The art of cross-examination / by Francis L. Wellman : with the cross-examinations of important witnesses in some celebrated cases.

THE ART OF CROSS-EXAMINATION


The MMCo

THE ART OF

CROSS-EXAMINATION

BY

FRANCIS L. WELLMAN

OF THE NEW YORK BAR

WITH THE CROSS-EXAMINATIONS OF IMPORTANT WITNESSES IN SOME CELEBRATED CASES

New York

THE MACMILLAN COMPANY

LONDON: MACMILLAN & CO., LTD.

1904

Set up, electrotyped, and published December, 1903. Reprinted January, 1904.

Norwood Press
J. S. Cushing & Co. — Berwick & Smith Co.
Norwood, Mass., U.S.A.

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.

CONTENTS

CHAPTER I

INTRODUCTORY

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 abil-

ity, 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*

[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.

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 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

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 wit-

ness 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."[1]

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

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

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."[1] [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 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

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

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." [1]

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 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

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

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."[1]

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 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

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

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."[1]

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

CHAPTER III

THE MATTER OF CROSS-EXAMINATION

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?"[1] "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

[1] 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."

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."[1] 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.

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, receiv-

[1] "Curiosities of Law and Lawyers."

ing 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

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 accom-

plished 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."[1]

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 set-

[1] "Hints on Advocacy," Harris.

back 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 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.

It appeared that Dr. Ranney had been in constant attendance upon the patient ever since the day of her accident. He testified that he had visited her some three hundred times and had examined her minutely at least two hundred times in order to make up his mind as to the absolutely correct diagnosis of her case, which he was now thoroughly satisfied was one of genuine disease of the spinal marrow itself. Judge Davis asked him a few preliminary questions, and then gave the doctor his head and let him "turn to the jury and tell them all about it." Dr. Ranney spoke uninterruptedly for nearly three-quarters of an hour. He described in

detail the sufferings of his patient since she had been under his care; his efforts to relieve her pain; the hopeless nature of her malady. He then proceeded in a most impressive way to picture to the jury the gradual and relentless progress of the disease as it assumed the form of creeping paralysis, involving the destruction of one organ after another until death became a blessed relief. At the close of this recital, without a question more, Judge Davis said in a calm but triumphant tone, "Do you wish to cross-examine?"

Now the point in dispute — there was no defence on the merits — was the nature of the patient's malady. The city's medical witnesses were unanimous that the lady had not, and could not have, contracted spinal disease from the slight injury she had received. They styled her complaint as "hysterical," existing in the patient's mind alone, and not indicating nor involving a single diseased organ; but the jury evidently all believed Dr. Ranney, and were anxious to render a verdict on his testimony. He must be cross-examined. Absolute failure could be no worse than silence, though it was evident that, along expected lines, questions relating to his direct evidence would be worse than useless. Counsel was well aware of the doctor's reputed fertility of resource, and quickly decided upon his tactics.

The cross-examiner first directed his questions toward developing before the jury the fact that the witness had been the medical expert for the New York, New Haven,

and Hartford R. R. thirty-five years, for the New York Central R. R. forty years, for the New York and Harlem River R. R. twenty years, for the Erie R. R. fifteen years, and so on until the doctor was forced to admit that he was so much in court as a witness in defence of these various railroads, and was so occupied with their affairs that he had but comparatively little time to devote to his reading and private practice.

Counsel (perfectly quietly). "Are you able to give us, doctor, the name of any medical authority that agrees with you when you say that the particular group of symptoms existing in this case points to one disease and one only?"

Doctor. "Oh, yes, Dr. Ericson agrees with me."

Counsel. "Who is Dr. Ericson, if you please?"

Doctor (with a patronizing smile). "Well, Mr. ——, Ericson was probably one of the most famous surgeons that England has ever produced." (There was a titter in the audience at the expense of counsel.)

Counsel. "What book has he written?"

Doctor (still smiling). "He has written a book called 'Ericson on the Spine,' which is altogether the best known work on the subject." (The titter among the audience grew louder.)

Counsel. "When was this book published?"

Doctor. "About ten years ago."

Counsel. "Well, how is it that a man whose time is so much occupied as you have told us yours is, has

leisure enough to look up medical authorities to see if they agree with him?"

Doctor (fairly beaming on counsel). "Well, Mr. ——, to tell you the truth, I have often heard of you, and I half suspected you would ask me some such foolish question; so this morning after my breakfast, and before starting for court, I took down from my library my copy of Ericson's book, and found that he agreed entirely with my diagnosis in this case." (Loud laughter at expense of counsel, in which the jury joined.)

Counsel (reaching under the counsel table and taking up his own copy of "Ericson on the Spine," and walking deliberately up to the witness). "Won't you be good enough to point out to me where Ericson adopts your view of this case?"

Doctor (embarrassed). "Oh, I can't do it now; it is a very thick book."

Counsel (still holding out the book to the witness). "But you forget, doctor, that thinking I might ask you some such foolish question, you examined your volume of Ericson this very morning after breakfast and before coming to court."

Doctor (becoming more embarrassed and still refusing to take the book). "I have not time to do it now."

Counsel. "*Time!* why there is all the time in the world."

Doctor. (no answer).

Counsel and witness eye each other closely.

Counsel (sitting down, still eying witness). "I am sure the court will allow me to suspend my examination until you shall have had time to turn to the place you read this morning in that book, and can reread it now aloud to the jury."

Doctor (no answer).

The court room was in deathly silence for fully three minutes. The witness *wouldn't* say anything, counsel for plaintiff *didn't dare* to say anything, and counsel for the city *didn't want* to say anything; he saw that he had caught the witness in a manifest falsehood, and that the doctor's whole testimony was discredited with the jury unless he could open to the paragraph referred to which counsel well knew did not exist in the whole work of Ericson.

At the expiration of a few minutes, Mr. Justice Barrett, who was presiding at the trial, turned quietly to the witness and asked him if he desired to answer the question, and upon his replying that he did not intend to answer it any further than he had already done, he was excused from the witness-stand amid almost breathless silence in the court room. As he passed from the witness chair to his seat, he stooped and whispered into the ear of counsel, "You are the ——est most impertinent man I have ever met."

After a ten days' trial the jury were unable to forget the collapse of the plaintiff's principal witness, and failed to agree upon a verdict.

CHAPTER V

CROSS-EXAMINATION OF EXPERTS

CHAPTER V

CROSS-EXAMINATION OF EXPERTS

In these days when it is impossible to know everything, but it becomes necessary for success in any avocation to know something of everything and everything of something, the expert is more and more called upon as a witness both in civil and criminal cases. In these times of specialists, their services are often needed to aid the jury in their investigations of questions of fact relating to subjects with which the ordinary man is not acquainted.

The cross-examination of various experts, whether medical, handwriting, real estate, or other specialists, is a subject of growing importance, but it is intended in this chapter merely to make some suggestions, and to give a few illustrations of certain methods that may be adopted with more or less success in the examination of this class of witnesses.

It has become a matter of common observation that not only can the honest opinions of different experts be obtained upon opposite sides of the same question, but also that dishonest opinions may be obtained upon different sides of the same question.

Attention is also called to the distinction between mere matters of scientific fact and mere matters of opinion. For example: certain medical experts may be called to establish certain medical facts which are not mere matters of opinion. On such facts the experts could not disagree; but in the province of mere opinion it is well known that the experts differ so much among themselves that but little credit is given to mere expert opinion as such.

As a general thing, it is unwise for the cross-examiner to attempt to cope with a specialist in his own field of inquiry. Lengthy cross-examinations along the lines of the expert's theory are usually disastrous and should rarely be attempted.

Many lawyers, for example, undertake to cope with a medical or handwriting expert on his own ground, — surgery, correct diagnosis, or the intricacies of penmanship. In some rare instances (more especially with poorly educated physicians) this method of cross-questioning is productive of results. More frequently, however, it only affords an opportunity for the doctor to enlarge upon the testimony he has already given, and to explain what might otherwise have been misunderstood or even entirely overlooked by the jury. Experience has led me to believe that a physician should rarely be cross-examined on his own specialty, unless the importance of the case has warranted so close a study by the counsel of the particular subject under discussion as to justify the

experiment; and then only when the lawyer's research of the medical authorities, which he should have with him in court, convinces him that he can expose the doctor's erroneous conclusions, not only to himself, but to a jury who will not readily comprehend the abstract theories of physiology upon which even the medical profession itself is divided.

On the other hand, some careful and judicious questions, seeking to bring out separate facts and separate points from the knowledge and experience of the expert, which will tend to support the theory of the attorney's own side of the case, are usually productive of good results. In other words, the art of the cross-examiner should be directed to bring out such scientific facts from the knowledge of the expert as will help his own case, and thus tend to destroy the weight of the opinion of the expert given against him.

Another suggestion which should always be borne in mind is that no question should be put to an expert which is in any way so broad as to give the expert an opportunity to expatiate upon his own views, and thus afford him an opportunity in his answer to give his reasons, in his own way, for his opinions, which counsel calling him as an expert might not otherwise have fully brought out in his examination.

It was in the trial of Dr. Buchanan on the charge of murdering his wife, that a single, ill-advised question put upon cross-examination to the physician who had attended

Mrs. Buchanan upon her death-bed, and who had given it as his opinion that her death was due to natural causes, which enabled the jury, after twenty-four hours of dispute among themselves, finally to agree against the prisoner on a verdict of murder in the first degree, resulting in Buchanan's execution.

The charge against Dr. Buchanan was that he had poisoned his wife — a woman considerably older than himself, and who had made a will in his favor — with morphine and atropine, each drug being used in such proportion as to effectually obliterate the group of symptoms attending death when resulting from the use of either drug alone.

At Buchanan's trial the district attorney found himself in the extremely awkward position of trying to persuade a jury to decide that Mrs. Buchanan's death was, beyond all reasonable doubt, the result of an overdose of morphine mixed with atropine administered by her husband, although a respectable physician, who had attended her at her death-bed, had given it as his opinion that she died from natural causes, and had himself made out a death certificate in which he attributed her death to apoplexy.

It was only fair to the prisoner that he should be given the benefit of the testimony of this physician. The District Attorney, therefore, called the doctor to the witness-stand and questioned him concerning the symptoms he had observed during his treatment of Mrs. Buchanan just

prior to her death, and developed the fact that the doctor had made out a death certificate in which he had certified that in his opinion apoplexy was the sole cause of death. The doctor was then turned over to the lawyers for the defence for cross-examination.

One of the prisoner's counsel, who had far more knowledge of medicine than of the art of cross-examination, was assigned the important duty of cross-examining this witness. After badgering the doctor for an hour or so with technical medical questions more or less remote from the subject under discussion, and tending to show the erudition of the lawyer who was conducting the examination rather than to throw light upon the inquiry uppermost in the minds of the jury, the cross-examiner finally reproduced the death certificate and put it in evidence, and calling the doctor's attention to the statement therein made — that death was the result of apoplexy — exclaimed, while flourishing the paper in the air: —

"Now, doctor, you have told us what this lady's symptoms were, you have told us what you then believed was the cause of her death; I now ask you, has anything transpired since Mrs. Buchanan's death which would lead you to change your opinion as it is expressed in this paper?"

The doctor settled back in his chair and slowly repeated the question asked: "Has — anything — transpired — since — Mrs. Buchanan's — death — which — would — lead — me — to — change — my — opinion — as

it — is — expressed — in — this — paper?" The witness turned to the judge and inquired if in answer to such a question he would be allowed to speak of matters that had come to his knowledge since he wrote the certificate. The judge replied: "The question is a broad one. Counsel asks you if you know of *any reason* why you should change your former opinion?"

The witness leaned forward to the stenographer and requested him to read the question over again. This was done. The attention of everybody in court was by this time focussed upon the witness, intent upon his answer. It seemed to appear to the jury as if this must be the turning point of the case.

The doctor having heard the question read a second time, paused for a moment, and then straightening himself in his chair, turned to the cross-examiner and said, "I wish to ask *you* a question, Has the report of the chemist telling of his discovery of atropine and morphine in the contents of this woman's stomach been offered in evidence yet?" The court answered, "It has not."

"One more question," said the doctor, "Has the report of the pathologist *yet* been received in evidence?" The court replied, "No."

"*Then*," said the doctor, rising in his chair, "I can answer your question truthfully, that *as yet* in the absence of the pathological report and in the absence of the chemical report I know of no legal evidence which

would cause me to alter the opinion expressed in my death certificate."

It is impossible to exaggerate the impression made upon the court and jury by these answers. All the advantage that the prisoner might have derived from the original death certificate was entirely swept away.

The trial lasted for fully two weeks after this episode. When the jury retired to their consultation room at the end of the trial, they found they were utterly unable to agree upon a verdict. They argued among themselves for twenty-four hours without coming to any conclusion. At the expiration of this time the jury returned to the court room and asked to have the testimony of this doctor reread to them by the stenographer. The stenographer, as he read from his notes, reproduced the entire scene which had been enacted two weeks before. The jury retired a second time and immediately agreed upon their verdict of death.

The cross-examinations of the medical witnesses in the Buchanan case conducted by this same "Medico-legal Wonder" were the subject of very extended newspaper praise at the time, one daily paper devoting the entire front page of its Sunday edition to his portrait.

How expert witnesses have been discredited with juries in the past, should serve as practical guides for the future. The whole effect of the testimony of an expert witness may sometimes effectually be destroyed by putting the witness to some unexpected and offhand test at the trial,

as to his experience, his ability and discrimination as an expert, so that in case of his failure to meet the test he can be held up to ridicule before the jury, and thus the laughter at his expense will cause the jury to forget anything of weight that he has said against you.

I have always found this to be the most effective method to cross-examine a certain type of professional medical witnesses now so frequently seen in our courts. A striking instance of the efficacy of this style of cross-examination was experienced by the writer in a damage suit against the city of New York, tried in the Supreme Court sometime in 1887.

A very prominent physician, president of one of our leading clubs at the time, but now dead, had advised a woman who had been his housekeeper for thirty years, and who had broken her ankle in consequence of stepping into an unprotected hole in the street pavement, to bring suit against the city to recover $40,000 damages. There was very little defence to the principal cause of action: the hole in the street *was* there, and the plaintiff *had* stepped into it; but her right to recover substantial damages was vigorously contested.

Her principal, in fact her only medical witness was her employer, the famous physician. The doctor testified to the plaintiff's sufferings, described the fracture of her ankle, explained how he had himself set the broken bones and attended the patient, but affirmed that all his efforts were of no avail as he could bring about nothing

but a most imperfect union of the bones, and that his housekeeper, a most respectable and estimable lady, would be lame for life. His manner on the witness-stand was exceedingly dignified and frank, and evidently impressed the jury. A large verdict of fully $15,000 was certain to be the result unless this witness's hold upon the jury could be broken on his cross-examination. There was no reason known to counsel why this ankle should not have healed promptly, as such fractures usually do; but how to make the jury *realize* the fact was the question. The intimate personal acquaintance between the cross-examiner and the witness was another embarrassment.

The cross-examination began by showing that the witness, although a graduate of Harvard, had not immediately entered a medical school, but on the contrary had started in business in Wall Street, had later been manager of several business enterprises, and had not begun the study of medicine until he was forty years old. The examination then continued in the most amiable manner possible, each question being asked in a tone almost of apology.

Counsel. "We all know, doctor, that you have a large and lucrative family practice as a general practitioner; but is it not a fact that in this great city, where accidents are of such common occurrence, surgical cases are usually taken to the hospitals and cared for by experienced surgeons?"

Doctor. "Yes, sir, that is so."

Counsel. "You do not even claim to be an experienced surgeon?"

Doctor. "Oh, no, sir. I have the experience of any general practitioner."

Counsel. "What would be the surgical name for the particular form of fracture that this lady suffered?"

Doctor. "What is known as a 'Potts fracture of the ankle.'"

Counsel. "That is a well-recognized form of fracture, is it not?"

Doctor. "Oh, yes."

Counsel (chancing it). "Would you mind telling the jury about when you had a fracture of this nature in your regular practice, the last before this one?"

Doctor (dodging). "I should not feel at liberty to disclose the names of my patients."

Counsel (encouraged). "I am not asking for names and secrets of patients — far from it. I am only asking for the date, doctor; but on your oath."

Doctor. "I couldn't possibly give you the date, sir."

Counsel (still feeling his way). "Was it within the year preceding this one?"

Doctor (hesitating). "I would not like to say, sir."

Counsel (still more encouraged). "I am sorry to press you, sir; but I am obliged to demand a positive answer from you whether or not you had had a similar case of 'Potts fracture of the ankle' the year preceding this one?"

Doctor. "Well, no, I cannot remember that I had."

Counsel. "Did you have one two years before?"

Doctor. "I cannot say."

Counsel (forcing the issue). "Did you have one within five years preceding the plaintiff's case?"

Doctor. "I am unable to say positively."

Counsel. (appreciating the danger of pressing the inquiry further, but as a last resort). "Will you swear that you *ever* had a case of 'Potts fracture' within your own practice before this one? I tell you frankly, if you say you have, I shall ask you day and date, time, place, and circumstance."

Doctor (much embarrassed). "Your question is an embarrassing one. I should want time to search my memory."

Counsel. "I am only asking you for your best memory as a gentleman, and under oath."

Doctor. "If you put it that way, I will say I cannot now remember of any case previous to the one in question, excepting as a student in the hospitals."

Counsel. "But does it not require a great deal of practice and experience to attend successfully so serious a fracture as that involving the ankle joint?"

Doctor. "Oh, yes."

Counsel. "Well, doctor, speaking frankly, won't you admit that 'Potts fractures' are daily being attended to in our hospitals by experienced men, and the use of the ankle fully restored in a few months' time?"

Doctor. "That may be, but much depends upon the age of the patient; and again, in some cases, nothing seems to make the bones unite."

Counsel (stooping under the table and taking up the two lower bones of the leg attached and approaching the witness). "Will you please take these, doctor, and tell the jury whether in life they constituted the bones of a woman's leg or a man's leg?"

Doctor. "It is difficult to tell, sir."

Counsel. "What, can't you tell the skeleton of a woman's leg from a man's, doctor?"

Doctor. "Oh, yes, I should say it was a woman's leg."

Counsel (smiling and looking pleased). "So in your opinion, doctor, this was a *woman's* leg?" [It *was* a woman's leg.]

Doctor (observing counsel's face and thinking he had made a mistake). "Oh, I beg your pardon, it is a man's leg, of course. I had not examined it carefully."

By this time the jury were all sitting upright in their seats and evinced much amusement at the doctor's increasing embarrassment.

Counsel (still smiling). "Would you be good enough to tell the jury if it is the right leg or the left leg?"

Doctor (quietly, but hesitatingly). [It is very difficult for the inexperienced to distinguish right from left.] "This is the *right* leg."

Counsel (astonished). "*What* do you say, doctor?"

Doctor (much confused). "Pardon me, it is the *left* leg."

Counsel. "Were you not right the first time, doctor. Is it not in fact the *right* leg?"

Doctor. "I don't think so; no, it is the *left* leg."

Counsel (again stooping and bringing from under the table the bones of the foot attached together, and handing it to the doctor). "Please put the skeleton of the foot into the ankle joint of the bones you already have in your hand, and then tell me whether it is the right or left leg."

Doctor (confidently). "Yes, it is the left leg, as I said before."

Counsel (uproariously). "But, doctor, don't you see you have inserted the *foot* into the *knee joint?* Is that the way it is in life?"

The doctor, amid roars of laughter from the jury, in which the entire court room joined, hastily readjusted the bones and sat blushing to the roots of his hair. Counsel waited until the laughter had subsided, and then said quietly, "I think I will not trouble you further, doctor."

This incident is not the least bit exaggerated; on the contrary, the impression made by the occurrence is difficult to present adequately on paper. Counsel on both sides proceeded to sum up the case, and upon the part of the defence no allusion whatsoever was made to the incident just described. The jury appreciated the fact,

and returned a verdict for the plaintiff for $240. Next day the learned doctor wrote a four-page letter of thanks and appreciation that the results of his "stage fright" had not been spread before the jury in the closing speech.

An estimate of the susceptibility of occasional juries drawn from some country panels to have their attention diverted from the facts in a case by their fondness for entertainment has at times induced attorneys to try the experiment of framing their questions on cross-examination of medical experts so that the jury will be amused by the questions themselves and will overlook the damaging testimony given by a serious-minded and learned opposing medical witness.

An illustration of this was afforded not long ago by a case brought by a woman against the Trustees of the New York and Brooklyn Bridge. The plaintiff, while alighting from a bridge car, stepped into the space between the car and the bridge platform and fell up to her armpits. She claimed that she had sustained injuries to her ribs, lungs, and chest, and that she was suffering from resultant pleurisy and intercostal neuritis. A specialist on nerve injuries, called by the defence, had testified that there was nothing the matter with the plaintiff, as he had tested her with the stethoscope and had made a thorough examination, had listened at her chest to detect such "rales" as are generally left after pleurisy, and had failed to find any lesions or injuries to the pleural nerves whatsoever.

The attorney for the plaintiff, Mirabeau L. Towns of Brooklyn, had evidently correctly "sized up" the particular jury who were to decide his case, and proceeded to cross-examine the doctor in *rhyme*, which the learned physician, absorbed in his task of defending himself, did not notice until the laughter of the jury advised him that he was being made ridiculous.

Mr. Towns arose and said: —

Q. "Now, doctor, please listen to me. You say for the sake of a modest fee you examined the plaintiff most carefully?"

A. "I tried to do my duty, sir."

Q. "But you saw no more than you wanted to see?"

A. "What do you mean, sir?"

Q. "Well, you laid your head upon her chest?"

A. "I did."

Q. "That was a most delightful test?"

A. "Well, it is the common way of ascertaining if there is anything abnormal in the lungs."

Q. "And you mean to say, doctor, that if your ears are as good as mine, and with your knowledge of medicine, a mangled pleura's rale and rattle you'd hear as plain as guns in battle?"

A. "I mean to say this, and no more, — that it would be impossible, if a person was suffering from a lacerated pleura, for me not to detect it by the test I made."

Q. "Now, you did this most carefully?"

A. "I did."

Q. "For you had to earn your expert's fee?"

A. "Of course I was paid for my examination, but that had nothing to do with it. I want you to understand that I made my examination most conscientiously."

Q. "Can you swear that you saw no more than you wanted to see?"

A. "I saw nothing."

Q. "And each of her ribs, on your oath as a scholar, was as good and sound as a daddy's dollar?"

(Outburst of laughter, and the judge used his gavel. Dr. —— appealed to the court for protection, but Mr. Towns continued.)

Q. "You say you think she was malingering?"

A. "I do."

Q. "So when the poor creature ventured to cope with you and your science and your stethoscope, for her you'll acknowledge there was little hope?"

A. "I have come here to tell the truth, and I maintain that it would be very hard for a young woman of her type to deceive me."

(Renewed laughter and the judge's gavel fell with greater force. Counsel was admonished, but he continued.)

Q. "She might scream in anguish till the end of her breath, your opinion once formed you'd hold until death?"

Not answered.

Q. "Though she fell through a hole clear up to her arm, and that's quite a fall, it did her no harm; in

fact, if she'd fallen from Mount Chimborazo, you'd say she's unhurt and continue to say so. Such a fall from such a height, one might observe, might break all her ribs, but ne'er injure a nerve?"

The Doctor. "Your honor, I don't wish to be made ridiculous by this gentleman, and I protest against his questions, they are unfair."

Before the court could rule, Mr. Towns continued:—

Q. "And you hope to be seized with the dance of St. Vitus if you found on the plaintiff intercostal neuritis?"

The Doctor. "Your Honor, I refuse to answer."

Here the judge interfered and admonished counsel that he had pursued this line of inquiry long enough.

That Mr. Towns was correct in his estimate of this absurd panel of jurors was shown by a very large verdict in favor of his client, and by a request signed by each one of the jurors personally that counsel would send them a copy of his cross-examination of the defendant's doctor.

As distinguished from the lengthy, though doubtless scientific, cross-examination of experts in handwriting with which the profession has become familiar in many recent famous trials that have occurred in this city, the following incident cannot fail to serve as a forcible illustration of the suggestions laid down as to the cross-examination of specialists. It would almost be thought improbable in a romance, yet every word of it is true.

In the trial of Ellison for felonious assault upon William Henriques, who had brought Mr. Ellison's attentions to his daughter, Mrs. Lila Noeme, to a sudden close by forbidding him his house, the authenticity of some letters, alleged to have been written by Mrs. Noeme to Mr. Ellison, was brought in question. The lady herself had strenuously denied that the alleged compromising documents had ever been written by her. Counsel for Ellison, the late Charles Brooke, Esq., had evidently framed his whole cross-examination of Mrs. Noeme upon these letters, and made a final effort to introduce them in evidence by calling Professor Ames, the well-known expert in handwriting. He deposed to having closely studied the letter in question, in conjunction with an admittedly genuine specimen of the lady's handwriting, and gave it as his opinion that they were all written by the same hand. Mr. Brooke then offered the letters in evidence, and was about to read them to the jury when the assistant district attorney asked permission to put a few questions.

District Attorney. "Mr. Ames, as I understood you, you were given only one sample of the lady's genuine handwriting, and you base your opinion upon that single exhibit, is that correct?"

Witness. "Yes, sir, there was only one letter given me, but that was quite a long one, and afforded me great opportunity for comparison."

District Attorney. "Would it not assist you if you

were given a number of her letters with which to make a comparison?"

