripped all advocates who, up to that time, had appeared at

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[2] "Life Sketches of Eminent Lawyers," G. J. Clark, Esq.

[3] "Memories of Rufus Choate," Neilson.

the British Bar. "The gentlemanly ease, the polished courtesy, and the Christian urbanity and affection, with which he proceeded to the task, did infinite mischief to the testimony of witnesses who were striving to deceive, or upon whom he found it expedient to fasten a suspicion."

A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If you show by your face how the answer hurt, you may lose your case by that one point alone. How often one sees the cross-examiner fairly staggered by such an answer. He pauses, perhaps blushes, and after he has allowed the answer to have its full effect, finally regains his self-possession, but seldom his control of the witness. With the really experienced trial lawyer, such answers, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a minute?"

An anecdote apropos of this point is told of Rufus Choate. "A witness for his antagonist let fall, with no particular emphasis, a statement of a most important fact from which he saw that inferences greatly damaging to his client's case might be drawn if skilfully used. He suffered the witness to go through his statement and then, as if he saw in it something of great value to himself, requested him to repeat it carefully that he might take it down

correctly. He as carefully avoided cross-examining the witness, and in his argument made not the least allusion to his testimony. When the opposing counsel, in his close, came to that part of his case in his argument, he was so impressed with the idea that Mr. Choate had discovered that there was something in that testimony which made in his favor, although he could not see how, that he contented himself with merely remarking that though Mr. Choate had seemed to think that the testimony bore in favor of his client, it seemed to him that it went to sustain the opposite side, and then went on with the other parts of his case."[4]

It is the love of combat which every man possesses that fastens the attention of the jury upon the progress of the trial. The counsel who has a pleasant personality; who speaks with apparent frankness; who appears to be an earnest searcher after truth; who is courteous to those who testify against him; who avoids delaying constantly the progress of the trial by innumerable objections and exceptions to perhaps incompetent but harmless evidence; who seems to know what he is about and sits down when he has accomplished it, exhibiting a spirit of fair play on all occasions —he it is who creates an atmosphere in favor of the side which he represents, a powerful though unconscious influence with the jury in arriving at their verdict. Even if, owing to the weight of testimony, the verdict is against him, yet the amount will be far less than the client had schooled himself to expect.

On the other hand, the lawyer who wearies the court and

[4] "Memories of Rufus Choate," Neilson.

the jury with endless and pointless cross-examinations; who is constantly losing his temper and showing his teeth to the witnesses; who wears a sour, anxious expression; who possesses a monotonous, rasping, penetrating voice; who presents a slovenly, unkempt personal appearance; who is prone to take unfair advantage of witness or counsel, and seems determined to win at all hazards—soon prejudices a jury against himself and the client he represents, entirely irrespective of the sworn testimony in the case.

The evidence often *seems* to be going all one way, when in reality it is not so at all. The cleverness of the cross-examiner has a great deal to do with this; he can often create an atmosphere which will obscure much evidence that would otherwise tell against him. This is part of the "generalship of a case" in its progress to the argument, which is of such vast consequence. There is eloquence displayed in the examination of witnesses as well as on the argument. "There is *matter* in *manner*." I do not mean to advocate that exaggerated manner one often meets with, which divides the attention of your hearers between yourself and your question, which often diverts the attention of the jury from the point you are trying to make and centres it upon your own idiosyncrasies of manner and speech. As the man who was somewhat deaf and could not get near enough to Henry Clay in one of his finest efforts, exclaimed, "I didn't hear a word he said, but, great Jehovah, didn't he make the motions!"

The very intonations of voice and the expression of face of the

cross-examiner can be made to produce a marked effect upon the jury and enable them to appreciate fully a point they might otherwise lose altogether.

"Once, when cross-examining a witness by the name of Sampson, who was sued for libel as editor of the *Referee*, Russell asked the witness a question which he did not answer. 'Did you hear my question?' said Russell in a low voice. 'I did,' said Sampson. 'Did you understand it?' asked Russell, in a still lower voice. 'I did,' said Sampson. 'Then,' said Russell, raising his voice to its highest pitch, and looking as if he would spring from his place and seize the witness by the throat, 'why have you not answered it? Tell the jury why you have not answered it.' A thrill of excitement ran through the court room. Sampson was overwhelmed, and he never pulled himself together again."[5]

Speak distinctly yourself, and compel your witness to do so. Bring out your points so clearly that men of the most ordinary intelligence can understand them. Keep your audience—the jury—always interested and on the alert. Remember it is the minds of the jury you are addressing, even though your question is put to the witness. Suit the modulations of your voice to the subject under discussion. Rufus Choate's voice would seem to take hold of the witness, to exercise a certain sway over him, and to silence the audience into a hush. He allowed his rich voice to exhibit in the examination of witnesses, much of its variety and all of its resonance. The contrast between his tone in examining and that

[5] "Life of Lord Russell," O'Brien.

of the counsel who followed him was very marked.

