

CROSS-EXAMINATION.

Francis L. Wellman's Interesting New Book of Advice and Anecdote.



IN HIS interesting book on "The Art of Cross-Examination," Francis L. Wellman, who was formerly an Assistant District Attorney for the County of New York, has taken the unusual course of permitting some other lawyer to begin his first chapter and to close his last. He opens with the following quotation from "one of England's greatest advocates at the close of a long and eventful career at the bar," written half a century ago:

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.

The book ends abruptly with Joseph H. Choate's closing words in the cross-examination of Russell Sage in the Laidlaw case—words that fall almost unconsciously from the lips of every lawyer when he has squeezed his witness dry:

"I think that is all."

Mr. Wellman's book is not, as its title might lead many persons to suppose, written solely for lawyers. It has no place with the great company of dreary and dignified tomes of sheepskin that fill the bookshelves in attorneys' offices. The text is written in a chatty, narrative style and abounds with anecdotes about great men whose battles in court are so familiar to the present generation, that it is entertaining to a degree, even to men who know nothing about law. Whatever benefit younger attorneys and law-students may derive from Mr. Wellman's advice and counsel depends upon the application of it. The author makes it very clear that what is good cross-examination in one case is dangerous tactics in another. The cross-examiner must not fuss with his notes, but must watch every move of his witness as a prizefighter watches his opponent, sparing guardedly for an opening, landing a telling blow at the first opportunity and making every hit tell. He believes in the maxim of the late Sir Charles Russell, whom he considers altogether the most successful cross-examiner of modern times:

"Go straight at the witness and at the point; throw your cards on the table; mere finesse juries do not appreciate."

Mr. Wellman confesses that he does not intend to arrogate to himself any superior knowledge upon the subject of cross-examination excepting in so far as it may have been gleaned from actual experience of twenty-five years' court practice, in which he examined and cross-examined about 15,000 witnesses drawn from all classes of the community. In cautioning young advocates against spread-eagle oratory he says that 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.

Mr. Wellman makes a strong plea for confining the trial of cases in court to lawyers who have been specially trained for that branch of the profession. "We are beginning to appreciate in this country," he writes, "what the English courts have so long recognized, that the only way to insure speedy and intelligently conducted litigations is to inaugurate a custom of confining court practice to a comparatively limited number of trained trial lawyers." He directs attention 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."

Mr. Wellman calls these men "business lawyers," who through opportunity, combined with rare commercial ability, have come to apply their knowledge of law to great corporate enterprises. To such an extent is this change taking place, he says, that in some localities the more important commercial cases never reach a court decision. Merchants prefer to compromise their difficulties or write off their losses rather than enter into dormant litigation caused by overcrowded calendars; yet fully 6,000 cases of one kind or another are tried or disposed of yearly in the Borough of Manhattan alone.

It is Mr. Wellman's opinion that "one has but to frequent the courts to become convinced that so long as the ten thousand members of the New York County bar will 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." A lawyer experienced in the trial of causes will not require, at the utmost, more than one-quarter of the time taken by the most learned inexperienced lawyer in developing his case. His points of law and issues of fact will be clearly defined and presented to the jury in the fewest possible words. A few lawyers have gone so far as to refuse direct communication with clients excepting as they come represented by their own attorneys.

When the public realizes [says the author] that a good trial lawyer is the outcome, one might say, of generations of witnesses; when clients fully appreciate the danger 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.

There is no short cut, no royal road to proficiency in the art of advocacy and cross-examination, Mr. Wellman declares.

THE ART OF CROSS-EXAMINATION.
By Francis L. Wellman of the New York Bar. One volume. Royal octavo. New York: The Macmillan Company. \$2.50.

It is experience alone that brings success. Cross-examination is generally considered to be the most difficult branch of the multifarious duties of the lawyer. It requires the greatest ingenuity, a habit of logical thought, clearness of perception, infinite patience and self-control, power to read men's minds intuitively, to judge of their characters by their faces, and to read their motives. It requires ability to act with force and precision, a master knowledge of the subject matter itself, 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 emphasizing this point Mr. Wellman quotes liberally from the memorable struggle between two powerful intellects when Judge William Fullerton cross-examined Henry Ward Beecher and won an international reputation. When the lawyer found fault with the clergyman for not answering his questions more freely and directly, Mr. Beecher looked him straight in the face and said, "I am afraid of you."

Yet, as Mr. Wellman remarks, these very examinations, laborious and brilliant, were singularly unproductive of results, owing to the unusual intelligence and shrewdness of the witnesses themselves. As an instance of the studious preparation for cross-examination, Mr. Wellman mentions Benjamin F. Butler. He was known once to have spent days in examining all parts of a steam engine, even learning to drive one himself, in order to cross-examine some important witness. Another time Butler spent a week in a locomotive repair shop, part of the time with his coat off and hammer in hand. Butler was not a great lawyer, nor even a great advocate, like Rufus Choate. But he would frequently defeat Choate. Butler's peculiarly aggressive method of cross-examination was his chief weapon.

Rufus Choate, on the other hand, "whose art and graceful qualities of mind entitle him to the foremost rank among American advocates in cross-examination," never aroused the opposition of a witness by attacking him. He disarmed his man by the quiet and courteous manner in which he pursued his cross-examination. 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.

While Jeremiah Mason, whom Daniel Webster considered the greatest lawyer that ever practiced at the New England bar, was cross-examining a witness he suddenly exclaimed:

Let me see that paper you've got in your waistcoat pocket.

The astonished witness produced it, and Mr. Mason read off the exact answers that had been given to his questions written by the lawyer on the other side.

"How under the sun did you know that paper was there?" inquired a brother lawyer.

"Well," replied 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 let it fall again when he got through."

Lawyers in New York will have little difficulty in recognizing the "medico-legal wender" whom Mr. Wellman takes to task for his methods of cross-examination in the Buchanan poisoning case, and who has since become influential in Tammany Hall through his closeness to Richard Croker. It is a pity that in describing an experience with his one-time formidable antagonist, the late Charles Brooke, Mr. Wellman has permitted his printer to hand that astute cross-examiner down to posterity as Charles "Brooks." The painstaking Mr. Brooke, had he been the biographer, surely would never have spelled Mr. Wellman's name with one "l." It was in this conflict with Mr. Brooke that Mr. Wellman himself utterly put to rout Prof. Ames, the handwriting expert, and gave that sort of testimony a black eye from which it has not yet recovered. The occasion was the Henriques-Ellison case for assault, in which Mr. Wellman secured a conviction. He introduced three letters, and the expert was very positive in declaring them all to be in the handwriting of Mrs. Naeme, daughter of Mr. Henriques. Unfolding the signatures, which had been concealed, the prosecution showed that one of the letters only was in the handwriting of Mrs. Naeme. The other two were signed by William Henriques and Frank Ellison. But in mentioning this incident Mr. Wellman modestly refrains from mentioning his own name. He has a story for almost every lawyer of prominence with whom his duty brought him in contact. Here is some of Mr. Wellman's hints to cross-examiners:

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.

A skillful 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 the movement of his hands, help the examiner to estimate his integrity.

It is absurd to assume 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.

If the cross-examiner allows the witness to see that he distrusts his integrity he will straighten himself out in the witness chair and mentally defy him at once. If the counsel's manner is courteous and conciliatory the witness will soon lose all fear.

The sympathies of the jury are invariably on the side of the witness. They are quick to resent any discourtesy toward him. They are willing to admit his mistakes, if you can make them apparent, but they are slow to believe him guilty of perjury.

A good advocate should be a good actor.

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THE ART OF CROSS-EXAMINATION .

•The  Co. •

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 AND ENLARGED EDITION

New York
THE MACMILLAN COMPANY
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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 TO THE SECOND EDITION

I PRESUME it is the experience of every author, after his first book is published upon an important subject, to be almost overwhelmed with a wealth of ideas and illustrations which could readily have been included in his book, and which to his own mind, at least, seem to make a second edition inevitable. Such certainly was the case with me; and when the first edition had reached its sixth impression in five months, I rejoiced to learn that it seemed to my publishers that the book had met with a sufficiently favorable reception to justify a second and considerably enlarged edition.

The book has practically been rewritten, so important are the additions, although the first few chapters have been left very much as they were.

The chapter on the "Cross-examination of Experts" has been rearranged, many new examples added, and the discussion much extended.

There is a new chapter on "Cross-examination to the Fallacies of Testimony," which is intended to be a brief discussion of the philosophy of oral evidence.

There is also a new chapter on "Cross-examination

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to Probabilities,—Personality of the Examiner, etc.," with many instructive illustrations.

Perhaps one of the most entertaining additions is the chapter devoted to "The Celebrated Breach of Promise Case of *Martinez v. Del Valle*," in which one of Mr. Joseph H. Choate's most subtle cross-examinations is given at length, with explanatory annotations. This case is placed first among the examples of celebrated cross-examinations because of these annotations. They are intended to guide the student and to indicate to him some of the methods that are used by great cross-examiners, in order that he may have a clearer understanding of the methods used in the cross-examinations in the chapters that follow.

Extracts from the cross-examination of Guiteau, President Garfield's assassin, conducted by Mr. John K. Porter, comprise another new chapter.

In the place of Mr. Choate's cross-examination of Russell Sage in the third trial (extracts of which were given in the first edition), the far more instructive and amusing cross-examination that took place in the *second* trial has been substituted.

Whatever in the first edition was merely amusing, or, if instructive, was somewhat obscure, has been omitted; so that quite one-half the present edition is entirely new matter, and of a more serious character.

One important feature of the book is the fact that the cases and illustrations are all *real*, and many of them

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heretofore almost unknown to the profession. They have not been intentionally misrepresented or exaggerated.

This new edition of my book is submitted with the hope that my readers may take as much pleasure in its perusal as I have done in the researches necessary to its preparation.

BAR HARBOR, MAINE,
September 1, 1904.

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.

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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.

THE ART OF CROSS-EXAMINATION

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 jurymen, and especially the modern city jurymen, — 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-

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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

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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

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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.

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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

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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

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intrusting their litigations to so-called "office lawyers" with little or no experience in court, they will insist upon their briefs being intrusted to those who make a specialty of court practice, advised and assisted, if you will, by their own private attorneys. One of the chief disadvantages of our present system will be suddenly swept away; the court calendars will be cleared by speedily conducted trials; issues will be tried within a reasonable time after they are framed; the commercial cases, now disadvantageously settled out of court or abandoned altogether, will return to our courts to the satisfaction both of the legal profession and of the business community at large; causes will be more skilfully tried—the art of cross-examination more thoroughly understood.

CHAPTER II

THE MANNER OF CROSS-EXAMINATION

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

If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, “to tell the truth, the whole

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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

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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-

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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.

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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

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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 jurymen 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*."

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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.

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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.

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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

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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.

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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

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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.

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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

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,

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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

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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

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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

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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

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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

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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

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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 jurymen see 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

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straight into Mr. Beecher's eyes and said, "Do you still consider that sound doctrine?" Mr. Beecher replied, "I do." The inference a jurymen 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 counsel 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 Worcester 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."

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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."

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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?"

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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."

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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

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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

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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

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asked, "Do you think the accused would have acted as he did if a policeman had been present?" to which the witness at once answered in the negative. Thereupon the judge remarked, "Your definition of an irresistible impulse must then be an impulse irresistible at all times except when a policeman is present."

CHAPTER IV

CROSS-EXAMINATION OF THE PERJURED WITNESS

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

It seldom happens that a witness's entire testimony is false from beginning to end. Perhaps the greater part of it is true, and only the crucial part — the point, however, on which the whole case may turn — is wilfully

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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

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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

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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;

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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

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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

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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!'

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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.*’ ”

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“*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

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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.”

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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-

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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

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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.

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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 jurymen 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

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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

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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

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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,"

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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

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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,

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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

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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.

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Counsel (sitting down, still eyeing 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

IN these days when it is impossible to know everything, but 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.

In our American courts, as they are now constituted, I think I am safe in saying that in half the cases presented to a jury the evidence of one or more expert witnesses becomes a very important factor in a juror's effort to arrive at a just verdict. The proper handling of these witnesses, therefore, has become of greater importance at the present time than ever before. It is useless for our law writers to dismiss the subject of expert testimony, as is so often the case, by quoting some authority like Lord Campbell, who gives it as his final judgment, after the experience of a lifetime at the

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bar and on the bench, that "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence;" or, as Taylor even more emphatically puts it in the last edition of his treatise on the "Law of Evidence," "Expert witnesses become so warped in their judgment by regarding the subject in one point of view, that, even when conscientiously disposed, *they are incapable* of expressing a candid opinion." The fact still remains that the testimony of expert witnesses must be reckoned with in about sixty per cent of our more important litigated business, and the only possible way to enlighten our jurors and enable them to arrive at a just estimate of such testimony is by a thorough understanding of the art of cross-examination of such witnesses.

Although the cross-examination of various experts, whether medical, handwriting, real estate, or other specialists, is a subject of growing importance, yet it is not intended in this chapter to do more than to make some suggestions and to give a number of illustrations of certain methods that have been successfully adopted 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.

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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

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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

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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

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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

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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

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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,

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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

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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?"

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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?"

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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?"

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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?"

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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,

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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.

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 Brooks, 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

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lady's handwriting, and gave it as his opinion that they were all written by the same hand. Mr. Brooks 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?"

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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?"

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

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.

It will not be uninteresting, by way of contrast, I think, to record here another instance where the cross-examination of an expert in handwriting did more to convict a prisoner, probably, than any other one piece of evidence during the entire trial.

The examination referred to occurred in the famous trial of Munroe Edwards, who was indicted for forging two drafts upon Messrs. Brown Brothers & Company, who had offered a reward of \$20,000 for his arrest.

Munroe had engaged Mr. Robert Emmet to defend him, and had associated with Emmet as his counsel Mr. William M. Evarts and several famous lawyers from without the state. At that time the district attorney was Mr. James R. Whiting, who had four prominent

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.

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lawyers, including Mr. Ogden Hoffman, associated with him upon the side of the government.

Recorder Vaux, of Philadelphia, was called to the witness-stand as an expert in handwriting, and in his direct testimony had very clearly identified the prisoner with the commission of the particular forgery for which he was on trial. He was then turned over to Mr. Emmet for cross-examination.

Mr. Emmet (taking a letter from among his papers and handing it to the witness, after turning down the signature). "Would you be good enough to tell me, Mr. Vaux, who was the author of the letter which I now hand you?"

Mr. Vaux (answering promptly). "This letter is in the handwriting of Munroe Edwards."

Mr. Emmet. "Do you feel certain of that, Mr. Vaux?"

Mr. Vaux. "I do."

Mr. Emmet. "As certain as you are in relation to the handwriting of the letters which you have previously identified as having been written by the prisoner?"

Mr. Vaux. "Exactly the same."

Mr. Emmet. "You have no hesitation then in swearing positively that the letter you hold in your hand, in your opinion, was written by Munroe Edwards?"

Mr. Vaux. "Not the slightest."

Mr. Emmet (with a sneer). "That will do, sir."

District Attorney (rising quickly). "Let me see the letter."

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Mr. Emmet (contemptuously). "That is your privilege, sir, but I doubt if it will be to your profit. The letter is directed to myself, and is written by the cashier of the Orleans bank, informing me of a sum of money deposited in that institution to the credit of the prisoner. Mr. Vaux's evidence in relation to it will test the value of his testimony in relation to other equally important points."

Mr. Vaux here left the witness chair and walked to the table of the prosecution, reëxamined the letter carefully, then reached to a tin box which was in the keeping of the prosecution and which contained New Orleans post-office stamps. He then resumed his seat in the witness chair.

Mr. Vaux (smiling). "I may be willing, Mr. Emmet, to submit my testimony to your test."

Mr. Emmet made no reply, but the prosecuting attorney continued the examination as follows:—

District Attorney. "You have just testified, Mr. Vaux, that you believe the letter which you now hold in your hand was written by the same hand that wrote the Caldwell forgeries, and that such hand was Munroe Edwards's. Do you still retain that opinion?"

Mr. Vaux. "I do."

District Attorney. "Upon what grounds?"

Mr. Vaux. "Because it is a fellow of the same character as well in appearance as in device. It is a forgery, probably only intended to impose upon his counsel, but

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now by its unadvised introduction in evidence, made to impose upon himself and brand him as a forger.”

The true New Orleans stamps were here shown to be at variance with the counterfeit postmark upon the forged letter, and the character of the writing was also proved by comparison with many letters which were in the forger's undoubted hand.

It turned out subsequently that the prisoner had informed his counsel, Mr. Emmet, that he was possessed of large amounts of property in Texas, some of which he had ordered to be sold to meet the contingent cost of his defence. He had drawn up a letter purporting to come from a cashier in a bank at New Orleans, directed to Mr. Emmet, informing him of the deposit on that day of \$1500 to the credit of his client, which notification he, the cashier, thought proper to send to the counsel, as he had observed in the newspapers that Mr. Edwards was confined to the jail. Mr. Emmet was so entirely deceived by this letter that he had taken it to his client in prison, and had shown it to him as a sign of pleasant tidings.¹

The manufacture or exaggeration of injuries, in damage cases against surface railroads and other corporations, had at one time, not many years ago, become almost a trade among a certain class of lawyers in the city of New York.

There are several medical books which detail the

¹ “Pleasantries about Courts and Lawyers,” Edwards.

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symptoms that may be expected to be exhibited in almost any form of railroad accidents. Any lawyer who is familiar with the pages of these books can readily detect indications of an equal familiarity with them on the part of the lawyer who is examining his client — the plaintiff in an accident case — as to the *symptoms* of his malady as set forth in these medical treatises, which have probably been put into his hands in order that he may become thoroughly posted upon the symptoms which he would be expected to manifest.

It becomes interesting to watch the history of some of these cases after the substantial amount of the verdict awarded by a jury has been paid over to the suffering plaintiff. Only last winter a couple of medical gentlemen were called as witnesses in a case where a Mrs. Bogardus was suing the Metropolitan Street Railway Company for injuries she claimed to have sustained while a passenger on one of the defendant's cars. These expert physicians swore that Mrs. Bogardus had a lesion of the spine and was suffering from paralysis as a result of the accident. According to the testimony of the doctors, her malady was incurable and permanent. The records of the legal department of this railway company showed that these same medical gentlemen had, on a prior occasion in the case of a Mr. Hoyt against the railroad, testified to the same state of affairs in regard to Mr. Hoyt's physical condition. He, too, was alleged to be suffering from an incurable lesion of the spine and would be paralyzed and

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helpless for the balance of his life. The records of the company also showed that Hoyt had recovered his health promptly upon being paid the amount of his verdict. At the time of the Bogardus trial Hoyt had been employed by H. B. Claffin & Co. for three years. He was working from seven in the morning until six in the evening, lifting heavy boxes and loading trucks.

The moment the physicians had finished their testimony in the Bogardus case, this man Hoyt was subpoenaed by the railroad company. On cross-examination these physicians both recollected the Hoyt case and their attention was called to the stenographic minutes of the questions and answers they had given under oath in that case. They were then asked if Hoyt was still alive and where he could be found. They both replied that he must be dead by this time, that his case was a hopeless one, and if not dead, he would probably be found as an inmate of one of our public insane asylums.

At this stage of the proceedings Hoyt arrived in the court room. He was requested to step forward in front of the jury. The doctors were asked to identify him, which they both did. Hoyt then took the witness-stand himself and admitted that he had never had a sick moment since the day the jury rendered a verdict in his favor; that he had gained thirty-five pounds in weight, and that he was then doing work which was harder than any he had ever done before in his life; that he worked from early morning till late at night; had never been in

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an insane asylum or under the care of any doctor since his trial; and ended up by making the astounding statement that out of the verdict rendered him by the jury and paid by the railroad company, *he had been obliged to forfeit upwards of \$1500 to the doctors who had treated him and testified in his behalf.*

This was a little too much enlightenment for the jury in Mrs. Bogardus's case, and this time they rendered their verdict promptly in favor of the railroad company.

I cannot forbear relating in this connection another most striking instance of the unreliability of expert testimony in personal injury cases. This is especially the case with certain New York physicians who openly confess it to be a part of their professional business to give expert medical testimony in court. Some of these men have taken a course at a law school in connection with their medical studies for the very purpose of fitting themselves for the witness-stand as medical experts.

One of these gentlemen gave testimony in a case which was tried only last November, which should forever brand him as a dangerous witness in any subsequent litigation in which he may appear. I have reference to the trial of Ellen McQuade against the Metropolitan Street Railway Company. This was a suit brought on behalf of the next of kin, to recover damages for the death of John McQuade who had fallen from a surface railway car and had broken his wrist so that the bone penetrated the skin. This wound was slow in

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healing and did not close entirely until some three months later. About six months after his accident McQuade was suddenly taken ill and died. An autopsy disclosed the fact that death resulted from inflammation of the brain, and the effort of the expert testimony in the case was to connect this abscess of the brain with the accident to the wrist, which had occurred six months previously.

This expert doctor had, of course, never seen McQuade in his lifetime, and knew nothing about the case except what was contained in the hypothetical question which he was called upon to answer. He gave it as his opinion that the broken wrist was the direct cause of the abscess in the brain, which in turn was due to a pus germ that had travelled from the wound in the arm by means of the lymphatics up to the brain, where it had found lodgment and developed into an abscess of the brain, causing death.

The contention of the railway company was that the diseased condition of the brain was due to "middle-ear disease," which itself was the result of a cold or exposure, and in nowise connected with the accident; and that the presence of the large amount of fluid which was found in the brain after death could be accounted for only by this disease.