Witness. "Oh, yes, the more samples I had of genuine handwriting, the more valuable my conclusion would become."

District Attorney (taking from among a bundle of papers a letter, folding down the signature and handing it to the witness). "Would you mind taking this one and comparing it with the others, and then tell us if that is in the same handwriting?"

Witness (examining paper closely for a few minutes). "Yes, sir, I should say that was the same handwriting."

District Attorney. "Is it not a fact, sir, that the same individual may write a variety of hands upon different occasions and with different pens?"

Witness. "Oh, yes, sir; they might vary somewhat."

District Attorney (taking a second letter from his files, also folding over the signature and handing to the witness). "Won't you kindly take this letter, also, and compare it with the others you have?"

Witness (examining the letter). "Yes, sir, that is a variety of the same penmanship."

District Attorney. "Would you be willing to give it as your opinion that it was written by the same person?"

Witness. "I certainly would, sir."

District Attorney (taking a third letter from his files, again folding over the signature, and handing to the witness). "Be good enough to take just one more sample

— I don't want to weary you — and say if this last one is also in the lady's handwriting."

Witness (appearing to examine it closely, leaving the witness-chair and going to the window to complete his inspection). "Yes, sir, you understand I am not swearing to a fact, only an opinion."

District Attorney (good-naturedly). "Of course I understand; but is it your honest opinion as an expert, that these three letters are all in the same handwriting?"

Witness. "I say yes, it is my honest opinion."

District Attorney. "Now sir, won't you please turn down the edge where I folded over the signature to the first letter I handed you, and read aloud to the jury the signature?"

Witness (unfolding the letter and reading triumphantly). "*Lila Noeme.*"

District Attorney. "Please unfold the second letter and read the signature."

Witness (reading). "*William Henriques.*"

District Attorney. "Now the third, please."

Witness (hesitating and reading with much embarrassment). "*Frank Ellison!*"[1]

The alleged compromising letters were never read to the jury.

[1] As a matter of fact, father and daughter wrote very much alike, and with surprising similarity to Mr. Ellison. It was this circumstance that led to the use of the three letters in the cross-examination.

CHAPTER VI

THE SEQUENCE OF CROSS-EXAMINATION

CHAPTER VI

THE SEQUENCE OF CROSS-EXAMINATION

MUCH depends upon the *sequence* in which one conducts the cross-examination of a dishonest witness. You should never hazard the important question until you have laid the foundation for it in such a way that, when confronted with the fact, the witness can neither deny nor explain it. One often sees the most damaging documentary evidence, in the form of letters or affidavits, fall absolutely flat as exponents of falsehood, merely because of the unskilful way in which they are handled. If you have in your possession a letter written by the witness, in which he takes an opposite position on some part of the case to the one he has just sworn to, avoid the common error of showing the witness the letter for identification, and then reading it to him with the inquiry, "What have you to say to that?" During the reading of his letter the witness will be collecting his thoughts and getting ready his explanations in anticipation of the question that is to follow, and the effect of the damaging letter will be lost.

The correct method of using such a letter is to lead the witness quietly into repeating the statements he has

made in his direct testimony, and which his letter contradicts. "I have you down as saying so and so; will you please repeat it? I am apt to read my notes to the jury, and I want to be accurate." The witness will repeat his statement. Then write it down and read it off to him. "Is that correct? Is there any doubt about it? For if you have any explanation or qualification to make, I think you owe it to us, in justice, to make it before I leave the subject." The witness has none. He has stated the fact; there is nothing to qualify; the jury rather like his straightforwardness. Then let your whole manner toward him suddenly change, and spring the letter upon him. "Do you recognize your own handwriting, sir? Let me read you from your own letter, in which you say," —and afterward—"Now, what have you to say to that?" You will make your point in such fashion that the jury will not readily forget it. It is usually expedient, when you have once made your point, to drop it and go to something else, lest the witness wriggle out of it. But when you have a witness under oath, who is orally contradicting a statement he has previously made, when not under oath, but in his own handwriting, you then have him fast on the hook, and there is no danger of his getting away; now is the time to press your advantage. Put his self-contradictions to him in as many forms as you can invent:—

"Which statement is true?" "Had you forgotten this letter when you gave your testimony to-day?" "Did

you tell your counsel about it?" "Were you intending to deceive him?" "What was your object in trying to mislead the jury?"[1]

"Some men," said a London barrister who often saw Sir Charles Russell in action, "get in a bit of the nail, and there they leave it hanging loosely about until the judge or some one else pulls it out. But when Russell got in a bit of the nail, he never stopped until he drove it home. No man ever pulled *that* nail out again."

Sometimes it is advisable to deal the witness a stinging blow with your first few questions; this, of course, assumes that you have the material with which to do it. The advantage of putting your best point forward at the very start is twofold. First, the jury have been listening to his direct testimony and have been forming their own impressions of him, and when you rise to cross-examine, they are keen for your first questions. If you "land one" in the first bout, it makes far more impression on the jury than if it came later on when their attention has begun to lag, and when it might only appear as a chance shot. The second, and perhaps more important, effect of scoring on the witness with the first group of questions is that it makes him afraid of you and less hostile in his subsequent answers, not knowing when you will trip him again and give him another fall. This will often

[1] In Chapter XI (*infra*) is given in detail the cross-examination of the witness Pigott by Sir Charles Russell, which affords a most striking example of the most effective use that can be made of an incriminating letter.

enable you to obtain from him truthful answers on subjects about which you are not prepared to contradict him.

I have seen the most determined witness completely lose his presence of mind after two or three well-directed blows given at the very start of his cross-examination, and become as docile in the examiner's hands as if he were his own witness. This is the time to lead the witness back to his original story and give him the opportunity to tone it down or retint it, as it were; possibly even to switch him over until he finds himself supporting your side of the controversy. This taming of a hostile witness, and forcing him to tell the truth against his will, is one of the triumphs of the cross-examiner's art. In a speech to the jury, Choate once said of such a witness, "I brand him a vagabond and a villain; they brought him to curse, and, behold, he hath blessed us altogether."

Some witnesses, under this style of examination, lose their tempers completely, and if the examiner only keeps his own and puts his questions rapidly enough, he will be sure to lead the witness into such a web of contradictions as entirely to discredit him with any fair-minded jury. A witness, in anger, often forgets himself and speaks the truth. His passion benumbs his power to deceive. Still another sort of witness displays his temper on such occasions by becoming sullen; he begins by giving evasive answers, and ends by refusing to answer

at all. He might as well go a little farther and admit his perjury at once, so far as the effect on the jury is concerned.

When, however, you have not the material at hand with which to frighten the witness into correcting his perjured narrative, and yet you have concluded that a cross-examination is necessary, never waste time by putting questions which will enable him to repeat his original testimony in the sequence in which he first gave it. You can accomplish nothing with him unless you abandon the train of ideas he followed in giving his main story. Select the weakest points of his testimony and the attendant circumstances he would be least likely to prepare for. Do not ask your questions in logical order, lest he invent conveniently as he goes along; but dodge him about in his story and pin him down to precise answers on all the accidental circumstances indirectly associated with his main narrative. As he begins to invent his answers, put your questions more rapidly, asking many unimportant ones to one important one, and all in the same voice. If he is not telling the truth, and answering from memory and associated ideas rather than from imagination, he will never be able to invent his answers as quickly as you can frame your questions, and at the same time correctly estimate the bearing his present answer may have upon those that have preceded it. If you have the requisite skill to pursue this method of questioning, you will be sure to land him in a maze of

self-contradictions from which he will never be able to extricate himself.

Some witnesses, though unwilling to perjure themselves, are yet determined not to tell the *whole* truth if they can help it, owing to some personal interest in, or relationship to, the party on whose behalf they are called to testify. If you are instructed that such a witness (generally a woman) is in possession of the fact you want and can help you if she chooses, it is your duty to draw it out of her. This requires much patience and ingenuity. If you put the direct question to her at once, you will probably receive a "don't remember" answer, or she may even indulge her conscience in a mental reservation and pretend a willingness but inability to answer. You must approach the subject by slow stages. Begin with matters remotely connected with the important fact you are aiming at. She will relate these, not perhaps realizing on the spur of the moment exactly where they will lead her. Having admitted that much, you can lead her nearer and nearer by successive approaches to the gist of the matter, until you have her in such a dilemma that she must either tell you what she had intended to conceal or else openly commit perjury. When she leaves the witness-chair, you can almost hear her whisper to her friends, "I never intended to tell it, but that man put me in such a position I simply had to tell or admit that I was lying."

In all your cross-examinations never lose control of

the witness; confine his answers to the exact questions you ask. He will try to dodge direct answers, or if forced to answer directly, will attempt to add a qualification or an explanation which will rob his answer of the benefit it might otherwise be to you. And lastly, most important of all, let me repeat the injunction to be ever on the alert for a *good place to stop*. Nothing can be more important than to close your examination with a triumph. So many lawyers succeed in catching a witness in a serious contradiction; but, not satisfied with this, go on asking questions, and taper off their examination until the effect upon the jury of their former advantage is lost altogether. "Stop with a victory" is one of the maxims of cross-examination. If you have done nothing more than to expose an attempt to deceive on the part of the witness, you have gone a long way toward discrediting him with your jury. Jurymen are apt to regard a witness as a whole — either they believe him or they don't. If they distrust him, they are likely to disregard his testimony altogether, though much of it may have been true. The fact that remains uppermost in their minds is that he attempted to deceive them, or that he left the witness-stand with a lie upon his lips, or after he had displayed his ignorance to such an extent that the entire audience laughed at him. Thereafter his evidence is dismissed from the case so far as they are concerned.

Erskine once wasted a whole day in trying to expose

to a jury the lack of mental balance of a witness, until a physician who was assisting him suggested that Erskine ask the witness whether he did not believe himself to be Jesus Christ. This question was put by Erskine very cautiously and with studied humility, accompanied by a request for forgiveness for the indecency of the question. The witness, who was at once taken unawares, amid breathless silence and with great solemnity exclaimed, "I am the Christ" — which soon ended the case.[1]

[1] "Curiosities of Law and Lawyers."

CHAPTER VII

SILENT CROSS-EXAMINATION

CHAPTER VII

SILENT CROSS-EXAMINATION

NOTHING could be more absurd or a greater waste of time than to cross-examine a witness who has testified to no material fact against you. And yet, strange as it may seem, the courts are full of young lawyers — and alas! not only young ones — who seem to feel it their duty to cross-examine every witness who is sworn. They seem afraid that their clients or the jury will suspect them of ignorance or inability to conduct a trial. It not infrequently happens that such unnecessary examinations result in the development of new theories of the case for the other side; and a witness who might have been disposed of as harmless by mere silence, develops into a formidable obstacle in the case.

The infinite variety of types of witnesses one meets with in court makes it impossible to lay down any set rules applicable to all cases. One seldom comes in contact with a witness who is in all respects like any one he has ever examined before; it is this that constitutes the fascination of the art. The particular method you use in any given case depends upon the degree of importance you

attach to the testimony given by the witness, even if it is false. It may be that you have on your own side so many witnesses who will contradict the testimony, that it is not worth while to hazard the risks you will necessarily run by undertaking an elaborate cross-examination. In such cases by far the better course is to keep your seat and ask no questions at all. Much depends also, as will be readily appreciated, upon the age and sex of the witness. In fact, it may be said that the truly great trial lawyer is he who, while knowing perfectly well the established rules of his art, appreciates when they should be broken. If the witness happens to be a woman, and at the close of her testimony-in-chief it seems that she will be more than a match for the cross-examiner, it often works like a charm with the jury to practise upon her what may be styled the silent cross-examination. Rise suddenly, as if you intended to cross-examine. The witness will turn a determined face toward you, preparatory to demolishing you with her first answer. This is the signal for you to hesitate a moment. Look her over good-naturedly and as if you were in doubt whether it would be worth while to question her — and sit down. It can be done by a good actor in such a manner as to be equivalent to saying to the jury, "What's the use? she is only a woman."

John Philpot Curran, known as the most popular advocate of his time, and second only to Erskine as a jury lawyer, once indulged himself in this silent mode of

cross-examination, but made the mistake of speaking his thoughts aloud before he sat down. "There is no use asking you questions, for I see the villain in your face." "Do you, sir?" replied the witness with a smile. "I never knew before that my face was a looking-glass."

Since the sole object of cross-examination is to break the force of the adverse testimony, it must be remembered that a futile attempt only strengthens the witness with the jury. It cannot be too often repeated, therefore, that saying nothing will frequently accomplish more than hours of questioning. It is experience alone that can teach us which method to adopt.

An amusing instance of this occurred in the trial of Alphonse Stephani, indicted for the murder of Clinton G. Reynolds, a prominent lawyer in New York, who had had the management and settlement of his father's estate. The defence was insanity; but the prisoner, though evidently suffering from the early stages of some serious brain disorder, was still not insane in the legal acceptation of the term. He was convicted of murder in the second degree and sentenced to a life imprisonment.

Stephani was defended by the late William F. Howe, Esq., who was certainly one of the most successful lawyers of his time in criminal cases. Howe was not a great lawyer, but the kind of witnesses ordinarily met with in such cases he usually handled with a skill that was little short of positive genius.

Dr. Allan McLane Hamilton, the eminent alienist, had made a special study of Stephani's case, had visited him for weeks at the Tombs Prison, and had prepared himself for a most exhaustive exposition of his mental condition. Dr. Hamilton had been retained by Mr. Howe, and was to be put forward by the defence as their chief witness. Upon calling him to the witness-chair, however, he did not question his witness so as to lay before the jury the extent of his experience in mental disorders and his familiarity with all forms of insanity, nor develop before them the doctor's peculiar opportunities for judging correctly of the prisoner's present condition. The wily advocate evidently looked upon District Attorney De-Lancey Nicoll and his associates, who were opposed to him, as a lot of inexperienced youngsters, who would cross-examine at great length and allow the witness to make every answer tell with double effect when elicited by the state's attorney. It has always been supposed that it was a preconceived plan of action between the learned doctor and the advocate. In accordance therewith, and upon the examination-in-chief, Mr. Howe contented himself with this single inquiry: —

"Dr. Hamilton, you have examined the prisoner at the Bar, have you not?"

"I have, sir," replied Dr. Hamilton.

"Is he, in your opinion, sane or insane?" continued Mr. Howe.

"Insane," said Dr. Hamilton.

"You may cross-examine," thundered Howe, with one of his characteristic gestures. There was a hurried consultation between Mr. Nicoll and his associates.

"We have no questions," remarked Mr. Nicoll, quietly.

"What!" exclaimed Howe, "not ask the famous Dr. Hamilton a question? Well, *I* will," and turning to the witness began to ask him how close a study he had made of the prisoner's symptoms, etc.; when, upon our objection, Chief Justice Van Brunt directed the witness to leave the witness-box, as his testimony was concluded, and ruled that inasmuch as the direct examination had been finished, and there had been no cross-examination, there was no course open to Mr. Howe but to call his next witness!

Mr. Sergeant Ballantine in his autobiography, "Some Experiences of a Barrister's Life," gives an account of the trial for murder of a young woman of somewhat prepossessing appearance, who was charged with poisoning her husband. "They were people in a humble class of life, and it was suggested that she had committed the act to obtain possession of money from a burial fund, and also that she was on terms of improper intimacy with a young man in the neighborhood. A minute quantity of arsenic was discovered in the body of the deceased, which in the defence I accounted for by the suggestion that poison had been used carelessly for the destruction of rats. Mr. Baron Parke charged the jury not unfavorably to the prisoner, dwelling pointedly

upon the small quantity of arsenic found in the body, and the jury without much hesitation acquitted her. Dr. Taylor, the professor of chemistry and an experienced witness, had proved the presence of arsenic, and, as I imagine, to the great disappointment of my solicitor, who desired a severe cross-examination, I did not ask him a single question. He was sitting on the bench and near the judge, who, after he had summed up and before the verdict was pronounced, remarked to him that he was surprised at the small amount of arsenic found; upon which Taylor said that if he had been asked the question, he should have proved that it indicated, under the circumstances detailed in evidence, that a very large quantity had been taken. The professor had learned never to volunteer evidence, and the counsel for the prosecution had omitted to put the necessary question. Mr. Baron Parke, having learned the circumstance by accidental means, did not feel warranted in using the information, and I had my first lesson in the art of 'silent cross-examination.'"

CHAPTER VIII

CROSS-EXAMINATION TO CREDIT, AND ITS ABUSES

CHAPTER VIII

CROSS-EXAMINATION TO CREDIT, AND ITS ABUSES

THE preceding chapters have been devoted to the legitimate uses of cross-examination — the development of truth and exposure of fraud.

Cross-examination as to credit has also its legitimate use to accomplish the same end; but this powerful weapon for good has almost equal possibilities for evil. It is proposed in the present chapter to demonstrate that cross-examination as to credit should be exercised with great care and caution, and also to discuss some of the abuses of cross-examination by attorneys, under the guise and plea of cross-examination as to credit.

Questions which throw no light upon the real issues in the case, nor upon the integrity or credit of the witness under examination, but which expose misdeeds, perhaps long since repented of and lived down, are often put for the sole purpose of causing humiliation and disgrace. Such inquiries into private life, private affairs, or domestic infelicities, perhaps involving innocent persons who have nothing to do with the particular litigation and who have no opportunity for explanation nor means of redress, form no legitimate part of the cross-

examiner's art. The lawyer who allows himself to become the mouthpiece of the spite or revenge of his client may inflict untold suffering and unwarranted torture. Such questions may be within the legal rights of counsel in certain instances, but the lawyer who allows himself to be led astray by his zeal or by the solicitations of his client, at his elbow, ready to make any sacrifice to humiliate his adversary, thereby debauches his profession and surrenders his self-respect, for which an occasional verdict, won from an impressionable jury by such methods, is a poor recompense.

To warrant an investigation into matters irrelevant to the main issues in the case, and calculated to disgrace the witness or prejudice him in the eyes of the jury, they must at least be such as tend to impeach his general moral character and his credibility as a witness. There can be no sanction for questions that tend simply to degrade the witness personally, and which can have no possible bearing upon his veracity.

In all that has preceded we have gone upon the presumption that the cross-examiner's art would be used to further his client's cause by all fair and legitimate means, not by misrepresentation, insinuation, or by knowingly putting a witness in a false light before a jury. These methods doubtless succeed at times, but he who practises them acquires the reputation, with astounding rapidity, of being "smart," and finds himself discredited not only with the court, but in some almost unaccountable way,

with the very juries before whom he appears. Let him once get the reputation of being "unfair" among the habitués of the court-house, and his usefulness to clients as a trial lawyer is gone forever. Honesty is the best policy quite as much with the advocate as in any of the walks of life.

Counsel may have in his possession material for injuring the witness, but the propriety of using it often becomes a serious question even in cases where its use is otherwise perfectly legitimate. An outrage to the feelings of a witness may be quickly resented by a jury, and sympathy take the place of disgust. Then, too, one has to reckon with the judge, and the indignation of a strong judge is not wisely provoked. Nothing could be more unprofessional than for counsel to ask questions which disgrace not only the witness, but a host of innocent persons, for the mere reason that the client wishes them to be asked.

There could be no better example of the folly of yielding to a client's hatred or desire for revenge than the outcome of the famous case in which Mrs. Edwin Forrest was granted a divorce against her husband, the distinguished tragedian. Mrs. Forrest, a lady of culture and refinement, demanded her divorce upon the ground of adultery, and her husband had made counter-charges against her. At the trial (1851) Charles O'Connor, counsel for Mrs. Forrest, called as his first witness the husband himself, and asked him concerning his infideli-

ties in connection with a certain actress. John Van Buren, who appeared for Edwin Forrest, objected to the question on the ground that it required his client to testify to matters that might incriminate him. The question was not allowed, and the husband left the witness-stand. After calling a few unimportant witnesses, O'Connor rested the case for plaintiff without having elicited any tangible proof against the husband. Had a motion to take the case from the jury been made at this time, it would of necessity have been granted, and the wife's suit would have failed. It is said that when Mr. Van Buren was about to make such a motion and end the case, Mr. Forrest directed him to proceed with the testimony for the defence, and develop the nauseating evidence he had accumulated against his wife. Van Buren yielded to his client's wishes, and for days and weeks continued to call witness after witness to the disgusting details of Mrs. Forrest's alleged debauchery. The case attracted great public attention and was widely reported by the newspapers. The public, as so often happens, took the opposite view of the evidence from the one the husband had anticipated. Its very revolting character aroused universal sympathy on the wife's behalf. Mr. O'Connor soon found himself flooded with offers of evidence, anonymous and otherwise, against the husband, and when Van Buren finally closed his attack upon the wife, O'Connor was enabled, in rebuttal, to bring such an avalanche of convincing testimony against

the defendant that the jury promptly exonerated Mrs. Forrest and granted her the divorce. At the end of the first day's trial the case could have been decided in favor of the husband, had a simple motion to that effect been made; but, yielding to his client's hatred of his wife, and after a hard-fought trial of thirty-three days, Mr. Van Buren found both himself and his client ignominiously defeated. This error of Mr. Van Buren's was widely commented on by the profession at the time. He had but lately resigned his office at Albany as attorney general, and up to the time of this trial had acquired no little prestige in his practice in the city of New York, which, however, he never seemed to regain after his fatal blunder in the Forrest divorce case.[1]

The abuse of cross-examination has been widely discussed in England in recent years, partly in consequence of the cross-examination of a Mrs. Bravo, whose husband had died by poison. He had lived unhappily with her on account of the attentions of a certain physician. During the inquiry into the circumstances of her husband's death, the story of the wife's intrigue was made public through her cross-examination. Sir Charles Russell, who was then regarded as standing at the head of the Bar, both in the extent of his business and in his success in court, and Sir Edward Clark, one of her Majesty's law officers, with a high reputation for ability in jury trials, were severely criticised as "forensic bul-

[1] "Extraordinary Cases," H. L. Clinton.

lies," and complained of as "lending the authority of their example to the abuse of cross-examination to credit which was quickly followed by barristers of inferior positions, among whom the practice was spreading of assailing witnesses with what was not unfairly called a system of innuendoes, suggestions, and bullying from which sensitive persons recoil." And Mr. Charles Gill, one of the many imitators of Russell's domineering style, was criticised as "bettering the instructions of his elders."

The complaint against Russell was that by his practices as displayed in the Osborne case — robbery of jewels — not only may a man's, or a woman's, whole past be laid bare to malignant comment and public curiosity, but there is no means afforded by the courts of showing how the facts really stood or of producing evidence to repel the damaging charges.

Lord Bramwell, in an article published originally in *Nineteenth Century* for February, 1892, and republished in legal periodicals all over the world, strongly defends the methods of Sir Charles Russell and his imitators. Lord Bramwell claimed to speak after an experience of forty-seven years' practice at the Bar and on the bench, and long acquaintance with the legal profession.

"A judge's sentence for a crime, however much repented of, is not the only punishment; there is the consequent loss of character in addition, which should confront such a person whenever called to the witness-stand." "Women who carry on illicit intercourse, and

whose husbands die of poison, must not complain at having the veil that ordinarily screens a woman's life from public inquiry rudely torn aside." "It is well for the sake of truth that there should be a wholesome dread of cross-examination." "It should not be understood to be a trivial matter, but rather looked upon as a trying ordeal." "None but the sore feel the probe." Such were some of the many arguments of the various upholders of broad license in examinations to credit.

Lord Chief Justice Cockburn took the opposite view of the question. "I deeply deplore that members of the Bar so frequently unnecessarily put questions affecting the private life of witnesses, which are only justifiable when they challenge the credibility of a witness. I have watched closely the administration of justice in France, Germany, Holland, Belgium, Italy, and a little in Spain, as well as in the United States, in Canada, and in Ireland, and in no place have I seen witnesses so badgered, browbeaten, and in every way so brutally maltreated as in England. The way in which we treat our witnesses is a national disgrace and a serious obstacle, instead of aiding the ends of justice. In England the most honorable and conscientious men loathe the witness-box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-examination in our English courts. Watch the tremor that passes the frames of many persons as they enter the witness-box.

I remember to have seen so distinguished a man as the late Sir Benjamin Brodie shiver as he entered the witness-box. I daresay his apprehension amounted to exquisite torture. Witnesses are just as necessary for the administration of justice as judges or jurymen, and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or the jurymen. I venture to think that it is the duty of a judge to allow no questions to be put to a witness, unless such as are clearly pertinent to the issue before the court, except where the credibility of the witness is deliberately challenged by counsel and that the credibility of a witness should not be wantonly challenged on slight grounds."[1]

The propriety or impropriety of questions to credit is of course largely addressed to the discretion of the court. Such questions are generally held to be fair when, if the imputation they convey be true, the opinion of the court would be seriously affected as to the credibility of the witness on the matter to which he testifies; they are unfair when the imputation refers to matters so remote in time, or of such character that its truth would not affect the opinion of the court; or if there be a great disproportion between the importance of the imputation and the importance of the witness's evidence.[2]

A judge, however, to whose discretion such questions

[1] "Irish Law Times," 1874. [2] Sir James Stephen's Evidence Act.

are addressed in the first instance, can have but an imperfect knowledge of either side of the case before him. He cannot always be sure, without hearing all the facts, whether the questions asked would or would not tend to develop the truth rather than simply degrade the witness. Then, again, the mischief is often done by the mere asking of the question, even if the judge directs the witness not to answer. The insinuation has been made publicly — the dirt has been thrown. The discretion must therefore after all be largely left to the lawyer himself. He is bound in honor, and out of respect to his profession, to consider whether the question ought in conscience to be asked — whether in his own honest judgment it renders the witness unworthy of belief under oath — before he allows himself to ask it. It is much safer, for example, to proceed upon the principle that the relations between the sexes has no bearing whatever upon the probability of the witness telling the truth, unless in the extreme case of an abandoned woman.