"Mr. Choate's appeal to the jury began long before his final argument; it began when he first took his seat before them and looked into their eyes. He generally contrived to get his seat as near them as was convenient, if possible having his table close to the Bar, in front of their seats, and separated from them only by a narrow space for passage. There he sat, calm, contemplative; in the midst of occasional noise and confusion solemnly unruffled; always making some little headway either with the jury, the court, or the witness; never doing a single thing which could by possibility lose him favor, ever doing some little thing to win it; smiling benignantly upon the counsel when a good thing was said; smiling sympathizingly upon the jury when any juryman laughed or made an inquiry; wooing them all the time with his magnetic glances as a lover might woo his mistress; seeming to preside over the whole scene with an air of easy superiority; exercising from the very first moment an indefinable sway and influence upon the minds of all before and around him. His manner to the jury was that of a *friend*, a friend solicitous to help them through their tedious investigation; never that of an expert combatant, intent on victory, and looking upon them as only instruments for its attainment."[6]

[6] "Reminiscences of Rufus Choate," Parker.

CHAPTER III
THE MATTER OF CROSS-EXAMINATION

If by experience we have learned the first lesson of our art, —to control our *manner* toward the witness even under the most trying circumstances,—it then becomes important that we should turn our attention to the *matter* of our cross-examination. By our manner toward him we may have in a measure disarmed him, or at least put him off his guard, while his memory and conscience are being ransacked by subtle and searching questions, the scope of which shall be hardly apparent to himself; but it is only with the matter of our cross-examination that we can hope to destroy him.

What shall be our first mode of attack? Shall we adopt the fatal method of those we see around us daily in the courts, and proceed to take the witness over the same story that he has already given our adversary, in the absurd hope that he is going to change it in the repetition, and not retell it with double effect upon the jury? Or shall we rather avoid carefully his original story, except in so far as is necessary to refer to it in order to point out its weak spots? Whatever we do, let us do it with quiet dignity, with absolute fairness to the witness; and let us frame our questions in such simple language that there can be no misunderstanding or

confusion. Let us imagine ourselves in the jury box, so that we may see the evidence from their standpoint. We are not trying to make a reputation for ourselves with the audience as "smart" cross-examiners. We are thinking rather of our client and our employment by him to win the jury upon his side of the case. Let us also avoid asking questions recklessly, without any definite purpose. Unskilful questions are worse than none at all, and only tend to uphold rather than to destroy the witness.

All through the direct testimony of our imaginary witness, it will be remembered, we were watching his every movement and expression. Did we find an opening for our cross-examination? Did we detect the weak spot in his narrative? If so, let us waste no time, but go direct to the point. It may be that the witness's situation in respect to the parties or the subject-matter of the suit should be disclosed to the jury, as one reason why his testimony has been shaded somewhat in favor of the side on which he testifies. It may be that he has a direct interest in the result of the litigation, or is to receive some indirect benefit therefrom. Or he may have some other tangible motive which he can gently be made to disclose. Perhaps the witness is only suffering from that partisanship, so fatal to fair evidence, of which oftentimes the witness himself is not conscious. It may even be that, if the jury only knew the scanty means the witness has had for obtaining a correct and certain knowledge of the very facts to which he has sworn so glibly, aided by the adroit questioning of the opposing counsel, this in itself would go far toward weakening the effect

of his testimony. It may appear, on the other hand, that the witness had the best possible opportunity to observe the facts he speaks of, but had not the intelligence to observe these facts correctly. Two people may witness the same occurrence and yet take away with them an entirely different impression of it; but each, when called to the witness stand, may be willing to swear to that impression as a fact. Obviously, both accounts of the same transaction cannot be true; whose impressions were wrong? Which had the better opportunity to see? Which had the keener power of perception? All this we may very properly term the matter of our cross-examination.

It is one thing to have the opportunity of observation, or even the intelligence to observe correctly, but it is still another to be able to retain accurately, for any length of time, what we have once seen or heard, and what is perhaps more difficult still—to be able to describe it intelligibly. Many witnesses have seen one part of a transaction and heard about another part, and later on become confused in their own minds, or perhaps only in their modes of expression, as to what they have seen themselves and what they have heard from others. All witnesses are prone to exaggerate—to enlarge or minimize the facts to which they take oath.

A very common type of witness, met with almost daily, is the man who, having witnessed some event years ago, suddenly finds that he is to be called as a court witness. He immediately attempts to recall his original impressions; and gradually, as he

talks with the attorney who is to examine him, he amplifies his story with new details which he leads himself, or is led, to believe are recollections and which he finally swears to as facts. Many people seem to fear that an "I don't know" answer will be attributed to ignorance on their part. Although perfectly honest in intention, they are apt, in consequence, to complete their story by recourse to their imagination. And few witnesses fail, at least in some part of their story, to entangle facts with their own beliefs and inferences.

All these considerations should readily suggest a line of questions, varying with each witness examined, that will, if closely followed, be likely to separate appearance from reality and to reduce exaggerations to their proper proportions. It must further be borne in mind that the jury should not merely see the mistake; they should be made to appreciate at the time why and whence it arose. It is fresher then and makes a more lasting effect than if left until the summing up, and then drawn to the attention of the jury.