During the cross-examination of this medical expert, a young woman, wearing a veil, had come into court and was requested to step forward and lift her veil. The doc-

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tor was then asked to identify her as a Miss Zimmer, for whom he had testified some years previously in her damage suit against the same railway company.

At her own trial Miss Zimmer had been carried into the court room resting in a reclining chair, apparently unable to move her lower limbs, and this doctor had testified that she was suffering from chronic myelitis, an affection of the spine, which caused her to be paralyzed, and that she would never be able to move her lower limbs. His oracular words to the jury were, "Just as she is now, gentlemen, so she will always be." The witness's attention was called to these statements, and he was confronted with Miss Zimmer, now apparently in the full vigor of her health, and who had for many years been acting as a trained nurse. She afterward took the witness-stand and admitted that the jury had found a verdict for her in the sum of \$15,000, but that her paralysis had so much improved after the administration of this panacea by the railway company that she was able, after a few months, to get about with the aid of crutches, and shortly thereafter regained the normal use of her limbs, and had ever since earned her livelihood as an obstetrical nurse.

The sensation caused by the appearance of the Zimmer woman had hardly subsided when the witness's attention was drawn to another case, Kelly against the railway company, in which this doctor had also assisted the plaintiff. Kelly was really paralyzed, but

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claimed that his paralysis was due to a recent railroad accident. It appeared during the trial, however, that long before the alleged railroad accident, Kelly had lost the use of his limbs, and that his case had become so notorious as to be a subject for public lectures by many reputable city physicians. The doctor was obliged to admit being a witness in that case also, but disclaimed any intentional assistance in the fraud.

One of the greatest vices of expert medical testimony is the *hypothetical* question and answer which has come to play so important a part in our trials nowadays. It is, perhaps, the most abominable form of evidence that was ever allowed to choke the mind of a juror or throttle his intelligence.

An hypothetical question is supposed to be an accurate synopsis of the testimony that has already been sworn to by the various witnesses who have preceded the appearance of the medical expert in the case. The doctor is then asked to assume the truth of every fact which counsel has included in his question, and to give the jury his opinion and conclusions as an expert from these supposed facts.

It frequently happens that the physician has never even seen, much less examined, the patient concerning whose condition he is giving sworn testimony. Nine times out of ten the jury take the answer of the witness as direct evidence of the existence of the fact itself. It is the duty of the cross-examiner to enlighten the jury

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in regard to such questions and make them realize that it is not usually the truth of the *answer*, but the truth and accuracy of the *question* which requires their consideration. These hypothetical questions are usually loosely and inaccurately framed and present a very different aspect of the case from that which the testimony of the witnesses would justify. If, however, the question is substantially correct, it is allowed to be put to the witness; the damaging answer follows, and the jury conclude that the plaintiff is certainly suffering from the dreadful or incurable malady the doctor has apparently sworn to.

A clever cross-examiner is frequently able to shatter the injurious effect of such hypothetical questions. One useful method is to rise and demand of the physician that he repeat, in substance, the question that had just been put to him and upon which he bases his answer. The stumbling effort of the witness to recall the various stages of the question (such questions are usually very long) opens the eyes of the jury at once to the dangers of such testimony. It is not always safe, however, to make this inquiry. It all depends upon the character of witness you are examining. Some doctors, before being sworn as witnesses, study carefully the typewritten hypothetical questions which they are to answer. A single inquiry will easily develop this phase of the matter, and if the witness answers that he has previously read the question, it is often usual to ask him which

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particular part of it he lays the most stress upon, and which parts he could throw out altogether. Thus one may gradually narrow him down to some particular factor in the hypothetical question, the truth of which the previous testimony in the case might have left in considerable doubt.

It will often turn out that a single sentence or *twist* in the question serves as a foundation for the entire answer of the witness. This is especially the case with conscientious physicians, who often suggest to counsel the addition of a few words which will enable them to answer the entire question as desired. The development of this fact alone will do much to destroy the witness with the jury. I discovered once, upon cross-examining one of our most eminent physicians, that he had added the words, "Can you say *with positiveness*," to a lawyer's hypothetical question, and then had taken the stand and answered the question in the negative, although had he been asked for his honest *opinion* on the subject, he would have been obliged to have given a different answer.

Hypothetical questions put in behalf of a plaintiff would not of course include facts which might develop later for the defence. When cross-examining to such questions, therefore, it is often useful to inquire in what respect the witness would modify his answer if he were to assume the truth of these new factors in the case. "Supposing that in addition to the matters you have

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already considered, there were to be added the facts that I will now give you," etc., "what would your opinion be then?" etc.

Frequently hypothetical questions are so framed that they answer themselves by begging the question. In the Guiteau case all the medical experts were asked in effect, though not in form, to assume that a man having an hereditary taint of insanity, exhibits his *insanity* in his youth, exhibits it in his manhood, and at a subsequent date, being under the *insane delusion* that he was authorized and commanded by God to kill the President of the United States, proceeded *without cause* to kill him; and upon these assumptions the experts were asked to give their opinion whether such a man was sane or insane.

To pick out the flaws in most hypothetical questions; to single out the particular sentence, adjective, or adverb upon which the physician is centring his attention as he takes his oath, requires no little experience and astuteness.

The professional witness is always partisan, ready and even eager to serve the party calling him. This fact should be ever present in the mind of the cross-examiner. Encourage the witness to betray his partisanship; encourage him to volunteer statements and opinions, and to give irresponsive answers. Jurors always look with suspicion upon such testimony. Assume that an expert witness called against you has come prepared to do you all the

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harm he can, and will avail himself of every opportunity to do so which you may inadvertently give him. Such witnesses are usually shrewd and cunning men, and come into court prepared on the subject concerning which they are to testify.

Some experts, however, are mere shams and pretenders. I remember witnessing some years ago the utter collapse of one of these expert pretenders of the medical type. It was in a damage suit against the city. The plaintiff's doctor was a loquacious gentleman of considerable personal presence. He testified to a serious head injury, and proceeded to "lecture" the jury on the subject in a sensational and oracular manner which evidently made a great impression upon the jury. Even the judge seemed to give more than the usual attention. The doctor talked glibly about "vasomotor nerves" and "reflexes" and expressed himself almost entirely in medical terms which the jury did not understand. He polished off his testimony with the prediction that the plaintiff could never recover, and if he lived at all, it would necessarily be within the precincts of an insane asylum. Counsel representing the city saw at a glance that this was no ordinary type of witness. Any cross-examination on the medical side of the case would be sure to fail; for the witness, though evidently dishonest, was yet ingenious enough to cover his tracks by the cuttle-fish expedient of befogging his answers in a cloud of medical terms. Dr. Allan McLane Hamilton, who was present as

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medical adviser in behalf of the city, suggested the following expedient:—

Counsel. “ Doctor, I infer from the number of books that you have brought here to substantiate your position, and from your manner of testifying, that you are very familiar with the literature of your profession, and especially that part relating to head injury.”

Doctor. “ I pride myself that I am — I have not only a large private library, but have spent many months in the libraries of Vienna, Berlin, Paris, and London.”

Counsel. “ Then perhaps you are acquainted with Andrews’s celebrated work ‘ On the Recent and Remote Effects of Head Injury ’ ? ”

Doctor (smiling superciliously). “ Well, I should say I was. I had occasion to consult it only last week.”

Counsel. “ Have you ever come across ‘ Charvais on Cerebral Trauma ’ ? ”

Doctor. “ Yes, I have read Dr. Charvais’s book from cover to cover many times.”

Counsel continued in much the same strain, putting to the witness similar questions relating to many other fictitious medical works, all of which the doctor had either “ studied carefully ” or “ had in his library about to read,” until finally, suspecting that the doctor was becoming conscious of the trap into which he was being led, the counsel suddenly changed his tactics and demanded in a loud sneering tone if the doctor had ever read Page on “ Injuries of the Spine and Spinal Cord ”

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(a genuine and most learned treatise on the subject). To this inquiry the doctor laughingly replied, "I never heard of any such book and I guess you never did either!"

The climax had been reached. Dr. Hamilton was immediately sworn for the defence and explained to the jury his participation in preparing the list of bogus medical works with which the learned expert for the plaintiff had shown such familiarity!

On the other hand, when the cross-examiner has totally failed to shake the testimony of an able and honest expert, he should be very wary of attempting to discredit him by any slurring allusions to his professional ability, as is well illustrated by the following example of the danger of giving the expert a good chance for a retort.

Dr. Joseph Collins, a well-known nerve specialist, was giving testimony last winter on the side of the Metropolitan Street Railway in a case where the plaintiff claimed to be suffering from a misplaced kidney which the railroad doctor's examination failed to disclose. Having made nothing out of the cross-examination of Dr. Collins, the plaintiff's lawyer threw this parting boomerang at the witness:—

Counsel. "After all, doctor, isn't it a fact that nobody in your profession regards you as a surgeon?"

Doctor. "I never regarded myself as one."

Counsel. "You are a neurologist, aren't you, doctor?"

Doctor. "I am, sir."

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Counsel. "A neurologist, pure and simple?"

Doctor. "Well, I am moderately pure and altogether simple."

Aside from the suggestions already made as to the best methods of cross-examining experts, no safe general rules can be laid down for the successful cross-examination of expert alienists, but a most happy illustration of one excellent method which may be adopted with a certain type of alienist was afforded by the cross-examination in the following proceedings:—

In the summer of 1898 habeas corpus proceedings were instituted in New York to obtain the custody of a child. The question of the father's sanity or insanity at the time he executed a certain deed of guardianship was the issue in the trial.

A well-known alienist, who for the past ten years has appeared in the New York courts upon one side or the other in pretty nearly every important case involving the question of insanity, was retained by the petitioner to sit in court during the trial and observe the actions, demeanor, and testimony of the father, the alleged lunatic, while he was giving his evidence upon the witness-stand.

At the close of the father's testimony this expert witness was himself called upon to testify as to the result of his observation, and was interrogated as follows:—

Counsel. "Were you present in court yesterday when the defendant in the present case was examined as a witness?"

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Witness. "I was."

Counsel. "Did you see him about the court room before he took the witness-stand?"

Witness. "I observed him in this court room and on the witness-stand on Monday."

Counsel. "You were sitting at the table here during the entire session?"

Witness. "I was sitting at the table during his examination."

Counsel. "You heard all his testimony?"

Witness. "I did."

Counsel. "Did you observe his manner and behavior while giving his testimony?"

Witness. "I did."

Counsel. "Closely?"

Witness. "Very closely."

Upon being shown certain specimens of the handwriting of the defendant, the examination proceeded as follows:—

Counsel. "Now, Doctor, assuming that the addresses on these envelopes were written by the defendant some three or more years ago, and that the other addresses shown you and the signatures attached thereto were written by him within this last year, and taking into consideration at the same time the defendant's manner upon the witness-stand, as you observed it, and his entire deportment while under examination, did you form an opinion as to his present mental condition?"

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Witness. " I formed an estimate of his mental condition from my observation of him in the court room and while he was giving his testimony and from an examination of these specimens of handwriting taken in connection with my observation of the man himself."

Counsel. " What in your opinion was his mental condition at the time he gave his testimony? "

The Court. " I think, Doctor, that before you answer that question, it would be well for you to tell us what you observed upon which you based your opinion."

Witness. " It appeared to me that upon the witness-stand the defendant exhibited a *slowness* and *hesitancy* in giving answers to perfectly distinct and easily comprehensible questions, which was not consistent with a sound mental condition of a person of his education and station in life. I noted a *forgetfulness*, particularly of recent events. I noted also an expression of face which was peculiarly characteristic of a certain form of mental disease; an expression of, I won't say hilarity, but a *fatuous, transitory smile*, and exhibited upon occasions which did not call in my opinion for any such facial expression, and which to alienists possesses a peculiar significance. As regards these specimens of handwriting which I have been shown, particularly the *signature* to the deed, it appears to me *to be tremulous* and to show a want of coördinating power over the muscles which were used in making that signature."

In answer to a hypothetical question describing the

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history of the defendant's life as claimed by the petitioner, the witness replied:—

Witness. "My opinion is that the person described in the hypothetical question is suffering from a form of insanity known as paresis, in the stage of dementia."

Upon the adjournment of the day's session of the court, the witness was requested to take the deed (the signature to which was the writing which he had described as "tremulous" and on which he had based his opinion of dementia) and to read it carefully over night. The following morning this witness resumed the stand and gave it as his opinion that the defendant was in such condition of mind that he could not comprehend the full purpose and effect of that paper.

The doctor was here turned over to defendant's counsel for cross-examination. Counsel jumped to his feet and, taking the witness off his guard, rather gruffly shouted:—

Counsel. "In your opinion, what were you employed to come here for?"

Witness (after hesitating a considerable time). "I was employed to come here to listen to the testimony of this defendant, the father of this child whose guardianship is under dispute."

Counsel. "Was that a simple question that I put to you? Did you consider it simple?"

Witness. "A perfectly simple question."

Counsel (smiling). "Why were you so *slow* about answering it then?"

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Witness. "I always answer deliberately; it is my habit."

Counsel. "Would that be an evidence of derangement in *your* mental faculties, Doctor—the slowness with which you answer?"

Witness. "I am making an effort to answer your questions correctly."

Counsel. "But perhaps the defendant was making an effort to answer questions correctly the other day?"

Witness. "He was undoubtedly endeavoring to do so."

Counsel. "You came here for the avowed purpose of watching the defendant, didn't you?"

Witness. "I came here for the purpose of giving an opinion upon his mental condition."

Counsel. "Did you intend to listen to his testimony before forming any opinion?"

Witness. "I did."

Counsel (now smiling). "One of the things that you stated as indicating the disease of paresis was the defendant's *slowness* in answering simple questions, wasn't it?"

Witness. "It was."

* * * * *

Counsel. "Now, in forming your opinion, you based it in part on his handwriting, did you not?"

Witness. "I did, as I testified yesterday."

Counsel. "And for that purpose you selected one signature to a particular instrument and threw out of consideration certain envelopes which were handed to you; is that right?"

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Witness. "I examined a number of signatures, but there was only one which showed the characteristic tremor of paresis, and that was the signature to the instrument."

The witness was here shown various letters and writings of the defendant executed at a later date than the deed of guardianship.

Counsel. "Now, Doctor, what have you to say to these later writings?"

Witness. "They are specimens of good handwriting. If you wish to draw it out, they do not indicate any disease—paresis or any other disease."

Counsel. "Do you think there has been an improvement in the defendant's condition meanwhile?"

Witness. "I don't know. There is certainly a great improvement in his handwriting."

Counsel. "It would appear, then, Doctor, that you selected from a large mass of papers and letters *only one* which showed nervous trouble, and do you pretend to say that you consider that as fair?"

Witness. "I do, because I looked for the one that showed the most nervous trouble, although it is true I found only one."

Counsel. "How many specimens of handwriting were submitted to you from which you made this selection?"

Witness. "Some fifteen or twenty."

Counsel. "Doctor, you are getting a little slow in your answers again."

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Witness. "I have a right; my answers go on the record. I have a right to make them as exact and careful as I please."

Counsel (sternly). "The defendant was testifying for his liberty and the custody of his child; he had a right to be a little careful; don't you think he had?"

Witness. "Undoubtedly."

Counsel. "You also expressed the opinion that the defendant could not understand or comprehend the meaning of the deed of guardianship that has been put in your hands for examination over night?"

Witness. "That is my opinion."

Counsel. "What do you understand to be the effect of this paper?"

Witness. "The effect of that paper is to appoint, for a formal legal consideration, Mrs. Blank as the guardian of defendant's daughter and to empower her and to give her all of the rights and privileges which such guardianship involves, and Mrs. Blank agrees on her part to defend all suits for wrongful detention as if it were done by the defendant himself, and the defendant empowers her to act for him as if it were by himself in that capacity. That is my recollection."

Counsel. "What that paper really accomplishes is to transfer the management and care and guardianship of the child to Mrs. Blank, isn't it?"

Witness. "I don't know. I am speaking only as to what bears on his mental condition."

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Counsel. "Do you know whether that is what the paper accomplishes?"

Witness. "I have given you my recollection as well as I can. I read the paper over once."

Counsel. "I am asking you what meaning it conveyed to your mind, because I am going to give the defendant the distinguished honor of contrasting his mind with yours."

Witness. "I should be very glad to be found inferior to his; I wish he were different."

Counsel. "When the defendant testified about that paper, he was asked the same question that you were asked, and he said, 'I know it was simply a paper supposed to give Mrs. Blank the management and care of my child.' Don't you think that was a pretty good recollection of the contents of the paper for a man in the state of dementia that you have described?"

Witness. "Very good."

Counsel. "Rather remarkable, wasn't it?"

Witness. "It was a correct interpretation of the paper."

Counsel. "If he could give that statement on the witness-stand in answer to hostile counsel, do you mean to say that he couldn't comprehend the meaning of the paper?"

Witness. "He was very uncertain, hesitating, if I recollect it, about that statement. He got it correct, that's true."

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Counsel. "Then it was the manner of his statement and not the substance that you are dealing with; is that it?"

Witness. "He stated that his recollection was not good and he didn't quite recollect what it was, but subsequently he made that statement."

Counsel. "Don't you think it was remarkable for him to have been able to recollect from the seventh day of June the one great fact concerning this paper, to wit: that he had given the care and maintenance of his daughter to Mrs. Blank?"

Witness. "He did recollect it."

Counsel. "It is a pretty good recollection for a dement, isn't it?"

Witness. "He recollected it."

Counsel. "Is that a good recollection for a dement?"

Witness. "It is."

Counsel. "Isn't it a good recollection for a man who is not a dement?"

Witness. "He recollected it perfectly."

Counsel. "Don't you understand, Doctor, that the man who can describe a paper in one sentence is considered to have a better mind than he who takes half a dozen sentences to describe it?"

Witness. "A great deal better mind."

Counsel. "Then the defendant rather out-distanced you in describing that paper?"

Witness. "He was very succinct and accurate."

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Counsel. "And that is in favor of his mind as against yours?"

Witness. "As far as that goes."

Counsel. "Now we will take up the next subject, and see if I cannot bring the defendant's mind up to your level in that particular. The next thing you noticed, you say, was the slowness and hesitancy with which he gave his answers to perfectly distinct and easily comprehended questions?"

Witness. "That is correct."

Counsel. "But you have shown the same slowness and hesitancy to-day, haven't you?"

Witness. "I have shown no hesitancy; I have been deliberate."

Counsel. "What is your idea of the difference between hesitancy and deliberation, Doctor?"

Witness. "Hesitancy is what I am suffering from now; I hesitate in finding an answer to that question."

Counsel. "You admit there is hesitation; isn't that so?"

Witness. "And slowness is slowness."

Counsel. "Then we have got them both from you now. You are both slow and you hesitate, on your own statement; is that so, Doctor?"

Witness. "Yes."

Counsel. "So the defendant and you are quits again on that; is that right?"

Witness. "I admit no slowness and hesitancy. I am

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giving answers to your questions as carefully and accurately and frankly and promptly as I can."

Counsel. "Wasn't the defendant doing that?"

Witness. "I presume he was."

Counsel. "What was the next thing that you observed besides his slowness and hesitancy, do you remember?"

Witness. "You will have to refresh my memory."

Counsel (quoting). "'I noted a forgetfulness, particularly of recent events.' You think the defendant is even with you now, on forgetfulness, don't you?"

Witness. "It looks that way."

Counsel. "You say further, 'I noted an expression of face which was peculiarly characteristic of a certain form of mental disease; I noticed particularly an expression of, I won't say hilarity, but a fatuous, transitory smile, on occasions which did not call, in my opinion, for any such facial expression.' Would you think it was extraordinary that there should be a supercilious smile on the face of a sane man under some circumstances?"

Witness. "I should think it would be very extraordinary."

Counsel. "Doctor, he might have had in mind the fact of the little talk you and I were to have this afternoon. That might have brought a smile to his face; don't you think so?"

Witness. "I do not."

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Counsel. "If as he sat there he had any idea of what I would ask you and what your testimony would be, don't you think he was justified in having an ironical expression upon his face?"

Witness. "Perhaps."

Counsel. "It comes to this, then, you selected only *one* specimen of tremulous handwriting?"

Witness. "I said so."

Counsel. "You yourself have shown slowness in answering my questions?"

Witness. "Sometimes."

Counsel. "And forgetfulness?"

Witness. "You said so."

Counsel. "And you admit that any sane man listening to you would be justified in having an ironical smile on his face?"

Witness. (No answer.)

Counsel. "You also admitted that the man you claim to be insane, gave from memory a better idea of the contents of this legal paper than you did, although you had examined and studied it over night?"

Witness. "Perhaps."

Counsel (condescendingly). "You didn't exactly mean then that the defendant was actually *deprived* of his mind?"

Witness. "No, he is not deprived of his mind, and I never intended to convey any such idea."

Counsel. "Then, after all, your answers mean only that

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the defendant has not got as much mind as some other people; is that it?"

Witness. "Well, my answers mean that he has paresis with mental deterioration, and, if you wish me to say so, not as much mind as some other people; there are some people who have more and some who have less."

Counsel. "He has enough mind to escape an expression which would indicate the entire deprivation of the mental faculties?"

Witness. "Yes."

Counsel. "He has enough mind to write the letters of which you have spoken in the highest terms?"

Witness. "I have said they were good letters."

Counsel. "He has enough mind to accurately and logically describe this instrument, the deed of guardianship, which he executed?"

Witness. "As I have described."