In criminal prosecutions the district attorney is usually regarded by the jury much in the light of a judicial officer and, as such, unprejudiced and impartial. Any slur or suggestion adverse to a prisoner's witness coming from this source, therefore, has an added power for evil, and is calculated to do injustice to the defendant. There have been many flagrant abuses of this character in the criminal courts of our own city. "Is it not a fact that you were not there at all?" "Has all

this been written out for you?" "Is it not a fact that you and your husband have concocted this whole story?" "You have been a witness for your husband in every lawsuit he has had, have you not?"—were all questions that were recently criticised by the court, on appeal, as "innuendo," and calculated to prejudice the defendant—by the Michigan Supreme Court in the People *vs.* Cahoon—and held sufficient, in connection with other similar errors, to set the conviction aside.

Assuming that the material with which you propose to assail the credibility of a witness fully justifies the attack, the question then arises, How to use this material to the best advantage? The sympathies of juries are keen toward those obliged to confess their crimes on the witness-stand. The same matters may be handled to the advantage or positive disadvantage of the cross-examiner. If you hold in your possession the evidence of the witness's conviction, for example, but allow him to understand that you know his history, he will surely get the better of you. Conceal it from him, and he will likely try to conceal it from you, or lie about it if necessary. "I don't suppose you have ever been in trouble, have you?" will bring a quick reply, "What trouble?"—"Oh, I can't refer to any particular trouble. I mean generally, have you ever been in jail?" The witness will believe you know nothing about him and deny it, or if he has been many times convicted, will admit some small offence and attempt to conceal every-

thing but what he suspects you know already about him. This very attempt to deceive, if exposed, will destroy him with the jury far more effectually than the knowledge of the offences he has committed. On the other hand, suppose you taunt him with his crime in the first instance; ten to one he will admit his wrong-doing in such a way as to arouse toward himself the sympathy of the jury and their resentment toward the lawyer who was unchristian enough to uncover to public view offences long since forgotten.

Chief Baron Pollock once presided at a case where a witness was asked about a conviction years gone by, though his (the witness's) honesty was not doubted. The baron burst into tears at the answer of the witness.

In the Bellevue Hospital case (the details of which are fully described in a subsequent chapter), and during the cross-examination of the witness Chambers, who was confined in the Pavilion for the Insane at the time, the writer was imprudent enough to ask the witness to explain to the jury how he came to be confined on Ward's Island, only to receive the pathetic reply: "I was sent there because I was insane. You see my wife was very ill with locomotor ataxia. She had been ill a year; I was her only nurse. I tended her day and night. We loved each other dearly. I was greatly worried over her long illness and frightful suffering. The result was, I worried too deeply; she had been very good to me. I overstrained myself, my mind gave way; but I am better now, thank you."

CHAPTER IX

GOLDEN RULES FOR THE EXAMINATION OF WITNESSES

CHAPTER IX

GOLDEN RULES FOR THE EXAMINATION OF WITNESSES

David Paul Brown, a member of the Philadelphia Bar, has condensed his experiences into eighteen paragraphs which he has entitled, "Golden Rules for the Examination of Witnesses."

Although I am of the opinion that it is impossible to embody in any set of rules the art of examination of witnesses, yet the Golden Rules of Brown contain so many useful and valuable suggestions concerning the art, that it is well to reprint them here for the benefit of the student.

Golden Rules for the Examination of Witnesses

First, as to your own witnesses.

I. If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner toward them which may be calculated to repress their assurance.

II. If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as,

for instance, — Where do you live? Do you know the parties? How long have you known them? etc. And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and distinct in your approaches, lest you may again trouble the fountain from which you are to drink.

III. If the evidence of your own witnesses be unfavorable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.

IV. If you perceive that the *mind* of the witness is imbued with prejudices against your client, hope but little from such a quarter — unless there be some facts which are essential to your client's protection, and which that witness alone can prove, either do not call him, or get rid of him as soon as possible. If the opposite counsel perceive the bias to which I have referred, he may employ it to your ruin. In judicial inquiries, of all possible evils, the worst and the least to be resisted is an enemy in the disguise of a friend. You cannot impeach him; you cannot cross-examine him; you cannot disarm him; you cannot indirectly, even, assail him; and if you exercise the only privilege that is left to you, and call other witnesses for the purposes of explanation, you must bear in mind that, instead of carrying the war into

the enemy's country, the struggle is still between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this, by all means.

V. Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination, — take from your opponent the same privilege it thus gives to you, — and, in addition thereto, not only render everything unfavorable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony.

VI. Never ask a question without an object, nor without being able to connect that object with the case, if objected to as irrelevant.

VII. Be careful not to put your question in such a *shape* that, if opposed for informality, you cannot sustain it, or, at all events, produce strong reason in its support. Frequent failures in the discussions of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

VIII. Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception *in making them*, or a deficiency of real or of moral courage in *not making them good.*

IX. Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest,

and make *him* also speak distinctly and to your question. How can it be supposed that the court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

X. Modulate your voice as circumstances may direct, "Inspire the fearful and repress the bold."

XI. Never begin before you are *ready*, and always finish when you have *done*. In other words, do not question for question's sake, but for an *answer*.

Cross-examination

I. Except in indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss of which nothing can compensate.

> "Truth, falsehood, hatred, anger, scorn, despair,
> And all the passions — all the soul — is there."

II. Be not regardless, either, of the *voice* of the witness; next to the eye this is perhaps the best interpreter of his mind. The very design to screen conscience from crime — the mental reservation of the witness — is often manifested in the tone or accent or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut streets at a certain time, the question is asked, Were you at the corner of Sixth and Chestnut streets at six o'clock? A frank witness would answer, perhaps I

was near there. But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers, No; although he may have been within a stone's throw of the place, or at the very place, within ten minutes of the time. The common answer of such a witness would be, I was not at the *corner at six o'clock.*

Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise with a skilful examiner to the question, At what hour were you at the corner, or at what place were you at six o'clock? And in nine instances out of ten it will appear, that the witness was at the place about the time, or at the time about the place. There is no scope for further illustrations; but be watchful, I say, of the voice, and the principle may be easily applied.

III. Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail, or the fearful; rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that *you* may shine, but that *virtue* may triumph, and your *cause* may prosper.

IV. In a *criminal*, especially in a *capital* case, so long as your cause stands well, ask but few questions; and be certain never to ask *any* the answer to which, if against you, may destroy your client, unless you know the witness *perfectly* well, and know that his answer will

be favorable *equally* well; or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations.

V. An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always *leads* to, or *excuses*, an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth, or if by cunning, it is the cunning of the witness, and not of the counsel.

VI. If the witness determine to be witty or refractory with you, you had better settle that account with him at *first*, or its items will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken *your* power, or his *own*. But in any result, be careful that you do not lose your temper; anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

VII. Like a skilful chess-player, in every move, fix your mind upon the combinations and relations of the game — partial and temporary success may otherwise end in total and remediless defeat.

VIII. Never undervalue your adversary, but stand steadily upon your guard; a random blow may be just as fatal as though it were directed by the most consummate skill; the negligence of one often cures, and sometimes renders effective, the blunders of another.

IX. Be respectful to the court and to the jury; kind to your colleague; civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward *either*.

In "The Advocate, his Training, Practice, Rights, and Duties," written by Cox, and published in England about a half century ago, there is an excellent chapter on cross-examination, to which the writer is indebted for many suggestions. Cox closes his chapter with this final admonition to the students, to whom his book is evidently addressed: —

"In concluding these remarks on cross-examination, the rarest, the most useful, and the most difficult to be acquired of the accomplishments of the advocate, we would again urge upon your attention the importance of calm discretion. In addressing a jury you may sometimes talk without having anything to say, and no harm will come of it. But in cross-examination every question that does not advance your cause injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here; the most apparently unimportant may bring destruction or victory. If the summit of the orator's art has been rightly defined to consist in knowing when to sit down, that of an advocate may be described as knowing when to keep his seat. Very little experience in our courts will teach you this lesson, for every day will show to your observant eye instances of self-destruction brought about

by imprudent cross-examination. Fear not that your discreet reserve may be mistaken for carelessness or want of self-reliance. The true motive will soon be seen and approved. Your critics are lawyers, who know well the value of discretion in an advocate; and how indiscretion in cross-examination cannot be compensated by any amount of ability in other duties. The attorneys are sure to discover the prudence that governs your tongue. Even if the wisdom of your abstinence be not apparent at the moment, it will be recognized in the result. Your fame may be of slower growth than that of the talker, but it will be larger and more enduring."

CHAPTER X

SOME FAMOUS CROSS-EXAMINERS AND THEIR METHODS

CHAPTER X

SOME FAMOUS CROSS-EXAMINERS AND THEIR METHODS

One of the best ways to acquire the art of cross-examination is to study the methods of the great cross-examiners who serve as models for the legal profession.

Indeed, nearly every great cross-examiner attributes his success to the fact of having had the opportunity to study the art of some great advocate in actual practice.

In view of the fact also that a keen interest is always taken in the personality and life sketches of great cross-examiners, it has seemed fitting to introduce some brief sketches of great cross-examiners, and to give some illustrations of their methods.

Sir Charles Russell, Lord Russell of Killowen, who died in February, 1901, while he was Lord Chief Justice of England, was altogether the most successful cross-examiner of modern times. Lord Coleridge said of him while he was still practising at the bar, and on one side or the other in nearly every important case tried, "Russell is the biggest advocate of the century."

It has been said that his success in cross-examination, like his success in everything, was due to his force of

character. It was his striking personality, added to his skill and adroitness, which seemed to give him his overwhelming influence over the witnesses whom he cross-examined. Russell is said to have had a wonderful faculty for using the brain and knowledge of other men. Others might possess a knowledge of the subject far in excess of Russell, but he had the reputation of being able to make that knowledge valuable and use it in his examination of a witness in a way altogether unexpected and unique.

Unlike Rufus Choate, "The Ruler of the Twelve," and by far the greatest advocate of the century on this side of the water, Russell read but little. He belonged to the category of famous men who "neither found nor pretended to find any real solace in books." With Choate, his library of some eight thousand volumes was his home, and "his authors were the loves of his life." Choate used to read at his meals and while walking in the streets, for books were his only pastime. Neither was Russell a great orator, while Choate was ranked as "the first orator of his time in any quarter of the globe where the English language was spoken, or who was ever seen standing before a jury panel."

Both Russell and Choate were consummate actors; they were both men of genius in their advocacy. Each knew the precise points upon which to seize; each watched every turn of the jury, knew at a glance what was telling with them, knew how to use to the best

advantage every accident that might arise in the progress of the case.

"One day a junior was taking a note in the orthodox fashion. Russell was taking no note, but he was thoroughly on the alert, glancing about the court, sometimes at the judge, sometimes at the jury, sometimes at the witness or the counsel on the other side. Suddenly he turned to the junior and said, 'What are you doing?' 'Taking a note,' was the answer. 'What the devil do you mean by saying you are taking a note? Why don't you watch the case?' he burst out. *He* had been 'watching' the case. Something had happened to make a change of front necessary, and he wheeled his colleagues around almost before they had time to grasp the new situation."[1]

Russell's maxim for cross-examination was, "Go straight at the witness and at the point; throw your cards on the table, mere *finesse* English juries do not appreciate."

Speaking of Russell's success as a cross-examiner, his biographer, Barry O'Brien says: "It was a fine sight to see him rise to cross-examine. His very appearance must have been a shock to the witness, — the manly, defiant bearing, the noble brow, the haughty look, the remorseless mouth, those deep-set eyes, widely opened, and that searching glance which pierced the very soul. 'Russell,' said a member of the Northern Circuit, 'pro-

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

duced the same effect on a witness that a cobra produces on a rabbit.' In a certain case he appeared on the wrong side. Thirty-two witnesses were called, thirty-one on the wrong side, and one on the right side. Not one of the thirty-one was broken down in cross-examination; but the one on the right side was utterly annihilated by Russell.

"'How is Russell getting on?' a friend asked one of the judges of the Parnell Commission during the days of Pigott's cross-examination. 'Master Charlie is bowling very straight,' was the answer. 'Master Charlie' always bowled 'very straight,' and the man at the wicket generally came quickly to grief. I have myself seen him approach a witness with great gentleness — the gentleness of a lion reconnoitring his prey. I have also seen him fly at a witness with the fierceness of a tiger. But, gentle or fierce, he must have always looked a very ugly object to the man who had gone into the box to lie."

Rufus Choate had little of Russell's natural force with which to command his witnesses; his effort was to magnetize, he was called "the wizard of the court room." He employed an entirely different method in his cross-examinations. He never assaulted a witness as if determined to browbeat him. "Commenting once on the cross-examination of a certain eminent counsellor at the Boston Bar with decided disapprobation, Choate said, 'This man goes at a witness in such a way that he in-

evitably gets the jury all on the side of the witness. I do not,' he added, 'think that is a good plan.' His own plan was far more wary, intelligent, and circumspect. He had a profound knowledge of human nature, of the springs of human action, of the thoughts of human hearts. To get at these and make them patent to the jury, he would ask only a few telling questions — a very few questions, but generally every one of them was fired point-blank, and hit the mark. His motto was: 'Never cross-examine any more than is absolutely necessary. If you don't break your witness, he breaks you.' He treated every man who appeared like a fair and honest person on the stand, as if upon the presumption that he was a gentleman; and if a man appeared badly, he demolished him, but with the air of a surgeon performing a disagreeable amputation — as if he was profoundly sorry for the necessity. Few men, good or bad, ever cherished any resentment against Choate for his cross-examination of them. His whole style of address to the occupants of the witness-stand was soothing, kind, and reassuring. When he came down heavily to crush a witness, it was with a calm, resolute decision, but no asperity — nothing curt, nothing tart."[1]

Choate's idea of the proper length of an address to a jury was that "a speaker makes his impression, if he ever makes it, in the first *hour*, sometimes in the first fifteen minutes; for if he has a proper and firm grasp

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

of his case, he then puts forth the outline of his grounds of argument. He plays the *overture*, which hints at or announces all the airs of the coming opera. All the rest is mere filling up: answering objections, giving one juryman little arguments with which to answer the objections of his fellows, etc. Indeed, this may be taken as a fixed rule, that the popular mind can never be vigorously addressed, deeply moved, and stirred and fixed more than *one hour* in any single address."

What Choate was to America, and Erskine, and later Russell, to England, John Philpot Curran was to Ireland. He ranked as a jury lawyer next to Erskine. The son of a peasant, he became Master of Rolls for Ireland in 1806. He had a small, slim body, a stuttering, harsh, shrill voice, originally of such a diffident nature that in the midst of his first case he became speechless and dropped his brief to the floor, and yet by perseverance and experience he became one of the most eloquent and powerful forensic advocates of the world. As a cross-examiner it was said of Curran that "he could unravel the most ingenious web which perjury ever spun, he could seize on every fault and inconsistency, and build on them a denunciation terrible in its earnestness."[1]

It was said of Scarlett, Lord Abinger, that he won his cases because there were twelve Sir James Scarletts in the jury-box. He became one of the leading jury lawyers of his time, so far as winning verdicts was con-

[1] "Life Sketches of Eminent Lawyers," Gilbert J. Clark.

cerned. Scarlett used to wheedle the juries over the weak places in his case. Choate would rush them right over with that enthusiasm which he put into everything, "with fire in his eye and fury on his tongue." Scarlett would level himself right down to each juryman, while he flattered and won them. In his cross-examinations "he would take those he had to examine, as it were by the hand, made them his friends, entered into familiar conversation with them, encouraged them to tell him what would best answer his purpose, and thus secured a victory without appearing to commence a conflict."

A story is told about Scarlett by Justice Wightman who was leaving his court one day and found himself walking in a crowd alongside a countryman, whom he had seen, day by day, serving as a juryman, and to whom he could not help speaking. Liking the look of the man, and finding that this was the first occasion on which he had been at the court, Judge Wightman asked him what he thought of the leading counsel. "Well," said the countryman, "that lawyer Brougham be a wonderful man, he can talk, he can, but I don't think nowt of Lawyer Scarlett." — "Indeed!" exclaimed the judge, "you surprise me, for you have given him all the verdicts." — "Oh, there's nowt in that," was the reply, "he be so lucky, you see, he be always on the right side." [1]

Choate also had a way of getting himself "into the jury-box," and has been known to address a single jury-

[1] "Curiosities of Law and Lawyers."

man, who he feared was against him, for an hour at a time. After he had piled up proof and persuasion all together, one of his favorite expressions was, "But this is only *half* my case, gentlemen, I go now to the main body of my proofs."

Like Scarlett, Erskine was of medium height and slender, but he was handsome and magnetic, quick and nervous, "his motions resembled those of a blood horse —as light, as limber, as much betokening strength and speed." He, too, lacked the advantage of a college education and was at first painfully unready of speech. In his maiden effort he would have abandoned his case, had he not felt, as he said, that his children were tugging at his gown. "In later years," Choate once said of him, "he spoke the best English ever spoken by an advocate." Once, when the presiding judge threatened to commit him for contempt, he replied, "Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours." His simple grace of diction, quiet and natural passion, was in marked contrast to Rufus Choate, whose delivery has been described as "a musical flow of rhythm and cadence, more like a long, rising, and swelling song than a *talk* or an argument." To one of his clients who was dissatisfied with Erskine's efforts in his behalf, and who had written his counsellor on a slip of paper, "I'll be hanged if I don't plead my own cause," Erskine quietly replied, "You'll be hanged if you do." Erskine boasted that

in twenty years he had never been kept a day from court by ill health. And it is said of Curran that he has been known to rise before a jury, after a session of sixteen hours with only twenty minutes' intermission, and make one of the most memorable arguments of his life.

Among the more modern advocates of the English Bar, Sir Henry Hawkins stands out conspicuously. He is reputed to have taken more money away with him from the Bar than any man of his generation. His leading characteristic when at the Bar, was his marvellous skill in cross-examination. He was associated with Lord Coleridge in the first Tichborne trial, and in his cross-examination of the witnesses, Baignet and Carter, he made his reputation as "the foremost cross-examiner in the world."[1] Sir Richard Webster was another great cross-examiner. He is said to have received $100,000 for his services in the trial before the Parnell Special Commission, in which he was opposed to Sir Charles Russell.

Rufus Choate said of Daniel Webster, that he considered him the grandest lawyer in the world. And on his death-bed Webster called Choate the most brilliant man in America. Parker relates an episode characteristic of the clashing of swords between these two idols of the American Bar. "We heard Webster once, in a sentence and a look, crush an hour's argument of Choate's curious workmanship; it was most intellectually wire-drawn and hair-splitting, with Grecian sophis-

[1] "Life Sketches of Eminent Lawyers," Clark.

try, and a subtlety the Leontine Gorgias might have envied. It was about two car-wheels, which to common eyes looked as like as two eggs; but Mr. Choate, by a fine line of argument between tweedle-dum and tweedle-dee, and a discourse on 'the fixation of points' so deep and fine as to lose itself in obscurity, showed the jury there was a heaven-wide difference between them. 'But,' said Mr. Webster, and his great eyes opened wide and black, as he stared at the big twin wheels before him, 'gentlemen of the jury, there they are — look at 'em;' and as he pronounced this answer, in tones of vast volume, the distorted wheels seemed to shrink back again into their original similarity, and the long argument on the 'fixation of points' died a natural death. It was an example of the ascendency of mere *character* over mere *intellectuality;* but so much greater, nevertheless, the *intellectuality.*"[1]

Jeremiah Mason was quite on a par with either Choate or Webster before a jury. His style was conversational and plain. He was no orator. He would go close up to the jury-box, and in the plainest possible logic force conviction upon his hearers. Webster said he "owed his own success to the close attention he was compelled to pay for nine successive years, day by day, to Mason's efforts at the same Bar." As a cross-examiner he had no peer at the New England Bar.

In the history of our own New York Bar there have

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

been, probably, but few equals of Judge William Fullerton as a cross-examiner. He was famous for his calmness and mildness of manner, his rapidly repeated questions; his sallies of wit interwoven with his questions, and an ingenuity of method quite his own.

Fullerton's cross-examinations in the celebrated Tilton *vs.* Henry Ward Beecher case gave him an international reputation, and were considered the best ever heard in this country. And yet these very examinations, laborious and brilliant, were singularly unproductive of results, owing probably to the unusual intelligence and shrewdness of the witnesses themselves. The trial as a whole was by far the most celebrated of its kind the New York courts have ever witnessed. One of the most eminent of Christian preachers was charged with using the persuasive powers of his eloquence, strengthened by his religious influence, to alienate the affections and destroy the probity of a member of his church — a devout and theretofore pure-souled woman, the wife of a long-loved friend. He was charged with continuing the guilty relation during the period of a year and a half, and of cloaking the offence to his own conscience and to hers under specious words of piety; of invoking first divine blessing on it, and then divine guidance out of it; and finally of adding perjury to seduction in order to escape the consequences. His accusers, moreover, Mr. Tilton and Mr. Moulton, were persons of public reputation and honorable station in life.

The length and complexity of Fullerton's cross-examinations preclude any minute mention of them here. Once when he found fault with Mr. Beecher for not answering his questions more freely and directly, the reply was frankly made, "*I am afraid of you!*"

While cross-examining Beecher about the celebrated "ragged letter," Fullerton asked why he had not made an explanation to the church, if he was innocent. Beecher answered that he was keeping his part of the compact of silence, and added that he did not believe the others were keeping theirs. There was audible laughter throughout the court room at this remark, and Judge Neilson ordered the court officer to remove from the court room any person found offending — "Except the counsel," spoke up Mr. Fullerton. Later the cross-examiner exclaimed impatiently to Mr. Beecher that he was bound to find out all about these things before he got through, to which Beecher retorted, "I don't think you are succeeding very well."

Mr. Fullerton (in a voice like thunder). "Why did you not rise up and deny the charge?"

Mr. Beecher (putting into his voice all that marvellous magnetic force, which so distinguished him from other men of his time). "Mr. Fullerton, that is not my habit of mind, nor my manner of dealing with men and things."

Mr. Fullerton. "So I observe. You say that Theodore Tilton's charge of intimacy with his wife, and the

charges made by your church and by the committee of your church, made no impression on you?"

Mr. Beecher (shortly). "Not the slightest."

At this juncture Mr. Thomas G. Sherman, Beecher's personal counsel, jumped to his client's aid, and remarked that it was a singular coincidence that when counsel had not the record before him, he never quoted correctly.

Mr. Fullerton (addressing the court impressively). "When Mr. Sherman is not impertinent, he is nothing in this case."

Judge Neilson (to the rescue). "Probably counsel thought —"

Mr. Fullerton (interrupting). "What Mr. Sherman *thinks*, your Honor, cannot possibly be of sufficient importance to take up the time either of the court or opposing counsel."

"Are you in the habit of having your sermons published?" continued Mr. Fullerton. Mr. Beecher acknowledged that he was, and also that he had preached a sermon on "The Nobility of Confession."

Mr. Sherman (sarcastically). "I hope Mr. Fullerton is not going to preach *us* a sermon."

Mr. Fullerton. "I would do so if I thought I could convert brother Sherman."

Mr. Beecher (quietly). "I will be happy to give you the use of my pulpit."

Mr. Fullerton (laughing). "Brother Sherman is the only audience I shall want."

Mr. Beecher (sarcastically). "Perhaps he is the only audience you can get."

Mr. Fullerton. "If I succeed in converting brother Sherman, I will consider my work as a Christian minister complete."

Mr. Fullerton then read a passage from the sermon, the effect of which was that if a person commits a great sin, and the exposure of it would cause misery, such a person would not be justified in confessing it, merely to relieve his own conscience. Mr. Beecher admitted that he still considered that "sound doctrine."

At this point Mr. Fullerton turned to the court, and pointing to the clock, said, "Nothing comes after the sermon, I believe, but the benediction." His Honor took the hint, and the proceedings adjourned.[1]

In this same trial Hon. William M. Evarts, as leading counsel for Mr. Beecher, heightened his already international reputation as an advocate. It was Mr. Evarts's versatility in the Beecher case that occasioned so much comment. Whether he was examining in chief or on cross, in the discussion of points of evidence, or in the summing up, he displayed equally his masterly talents. His cross-examination of Theodore Tilton was a masterpiece. His speeches in court were clear, calm, and logical. Mr. Evarts was not only a great lawyer, but an orator and statesman of the highest distinction. He has

[1] Extracts from the daily press accounts of the proceedings of one of the thirty days of the trial, as reported in "Modern Jury Trials," Donovan.

been called "the Prince of the American Bar." He was a gentleman of high scholarship and fine literary tastes. His manner in the trial of a case has been described by some one as "all head, nose, voice, and forefinger." He was five feet seven inches tall, thin and slender, "with a face like parchment."