The experienced examiner can usually tell, after a few simple questions, what line to pursue. Picture the scene in your own mind; closely inquire into the sources of the witness's information, and draw your own conclusions as to how his mistake arose, and why he formed his erroneous impressions. Exhibit plainly your belief in his integrity and your desire to be fair with him, and try to beguile him into being candid with you. Then when the particular foible which has affected his testimony

has once been discovered, he can easily be led to expose it to the jury. His mistakes should be drawn out often by inference rather than by direct question, because all witnesses have a dread of self-contradiction. If he sees the connection between your inquiries and his own story, he will draw upon his imagination for explanations, before you get the chance to point out to him the inconsistency between his later statement and his original one. It is often wise to break the effect of a witness's story by putting questions to him that will acquaint the jury at once with the fact that there is another more probable story to be told later on, to disclose to them something of the defence, as it were. Avoid the mistake, so common among the inexperienced, of making much of trifling discrepancies. It has been aptly said that "juries have no respect for small triumphs over a witness's self-possession or memory." Allow the loquacious witness to talk on; he will be sure to involve himself in difficulties from which he can never extricate himself. Some witnesses prove altogether too much; encourage them and lead them by degrees into exaggerations that will conflict with the common sense of the jury. Under no circumstances put a false construction on the words of a witness; there are few faults in an advocate more fatal with a jury.

If, perchance, you obtain a really favorable answer, leave it and pass quietly to some other inquiry. The inexperienced examiner in all probability will repeat the question with the idea of impressing the admission upon his hearers, instead of reserving it for the summing up, and will attribute it to bad luck

that his witness corrects his answer or modifies it in some way, so that the point is lost. He is indeed a poor judge of human nature who supposes that if he exults over his success during the cross-examination, he will not quickly put the witness on his guard to avoid all future favorable disclosures.

David Graham, a prudent and successful cross-examiner, once said, perhaps more in jest than anything else, "A lawyer should never ask a witness on cross-examination a question unless in the first place he knew what the answer would be, or in the second place he didn't care." This is something on the principle of the lawyer who claimed that the result of most trials depended upon which side perpetrated the greatest blunders in cross-examination. Certainly no lawyer should ask a *critical* question unless he is sure of the answer.

Mr. Sergeant Ballantine, in his "Experiences," quotes an instance in the trial of a prisoner on the charge of homicide, where a once famous English barrister had been induced by the urgency of an attorney, although against his own judgment, to ask a question on cross-examination, the answer to which convicted his client. Upon receiving the answer, he turned to the attorney who had advised him to ask it, and said, emphasizing every word, "Go home; cut your throat; and when you meet your client in hell, beg his pardon."

It is well, sometimes, in a case where you believe that the witness is reluctant to develop the whole truth, so to put questions that the answers you know will be elicited may come by way

of a surprise and in the light of improbability to the jury. I remember a recent incident, illustrative of this point, which occurred in a suit brought to recover the insurance on a large warehouse full of goods that had been burnt to the ground. The insurance companies had been unable to find any stock-book which would show the amount of goods in stock at the time of the fire. One of the witnesses to the fire happened to be the plaintiff's bookkeeper, who on the direct examination testified to all the details of the fire, but nothing about the books. The cross-examination was confined to these few pointed questions.

"I suppose you had an iron safe in your office, in which you kept your books of account?" "Yes, sir."—"Did that burn up?" "Oh, no."—"Were you present when it was opened after the fire?" "Yes, sir."—"Then won't you be good enough to hand me the stock-book that we may show the jury exactly what stock you had on hand at the time of the fire on which you claim loss?" (This was the point of the case and the jury were not prepared for the answer which followed.) "I haven't it, sir."—"What, haven't the stock-book? You don't mean you have lost it?" "It wasn't in the safe, sir."—"Wasn't that the proper place for it?" "Yes, sir."—"How was it that the book wasn't there?" "It had evidently been left out the night before the fire by mistake." Some of the jury at once drew the inference that the all-important stock-book was being suppressed, and refused to agree with their fellows against the insurance companies.

The average mind is much wiser than many suppose.

Questions can be put to a witness under cross-examination, in argumentative form, often with far greater effect upon the minds of the jury than if the same line of reasoning were reserved for the summing up. The juryman sees the point for himself, as if it were his own discovery, and clings to it all the more tenaciously. During the cross-examination of Henry Ward Beecher, in the celebrated Tilton-Beecher case, and after Mr. Beecher had denied his alleged intimacy with Mr. Tilton's wife, Judge Fullerton read a passage from one of Mr. Beecher's sermons to the effect that if a person commits a great sin, the exposure of which would cause misery to others, such a person would not be justified in confessing it, merely to relieve his own conscience. Fullerton then looked straight into Mr. Beecher's eyes and said, "Do you still consider that sound doctrine?" Mr. Beecher replied, "I do." The inference a juryman might draw from this question and answer would constitute a subtle argument upon that branch of the case.

The entire effect of the testimony of an adverse witness can sometimes be destroyed by a pleasant little passage-at-arms in which he is finally held up to ridicule before the jury, and all that he has previously said against you disappears in the laugh that accompanies him from the witness box. In a recent Metropolitan Street Railway case a witness who had been badgered rather persistently on cross-examination, finally straightened himself up in the witness chair and said pertly, "I have not come here

asking you to *play with me*. Do you take me for Anna Held?"[7] "I was not thinking of Anna Held," replied the counsel quietly; "supposing you try *Ananias*!" The witness was enraged, the jury laughed, and the lawyer, who had really made nothing out of the witness up to this time, sat down.