Counsel. "He probably knows more about his domestic affairs than you do. That is a fair presumption, isn't it?"

Witness. "I know nothing about them."

Counsel. "For all that you know he may have had excellent reasons for taking the very course he has taken in this case?"

Witness. "That is not impossible; it is none of my affair."

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

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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

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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.

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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

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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

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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

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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

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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

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

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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

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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 acceptance 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.

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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 DeLancey 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.

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“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

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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.'"

Another exceedingly interesting and useful lesson in the art of silent cross-examination will be found in the following story as told by Richard Harris, K. C., in the *London Law Journal* for 1902.

"A long time ago, in the East End of London, lived a manufacturer of the name of Waring. He was in a large way of business, had his country house, where his family lived, and his town establishment.

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He was a man of great parochial eminence and respect ability.

“Among the many hands he employed was a girl of the name of Harriet Smith. She came from the country and had not quite lost the bloom of rusticity when the respectable Mr. Waring fell in love with her. Had Harriet known he was married, in all probability she would have rejected his respectable attentions. He induced her to marry him, but it was to be kept secret; her father was not to know of it until such time as suited Mr. Waring’s circumstances.

“In the course of time there were two children; and then unfortunately came a crisis in Mr. Waring’s affairs. He was bankrupt. The factory and warehouse were empty, and Harriet was deprived of her weekly allowance.

“One day when Waring was in his warehouse, wondering, probably, what would be his next step, old Mr. Smith, the father of Harriet, called to know what had become of his daughter. ‘That,’ said Mr. Waring, ‘is exactly what I should like to know.’ She had left him, it seemed, for over a year, and, as he understood, was last seen in Paris. The old man was puzzled, and informed Waring that he would find her out, dead or alive; and so went away. It was a strange thing, said the woman in whose house Mrs. Waring had apartments, that she should have gone away and never inquired about her children, especially as she was so fond of them.

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“She had gone nearly a year, and in a few days Mr. Waring was to surrender the premises to his landlord. There never was a man who took things more easily than Mr. Waring; leaving his premises did not disturb him in the least, except that he had a couple of rather large parcels which he wanted to get away without anybody seeing him. It might be thought that he had been concealing some of his property if he were to be seen taking them away.

“It happened that there had been a youth in his employ of the name of Davis — James Davis — a plain simple lad enough, and of kind obliging disposition. He had always liked his old master, and was himself a favorite. Since the bankruptcy he had been apprenticed to another firm in Whitechapel, and one Saturday night as he was strolling along toward the Minories to get a little fresh air, suddenly met his old master, who greeted him with his usual cordiality and asked him if he had an hour to spare, and, if so, would he oblige him by helping him to a cab with a couple of parcels which belonged to a commercial traveller and contained valuable samples? James consented willingly, and lighting each a cigar which Mr. Waring produced, they walked along, chatting about old times and old friends. When they got to the warehouse there were the two parcels, tied up in American cloth.

“‘Here they are,’ said Mr. Waring, striking a light. ‘You take one, and I’ll take the other; they’re pretty

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heavy and you must be careful how you handle them, or some of the things might break.'

"When they got to the curb of the pavement, Mr. Waring said, 'Stop here, and I'll fetch a four-wheeler.'

"While James was waiting, a strange curiosity to look into the parcels came over him; so strange that it was irresistible, and accordingly he undid the end of one of them. Imagine the youth's horror when he was confronted with a human head that had been chopped off at the shoulders!

"'My hair stood on end,' said the witness, 'and my hat fell off.' But his presence of mind never forsook him. He covered the ghastly 'relic of mortality' up and stood like a statue, waiting Mr. Waring's return with his cab.

"'Jump in, James,' said he, after they had put the 'samples' on the top of the cab. But James was not in the humor to get into the cab. He preferred running behind. So he ran behind all along Whitechapel road, over London bridge, and away down Old Kent road, shouting to every policeman he saw to stop the cab, but no policeman took any notice of him except to laugh at him for a lunatic. The 'force' does not disturb its serenity of mind for trifles.

"By and by the cab drew up in a back street in front of an empty house, which turned out to be in the possession of Mr. Waring's brother; a house built in a part of Old London with labyrinths of arches, vaults, and cellars in the occupation of rats and other vermin.

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“James came up, panting, just as his old master had taken his first packet of samples into the house. He had managed somehow or other to get a policeman to listen to him.

“The policeman, when Mr. Waring was taking in the second parcel, boldly asked him what he'd got there.

“‘Nothing for you,’ said Mr. Waring.

“‘I don't know about that,’ replied the policeman; ‘let's have a look.’

“Here Mr. Waring lost his presence of mind, and offered the policeman, and another member of the force who had strolled up, a hundred pounds not to look at the parcels.

“But the force was not to be tampered with. They pushed Mr. Waring inside the house, and there discovered the ghastly contents of the huge bundles. The policemen's suspicions were now aroused, and they proceeded to the police station, where the divisional surgeon pronounced the remains to be those of a young woman who had been dead for a considerable time and buried in chloride of lime.

“Of course this was no proof of murder, and the charge of murder against Waring was not made until a considerable time after — not until the old father had declared time after time that the remains were those of his daughter Harriet.

“At length the treasury became so impressed with the old man's statement that the officials began to think it

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might be a case of murder after all, especially as there were two bullet-wounds at the back of the woman's head, and her throat had been cut. There was also some proof that she had been buried under the floor of Mr. Waring's warehouse, some hair being found in the grave, and a button or two from the young woman's jacket.

"All these things tended to awaken the suspicion of the treasury officials. Of course there was a suggestion that it was a case of suicide, but the Lord Chief Justice disposed of that later on at the trial by asking how a woman could shoot herself twice in the back of the head, cut her throat, bury herself under the floor, and nail the boards down over her grave.

"Notwithstanding it was clear that no charge of murder could be proved without identification, the treasury boldly made a dash for the capital charge, in the hope that something might turn up. And now, driven to their wits' end, old Mr. Smith was examined by one of the best advocates of the day, and this is what he made of him:—

"'You have seen the remains?'

"'Yes.'

"'Whose do you believe them to be?'

"'My daughter's, to the best of my belief.'

"'Why do you believe them to be your daughter's?'

"'By the height, the color of the hair, and the smallness of the foot and leg.'

"That was all; and it was nothing.

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“But there must needs be cross-examination if you are to satisfy your client. So the defendant’s advocate asks:—

“‘Is there anything else upon which your belief is founded?’

“‘No,’ hesitatingly answers the old man, turning his hat about as if there was some mystery about it.

“There is breathless anxiety in the crowded court, for the witness seemed to be revolving something in his mind that he did not like to bring out.

“‘Yes,’ he said, after a dead silence of two or three minutes. ‘My daughter had a scar on her leg.’

“There was sensation enough for the drop scene. More cross-examination was necessary now to get rid of the business of the scar, and some reëxamination, too.

“The mark, it appeared, was caused by Harriet’s having fallen into the fireplace when she was a girl.

“‘Did you see the mark on the remains?’ asked the prisoner’s counsel.

“‘No; I did not examine for it. I hadn’t seen it for ten years.’

“There was much penmanship on the part of the treasury, and as many interchanges of smiles between the officials as if the discovery had been due to their sagacity; and they went about saying, ‘How about the scar? How will he get over the scar? What do you think of the scar?’ Strange to say, the defendant’s advisers thought it prudent to ask the magistrate to

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allow the doctors on both sides to examine the remains in order to ascertain whether there was a scar or not, and, stranger still, while giving his consent, the magistrate thought it was very immaterial.

“It proved to be so material that when it was found on the leg, exactly as the old man and a sister had described it, the doctors cut it out and preserved it for production at the trial.

“After the discovery, of course the result of the trial was a foregone conclusion.

“It will be obvious to the sagacious reader that the blunder indicated was not the only one in the case. On the other side was one of equal gravity and more unpardonable, which needs no pointing out. Justice, baffled by want of tact on one side, was righted by an accident on the other.”

CHAPTER VIII

CROSS-EXAMINATION TO THE "FALLACIES OF TESTIMONY"

It is intended in this chapter to analyze some of the elements of human nature and human understanding that combine to conceal the truth about any given subject under investigation, where the witnesses are themselves honest and unconscious of any bias, or partisanship, or motive for erroneous statement.

Rufus Choate once began one of his more abstruse arguments before Chief Justice Shaw in the following manner: "In coming into the presence of your Honor I experience the same feelings as the Hindoo when he bows before his idol. I realize that you are ugly, but I feel that you are great!"

I am conscious of something of the same feeling as I embark upon the following discussion. I realize the subject is dry, but I feel that its importance to all serious students of advocacy is great.

No one can frequent our courts of justice for any length of time without finding himself aghast at the daily spectacle presented by seemingly honest and intelligent men and women who array themselves upon opposite sides of a case and testify under oath to what

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appear to be absolutely contradictory statements of fact.

It will be my endeavor in what follows to deal with this subject from its psychological point of view and to trace some of the *causes* of these unconscious mistakes of witnesses, so far as it is possible. The inquiry is most germane to what has preceded, for unless the advocate comprehends something of the *sources* of the fallacies of testimony, it surely would become a hopeless task for him to try to illuminate them by his cross-examinations.

It has been aptly said that "Knowledge is only the impression of one's mind and *not the fact itself*, which may present itself to many minds in many different aspects." The *unconscious sense impressions*—sight, sound, or touch—would be the same to every human mind; but once you awaken the mind to consciousness, then the original impression takes on all the color of motive, past experience, and character of the individual mind that receives it. The *sensation* by itself will be always the same. The variance arises when the sensation is *interpreted* by the *individual* and becomes a *perception* of his own mind.

When a man on a hot day looks at a running stream and *sees* the delicious coolness, he is really adding something of himself, which he acquired by his past experience to the *sense impression* which his eye gives him. A different individual might receive the impression of

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tepid insipidity instead of “delicious coolness” in accordance with his own past experiences. The material of sensation is acted on by the mind which clothes the sensation with the experiences of the individual.¹ Helmholtz distinctly calls the perception of *distance*, for example, an unconscious *inference*, — a mechanically performed act of judgment.

The *interpretation* of a sensation is, therefore, the act of the individual, and different individuals will naturally vary in their interpretations of the same sensation according to their previous experiences and various mental characteristics. This process is most instantaneous, automatic, and unconscious. “The artist immediately sees details where to other eyes there is a vague or confused mass; the naturalist sees an animal where the ordinary eye only sees a form.”² An adult sees an infinite variety of things that are meaningless to the child.

Likewise the same impression may be differently interpreted by the same individual at different times, due in part to variations in his *state of attention* at the moment, and in the degree of the mind’s readiness to look at the impression in the required way. A timid man will more readily fall into the illusion of ghost-seeing than a cool-headed man, because he is less attentive to the actual impression of the moment.

¹ “Illusions,” Sully (in part).

² “Problems of Life and Mind,” C. H. Lewes, p. 107.

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Every mind is attentive to what it sees or hears, more or less, according to circumstances. It is in the region of hazy impressions that the imagination is wont to get in its most dangerous work. It often happens that, when the mind is either inactive, or is completely engrossed by some other subject of thought, the sensation may neither be perceived, nor interpreted, nor remembered, notwithstanding there may be evidence, derived from the respondent movements of the body, that it has been felt; as, for example, a person in a state of imperfect sleep may start at a loud sound, or turn away from a bright light, being conscious of the sensation and acting automatically upon it, but forming no kind of appreciation of its source and no memory of its occurrence.¹ Such is the effect of sensation upon *complete* inattention. It thus appears that it is partly owing to this variation in *intensity* of attention that different individuals get such contradictory ideas of the same occurrence or conversation. When we add to this variance in the degree of attention, the variance, just explained, in the individual *interpretation* or coloring of the physical sensation, we have still further explanation of why men so often differ in what they think they have seen and heard.

Desire often gives rise to still further fallacy. Desire prompts the will to fix the attention on a certain point, and this causes the emphasis of this particular point or proposition to the exclusion of others. The will has the

¹ "Mental Philosophy," Carpenter (in part).

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power of keeping some considerations out of view, and thereby *diminishes* their force, while it fixes the attention upon others, and thereby *increases* their force.

Sir John Romilly, in an opinion reported in 16 Beavan, 105, says: “It must always be borne in mind how extremely prone persons are to believe what they wish. It is a matter of frequent observation that persons dwelling for a long time on facts which they believed must have occurred, and trying to remember whether they did so or not, come at last to persuade themselves that they do actually *recollect* the occurrences of circumstances which at first they only begin by *believing* must have happened. What was originally the result of imagination becomes in time the result of recollection. Without imputing anything like wilful and corrupt perjury to witnesses of this description, they often in truth *bona fide* believe that they have heard and remembered conversations and observations which in truth never existed, but are the mere offspring of their imaginations.”

Still another most important factor and itself the source of an enormous number of “fallacies of testimony” is memory. We are accustomed to speak of memory as if it consisted in an *exact* reproduction of past states of consciousness, yet experience is continually showing us that this reproduction is very often *inexact*, through the modifications which the “trace” has undergone in the interval. Sometimes the trace has been partially obliterated; and what remains may serve to

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give a very erroneous (because imperfect) view of the occurrence. When it is one in which our own feelings are interested, we are extremely apt to lose sight of what goes against them, so that the representation given by memory is altogether one-sided. This is continually demonstrated by the entire dissimilarity of the accounts of the same occurrence or conversation which is often given by two or more parties concerned in it, even when the matter is fresh in their minds, and they are honestly desirous of telling the truth. This diversity will usually become still more pronounced with the lapse of time, the trace becoming gradually but unconsciously modified by the habitual course of thought and feeling, so that when it is so acted upon after a lengthened interval as to bring up a reminiscence of the original occurrence, that reminiscence really represents, *not* the original occurrence, but the modified trace of it.¹

Mr. Sully says: "Just as when distant objects are seen mistily our imaginations come into play, leading us to fancy that we see something completely and distinctly, so when the images of memory become dim, our present imagination helps to restore them, putting a new patch into the old garment. If only there is some relic even of the past preserved, a bare suggestion of the way in which it *may have* happened will often suffice to produce the conviction that it actually did happen in this way. The suggestions that naturally

¹ "Campbell's Mental Physiology" (in great part).

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arise in our minds at such times will bear the stamp of our present modes of experience and habits of thought. Hence, in trying to reconstruct the remote past we are constantly in danger of importing our present selves into our past selves.”

Senator George F. Hoar, in his recently published “Autobiography of Seventy Years,” says:—

“The recollections of the actors in important political transactions are doubtless of great historic value. But I ought to say frankly that my experience has taught me that the memory of men, even of good and true men, as to matters in which they have been personal actors, is frequently most dangerous and misleading. I could recount many curious stories which have been told me by friends who have been writers of history and biography, of the contradictory statements they have received from the best men in regard to scenes in which they have been present.”

It is obviously the province of the cross-examiner to detect the nature of any foreign element which may have been imported into a witness's memory of an event or transaction to which he testifies, and if possible to discover the source of the error; whether the memory has been warped by desire or imagination, or whether the error was one of original perception, and if so, whence it arose, whether from lack of attention or from wrong association of previous personal experience.

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Not only does our idea of the past become inexact by the mere decay and disappearance of essential features; it becomes positively incorrect through the gradual incorporation of elements that do not properly belong to it. Sometimes it is easy to see how these extraneous ideas become imported into our mental representation of a past event. Suppose, for example, that a man has lost a valuable scarf-pin. His wife suggests that a particular servant, whose reputation does not stand too high, has stolen it. When he afterwards recalls the loss, the chances are that he will confuse the fact with the conjecture attached to it, and say he remembers that this particular servant did steal the pin. Thus the past activity of imagination serves to corrupt and partially falsify recollections that have a genuine basis of fact.¹

A very striking instance of the effect of *habit* on the memory, especially in relation to events happening in moments of intense excitement, was afforded by the trial of a man by the name of Twichell, who was justly convicted in Philadelphia some years ago, although by erroneous testimony. In order to obtain possession of some of his wife's property which she always wore concealed in her clothing, Twichell, in great need of funds, murdered his wife by hitting her on the head with a slug shot. He then took her body to the yard of the house in which they were living, bent a poker,

¹ "Illusions," p. 264 (in part).

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and covered it with his wife's blood, so that it would be accepted as the instrument that inflicted the blow, and having *unbolted the gate* leading to the street, left it ajar, and went to bed. In the morning, when the servant arose, she stumbled over the dead body of her mistress, and in great terror she rushed through the gate, into the street, and summoned the police. The servant had always been *in the habit* of unbolting this gate the first thing each morning, and she swore on the trial that she had done the same thing upon the morning of the murder. There was no other way the house could have been entered from without excepting through this gate. The servant's testimony was, therefore, conclusive that the murder had been committed by some one from *within* the house, and Twichell was the only other person in the house.

After the conviction Twichell confessed his guilt to his lawyer and explained to him how careful he had been *to pull back the bolt and leave the gate ajar* for the very purpose of diverting suspicion from himself. The servant in her excitement had failed either to notice that the bolt was drawn or that the gate was open, and in recalling the circumstance later she had allowed her usual daily *experience* and *habit* of pulling back the bolt to become incorporated into her recollection of this particular morning. It was this piece of fallacious testimony that really convicted the prisoner.

As the day of the execution drew near, Twichell

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complained to the prison authorities that the print in the prison Bible was too fine for him to read, and requested that his friend—a druggist—be allowed to supply him with a Bible in larger type. This friend saturated some of the pages of the Bible with corrosive sublimate. Twichell rolled these pages up into balls, and, with the aid of water, swallowed them. Death was almost instantaneous.

Boswell in his "Life of Dr. Johnson,"¹ has related the particulars of his first meeting with Dr. Johnson, whom he had been long very desirous of seeing and conversing with. At last they accidentally met at the house of a Mr. Davies.

Mr. Arthur Murphy, in his "Essay on the Life and Genius of Dr. Johnson," likewise gives a description of Boswell's first meeting with Johnson. Concerning Mr. Murphy's account of the matter, Mr. Boswell says: "Mr. Murphy has given an account of my first meeting with Dr. Johnson considerably different from my own, and I am persuaded, without any consciousness of error, his memory at the end of near thirty years has undoubtedly deceived him, and he supposes himself to have been present at a scene which he has probably heard inaccurately described by others. In my own notes, *taken on the very day in which I am confident I marked everything material that passed*, no mention is made of this gentleman; and I am sure that I should not have omitted one

¹ Vol. ii., p. 165.

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so well-known in the literary world. It may easily be imagined that this, my first interview with Dr. Johnson, with all its circumstances, made a strong impression on my mind and would be registered with peculiar attention.”

A writer in the *Quarterly Review*,¹ speaking of this same occurrence, says: “An erroneous account of Boswell’s first introduction to Dr. Johnson was published by Arthur Murphy, *who asserted that he witnessed it*. Boswell’s appeal to his own strong recollection of so memorable an occasion and to the narrative he entered in his Journal at the time show that Murphy’s account was quite inaccurate, and that he *was not present* at the scene. This, Murphy did not later venture to contradict. As Boswell suggested, he had doubtless heard the circumstances repeated till at the end of thirty years he had come to fancy that he was an actor in them. His good faith was unquestionable, and that he should have been so deluded is a memorable example of the fallibility of testimony and of the extreme difficulty of arriving at the truth.”

Perhaps the most subtle and prolific of all of the “fallacies of testimony” arises out of *unconscious partisanship*. It is rare that one comes across a witness in court who is so candid and fair that he will testify as fully and favorably for the one side as the other.

It is extraordinary to mark this tendency we all have

¹ *Quarterly Review*, vol. ciii., p. 292.

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when once we are identified with a "side" or cause, to accept all its demands as our own. To put on the uniform makes the policeman or soldier, even when in himself corrupt, a guardian of law and order.

Witnesses in court are almost always favorable to the party who calls them, and this feeling induces them to conceal some facts and to color others which might, in their opinion, be injurious to the side for which they give their testimony. This partisanship in the witness-box is most fatal to fair evidence; and when we add to the partisanship of the witness the similar leaning of the lawyer who is conducting the examination, it is easy to produce evidence that varies very widely from the exact truth. This is often done by overzealous practitioners by putting leading questions or by incorporating two questions into one, the second a simple one, misleading the witness into a "yes" for both, and thus creating an entirely false impression.

What is it in the human make-up which invariably leads men to take sides when they come into court? In the first place, witnesses usually feel more or less *complimented by the confidence* that is placed in them by the party calling them to prove a certain state of facts, and it is human nature to try to prove worthy of this confidence. This feeling is unconscious on the part of the witness and usually is not a strong enough motive to lead to actual perjury in its full extent, but it serves as a sufficient reason why the witness will almost un-

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consciously dilute or color the evidence to suit a particular purpose and perhaps add only a *bit* here, or suppress one there, but this bit will make all the difference in the meaning.

Many men in the witness-box feel and enjoy a *sense of power* to direct the verdict toward the one side or the other, and cannot resist the temptation to indulge it and to be thought a “fine witness” for their side. I say their side; the side for which they testify always becomes their side the moment they take the witness chair, and they instinctively desire to see that side win, although they may be entirely devoid of any other interest in the case whatsoever.

It is a characteristic of the human race to be intensely interested in the success of some one party to a contest, whether it be a war, a boat race, a ball game, or a lawsuit. This desire *to win* seldom fails to color the testimony of a witness and to create fallacies and inferences dictated by the witness's *feelings*, rather than by his *intellect* or the dispassionate powers of observation.