Mr. Joseph H. Choate once told me he considered that he owed his own success in court to the nine years during which he acted as Mr. Evarts's junior in the trial of cases. No one but Mr. Choate himself would have said this. His transcendent genius as an advocate could not have been acquired from any tutelage under Mr. Evarts. When Mr. Choate accepted his appointment as Ambassador to the Court of St. James, he retired from the practice of the law; and it is therefore permissible to comment upon his marvellous talents as a jury lawyer. He was not only easily the leading trial lawyer of the New York Bar, but was by many thought to be the representative lawyer of the American Bar. Surely no man of his time was more successful in winning juries. His career was one uninterrupted success. Not that he shone especially in any particular one of the duties of the trial lawyer, but he was preëminent in the quality of his humor and keenness of satire. His whole conduct of a case, his treatment of witnesses, of the court, of opposing counsel, and especially of the jury, were so irresistibly fascinating and winning that he carried everything before him. One would emerge from a three weeks' contest

with Choate in a state almost of mental exhilaration, despite the jury's verdict.

It was not so with the late Edward C. James; a contest with him meant great mental and physical fatigue for his opponent. James was ponderous and indefatigable. His cross-examinations were labored in the extreme. His manner as an examiner was dignified and forceful, his mind always alert and centred on the subject before him; but he had none of Mr. Choate's fascination or brilliancy. He was dogged, determined, heavy. He would pound at you incessantly, but seldom reached the mark. He literally wore out his opponent, and could never realize that he was on the wrong side of a case until the foreman of the jury told him so. Even then he would want the jury polled to see if there was not some mistake. James never smiled except in triumph and when his opponent frowned. When Mr. Choate smiled, you couldn't help smiling with him. During the last ten years of his life James was found on one side or the other of most of the important cases that were tried. He owed his success to his industrious and indefatigable qualities as a fighter; not, I think, to his art.

James T. Brady was called "the Curran of the New York Bar." His success was almost entirely due to his courtesy and the marvellous skill of his cross-examinations. He had a serene, captivating manner in court, and was one of the foremost orators of his time. He has the proud record of having defended fifty men on

trial for their lives, and of saving every one of them from the gallows.

On the other hand, William A. Beech, "the Hamlet of the American Bar," was a poor cross-examiner. He treated all his witnesses alike. He was methodical, but of a domineering manner. He was slow to attune himself to an unexpected turn in a case he might be conducting. He lost many cases and was not fitted to conduct a desperate one. It was as a court orator that he was preëminent. His speech in the Beecher case alone would have made him a reputation as a consummate orator. His vocabulary was surprisingly rich and his voice wonderfully winning.

It is said of James W. Gerard, the elder, that "he obtained the greatest number of verdicts against evidence of any one who ever practised at the New York Bar. He was full of expedients and possessed extraordinary tact. In his profound knowledge of human nature and his ready adaptation, in the conduct of trials, to the peculiarities, caprices, and whims of the different juries before whom he appeared he was almost without a rival. . . . Any one who witnessed the telling hits made by Mr. Gerard on cross-examination, and the sensational incidents sprung by him upon his opponents, the court, and the jury, would have thought that he acted upon the inspiration of the moment — that all he did and all he said was *impromptu*. In fact, Mr. Gerard made thorough preparation for trial. Generally his hits in cross-exami-

nation were the result of previous preparation. He made briefs for cross-examination. To a large extent his flashes of wit and his extraordinary and grotesque humor were well pondered over and studied up beforehand."[1]

Justice Miller said of Roscoe Conkling that "he was one of the greatest men intellectually of his time." He was more than fifty years of age when he abandoned his arduous public service at Washington, and opened an office in New York City. During his six years at the New York Bar, such was his success, that he is reputed to have accumulated, for a lawyer, a very large fortune. He constituted himself a barrister and adopted the plan of acting only as counsel. He was fluent and eloquent of speech, most thorough in the preparation of his cases, and an accomplished cross-examiner. Despite his public career, he said of himself, "My proper place is to be before twelve men in the box." Conkling used to study for his cross-examinations, in important cases, with the most painstaking minuteness. In the trial of the Rev. Henry Burge for murder, Conkling saw that the case was likely to turn upon the cross-examination of Dr. Swinburne, who had performed the autopsy. The charge of the prosecution was that Mrs. Burge had been strangled by her husband, who had then cut her throat. In order to disprove this on cross-examination, Mr. Conkling procured a body for dissection and had dissected, in his presence, the parts of the body that he

[1] "Extraordinary Cases," Henry Lauran Clinton.

wished to study. As the result of Dr. Swinburne's cross-examination at the trial, the presiding judge felt compelled to declare the evidence so entirely untrustworthy that he would decline to submit it to the jury and directed that the prisoner be set at liberty.

This studious preparation for cross-examination was one of the secrets of the success of Benjamin F. Butler. He was once known to have spent days in examining all parts of a steam-engine, and even learning to drive one himself, in order to cross-examine some witnesses in an important case in which he had been retained. At another time Butler spent a week in the repair shop of a railroad, part of the time with coat off and hammer in hand, ascertaining the capabilities of iron to resist pressure — a point on which his case turned. To use his own language: "A lawyer who sits in his office and prepares his cases only by the statements of those who are brought to him, will be very likely to be beaten. A lawyer in full practice, who carefully prepares his cases, must study almost every variety of business and many of the sciences." A pleasant humor and a lively wit, coupled with wonderful thoroughness and acuteness, were Butler's leading characteristics. He was not a great lawyer, nor even a great advocate like Rufus Choate, and yet he would frequently defeat Choate. His cross-examination was his chief weapon. Here he was fertile in resource and stratagem to a degree attained by few others. Choate had mastered all the little tricks of the trial

lawyer, but he attained also to the grander thoughts and the logical powers of the really great advocate. Butler's success depended upon zeal, combined with shrewdness and not overconscientious trickery.

In his autobiography, Butler gives several examples of what he was pleased to call his legerdemain, and to believe were illustrations of his skill as a cross-examiner. They are quoted from "Butler's Book," but are not reprinted as illustrations of the subtler forms of cross-examination, but rather as indicative of the tricks to which Butler owed much of his success before country juries.

"When I was quite a young man I was called upon to defend a man for homicide. He and his associate had been engaged in a quarrel which proceeded to blows and at last to stones. My client, with a sharp stone, struck the deceased in the head on that part usually called the temple. The man went and sat down on the curbstone, the blood streaming from his face, and shortly afterward fell over dead.

"The theory of the government was that he died from the wound in the temporal artery. My theory was that the man died of apoplexy, and that if he had bled more from the temporal artery, he might have been saved — a wide enough difference in the theories of the cause of death.

"Of course to be enabled to carry out my proposition I must know all about the temporal artery, — its location,

its functions, its capabilities to allow the blood to pass through it, and in how short a time a man could bleed to death through the temporal artery; also, how far excitement in a body stirred almost to frenzy in an embittered conflict, and largely under the influence of liquor on a hot day, would tend to produce apoplexy. I was relieved on these two points in my subject, but relied wholly upon the testimony of a surgeon that the man bled to death from the cut on the temporal artery from a stone in the hand of my client. That surgeon was one of those whom we sometimes see on the stand, who think that what they don't know on the subject of their profession is not worth knowing. He testified positively and distinctly that there was and could be no other cause for death except the bleeding from the temporal artery, and he described the action of the bleeding and the amount of blood discharged.

"Upon all these questions I had thoroughly prepared myself.

"*Mr. Butler.* 'Doctor, you have talked a great deal about the temporal artery; now will you please describe it and its functions? I suppose the temporal artery is so called because it supplies the flesh on the outside of the skull, especially that part we call the temples, with blood.'

"*Witness.* 'Yes; that is so.'

"*Mr. Butler.* 'Very well. Where does the temporal artery take its rise in the system? Is it at the heart?'

"*Witness.* 'No, the aorta is the only artery leaving the

heart which carries blood toward the head. Branches from it carry the blood up through the opening into the skull at the neck, and the temporal artery branches from one of these.'

"*Mr. Butler.* 'Doctor, where does it branch off from it? on the inside or the outside of the skull?'

"*Witness.* 'On the inside.'

"*Mr. Butler.* 'Does it have anything to do inside with supplying the brain?'

"*Witness.* 'No.'

"*Mr. Butler.* 'Well, doctor, how does it get outside to supply the head and temples?'

"*Witness.* 'Oh, it passes out through its appropriate opening in the skull.'

"*Mr. Butler.* 'Is that through the eyes?'

"*Witness.* 'No.'

"*Mr. Butler.* 'The ears?'

"*Witness.* 'No.'

"*Mr. Butler.* 'It would be inconvenient to go through the mouth, would it not, doctor?'

"Here I produced from my green bag a skull. 'I cannot find any opening on this skull which I think is appropriate to the temporal artery. Will you please point out the appropriate opening through which the temporal artery passes from the inside to the outside of the skull?'

"He was utterly unable so to do.

"*Mr. Butler.* 'Doctor, I don't think I will trouble you

any further; you can step down.' He did so, and my client's life was saved on that point.

"The temporal artery doesn't go inside the skull at all.

"I had a young client who was on a railroad car when it was derailed by a broken switch. The car ran at considerable speed over the cross-ties for some distance, and my client was thrown up and down with great violence on his seat. After the accident, when he recovered from the bruising, it was found that his nervous system had been wholly shattered, and that he could not control his nerves in the slightest degree by any act of his will. When the case came to trial, the production of the pin by which the position of the switch was controlled, two-thirds worn away and broken off, settled the liability of the road for any damages that occurred from that cause, and the case resolved itself into a question of the amount of damages only. My claim was that my client's condition was an incurable one, arising from the injury to the spinal cord. The claim put forward on behalf of the railroad was that it was simply nervousness, which probably would disappear in a short time. The surgeon who appeared for the road claimed the privilege of examining my client personally before he should testify. I did not care to object to that, and the doctor who was my witness and the railroad surgeon went into the consultation room together and had a full examination in which I took no part, having looked into that matter before.

"After some substantially immaterial matters on the part of the defence, the surgeon was called and was qualified as a witness. He testified that he was a man of great position in his profession. Of course in that I was not interested, for I knew he could qualify himself as an expert. In his direct examination he spent a good deal of the time in giving a very learned and somewhat technical description of the condition of my client. He admitted that my client's nervous system was very much shattered, but he also stated that it would probably be only temporary. Of all this I took little notice; for, to tell the truth, I had been up quite late the night before and in the warm court room felt a little sleepy. But the counsel for the road put this question to him: —

"'Doctor, to what do you attribute this condition of the plaintiff which you describe?'

"'Hysteria, sir; he is hysterical.'

"That waked me up. I said, 'Doctor, did I understand — I was not paying proper attention — to what did you attribute this nervous condition of my client?'

"'Hysteria, sir.'

"I subsided, and the examination went on until it came my turn to cross-examine.

"*Mr. Butler.* 'Do I understand that you think this condition of my client wholly hysterical?'

"*Witness.* 'Yes, sir; undoubtedly.'

"*Mr. Butler.* 'And therefore won't last long?'

"*Witness.* 'No, sir; not likely to.'

"*Mr. Butler.* 'Well, doctor, let us see; is not the disease called hysteria and its effects hysterics; and isn't it true that hysteria, hysterics, hysterical, all come from the Greek word ὑστέρα?'

"*Witness.* 'It may be.'

"*Mr. Butler.* 'Don't say it may, doctor; isn't it? Isn't an exact translation of the Greek word ὑστέρα the English word "womb"?'

"*Witness.* 'You are right, sir.'

"*Mr. Butler.* 'Well, doctor, this morning when you examined this young man here,' pointing to my client, 'did you find that he had a womb? I was not aware of it before, but I will have him examined over again and see if I can find it. That is all, doctor; you may step down.'"

Robert Ingersoll took part in numerous noted lawsuits in all parts of the country. But he was almost helpless in court without a competent junior. He was a born orator if ever there was one. Henry Ward Beecher regarded him as "the most brilliant speaker of the English tongue in any land on the globe." He was not a profound lawyer, however, and hardly the equal of the most mediocre trial lawyer in the examination of witnesses. Of the art of cross-examining witnesses he knew practically nothing. His definition of a lawyer, to use his own words, was "a sort of intellectual strumpet." "My ideal of a great lawyer," he once wrote, "is that great English attorney who accumulated a fortune of a million pounds, and left it all in his will to make a home for

idiots, declaring that he wanted to give it back to the people from whom he took it."

Judge Walter H. Sanborn relates a conversation he had with Judge Miller of the United States Court about Ingersoll. "Just after Colonel Ingersoll had concluded an argument before Mr. Justice Miller, while on Circuit I came into the court and remarked to Judge Miller that I wished I had got there a little sooner, as I had never heard Colonel Ingersoll make a legal argument." — "Well," said Judge Miller, "you never will."[1]

Ingersoll's genius lay in other directions. Who but Ingersoll could have written the following: —

"A little while ago I stood by the grave of the old Napoleon — a magnificent tomb of gilt and gold, fit almost for a dead deity, and gazed upon the sarcophagus of black marble, where rest at last the ashes of that restless man. I leaned over the balustrade, and thought about the career of the greatest soldier of the modern world. I saw him walking upon the banks of the Seine, contemplating suicide; I saw him at Toulon; I saw him putting down the mob in the streets of Paris; I saw him at the head of the army in Italy; I saw him crossing the bridge of Lodi, with the tricolor in his hand; I saw him in Egypt, in the shadows of the Pyramids; I saw him conquer the Alps, and mingle the eagles of France with the eagles of the crags; I saw him at Marengo, at Ulm, and at Austerlitz; I saw him in Russia, where the infan-

[1] "Life Sketches of Eminent Lawyers," Gilbert J. Clark.

try of the snow and the cavalry of the wild blast scattered his legions like winter's withered leaves. I saw him at Leipsic, in defeat and disaster; driven by a million bayonets back upon Paris; clutched like a wild beast; banished to Elba. I saw him escape and retake an empire by the force of his genius. I saw him upon the frightful field of Waterloo, where chance and fate combined to wreck the fortunes of their former king. And I saw him at St. Helena, with his hands crossed behind him, gazing out upon the sad and solemn sea. I thought of the orphans and widows he had made, of the tears that had been shed for his glory, and of the only woman who had ever loved him, pushed from his heart by the cold hand of ambition. And I said I would rather have been a French peasant, and worn wooden shoes; I would rather have lived in a hut, with a vine growing over the door, and the grapes growing purple in the kisses of the autumn sun. I would rather have been that poor peasant, with my loving wife by my side, knitting as the day died out of the sky, with my children upon my knees, and their arms about me. I would rather have been that man, and gone down to the tongueless silence of the dreamless dust, than to have been that imperial impersonation of force and murder, known as Napoleon the Great."

CHAPTER XI

THE CROSS-EXAMINATION OF RICHARD PIGOTT BY SIR CHARLES RUSSELL BEFORE THE PARNELL COMMISSION

CHAPTER XI

THE CROSS-EXAMINATION OF RICHARD PIGOTT BY SIR CHARLES RUSSELL BEFORE THE PARNELL COMMISSION

The modern method of studying any subject, or acquiring any art, is the inductive method. This is illustrated in our law schools, where to a large extent actual cases are studied, to get at the principles of law instead of acquiring those principles solely through the *a priori* method of the study of text-books.

As already indicated, this method is also the only way to become a master of the art of cross-examination, and, in addition to actual personal experience, it is important to study the methods of great cross-examiners, or those whose extended experience makes them safe guides to follow.

Hence, the writer believes it would be decidedly helpful to the students of the art of cross-examination to have placed before them, in a convenient and somewhat condensed form, some good illustrations of the methods of well-known cross-examiners as exhibited in actual practice, in the cross-examination of important witnesses in famous trials.

For these reasons, and the further fact that such examples are interesting as a study of human nature, I have in the following pages introduced the cross-examination of some important witnesses in several well-known cases.

Probably one of the most dramatic and successful of the more celebrated cross-examinations in the history of the English courts is Russell's cross-examination of Pigott — the chief witness in the investigation growing out of the attack upon Charles S. Parnell and sixty-five Irish members of Parliament, by name, for belonging to a lawless and even murderous organization, whose aim was the overthrow of English rule.

The principal charge against Parnell, and the only one that interests us in the cross-examination of the witness Pigott, was the writing of a letter by Parnell which the *Times* claimed to have obtained and published in facsimile, in which he excused the murderer of Lord Frederick Cavendish, Chief Secretary for Ireland, and of Mr. Burke, Under Secretary, in Phœnix Park, Dublin, on May 6, 1882. One particular sentence in the letter read, "I cannot refuse to admit that Burke got no more than his deserts."

The publication of this letter naturally made a great stir in Parliament and in the country at large. Parnell stated in the House of Commons that the letter was a forgery, and later asked for the appointment of a select committee to inquire whether the facsimile letter was

a forgery. The Government refused this request, but appointed a special committee, composed of three judges, to investigate all the charges made by the *Times*.

The writer is indebted again to Russell's biographer, Mr. O'Brien, for the details of this celebrated case. Seldom has any legal controversy been so graphically described as this one. One seems to be living with Russell, and indeed with Mr. O'Brien himself, throughout those eventful months. We must content ourselves, however, with a reproduction of the cross-examination of Pigott as it comes from the stenographer's minutes of the trial, enlightened by the pen of Russell's facile biographer.

Mr. O'Brien speaks of it as "the event in the life of Russell — the defence of Parnell." In order to undertake this defence, Russell returned to the *Times* the retainer he had enjoyed from them for many previous years. It was known that the *Times* had bought the letter from Mr. Houston, the secretary of the Irish Loyal and Patriotic Union, and that Mr. Houston had bought it from Pigott. But how did Pigott come by it? That was the question of the hour, and people looked forward to the day when Pigott should go into the box to tell his story, and when Sir Charles Russell should rise to cross-examine him. Mr. O'Brien writes: "Pigott's evidence in chief, so far as the letter was concerned, came practically to this: he had been employed by the Irish Loyal and Patriotic Union to hunt up

documents which might incriminate Parnell, and he had bought the facsimile letter, with other letters, in Paris from an agent of the Clan-na-Gael, who had no objection to injuring Parnell for a valuable consideration. . . .

" During the whole week or more Russell had looked pale, worn, anxious, nervous, distressed. He was impatient, irritable, at times disagreeable. Even at luncheon, half an hour before, he seemed to be thoroughly out of sorts, and gave you the idea rather of a young junior with his first brief than of the most formidable advocate at the Bar. Now all was changed. As he stood facing Pigott, he was a picture of calmness, self-possession, strength; there was no sign of impatience or irritability; not a trace of illness, anxiety, or care; a slight tinge of color lighted up the face, the eyes sparkled, and a pleasant smile played about the mouth. The whole bearing and manner of the man, as he proudly turned his head toward the box, showed courage, resolution, confidence. Addressing the witness with much courtesy, while a profound silence fell upon the crowded court, he began: 'Mr. Pigott, would you be good enough, with my Lords' permission, to write some words on that sheet of paper for me? Perhaps you will sit down in order to do so?' A sheet of paper was then handed to the witness. I thought he looked for a moment surprised. This clearly was not the beginning that he had expected. He hesitated, seemed confused. Perhaps Russell observed it. At all events he added quickly: —

"'Would you like to sit down?'

"'Oh, no, thanks,' replied Pigott, a little flurried.

"*The President.* 'Well, but I think it is better that you should sit down. Here is a table upon which you can write in the ordinary way—the course you always pursue.'

"Pigott sat down and seemed to recover his equilibrium.

"*Russell.* 'Will you write the word "livelihood"?'

"Pigott wrote.

"*Russell.* 'Just leave a space. Will you write the word "likelihood"?'

"Pigott wrote.

"*Russell.* 'Will you write your own name? Will you write the word "proselytism," and finally (I think I will not trouble you at present with any more) "Patrick Egan" and "P. Egan"?'

"He uttered these last words with emphasis, as if they imported something of great importance. Then, when Pigott had written, he added carelessly, 'There is one word I had forgotten. Lower down, please, leaving spaces, write the word "hesitancy."' Then, as Pigott was about to write, he added, as if this were the vital point, 'with a small "h."' Pigott wrote and looked relieved.

"*Russell.* 'Will you kindly give me the sheet?'

"Pigott took up a bit of blotting paper to lay on the sheet, when Russell, with a sharp ring in his voice,

said rapidly, 'Don't blot it, please.' It seemed to me that the sharp ring in Russell's voice startled Pigott. While writing he had looked composed; now again he looked flurried, and nervously handed back the sheet. The attorney general looked keenly at it, and then said, with the air of a man who had himself scored, 'My Lords, I suggest that had better be photographed, if your Lordships see no objection.'

"*Russell* (turning sharply toward the attorney general, and with an angry glance and an Ulster accent, which sometimes broke out when he felt irritated). 'Do not interrupt my cross-examination with that request.'

"Little did the attorney general at that moment know that, in the ten minutes or quarter of an hour which it had taken to ask these questions, Russell had gained a decisive advantage. Pigott had in one of his letters to Pat Egan spelt 'hesitancy' thus, 'hesitency.' In one of the incriminatory letters 'hesitancy' was so spelt; and in the sheet now handed back to Russell, Pigott had written 'hesitency,' too. In fact it was Pigott's spelling of this word that had put the Irish members on his scent. Pat Egan, seeing the word spelt with an 'e' in one of the incriminatory letters, had written to Parnell, saying in effect, 'Pigott is the forger. In the letter ascribed to you "hesitancy" is spelt "hesitency." That is the way Pigott always spells the word.' These things were not dreamt of in the philosophy of the attorney general when he interrupted Russell's cross-examination

with the request that the sheet 'had better be photographed.' So closed the first round of the combat.

"Russell went on in his former courteous manner, and Pigott, who had now completely recovered confidence, looked once more like a man determined to stand to his guns.

"Russell, having disposed of some preliminary points at length (and after he had been perhaps about half an hour on his feet), closed with the witness.

"*Russell.* 'The first publication of the articles "Parnellism and Crime" was on the 7th March, 1887?'

"*Pigott* (sturdily). 'I do not know.'

"*Russell* (amiably). 'Well, you may assume that is the date.'

"*Pigott* (carelessly). 'I suppose so.'

"*Russell.* 'And you were aware of the intended publication of the correspondence, the incriminatory letters?'

"*Pigott* (firmly). 'No, I was not at all aware of it.'

"*Russell* (sharply, and with the Ulster ring in his voice). 'What?'

"*Pigott* (boldly). 'No, certainly not.'

* * * * * * * *

"*Russell.* 'Were you not aware that there were grave charges to be made against Mr. Parnell and the leading members of the Land League?'

"*Pigott* (positively). 'I was not aware of it until they actually commenced.'

"*Russell* (again with the Ulster ring). 'What?'

"*Pigott* (defiantly). 'I was not aware of it until the publication actually commenced.'

"*Russell* (pausing, and looking straight at the witness). 'Do you swear that?'

"*Pigott* (aggressively). 'I do.'

"*Russell* (making a gesture with both hands, and looking toward the bench). 'Very good, there is no mistake about that.'

"Then there was a pause; Russell placed his hands beneath the shelf in front of him, and drew from it some papers — Pigott, the attorney general, the judges, every one in court looking intently at him the while. There was not a breath, not a movement. I think it was the most dramatic scene in the whole cross-examination, abounding as it did in dramatic scenes. Then, handing Pigott a letter, Russell said calmly: —

"'Is that your letter? Do not trouble to read it; tell me if it is your letter.'

"Pigott took the letter, and held it close to his eyes as if reading it.

"*Russell* (sharply). 'Do not trouble to read it.'

"*Pigott.* 'Yes, I think it is.'

"*Russell* (with a frown). 'Have you any doubt of it?'

"*Pigott.* 'No.'

"*Russell* (addressing the judges). 'My Lords, it is from Anderton's Hotel, and it is addressed by the witness to Archbishop Walsh. The date, my Lords, is the

4th of March, three days before the first appearance of the first of the articles, "Parnellism and Crime."'

"He then read:—

"'Private and confidential.'

"'My Lord:—The importance of the matter about which I write will doubtless excuse this intrusion on your Grace's attention. Briefly, I wish to say that I have been made aware of the details of certain proceedings that are in preparation with the object of destroying the influence of the Parnellite party in Parliament.'

"Having read this much Russell turned to Pigott and said:—

"'What were the certain proceedings that were in preparation?'

"*Pigott.* 'I do not recollect.'

"*Russell* (resolutely). 'Turn to my Lords and repeat the answer.'

"*Pigott.* 'I do not recollect.'

"*Russell.* 'You swear that—writing on the 4th of March, less than two years ago?'

"*Pigott.* 'Yes.'

"*Russell.* 'You do not know what that referred to?'

"*Pigott.* 'I do not really.'

"*Russell.* 'May I suggest to you?'

"*Pigott.* 'Yes, you may.'

"*Russell.* 'Did it refer to the incriminatory letters among other things?'

"*Pigott.* 'Oh, at that date? No, the letters had not

been obtained, I think, at that date, had they, two years ago?'

"*Russell* (quietly and courteously). 'I do not want to confuse you at all, Mr. Pigott.'

"*Pigott.* 'Would you mind giving me the date of that letter?'

"*Russell.* 'The 4th of March.'

"*Pigott.* 'The 4th of March.'

"*Russell.* 'Is it your impression that the letters had not been obtained at that date?'

"*Pigott.* 'Oh, yes, some of the letters had been obtained before that date.'

"*Russell.* 'Then, reminding you that some of the letters had been obtained before that date, did that passage that I have read to you in that letter refer to these letters among other things?'

"*Pigott.* 'No, I rather fancy they had reference to the forthcoming articles in the *Times*.'

"*Russell* (glancing keenly at the witness). 'I thought you told us you did not know anything about the forthcoming articles.'