These little triumphs are, however, by no means always one-sided. Often, if the council gives him an opening, a clever witness will counter on him in a most humiliating fashion, certain to meet with the hearty approval of jury and audience. At the Worster Assizes, in England, a case was being tried which involved the soundness of a horse, and a clergyman had been called as a witness who succeeded only in giving a rather confused account of the transaction. A blustering counsel on the other side, after many attempts to get at the facts upon cross-examination, blurted out, "Pray, sir, do you know the difference between a horse and a cow?" "I acknowledge my ignorance," replied the clergyman; "I hardly do know the difference between a horse and a cow, or between a bull and a bully—only a bull, I am told, has horns, and a bully (bowing respectfully to the counsel), *luckily for me*, has none."[8] Reference is made in a subsequent chapter to the cross-examination of Dr. – in the Carlyle Harris case, where is related at length a striking example of success in this method of examination.

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[7] This occurrence was at the time when the actress Anna Held was singing her popular stage song, "Won't you come and play with me."

[8] "Curiosities of Law and Lawyers."

It may not be uninteresting to record in this connection one or two cases illustrative of matter that is valuable in cross-examination in personal damage suits where the sole object of counsel is to reduce the amount of the jury's verdict, and to puncture the pitiful tale of suffering told by the plaintiff in such cases.

A New York commission merchant, named Metts, sixty-six years of age, was riding in a Columbus Avenue open car. As the car neared the curve at Fifty-third Street and Seventh Avenue, and while he was in the act of closing an open window in the front of the car at the request of an old lady passenger, the car gave a sudden, violent lurch, and he was thrown into the street, receiving injuries from which, at the time of the trial, he had suffered for three years.

Counsel for the plaintiff went into his client's sufferings in great detail. Plaintiff had had concussion of the brain, loss of memory, bladder difficulties, a broken leg, nervous prostration, constant pain in his back. And the attempt to alleviate the pain attendant upon all these difficulties was gone into with great detail. To cap all, the attending physician had testified that the reasonable value of his professional services was the modest sum of $2500.

Counsel for the railroad, before cross-examining, had made a critical examination of the doctor's face and bearing in the witness chair, and had concluded that, if pleasantly handled, he could be made to testify pretty nearly to the truth, whatever it

might be. He concluded to spar for an opening, and it came within the first half-dozen questions:—

Counsel. "What medical name, doctor, would you give to the plaintiff's present ailment?"

Doctor. "He has what is known as 'traumatic microsis.'"

Counsel. "*Microsis*, doctor? That means, does it not, the habit, or disease as you may call it, of making much of ailments that an ordinary healthy man would pass by as of no account?"

Doctor. "That is right, sir."

Counsel (smiling). "I hope you haven't got this disease, doctor, have you?"

Doctor. "Not that I am aware of, sir."

Counsel. "Then we ought to be able to get a very fair statement from you of this man's troubles, ought we not?"

Doctor. "I hope so, sir."

The opening had been found; witness was already flattered into agreeing with all suggestions, and warned against exaggeration.

Counsel. "Let us take up the bladder trouble first. Do not practically all men who have reached the age of sixty-six have troubles of one kind or another that result in more or less irritation of the bladder?"

Doctor. "Yes, that is very common with old men."

Counsel. "You said Mr. Metts was deaf in one ear. I noticed that he seemed to hear the questions asked him in court particularly well; did you notice it?"

Doctor. "I did."

Counsel. "At the age of sixty-six are not the majority of men gradually failing in their hearing?"

Doctor. "Yes, sir, frequently."

Counsel. "Frankly, doctor, don't you think this man hears remarkably well for his age, leaving out the deaf ear altogether?"

Doctor. "I think he does."

Counsel (keeping the ball rolling). "I don't think you have even the first symptoms of this 'traumatic microsis,' doctor."

Doctor (pleased). "I haven't got it at all."

Counsel. "You said Mr. Metts had had concussion of the brain. Has not every boy who has fallen over backward, when skating on the ice, and struck his head, also had what you physicians would call 'concussion of the brain'?"

Doctor. "Yes, sir."

Counsel. "But I understood you to say that this plaintiff had had, in addition, hæmorrhages of the brain. Do you mean to tell us that he could have had hæmorrhages of the brain and be alive to-day?"

Doctor. "They were microscopic hæmorrhages."

Counsel. "That is to say, one would have to take a microscope to find them?"

Doctor. "That is right."

Counsel. "You do not mean us to understand, doctor, that you have not cured him of these microscopic hæmorrhages?"

Doctor. "I have cured him; that is right."

Counsel. "You certainly were competent to set his broken leg or you wouldn't have attempted it; did you get a good union?"

Doctor. "Yes, he has got a good, strong, healthy leg."

Counsel having elicited, by the "smiling method," all the required admissions, suddenly changed his whole bearing toward the witness, and continued pointedly:—

Counsel. "And you said that $2500 would be a fair and reasonable charge for your services. It is three years since Mr. Metts was injured. Have you sent him no bill?"

Doctor. "Yes, sir, I have."

Counsel. "Let me see it. (Turning to plaintiff's counsel.) Will either of you let me have the bill?"

Doctor. "I haven't it, sir."

Counsel (astonished). "What was the amount of it?"

Doctor. "$1000."

Counsel (savagely). "Why do you charge the railroad company two and a half times as much as you charge the patient himself?"

Doctor (embarrassed at this sudden change on part of counsel). "You asked me what my services were worth."

Counsel. "Didn't you charge your patient the full worth of your services?"

Doctor (no answer).

Counsel (quickly). "How much have you been *paid* on your bill—on your oath?"

Doctor. "He paid me $100 at one time, that is, two years ago; and at two different times since he has paid me $30."

Counsel. "And he is a rich commission merchant down town!" (And with something between a sneer and a laugh counsel sat down.)