Many witnesses take the stand with no well-defined motive of what they are going to testify to, but upon discovering that they are being led into statements unfavorable to the side on which they are called, experience a sudden dread of being considered *disloyal*, or “going back on” the party who selected them, and immediately become unconscious partisans and allow this feeling to color or warp their testimony.

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There is still another class of persons who would not become witnesses for either side unless they felt that some wrong or injustice had been done to one of the parties, and thus to become a witness for the injured party seems to them to be a vindication of the right. Such witnesses allow their feelings to become enlisted in what they believe to be a cause of righteousness, and this in turn enlists their sympathy and feelings and prompts them to color their testimony as in the case of those influenced by the other motives already spoken of.

One sees, perhaps, the most marked instances of partisanship in admiralty cases which arise out of a collision between two ships. Almost invariably all the crew on one ship will testify in unison against the opposing crew, and, what is more significant, such passengers as happen to be on either ship will almost invariably be found corroborating the stories of their respective crews.

It is the same, in a lesser degree, in an ordinary personal injury case against a surface railway. Upon the happening of an accident the casual passengers on board a street car are very apt to side with the employees in charge of the car, whereas the injured plaintiff and whatever friends or relatives happen to be with him at the time, will invariably be found upon the witness-stand testifying against the railway company.

It is difficult to point out the methods that should be employed by the cross-examiner in order to expose to a jury the particular source of the fallacy that has warped

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the judgment, choked the conscience, or blinded the intelligence, of any particular witness. It must necessarily all depend upon the circumstances arising in each particular case. All I have attempted to do is to draw attention to the *usual* sources of these fallacies, and I must perforce leave it to the ingenuity of the trial lawyer to work out his own solution when the emergency arises. This he certainly would never be able to do successfully, unless he had given careful thought and study to this branch of his professional equipment.

The subject is a great one, and rarely, if ever, discussed by law writers, who usually pass it by with the bare suggestion that it is a topic worthy of deep investigation upon the proper occasion. I trust that my few suggestions may serve as a stimulus to some philosophic legal mind to elaborate and elucidate the reasons for the existence of this *flaw* in the human mechanism, which appears to be the chief stumbling block in our efforts to arrive at truth in courts of justice.

CHAPTER IX

CROSS-EXAMINATION TO PROBABILITIES — PERSONALITY OF THE EXAMINER, ETC.

IN delivering one of his celebrated judgments Lord Mansfield said: "As mathematical and absolute certainty is seldom to be attained in human affairs, reason and public utility require that judges and all mankind in forming their opinion of the truth of facts should be regulated by the superior number of *probabilities* on the one side or the other."

Theoretically the goal we all strive for in litigation is the *probable* truth. It is therefore in this effort to develop the probabilities in any given case, that a trial lawyer is called upon for the exercise of the most active imagination and profound knowledge of men and things.

It requires but little experience in court to arrive at the conclusion that the great majority of cases are composed of a few principal facts surrounded by a host of minor ones; and that the strength of either side of a case depends not so much upon the direct testimony relating to these principal facts alone, but, as one writer very tersely puts it, "upon the *support* given them by

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the probabilities created by establishing and developing the relation of the *minor* facts in the case.”

One of the latest causes of any importance, tried in our New York courts this year, afforded an excellent illustration of the relative importance of the main facts in a case to the multitudinous *little* things which surround any given issue, and which when carefully gathered together and skilfully grouped, create the probabilities of a case. The suit was upon an oral agreement for the purchase and sale of a large block of mining stock with *an alleged guaranty against loss*. The plaintiff and defendant were both gentlemen holding prominent positions in the business world and of unquestioned integrity and veracity. The only issue in the case was the simple question, which one was correct in his memory of a conversation that had occurred five years before. The plaintiff swore there was an agreement by the defendant to repurchase the stock from him, at the price paid, at plaintiff's option. The defendant swore no such conversation ever took place. Where was the truth? The direct yea and nay of this proposition occupied about five minutes of the court's time. The surrounding circumstances, the countless straws pointing to the probabilities on the one side or the other, occupied three full days, and no time was wasted.

In almost every trial there are circumstances which at first may appear light, valueless, even disconnected,

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but which, if skilfully handled, become united together and at last form wedges which drive conviction into the mind. This is obviously the business of the cross-examiner, although it is true that the examination of one's own witnesses, as well, often plays an important part in the development of probabilities.

All men stamp as probable or improbable that which they themselves would, or would not, have said or done under similar circumstances. "As in water, face answereth to face, so the heart of man to man."¹ Things *inconsistent* with human knowledge and experience are properly rated as improbable. It was Aristotle who first said, "Probability is never detected bearing *false* testimony."

Apart from experience in human affairs and the resultant knowledge of men, it is *industry* and diligent preparation for the trial which will enable an advocate to handle the circumstances surrounding the main facts in a case with the greatest effect upon a judge or jury.

One who has thought intently upon a subject which he is going to develop later on in a court, and has sought diligently for signs or "straws" to enable him to discover the true solution of a controversy, will, when the occasion arises upon the trial, catch and apply facts which a less thoughtful person would pass by almost unnoticed. Careful study of his case before he comes into court will usually open to an advocate avenues for

¹ Proverbs xxvii. 19.

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successful cross-examinations to the probabilities of a story, which will turn out to be his main arguments for a successful verdict in his favor.

“It is acute knowledge of human nature, thorough preliminary survey of the question and of the interests involved, and keen imagination which enable the questioner to see all the possibilities of a case. It is a cautious good judgment that prevents him from assuming that to be true which he only imagines may be true, and professional self-restraint that enables him to pass by all opportunities which may give a witness a chance for successful fencing.”¹

In the search for the probable it is often wise to use questions that serve for little more than a *suggestion* of the desired point. Sir James Scarlett used to allow the jurors and even the judges to discover for themselves the best parts of his case. It flattered their vanity. Scarlett went upon the theory, he tells us in the fragments of his autobiography which were completed before his death, that whatever strikes the mind of a juror as the result of his own observation and discovery makes always the strongest impression upon him, and the juror holds on to his own discovery with the greatest tenacity and often, possibly, to the exclusion of every other fact in the case.

This search for probabilities, however, is a hazardous occupation for the inexperienced. There is very great

¹ Austin Abbott, Esq., in *The Daily Register*, December, 1886.

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danger of bringing out some incidental circumstance that serves only to confirm or corroborate the statements of a witness made before the cross-examination began. Thus one not only stumbles upon a new circumstance in favor of his opponent, but the fact that it came to light during the cross-examination instead of in the direct multiplies its importance in the eyes of a jury; for it has often been said, and it is a well-recognized fact, that accidental testimony always makes a greater impression on a juror's mind than that deliberately and designedly given.

Another danger in this hazardous method of cross-examination is the development of such a mass of material that the minds of the jurors become choked and unable to follow intelligently. If one cannot make his points stand out clearly during his cross-examination, he had better keep his seat. It used to be said of Law, a famous English barrister, that "he wielded a huge two-handed sword to extract a fly from a spider's web."

At the end of a long but unsuccessful cross-examination of a plaintiff, the kind we have been discussing, an inexperienced trial lawyer once remarked rather testily, "Well, Mr. Whittemore, you have contrived to manage your case pretty well." "Thank you, counsellor," replied the witness, with a twinkle in his eye, "perhaps I might return the compliment if I were not testifying under oath."

It so frequently happens that a lawyer who has made

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a failure of his cross-examination accentuates that failure by a careless side remark, instead of a dignified retreat, that I cannot refrain from relating another anecdote, in this connection, to illustrate the danger of such side remarks; for I am of the opinion that there is no surer way to avoid such occurrences than to have ever present in one's mind the mistakes of others.

One of the most distinguished practitioners in the criminal courts of the city of Philadelphia was prosecuting a case for the government. His witnesses had been subjected to a very vehement cross-examination by the counsel for the prisoner, but with very little effect upon the jury. Counsel for the prisoner resumed his seat quietly, recognizing his failure, but content to wait for another opportunity. After the testimony for the state had closed, the prosecuting attorney arose and foolishly remarked, "Now, Mr. Ingraham, I give you fair warning, after the way you have treated my witnesses, I intend to handle your witnesses *without gloves*." "That is more than any one would care to do with yours, my friend," replied Mr. Ingraham; and the dirt seemed, somehow, to stick to the state witnesses throughout the trial.

An excellent example of effective cross-examination to the circumstances surrounding the main question in a case — the genuineness of a signature — will be found in Bigelow's "Bench and Bar." The issue was the forgery of a will; the proponent was a man of high respecta-

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bility and good social standing, who had an indirect interest to a large amount, if the will, as offered, was allowed to be probated. Samuel Warren, the author of "Ten Thousand a Year," conducted the cross-examination.

Warren (*placing his thumb over the seal and holding up the will*). "I understand you to say you saw the testator sign this instrument?"

Witness. "I did."

Warren. "And did you sign it at his request, as subscribing witness?"

Witness. "I did."

Warren. "Was it sealed with red or black wax?"

Witness. "With red wax."

Warren. "Did you see him seal it with red wax?"

Witness. "I did."

Warren. "Where was the testator when he signed and sealed this will?"

Witness. "In his bed."

Warren. "Pray, how long a piece of red wax did he use?"

Witness. "About three inches long."

Warren. "And who gave the testator this piece of wax?"

Witness. "I did."

Warren. "Where did you get it?"

Witness. "From the drawer of his desk."

Warren. "How did he melt that piece of wax?"

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Witness. "With a candle."

Warren. "Where did the candle come from?"

Witness. "I got it out of a cupboard in the room."

Warren. "How long should you say the candle was?"

Witness. "Perhaps four or five inches long."

Warren. "Do you remember who lit the candle?"

Witness. "I lit it."

Warren. "What did you light it with?"

Witness. "Why, with a match."

Warren. "Where did you get the match?"

Witness. "On the mantel-shelf in the room."

Here Mr. Warren paused, and fixing his eye upon the prisoner, he again held up the will, his thumb still resting upon the seal, and said in a solemn, measured tone:—

Warren. "Now, sir, upon your solemn oath, you saw the testator sign this will—he signed it in his bed—at his request you signed it as a subscribing witness—you saw him seal it—it was with red wax he sealed it—a piece of wax about three inches long—he lit the wax with a piece of candle which you procured from a cupboard—you lit the candle with a match which you found on a mantel-shelf?"

Witness. "I did."

Warren. "Once more, sir—upon your solemn oath, you did?"

Witness. "I did."

Warren. "My lord, *you will observe this will is sealed with a wafer!*"

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In "Irish Wit and Humor" there is given an illustration of the dexterity of Daniel O'Connell in bringing about his client's acquittal by a very simple ruse of cross-examination.

O'Connell was employed in defending a prisoner who was tried for a murder committed in the vicinity of Cork. The principal witness swore strongly against the prisoner — one corroborative circumstance was that the prisoner's hat was found near the place where the murder was committed. The witness swore positively that the hat produced was the one found, and that it belonged to the prisoner, whose first name was James.

O'Connell. "By virtue of your oath, are you positive that this is the same hat?"

Witness. "I am."

O'Connell. "Did you examine it carefully before you swore in your information that it was the property of the prisoner?"

Witness. "I did."

O'Connell (taking up the hat and examining the inside carefully, at the same time spelling aloud the name "James"). "Now let me see — 'J-A-M-E-S' — do you mean those letters were in the hat when *you* found it?"

Witness. "I do."

O'Connell. "Did you see them there?"

Witness. "I did."

O'Connell. "And you are sure this is the same hat?"

Witness. "I am sure."

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O'Connell (holding up the hat to the Bench). "Now, my lord, I submit this is an end of this case. There is no name whatever inscribed in this hat!"

Akin to the effect produced upon a jury by the probabilities in a case is the *personal conviction* of the lawyer who is conducting it. A man who genuinely and thoroughly believes in his own case will make others agree with him, often though he may be in the wrong.

Rufus Choate once said, "I care not how hard the case is — it may bristle with difficulties — if I *feel* I am on the right side, that case I win."

It is this personal consciousness of right that has a strong moral and mental effect upon one's hearers. In no way can a lawyer more readily communicate to the minds of the jury his personal belief in his case than in his method and manner of developing, throughout his examinations, the probability or improbability of the tale which is being unfolded to them. In fact, it is only through his examinations of the witnesses and general conduct of the trial, and his own personal deportment, that a lawyer is justified in impressing upon the jury his individual belief regarding the issues in the case. The expression in words of a lawyer's opinion is not only considered unprofessional, but produces an entirely different effect upon a juror from the influence which comes from earnestness and the profound conviction of the righteousness of the cause advocated.

Writing upon this branch of the subject, Senator

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Hoar says:¹ "It is not a lawyer's duty or his right to express his individual opinion. On him the responsibility of the decision does not rest. He not only has no right to accompany the statement of his argument with any assertion as to his individual belief, but I think the most experienced observers will agree that such expressions, if habitual, tend to diminish and not to increase the just influence of the lawyer. . . . There never was a weightier advocate before New England juries than Daniel Webster. Yet it is on record that he always carefully abstained from any positiveness of assertion. He introduced his weightiest arguments with such phrases as, 'It will be for the jury to consider,' 'It may, perhaps, be worth thinking of, gentlemen,' or some equivalent phrase, by which he kept scrupulously off the ground which belonged to the tribunal he was addressing."

But an advocate is justified in arousing in the minds of a jury all the excitement which he feels about the case himself. If he feels he is in the right, he can show it in a hundred different ways which cannot fail to have their effect upon his hearers. It was Gladstone's profound seriousness that most impressed itself upon everything that he said. He always made the impression upon his hearers that the matter he was discussing was that upon which the foundations of heaven and earth rested. Rufus Choate's *heart* was always in the court-

¹ "Autobiography of Seventy Years."

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house. "No gambler ever hankered for the feverish delight of the gaming-table as Choate did for the absorbing game, half-chance, half-skill, where twelve human dice must all turn up together one way, or there is no victory. . . . It was a curious sight to see on a jury twelve hard-headed and intelligent countrymen — farmers, town officers, trustees, men chosen by their neighbors to transact their important affairs — after an argument by some clear-headed lawyer for the defence about some apparently not very doubtful transaction, who had brought them all to his way of thinking, and had warned them against the wiles of the charmer, when Choate rose to reply for the plaintiff — to see their look of confidence and disdain — 'You needn't try your wiles upon me.' The shoulder turned a little against the speaker — the averted eye — and then the change; first, the changed posture of the body; the slight opening of the mouth; then the look, first, of curiosity, and then of doubt, then of respect; the surrender of the eye to the eye of the great advocate; then the spell, the charm, the great enchantment — till at last, jury and audience were all swept away, and followed the conqueror captive in his triumphal march."¹

Sir James Scarlett, England's greatest verdict getter, always had an appearance of confidence in himself and his cause which begot a feeling of confidence in all who listened to him. He used to "wind himself into a case

¹"Autobiography of Seventy Years," Hoar.

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like a great serpent." He always had about him "a happy mixture of sparkling intelligence and good nature, which told amazingly with juries." A writer in the *Britannia* gives the following graphic description of Scarlett's appearance in court: "A spectator unacquainted with the courts might have supposed that anybody rather than the portly, full-faced, florid man, who was taking his ease on the comfortable cushions of the front row, was the counsel engaged in the cause. Or if he saw him rise and cross-examine a witness, he would be apt to think him certainly too indolent to attend properly to his business, so cool, indifferent, and apparently unconcerned was the way in which the facts which his questions elicited were left to their fate, as though it were of no consequence whether they were attended to or not. Ten to one with him that the plaintiff's counsel would get the verdict, so clear seemed the case and so slight the opposition. But in the course of time the defendant's turn would come; and then the large-headed, ruddy-faced, easy-going advocate would rise slowly from his seat, not standing quite upright, but resting on his left hand placed upon the bar, and turning sideways to the jury to commence the defence of his client. Still the same unpretending *nonchalant* air was continued; it almost seemed too great an exertion to speak; the chin of that ample face rested upon the still more ample chest as though the motion of the lips alone would be enough for all that might have to be said. So

much for the first impression. A few moments' reflection sufficed to dispel the idea that indolence had anything to do with the previous quiescence of the speaker. Now it became clear that all the while he seemed to have been taking his ease bodily, he had been using his powers of observation and his understanding. That keen gray eye had not stolen glances at the jury, nor at the witnesses either, for nothing. Nor had those abandoned facts, drawn out in cross-examination, been unfruitful seeds or cast in barren places. Low as the tone of voice was, it was clear and distinct. It was not a mere organ of sound, but a medium of communication between the mind of the advocate and the minds of the jury. Sir James Scarlett did not attempt, like Denman or Brougham, to carry the feelings of a jury by storm before a torrent of invective or of eloquence; nor was there any obvious sophistry, such as occupied too large a space in the speeches of Campbell or Wilde; it was with facts — admitted, omitted or slurred over, as best suited his purpose — and with inferences made obvious in spite of prepossessions created by the other side, that this remarkable advocate achieved his triumphs."

Personal magnetism is, perhaps, the most important of all the attributes of a good trial lawyer. Those who possess it never fully realize it themselves and only partially, perhaps, when under the influence of a large audience. There is nothing like an audience as a stimulant to every faculty. The cross-examiner's

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questions seem to become vitalized with his knowledge of the topic of inquiry and his own shrewd discernment of the situation of the witness and the relation which the witness's interest and feelings bear to the topic. His force becomes almost irresistible, but it is a force in questions, a force aroused in the mind of the witness, not in the voice of the questioner. He seems to be able to concentrate all the attention of his hearers upon the vital points in the case; he imparts weight and solidity to all he touches; he unconsciously elevates the merits of his case; he comes almost intuitively to perceive the elements of truth or falsehood in the face itself of the narrative, without any regard to the narrator, and new and undreamed-of avenues of attacking the testimony seem to spring into being almost with the force of inspiration.

Such is the life and such the experiences of the trial lawyer. But I cannot leave this branch of the subject without one sentiment in behalf of the witness, as distinguished from the lawyer, by quoting the following amusing lamentation, which has found its way into public print:—

“Of all unfortunate people in this world, none are more entitled to sympathy and commiseration than those whom circumstances oblige to appear upon the witness-stand in court. You are called to the stand and place your hand upon a copy of the Scriptures in sheepskin binding, with a cross on the one side and

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none on the other, to accommodate either variety of the Christian faith. You are then arraigned before two legal gentlemen, one of whom smiles at you blandly because you are on his side, the other eying you savagely for the opposite reason. The gentleman who smiles, proceeds to pump you of all you know; and having squeezed all he wants out of you, hands you over to the other, who proceeds to show you that you are entirely mistaken in all your suppositions; that you never saw anything you have sworn to; that you never saw the defendant in your life; in short, that you have committed direct perjury. He wants to know if you have ever been in state prison, and takes your denial with the air of a man who thinks you ought to have been there, asking all the questions over again in different ways; and tells you with an awe-inspiring severity, to be very careful what you say. He wants to know if he understood you to say so and so, and also wants to know whether you meant something else. Having bullied and scared you out of your wits, and convicted you in the eye of the jury of prevarication, he lets you go. By and by everybody you have fallen out with is put on the stand to swear that you are the biggest scoundrel they ever knew, and not to be believed under oath. Then the opposing counsel, in summing up, paints your moral photograph to the jury as a character fit to be handed down to time as the type of infamy—as a man who

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has conspired against innocence and virtue, and stood convicted of the attempt. The judge in his charge tells the jury if they believe your testimony, etc., indicating that there is even a *judicial* doubt of your veracity; and you go home to your wife and family, neighbors and acquaintances, a suspected man—all because of your accidental presence on an unfortunate occasion!”

CHAPTER X

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-

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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,

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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-

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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

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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.

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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

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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.

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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.

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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

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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-

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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 XI

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

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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

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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.

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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-

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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.

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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 jurymen 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.

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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 jurymen, 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 jurymen, 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."

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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

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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.

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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 ascendancy 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.

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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.

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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

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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."

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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.

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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

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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

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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-

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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.

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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

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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,

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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

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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

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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.

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“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.’

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“*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

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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.

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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 XII

THE CROSS-EXAMINATION OF MISS MARTINEZ BY HON.
JOSEPH H. CHOATE IN THE CELEBRATED BREACH OF
PROMISE CASE, MARTINEZ *v.* DEL VALLE

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 in order 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. In addition to actual personal experience, however, 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.

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For these reasons, and the further one 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 remarkable trials.

Often when it is necessary to demonstrate the fact that a witness has given colored or false testimony, it is not some effective point that is the true test of a great cross-examination, but the general effect which is produced upon a jury by a long review of all the witness has said, bringing out inconsistencies, contradictions, and improbable situations which result finally in the breakdown of the witness's story. The brief extracts from the cross-examinations that have already been given will not fully illustrate this branch of the cross-examiner's work.

Really great triumphs in the art of cross-examination are but seldom achieved. They occur far less frequently than great speeches. All of us who attend the courts are now and then delighted with a burst of eloquence, but we may haunt them for years and never hear anything even faintly approaching a great cross-examination; yet few pleasures exceed that afforded by its successful application in the detection of fraud or the vindication of innocence.

Some of the greatest cross-examinations in the history of the courts become almost unintelligible in print. The reader nowadays must fancy in vain such triumphs as

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those attained by Lord Brougham in his cross-examination of the Italian witness Majocchi, in the trial of Queen Caroline. To a long succession of questions respecting matters of which he quite obviously had a lively recollection, the only answer to be obtained on cross-examination from this witness was *Non mi ricordo* (I do not remember).