"*Pigott* (looking confused). 'Yes, I did. I find now I am mistaken — that I must have heard something about them.'

"*Russell* (severely). 'Then try not to make the same mistake again, Mr. Pigott. "Now," you go on (continuing to read from Pigott's letter to the archbishop), "I cannot enter more fully into details than to state that the

proceedings referred to consist in the publication of certain statements purporting to prove the complicity of Mr. Parnell himself, and some of his supporters, with murders and outrages in Ireland, to be followed, in all probability, by the institution of criminal proceedings against these parties by the Government."'

"Having finished the reading, Russell laid down the letter and said (turning toward the witness), 'Who told you that?'

"*Pigott.* 'I have no idea.'

"*Russell* (striking the paper energetically with his fingers). 'But that refers, among other things, to the incriminatory letters.'

"*Pigott.* 'I do not recollect that it did.'

"*Russell* (with energy). 'Do you swear that it did not?'

"*Pigott.* 'I will not swear that it did not.'

"*Russell.* 'Do you think it did?'

"*Pigott.* 'No, I do not think it did.'

"*Russell.* 'Do you think that these letters, if genuine, would prove or would not prove Parnell's complicity in crime?'

"*Pigott.* 'I thought they would be very likely to prove it.'

"*Russell.* 'Now, reminding you of that opinion, I ask you whether you did not intend to refer — not solely, I suggest, but among other things — to the letters as being the matter which would prove complicity or purport to prove complicity?'

"*Pigott.* 'Yes, I may have had that in my mind.'

"*Russell.* 'You could have had hardly any doubt that you had?'

"*Pigott.* 'I suppose so.'

"*Russell.* 'You suppose you may have had?'

"*Pigott.* 'Yes.'

"*Russell.* 'There is the letter and the statement (reading), "Your Grace may be assured that I speak with full knowledge, and am in a position to prove, beyond all doubt and question, the truth of what I say." Was that true?'

"*Pigott.* 'It could hardly be true.'

"*Russell.* 'Then did you write that which was false?'

"*Pigott.* 'I suppose it was in order to give strength to what I said. I do not think it was warranted by what I knew.'

"*Russell.* 'You added the untrue statement in order to add strength to what you said?'

"*Pigott.* 'Yes.'

"*Russell.* 'You believe these letters to be genuine?'

"*Pigott.* 'I do.'

"*Russell.* 'And did at this time?'

"*Pigott.* 'Yes.'

"*Russell* (reading). '"And I will further assure your Grace that I am also able to point out how these designs may be successfully combated and finally defeated." How, if these documents were genuine documents, and you believed them to be such, how were you able to assure his

Grace that you were able to point out how the design might be successfully combated and finally defeated?'

"*Pigott.* 'Well, as I say, I had not the letters actually in my mind at that time. So far as I can gather, I do not recollect the letter to Archbishop Walsh at all. My memory is really a blank on the circumstance.'

"*Russell.* 'You told me a moment ago, after great deliberation and consideration, you had both the incriminatory letters and the letter to Archbishop Walsh in your mind.'

"*Pigott.* 'I said it was probable I did; but I say the thing has completely faded out of my mind.'

"*Russell* (resolutely). 'I must press you. Assuming the letters to be genuine, what were the means by which you were able to assure his Grace that you could point out how the design might be successfully combated and finally defeated?'

"*Pigott* (helplessly). 'I cannot conceive really.'

"*Russell.* 'Oh, try. You must really try.'

"*Pigott* (in manifest confusion and distress). 'I cannot.'

"*Russell* (looking fixedly at the witness). 'Try.'

"*Pigott.* 'I cannot.'

"*Russell.* 'Try.'

"*Pigott.* 'It is no use.'

"*Russell* (emphatically). 'May I take it, then, your answer to my Lords is that you cannot give any explanation?'

"*Pigott.* 'I really cannot absolutely.'

"*Russell* (reading). '"I assure your Grace that I have no other motive except to respectfully suggest that your Grace would communicate the substance to some one or other of the parties concerned, to whom I could furnish details, exhibit proofs, and suggest how the coming blow may be effectually met." What do you say to that, Mr. Pigott?'

"*Pigott.* 'I have nothing to say except that I do not recollect anything about it absolutely.'

"*Russell.* 'What was the coming blow?'

"*Pigott.* 'I suppose the coming publication.'

"*Russell.* 'How was it to be effectively met?'

"*Pigott.* 'I have not the slightest idea.'

"*Russell.* 'Assuming the letters to be genuine, does it not even now occur to your mind how it could be effectively met?'

"*Pigott.* 'No.'

"Pigott now looked like a man, after the sixth round in a prize fight, who had been knocked down in every round. But Russell showed him no mercy. I shall take another extract.

* * * * * * * *

"*Russell.* 'Whatever the charges in "Parnellism and Crime," including the letters, were, did you believe them to be true or not?'

"*Pigott.* 'How can I say that when I say I do not know what the charges were? I say I do not recollect

that letter to the archbishop at all, or any of the circumstances it refers to.'

"*Russell.* 'First of all you knew this: that you procured and paid for a number of letters?'

"*Pigott.* 'Yes.'

"*Russell.* 'Which, if genuine, you have already told me, would gravely implicate the parties from whom these were supposed to come.'

"*Pigott.* 'Yes, gravely implicate.'

"*Russell.* 'You would regard that, I suppose, as a serious charge?'

"*Pigott.* 'Yes.'

"*Russell.* 'Did you believe that charge to be true or false?'

"*Pigott.* 'I believed that charge to be true.'

"*Russell.* 'You believed that to be true?'

"*Pigott.* 'I do.'

"*Russell.* 'Now I will read this passage [from Pigott's letter to the archbishop], "I need hardly add that, did I consider the parties really guilty of the things charged against them, I should not dream of suggesting that your Grace should take part in an effort to shield them; I only wish to impress on your Grace that the evidence is apparently convincing, and would probably be sufficient to secure conviction if submitted to an English jury." What do you say to that, Mr. Pigott?'

"*Pigott* (bewildered). 'I say nothing, except that I am

sure I could not have had the letters in my mind when I said that, because I do not think the letters conveyed a sufficiently serious charge to cause me to write in that way.'

"*Russell.* 'But you know that was the only part of the charge, so far as you have yet told us, that you had anything to do in getting up?'

"*Pigott.* 'Yes, that is what I say; I must have had something else in my mind which I cannot at present recollect — that I must have had other charges.'

"*Russell.* 'What charges?'

"*Pigott.* 'I do not know. That is what I cannot tell you.'

"*Russell.* 'Well, let me remind you that that particular part of the charges — the incriminatory letters — were letters that you yourself knew all about.'

"*Pigott.* 'Yes, of course.'

"*Russell* (reading from another letter of Pigott's to the archbishop). '"I was somewhat disappointed in not having a line from your Grace, as I ventured to expect I might have been so far honored. I can assure your Grace that I have no other motive in writing save to avert, if possible, a great danger to people with whom your Grace is known to be in strong sympathy. At the same time, should your Grace not desire to interfere in the matter, or should you consider that they would refuse me a hearing, I am well content, having acquitted myself of what I conceived to be my duty in the circumstances.

I will not further trouble your Grace save to again beg that you will not allow my name to transpire, seeing that to do so would interfere injuriously with my prospects, without any compensating advantage to any one. I make the request all the more confidently because I have had no part in what is being done to the prejudice of the Parnellite party, though I was enabled to become acquainted with all the details."'

"*Pigott* (with a look of confusion and alarm). 'Yes.'

"*Russell.* 'What do you say to that?'

"*Pigott.* 'That it appears to me clearly that I had not the letters in my mind.'

"*Russell.* 'Then if it appears to you clearly that you had not the letters in your mind, what had you in your mind?'

"*Pigott.* 'It must have been something far more serious.'

"*Russell.* 'What was it?'

"*Pigott* (helplessly, great beads of perspiration standing out on his forehead and trickling down his face). 'I cannot tell you. I have no idea.'

"*Russell.* 'It must have been something far more serious than the letters?'

"*Pigott* (vacantly). 'Far more serious.'

"*Russell* (briskly). 'Can you give my Lords any clew of the most indirect kind to what it was?'

"*Pigott* (in despair). 'I cannot.'

"*Russell.* 'Or from whom you heard it?'

"*Pigott.* 'No.'

"*Russell.* 'Or when you heard it?'

"*Pigott.* 'Or when I heard it.'

"*Russell.* 'Or where you heard it?'

"*Pigott.* 'Or where I heard it.'

"*Russell.* 'Have you ever mentioned this fearful matter — whatever it is — to anybody?'

"*Pigott.* 'No.'

"*Russell.* 'Still locked up, hermetically sealed in your own bosom?'

"*Pigott.* 'No, because it has gone away out of my bosom, whatever it was.'

"On receiving this answer Russell smiled, looked at the bench, and sat down. A ripple of derisive laughter broke over the court, and a buzz of many voices followed. The people standing around me looked at each other and said, 'Splendid.' The judges rose, the great crowd melted away, and an Irishman who mingled in the throng expressed, I think, the general sentiment in a single word, 'Smashed.'"

Pigott's cross-examination was finished the following day, and the second day he disappeared entirely, and later sent back from Paris a confession of his guilt, admitting his perjury, and giving the details of how he had forged the alleged Parnell letter by tracing words and phrases from genuine Parnell letters, placed against the window-pane, and admitting that he had sold the forged letter for £605.

After the confession was read, the Commission "found" that it was a forgery, and the *Times* withdrew the facsimile letter.

A warrant was issued for Pigott's arrest on the charge of perjury, but when he was tracked by the police to a hotel in Madrid, he asked to be given time enough to collect his belongings, and, retiring to his room, blew out his brains.

CHAPTER XII

THE CROSS-EXAMINATION OF DR. —— IN THE CARLYLE W. HARRIS CASE

CHAPTER XII

THE CROSS-EXAMINATION OF DR. —— IN THE CARLYLE W. HARRIS CASE

The records of the criminal courts in this country contain few cases that have excited so much human interest among all classes of the community as the prosecution and conviction of Carlyle W. Harris.

Even to this day — ten years after the trial — there is a widespread belief among men, perhaps more especially among women, who did not attend the trial, but simply listened to the current gossip of the day and followed the newspaper accounts of the court proceedings, that Harris was innocent of the crime for the commission of which his life was forfeited to the state.

It is proposed in this chapter to discuss some of the facts that led up to the testimony of one of the most distinguished toxicologists in the country, who was called for the defence on the crucial point in the case; and to give extracts from his cross-examination, his failure to withstand which was the turning-point in the entire trial. He returned to his home in Philadelphia after he left the witness-stand, and openly declared in public, when asked

to describe his experiences in New York, that he had "gone to New York only to make a fool of himself and return home again."

It is also proposed to give some of the *inside* history of the case — facts that never came out at the trial, not because they were unknown at the time to the district attorney, nor unsusceptible of proof, but because the strict rules of evidence in such cases often, as it seems to the writer, withhold from the ears of the jury certain facts, the mere recital of which seems to conclude the question of guilt. For example, the rule forbidding the presentation to the jury of anything that was said by the victim of a homicide, even to witnesses surrounding the death-bed, unless the victim in express terms makes known his own belief that he cannot live, and that he has abandoned all *hope* or expectation of recovery before he tells the tale of the manner in which he was slain, or the causes that led up to it, has allowed many a guilty prisoner, if not to escape entirely, at least to avoid the full penalty for the crime he had undoubtedly committed.

Carlyle Harris was a gentleman's son, with all the advantages of education and breeding. In his twenty-second year, and just after graduating with honors from the College of Physicians and Surgeons in New York City, he was indicted and tried for the murder of Miss Helen Potts, a young, pretty, intelligent, and talented school girl in attendance at Miss Day's Ladies' Boarding School, on 40th Street, New York City.

Harris had made the acquaintance of Miss Potts in the summer of 1889, and all during the winter paid marked attention to her. The following spring, while visiting her uncle, who was a doctor, she was delivered of a four months' child, and was obliged to confess to her mother that she was secretly married to Harris under assumed names, and that her student husband had himself performed an abortion upon her.

Harris was sent for. He acknowledged the truth of his wife's statements, but refused to make the marriage public. From this time on, till the day of her daughter's death, the wretched mother made every effort to induce Harris to acknowledge his wife publicly. She finally wrote him on the 20th of January, 1891, "You must go on the 8th of February, the anniversary of your secret marriage, before a minister of the gospel, and there have a Christian marriage performed — no other course than this will any longer be satisfactory to me or keep me quiet."

That very day Harris ordered at an apothecary store six capsules, each containing $4\frac{1}{2}$ grains of quinine and $\frac{1}{6}$ of a grain of morphine, and had the box marked: "C. W. H. Student. One before retiring." Miss Potts had been complaining of sick headaches, and Harris gave her four of these capsules as an ostensible remedy. He then wrote to Mrs. Potts that he would agree to her terms "unless some other way could be found of satisfying her scruples," and went hurriedly to Old Point Comfort. Upon hearing from his wife that the capsules

made her worse instead of better, he still persuaded her to continue taking them. On the day of her death she complained to her mother about the medicine Carlyle had given her, and threatened to throw the box with the remaining capsule out of the window. Her mother persuaded her to try this last one, which she promised to do. Miss Potts slept in a room with three classmates who, on this particular night, had gone to a symphony concert. Upon their return they found Helen asleep, but woke her up and learned from her that she had been having "such beautiful dreams," she "had been dreaming of Carl." Then she complained of feeling numb, and becoming frightened, begged the girls not to let her go to sleep. She repeated that she had taken the medicine Harris had given her, and asked them if they thought it possible that he would give her anything to harm her. She soon fell into a profound coma, breathing only twice to the minute. The doctors worked over her for eleven hours without restoring her to consciousness, when she stopped breathing entirely.

The autopsy, fifty-six days afterward, disclosed an apparently healthy body, and the chemical analysis of the contents of the stomach disclosed the presence of morphine but *not* of quinine, though the capsules as originally compounded by the druggist contained twenty-seven times as much quinine as morphine.

This astounding discovery led to the theory of the prosecution: that Harris had emptied the contents of

one of the capsules, had substituted morphine in sufficient quantities to kill, *in place of* the 4½ grains of quinine (to the eye, powdered quinine and morphine are identical), and had placed this fatal capsule in the box with the other three harmless ones, one to be taken each night. He had then fled from the city, not knowing which day would brand him a murderer.

Immediately after his wife's death Harris went to one of his medical friends and said: "I only gave her four capsules of the six I had made up; *the two I kept out will show that they are perfectly harmless. No jury can convict me with those in my possession; they can be analyzed and proved to be harmless.*"

They *were* analyzed and it was proved that the prescription had been correctly compounded. But oftentimes the means a criminal uses in order to conceal his deed are the very means that Providence employs to reveal the sin that lies hidden in his soul. Harris failed to foresee that it was the preservation of these capsules that would really convict him. Miss Potts had taken *all* that he had given her, and no one could ever have been certain that it was not the druggist's awful mistake, had not these retained capsules been analyzed. When Harris emptied one capsule and reloaded it with morphine, *he had himself become the druggist.*

It was contended that Harris never intended to recognize Helen Potts as his wife. He married her in secret, it appeared at the trial,—as it were from his own lips

through the medium of conversation with a friend, — "because he could not accomplish her ruin in any other way." He brought her to New York, was married to her before an alderman under assumed names, and then having accomplished his purpose, burned the evidence of their marriage, the false certificate. Finally, when the day was set upon which he *must* acknowledge her as his wife, he planned her death.

The late recorder, Frederick Smyth, presided at the trial with great dignity and fairness. The prisoner was ably represented by John A. Taylor, Esq., and William Travers Jerome, Esq., the present district attorney of New York.

Mr. Jerome's cross-examination of Professor Witthaus, the leading chemist for the prosecution, was an extremely able piece of work, and during its eight hours disclosed an amount of technical information and research such as is seldom seen in our courts. Had it not been for the witness's impregnable position, he certainly would have succumbed before the attack. The length and technicality of the examination render its use impracticable in this connection; but it is recommended to all students of cross-examination who find themselves confronted with the task of examination in so remote a branch of the advocate's equipment as a knowledge of chemistry.

The defence consisted entirely of medical testimony, directed toward creating a doubt as to our theory that

morphine was the cause of death. Their cross-examination of our witnesses was suggestive of death from natural causes: from heart disease, a brain tumor, apoplexy, epilepsy, uremia. In fact, the multiplicity of their defences was a great weakness. Gradually they were forced to abandon all but two possible causes of death, — that by morphine poisoning and that by uremic poisoning. This narrowed the issue down to the question, Was it a large dose of morphine that caused death, or was it a latent kidney disease that was superinduced and brought to light in the form of uremic coma by small doses of morphine, such as the one-sixth of a grain admittedly contained in the capsules Harris administered? In one case Harris was guilty; in the other he was innocent.

Helen Potts died in a profound coma. Was it the coma of morphine, or that of kidney disease? Many of the leading authorities in this city had given their convictions in favor of the morphine theory. In reply to those, the defence was able to call a number of young doctors, who have since made famous names for themselves, but who at the time were almost useless as witnesses with the jury because of their comparative inexperience. Mr. Jerome had, however, secured the services of one physician who, of all the others in the country, had perhaps apparently best qualified himself by his writings and thirty years of hospital experience to speak authoritatively upon the subject.

His direct testimony was to the effect that — basing his opinion partly upon wide reading of the literature of the subject, and what seemed to him to be the general consensus of professional opinion about it, and "*very largely on his own experience*" — no living doctor can distinguish the coma of morphine from that of kidney disease; and as the theory of the criminal law is that, if the death can be equally as well attributed to natural causes as to the use of poison, the jury would be bound to give the prisoner the benefit of the doubt and acquit him.

It was the turning-point in the trial. If any of the jurors credited this testimony, — the witness gave the reasons for his opinion in a very quiet, conscientious, and impressive manner, — there certainly could be no conviction in the case, nothing better than a disagreement of the jury. It was certain Harris had given the capsules, but unless his wife had died of morphine poisoning, he was innocent of her death.

The cross-examination that follows is much abbreviated and given partly from memory. It was apparent that the witness would withstand any amount of technical examination and easily get the better of the cross-examiner if such matters were gone into. He had made a profound impression. The court had listened to him with breathless interest. He must be dealt with gently and, if possible, led into self-contradictions where he was least prepared for them.

The cross-examiner sparred for an opening with the

determination to strike quickly and to sit down if he got in one telling blow. The first one missed aim a little, but the second brought a peal of laughter from the jury and the audience, and the witness retired in great confusion. Even the lawyers for the defence seemed to lose heart, and although two hours before time of adjournment, begged the court for a recess till the following day.

Counsel (quietly). "Do you wish the jury to understand, doctor, that Miss Helen Potts did not die of morphine poisoning?"

Witness. "I do not swear to that."

Counsel. "What did she die of?"

Witness. "I don't swear what she died of."

Counsel. "I understood you to say that in your opinion the symptoms of morphine could not be sworn to with positiveness. Is that correct?"

Witness. "I don't think they can, with positiveness."

Counsel. "Do you wish to go out to the world as saying that you have never diagnosed a case of morphine poisoning excepting when you had an autopsy to exclude kidney disease?"

Witness. "I do not. I have not said so."

Counsel. "Then you have diagnosed a case on the symptoms alone, yes? or no? I want a categorical answer."

Witness (sparring). "I would refuse to answer that question categorically; the word 'diagnosed' is used

with two different meanings. One has to make what is known as a 'working diagnosis' when he is called to a case, not a positive diagnosis."

Counsel. "When was your last case of opium or morphine poisoning?"

Witness. "I can't remember which was the last."

Counsel (seeing an opening). "I don't want the name of the patient. Give me the date approximately, that is, the year — but under oath."

Witness. "I think the last was some years ago."

Counsel. "How many years ago?"

Witness (hesitating). "It may be eight or ten years ago."

Counsel. "Was it a case of death from morphine poisoning?"

Witness. "Yes, sir."

Counsel. "Was there an autopsy?"

Witness. "No, sir."

Counsel. "How did you know it was a death from morphine, if, as you said before, such symptoms cannot be distinguished?"

Witness. "I found out from a druggist that the woman had taken seven grains of morphine."

Counsel. "You made no diagnosis at all until you heard from the druggist?"

Witness. "I began to give artificial respiration."

Counsel. "But that is just what you would do in a case of morphine poisoning?"

Witness (hesitating). "Yes, sir. I made, of course, a working diagnosis."

Counsel. "Do you remember the case you had before that?"

Witness. "I remember another case."

Counsel. "When was that?"

Witness. "It was a still longer time ago. I don't know the date."

Counsel. "How many years ago, on your oath?"

Witness. "Fifteen, probably."

Counsel. "Any others?"

Witness. "Yes, one other."

Counsel. "When?"

Witness. "Twenty years ago."

Counsel. "Are these three cases all you can remember in your experience?"

Witness. "Yes, sir."

Counsel (chancing it). "Were more than one of them deaths from morphine?"

Witness. "No, sir, only one."

Counsel (looking at the jury somewhat triumphantly). "Then it all comes down to this: you have had the experience of one case of morphine poisoning in the last twenty years?"

Witness (in a low voice). "Yes, sir, one that I can remember."

Counsel (excitedly). "And are you willing to come here from Philadelphia, and state that the New York

doctors who have already testified against you, and who swore they had had seventy-five similar cases in their own practice, are mistaken in their diagnoses and conclusions?"

Witness (embarrassed and in a low tone). "Yes, sir, I am."

Counsel. "You never heard of Helen Potts until a year after her death, did you?"

Witness. "No, sir."

Counsel. "You heard these New York physicians say that they attended her and observed her symptoms for eleven hours before death?"

Witness. "Yes, sir."

Counsel. "Are you willing to go on record, with your one experience in twenty years, as coming here and saying that you do not believe our doctors can tell morphine poisoning when they see it?"

Witness (sheepishly). "Yes, sir."

Counsel. "You have stated, have you not, that the symptoms of morphine poisoning cannot be told with positiveness?"

Witness. "Yes, sir."

Counsel. "You said you based that opinion upon your own experience, and it now turns out you have seen but one case in twenty years."

Witness. "I also base it upon my reading."

Counsel (becoming almost contemptuous in manner). "Is your reading confined to your own book?"

Witness (excitedly). "No, sir; I say no."

Counsel (calmly). "But I presume you embodied in your own book the results of your reading, did you not?"

Witness (a little apprehensively). "I tried to, sir."

It must be explained here that the attending physicians had said that the pupils of the eyes of Helen Potts were contracted to a pin-point, so much so as to be practically unrecognizable, and *symmetrically* contracted — that this symptom was the one *invariably* present in coma from morphine poisoning, and distinguished it from all other forms of death, whereas in the coma of kidney disease one pupil would be dilated and the other contracted; they would be unsymmetrical.

Counsel (continuing). "Allow me to read to you from your own book on page 166, where you say (reading), 'I have thought that inequality of the pupils' — that is, where they are not symmetrically contracted — 'is proof that a case is not one of narcotism' — or morphine poisoning — 'but *Professor Taylor has recorded a case of morphine poisoning in which it* [the unsymmetrical contraction of the pupils] *occurred.*' Do I read it as you intended it?"

Witness. "Yes, sir."

Counsel. "*So until you heard of the case that Professor Taylor reported, you had always supposed symmetrical contraction of the pupils of the eyes to be the distin-*

guishing symptom of morphine poisoning, and it is on this that you base your statement that the New York doctors could not tell morphine poisoning positively when they see it?"

Witness (little realizing the point). "Yes, sir."

Counsel (very loudly). "*Well, sir, did you investigate that case far enough to discover that Professor Taylor's patient had one glass eye?*" [1]

Witness (in confusion). "I have no memory of it."

Counsel. "That has been proved to be the case here. You would better go back to Philadelphia, sir."

There were roars of laughter throughout the audience as counsel resumed his seat and the witness walked out of the court room. It is difficult to reproduce in print the effect made by this occurrence, but with the retirement of this witness the defendant's case suffered a collapse from which it never recovered.

It is interesting to note that within a year of Harris's conviction, Dr. Buchanan was indicted and tried for a similar offence — wife poisoning by the use of morphine.

It appeared in evidence at Dr. Buchanan's trial that, during the Harris trial and the examination of the medical witnesses, presumably the witness whose examination has been given above, Buchanan had said to his mess-

[1] The reports of six thousand cases of morphine poisoning had been examined by the prosecution in this case before trial, and among them the case reported by Professor Taylor.

mates that " Harris was a —— fool, he didn't know how to mix his drugs. If he had put a little atropine with his morphine, it would have dilated the pupil of at least one of his victim's eyes, and no doctor could have deposed to death by morphine."

When Buchanan's case came up for trial it was discovered that, although morphine had been found in the stomach, blood, and intestines of his wife's body, the pupils of the eyes were not symmetrically contracted. No positive diagnosis of her case could be made by the attending physicians until the continued chemical examination of the contents of the body disclosed indisputable evidence of atropine (belladonna). Buchanan had profited by the disclosures in the Harris trial, but had made the fatal mistake of telling his friends how it could have been done in order to cheat science. It was this statement of his that put the chemists on their guard, and resulted in Buchanan's conviction and subsequent execution.

Carlyle Harris maintained his innocence even after the Court of Appeals had unanimously sustained his conviction, and even as he calmly took his seat in the electric chair.