An amusing incident, leading to the exposure of a manifest fraud, occurred recently in another of the many damage suits brought against the Metropolitan Street Railway and growing out of a collision between two of the company's electric cars.

The plaintiff, a laboring man, had been thrown to the street pavement from the platform of the car by the force of the collision, and had dislocated his shoulder. He had testified in his own behalf that he had been permanently injured in so far as he had not been able to follow his usual employment for the reason that he could not raise his arm above a point parallel with his shoulder. Upon cross-examination the attorney for the railroad asked the witness a few sympathetic questions about his sufferings, and upon getting on a friendly basis with him asked him "to be good enough to show the jury the extreme limit to which he could raise his arm since the accident." The plaintiff slowly and with considerable difficulty raised his arm to the parallel of his shoulder. "Now, using the same arm, show the jury how high you could get it up before the accident," quietly continued the attorney; whereupon the witness extended his arm to its full height above his head, amid peals of laughter from the court and jury.

In a case of murder, to which the defence of insanity was set up, a medical witness called on behalf of the accused swore that

in his opinion the accused, at the time he killed the deceased, was affected with a homicidal mania, and urged to the act by an *irresistible* impulse. The judge, not satisfied with this, first put the witness some questions on other subjects, and then asked, "Do you think the accused would have acted as he did if a policeman had been present?" to which the witness at once answered in the negative. Thereupon the judge remarked, "Your definition of an irresistible impulse must then be an impulse irresistible at all times except when a policeman is present."

CHAPTER IV
CROSS-EXAMINATION OF THE PERJURED WITNESS

In the preceding chapters it was attempted to offer a few suggestions, gathered from experience, for the proper handling of an honest witness who, through ignorance or partisanship, and more or less unintentionally, had testified to a mistaken state of facts injurious to our side of the litigation. In the present chapter it is proposed to discuss the far more difficult task of exposing, by the arts of cross-examination, the intentional Fraud, the perjured witness. Here it is that the greatest ingenuity of the trial lawyer is called into play; here rules help but little as compared with years of actual experience. What can be conceived more difficult in advocacy than the task of proving a witness, whom you may neither have seen nor heard of before he gives his testimony against you, to be a wilful perjurer, as it were out of his own mouth?

It seldom happens that a witness's entire testimony is false from beginning to end. Perhaps the greater part of it is true, and only the crucial part—the point, however, on which the whole case may turn—is wilfully false. If, at the end of his direct testimony, we conclude that the witness we have to cross-examine—to continue the imaginary trial we were conducting in

the previous chapter—comes under this class, what means are we to employ to expose him to the jury?

Let us first be certain we are right in our estimate of him—that he intends perjury. Embarrassment is one of the emblems of perjury, but by no means always so. The novelty and difficulty of the situation—being called upon to testify before a room full of people, with lawyers on all sides ready to ridicule or abuse—often occasions embarrassment in witnesses of the highest integrity. Then again some people are constitutionally nervous and could be nothing else when testifying in open court. Let us be sure our witness is not of this type before we subject him to the particular form of torture we have in store for the perjurer.

Witnesses of a low grade of intelligence, when they testify falsely, usually display it in various ways: in the voice, in a certain vacant expression of the eyes, in a nervous twisting about in the witness chair, in an apparent effort to recall to mind the exact wording of their story, and especially in the use of language not suited to their station in life. On the other hand, there is something about the manner of an honest but ignorant witness that makes it at once manifest to an experienced lawyer that he is narrating only the things that he has actually seen and heard. The expression of the face changes with the narrative as he recalls the scene to his mind; he looks the examiner full in the face; his eye brightens as he recalls to mind the various incidents; he uses gestures natural to a man in his station of life, and suits them to the part of the story he is narrating, and he tells his tale in his

own accustomed language.

If, however, the manner of the witness and the wording of his testimony bear all the earmarks of fabrication, it is often useful, as your first question, to ask him to repeat his story. Usually he will repeat it in almost identically the same words as before, showing he has learned it by heart. Of course it is possible, though not probable, that he has done this and still is telling the truth. Try him by taking him to the middle of his story, and from there jump him quickly to the beginning and then to the end of it. If he is speaking by rote rather than from recollection, he will be sure to succumb to this method. He has no facts with which to associate the wording of his story; he can only call it to mind as a whole, and not in detachments. Draw his attention to other facts entirely disassociated with the main story as told by himself. He will be entirely unprepared for these new inquiries, and will draw upon his imagination for answers. Distract his thoughts again to some new part of his main story and then suddenly, when his mind is upon another subject, return to those considerations to which you had first called his attention, and ask him the same questions a second time. He will again fall back upon his imagination and very likely will give a different answer from the first—and you have him in the net. He cannot invent answers as fast as you can invent questions, and at the same time remember his previous inventions correctly; he will not keep his answers all consistent with one another. He will soon become confused and, from that time on, will be at your mercy.

Let him go as soon as you have made it apparent that he is not mistaken, but lying.

An amusing account is given in the *Green Bag* for November, 1891, of one of Jeremiah Mason's cross-examinations of such a witness. "The witness had previously testified to having heard Mason's client make a certain statement, and it was upon the evidence of that statement that the adversary's case was based. Mr. Mason led the witness round to his statement, and again it was repeated verbatim. Then, without warning, he walked to the stand, and pointing straight at the witness said, in his high, impassioned voice, 'Let's see that paper you've got in your waistcoat pocket!' Taken completely by surprise, the witness mechanically drew a paper from the pocket indicated, and handed it to Mr. Mason. The lawyer slowly read the exact words of the witness in regard to the statement, and called attention to the fact that they were in the handwriting of the lawyer on the other side.