Seventy years ago this cross-examination was reputed "the greatest masterpiece of forensic skill in the history of the world," and *Non mi ricordo* became household words in England for denoting *mendacity*. Almost equally famous was the cross-examination of Louise Demont by Williams, in the same trial. And yet nothing could be less interesting or less instructive, perhaps, than the perusal in print of these two examinations, robbed as they now are of all the stirring interest they possessed at the time when England's queen was on trial charged with adulterous relations with her Italian *courier de place*.

Much that goes to make up an oration dies with its author and the event that called it into being. Likewise the manner of the cross-examiner, the attitude of the witness, and the dramatic quality of the scene, cannot be reproduced in print.

In order to appreciate thoroughly the examples of successful cross-examinations which here follow, the reader must give full vent to his imagination. He must try to picture to himself the crowded court room, the excite-

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ment, the hush, the expectancy, the eager faces, the silence and dignity of the court, if he wishes to realize even faintly the real spirit of the occasion.

MARTINEZ *v.* DEL VALLE

One of the most brilliant trials in the annals of the New York courts was the celebrated action for breach of promise of marriage brought by Miss Eugénie Martinez against Juan del Valle. The cross-examination of the plaintiff in this case was conducted by the Hon. Joseph H. Choate, and is considered by lawyers who heard it as perhaps the most brilliant piece of work of the kind Mr. Choate ever did.¹

The case was called for trial in the Supreme Court, New York County, before Mr. Justice Donohue, on the fourteenth of January, 1875. The plaintiff was represented by Mr. William A. Beach, and Mr. Choate appeared for the defendant, Mr. del Valle. The trial lasted for a week and was the occasion of great excitement among the habitués of the court-house. To quote from the daily press, "All those who cannot find seats within

¹When Mr. Choate retired from practice his court records had become so voluminous that many of them were destroyed, including all record of this trial. Both of the court stenographers who reported the trial have since died. Mr. Beach's recollection of the case had died with him and all his notes had likewise been destroyed. It was by the merest accident that a full transcript of the stenographic minutes of the trial was discovered in the possession of a former friend and legal representative of the defendant.

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the court room, remain standing throughout the entire day in the halls, with the faint hope of catching a sight of the famous plaintiff, whose beauty and grace has attracted admirers by the score, from every stage of society, who haunt the place regardless of inconvenience or decency."

There is no more popular occasion in a court room than the trial of a breach of promise case, and none more interesting to a jury. Such cases always afford the greatest satisfaction to an eager public who come to witness the conflict between the lawyers and to listen to the cross-examinations and speeches. With Mr. Beach, fresh from his nine days' oration in the Henry Ward Beecher case, pitted against Mr. Choate, who told the jury that this was his first venture in this region of the law; and with a really beautiful Spanish woman just twenty-one years of age, "with raven black hair and melting eyes shadowed by long, graceful lashes, the complexion of a peach, and a form ravishing to contemplate," suing a rich middle-aged Cuban banker for \$50,000 damages for seduction and breach of promise of marriage, the intensity of the public interest on this particular occasion can be readily imagined, and served as a stimulus to both counsel to put forth their grandest efforts.

The plaintiff and defendant were strangers until the day when she had slipped on the ice, and had fallen in front of the Gilsey House on the corner of 29th Street

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and Broadway. Mr. del Valle had rushed to her assistance, had lifted her to her feet, conducted her to her home, received the permission of her mother to become her friend, and six months later had become the defendant in this notorious suit which he had tried to avoid by offering the plaintiff \$20,000 not to bring it into court.

Mr. Choate spoke of it to the jury as an excellent illustration of the folly, in these modern times, of attempting to raise a fallen woman! To quote his exact words:—

“ Now I want to speak a word of warning to all Good Samaritans, if there are any in the jury box, against this practice of going to the rescue of fallen women on the sidewalks. I do not think my client will ever do it again. I do not think anybody connected with the administration of justice in this case will ever again go to the relief of one of our fair fallen sisters under such circumstances. I know the parable of the Good Samaritan is held up as an example for Christian conduct and action to all good people, but, gentlemen, it does not apply to this case, because it was ‘a certain man’ who went down to Jericho and fell among thieves, and not a woman, and the Good Samaritan himself was of the same sex, and there is not a word of injunction upon any of us to go to the rescue of a person of the other sex if she slips upon the ice. Why, gentlemen, that is an historical trick of the ‘nymphs of the pave.’ Hundreds of times has it been practised upon the verdant and inexperienced stranger in our great city.”

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Mr. Choate felt that he had a good case, a perfectly clear case, but that there was one obstacle in it which he could not overcome. There was a beautiful woman in the case against him, "a combination of beauty and eloquence which would outweigh any facts that might be brought before a jury."

Very early in the trial Mr. Choate warned the jury against the seductive eloquence and power of the learned counsel whom the plaintiff had enlisted in her behalf, — "one of the veterans of our Bar, of whose talents and achievements the whole profession is proud. In that branch of jurisprudence which I may call *sexual* litigation he is without a peer or a rival, from his long experience! You can no more help being swayed by his eloquence than could the rocks and the trees help following the lyre of Orpheus!"

When it came Mr. Beach's turn to address the jury he replied to this sally of Choate's:—

"During the progress of this trial, counsel has seen fit to make some personal allusions to myself. (Here Mr. Choate faced around.) It seemed to me not conceived in an entirely courteous spirit. He belabored me with compliments so extravagant and fulsome that they assumed the character of irony and satire. It is a common trick of the forum to excite expectations which the speaker knows will not be gratified, and blunt even the force of plain and simple arguments which may be addressed to the jury. The courtesy of the learned

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counsel requires a fitting acknowledgment, and yet I confess my utter inability to do it. I lack the language to delineate in proper colors the brilliant faculties of the learned gentleman, and I am perforce driven to borrow from others the words which describe him properly. I know no other source more likely to do the gentleman justice than the learned and accomplished friends among us taking notes. I noticed a description of my learned friend so appropriate and just that I adopt the language of it. (Here counsel read.) ‘The eloquent and witty Choate sat with his classic head erect, while over his Cupid features his blue eyes shed a mild light.’ (Great laughter.) Allow me to tender it to you, sir. (Mr. Choate smilingly accepted the newspaper clipping.)

“And how completely does my learned friend fulfil this description! How like a god he is! What beauty! The gloss of fashion and the mould of form! [*Laughter.*] The observed of all observers! Why, how can I undertake to contend with such a heaven-descended god! [*Laughter.*] He chooses to attribute to me something of Orpheonic enchantments, but should I attempt to imitate the fabled musician, sure I am I could not touch his heart of stone! But he strikes the Orpheonic lyre which he brings with him from the celestial habitation. How can you resist him? What hope have I with like weapons or efforts? If the case of this poor and crushed girl depends on any contest of wit or words between the counsel and myself, how hopeless it is; and yet I have

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some homely words, some practical facts and considerations to address to your understandings, which I hope and believe will reach your conviction."

Miss Martinez took the witness-stand in her own behalf and told her story:—

"I became acquainted with Juan del Valle under the following circumstances: On or about the fourteenth of January, 1875, when passing through 29th Street, near Broadway, I slipped on a piece of ice and fell on the sidewalk, badly spraining my ankle. Recovering from my bewilderment, I found myself being raised by a gentleman, who called a carriage and took me home. He assisted me into the house, and asked whether he might call again and see how I was getting on. I asked my mother, and she gave him permission. He called the next day, and passed half or three quarters of an hour with me, and told me he was a gentleman of character and position, a widower, and lived at 55 West 28th Street, that he was very much pleased with and impressed by me, and that he desired to become better acquainted. He then asked whether he might call in the evening and take me to the theatre. I told him that my stepfather was very particular with me, and would not permit gentlemen to take me out in the evening, but that, as mother had given her consent, I had no objections to his calling in the afternoon. He called three or four times a week, sometimes with his two younger children, and sometimes taking me to drive in the Park.

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“About three weeks after the beginning of our acquaintance he told me he had become very fond of me, and would like to marry me; that his wife had been dead for three years, and that he was alone in the world with four children who had no mother to care for them, and that if I could sacrifice my young life for an old man like him, he would marry me and give me a pleasant home; that he was a gentleman of wealth, able to provide for my every want, and that if I would accept him I should no longer be compelled, either to endure the strict discipline of my stepfather, or to struggle for simple existence by teaching. He gave me the names of several residents of New York, some of whom my stepfather knew personally, of whom I might make inquiries as to his character and position.

“I asked Mr. del Valle whether he was in earnest, saying that I was comparatively poor, and since my stepfather's embarrassment in business had not mingled in society, and wondered that he should select me when there were so many other ladies who would seem more eligible to a gentleman of his wealth and position. He replied that he was in earnest and that he had once married for wealth, but should not do so again. He told me to talk with mother and give him an answer as soon as possible. He said that he loved me from the first moment he saw me, and could not do without me. My mother gave consent and I promised to marry him. Mr. del Valle then took me to Delmonico's and after

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we had dined we went to a jewellery store in 6th Avenue, and he selected an amethyst ring for an engagement ring, as he said. The ring was too large and was left to be made smaller. Two or three days afterward he called on me at my house, placed the ring on my finger, and said, 'Keep that ring on that finger until I replace it with another.'

"At the third interview after the presentation of the ring, Mr. del Valle said that owing to some difficulties in his domestic affairs, which he called a 'compromise,' he did not think it best to be married publicly, as he feared that the publication of his marriage might cause trouble. So he urged me to marry him immediately and privately. I was greatly surprised, and said: 'If there is any trouble, why marry at all? I hope there is nothing wrong. What is the nature of the "compromise"?' and he replied: 'Oh, there is nothing wrong, but I have a "compromise" in Cuba, and it is not convenient for you or me to marry publicly, as the person concerned might make you trouble.'

"I told Mr. del Valle that I would not marry him privately, and that I would release him from his engagement. A day or two afterward he took me to a restaurant to dine with him, and I then gave him a letter in which I enclosed the engagement ring, and told him I would not marry him privately. This letter I sealed, asking him not to open it until after we had separated. Five or six days afterward he called again, and seemed

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ill. He said that my letter had made him sick, and he asked, 'What could induce you to write such a letter, Eugénie? You could not have loved me if you thought so much about the nonsense I told you about a compromise. The compromise is all arranged, and I want you to take back the ring, and say when and where we shall be married.' I said I still loved him, and if the 'compromise' had been arranged, I would accept the ring, but would not marry him secretly. He then put the ring on my finger, and said, 'Now I want you to tell when and where we shall get married.' It was finally agreed that we should be married in the fall.

"From the date of this conversation, which was early in March, 1875, until the twenty-eighth of April, 1875, Mr. del Valle called almost daily and took me to theatres and other places, and was received at home by all my family except my stepfather as my accepted suitor. He frequently complained that he could not call in the evening, and wished me to live in his house in Twenty-eighth Street, and take charge of his children. I refused, and he then proposed to take a place in the country, where the children could have plenty of air and exercise, if I would go and take charge of them, and as we were to be married so soon, he wished me to get well acquainted with his children, adding that if I really loved him, I need have no doubt about his honorable intentions.

"I laughed at the idea, but finally consented to leave

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my home and go into the country with his family. As I was losing all my pupils he insisted upon giving me \$100 a month. He persuaded me there was no impropriety in his suggestion, as we were to be married, and that I should never return home excepting as his wife. I had told him that my stepfather had threatened to shoot me and any man whom I might marry. He persuaded me to leave my home at once, and as he had not yet secured a country house for the summer, I was to go to the Hotel Royal for a few days and live under an assumed name, which I did. He kept me at the hotel for five weeks, persuading me not to return home, and by the first of June he had secured a country place at Poughkeepsie, and I went there to live with himself and his four children.

“His conduct toward me up to this time had always been everything that could be desired,—always kind and considerate and anxious for my every comfort,—neither by word or act did he indicate to me that his intention was any other than to make me his wife. He had engaged a very fine mansion at Poughkeepsie, overlooking the Hudson, fine grounds, and everything one could desire in a country house. Mr. del Valle gave me the keys to the house and told me the entire establishment was under my charge.

“Six days after I arrived at Poughkeepsie he forced his way into my bedroom. I insisted upon an immediate marriage as my right. He told me he had not been

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able to arrange the compromise in Cuba, and begged me to be reasonable and he would be my life friend; that I could not return home under the circumstances, and that anything I might at any time want he would always do for me. He tried to persuade me that I would best accept the situation as it was, and that it was a very common occurrence. I had no home to go to and did not dare to record the circumstance to my mother; I would have died first. Three months later, or at the end of the summer, his manner entirely changed toward me. I repeatedly asked him for some explanation. He persuaded me that his coldness was assumed to prevent the servants from talking, that he was going to Cuba to try to fix up the compromise, and prevailed upon me to go back to my home and parents and wait. This I did on the sixth of September. After I returned to New York I wrote to him but received no reply, and have never seen him since."

Nothing could be more witty or brilliant than Mr. Choate's own description to the jury of "the appearance of this fair and beautiful woman while she was giving her evidence on the witness-stand." It was a part of the exhibition, he said, which no reporter had been adequate to describe.

"Gentlemen, have you seen since the opening of this trial one blush, one symptom of distress upon her sharp and intelligent features? Not one. There was in a critical point of her examination a breaking down or a

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breaking up, as I should prefer to call it. Her handkerchief was applied to her eyes; there was a loud cry for 'Water, water,' from my learned friend, echoed by his worthy and amiable junior, as though the very Bench itself were about to be wrapped in flames! [*Laughter.*] But when the crisis was over, then it appeared that there had only been a momentary eclipse of the handkerchief, — that she had been shedding *dry* tears all the while! Not a muscle was disturbed; she advanced in the progress of her story with sparkling eyes and radiant smile and tripping tongue, and thus continued to the end of the case!

"The great masters of English fiction have loved nothing better than to depict the appearance in court of these wounded and bleeding victims of seduction when they come to be arrayed before the gaze of the world.

"You cannot have forgotten how Walter Scott and George Eliot have portrayed them sitting through the ordeal of their trials, — the very pictures of crushed and bleeding innocence, withering under the blight that had fallen upon them from Heaven, or risen upon them from Hell. Never able so much as to raise their eyes to the radiant dignity of the Bench [*Laughter*], seeming to bear mere existence as a burden and a sorrow. But, gentlemen, our future novelist, if he will listen and learn from what has been exhibited here, will have a wholly different picture to paint. He will

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not omit the bright and fascinating smile, the sparkling eye, the undisturbed composure from the beginning to the end of the terrible ordeal. With what zest and relish and keen enjoyment she detailed her story! What must be the condition of mind and heart of the woman who can detail such stories to such an audience as was gathered together here!"

Speaking of the whole case, Mr. Choate said: "Never did a privateer upon the Spanish main give chase to and board a homeward-bound Indiaman with more avidity and vigor than this family proposed to board this rich Cuban and make a capture of him. It was a 'big bonanza' thrown to them in their distress."

It will be seen that the one great question of fact to be disposed of in the case was whether there was a breach of promise of marriage on the part of the defendant to the plaintiff; that being decided in the negative, everything else would disappear from the case. All other matters were simply incidental to that.

The conflicting evidence could not be reconciled. One side was wholly true, the other side wholly false, and the jury were to be called upon to say where the truth was. Was there a promise of marriage three weeks after the plaintiff and defendant met on the corner of 29th Street and Broadway?

The plaintiff had stated in substance that after three weeks the defendant proposed marriage and she accepted

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him; that he took her in a carriage to Delmonico's to lunch and took her to a jeweller's store in Sixth Avenue and there purchased a ring as a binding token of the promise of marriage. That was her case. If the jury believed that, she would succeed. If they did not, her case falls. That ring was a clincher, according to her statement of the story, given on the heels of the promise of marriage. What else could it mean but to bind that bargain? This was the way the case stood when Mr. Choate rose to cross-examine Miss Martinez.

There could be no greater evidence of the success of the particular method of examination that Mr. Choate chose to adopt on this occasion than the comment in the *New York Sun*: "A vigorous cross-examination by Mr. Joseph Choate did not shake the plaintiff's testimony. Miss Martinez told her story over again, only more in detail!" How poor a judge of the art of cross-examination this newspaper scribe proved himself to be! He had entirely failed to penetrate the subtlety of Mr. Choate's methods or to realize that, in the light of the testimony that was to follow for the defence, Miss Martinez, during her ordeal, which she appeared to stand so well, had been wheedled into a complete annihilation of her case, unconsciously to herself and apparently to all who heard her.

In sharp contrast to Mr. Choate's style of cross-examination is that adopted by Sir Charles Russell in the cross-examination of the witness Pigott, — which is given

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in the following chapter,—and where the general verdict of the audience as Pigott left the witness-box was “*smashed*”; and yet, though the audience did not realize it, Miss Martinez left the witness-stand so effectually “*smashed*” that there never afterwards could be any doubt in Mr. Choate’s mind as to the final outcome of the case. In his summing up Mr. Choate made this modest reference to his cross-examination: “I briefly ask your attention to her picture as painted by herself,—to her evidence, and her letters, giving us her history and her career.” And then he proceeded to tear her whole case to pieces, bit by bit, in consequence of the admissions she had unsuspectingly made during her cross-examination.

“And now, gentlemen, with pain and sorrow I say it, has not this lady by her own showing, by her own written and spoken evidence and the corroborating testimony of her sister, *established* her character in such a way that it will live as long as the memory of this trial survives?”

In starting his cross-examination Mr. Choate proceeded to introduce the plaintiff to the jury by interrogating her with a series of short, simple questions, the answers to which elicited from the lady a detailed account of her life in New York since the year of her birth.

She said she was twenty-one years old; was born in New York City; her parents were French; her own father was a wine merchant; he died when she was

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seven years old; two years later her mother married a Mr. Henriques, with whom she had lived as her stepfather for the fourteen years preceding the trial. She had been educated in a boarding-school, and since graduation had been employing herself as a teacher of languages, etc., etc.

Mr. Choate had in his possession a letter written by the plaintiff to Mr. del Valle during the first few weeks of their acquaintance. In this letter Miss Martinez had complained of the wretchedness of her home life in consequence of the amorous advances made to her by her stepfather. Mr. Choate was evidently of the opinion that this letter was a hoax and had been written by Miss Martinez for the sole purpose of eliciting Mr. del Valle's sympathy, and inducing him to allow her to come and live in his family as the governess of his children with the idea that a proposal of marriage would naturally result from such propinquity. Suspecting that the contents of this letter¹ were false, and judging from state-

¹ DEAR FRIEND: I believe I promised to write and tell you my secret. I will now do so. When I was nine years of age my father died. My mother married my uncle, who is now my father. To make a long story short, papa loves me, and has done everything in his power to rob me of what is dearer to me than my life,—my honor. And ever since I was a little child he has annoyed me with infamous propositions and does so still. You can easily imagine how unhappy and miserable he made me, for I don't love him the way he wishes me to, and I cannot give him what he wants. for I would sooner part with my life. I have only God to thank for my unsullied honor. He has watched over me in all my troubles, for oh, my dear friend, I have had so many, many trials! But it is God's will and I always tried to be a good

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ments made in the plaintiff's testimony-in-chief that she had either forgotten all about this letter or concluded that it had been destroyed, Mr. Choate set the first trap for the plaintiff in the following simple and extremely clever manner.

Mr. Choate. "By what name did you pass after you returned home from boarding-school and found your mother married to Mr. Henriques?"

Miss Martinez. "Eugénie Henriques, invariably."

Mr. Choate. "And when did you first resume the name of Martinez?"

Miss Martinez. "When I left the roof of Mr. Henriques."

Mr. Choate. "Always until that time were you called by his name?"

Miss Martinez. "Always."

Mr. Choate. "Did your father exercise any very rigid discipline over yourself and your sister that you remember?"

Miss Martinez. "He did."

Mr. Choate. "When did that rigid discipline begin?"

Miss Martinez. "It commenced when I first knew him."

girl, and now you know my secret, my heart feels light. I now leave you, wishing you all my sincere good wishes, and with many kisses to the dear little girls, I remain your friend,

"Eugénie.

"N.B. I will meet you on Saturday at 1 o'clock, corner of Twenty-eighth Street and Broadway."

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Mr. Choate. "And it was very rigid, wasn't it?"

Miss Martinez. "It was, very."

Mr. Choate. "Both over yourself and over your younger sister?"

Miss Martinez. "Yes."

Mr. Choate. "Taking very strict observation and care as to your morals and your manners?"

Miss Martinez. "Exceedingly so."

Mr. Choate. "How did this manifest itself?"

Miss Martinez. "Well, in preventing my having any other associates. He thought there was no one good enough to associate with us."

Mr. Choate. "Then he was always very strict in keeping you in the path of duty, was he not?"

Miss Martinez. "Most undeniably so."

Mr. Choate. "Was this a united family of which you were a member? Were they united in feeling?"

Miss Martinez. "Very much so indeed. There are very few families that are more united than we were."

Mr. Choate. "All fond of each other?"

Miss Martinez. "Always."

One can readily picture to himself Mr. Choate and the fair plaintiff smiling upon each other as these friendly questions were put and answered. And the plaintiff, entirely off her guard, is then asked, probably in a cooing tone of gentleness and courtesy that can be easily imagined by any one who has ever heard Mr. Choate in court, the *important* question:—

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Mr. Choate. "As to your *stepfather*, you were all fond of him and he of you?"

Miss Martinez. "Very fond of him indeed, and he very fond of us."

Mr. Choate. "And except this matter of his rigid discipline, was he kind to you?"

Miss Martinez. "Very."

Mr. Choate. "And gentle?"

Miss Martinez. "Very gentle and very kind."