The most famous English poison case comparable to the Harris and Buchanan cases was that of the celebrated William Palmer, also a physician by profession, who poisoned his companion by the use of strychnine in order to obtain his money and collect his racing bets. The trial is referred to in detail in another chapter.

Palmer, like Harris and Buchanan, maintained a stoical demeanor throughout his trial and confinement in jail, awaiting execution. The morning of his execution he ate his eggs at breakfast as if he were going on a journey. When he was led to the gallows, it was demanded of him in the name of God, as was the custom in England in those days, if he was innocent or guilty. He made no reply. Again the question was put, "William Palmer, in the name of Almighty God, are you innocent or guilty?" Just as the white cap came over his face he murmured in a low breath, "Guilty," and the bolts were drawn with a crash.

CHAPTER XIII

THE BELLEVUE HOSPITAL CASE

CHAPTER XIII

THE BELLEVUE HOSPITAL CASE

On December 15, 1900, there appeared in the *New York World* an article written by Thomas J. Minnock, a newspaper reporter, in which he claimed to have been an eye-witness to the shocking brutality of certain nurses in attendance at the Insane Pavilion of Bellevue Hospital, which resulted in the death, by strangulation, of one of its inmates, a Frenchman named Hilliard. This Frenchman had arrived at the hospital at about four o'clock in the afternoon of Tuesday, December 11. He was suffering from alcoholic mania, but was apparently otherwise in normal physical condition. Twenty-six hours later, or on Wednesday, December 12, he died. An autopsy was performed which disclosed several bruises on the forehead, arm, hand, and shoulder, three broken ribs and a broken hyoid bone in the neck (which supports the tongue), and a suffusion of blood or hæmorrhage on both sides of the windpipe. The coroner's physician reported the cause of death, as shown by the autopsy, to be strangulation. The newspaper reporter, Minnock, claimed to have been in Bellevue at the time, feigning insanity for newspaper purposes; and upon his discharge from the

hospital he stated that he had seen the Frenchman strangled to death by the nurses in charge of the Pavilion by the use of a sheet tightly twisted around the insane man's neck. The language used in the newspaper articles written by Minnock to describe the occurrences preceding the Frenchman's death was as follows: —

"At supper time on Wednesday evening, when the Frenchman, Mr. Hilliard, refused to eat his supper, the nurse, Davis, started for him. Hilliard ran around the table, and the other two nurses, Dean and Marshall, headed him off and held him; they forced him down on a bench, Davis called for a sheet, one of the other two, I do not remember which, brought it, and Davis drew it around Hilliard's neck like a rope. Dean was behind the bench on which Hilliard had been pulled back; he gathered up the loose ends of the sheet and pulled the linen tight around Hilliard's neck, then he began to twist the folds in his hand. I was horrified. I have read of the garrote; I have seen pictures of how persons are executed in Spanish countries; I realized that here, before my eyes, a strangle was going to be performed. Davis twisted the ends of the sheet in his hands, round and round; he placed his knee against Hilliard's back and exercised all his force. The dying man's eyes began to bulge from their sockets; it made me sick, but I looked on as if fascinated. Hilliard's hands clutched frantically at the coils around his neck. 'Keep his hands down, can't you?' shouted Davis in a rage.

Dean and Marshall seized the helpless man's hands; slowly, remorselessly, Davis kept on twisting the sheet. Hilliard began to get black in the face; his tongue was hanging out. Marshall got frightened. 'Let up, he is getting black!' he said to Davis. Davis let out a couple of twists of the sheet, but did not seem to like to do it. At last Hilliard got a little breath, just a little. The sheet was still brought tight about the neck. 'Now will you eat?' cried Davis. 'No,' gasped the insane man. Davis was furious. 'Well, I will make you eat; I will choke you until you do eat,' he shouted, and he began to twist the sheet again. Hilliard's head would have fallen upon his breast but for the fact that Davis was holding it up. He began to get black in the face again. A second time they got frightened, and Davis eased up on the string. He untwisted the sheet, but still kept a firm grasp on the folds. It took Hilliard some time to come to. When he did at last, Davis again asked him if he would eat. Hilliard had just breath enough to whisper faintly, 'No.' I thought the man was dying then. Davis twisted up the sheet again, and cried, 'Well, I will make him eat or I will choke him to death.' He twisted and twisted until I thought he would break the man's neck. Hilliard was unconscious at last. Davis jerked the man to the floor and kneeled on him, but still had the strangle hold with his knee giving him additional purchase. He twisted the sheet until his own fingers were sore, then the three

nurses dragged the limp body to the bath-room, heaved him into the tub with his clothes on, and turned the cold water on him. He was dead by this time, I believe. He was strangled to death, and the finishing touches were put on when they had him on the floor. No big, strong, healthy man could have lived under that awful strangling. Hilliard was weak and feeble."

The above article appeared in the morning *Journal*, a few days after the original publication in the *New York World*. The other local papers immediately took up the story, and it is easy to imagine the pitch to which the public excitement and indignation were aroused. The three nurses in charge of the pavilion at the time of Hilliard's death were immediately indicted for manslaughter, and the head nurse, Jesse R. Davis, was promptly put on trial in the Court of General Sessions, before Mr. Justice Cowing and a "special jury." The trial lasted three weeks, and after deliberating five hours upon their verdict, the jury acquitted the prisoner.

The intense interest taken in the case, not only by the public, but by the medical profession, was increased by the fact that for the first time in the criminal courts of this country two inmates of the insane pavilion, themselves admittedly insane, were called by the prosecution, and sworn and accepted by the court as witnesses against the prisoner. One of these witnesses was suffering from a form of insanity known as paranoia, and the other from general paresis. With the exception of the two insane

witnesses and the medical testimony founded upon the autopsy, there was no direct evidence on which to convict the prisoner but the statement of the newspaper reporter, Minnock. He was the one sane witness called on behalf of the prosecution, who was an eye-witness to the occurrence, and the issues in the case gradually narrowed down to a question of veracity between the newspaper reporter and the accused prisoner, the testimony of each of these witnesses being corroborated or contradicted on one side or the other by various other witnesses.

If Minnock's testimony was credited by the jury, the prisoner's contradiction would naturally have no effect whatever, and the public prejudice, indignation, and excitement ran so high that the jury were only too ready and willing to accept the newspaper account of the transaction. The cross-examination of Minnock, therefore, became of the utmost importance. It was essential that the effect of his testimony should be broken, and counsel having his cross-examination in charge had made the most elaborate preparations for the task. Extracts from the cross-examination are here given as illustrations of many of the suggestions which have been discussed in previous chapters.

The district attorney in charge of the prosecution was Franklin Pierce, Esq. In his opening address to the jury he stated that he "did not believe that ever in the history of the state, or indeed of the country, had a jury

been called upon to decide such an important case as the one on trial." He continued: "There is no fiction — no 'Hard Cash' — in this case. The facts here surpass anything that fiction has ever produced. The witnesses will describe the most terrible treatment that was ever given to an insane man. No writer of fiction could have put them in a book. They would appear so improbable and monstrous that his manuscript would have been rejected as soon as offered to a publisher."

When the reporter, Minnock, stepped to the witness-stand, the court room was crowded, and yet so intense was the excitement that every word the witness uttered could be distinctly heard by everybody present. He gave his evidence in chief clearly and calmly, and with no apparent motive but to narrate correctly the details of the crime he had seen committed. Any one unaware of his career would have regarded him as an unusually clever and apparently honest and courageous man with a keen memory and with just the slightest touch of gratification at the important position he was holding in the public eye in consequence of his having unearthed the atrocities perpetrated in our public hospitals.

His direct evidence was practically a repetition of his newspaper article already referred to, only much more in detail. After questioning him for about an hour, the district attorney sat down with a confident "He is your witness, if you wish to cross-examine him."

No one who has never experienced it can have the

slightest appreciation of the nervous excitement attendant on being called upon to cross-examine the chief witness in a case involving the life or liberty of a human being. If Minnock withstood the cross-examination, the nurse Davis, apparently a most worthy and refined young man who had just graduated from the Mills Training School for Nurses, and about to be married to a most estimable young lady, would have to spend at least the next twenty years of his life at hard labor in state prison.

The first fifteen minutes of the cross-examination were devoted to showing that the witness was a thoroughly educated man, twenty-five years of age, a graduate of Saint John's College, Fordham, New York, the Sacred Heart Academy, the Francis Xavier, the De Lasalle Institution, and had travelled extensively in Europe and America. The cross-examination then proceeded: —

Counsel (amiably). "Mr. Minnock, I believe you have written the story of your life and published it in the *Bridgeport Sunday Herald* as recently as last December? I hold the original article in my hand."

Witness. "It was not the story of my life."

Counsel. "The article is signed by you and purports to be a history of your life."

Witness. "It is an imaginary story dealing with hypnotism. Fiction partly, but it dealt with facts."

Counsel. "That is, you mean to say you mixed fiction and fact in the history of your life?"

Witness. "Yes, sir."

Counsel. "In other words, you dressed up facts with fiction to make them more interesting?"

Witness. "Precisely."

Counsel. "When in this article you wrote that at the age of twelve you ran away with a circus, was that dressed up?"

Witness. "Yes, sir."

Counsel. "It was not true?"

Witness. "No, sir."

Counsel. "When you said that you continued with this circus for over a year, and went with it to Belgium, there was a particle of truth in that because you did, as a matter of fact, go to Belgium, but not with the circus as a public clown; is that the idea?"

Witness. "Yes, sir."

Counsel. "So there was some little truth mixed in at this point with the other matter?"

Witness. "Yes, sir."

Counsel. "When you wrote that you were introduced in Belgium, at the Hospital General, to Charcot, the celebrated Parisian hypnotist, was there some truth in that?"

Witness. "No, sir."

Counsel. "You knew that Charcot was one of the originators of hypnotism in France, didn't you?"

Witness. "I knew that he was one of the original hypnotists."

Counsel. "How did you come to state in the newspaper history of your life that you were introduced to

Charcot at the Hospital General at Paris if that was not true?"

Witness. "While there I met a Charcot."

Counsel. "Oh, I see."

Witness. "But not the original Charcot."

Counsel. "Which Charcot did you meet?"

Witness. "A woman. She was a lady assuming the name of Charcot, claiming to be Madame Charcot."

Counsel. "So that when you wrote in this article that you had met Charcot, you intended people to understand that it was the celebrated Professor Charcot, and it was partly true, because there was a woman by the name of Charcot whom you had really met?"

Witness. "Precisely."

Counsel (quietly). "That is to say, there was some truth in it?"

Witness. "Yes, sir."

Counsel. "When in that article you said that Charcot taught you to stand pain, was there any truth in that?"

Witness. "No."

Counsel. "Did you as a matter of fact learn to stand pain?"

Witness. "No."

Counsel. "When you said in this article that Charcot began by sticking pins and knives into you little by little, so as to accustom you to standing pain, was that all fiction?"

Witness. "Yes, sir."

Counsel. "When you wrote that Charcot taught you to reduce your respirations to two a minute, so as to make your body insensible to pain, was that fiction?"

Witness. "Purely imagination."

Court (interrupting). "Counsellor, I will not allow you to go further in this line of inquiry. The witness himself says his article was almost entirely fiction, some of it founded upon fact. I will allow you the greatest latitude in a proper way, but not in this direction."

Counsel. "Your Honor does not catch the point."

Court. "I do not think I do."

Counsel. "This prosecution was started by a newspaper article written by the witness, and published in the morning *Journal.* It is the claim of the defence that the newspaper article was a mixture of fact and fiction, mostly fiction. The witness has already admitted that the history of his life, published but a few months ago, and written and signed by himself and sold as a history of his life, was a mixture of fact and fiction, mostly fiction. Would it not be instructive to the jury to learn from the lips of the witness himself how far he dressed up the pretended history of his own life, that they may draw from it some inference as to how far he has likewise dressed up the article which was the origin of this prosecution?"

Court. "I shall grant you the greatest latitude in examination of the witness in regard to the newspaper article which he published in regard to this case, but I

exclude all questions relating to the witness's newspaper history of his own life."

Counsel. "Did you not have yourself photographed and published in the newspapers in connection with the history of your life, with your mouth and lips and ears sewed up, while you were insensible to pain?"

Court. "Question excluded."

Counsel. "Did you not publish a picture of yourself in connection with the pretended history of your life, representing yourself upon a cross, spiked hand and foot, but insensible to pain, in consequence of the instruction you had received from Professor Charcot?"

Court. "Question excluded."

Counsel. "I offer these pictures and articles in evidence."

Court (roughly). "Excluded."

Counsel. "In the article you published in the *New York Journal*, wherein you described the occurrences in the present case, which you have just now related upon the witness-stand, did you there have yourself represented as in the position of the insane patient, with a sheet twisted around your neck, and held by the hands of the hospital nurse who was strangling you to death?"

Witness. "I wrote the article, but I did not pose for the picture. The picture was posed for by some one else who looked like me."

Counsel (stepping up to the witness and handing him the newspaper article). "Are not these words under

your picture, 'This is how I saw it done, Thomas J. Minnock,' a facsimile of your handwriting?"

Witness. "Yes, sir, it is my handwriting."

Counsel. "Referring to the history of your life again how many imaginary articles on the subject have you written for the newspapers throughout the country?"

Witness. "One."

Counsel. "You have put several articles in New York papers, have you not?"

Witness. "It was only the original story. It has since been redressed, that's all."

Counsel. "Each time you signed the article and sold it to the newspaper for money, did you not?"

Court. "Excluded."

Counsel (with a sudden change of manner, and in a loud voice, turning to the audience). "Is the chief of police of Bridgeport, Connecticut, in the court room? (Turning to the witness.) Mr. Minnock, do you know this gentleman?"

Witness. "I do."

Counsel. "Tell the jury when you first made his acquaintance."

Witness. "It was when I was arrested in the Atlantic Hotel, in Bridgeport, Connecticut, with my wife."

Counsel. "Was she your wife at the time?"

Witness. "Yes, sir."

Counsel. "She was but sixteen years old?"

Witness. "Seventeen, I guess."

Counsel. "You were arrested on the ground that you were trying to drug this sixteen-year-old girl and kidnap her to New York. Do you deny it?"

Witness (doggedly). "I was arrested."

Counsel (sharply). "You know the cause of the arrest to be as I have stated? Answer yes or no!"

Witness (hesitating). "Yes, sir."

Counsel. "You were permitted by the prosecuting attorney, F. A. Bartlett, to be discharged without trial on your promise to leave the state, were you not?"

Witness. "I don't remember anything of that."

Counsel. "Do you deny it?"

Witness. "I do."

Counsel. "Did you have another young man with you upon that occasion?"

Witness. "I did. A college chum."

Counsel. "Was he also married to this sixteen-year-old girl?"

Witness (no answer).

Counsel (pointedly at witness). "Was he married to this girl also?"

Witness. "Why, no."

Counsel. "You say you were married to her. Give me the date of your marriage."

Witness (hesitating). "I don't remember the date."

Counsel. "How many years ago was it?"

Witness. "I don't remember."

Counsel. "How many years ago was it?"

Witness. "I couldn't say."

Counsel. "What is your best memory as to how many years ago it was?"

Witness. "I can't recollect."

Counsel. "Try to recollect about when you were married."

Witness. "I was married twice, civil marriage and church marriage."

Counsel. "I am talking about Miss Sadie Cook. When were you married to Sadie Cook, and where is the marriage recorded?"

Witness. "I tell you I don't remember."

Counsel. "Try."

Witness. "It might be five or six or seven or ten years ago."

Counsel. "Then you cannot tell within five years of the time when you were married, and you are now only twenty-five years old?"

Witness. "I cannot."

Counsel. "Were you married at fifteen years of age?"

Witness. "I don't think I was."

Counsel. "You know, do you not, that your marriage was several years after this arrest in Bridgeport that I have been speaking to you about?"

Witness. "I know nothing of the kind."

Counsel (resolutely). "Do you deny it?"

Witness (hesitating). "Well, no, I do not deny it."

Counsel. "I hand you now what purports to be the certificate of your marriage, three years ago. Is the date correct?"

Witness. "I never saw it before."

Counsel. "Does the certificate correctly state the time and place and circumstances of your marriage?"

Witness. "I refuse to answer the question on the ground that it would incriminate my wife."

The theory on which the defence was being made was that the witness, Minnock, had manufactured the story which he had printed in the paper, and later swore to before the grand jury and at the trial. The effort in his cross-examination was to show that he was the kind of man who would manufacture such a story and sell it to the newspapers, and afterward, when compelled to do so, swear to it in court.

Counsel next called the witness's attention to many facts tending to show that he had been an eye-witness to adultery in divorce cases, and on both sides of them, first on one side, then on the other, in the same case, and that he had been at one time a private detective. Men whom he had robbed and blackmailed and cheated at cards were called from the audience, one after another, and he was confronted with questions referring to these charges, all of which he denied in the presence of his accusers. The presiding judge having stated to the counsel in the hearing of the witness that although he

allowed the witness to be brought face to face with his alleged accusers, yet he would allow no contradictions of the witness on these collateral matters. Minnock's former defiant demeanor immediately returned.

The next interrogatories put to the witness developed the fact that, feigning insanity, he had allowed himself to be taken to Bellevue with the hope of being transferred to Ward's Island, with the intention of finally being discharged as cured, and then writing sensational newspaper articles regarding what he had seen while an inmate of the public insane asylums; that in Bellevue Hospital he had been detected as a malingerer by one of the attending physicians, Dr. Fitch, and had been taken before a police magistrate where he had stated in open court that he had found everything in Bellevue "far better than he had expected to find it," and that he had "no complaint to make and nothing to criticise."

The witness's mind was then taken from the main subject by questions concerning the various conversations had with the different nurses while in the asylum, all of which conversations he denied. The interrogatories were put in such a way as to admit of a "yes" or "no" answer only. Gradually coming nearer to the point desired to be made, the following questions were asked:—

Counsel. "Did the nurse Gordon ask you why you were willing to submit to confinement as an insane patient, and did you reply that you were a newspaper man and under contract with a Sunday paper to write

up the methods of the asylum, but that the paper had repudiated the contract?"

Witness. "No."

Counsel. "Or words to that effect?"

Witness. "No."

Counsel. "I am referring to a time subsequent to your discharge from the asylum, and after you had returned to take away your belongings. Did you, at that time, tell the nurse Gordon that you had expected to be able to write an article for which you could get $140?"

Witness. "I did not."

Counsel. "Did the nurse say to you, 'You got fooled this time, didn't you?' And did you reply, 'Yes, but I will try to write up something and see if I can't get square with them!'"

Witness. "I have no memory of it."

Counsel. "Or words to that effect?"

Witness. "I did not."

All that preceded had served only as a veiled introduction to the next important question.

Counsel (quietly). "At that time, as a matter of fact, did you know anything you could write about when you got back to the *Herald* office?"

Witness. "*I knew there was nothing to write.*"

Counsel. "Did you know at that time, or have any idea, what you would write when you got out?"

Witness. "Did I at that time know? *Why, I knew there was nothing to write.*"

Counsel (walking forward and pointing excitedly at the witness). "Although you had seen a man choked to death with a sheet on Wednesday night, you knew on Friday morning that there was nothing you could write about?"

Witness (hesitating). "I didn't know they had killed the man."

Counsel. "Although you had seen the patient fall unconscious several times to the floor after having been choked with the sheet twisted around his neck, you knew there was nothing to write about?"

Witness. "I knew it was my duty to go and see the charity commissioner and tell him about that."

Counsel. "But you were a newspaper reporter in the asylum, for the purpose of writing up an article. Do you want to take back what you said a moment ago — that you knew there was nothing to write about?"

Witness. "Certainly not. I did not know the man was dead."

Counsel. "Did you not testify that the morning after you had seen the patient choked into unconsciousness, you heard the nurse call up the morgue to inquire if the autopsy had been made?"

Witness (sheepishly.) "Well, the story that I had the contract for with the *Herald* was cancelled."

Counsel. "Is it not a fact that within four hours of the time you were finally discharged from the hospital on Saturday afternoon, you read the newspaper account of

the autopsy, and then immediately wrote your story of having seen this patient strangled to death and offered it for sale to the *New York World?*"

Witness. "That is right; yes, sir."

Counsel. "You say you knew it was your duty to go to the charity commissioner and tell him what you had seen. Did you go to him?"

Witness. "No, not after I found out through reading the autopsy that the man was killed."

Counsel. "Instead, you went to the *World*, and offered them the story in which you describe the way Hilliard was killed?"

Witness. "Yes."

Counsel. "And you did this within three or four hours of the time you read the newspaper account of the autopsy?"

Witness. "Yes."

Counsel. "The editors of the *World* refused your story unless you would put it in the form of an affidavit, did they not?"

Witness. "Yes."

Counsel. "Did you put it in the form of an affidavit?"

Witness. "Yes."

Counsel. "And that was the very night that you were discharged from the hospital?"

Witness. "Yes."

Counsel. "Every occurrence was then fresh in your mind, was it not?"

Witness (hesitating). "What?"

Counsel. "Were the occurrences of the hospital fresh in your mind at the time?"

Witness. "Well, not any fresher then than they are now."

Counsel. "As fresh as now?"

Witness. "Yes, sir."

Counsel (pausing, looking among his papers, selecting one and walking up to the witness, handing it to him). "Take this affidavit, made that Friday night, and sold to the *World;* show me where there is a word in it about Davis having strangled the Frenchman with a sheet, the way you have described it here to-day to this jury."

Witness (refusing paper). "No, I don't think that it is there. It is not necessary for me to look it over."

Counsel (shouting). "Don't *think!* You know that it is not there, do you not?"

Witness (nervously). "Yes, sir; it is not there."

Counsel. "Had you forgotten it when you made that affidavit?"

Witness. "Yes, sir."

Counsel (loudly). "You had forgotten it, although only three days before you had seen a man strangled in your presence, with a sheet twisted around his throat, and had seen him fall lifeless upon the floor; you had forgotten it when you described the incident and made the affidavit about it to the *World?*"

Witness (hesitating). "I made two affidavits. I believe that is in the second affidavit."

Counsel. "Answer my questions, Mr. Minnock. Is there any doubt that you had forgotten it when you made the first affidavit to the *World?*"

Witness. "I had forgotten it."

Counsel (abruptly). "When did you recollect?"

Witness. "I recollected it when I made the second affidavit before the coroner."

Counsel. "And when did you make that?"

Witness. "It was a few days afterward, probably the next day or two."

Counsel (looking among his papers, and again walking up to the witness). "Please take the coroner's affidavit and point out to the jury where there is a word about a sheet having been used to strangle this man."

Witness (refusing paper). "Well, it may not be there."

Counsel. "Is it there?"

Witness (still refusing paper). "I don't know."

Counsel. "Read it, read it carefully."

Witness (reading). "I don't see anything about it."

Counsel. "Had you forgotten it at that time as well?"

Witness (in confusion). "I certainly must have."

Counsel. "Do you want this jury to believe that, having witnessed this horrible scene which you have described, you immediately forgot it, and on two different occasions when you were narrating under oath what took place in that hospital, you forgot to mention it?"

Witness. "It escaped my memory."

Counsel. "You have testified as a witness before in this case, have you not?"

Witness. "Yes, sir."

Counsel. "Before the coroner?"

Witness. "Yes, sir."

Counsel. "But this sheet incident escaped your memory then?"

Witness. "It did not."

Counsel (taking in his hands the stenographer's minutes of the coroner's inquest). "Do you not recollect that you testified for two hours before the coroner without mentioning the sheet incident, and were then excused and were absent from the court for several days before you returned and gave the details of the sheet incident?"

Witness. "Yes, sir; that is correct."

Counsel. "Why did you not give an account of the sheet incident on the first day of your testimony?"

Witness. "Well, it escaped my memory; I forgot it."

Counsel. "Do you recollect, before beginning your testimony before the coroner, you asked to look at the affidavit that you had made for the *World?*"

Witness. "Yes, I had been sick, and I wanted to refresh my memory."

Counsel. "Do you mean that this scene that you have described so glibly to-day had faded out of your

mind then, and you wanted your affidavit to refresh your recollection?"

Witness. "No, it had not faded. I merely wanted to refresh my recollection."

Counsel. "Was it not rather that you had made up the story in your affidavit, and you wanted the affidavit to refresh your recollection as to the story you had manufactured?"

Witness. "No, sir; that is not true."

The purpose of these questions, and the use made of the answers upon the argument, is shown by the following extract from the summing up: —

"My point is this, gentlemen of the jury, and it is an unanswerable one in my judgment, Mr. District Attorney: If Minnock, fresh from the asylum, forgot this sheet incident when he went to sell his first newspaper article to the *World;* if he also forgot it when he went to the coroner two days afterward to make his second affidavit; if he still forgot it two weeks later when, at the inquest, he testified for two hours, without mentioning it, and only first recollected it when he was recalled two days afterward, then there is but one inference to be drawn, and that is, *that he never saw it, because he could not forget it if he had ever seen it!* And the important feature is this: he was a newspaper reporter; he was there, as the district attorney says, 'to observe what was going on.' He says that he stood by in that part of the room, pretending to take away the dishes in

order to see what was going on. He was sane, the only sane man there. Now if he did not see it, it is because it did not take place, and if it did not take place, the insane men called here as witnesses could not have seen it. Do you see the point? Can you answer it? Let me put it again. It is not in mortal mind to believe that this man could have seen such a transaction as he describes and ever have forgotten it. Forget it when he writes his article the night he leaves the asylum and sells it to the morning *World!* Forget it two days afterward when he makes a second important affidavit! He makes still another statement, and does not mention it, and even testifies at the coroner's inquest two weeks later, and leaves it out. Can the human mind draw any other inference from these facts than that he never saw it — because he could not have forgotten it if he had ever seen it? If *he* never saw it, it did not take place. He was on the spot, sane, and watching everything that went on, *for the very purpose of reporting it.* Now if this sheet incident did not take place, the insane men *could not* have seen it. This disposes not only of Minnock, but of all the testimony in the People's case. In order to say by your verdict that that sheet incident took place, you have got to find something that is contrary to all human experience; that is, that this man, Minnock, having seen the horrible strangling with the sheet, as he described, could *possibly* have immediately forgotten it."