"'Mr. Mason, how under the sun did you know that paper was there?' asked a brother lawyer. 'Well,' replied Mr. Mason, 'I thought he gave that part of his testimony just as if he'd heard it, and I noticed every time he repeated it he put his hand to his waistcoat pocket, and then let it fall again when he got through.'"

Daniel Webster considered Mason the greatest lawyer that ever practised at the New England Bar. He said of him, "I would rather, after my own experience, meet all the lawyers I have ever known combined in a case, than to meet him alone and

single-handed." Mason was always reputed to have possessed to a marked degree "the instinct for the weak point" in the witness he was cross-examining.

If perjured testimony in our courts were confined to the ignorant classes, the work of cross-examining them would be a comparatively simple matter, but unfortunately for the cause of truth and justice this is far from the case. Perjury is decidedly on the increase, and at the present time scarcely a trial is conducted in which it does not appear in a more or less flagrant form. Nothing in the trial of a cause is so difficult as to expose the perjury of a witness whose intelligence enables him to hide his lack of scruple. There are various methods of attempting it, but no uniform rule can be laid down as to the proper manner to be displayed toward such a witness. It all depends upon the individual character you have to unmask. In a large majority of cases the chance of success will be greatly increased by not allowing the witness to see that you suspect him, before you have led him to commit himself as to various matters with which you have reason to believe you can confront him later on.

Two famous cross-examiners at the Irish Bar were Sergeant Sullivan, afterwards Master of the Rolls in Ireland, and Sergeant Armstrong. Barry O'Brien, in his "Life of Lord Russell," describes their methods. "Sullivan," he says, "approached the witness quite in a friendly way, seemed to be an impartial inquirer seeking information, looked surprised at what the witness said, appeared even grateful for the additional light thrown on the

case. 'Ah, indeed! Well, as you have said so much, perhaps you can help us a little further. Well, really, my Lord, this is a very intelligent man.' So playing the witness with caution and skill, drawing him stealthily on, keeping him completely in the dark about the real point of attack, the 'little sergeant' waited until the man was in the meshes, and then flew at him and shook him as a terrier would a rat.

"The 'big Sergeant' (Armstrong) had more humor and more power, but less dexterity and resource. His great weapon was ridicule. He laughed at the witness and made everybody else laugh. The witness got confused and lost his temper, and then Armstrong pounded him like a champion in the ring."

In some cases it is wise to confine yourself to one or two salient points on which you feel confident you can get the witness to contradict himself out of his own mouth. It is seldom useful to press him on matters with which he is familiar. It is the safer course to question him on circumstances connected with his story, but to which he has not already testified and for which he would not be likely to prepare himself.

A simple but instructive example of cross-examination, conducted along these lines, is quoted from Judge J. W. Donovan's "Tact in Court." It is doubly interesting in that it occurred in Abraham Lincoln's first defence at a murder trial.

"Grayson was charged with shooting Lockwood at a camp-meeting, on the evening of August 9, 18—, and with running away from the scene of the killing, which was witnessed by

Sovine. The proof was so strong that, even with an excellent previous character, Grayson came very near being lynched on two occasions soon after his indictment for murder.

"The mother of the accused, after failing to secure older counsel, finally engaged young Abraham Lincoln, as he was then called, and the trial came on to an early hearing. No objection was made to the jury, and no cross-examination of witnesses, save the last and only important one, who swore that he knew the parties, saw the shot fired by Grayson, saw him run away, and picked up the deceased, who died instantly.

"The evidence of guilt and identity was morally certain. The attendance was large, the interest intense. Grayson's mother began to wonder why 'Abraham remained silent so long and why he didn't do something!' The people finally rested. The tall lawyer (Lincoln) stood up and eyed the strong witness in silence, without books or notes, and slowly began his defence by these questions:

"*Lincoln.* 'And you were with Lockwood just before and saw the shooting?'

"*Witness.* 'Yes.'

"*Lincoln.* 'And you stood very near to them?'

"*Witness.* 'No, about twenty feet away.'

"*Lincoln.* 'May it not have been *ten* feet?'

"*Witness.* 'No, it was twenty feet *or more*.'

"*Lincoln.* 'In the open field?'

"*Witness.* 'No, in the timber.'

"*Lincoln.* 'What kind of timber?'

"*Witness.* 'Beech timber.'

"*Lincoln.* 'Leaves on it are rather thick in August?'

"*Witness.* 'Rather.'

"*Lincoln.* 'And you think *this* pistol was the one used?'

"*Witness.* 'It looks like it.'

"*Lincoln.* 'You could see defendant shoot—see how the barrel hung, and all about it?'

"*Witness.* 'Yes.'

"*Lincoln.* 'How near was this to the meeting place?'

"*Witness.* 'Three-quarters of a mile away.'

"*Lincoln.* 'Where were the lights?'

"*Witness.* 'Up by the minister's stand.'

"*Lincoln.* 'Three-quarters of a mile away?'

"*Witness.* 'Yes,—I answered ye *twiste*.'

"*Lincoln.* 'Did you not see a candle there, with Lockwood or Grayson?'