Mr. Choate. "Considerate?"

Miss Martinez. "Very considerate always of our happiness, but he did not wish us to associate with the people by whom we were surrounded, as we were not in circumstances to live amongst our class."

Mr. Choate. "When was it that he first introduced the subject of marriage, or forbidding you to marry, or thinking of marrying?"

Miss Martinez. "Well, when I was about sixteen or seventeen."

Mr. Choate. "And was it then that he said that if you married, he would shoot you and shoot any man that you married?"

Miss Martinez. "He did."

Mr. Choate. "That was the one exception to his ordinary gentleness and kindness, wasn't it?"

Miss Martinez. "Yes."

Mr. Choate. "And the only one?"

Miss Martinez. "And the only one."

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Mr. Choate. "Your stepfather is no longer living, is he?"

Miss Martinez. "He is not. He died last October."

It will be observed that Mr. Choate did not confront the witness at this point with the letter that she had written, complaining of her father's brutal advances to her, and of the necessity of her leaving her home in consequence. Many cross-examiners would have produced the letter and would have confronted the witness on the spot with the contradiction it contained, instead of saving it for the summing up. It is interesting to study the effect of such a procedure. By a production of this letter, the witness would have been immediately discredited in the eyes of the jury; the full force of the contradictory letter would have been borne in upon the jury as perhaps it could not have been at any other time in the proceeding, and the *Sun* reporter could not have said the plaintiff had not been "shaken." On the other hand, it would have put the witness upon her guard at the very start of her cross-examination, and she would have avoided many of the pitfalls which she confidently stepped into later in her testimony. All through the examination Mr. Choate had frequent opportunities to put the witness on her guard, but at the same time *off her balance*. It is a mooted question which method is the better one to employ. It all depends upon the nature of the case on trial.

Richard Harris, K.C., an English barrister who has

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written several clever books on advocacy, says: "From a careful observation, I have reluctantly come to the conclusion that in five cases out of six, I would back the advocate and not the case." This is especially true of a breach of promise case when the suit is for a breach of promise of marriage, but when owing to the unwise conduct of the defendant's lawyer at the trial in unnecessarily attacking the woman plaintiff, the verdict of the jury in her favor is for *slander*. It may have been some such consideration as this which determined Mr. Choate to save all his "points" for his summing up.

It is perhaps the *safer* course of the two in cases of this kind, but I doubt very much if, in the great majority of cases, it is the wiser one; for it must be remembered that there are few lawyers at the Bar who can make such use of his "points" in his summing up as did Mr. Choate.

Had Miss Martinez been confronted with her own letter in which she had written of her stepfather, "He loves me and has done everything in his power to rob me of what is dearer to me than my life, — my honor. . . . Ever since I was a little child he has annoyed me with infamous propositions," etc., it would be difficult to imagine any way in which she could reconcile her letter and her sworn testimony, and Mr. Choate would have had the upper hand of his witness from that time on.

Furthermore, during the examination of a witness the jury invariably form their opinion of the witness' integrity,

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and if that opinion is in favor of the witness it is often too late to try to shake it in the summing up. It is usually, therefore, the safer course to expose the witness to the jury in his or her true colors during the examination, and, if possible, prejudice them against her at the outset. In such cases, oftentimes, no summing up at all would be necessary, and the closing speech becomes a mere matter of form. Many lawyers save their points in order to make a brilliant summing up, but then it is perhaps too late to change the jury's estimate of the witnesses. An opinion once formed by a juror is not easily changed by a speech, however eloquent. This is the experience of every trial lawyer.

As evidence of how completely this part of Mr. Choate's case flattened out because it was left until the final argument, it is only necessary to call the reader's attention to all that was said on the subject in the summing up, viz. : " Her letter was read to the jury, which she had delivered to the defendant on the fifteenth of March, revealing her stepfather's barbarous treatment of her. When I was cross-examining her, I did it with that letter in my hand, with a view to what was written in it; so I asked her about the relations existing between herself and her stepfather, and she said he was always kind and loving and considerate, tender and gentle."

Instead of nailing this point in the cross-examination, as Sir Charles Russell, for instance, would have done, Mr. Choate turns quietly to the next subject of his ex-

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amination, which is one of vital importance to his client, and to the theory of his defence.

Mr. Choate. "Can you fix the date in January when you first saw the defendant, Mr. del Valle?"

Miss Martinez. "It was on the fifteenth day of January, — either the fourteenth or the fifteenth. It was on a Thursday. I had an appointment with my dentist."

Mr. Choate. "Thursday appears by the calendar of that year to have been on the *fourteenth* of January."

Miss Martinez. "That was the day."

The supreme importance of this inquiry lies in the fact that Mr. Choate was in possession of the account books of the jeweller from whom the alleged "engagement ring" had been purchased. These records showed that the ring had been bought on the *fifteenth* day of January, or *one day after* the plaintiff and the defendant *first met*, and before there had been any opportunity for acquaintance or love making, or any suggestion or possibility of a proposition of marriage and presentation of an engagement ring, which, as the plaintiff said in her own story, had been given her with the express request that she should wear it until another ring should take its place.

Mr. del Valle's version of the story, which Mr. Choate was intending to develop later in the case, was that he had met the plaintiff, was pleased with her, had assisted her to her home, had met her again the following day, had suggested to her, as a little memento of their

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acquaintance and his coming to her assistance, that she would allow him to present her with a ring, and that after lunching together in a private room at Solari's, they had gone to a jeweller's and he had selected for her an amethyst ring in commemoration of the day of their meeting. It was this ring which the plaintiff later tried to convert into an engagement ring, which she claimed was given her *three or four weeks* after she had first made the acquaintance of Mr. del Valle, and after he had repeatedly asked her hand in marriage.

Mr. Choate. "What time in the day was it that you first met Mr. del Valle on this Thursday, the fourteenth day of January?"

Miss Martinez. "About half-past two o'clock in the afternoon."

Mr. Choate. "Have you any means of fixing the hour of that day?"

Miss Martinez. "Yes. I had an appointment with my dentist at three o'clock."

Mr. Choate. "Your appointment with the dentist had been previously made, and you were on your way there?"

Miss Martinez. "I was on my way there."

Mr. Choate. "It was at the corner of Broadway and 29th Street that you fell on the ice, was it not?"

Miss Martinez. "It was."

Mr. Choate. "You did not observe the defendant before you fell?"

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Miss Martinez. "I did not."

Mr. Choate. "And you had never seen him before?"

Miss Martinez. "I had never seen him before."

Mr. Choate. "Did this fall render you insensible?"

Miss Martinez. "Very nearly so. I fell on my side and was lying down on the ground when Mr. del Valle raised me up. I remember there were some iron railings near there, and I was leaning against these railings while Mr. del Valle hailed a cab, assisted me into it, and took me home. He told me in the cab that he had been following me all the way up Broadway."

Mr. Choate. "Did he tell you for what object he followed you?"

Miss Martinez. "He did not. He merely told me that he was following me."

Mr. Choate. "And you did not ask him for what purpose he followed you?"

Miss Martinez. "I did not."

Mr. Choate. "Did he drive you to your home?"

Miss Martinez. "He did, and when we arrived he assisted me into the house. I had sprained my ankle. He explained my accident to my mother, and that he had brought me home. My mother thanked him and he asked if he might call again and see how I was getting along with my injury."

The plaintiff had explained that it was the serious nature of her injury which had occasioned her allowing a stranger to get her a cab and take her home.

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Whereas the clerks in the jeweller's store where the ring was bought *the day following the accident*, remembered distinctly seeing the plaintiff and the defendant together in the jewellery store for over half an hour while they were selecting the ring.

In order to involve the plaintiff in further difficulties and contradictions, Mr. Choate continues in the same vein:—

Mr. Choate. "You were somewhat seriously disabled by your accident, were you not?"

Miss Martinez. "I was."

Mr. Choate. "For how long?"

Miss Martinez. "Well, for two or three days."

Mr. Choate. "A sprained ankle?"

Miss Martinez. "My ankle hurt me very much. I had it bandaged with cold water and lay on the bed for two days. The third day I was able to limp around the room only a little, and the fourth day I could walk around."

Mr. Choate. "How long was it before you got entirely over it so as to be able to go out of doors?"

Miss Martinez. "Well, *I went out the fifth day.*"

Mr. Choate. "And not before?"

Miss Martinez. "And not before."

Mr. Choate. "So that because of the injuries that you sustained, you were confined to the house for five days?"

Miss Martinez. "I was."

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Mr. Choate. "And the first day, or January 16 (this was the day she had bought the ring), you were confined to your room and lying upon the bed?"

Miss Martinez. "Yes, sir. I reclined upon my bed. I was not confined in bed as sick."

Mr. Choate. "When was the first time that you were with Mr. del Valle at any time except at your father's or your mother's house?"

Miss Martinez. "Do you mean the first time that I went out with him?"

Mr. Choate. "Yes."

Miss Martinez. "It was during the week following that in which I met him. I met him on Thursday, the fourteenth, and went out with him sometime during the following week."

Mr. Choate. "What was the place?"

Miss Martinez. "We went to Delmonico's to dine."

* * * * *

Mr. Choate. "Was the ring the only present he gave you, or the first present?"

Miss Martinez. "Oh, no, not by any means."

Mr. Choate. "When did you begin to accept presents from him?"

Miss Martinez. "The first day I went out with him, when we went to Delmonico's, I accepted books from him."

Mr. Choate. "What was the book that he then presented to you?"

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Miss Martinez. "Oh, well, I forget the title of it. I think it was 'Les Misérables' by Victor Hugo."

Mr. Choate. "And from that time he continued, when you went out with him, as a general thing, giving you something?"

Miss Martinez. "Giving me books and buying me candies. After we were through dining, he would stop at a confectioner's and buy me something."

Mr. Choate. "Down to the first time of the first talk of marriage, which you say was about three weeks after you met, how many times did you go with him to Delmonico's, or other restaurants?"

Miss Martinez. "Well, on an average of about two or three times a week."

Mr. Choate. "Where else did you go besides Delmonico's?"

Miss Martinez. "The first time I went to any place with him besides Delmonico's was at the time of the engagement, when he gave me the ring,—when he bought the ring for me."

Mr. Choate. "Where did you go then?"

Miss Martinez. "We went in University Place somewhere. I do not exactly know what street."

Mr. Choate. "What side of University Place was it?"

Miss Martinez. "On the opposite side from Christern's book store."

Mr. Choate (with a smile). "Was it a place called Solari's?"

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Miss Martinez (hesitating). "I think it was."

Mr. Choate. "How many times did you go there with him before he gave you the ring?"

Miss Martinez. "I never went there before he gave me the ring. That was the first time I ever went to this place."

Mr. Choate. "How came you way down there in University Place if you live up in 56th Street? Did you make an appointment to be there?"

Miss Martinez. "He came up to the house for me."

Mr. Choate. "Came up and took you down there?"

Miss Martinez. "Yes. Didn't he come up to inquire if I had accepted him as a husband, and ask me if I had consulted with my mother, and ask me what answer I had for him, and had I not told him that I would marry him? It was then that he took me to this restaurant in a carriage, and after that he bought the ring for me."

Mr. Choate. "The same day?"

Miss Martinez. "The very same day."

Mr. Choate. "Some considerable number of weeks, you say, intervened between your first acquaintance and this dinner at Solari's, — this engagement and the giving of the ring?"

Miss Martinez. "About three weeks as nearly as I can fix the time."

Mr. Choate. "Where was this jewellery store where the ring was bought?"

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Miss Martinez. "It was on Sixth Avenue. I cannot say near what street it was. I felt cold and tired that day. We walked from Solari's and it seemed to me as though the walk was rather long."

Mr. Choate. "You remember the name of the store?"

Miss Martinez. "I do not."

Mr. Choate. "Should you know the name if I told you?"

Miss Martinez. "No, I never knew the name."

This jeweller took the witness-stand for the defence, and testified that Miss Martinez was present on the fifteenth of January, when the ring was bought, according to the entry made in his books, and that in consequence of the ring being too large she had ordered it made smaller, and had returned three days later herself alone, had taken the ring from his hand, and had given him a letter addressed to Mr. del Valle, asking him to deliver it when Mr. del Valle should call to pay for the ring, "although," as Mr. Choate sarcastically put it, "it had been in her fond memory as a cherished remembrance that Mr. del Valle had put it on her finger and told her to keep it there until he replaced it with another. Who does not see," said Mr. Choate, in his summing up, "that the disappearance of the ring from the case as a gift upon a promise of marriage three weeks after the first acquaintance carries down with it all this story of the return of the ring to the defendant, and the defendant's re-return of it to the plaintiff?"

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Mr. Choate. "Did you ever go to this store but the one time?"

Miss Martinez. "Never went there but the one time."

Mr. Choate. "And you are sure of that?"

Miss Martinez. "I am very sure of that."

Mr. Choate. "The only time you were there was with Mr. del Valle?"

Miss Martinez. "That was the only time I have ever been in that store in my life."

Mr. Choate. "You say you looked at a solitaire diamond ring?"

Miss Martinez. "Yes, but Mr. del Valle told me that he preferred an amethyst, and I took the amethyst."

Mr. Choate. "There was a considerable difference in the cost, wasn't there, between them?"

Miss Martinez. "There was."

Mr. Choate. "Do you know the cost of the amethyst ring?"

Miss Martinez. "I think it was forty-five dollars."

Mr. Choate. "The cost of a solitaire diamond ring might be many hundreds of dollars?"

Miss Martinez. "One hundred and five dollars, one hundred and ten dollars, one hundred and fifteen dollars,— I do not know."

Mr. Choate. "Did you look at any other jewellery?"

Miss Martinez. "Mr. del Valle asked me if I wished anything else, but I did not."

Mr. Choate here deviated from his former plan of not

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confronting the witness with the evidence he was intending to contradict her with, and having first shown the witness the letter addressed to Mr. del Valle which she had left at the jeweller's on her second visit there, the handwriting of which the witness denied, Mr. Choate followed with this question:¹ —

Mr. Choate. “Now let me refresh your recollection a little, Miss Martinez. Didn't this visit to the jeweller's take place on the fifteenth of January, the day after you made the acquaintance of Mr. del Valle?”

Miss Martinez. “Oh, no, not by any means, sir.”

Mr. Choate. “Sure of that?”

Miss Martinez. “I am very sure of it, for I was confined to my room the day after I first made the acquaintance of Mr. del Valle.”

Mr. Choate. “Then you never went to that jeweller's store but once?”

Miss Martinez. “Never. I would not know the store, and do not know. I do not recollect the name or anything about it.”

Mr. Choate. “There was some trouble about the ring being too large, wasn't there?”

Miss Martinez. “Yes, the ring was too large for the finger I wished it for.”

¹ This is an illustration of a practice recommended in a former chapter, of asking questions upon the cross-examination which you know the witness will deny, but which will acquaint the jury with the *nature of the defence* and serve to keep up their interest in the examination.

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Mr. Choate. "And orders were left to have it made smaller?"

Miss Martinez. "Yes."

Mr. Choate. "What arrangement was made, if any, for your getting the ring when it should be made smaller?"

Miss Martinez. "There was no arrangement made. Mr. del Valle merely said that when he called upon me again he would bring it to me, and he did bring it to me."

Mr. Choate. "About what time was that; in February?"

Miss Martinez. "It was, I should say, the first week in February. I cannot give the exact date."

Mr. Choate. "Now let me again try to refresh your recollection. Didn't you yourself go to the jewellery store and get the ring?"

Miss Martinez. "I myself?"

Mr. Choate. "You yourself."

Miss Martinez. "I never went to that jewellery store but once in my life and that was with Mr. del Valle himself while I selected the ring."

* * * * *

On behalf of the defendant Mr. Choate was intending to swear as witnesses a Mr. Louis, who kept the store on Ninth Avenue around the corner from where the plaintiff lived in 44th Street, and a Mrs. Krank, who lived around the corner from her residence on 56th

Street, who would both testify that the plaintiff had a confirmed habit of having letters left there,—letters from various gentlemen, some of them having the monogram “F. H.,” the initials of Frederick Hammond, the clerk of the Hotel Royal. Mr. Choate also had in his possession a letter of the twenty-second of January, in the plaintiff’s handwriting and addressed to Mr. del Valle at the inception of their acquaintance, which read, “Should you deem it necessary to write to me, a line addressed ‘Miss Howard, in care of J. Krank, 1060 First Avenue,’ will reach me.” In anticipation of this testimony, Mr. Choate next interrogated the witness as follows:—

Mr. Choate. “Did you ever go by any other name than your own father’s name, Martinez, or your step-father’s name, Henriques?”

Miss Martinez. “I did not.”

Mr. Choate. “Did you ever have letters left for you directed to ‘Miss Howard, care of J. Krank, No. 1060 First Avenue’?”¹

Miss Martinez. “I never did.”

Mr. Choate. “Do you know No. 1060 First Avenue?”

Miss Martinez. “I do not. I have no idea where it is.”

Mr. Choate. “Do you know what numbers on First Avenue are near to your house on 56th Street?”

¹ Mr. Choate took as one theme for his summing up: “The woman who possesses an *alias* in the big cities of the world.”

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Miss Martinez. "I do not. I never went on First Avenue."

Mr. Choate. "Did you ever have any letters sent to you addressed to 'Miss Howard, care of Mrs. C. Nelson,' on Ninth Avenue?"

Miss Martinez. "I never did."

Here Mr. Choate again treads upon the toes of the witness' veracity, but it is difficult to see why he did not confront her then and there with her own letter. By adopting such a course he took no chances whatever. He would have dealt her a serious blow in the eyes of the jury. Instead, Mr. Choate contents himself by putting this letter in evidence, while the defendant himself was on the witness-stand, and the jury never really saw the point of it until the summing up, when their heads were so full of other things that this serious prevarication of the plaintiff probably went almost unnoticed.¹

* * * * *

Mr. Choate. "At the meeting when Mr. del Valle brought the ring to your house, was anybody present?"

Miss Martinez. "Nobody was present."

Mr. Choate. "And I have forgotten how long you said it was that you kept the ring before returning it to him?"

Miss Martinez. "I never told you any stated time."

Mr. Choate. "Well, I would like to know now."

¹ The jury remained locked up for twenty-six hours unable to agree upon a verdict, several of them voting for large damages.

CROSS-EXAMINATION BY JOSEPH H. CHOATE

Miss Martinez. "I returned the ring to him when I dissolved the engagement between him and me — about a week or so after I had received the ring."

Mr. Choate. "Then it was only a week that the engagement lasted at first before it was resumed the second time?"

Miss Martinez. "Well, I think so."

The plaintiff had already read in evidence to the jury a *fabricated copy* of a letter breaking her engagement to the defendant, and returning him the ring. There had been no such letter in fact handed to Mr. del Valle, but the plaintiff had substituted this alleged copy for a letter, the original of which Mr. Choate had in his possession, which was the one already referred to, wherein the plaintiff had complained of the brutal solicitations of her stepfather, and had requested him not to read until he was alone.

Mr. Choate. "Now you have spoken of the circumstances under which you returned him the ring in a letter, with injunctions not to open the letter until you separated. What was your purpose in requiring him not to open the letter until he should be out of your presence?"

Miss Martinez. "Because I knew if I told him what my purpose was, he would not accept of it. He would not dissolve the engagement between us, and I wished him to see that I was determined upon it. That was my purpose."

THE ART OF CROSS-EXAMINATION

Mr. Choate. "Was not the fact of the ring being in the letter quite obvious from the outside?"

Miss Martinez. "It was, and he asked me what it was."

Mr. Choate. "Where was it that you handed him that letter?"

Miss Martinez. "When we were dining."

Mr. Choate. "At what place? Was it this place you have just mentioned, — Solari's?"

Miss Martinez. "Yes, sir."

Mr. Choate. "How many times had you been there then?"

Miss Martinez. "We went there after our engagement very frequently."

Mr. Choate. "Was that your regular place of meeting after your engagement?"

Miss Martinez. "Sometimes we went to Delmonico's; more frequently we went to Solari's."

Mr. Choate. "And it was there that you handed him the letter? How long before going there had you written the letter?"

Miss Martinez. "It was written the day after he spoke to me of having a compromise in Cuba. The very day after, I made up my mind to break the engagement."

Mr. Choate. "Tell me, if you please, all that he said when he spoke about this compromise."

Miss Martinez. "Well, we were coming home in a

CROSS-EXAMINATION BY JOSEPH H. CHOATE

carriage, and he asked me when we should be married, and I told him I did not know; that I was not thinking of it yet for some time, and he said that when we should be married, he would like to be married privately, without anybody knowing anything about it. That he had a good many friends here in New York and people that were apt to talk, and he requested me to marry him privately and at once."

Mr. Choate. "Did he say that he already had a wife as a 'compromise'?"

Miss Martinez. "He did not."

Mr. Choate. "Did he explain in any way what this 'compromise,' as you call it, was?"

Miss Martinez. "He merely told me, 'Oh, there is no secrecy. I have a compromise in Cuba — some trouble there, for reasons best known to myself,' but that it was better to marry privately."

Mr. Choate. "Did you believe he had another wife living in Cuba?"

Miss Martinez. "No."

Mr. Choate. "What was there that you supposed could prevent a man marrying again if he loved a woman, as he said he did you, except the existence of a wife already?"

Miss Martinez. "Well, I thought perhaps he had some alliance with some woman whom he had promised to marry, or was obliged to marry, and could not marry any other woman under those circumstances."

THE ART OF CROSS-EXAMINATION

Mr. Choate. "He did not suggest anything of that sort?"