The contents of the two affidavits made to the *World* and the coroner were next taken up, and the witness was first asked what the occurrence really was as he now remembered it. After his answers, his attention was called to what he said in his affidavits, and upon the differences being made apparent, he was asked whether what he then swore to, or what he now swore to, was the actual fact; and if he was now testifying from what he remembered to have seen, or if he was trying to remember the facts as he made them up in the affidavit.

Counsel. "What was the condition of the Frenchman at supper time? Was he as gay and chipper as when you said that he had warmed up after he had been walking around awhile?"

Witness. "Yes, sir."

Counsel. "But in your affidavit you state that he seemed to be very feeble at supper. Is that true?"

Witness. "Well, yes; he did seem to be feeble."

Counsel. "But you said a moment ago that he warmed up and was all right at supper time."

Witness. "Oh, you just led me into that."

Counsel. "Well, I won't lead you into anything more. Tell us how he walked to the table."

Witness. "Well, slowly."

Counsel. "Do you remember what you said in the affidavit?"

Witness. "I certainly do."

Counsel. "What did you say?"

Witness. "I said he walked in a feeble condition."

Counsel. "Are you sure that you said anything in the affidavit about how he walked at all?"

Witness. "I am not sure."

Counsel. "The sheet incident, which you have described so graphically, occurred at what hour on Wednesday afternoon?"

Witness. "About six o'clock."

Counsel. "Previous to that time, during the afternoon, had there been any violence shown toward him?"

Witness. "Yes; he was shoved down several times by the nurses."

Counsel. "You mean they let him fall?"

Witness. "Yes, they thought it a very funny thing to let him totter backward, and to fall down. They then picked him up. His knees seemed to be kind of muscle-bound, and he tottered back and fell, and they laughed. This was somewhere around three o'clock in the afternoon."

Counsel. "How many times, Mr. Minnock, would you swear that you saw him fall over backward, and after being picked up by the nurse, let fall again?"

Witness. "Four or five times during the afternoon."

Counsel. "And would he always fall backward?"

Witness. "Yes, sir; he repeated the operation of tottering backward. He would totter about five feet, and would lose his balance and would fall over backward."

The witness was led on to describe in detail this pro-

cess of holding up the patient, and allowing him to fall backward, and then picking him up again, in order to make the contrast more apparent with what he had said on previous occasions and had evidently forgotten.

Counsel. "I now read to you from the stenographer's minutes what you said on this subject in your sworn testimony given at the coroner's inquest. You were asked, 'Was there any violence inflicted on Wednesday before dinner time?' And you answered, 'I didn't see any.' You were then asked if, up to dinner time at six o'clock on Wednesday night, there had been any violence; and you answered: 'No, sir; no violence since Tuesday night. There was nothing happened until Wednesday at supper time, somewhere about six o'clock.' Now what have you to say as to these different statements, both given under oath, one given at the coroner's inquest, and the other given here to-day?"

Witness. "Well, what I said about violence may have been omitted by the coroner's stenographer."

Counsel. "But did you swear to the answers that I have just read to you before the coroner?"

Witness. "I may have, and I may not have. I don't know."

Counsel. "If you swore before the coroner there was no violence, and nothing happened until Wednesday after supper, did you mean to say it?"

Witness. "I don't remember."

Counsel. "After hearing read what you swore to at

the coroner's inquest, do you still maintain the truth of what you have sworn to at this trial, as to seeing the nurse let the patient fall backward four or five times, and pick him up and laugh at him?"

Witness. "I certainly do."

Counsel. "I again read you from the coroner's minutes a question asked you by the coroner himself. Question by the coroner, 'Did you at any time while in the office or the large room of the asylum see Hilliard fall or stumble?' Answer, 'No, sir; I never did.' What have you to say to that?"

Witness. "That is correct."

Counsel. "Then what becomes of your statement made to the jury but fifteen minutes ago, that you saw him totter and fall backward several times?"

Witness. "It was brought out later on before the coroner."

Counsel. "Brought out later on! Let me read to you the next question put to you before the coroner. Question, 'Did you at *any time* see him try to walk or run away and fall?' Answer, 'No, I never saw him fall.' What have you to say to that?"

Witness. "Well, I must have put in about the tottering in my affidavit, and omitted it later before the coroner."

At the beginning of the cross-examination it had been necessary for the counsel to fight with the Court over nearly every question asked; and question after question

was ruled out. As the examination proceeded, however, the Court began to change its attitude entirely toward the witness. The presiding judge constantly frowned on the witness, kept his eyes riveted upon him, and finally broke out at this juncture: "Let me caution you, Mr. Minnock, once for all, you are here to answer counsel's questions. If you can't answer them, say so; and if you can answer them, do so; and if you have no recollection, say so."

Witness. "Well, your Honor, Mr. —— has been cross-examining me very severely about my wife, which he has no right to do."

Court. "You have no right to bring that up. He has a perfect right to cross-examine you."

Witness (losing his temper completely). "That man wouldn't dare to ask me those questions outside. He knows that he is under the protection of the court, or I would break his neck."

Court. "You are making a poor exhibit of yourself. Answer the questions, sir."

Counsel. "You don't seem to have any memory at all about this transaction. Are you testifying from memory as to what you saw, or making up as you go along?"

Witness (no answer).

Counsel. Which is it?"

Witness (doggedly). "I am telling what I saw."

Counsel. "Well, listen to this then. You said in your affidavit: 'The blood was all over the floor. It was covered

with Hilliard's blood, and the scrub woman came Tuesday and Wednesday morning, and washed the blood away.' Is that right?"

Witness. "Yes, sir."

Counsel. "Why, I understood you to say that you didn't get up Wednesday morning until noon. How could you see the scrub woman wash the blood away?"

Witness. "They were at the farther end of the hall. They washed the whole pavilion. I didn't see them Wednesday morning; it was Tuesday morning I saw them scrubbing."

Counsel. "You seem to have forgotten that Hilliard, the deceased, did not arrive at the pavilion until Tuesday afternoon at four o'clock. What have you to say to that?"

Witness. "Well, there were other people who got beatings besides him."

Counsel. "Then that is what you meant to refer to in your affidavit, when speaking of Hilliard's blood upon the floor. You meant beatings of other people?"

Witness. "Yes sir — on Tuesday."

The witness was then forced to testify to minor details, which, within the knowledge of the defence, could be contradicted by a dozen disinterested witnesses. Such, for instance, as hearing the nurse Davis call up the morgue, the morning after Hilliard was killed, at least a dozen times on the telephone, and anxiously inquire what had

been disclosed by the autopsy; whereas, in fact, there was no direct telephonic communication whatever between the morgue and the insane pavilion; and the morgue attendants were prepared to swear that no one had called them up concerning the Hilliard autopsy, and that there were no inquiries from any source. The witness was next made to testify affirmatively to minor facts that could be, and were afterward, contradicted by Dr. Wildman, by Dr. Moore, by Dr. Fitch, by Justice Hogman, by night nurses Clancy and Gordon, by Mr. Dwyer, Mr. Hayes, Mr. Fayne, by Gleason the registrar, by Spencer the electrician, by Jackson the janitor, and by several of the state's own witnesses who were to be called later.

By this time the witness had begun to flounder helplessly. He contradicted himself constantly, became red and pale by turns, hesitated before each answer, at times corrected his answers, at others was silent and made no answer at all. At the expiration of four hours he left the witness-stand a thoroughly discredited, haggard, and wretched object. The court ordered him to return the following day, but he never was seen again at the trial.

A week later, his foster-mother, when called to the witness-chair by the defence, handed to the judge a letter received that morning from her son, who was in Philadelphia (which, however, was not allowed to be shown to the jury) in which he wrote that he had shaken from his feet the dust of New York forever, and would never

return; that he felt he had been ruined, and would be arrested for perjury if he came back, and requested money that he might travel far into the West and commence life anew. It was altogether the most tragic incident in the experience of the writer.

CHAPTER XIV

THE CROSS-EXAMINATION OF JEREMIAH SMITH BY SIR ALEXANDER COCKBURN IN THE WILLIAM PALMER CASE

CHAPTER XIV

THE CROSS-EXAMINATION OF JEREMIAH SMITH BY SIR ALEXANDER COCKBURN IN THE WILLIAM PALMER CASE

It was the cross-examination of a Birmingham attorney, named Jeremiah Smith, by Sir Alexander Cockburn, then Attorney-General and afterward Chief Justice of England, in the celebrated trial of William Palmer for taking the life of John Parsons Cook by poison, that finally turned the tide, in this closely contested case, against the prisoner, and resulted in his conviction and execution. An observer of such long experience as Mr. Justice Stephens said of this cross-examination that "it was something to be heard and seen, but incapable of being described."

William Palmer at the time of his trial was thirty-one years old. He was a physician by profession, but had for several years prior to his trial given up the active practice of medicine and had devoted all his time to the turf. His victim, John Parsons Cook, was also a young man of decent family, originally intended for the profession of the law, but after inheriting some £15,000, also betook himself to the turf. He kept race horses and betted considerably, and in the course of his operations

became intimate with Palmer. At the time of his acquaintance with Cook, Palmer had become involved financially through forging the name of his mother, a woman of considerable property, as indorser of his notes. These indorsements amounted to the sum of £13,000. He had effected an insurance upon the life of his wife for £13,000, and the policies of insurance he had given as collateral on the forged notes. Upon the death of his wife he was enabled to pay off the first notes, but shortly issued fresh ones to the amount of £12,500, had them discounted at the rate of sixty per cent, and gave as new collateral, policies of insurance of an equal amount upon his brother's life, which policies had been assigned to himself. Upon his brother's death, there being a year's interim between the death of his wife and brother, the companies in which the insurance had been effected declined to pay, and Palmer found himself confronted with suits upon these forged notes and the exposure of his forgeries.

It was for the supposed intention of getting possession of Cook's money and race horses that he took the life of his intimate companion.

The trial was held in the Central Criminal Court, London, May 14, 1856, Lord Campbell presiding, and has ever since maintained its reputation as being one of the most learned trials in the history of the criminal courts of the world.

H. D. Traill, in the *English Illustrated Magazine*,

gives a most graphic account of the incidents during the cross-examination of Jeremiah Smith.

"'It was the riding that did it,' exclaimed one of the greatest criminals of the century in extorted admiration of the skill with which one of the greatest advocates of the century had brought Justice in a winner by a short head in one of the century's greatest trials. Sir Alexander Cockburn is said to have been more proud of this tribute from the eminent sportsman and poisoner whom he hunted to the gallows post, than of any other of the many triumphs of his brilliant career. And undoubtedly it has all the ring of one of those utterances which come straight from the heart and attest their source by taking shape in the form of words most familiar to the speaker's lips. There is plenty of evidence to the critical attention with which Mr. William Palmer observed the jockeyship of the attorney in driving that terribly exciting race for life.

"There exists, or existed once, a slip of paper about six inches long by an inch broad — just such a slip, in fact, as a man might tear irregularly off the top of a sheet of foolscap, which bears this calm and matter-of-fact legend, more impressive than the most impassioned prose. 'I suppose you think that last witness did harm.' It is one of those notes which Palmer subscribed from time to time and turned over to his counsel to read and, if necessary, reply to. There is no sign of trembling in the hand that wrote it. Yet it was written — this one —

just at the close of Sir Alexander Cockburn's memorable cross-examination. It was the conviction of the expert section of the audience that when the attorney-general resumed his seat, the halter was knotted around the neck of the prisoner too firmly to be loosed. There is little doubt that the doomed wretch read as much in the face of his counsel, and that the outward indifference of the hastily penned inquiry which he flung across to them must have caused a silent agony of doubt and dread.

"Palmer, of course, was not as well accustomed to observe the manners of the presiding judge as were the professional spectators of the scene, but if so, he would have drawn the worst possible augury from Lord Campbell's increasing politeness to him after this incident in the trial — a form of demeanor toward a prisoner which always indicated that in that distinguished judge's opinion, his doom was certain.

"Yet the cross-examination of Mr. Smith, important as its consequences are said to have been, *might easily be quoted* as *a very doubtful* illustration of the value of this formidable engine for the extraction, or supposed extraction, of the truth.

"Its effect upon the witness himself left nothing to be desired from the point of view of the operator. No abbreviation, in fact, can give the effect of it. The witness's efforts to gain time, and his distress as the various answers were extorted from him by degrees, may be faintly traced in the report. His face was covered with

sweat, and the papers put into his hands shook and rustled. These papers, it must be admitted, were some of them of a sufficiently agitating character. Mr. Smith had had to confess with great reluctance that he had witnessed the assignment of a policy for £13,000 by Walter to William Palmer, who was suspected, and indeed as good as known, to have been guilty of murdering him; he had had to confess that he wrote to an office to effect an insurance for £10,000 on the life of a groom of Palmer's in receipt of £1 a week as wages; he had been compelled to admit the self-impeachment of having tried, after Walter Palmer's death, to get his widow to give up her claim on the policy. The result was that Lord Campbell, in summing up, asked the jury whether they could believe a man who so disgraced himself, in the witness-box. The jury thought they couldn't, and they didn't. The witness, whose evidence was to the effect that Palmer was not at his victim's bedside, but some miles away, at a time when, on the theory of the prosecution, he was substituting poisonous drugs for the medicine supplied to the sick man by the doctor, was disbelieved. *Yet it is nevertheless tolerably certain from other evidence of an unimpeachable kind that Jeremiah Smith was speaking the truth.*"

The text of the cross-examination that follows is taken from the unabridged edition of the *Times*' "Report of the Trial of William Palmer," containing the shorthand notes taken from day to day, and published in London in 1856.

Attorney-General. "Are you the gentleman who took Mr. Myatt to Stafford Gaol?"

Smith. "I am."

Attorney-General. "Have you known Palmer long?"

Smith. "I have known him long and very intimately, and have been employed a good deal as an attorney by Palmer and his family."

Attorney-General. "In December, 1854, did he apply to you to attest a proposal of his brother, Walter Palmer, for £13,000 in the Solicitors and General Insurance Office?"

Smith. "I cannot recollect; if you will let me see the document, I will tell you."

Attorney-General. "Will you swear that you were not applied to?"

Smith. "I will not swear either that I was not applied to for that purpose or that I was. If you will let me see the document, I shall recognize my writing at once."

Attorney-General. "In January, 1855, were you applied to by Palmer to attest a proposal of his brother for £13,000 in the Prince of Wales Office?"

Smith. "I don't recollect."

Attorney-General. "Don't recollect! Why, £13,000 was a large sum for a man like Walter Palmer, wasn't it, who hadn't a shilling in the world?"

Smith. "Oh, he had money, because I know that he lived retired and carried on no business."

Attorney-General. "Didn't you know that he was an uncertified bankrupt?"

Smith. "I know that he had been a bankrupt some years before, but I did not know that he was an uncertified bankrupt. I know that he had an allowance from his mother, but I do not know whether he had money from any other source. I believe that his brother, William [the prisoner], gave him money at different times."

Attorney-General. "Where, in the course of 1854 and 1855, were you living — in Rugeley?"

Smith. "In 1854 I think I resided partly with William Palmer, and sometimes at his mother's."

Attorney-General. "Did you sometimes sleep at his mother's?"

Smith. "Yes."

Attorney-General. "When you did that, where did you sleep?"

Smith. "In a room."

Attorney-General. "Did you sleep in his mother's room — on your oath, were you not intimate with her — you know well enough what I mean?"

Smith. "I had no other intimacy, Mr. Attorney, than a proper intimacy."

Attorney-General. "How often did you sleep at her house, having an establishment of your own at Rugeley?"

Smith. "Frequently. Two or three times a week."

Attorney-General. "Are you a single or a married man?"

Smith. "A single man."

Attorney-General. "How long did that practice of sleeping two or three times a week at Mrs. Palmer's continue?"

Smith. "For several years."

Attorney-General. "Had you your own lodgings at Rugeley at the time?"

Smith. "Yes, all the time."

Attorney-General. "How far were your lodgings from Mrs. Palmer's house?"

Smith. "I should say nearly quarter of a mile."

Attorney-General. "Explain how it happened that you, having your own place of abode within a quarter of a mile, slept two or three times a week at Mrs. Palmer's."

Smith. "Sometimes her son Joseph or other members of her family were on a visit to her, and I went to see them."

Attorney-General. "And when you went to see those members of her family, was it too far for you to return a quarter of a mile in the evening?"

Smith. "Why, we used to play a game of cards, and have a glass of gin-and-water, and smoke a pipe perhaps; and then they said, 'It is late — you had better stop all night;' and I did. There was no particular reason why I did not go home that I know of."

Attorney-General. "Did that go on for three or four years?"

Smith. "Yes; and I sometimes used to stop there

when there was nobody there at all — when they were all away from home, the mother and all."

Attorney-General. "And you have slept there when the sons were not there and the mother was?"

Smith. "Yes."

Attorney-General. "How often did that happen?"

Smith. "Sometimes for two or three nights a week, for some months at a time, and then perhaps I would not go near the house for a month."

Attorney-General. "What did you stop for on those nights when the sons were not there; there was no one to smoke and drink with then, and you might have gone home, might you not?"

Smith. "Yes; but I did not."

Attorney-General. "Do you mean to say, on your oath, that there was nothing but a proper intimacy between you and Mrs. Palmer?"

Smith. "I do."

Attorney-General. "Now I will turn to another subject. Were you called upon to attest another proposal for £13,000 by Walter Palmer in the Universal Office?"

Smith. "I cannot say; if you will let me see the proposal, I shall know."

Attorney-General. "I ask you, sir, as an attorney and a man of business, whether you cannot tell me whether you were applied to by William Palmer to attest a proposal for an assurance for £13,000 on the life of Walter Palmer?"

Smith. "I say that I do not recollect it. If I could see any document on the subject, I daresay I should remember it."

Attorney-General. "Do you remember getting a £5 note for attesting an assignment by Walter Palmer to his brother of such a policy?"

Smith. "Perhaps I might. I don't recollect positively."

Attorney-General (handing a document to witness). "Is that your signature?"

Smith. "It is very like my signature."

Attorney-General. "Have you any doubt about it?"

Smith (after considerable hesitation). "I have some doubt."

Attorney-General. "Read the document, and tell me, on your oath, whether it is your signature."

Smith. "I have some doubt whether it is mine."

Attorney-General. "Read the document, sir. Was it prepared in your office?"

Smith. "It was not."

Attorney-General. "I will have an answer from you on your oath one way or another. Isn't that your handwriting?"

Smith. "I believe that it is not my handwriting. I think that it is a very clever imitation of it."

Attorney-General. "Will you swear that it is not?"

Smith. "I will. I think that it is a very good imitation of my handwriting."

Baron Alderson. "Did you ever make such an attestation?"

Smith. "I don't recollect, my Lord."

Attorney-General. "Look at the other signature there, 'Walter Palmer,' — is that his signature?"

Smith. "I believe that is Walter Palmer's."

Attorney-General. "Look at the attestation and the words 'signed, sealed, and delivered'; are they in Mr. Pratt's handwriting?"

Smith. "They are."

Attorney-General. "Did you receive that from Mr. Pratt?"

Smith. "Most likely I did; but I can't swear that I did. It might have been sent to William Palmer."

Attorney-General. "Did you receive it from William Palmer?"

Smith. "I don't know. Very likely I did."

Attorney-General. "Did William Palmer give you that document?"

Smith. "I have no doubt he did."

Attorney-General. "If that be the document he gave you, and those are the signatures of Walter Palmer and of Pratt, is not the other signature yours?"

Smith. "I'll tell you, Mr. Attorney — "

Attorney-General. "Don't 'Mr. Attorney' me, sir! Answer my question. Isn't that your handwriting?"

Smith. "I believe it not to be."

Attorney-General. "Will you swear that it isn't?"

Smith. "I believe that it is not."

Attorney-General. "Did you apply to the Midland Counties Insurance Office in October, 1855, to be appointed their agent at Rugeley?"

Smith. "I think I did."

Attorney-General. "Did you send them a proposal on the life of Bates for £10,000—you yourself?"

Smith. "I did."

Attorney-General. "Did William Palmer apply to you to send that proposal?"

Smith. "Bates and Palmer came together to my office with a prospectus, and asked me if I knew whether there was any agent for that company in Rugeley. I told them I had never heard of one, and they then asked me if I would write and get the appointment, because Bates wanted to raise some money."

Attorney-General. "Did you send to the Midland Office and get appointed as their agent in Rugeley, in order to effect that £10,000 insurance on Bates's life?"

Smith. "I did."

Attorney-General. "Was Bates at that time superintending William Palmer's stud and stables?"

Smith. "He was."

Attorney-General. "At a salary of £1 a week?"

Smith. "I can't tell his salary."

Attorney-General. "After that did you go to the widow

of Walter Palmer to get her to give up her claim on the policy of her husband?"

Smith. "I did."

Attorney-General. "Where was she at that time?"

Smith. "At Liverpool."

Attorney-General. "Did you receive a document from Pratt to take to her?"

Smith. "William Palmer gave me one which had been directed to him."

Attorney-General. "Did the widow refuse?"

Smith. "She said she should like her solicitor to see it; and I said, 'By all means.'"

Attorney-General. "Of course! Didn't she refuse to do it — didn't you bring it back?"

Smith. "I brought it back as I had no instructions to leave it."

Attorney-General. "Didn't she say that she understood from her husband that the insurance was for £10,000?"

Mr. Serjeant Shee objected to this question. What passed between the widow and witness could be no evidence against the prisoner.

The *Attorney-General* said that the question was intended to affect the credit of the witness, and with that view it was most important.

The court ruled that the question could not be put.

Attorney-General. "Do you know that Walter Palmer obtained nothing for making that assignment?"

Smith. "I believe that he ultimately did get something for it."

Attorney-General. "Don't you know that what he got was a bill for £200?"

Smith. "Yes; and he had a house furnished for him."

Attorney-General. "Don't you know that he got a bill for £200?"

Smith. "Yes."

Attorney-General. "And don't you know that that bill was never paid?"

Smith. "No, I do not."

Attorney-General. "Now, I'll refresh your memory a little with regard to those proposals [handing witness a document]. Look at that, and tell me whether it is in your handwriting."

Smith. "It is."

Attorney-General. "Refreshing your memory with that, I ask you were you not applied to by William Palmer in December, 1854, to attest a proposal on the life of his brother, Walter, for £13,000 in the Solicitors and General Insurance Office?"

Smith. "I might have been."

Attorney-General. "Were you or were you not, sir? Look at that document, and say have you any doubt upon the subject?"

Smith. "I do not like to speak from memory with reference to such matters."

Attorney-General. "No; but not speaking from mem-

ory in an abstract sense, but having your memory refreshed by a perusal of that document, have you any doubt that you were applied to?"

Smith. "I have no doubt that I might have been applied to."

Attorney-General. "Have you any doubt that in January, 1855, you were called on by William Palmer to attest another proposal for £13,000 on his brother's life in another office? Look at that document and tell me."

Smith. "I see the paper, but I don't know; I might have signed it in blank."

Attorney-General. "Do you usually sign attestations of this nature in blank?"

Smith. "I have some doubt whether I did not sign several of them in blank."

Attorney-General. "On your oath, looking at that document, don't you know that William Palmer applied to you to attest that proposal upon his brother's life for £13,000?"

Smith. "He did apply to me to attest proposals in some offices."

Attorney-General. "Were they for large amounts?"

Smith. "One was for £13,000."

Attorney-General. "Were you applied to to attest another for the like sum in the Universal Office?"

Smith. "I might be."

Attorney-General. "They were made much about the

same time, were they not? You did not wait for the answers to come back to the first application before you made the second?"

Smith. "I do not know that any answers were returned at all."

Attorney-General. "Will you swear that you were not present when Walter Palmer executed the deed assigning the policy upon his life to his brother, William Palmer? Now, be careful, Mr. Smith, for depend upon it you shall hear of this again if you are not."

Smith. "I will not swear that I was, I think I was not. I am not quite positive."

(Very few of the answers to these questions of the Attorney-General were given without considerable hesitation, and the witness appeared to labor under a sense of embarrassment which left a decidedly unfavorable impression upon the minds of the audience.)

Attorney-General. "Do you know that the £200 bill was given for the purpose of enabling William Palmer to make up a sum of £500?"

Smith. "I believe it was not; for Cook received absolutely from me £200. If I am not mistaken, he took it with him to Shrewsbury races — not the last races."

Attorney-General. "In whose favor was the bill drawn?"

Smith. "I think in favor of William Palmer. I don't know what became of it. I have never seen it since. I cannot state with certainty who saw me on the Monday;

but I called at the Talbot Arms, and went into Cook's room. One of the servants gave me a candle. As well as I can remember, the servant who did so was either Bond, Mills, or Lavinia Barnes, I can't say which."