"*Witness.* 'No! what would we want a candle for?'

"*Lincoln.* 'How, then, did you see the shooting?'

"*Witness.* 'By moonlight!' (defiantly).

"*Lincoln.* 'You saw this shooting at ten at night—in beech timber, three-quarters of a mile from the lights—saw the pistol barrel—saw the man fire—saw it twenty feet away—saw it all by moonlight? Saw it nearly a mile from the camp lights?'

"*Witness.* 'Yes, I told you so before.'

"The interest was now so intense that men leaned forward to

catch the smallest syllable. Then the lawyer drew out a blue-covered almanac from his side coat pocket—opened it slowly—offered it in evidence—showed it to the jury and the court—read from a page with careful deliberation that the moon on that night was unseen and only arose at *one* the next morning.

"Following this climax Mr. Lincoln moved the arrest of the perjured witness as the real murderer, saying: 'Nothing but *a motive to clear himself* could have induced him to swear away so falsely the life of one who never did him harm!' With such determined emphasis did Lincoln present his showing that the court ordered Sovine arrested, and under the strain of excitement he broke down and confessed to being the one who fired the fatal shot himself, but denied it was intentional."

A difficult but extremely effective method of exposing a certain kind of perjurer is to lead him gradually to a point in his story, where—in his answer to the final question "Which?"—he will have to choose either one or the other of the only two explanations left to him, either of which would degrade if not entirely discredit him in the eyes of the jury.

The writer once heard the Hon. Joseph H. Choate make very telling use of this method of examination. A stock-broker was being sued by a married woman for the return of certain bonds and securities in the broker's possession, which she alleged belonged to her. Her husband took the witness-stand and swore that he had deposited the securities with the stock-broker as collateral against his market speculations, but that they did not

belong to him, and that he was acting for himself and not as agent for his wife, and had taken her securities unknown to her.

It was the contention of Mr. Choate that, even if the bonds belonged to the wife, she had either consented to her husband's use of the bonds, or else was a partner with him in the transaction. Both of these contentions were denied under oath by the husband.

Mr. Choate. "When you ventured into the realm of speculations in Wall Street I presume you contemplated the possibility of the market going against you, did you not?"

Witness. "Well, no, Mr. Choate, I went into Wall Street to make money, not to lose it."

Mr. Choate. "Quite so, sir; but you will admit, will you not, that sometimes the stock market goes contrary to expectations?"

Witness. "Oh, yes, I suppose it does."

Mr. Choate. "You say the bonds were not your own property, but your wife's?"

Witness. "Yes, sir."

Mr. Choate. "And you say that she did not lend them to you for purposes of speculation, or even know you had possession of them?"

Witness. "Yes, sir."

Mr. Choate. "You even admit that when you deposited the bonds with your broker as collateral against your stock speculations, you did not acquaint him with the fact that they were not your own property?"

Witness. "I did not mention whose property they were, sir."

Mr. Choate (in his inimitable style). "Well, sir, in the event of the market going against you and your collateral being sold to meet your losses, *whom did you intend to cheat, your broker or your wife*?"

The witness could give no satisfactory answer, and for once a New York jury was found who were willing to give a verdict against the customer and in favor of a Wall Street broker.

In the great majority of cases, however, the most skilful efforts of the cross-examiner will fail to lead the witness into such "traps" as these. If you have accomplished one such *coup*, be content with the point you have made; do not try to make another with the same witness; sit down and let the witness leave the stand.

But let us suppose you are examining a witness with whom no such climax is possible. Here you will require infinite patience and industry. Try to show that his story is inconsistent with itself, or with other known facts in the case, or with the ordinary experience of mankind. There is a wonderful power in persistence. If you fail in one quarter, abandon it and try something else. There is surely a weak spot somewhere, if the story is perjured. Frame your questions skilfully. Ask them as if you wanted a certain answer, when in reality you desire just the opposite one. "Hold your own temper while you lead the witness to lose his" is a Golden Rule on all such occasions. If you allow the witness a chance to give his reasons or explanations, you may

be sure they will be damaging to you, not to him. If you can succeed in tiring out the witness or driving him to the point of sullenness, you have produced the effect of lying.

But it is not intended to advocate the practice of lengthy cross-examinations because the effect of them, unless the witness is broken down, is to lead the jury to exaggerate the importance of evidence given by a witness who requires so much cross-examination in the attempt to upset him. "During the Tichborne trial for perjury, a remarkable man named Luie was called to testify. He was a shrewd witness and told his tale with wonderful precision and apparent accuracy. That it was untrue there could hardly be a question, but that it could be proved untrue was extremely doubtful and an almost hopeless task. It was an improbable story, but still was not an absolutely impossible one. If true, however, the claimant was the veritable Roger Tichborne, or at least the probabilities would be so immensely in favor of that supposition that no jury would agree in finding that he was Arthur Orton. His manner of giving his evidence was perfect. After the trial one of the jurors was asked what he thought of Luie's evidence, and if he ever attached any importance to his story. He replied that at the close of the evidence-in-chief he thought it so improbable that no credence could be given to it. But after Mr. Hawkins had been at him for a day and could not shake him, I began to think, if such a cross-examiner as that cannot touch him, there must be something in what he says, and I began to waver. I could not understand how it was that, if it was all lies,

it did not break down under such able counsel."[9]

The presiding judge, whose slightest word is weightier than the eloquence of counsel, will often interrupt an aimless and prolonged cross-examination with an abrupt, "Mr. –, I think we are wasting time," or "I shall not allow you to pursue that subject further," or "I cannot see the object of this examination." This is a setback from which only the most experienced advocate can readily recover. Before the judge spoke, the jury, perhaps, were already a little tired and inattentive and anxious to finish the case; they were just in the mood to agree with the remark of his Honor, and the "ATMOSPHERE of the case," as I have always termed it, was fast becoming unfavorable to the delinquent attorney's client. How important a part in the final outcome of every trial this atmosphere of the case usually plays! Many jurymen lose sight of the parties to the litigation—our clients—in their absorption over the conflict of wits going on between their respective lawyers.