Miss Martinez. "That was only the impression that I received at the time, — what I thought."

Mr. Choate. "And you never had any other impression but that, had you?"

Miss Martinez. "No, I had not."

Mr. Choate. "When you concluded to take him again, it was under that impression?"

Miss Martinez. "Not at all. He told me that the compromise was arranged and had been adjusted. I took him again and became engaged to him."

Mr. Choate. "Your idea of the nature of the compromise when you took him again was that he had been engaged to another woman in Cuba and promised to marry her. Is that it?"

Miss Martinez. "Yes, sir, it was something of that kind."

Mr. Choate. "Then when you concluded to take back the ring, it was upon the understanding that he had broken an engagement with a woman in Cuba. Did it not occur to you as an obstacle, when you took him again, that he had just broken a match with another woman?"

Miss Martinez. "No, not at all."

Mr. Choate. "You did not care for that?"

Miss Martinez. "No. I did not care for it, because I trusted him."

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Mr. Choate. "How often did Mr. del Valle visit you at this time?"

Miss Martinez. "Four or five times a week."

Mr. Choate. "Did you and your mother keep these visits of this gentleman and the engagement a secret from your stepfather?"

Miss Martinez. "We did."

Mr. Choate. "And that because of his threat to shoot you and the man if you ever married?"

Miss Martinez. "Yes, sir."

Mr. Choate. "Had your father kept weapons ready?"

Miss Martinez. "Well, no, I do not think he did."

Mr. Choate seems to have changed his mind suddenly upon the advisability of introducing the atrocious stepfather's letter. This was the wrong time to introduce it, if at all, and his feeble attempt was productive of nothing but a hasty retreat upon his own part.

Mr. Choate. "Did you ever make any complaint to Mr. del Valle of being harshly treated by your stepfather?"

Miss Martinez. "I never did. My father never treated me harshly."

Mr. Choate. "I want you to look at this signature and see whether that is yours on the paper now handed you" (passing a paper to witness).

Miss Martinez. "I could not say whether it is mine or not."

Mr. Choate. "What is your opinion?"

THE ART OF CROSS-EXAMINATION

Miss Martinez. "I do not think it is. It does not look like my signature."

* * * * *

Mr. Choate. "How is it that you have produced here a copy of the letter in which you say you enclosed the ring in February or March. How is that?"

Miss Martinez. "I do not know. I merely found a copy one day in a book. I never made a practice of copying."

Mr. Choate. "When and where did you make the copy of that letter?"

Miss Martinez. "I did not make any copy of it after I had sent the letter to Mr. del Valle, but the paper upon which I wrote was defective when I wrote it to him. There was a blot or something on it, and I found the copy afterwards!"

Mr. Choate. "Then you do know exactly how you came to have a copy?"

Miss Martinez. "Yes, it was in my desk drawer, that is all, but I did not make a practice of keeping copies of all the papers."

Mr. Choate. "Did you not say a moment ago that you did not know how you came to have a copy?"

Miss Martinez. "No; I did not say I did not know how I came to have a copy."

Mr. Choate. "In what respect did this copy differ from the original enclosing the ring?"

Miss Martinez. "It did not differ. I only said there

CROSS-EXAMINATION BY JOSEPH H. CHOATE

was a blot upon the paper and I put it into a drawer and wrote another one, and that paper remained blotted in the drawer for a considerable length of time."

Mr. Choate. "What part of the paper was the blot on?"

Miss Martinez. "The first page."

Mr. Choate (handing the letter to the witness).
"Whereabouts do you see the blot?"

Miss Martinez. "Oh, well, it is not on the copy at all."

Mr. Choate. "Oh, you sent the blotted one?"

Miss Martinez. "No, I did not. I kept the blotted one in the drawer. I did not send that."

Mr. Choate. "Where is the blotted one?"

Miss Martinez. "I have it at home. I have a copy of all these letters at home."

Mr. Choate. "Then you made a second copy from that blotted copy?"

Miss Martinez. "I did."

Mr. Choate put one question too many by asking, "Where is the blotted one?" The effect of his previous questions concerning this fabricated copy of a letter was entirely lost by allowing her a chance to reply, "I have the blotted copy at home. I have a copy of all these letters at home." The reply was false, but had she been called upon to produce the blotted copy she could have easily supplied it over night. Mr. Choate had made his point, a good one, but he didn't leave it alone and so spoiled it.

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All through his examination Mr. Choate skipped from one subject to another, and then, without any apparent reason, returned to the same subject again. This may have been intentional art on his part or it may have been, as is so often the case in the excitement of a long trial, that new ideas occurred to him which brought him back to old subjects that had apparently already been exhausted. It would have been far more intelligible to the jury to have exhausted one subject at a time. It is asking too much of an ordinary jurymen to shift his attention back and forth from one subject to another and expect him to catch all the points and carry clearly in his memory all that has been previously said on the subject. This mistake is almost unavoidable unless the cross-examination is thought out thoroughly in advance, which, of course, is sometimes impracticable, as perhaps in the present case.

It was part of the plaintiff's evidence that Mr. del Valle had induced her to leave her home and go to the Hotel Royal under an assumed name until he could engage a house in the country where she could live as the governess to his children, pending their marriage, and on a salary of \$100 a month.¹ She said

¹ Mr. Choate cross-examined the plaintiff at length on this part of the case and in his summing up exclaimed, "Well, outlandish foreigners have done all sorts of things, and men have various ways of looking at the same thing, but here is a point and here is a question at which I think there are no two ways of looking, and that is that it is contrary to the common instincts of mankind, and a libel upon the common instincts of woman, that when

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Mr. del Valle's object was to avoid the threat of her stepfather to shoot any man to whom she might become engaged. Mr. del Valle's own version of the story was that Miss Martinez went to the Hotel Royal of her own accord; notified him that she was there, that she had deserted her home in consequence of her stepfather's advances to her, and that she was afraid to return. She then begged him to allow her to teach his children and to live with him in the country. Evidently it was with these facts in mind that Mr. Choate cross-questioned the plaintiff as follows:—

Mr. Choate. "Now you say, Miss Martinez, that you went to the hotel on the twenty-eighth day of April?"

Miss Martinez. "I did."

Mr. Choate. "From where did you go?"

Miss Martinez. "From my own home."

Mr. Choate. "Did you know anybody at that hotel?"

Miss Martinez. "I did not."

Mr. Choate was prepared to show that the plaintiff was acquainted with the clerk of the Hotel Royal, a man by the name of Frederick Hammond, who on several occasions was seen by the bell-boys in her room at the Hotel Royal, at which times the door of her bedroom

a betrothal has taken place between a fair and unsophisticated virgin and a man of any description, that in the interval between the betrothal and the wedding ceremony, he should take her to his house and she should consent to go upon a salary of \$100 a month, to serve in the capacity of a housekeeper, I leave the argument upon the point with you."

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was locked. The defendant's evidence subsequently showed, also, that many of the letters sent to the plaintiff under the name of Miss Howard, and addressed to different letter boxes on First Avenue, etc., had on the envelope the monogram "F. H." (Frederick Hammond).

Mr. Choate. "Did you know any of the managers or clerks at the Hotel Royal?"

Miss Martinez. "I did not."

Mr. Choate. "Did you register your name at that hotel?"

Miss Martinez. "I just merely gave my name as 'Miss Livingston.' I did not register. I suppose I was registered." (The name "Miss Livingston" registered on the hotel register was in the handwriting of this same Frederick Hammond.)

Mr. Choate. "To whom did you give your name as 'Miss Livingston'?"

Miss Martinez. "To a gentleman whom I saw before taking board there. I went to arrange for a room the day before, and he asked me my name and showed me a room and I told him my name was 'Miss Livingston,' and he put it down."

Mr. Choate. "Who was that gentleman?"

Miss Martinez. "I do not know who he was, or what he was."

Mr. Choate. "Do you know a gentleman named Frederick Hammond?"

Miss Martinez. "My receipts were signed that way,

CROSS-EXAMINATION BY JOSEPH H. CHOATE

by the name of Hammond. Mr. del Valle told me that he was acquainted with some of the managers of the hotel, and it was that hotel that he suggested my going to."

Mr. Choate. "You went by his suggestion?"

Miss Martinez. "Went by his suggestion to this hotel."

Mr. Choate. "Did he tell you of Frederick Hammond?"

Miss Martinez. "He did not. He merely said that he knew some of the managers."

Mr. Choate. "You say that Hammond was the name signed to your receipt?"

Miss Martinez. "Yes, sir."

Mr. Choate. "Was that the name of the gentleman to whom you gave your name as 'Miss Livingston'?"

Miss Martinez. "I really do not know."

Mr. Choate. "Was it anybody you had ever seen before?"

Miss Martinez. "I had never seen the person before in my life."¹

Mr. Choate. "And you do not know how or by whom your name was registered in that hotel book?"

¹ Mr. Choate, in his argument to the jury, said: "They went to her room on two separate occasions and found her there with Mr. Hammond with the door locked, Mr. Hammond sitting on the bed. This might have been explained had she not already said in her cross-examination that she did not know Mr. Hammond. Now how do they meet it?"

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Miss Martinez. "I do not know. The gentleman merely asked me my name and I told him. I told him the room would suit me, and I would come the next day."

Mr. Choate. "Then you went alone both days?"

Miss Martinez. "I did."

Mr. Choate. "And both times without the defendant?"

Miss Martinez. "Without the defendant."

Mr. Choate. "You selected a room that suited you?"

Miss Martinez. "I did. On the top floor. It was the only room that was available."

It was shown later that this room was a small-sized hall bedroom, and yet Miss Martinez was supposed to have made this arrangement with this hotel at the request of her wealthy affianced husband. In speaking of this in his summing up, Mr. Choate says:—

"That does not look like Mr. del Valle's generous accommodations. Mr. del Valle was profuse, lavish. She had the richest meats, the finest terrapin, wines of her own choice, always, at Solari's. But here in a little four-by-ten room, in the fourth story of the Hotel Royal,— why, gentlemen, that looks to me a little more like Frederick Hammond, who wrote her name in the hotel register!"

Mr. Choate. "Did the defendant select this name of Livingston for you?"

Miss Martinez. "He merely told me to take an as-

CROSS-EXAMINATION BY JOSEPH H. CHOATE

sumed name, — to go under some other name, — and I chose the name of Livingston.”

The purpose of this line of questions was shown in the summing up to have been as follows : —

“ Now, gentlemen, you have all been married, I infer from your appearance. [*Laughter.*] You have been through this mill of an engagement to be married. No matter what kind of a man he is, — he may be as bad as men are ever made, or from that all the way to the next grade below the archangels, — and I put it to you on your judgment and common sense and your conscience, that you cannot find a man who would take the betrothed of his heart, the woman whom he had chosen to be his wife, and the mother of his children, who would take her to a hotel in the city of New York to live for a longer or shorter period under an assumed name.

“ The plaintiff went to this hotel by the name of ‘ *Livingstone.*’ It was a good selection! She says Del Valle did not choose that name. She had already passed by the name under which she could claim the blood of all the Howards, but now she claimed alliance with the noble stock of Livingstons.”

Mr. Choate. “ Did you object to it when he told you to go there under an assumed name? ”

Miss Martinez. “ No, I did not.”

Mr. Choate. “ You were entirely willing to go to a strange hotel alone under an assumed name? ”

Miss Martinez. “ Yes. For a short while.”

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Mr. Choate. "I wish you would tell us again precisely what it was that induced you to go to this strange hotel under such circumstances?"

Miss Martinez. "Well, Mr. del Valle suggested that perhaps it would be better for me. He did not wish to have any trouble with my stepfather concerning my disappearance, neither did I wish to give him any unnecessary trouble if my father should take any violent steps of any kind, as he had so often threatened to do, and he suggested that I should take a room somewhere at some hotel, and see how papa would act."

Mr. Choate. "How was papa to know anything about it if you were under an assumed name?"

Miss Martinez. "Well, he certainly would know something about it when I left home."

Mr. Choate. "And the plan was that he should know about it?"

Miss Martinez. "Should know what?"

Mr. Choate. "Should know that you had gone?"

Miss Martinez. "Why, of course."

Mr. Choate. "To this hotel?"

Miss Martinez. "No, not to the hotel. He knew that I had left home, and my fear was that he would hire detectives to search for me, and of course, if he discovered me in Mr. del Valle's home, I could not answer for the consequences."

Mr. Choate. "What consequences did you apprehend?"

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Miss Martinez. "I apprehended that he would kill Mr. del Valle and kill me."

Mr. Choate. "And rather than that, you were willing to go to this hotel in this manner?"

Miss Martinez. "Certainly, Mr. del Valle suggested it."¹

Mr. Choate. "Do you know whether your father did do anything because of your leaving?"

Miss Martinez. "Yes, I know that he put a personal in the *Herald* for me."

Mr. Choate. "Did you show this 'personal' to Mr. del Valle?"

Miss Martinez. "I showed it to him."

Mr. Choate. "Did you discover it in the *Herald*?"

Miss Martinez. "I did."

Mr. Choate. "The 'personal' in the *Herald* of the second day of May, or about five days after you had reached the hotel, is contained in this paper which I now show you, isn't it?"

Miss Martinez. "Yes."

Mr. Choate. "Now after the second day of May, therefore, you knew that this 'personal' had come from your father, didn't you?"

Miss Martinez. "I did."

Mr. Choate. "After you knew that your father 'was

¹All through the discussion of the plaintiff's testimony, Mr. Choate kept exclaiming to the jury in his final argument, "What sort of an engaged young lady is this!"

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inconsolable and would make all satisfactory,' you did not have any more fear of his shooting you or Mr. del Valle either, did you?"

Miss Martinez. "I most certainly did. My father was not to be relied upon in what he said at all. He said a great many things which he never meant."

Mr. Choate. "Do you mean that he did not have a good reputation for veracity?"

Miss Martinez. "Not at all. But I knew that he had always threatened to shoot me and my husband, if I ever had one, and I knew that he would not make 'all satisfactory,' and that is why I did not return home."

Mr. Choate. "Did you answer this 'personal'?"

Miss Martinez. "I did not."

Mr. Choate. "Did you take any notice of your unhappy father?"

Miss Martinez. "I did not."

Mr. Choate. "Made no effort to console him?"

Miss Martinez. "I did not. I loved Mr. del Valle, and went with Mr. del Valle and trusted him. I had nothing to do with my father. My father had many others to console him."

Mr. Choate. "While you were at the Hotel Royal did you make a visit to the Central Park with Mr. del Valle?"

Miss Martinez. "Yes, frequently we went up to the Park and walked all round. It was the only chance I had of going out — when he took me up there."

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Mr. Choate. "Do you remember anything you told him at that time?"

Miss Martinez. "Nothing in particular."

Mr. Choate. "Did you tell him that your stepfather had been using you brutally?"

Miss Martinez. "I did not. I never told him any such thing."

Mr. Choate. "Did you say that you had to leave home and go to the hotel because of the bad treatment of your stepfather?"

Miss Martinez. "I never did tell him so."

Mr. Choate. "Did you ever tell anybody that?"

Miss Martinez. "I could never tell any one so, because my stepfather never treated me badly."

Later in the trial Mrs. Quackenbos testified on the part of the defendant that while she was visiting Mr. del Valle's summer home at Poughkeepsie, she was introduced to the plaintiff as "Miss Henriques, the housekeeper," and that during the conversation that followed she expressed her surprise at seeing so young a lady in that position. Whereupon the plaintiff had replied that she "had a mystery attached to her life, which she would tell Mrs. Quackenbos and perhaps she would then think differently." She testified that the plaintiff had told her that her mother had married her uncle, and that she lived very unhappily at home owing to her stepfather's constant overtures to her; that her stepfather was enamored of her; that the plaintiff in making this

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confession had used these words, "That is why I am here, madame. My mamma asked Mr. del Valle to take me from my home." The plaintiff told Mrs. Quackenbos that it was impossible for her to remain at home; that she was almost exhausted from fighting for her honor; and that her mother had begged Mr. del Valle to take her away. In speaking of this evidence in the summing up, Mr. Choate said:—

"Why, she said, gentlemen, that she had been driven from her home by the amorous persecutions of her stepfather, and that her mother had besought Mr. del Valle to take her to his house as his governess and housekeeper. You can't rub that out, gentlemen, if you dance on it all night with India-rubber shoes!"

* * * * *

Mr. Choate. "When was it that the arrangements were completed and the family moved to the summer home in Poughkeepsie?"

Miss Martinez. "The 1st of June."

Mr. Choate. "Did you go direct to Poughkeepsie with Mr. del Valle and his children?"

Miss Martinez. "I did."

Mr. Choate. "Now, I understand you that until the end of the first week of your stay at Mr. del Valle's house in Poughkeepsie, that is until this 6th of June which you have spoken about, and from the 14th of January, when you first made Mr. del Valle's acquaintance, he was uniformly kind and courteous?"

CROSS-EXAMINATION BY JOSEPH H. CHOATE

Miss Martinez. "Always."

Mr. Choate. "And there was not the least symptom of impropriety in his conduct towards you?"

Miss Martinez. "Never, sir. He never offered me the slightest indignity on any occasion."

Mr. Choate. "And no approach towards impropriety on his part?"

Miss Martinez. "Never. Not on any single occasion. Not a breath of it."

Mr. Choate. "As to this occurrence of the 6th of June, I understand you to say that after breakfast you went up to your room and lay down?"

Miss Martinez. "I did."

Mr. Choate. "And I understand you to say that was your usual habit?"

Miss Martinez. "Yes, sir. It was not an everyday habit; it was more of a Sunday habit."

Mr. Choate. "What time of the day did you have breakfast on that Sunday?"

Miss Martinez. "At eleven o'clock in the morning."

Mr. Choate. "How do you fix the date?"

Miss Martinez. "I think it is a day in a woman's life that she can never forget."¹

¹ Mr. Choate had in his hand at the time of this examination a letter written by Adèle, the plaintiff's sister, who had just left Poughkeepsie, where she had been making a visit, and in which she referred to her sister as being "as happy as a queen." This letter was later offered in evidence.

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Mr. Choate. "And you fix it as your first Sunday in Poughkeepsie?"

Miss Martinez. "I do."

Mr. Choate. "Who were the members of the household at that time on that day? Who were they besides yourself and Mr. del Valle?"

Miss Martinez. "There were the two younger children, Mr. Alvarez, and the servants."

Mr. Choate. "How many servants were there?"

Miss Martinez. "There were seven servants."

Mr. Choate. "And your room was where?"

Miss Martinez. "My room was on the same floor with the family and Mr. del Valle's and the children's, and next to the nurse and the two younger children, — all the children, in fact."

Mr. Choate. "Now at breakfast who were present that morning?"

Miss Martinez. "The children, Mr. Alvarez, Mr. del Valle, and myself."

Mr. Choate. "What time was it you finished breakfast?"

Miss Martinez. "About half-past eleven or a quarter to twelve, perhaps twelve o'clock; I do not remember."

Mr. Choate. "And how soon after you had finished breakfast did you go to your room?"

Miss Martinez. "Immediately after."

Mr. Choate. "Did you go alone?"

CROSS-EXAMINATION BY JOSEPH H. CHOATE

Miss Martinez. "I did."

Mr. Choate. "What did you do?"

Miss Martinez. "I lay on my bed reading. I could hear the children downstairs. They were on the veranda. I heard their voices as they went away from the house with the nurse."

Mr. Choate. "You remained on your bed, did you?"

Miss Martinez. "I did. I was interested in my book and I commenced to read."

Mr. Choate. "Did you remain upon the bed from the time you first took your place upon it until Mr. del Valle had accomplished what you charged upon him yesterday?"

Miss Martinez. "I did."

Mr. Choate. "And were not off the bed at all?"

Miss Martinez. "I was not. I had partially arisen when he entered."

Mr. Choate. "The door of your room opened into the centre of the house, did it not?"

Miss Martinez. "It did."

Mr. Choate. "Did you close the door?"

Miss Martinez. "I did."

Mr. Choate. "Did you lock it?"

Miss Martinez. "I did not."

Mr. Choate. "Did you hear any other sound before Mr. del Valle appeared in your room?"

Miss Martinez. "I did not. Merely the children's receding voices in the distance."

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Mr. Choate. "This was a warm summer day, was it not?"

Miss Martinez. "It was. The sixth of June."

Mr. Choate. "Were the windows open?"

Miss Martinez. "Yes."

Mr. Choate. "Did Mr. del Valle knock upon the door?"

Miss Martinez. "He did not."

Mr. Choate. "You heard the door open?"

Miss Martinez. "I did."

Mr. Choate. "You saw him enter?"

Miss Martinez. "I did."

Mr. Choate. "And were you lying upon the bed?"

Miss Martinez. "I was."

Mr. Choate. "Did you get up from the bed?"

Miss Martinez. "I just attempted to rise."

Mr. Choate. "Who prevented you?"

Miss Martinez. "He came over to me and sat down on the side of the bed."

Mr. Choate. "Did he shut the door?"

Miss Martinez. "He did."

Mr. Choate. "While he was doing that did you attempt to rise?"

Miss Martinez. "I did."

Mr. Choate. "Why didn't you rise?"

Miss Martinez. "Because I could not. He came over to me before I had partially risen."

Mr. Choate. "Do you mean to say that in the time

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of his coming in and presenting himself and opening and shutting the door, there was not time for you to spring up from the bed?"

Miss Martinez. "There was not, because he was already half in the room before I heard that he was in. I was engaged in reading at the time, and he had opened the door very softly."