CHAPTER XV

THE CROSS-EXAMINATION OF RUSSELL SAGE BY MR. JOSEPH H. CHOATE IN THE LAIDLAW-SAGE CASE

CHAPTER XV

THE CROSS-EXAMINATION OF RUSSELL SAGE BY MR. JOSEPH H. CHOATE IN THE LAIDLAW-SAGE CASE

One of the most recent cross-examinations to be made the subject of appeal to the Supreme Court General Term and the New York Court of Appeals was the cross-examination of Russell Sage by Mr. Joseph H. Choate, in the famous suit brought against the former by William R. Laidlaw. Sage was defended by the late Edwin C. James, and Mr. Choate appeared for the plaintiff, Mr. Laidlaw.

On the fourth day of December, 1891, a stranger by the name of Norcross came to Russell Sage's New York office and sent a message to him that he wanted to see him on important business, and that he had a letter of introduction from Mr. John Rockefeller. Mr. Sage left his private office, and going up to Norcross, was handed an open letter which read, "This carpet-bag I hold in my hand contains ten pounds of dynamite, and if I drop this bag on the floor it will destroy this building in ruins and kill every human being in it. I demand twelve hundred thousand dollars, or I will drop it. Will you give it? Yes or no?"

Mr. Sage read the letter, handed it back to Norcross, and suggested that he had a gentleman waiting for him in his private office, and could be through his business in a couple of minutes when he would give the matter his attention.

Norcross responded: "Then you decline my proposition? Will you give it to me? Yes or no?' Sage explained again why he would have to postpone giving it to him for two or three minutes to get rid of some one in his private office, and just at this juncture Mr. Laidlaw entered the office, saw Norcross and Sage without hearing the conversation, and waited in the anteroom until Sage should be disengaged. As he waited, Sage edged toward him and partly seating himself upon the table near Mr. Laidlaw, and without addressing him, took him by the left hand as if to shake hands with him, but with both his own hands, and drew Mr. Laidlaw almost imperceptibly around between him and Norcross. As he did so, he said to Norcross, "If you cannot trust me, how can you expect me to trust you?"

With that there was a terrible explosion. Norcross himself was blown to pieces and instantly killed. Mr. Laidlaw found himself on the floor on top of Russell Sage. He was seriously injured, and later brought suit against Mr. Sage for damages upon the ground that he had purposely made a shield of his body from the expected explosion. Mr. Sage denied that he had made a shield of Laidlaw or that he had taken him by the

hand or altered his own position so as to bring Laidlaw between him and the explosion.

The case was tried four times. It was dismissed by Mr. Justice Andrews, and upon appeal the judgment was reversed. On the second trial before Mr. Justice Patterson the jury rendered a verdict of $25,000 in favor of Mr. Laidlaw. On appeal this judgment in turn was reversed. On a third trial, also before Mr. Justice Patterson, the jury disagreed; and on the fourth trial before Mr. Justice Ingraham the jury rendered a verdict in favor of Mr. Laidlaw of $40,000, which judgment was sustained by the General Term of the Supreme Court, but subsequently reversed by the Court of Appeals.

Exception on this appeal was taken especially to the method used in the cross-examination of Mr. Sage by Mr. Choate. Thus the cross-examination is interesting, as an instance of what the New York Court of Appeals has decided to be an abuse of cross-examination into which, through their zeal, even eminent counsel are sometimes led, and to which I have referred in a previous chapter. It also shows to what lengths Mr. Choate was permitted to go upon the pretext of testing the witness's memory.

It was claimed by Mr. Sage's counsel upon the appeal that "the right of cross-examination was abused in this case to such an extent as to require the reversal of this monstrous judgment, which is plainly the precipitation

and product of that abuse." And the Court of Appeals unanimously took this view of the matter.

The portions of the cross-examination that were especially excepted to were the rejected jurors' conversation with Mr. Sage; the defendant's lack of sympathy for the plaintiff; the article in the *New York World;* the defendant's omission to give warning of the impending explosion, and the defendant's wealth and the extent and character of his business.

Mr. Choate. "I hope you are very well this morning, Mr. Sage?"

Mr. Sage. "Yes, sir."

Mr. Choate. "Do you remember swearing to the answer in this case?"

Mr. Sage. "I didn't hear you, sir."

Mr. Choate. "Which is your best ear?"

Mr. Sage. "This."

Mr. Choate. "Do you remember swearing to the answer in this case?"

Mr. Sage. "I do."

Mr. Choate. "Who prepared it for you?"

Mr. Sage. "It was prepared by my counsel."

Mr. Choate. "Counsel in whom you have every confidence?"

Mr. Sage. "Yes, sir."

Mr. Choate. "Prepared after you had given a careful statement of your case to them?"

Mr. Sage. "Such statement as I thought necessary."

Mr. Choate. "Did you mean to conceal anything from them?"

Mr. Sage. "No, sir."

Mr. Choate. "Did you read the complaint over with your counsel before you swore to the answer?"

Mr. Sage. "I presume I did."

Mr. Choate. "Just imagine you were down at the Stock Exchange now, and speak loud enough so that gentleman can hear you."

Mr. Sage. "I will endeavor to."

Mr. Choate. "Did you read your answer before you swore to it?"

Mr. Sage. "I did, sir."

Mr. Choate. "It was true, then, was it not?"

Mr. Sage. "I believed it to be so."

Mr. Choate. "I call your attention to a statement made in the answer." (Mr. Choate here read from Mr. Sage's answer in which he swore that he was in conversation with Mr. Norcross while Mr. Laidlaw was in the office, Mr. Sage having testified differently the day before.) "Was that true?"

Mr. Sage. "I don't know. I didn't catch it."

Mr. Choate. "I didn't want you to catch it. I wanted you to answer it. You observe, do you not, that the answer says that the plaintiff Laidlaw was in your office while you were conversing with the stranger?"

Mr. Sage. "I observe that, but I want to state the fact as I did yesterday."

Mr. Choate. "Answer my question. Did you observe it?"

Mr. Sage. "I did."

Mr. Choate. "Put down your fist and answer my question."

Mr. Sage. "I answered it."

Mr. Choate. "I think we will get along as soon as you answer my questions instead of making speeches. Did you observe that your answer states that before Laidlaw was in the office, and while you were conversing with the stranger, the stranger had already handed you a note demanding money?"

Mr. Sage. "He had done no such thing."

Mr. Choate. "Do you observe that your answer states that?"

Mr. Sage. "Your reading states it so, but the fact is as I have stated it."

Mr. Choate. "Was not your answer true as you swore to it?"

Mr. Sage. "No, sir; not on your interpretation."

Mr. Choate. "How came you to swear to it, if it is not true?"

Mr. Sage. "I suppose that was prepared afterward by counsel, as you prepare papers."

Mr. Choate. "I never prepare papers. What are you talking about?"

Mr. Sage. "You have the reputation of preparing papers."

Mr. Choate. "Do you mean that your lawyers distorted the facts from what you stated?"

Mr. Sage. "I suppose they prepared the papers in their usual form."

Mr. Choate. "In the usual form? Was there ever any usual form for a case like this?"

Mr. Sage. "Yes, sir."

Mr. Choate. "Did you ever know of such a case before?"

Mr. Sage. "No, sir."

(Mr. Choate then pursued this inquiry, in various forms, for at least one hundred questions more, and getting no satisfactory answer, he continued, "We will drop the subject and go to something else.")

Mr. Choate. "Since Mr. Laidlaw made this claim against you, you have been very hostile against him, have you not?"

Mr. Sage. "No, sir, not hostile."

Mr. Choate. "Have you not called him all sorts of bad names?"

Mr. Sage. "I said he did not tell the truth."

Mr. Choate. "Have you denounced him as a blackmailer? When did you do that?"

Mr. Sage. "I might have said that a man who would persevere in making a statement that there was not a word of truth in, and demanding a sum of money — I don't know what you call it. Call it what you please."

Mr. Choate. "Did you not say that you would see

Laidlaw a tramp before he would get through with this case?"

Mr. Sage. "I have no recollection of any such thing."

Mr. Choate. "Will you swear you didn't?"

Mr. Sage. "I won't swear. I might."

Mr. Choate. "What?"

Mr. Sage. "I won't testify to what I have said."

Mr. Choate. "I want you to say whether you will swear that you said that you would see Laidlaw a tramp before he got through."

Mr. Sage. "I don't know."

Mr. Choate. "Do you not know that when the last juror was excused from the jury-box, or discharged, he stated in the presence of the court and the other jurymen that after the verdict rendered by the former jury in this case against you, Mrs. Sage went to him at Tiffany's and stated that the verdict was a great outrage, and that Mr. Sage would never pay a cent?" (This question was bitterly objected to by Mr. James, but allowed by the court.)

Mr. Sage. "I want to state right here, if you will permit —"

Mr. Choate. "The first business is to answer this question."

Mr. Sage. "I don't know it. I know that Mrs. Sage denied ever having said anything of the kind."

Mr. Choate. "You think the juror told a falsehood?"

Mr. Sage. "Mrs. Sage has no recollection of having said that."

Mr. Choate. "Did you say to anybody that it was an outrage?"

Mr. Sage. "I have no recollection. I think it is the greatest outrage that was ever attempted by a respectable lawyer."

Mr. Choate. "Did you not say that you would spend $100,000 dollars in defending this case rather than pay a cent to Laidlaw?"

Mr. Sage. "I have great confidence in the courts of this state and the United States, and I am fighting for other people besides myself, and I propose to have this case settled by the highest courts."

Mr. Choate. "No matter what this jury says?"

Mr. Sage. "I have great respect for them that they will decide the case rightly. I want to know if a man can come into my office, and because a tramp drops in there and an accident happens, and an injury done, I am responsible for that?"

Mr. Choate. "These harangues of yours take a great deal of time. I ask you whether or not you knew that Laidlaw at the time of this accident had been very badly hurt?"

Mr. Sage. "Yes, sir; I knew he had been."

Mr. Choate. "Do not you know he was laid up in the hospital helpless?"

Mr. Sage. "I understand he was. Yes, sir."

Mr. Choate. "Did it ever occur to you to see what you could do for him?"

Mr. Sage. "Yes, sir. I sent my brother-in-law to inquire after him twice."

Mr. Choate. "Did you visit him yourself?"

Mr. Sage. "I did not."

Mr. Choate. "Did you do anything to relieve his sufferings?"

Mr. Sage. "I was not called upon to do anything of the kind."

Mr. Choate. "I did not ask you whether you were called upon. I asked whether you did?"

Mr. Sage. "I did not."

Mr. Choate. "Did not you refrain from going to see him because you were afraid if you did he would make a claim upon you?"

Mr. Sage. "No, sir."

Mr. Choate. "Did you care whether he was going to get cured or not?"

Mr. Sage. "It is an outrage to ask such a question."

Mr. Choate. "Did you have a grandnephew, Chapin, at this time?"

Mr. Sage. "Yes."

Mr. Choate. "Was he assistant editor of the *World* at that time?"

Mr. Sage. "Yes."

Mr. Choate. "Shortly after the explosion, did he come to see you and have a chat with you?"

Mr. Sage. "Yes."

Mr. Choate. "Did you afterward read an article published in the *New York World*, headed, 'A Chat with Russell Sage,' and giving an interview with you?"

Mr. Sage. "Yes."

Mr. Choate. "When you read in that article: 'He looks as vigorous as at any time before the time of the assassination. His face bears almost no marks of the glass that had got into it after the explosion. It was clean shaven; in fact, Mr. Sage had arisen yesterday morning and shaved himself,' did that accord with your recollection at the time you read it?"

Mr. Sage. "No, sir; it did not. I have stated it was a gross exaggeration."

Mr. Choate. "When the article continued, 'The only thing that impressed one was that there was a face of an old man, hearty and robust, tenacious of life and good for many years.' Did that accord with your recollection at the time?"

Mr. Sage. "No, sir; it was an exaggeration. I was very badly scarred all over my face."

Mr. Choate. "When you read in that article: 'It was more surprising though, when Mr. Sage arose, and helping himself up at full length, exhibited all his accustomed power of personality. He was like a warrior after battle, a warrior who has come from the thick of the fight, covered with the dust of conflict, yet without a hurt to body

or limb.' Did that accord when you read it with your then present recollection?"

Mr. Sage. "No, sir, it did not. This is the third time you have read those articles to the jury in this case; it is like the Fourth of July oration or the Declaration of Independence."

(Mr. Choate continued and was allowed to read from this newspaper article, although his questions were constantly and urgently objected to on the part of the defence, and although Mr. Sage said that he did not read half the article "because it was an exaggerated statement from beginning to end, as most paper interviews are." Mr. Choate here went into an exhaustive examination as to the details of the accident, comparing the witness's statements at previous trials with the statements at this trial, and then continued: —

Mr. Choate. "Everything you did after you once appreciated the danger you were in, having read the threat contained in the letter the stranger handed you, was to gain time, was it not?"

Mr. Sage. "Yes, sir."

Mr. Choate. "You knew at that time, did you not, that Laidlaw and Norcross were in the room? Why did you not tell them to step into your private room?"

Mr. Sage. "I will tell you very frankly it would have been almost certain death to six or seven men. There were three other men in that room with only board partitions between. It would have infuriated the stranger.

and would have made him disregard me and drop the bag."

Mr. Choate. "Did you think of the danger that Laidlaw and Norcross were in?"

Mr. Sage. "No more than the other clerks. We were all alike."

Mr. Choate. "And the reason you did not tell them to go into the other room was that they would even then not be out of danger?"

Mr. Sage. "I thought it would displease Norcross, and show that I was trying to do something to head him off."

Mr. Choate. "And he would allow the bag to drop?"

Mr. Sage. "Yes, sir."

Mr. Choate. "And kill you?"

Mr. Sage. "Kill me and kill the whole of us."

Mr. Choate. "What is your business?"

Mr. Sage. "My business is banker and broker."

Mr. Choate. "Why do you call yourself a banker?"

Mr. Sage. "Because I buy stock and discount paper and make loans."

Mr. Choate. "You are a money lender, are you not?"

Mr. Sage. "Sometimes I have money to loan."

Mr. Choate. "At various rates of interest?"

Mr. Sage. "Sometimes."

Mr. Choate. "Varying from six to sixty per cent?"

Mr. Sage. "Oh, no."

Mr. Choate. "What is the other part of your business?"

Mr. Sage. "My business is operating railroads."

Mr. Choate. "How many railroads do you operate?"

These questions were strenuously objected to, whereupon Mr. Choate said to the court, "I think I can show that this man has so many things in his head, that he is so full of affairs, that he is not a competent witness at any time to any transaction."

Mr. Sage. "I am operating two."

Mr. Choate. "Are they large railroads or horse railroads?"

Mr. Sage. "Well, one of them is a large one."

Mr. Choate. "You help run several banks, do you not?"

Mr. Sage. "I am not running any banks, only a director."

Mr. Choate. "Are you a director in two banks?"

Mr. Sage. "Yes, sir."

Mr. Choate. "And trust companies?"

Mr. Sage. "Yes, sir."

Mr. Choate. "In the Manhattan Elevated R. R.?"

Mr. Sage. "Yes, sir."

Mr. Choate. "In the Western Union?"

Mr. Sage. "Yes, sir."

Mr. Choate. "In the Missouri Pacific?"

Mr. Sage. "Yes, sir."

Mr. Choate. "In the Union Pacific?"

Mr. Sage. "Yes, sir."

Mr. Choate. "This stock ticker that stood by the desk in the adjoining room, did you keep run of it yourself?"

Mr. Sage. "Yes, sir."

Mr. Choate. "You take care of your own estate besides, do you not?"

Mr. Sage. "Yes, sir."

Mr. Choate. "That took a good deal of time?"

Mr. Sage. "It took some time."

Mr. Choate. "How much time did that occupy?"

Mr. Sage. "I have my assistants, my clerks, the same as you have in your office."

Mr. Choate. "You loan money, you manage these railroads, banks, trust companies, and the other affairs that you have mentioned. Did you not have dealings in stocks?"

Mr. Sage. "Oh, I buy and sell securities occasionally."

Mr. Choate. "Do you not deal in puts and calls and straddles?"

Mr. Sage. "I have in years gone by."

Mr. Choate. "These affairs take your whole time, do they not?"

Mr. Sage. "No, sir; I have leisure. I do not devote all my time to business."

Mr. Choate. "I think that is all."

THE CITIZEN'S LIBRARY OF ECONOMICS, POLITICS, AND SOCIOLOGY

UNDER THE GENERAL EDITORSHIP OF

RICHARD T. ELY, Ph.D., LL.D.

Director of the School of Economics and Political Science; Professor of Political Economy at the University of Wisconsin

12mo Half Leather $1.25, net, each

MONOPOLIES AND TRUSTS. By RICHARD T. ELY, Ph.D., LL.D.

"It is admirable. It is the soundest contribution on the subject that has appeared." — Professor JOHN R. COMMONS.

"By all odds the best written of Professor Ely's work." — Professor SIMON N. PATTEN, *University of Pennsylvania*.

OUTLINES OF ECONOMICS. By RICHARD T. ELY, Ph.D., LL.D., author of "Monopolies and Trusts," etc.

THE ECONOMICS OF DISTRIBUTION. By JOHN A. HOBSON, author of "The Evolution of Modern Capitalism," etc.

WORLD POLITICS. By PAUL S. REINSCH, Ph.D., LL.B., Assistant Professor of Political Science, University of Wisconsin.

ECONOMIC CRISES. By EDWARD D. JONES, Ph.D., Instructor in Economics and Statistics, University of Wisconsin.

GOVERNMENT IN SWITZERLAND. By JOHN MARTIN VINCENT, Ph.D., Associate Professor of History, Johns Hopkins University.

POLITICAL PARTIES IN THE UNITED STATES, 1846–1861. By JESSE MACY, LL.D., Professor of Political Science in Iowa College.

ESSAYS ON THE MONETARY HISTORY OF THE UNITED STATES. By CHARLES J. BULLOCK, Ph.D., Assistant Professor of Economics, Williams College.

SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER. By EDWARD ALSWORTH ROSS, Ph.D.

COLONIAL GOVERNMENT. By PAUL S. REINSCH, Ph.D., LL.B., author of "World Politics," etc.

DEMOCRACY AND SOCIAL ETHICS. By JANE ADDAMS, Head of "Hull House," Chicago.

MUNICIPAL ENGINEERING AND SANITATION. By M. N. BAKER, Ph.B., Associate Editor of *Engineering News*.

AMERICAN MUNICIPAL PROGRESS. By CHARLES ZUEBLIN, B.D., Associate Professor of Sociology in the University of Chicago.

IRRIGATION INSTITUTIONS. By ELWOOD MEAD, C.E., M.S., Chief of Irrigation Investigations, Department of Agriculture.

RAILWAY LEGISLATION IN THE UNITED STATES. By BALTHASAR H. MEYER, Ph.D., Professor of Institutes of Commerce, University of Wisconsin.

STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY. By RICHARD T. ELY, Ph.D., LL.D., author of "Monopolies and Trusts," etc.

THE MACMILLAN COMPANY
66 FIFTH AVENUE, NEW YORK

THE UNITED STATES

AN OUTLINE OF POLITICAL HISTORY, 1492–1871

By GOLDWIN SMITH, D.C.L.

Crown 8vo Cloth $2.00

"The brilliant comment of a liberal Englishman on the history and institutions of this country is of the utmost value to Americans, who will not be repelled by its occasional harshness, by its occasional injustice, but who will be materially helped to a juster conception of the results of American civilization, and will be immensely entertained and interested by the vivacity and freshness with which the comments are made." — *The Outlook.*

"Of this last production from the pen of Mr. Smith, a reader will not hesitate to speak his judgment in the highest terms of respect and commendation. Its three hundred of open pages, of terse and often brilliant and epigrammatic matter, make it a marvellous condensation of historical narrative and of philosophic comment on principles, men, events, and incidents. Its judgment upon our politicians, statesmen, military leaders, orators, and presidents, are sometimes keen, but always intelligent, impartial, and discriminating." — *Boston Evening Transcript.*

THE AMERICAN COMMONWEALTH

By the Right Hon. JAMES BRYCE, D.C.L.

Author of "The Holy Roman Empire"; M.P. for Aberdeen

Third Edition, Revised Throughout In Two Volumes Large 12mo $4.00 net
Abridged Edition, in One Volume, $1.75 net

"His work rises at once to an eminent place among studies of great nations and their institutions. It is, so far as America goes, a work unique in scope, spirit, and knowledge. There is nothing like it anywhere extant, nothing that approaches it. . . . Without exaggeration it may be called the most considerable and gratifying tribute that has yet been bestowed upon us by an Englishman, and perhaps by even England herself. . . . One despairs in an attempt to give, in a single newspaper article, an adequate account of a work so infused with knowledge and sparkling with suggestion. . . . Every thoughtful American will read it and will long hold in grateful remembrance its author's name." — *The New York Times.*

DEMOCRACY AND THE ORGANIZATION OF POLITICAL PARTIES

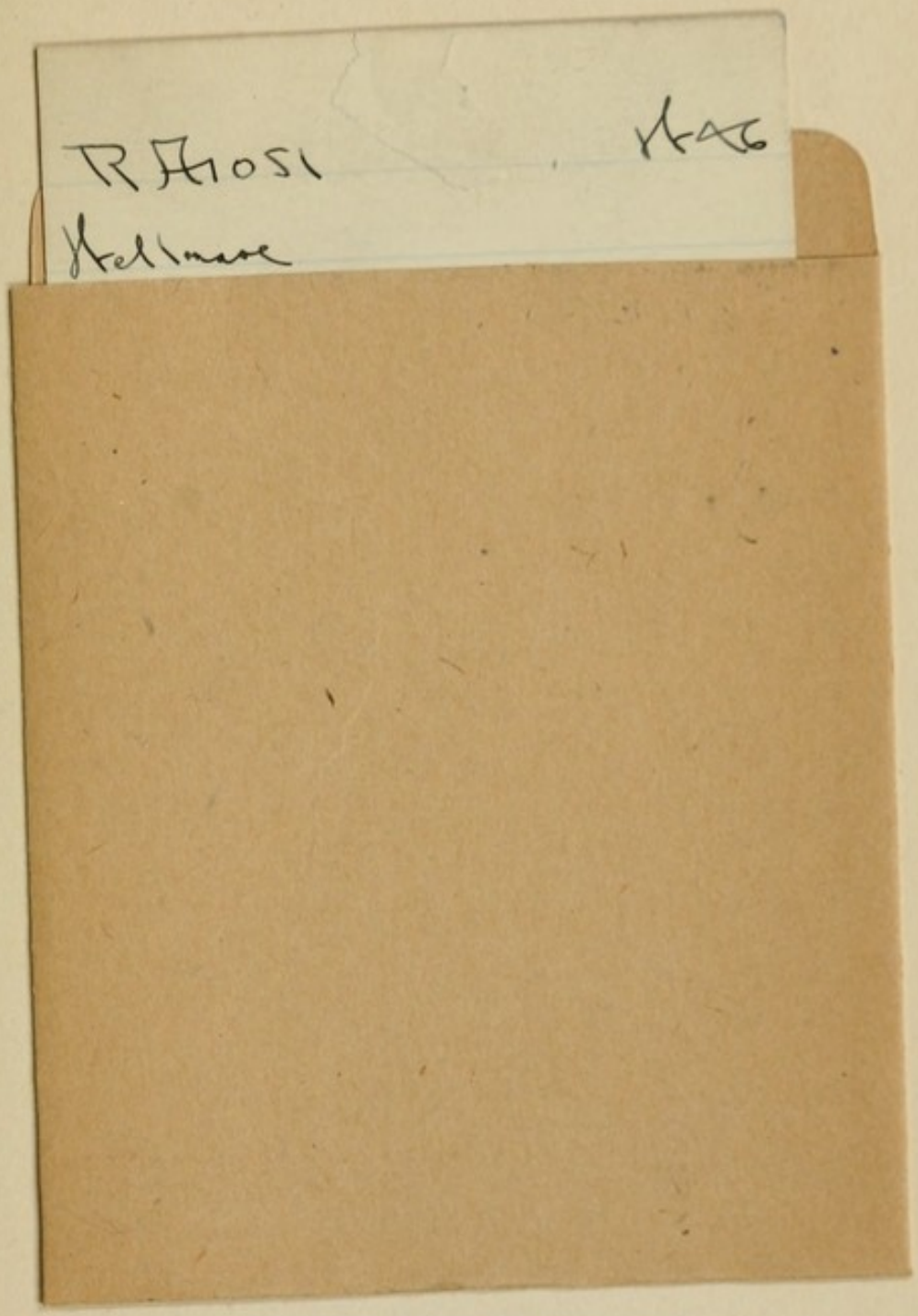
By M. OSTROGORSKI

Translated from the French by FREDERICK CLARKE, M.A., formerly Taylorian Scholar in the University of Oxford; with a Preface by the Right Hon. JAMES BRYCE, M.P.

In Two Volumes Cloth 8vo $6.00 net

"M. Ostrogorski's work is a monument of scholarship and painstaking research, and a treasury of information of political conditions in Britain and in America that is alike amazing and invaluable. The book is one that every publicist, every one desirous of acquainting himself with the growth and development of political conditions in the two great Anglo-speaking nations of the world, should possess, for he cannot afford to remain in ignorance of this master work." — MARSHAL H. BRIGHT.

THE MACMILLAN COMPANY
66 FIFTH AVENUE, NEW YORK


R Ahosi
Hellmore