It is in criminal prosecutions where local politics are involved, that the jury system is perhaps put to its severest test. The ordinary juryman is so apt to be blinded by his political prejudices that where the guilt or innocence of the prisoner at the Bar turns upon the question as to whether the prisoner did or did not perform some act, involving a supposed advantage to his political party, the jury is apt to be divided upon political lines.

About ten years ago, when a wave of political reform was sweeping over New York City, the Good Government Clubs

[9] "Hints on Advocacy," Harris.

caused the arrest of about fifty inspectors of election for violations of the election laws. These men were all brought up for trial in the Supreme Court criminal term, before Mr. Justice Barrett. The prisoners were to be defended by various leading trial lawyers, and everything depended upon the result of the first few cases tried. If these trials resulted in acquittals, it was anticipated that there would be acquittals all along the line; if the first offenders put on trial were convicted and sentenced to severe terms in prison, the great majority of the others would plead guilty, and few would escape.

At that time the county of New York was divided, for purposes of voting, into 1067 election districts, and on an average perhaps 250 votes were cast in each district. An inspector of one of the election districts was the first man called for trial. The charge against him was the failure to record correctly the vote cast in his district for the Republican candidate for alderman. In this particular election district there had been 167 ballots cast, and it was the duty of the inspectors to count them and return the result of their count to police headquarters.

At the trial twelve respectable citizens took the witness chair, one after another, and affirmed that they lived in the prisoner's election district, and had all cast their ballots on election day for the Republican candidate. The official count for that district, signed by the prisoner, was then put in evidence, which read: Democratic votes, 167; Republican, 0. There were a number of witnesses called by the defence who were Democrats. The case

began to take on a political aspect, which was likely to result in a divided jury and no conviction, since it had been shown that the prisoner had a most excellent reputation and had never been suspected of wrong-doing before. Finally the prisoner himself was sworn in his own behalf.

It was the attempt of the cross-examiner to leave the witness in such a position before the jury that no matter what their politics might be, they could not avoid convicting him. There were but five questions asked.

Counsel. "You have told us, sir, that you have a wife and seven children depending upon you for support. I presume your desire is not to be obliged to leave them; is it not?"

Prisoner. "Most assuredly, sir."

Counsel. "Apart from that consideration I presume you have no particular desire to spend a term of years in Sing Sing prison?"

Prisoner. "Certainly not, sir."

Counsel. "Well, you have heard twelve respectable citizens take the witness-stand and swear they voted the Republican ticket in your district, have you not?"

Prisoner. "Yes, sir."

Counsel (pointing to the jury). "And you see these twelve respectable gentlemen sitting here ready to pass judgment upon the question of your liberty, do you not?"

Prisoner. "I do, sir."

Counsel (impressively, but quietly). "Well, now, Mr. –, you will please explain to these twelve gentlemen (pointing to jury)

how it was that the ballots cast by the other twelve gentlemen were not counted by you, and then you can take your hat and walk right out of the court room a free man."

The witness hesitated, cast down his eyes, but made no answer —and counsel sat down.

Of course a conviction followed. The prisoner was sentenced to five years in state prison. During the following few days nearly thirty defendants, indicted for similar offences, pleaded guilty, and the entire work of the court was completed within a few weeks. There was not a single acquittal or disagreement.

Occasionally, when sufficient knowledge of facts about the witness or about the details of his direct testimony can be correctly anticipated, a trap may be set into which even a clever witness, as in the illustration that follows, will be likely to fall.

During the lifetime of Dr. J. W. Ranney there were few physicians in this country who were so frequently seen on the witness-stand, especially in damage suits. So expert a witness had he become that Chief Justice Van Brunt many years ago is said to have remarked, "Any lawyer who attempts to cross-examine Dr. Ranney is a fool." A case occurred a few years before Dr. Ranney died, however, where a failure to cross-examine would have been tantamount to a confession of judgment, and the trial lawyer having the case in charge, though fully aware of the dangers, was left no alternative, and as so often happens where "fools rush in," made one of those lucky "bull's eyes" that is perhaps worth recording.

It was a damage case brought against the city by a lady who, on her way from church one spring morning, had tripped over an obscure encumbrance in the street, and had, in consequence, been practically bedridden for the three years leading up to the day of trial. She was brought into the court room in a chair and was placed in front of the jury, a pallid, pitiable object, surrounded by her women friends, who acted upon this occasion as nurses, constantly bathing her hands and face with ill-smelling ointments, and administering restoratives, with marked effect upon the jury.

Her counsel, Ex-chief Justice Noah Davis, claimed that her spine had been permanently injured, and asked the jury for $50,000 damages.

Конец ознакомительного фрагмента.