Mr. Choate. "Was there time for you to begin to start from the bed?"

Miss Martinez. "Well, I do not know. I did not study the time."

Mr. Choate. "How long was he in your room that morning?"

Miss Martinez. "I cannot say exactly."

Mr. Choate. "You can say whether he was there an hour, or two hours, or half an hour?"

Miss Martinez. "Well, he was there about an hour."

Mr. Choate. "Did you make an outcry while he was in the room?"

Miss Martinez. "No, I did not scream."

Mr. Choate. "Did not attempt to scream, did you?"

Miss Martinez. "No, I did not attempt to scream. I remonstrated with him."

Mr. Choate. "Did you speak in a loud voice?"

Miss Martinez. "Well, not to be heard all over the house, but if anybody had been in the room he would have heard me."

Mr. Choate. "Did you speak low?"

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Miss Martinez. "Lower than I am speaking now."

Mr. Choate. "You did not make any effort to make yourself heard by anybody in the house, or outside?"

Miss Martinez. "No, I was not afraid of Mr. del Valle. I did not think he came into my room to murder me, nor to hurt me."

Mr. Choate. "You found out, according to your story, what he did come for, after a while, didn't you?"

Miss Martinez. "Yes."

Mr. Choate. "And before he accomplished his purpose?"

Miss Martinez. "Yes."

Mr. Choate. "Now, didn't you speak above a low voice then?"

Miss Martinez. "Well, perhaps I did."

Mr. Choate. "Well, did you?"

Miss Martinez. "I think I did."

Mr. Choate. "Well, did you scream out?"

Miss Martinez. "I did not."

Mr. Choate. "Did you call out?"

Miss Martinez. "I did not."

Mr. Choate. "Did you speak loud enough to be heard by any of the servants below, or anybody in the hall or on the veranda?"

Miss Martinez. "I do not think anybody could have heard me."

Mr. Choate. "Why didn't you cry out?"

Miss Martinez. "Because — he told me not to."

CROSS-EXAMINATION BY JOSEPH H. CHOATE

Mr. Choate. "Oh, he told you not to?"

Miss Martinez. "Yes."

Mr. Choate. "Then it was a spirit of obedience to him."

Miss Martinez. "Just as you please to look upon it."

Mr. Choate. "'Just as I please to look upon it'?" Well, I look upon it so. Now you say that you do not think he had any evil purpose when he came into the room?"

Miss Martinez. "No, I cannot believe he did."

Mr. Choate. "And you do not think so now?"

Miss Martinez. "Oh, I do think so now, certainly."

Mr. Choate. "You did not think so then?"

Miss Martinez. "No, I did not when he entered the room."

Mr. Choate. "There was nothing indicating an evil purpose on his part?"

Miss Martinez. "No, I do not think so."

Mr. Choate. "How long had he been there before there was anything on his part that indicated to you any evil intent?"

Miss Martinez. "About fifteen minutes."

Mr. Choate. "Before you had the least idea of any evil intent on his part?"

Miss Martinez. "Well, I did not then think he had any evil intent."

Mr. Choate. "Were you fully dressed that morning?"

Miss Martinez. "Fully dressed."

THE ART OF CROSS-EXAMINATION

Mr. Choate. "And fully dressed when he came into the room?"

Miss Martinez. "Fully dressed."

Mr. Choate. "Just as you had been at breakfast?"

Miss Martinez. "Just the very same."

Mr. Choate. "You were lying on the bed. Where was he?"

Miss Martinez. "He was also on the bed."

Mr. Choate. "Sitting by your side?"

Miss Martinez. "Yes."

Mr. Choate. "And you and he were engaged in conversation, were you?"

Miss Martinez. "We were."

Mr. Choate. "Sometime during that hour you became partly undressed, I suppose. When was that?"

Miss Martinez. "How do you know I became partly undressed?"

Mr. Choate. "I judge so from what you have stated. I beg your pardon. Did you, or did you not?"

Miss Martinez. "No, I did not become undressed. Merely Mr. del Valle took my belt off. I had a wrapper on. I had a black silk belt."

Mr. Choate. "You had a belt? How was that secured?"

Miss Martinez. "Just merely by hook and eye. It was a black silk ribbon belt."

Mr. Choate. "And that became unhooked?"

Miss Martinez. "It did not become unhooked; Mr. del Valle unhooked it."

CROSS-EXAMINATION BY JOSEPH H. CHOATE

Mr. Choate. "What was it you did when he unhooked the belt? Did you cry out?"

Miss Martinez. "No, I did not cry out. I told you I made no outcry whatever."

Mr. Choate had made his point. Immediately the idea flashed across his mind that if he stopped here he had one of the opportunities of his life for the summing up. This is how he made use of it:—

"Gentlemen of the jury: This is not a story of Lucretia and Tarquin, who came with his sword. Oh, no, there was not any sword. They conversed together. There is not a word as to what was said, and after a while, the story is, he unbuckled her belt and then it was all over! On the unloosening of her belt, she went all to pieces! Gentlemen, my question to you, which I want you to take to the jury room and answer, is whether, under such circumstances, by the mere undoing of that hook and eye, and the unloosening of that belt, a woman would go all to pieces unless there was something of a very loose woman behind the belt! All the household was there. Why did she not cry out? Why did she not raise that gentle-tempered voice of hers a little? A silent seduction, by her own story!"

* * * * *

Mr. Choate. "Now, Miss Martinez, you have spoken of your father being sometime or other informed of your having gone to Poughkeepsie, and did you also understand that he was informed of your project of marriage?"

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Miss Martinez. "Yes, sir, he was."

Mr. Choate. "Did he come up with his revolver?"

Miss Martinez. "He did not."

Mr. Choate. "Did he make any effort to see you?"

Miss Martinez. "No, he did not."

Mr. Choate. "Did he make any effort to see Mr. del Valle?"

Miss Martinez. "He did not."

Mr. Choate. "He appeared at Poughkeepsie after a while, did he not?"

Miss Martinez. "Yes, he did. My mother revealed the fact to him that I was at Poughkeepsie and engaged to be married to Mr. del Valle, and insisted upon his acting reasonably."

Mr. Choate. "And he did act reasonably, did he not?"

Miss Martinez. "He did."

Mr. Choate. "He came up making visits?"

Miss Martinez. "He did."

Mr. Choate. "Was Mr. del Valle at home?"

Miss Martinez. "He was."

Mr. Choate. "And you were there?"

Miss Martinez. "I was."

Mr. Choate. "Did you see the meeting between your father and Mr. del Valle?"

Miss Martinez. "I did. I introduced my father to Mr. del Valle."

Mr. Choate. "Everything was agreeable and pleasant, was it?"

CROSS-EXAMINATION BY JOSEPH H. CHOATE

Miss Martinez. "Very pleasant indeed."

Mr. Choate. "And your father stayed to dinner?"

Miss Martinez. "He did."

Mr. Choate. "Did he make any threats?"

Miss Martinez. "He did not."

Mr. Choate. "Did he exhibit any violence?"

Miss Martinez. "He did not."

Mr. Choate. "Then all your fears proved to have been unfounded, didn't they?"

Miss Martinez. "Not at all."

Mr. Choate. "You think that after all, if you had married Mr. del Valle, he would have carried his threats into execution?"

Miss Martinez. "I think he would, most certainly."

Mr. Choate. "And yet he came up pleasantly and spent the day with Mr. del Valle and you at Mr. del Valle's house, knowing that you were living in his house?"

Miss Martinez. "Yes."

Mr. Choate. "Upon a promise of marriage?"

Miss Martinez. "He did."

Mr. Choate. "Did he try to dissuade you from marrying?"

Miss Martinez. "He did not."

Mr. Choate. "And yet you think that if you married, he would have shot you and Mr. del Valle?"

Miss Martinez. "I do most certainly think so."

* * * * *

THE ART OF CROSS-EXAMINATION

Mr. Choate. "Miss Martinez, did you write a letter, dated September 8, to Mr. del Valle?"¹

Miss Martinez. "I did."

Mr. Choate. "Is this the letter which I now show you?"

Miss Martinez. "Well, it may be, but I would not swear to it."

Mr. Choate. "Will you swear it is not?"

Miss Martinez. "No, I would not swear it is not."

Mr. Choate. "In this letter you say, 'I have been very happy in your house'?"

Miss Martinez. "Yes."

Mr. Choate. "That was true, was it not?"

Miss Martinez. "It was very true."

Mr. Choate. "During that period was it true that you were 'very happy' in his house?"

Miss Martinez. "Until the 6th of June, the Sunday I told you about a little while ago."

Mr. Choate. "That was four days?"

Miss Martinez. "Well, that was some time."

Mr. Choate. "You got there on the night of the 1st, didn't you?"

Miss Martinez. "Yes, I did."

Mr. Choate. "And your happiness came to an end on the morning of the 6th?"

¹ The student's attention is directed to this extremely clever use, in cross-examination, of a letter which was wholly inconsistent with the story of her stay at Poughkeepsie, which the plaintiff had already sworn to.

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Miss Martinez. "Yes, it did."

Mr. Choate. "And that was what you meant when you wrote, 'I have been very happy in your house'?"

Miss Martinez. "I did, and up to the time when I heard of the compromise not being adjusted."

Mr. Choate. "Oh, you were very happy till then?"

Miss Martinez. "Yes."

Mr. Choate. "'I will always think of the many happy hours spent with you.' What did you mean by 'the many happy hours'?"

Miss Martinez. "What did I mean by it?"

Mr. Choate. "Yes, what hours did you mean?"

Miss Martinez. "I meant the hours that I spent with Mr. del Valle and which were happy."

Mr. Choate. "Before the 6th of June?"

Miss Martinez. "Yes."

Mr. Choate. "And none after?"

Miss Martinez. "Not many."

Mr. Choate. "Then your object in writing this letter was to thank him for the many happy hours spent with him between the afternoon of the 1st of June, when you arrived, and the morning of the 6th of June, was it?"

Miss Martinez. "It was."

Mr. Choate. "'And which were the only ones I have ever known.' What did you mean by that, — to compare the hours of those four days of June with all the previous hours of your life?"

THE ART OF CROSS-EXAMINATION

Miss Martinez. "I meant with all the previous hours of my life—I had never been happy in all my life."

Mr. Choate. "As in those four days?"

Miss Martinez. "No."

Mr. Choate. "What was it that prevented your being equally happy from the time of your engagement down to the 1st of June?"

Miss Martinez. "Oh, I don't think it was a very happy state of mind I was in, to be engaged to Mr. del Valle and could not see him as I wished to, occasionally in the evenings. I was restricted."

Mr. Choate. "It was the restrictions that were placed upon your seeing Mr. del Valle, and yet you saw him eight times a week, I think you testified, and every day you spent hours in his company?"

Miss Martinez. "Not every day."

Mr. Choate. "Well, whenever you met?"

Miss Martinez. "Yes."

Mr. Choate. "And you were alone together?"

Miss Martinez. "We were."

Mr. Choate. "And his conduct towards you during all these hours was absolutely unquestionable?"

Miss Martinez. "Unquestionable."

Mr. Choate. "Why, then, did you say that the hours of the 2d, 3d, 4th, and 5th of June that you spent with him, were the only happy hours that you had ever known compared with the previous hours spent with Mr. del Valle?"

CROSS-EXAMINATION BY JOSEPH H. CHOATE

Miss Martinez. "It was just merely from the fact that my father's manner and way towards me made me always unhappy."

Mr. Choate. "That is, the fear that your father, if he found it out, would shoot you and your intended?"

Miss Martinez. "It was."

Mr. Choate. "You still had that fear during the 2d, 3d, 4th, and 5th of June, it seems, didn't you?"

Miss Martinez. "No, I didn't have that fear as much as I had."

Mr. Choate. "You said that was not dissipated until your father's second visit in August."

Miss Martinez. "So it was not, but I did not have as much fear then as I had before."

Mr. Choate. "Oh, because your father was in New York and you at Poughkeepsie?"

Miss Martinez. "Yes."

Mr. Choate. "'I leave it to God to grant you the reward you so much deserve, and which is impossible for you to receive on this earth.' Reward for what, do you mean?"

Miss Martinez. "Oh, I had a conversation with Mr. del Valle before I wrote that letter to him."

Mr. Choate. "I am asking you now the meaning of this letter. What acts and conduct of his was it, taken all together, that you left it to God to reward him for, because it was impossible for him to have any reward on earth for it?"

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Miss Martinez. "I did not mean at all what I wrote."

Mr. Choate. "Oh, you did not mean what you wrote?"

Miss Martinez. "No, I did not. I merely wished to keep Mr. del Valle as my friend."

Mr. Choate. "Are you in the habit now of writing what you do not mean?"

Miss Martinez. "I am certainly not in the habit."

Mr. Choate. "But this you did not mean at all, did you?"

Miss Martinez. "Oh, I meant some of it, some I didn't."

Mr. Choate. "How much of it did you mean? Did you mean that you 'left it to God to grant the reward he so much deserved'; or did you mean 'that it was impossible for him to receive that reward on earth'? Which part of it did you mean?"

Miss Martinez. "I meant no part of that."

Mr. Choate. "Did you understand that Mr. del Valle was to come and see you in New York?"

Miss Martinez. "I did, certainly."

Mr. Choate. "And so you understood when you wrote this letter?"

Miss Martinez. "I did."

Mr. Choate. "Now you began, 'My dear friend, it may be that I may never see you again.' What did you mean by that?"

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Miss Martinez. "Because I doubted his word, and thought perhaps I should never see Mr. del Valle again, treating me as he had."

Mr. Choate. "You doubted his word, and you wrote him what you did not mean at all. Does that represent the real state of the relations between you at that time?"

Miss Martinez. "Well, the relations between us at the time would be very difficult indeed to define."

Mr. Choate. "I will complete the first sentence, 'still, I feel that I cannot leave your house without thanking you for all your kindness to me.'"

Miss Martinez. "Mr. del Valle always was very kind to me, always."

Mr. Choate. "And you thought that, taking his whole conduct together from the beginning to the end of your stay, it was incumbent upon you not to leave without thanking him for all his kindness to you. Is that so?"

Miss Martinez. "Yes."

Mr. Choate. "And you meant that, didn't you?"

Miss Martinez. "Well, no, I didn't mean it exactly."

Mr. Choate. "'I have been very happy in your house.' Did you mean that?"

Miss Martinez. "I was very happy in his house and I was very miserable."

Mr. Choate. "After you got to New York, Mr. del Valle did not come to see you?"

Miss Martinez. "He did not."

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Mr. Choate. "And you have never seen him since until you saw him in this court room?"

Miss Martinez. "I have not."

* * * * *

Mr. Choate. "In those visits to Solari's you spoke of the other day, did you always have a private room, no one being present but yourselves and the waiter?"

Miss Martinez. "We did have a private room."

Mr. Choate. "Did you always have the same room?"

Miss Martinez. "No, not always."

Mr. Choate. "How many different private rooms should you think you had at Solari's?"

Miss Martinez. "I can't tell you how many different ones, — perhaps two or three."

Mr. Choate. "Was Mr. del Valle's demeanor to you on such occasions the same as it was when you were in your mother's house and in the street, and in public places like the opera and matinée?"

Miss Martinez. "Always the same in a private room as he was at home when my mother was not there. He used to kiss me frequently, but he never kissed me at matinées, nor did he kiss me in the street. Our intercourse and behavior, therefore, must have been different."

Mr. Choate. "Otherwise it was the same?"

Miss Martinez. "Always most respectful."

Mr. Choate. "As to his kisses, of course you made no objection?"

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Miss Martinez. "None at all."

Mr. Choate. "How long were these interviews at Solari's, — these meetings when you went there and had a private room generally?"

Miss Martinez. "They varied in length. Sometimes we arrived there at two o'clock and remained until four, — sometimes we arrived there a little earlier."

Mr. Choate. "About a couple of hours."

Miss Martinez. "Two or three hours."

Mr. Choate. "What were you doing all that time?"

Miss Martinez. "We were eating."

Mr. Choate. "What, not eating all the time?"

Miss Martinez. "Eating all the time."

Mr. Choate. "Two hours eating! Well, you must have grown fat during that period!"

Miss Martinez. "Well, perhaps you eat much quicker than I do."

Mr. Choate. "You think you ate all that time?"

Miss Martinez. "Well, I do not say we gormandized continually."

Mr. Choate. "But pretty constantly eating; that was the only business?"

Miss Martinez. "First we had our dinner and then there was a digression of about half an hour before we called for dessert. That perhaps took up another hour."

Mr. Choate. "During that 'digression' what did you generally do?"

Miss Martinez. "We used to talk."

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Mr. Choate. "How did Mr. del Valle progress with his English?"

Miss Martinez. "Very well indeed. Remarkably well."

Mr. Choate. "Did you practise English at Solari's?"

Miss Martinez. "Yes, frequently."

Mr. Choate. "That was a pretty constant occupation at all your meetings in those private rooms at Solari's, wasn't it, — practising or speaking English?"

Miss Martinez. "We frequently spoke about the rules of the language."

Mr. Choate. "Did his English during these intervals improve?"

Miss Martinez. "I think it did."

Mr. Choate. "And you did all you could to improve it, I suppose?"

Miss Martinez. "Undeniably so."

Mr. Choate. "You even had a book of conversation with you?"

Miss Martinez. "We had."

Mr. Choate. "And did he make great efforts at those times to improve and advance his English?"

Miss Martinez. "I believe he did."

Referring in his summing up to this part of the examination, Mr. Choate said:—

"What I am endeavoring to show you, gentlemen, is that the action of the parties does not confirm this idea of a promise of marriage, because from what you have

heard of this place, from the sentiment which has made itself apparent in this court room whenever the name Solari was mentioned, I think you will bear me out in saying that it is not a place where ladies and gentlemen go for courtship with a view to matrimony. From what you know of the place, if you had made the acquaintance of a young woman and become betrothed to her, is it to Solari's you would go to do your courting with a view to matrimony? All of us, every jurymen, will say 'No,' and will you not judge the defendant as you judge yourselves?

"The defendant was tickled, attracted, and pleased. Here was a woman who could speak his own language and they could pick up the broken fragments of his English and her Spanish, and put them together, and he liked nothing better, and so they went to Solari's!

"Well, gentlemen, I do not know anything about Solari's except what is shown here upon the evidence. So far as I can make out, however, people go to Solari's for all sorts of purposes. Men go there with ladies, ladies with ladies, men with men, theatre parties, family parties, matinée parties, — all sorts of parties, — and *these* parties went there together. But under the developments of this case, Solari's assumes new importance and acquires a new fame. It is no longer a mere restaurant. It is no longer a mere place of refreshment for the body, where you can get meat and wine and whatever is pleasant for the inner mind; it now attains

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celebrity as a new school of learning, patronized, brought into notice, by my client and the fair plaintiff as a place where you can go to drink of the Fountain of Knowledge. [*Laughter.*] They had a 'Guide to Conversation.'

"I think the fair plaintiff said that there were 'digressions' there. They ate and drank, — she thinks they ate and drank for two hours at a time, but I compelled her to say that there was an intermediate 'digression.' What there was in the digressions does not exactly appear; for one thing, there was this 'Guide to Conversation,' but there were limits even to the regions to which this Guide led them, for they both agreed that it did not bring them even to the vestibule of Criminal Conversation, which is a very important point to consider in connection with the history of these meetings at Solari's." [*Roars of laughter.*]

* * * * *

Mr. Choate. "During the period of your engagement from early in February down to the time of going to Poughkeepsie, did you ever, while with Mr. del Valle, fall in with any of his friends or acquaintances?"

Miss Martinez. "I did, on several occasions."

Mr. Choate. "Were you introduced?"

Miss Martinez. "No, but on one occasion some of his friends were at the matinée."¹

¹ When speaking of this phase of the case to the jury, Mr. Choate said, "I will say this, that where there is a betrothal, the parties do give some symptoms of it sooner or later. You cannot prevent their showing it, and there is

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Mr. Choate. "Were you introduced to them there, and if so, who were they?"

Miss Martinez. "I was not."

Mr. Choate. "During the period of this engagement, as you say, to you, did he introduce you at all to anybody?"

Miss Martinez. "During the period of our engagement?"

Mr. Choate. "Yes."

Miss Martinez. "No, I think not."

Mr. Choate. "Then he certainly did not introduce you to anybody as his intended wife?"

Miss Martinez. "He did not. I was not introduced to anybody."

Mr. Choate. "When you were at Poughkeepsie did any person come to the house to make a visit?"

Miss Martinez. "They did."

Mr. Choate. "Were you introduced to them?"

Miss Martinez. "I was."

Mr. Choate. "By whom?"

Miss Martinez. "By Mr. del Valle."

Mr. Choate. "How?"

Miss Martinez. "As the instructress of his children, or governess, or something of that kind."

Mr. Choate. "Never in all that time did he introduce you to anybody as his intended wife?"

no suggestion of evidence that anybody saw these parties together acting towards each other as though they were engaged."

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Miss Martinez. "No, he did not wish anybody to know it, he said."

Mr. Choate. "When did he say that?"

Miss Martinez. "He told me so when he expected Mrs. Quackenbos' visit before she arrived."

Mr. Choate. "That was some three months after your engagement?"

Miss Martinez. "It was."

Mr. Choate. "He did not intimate for the first three months a desire that nobody should know, did he?"

Miss Martinez. "He never said a word to me about any one's knowing anything about it."

Mr. Choate. "And if there was any concealment, it was not on his part?"

Miss Martinez. "It was not, nor on my part either."

Mr. Choate. "Nor his desire?"

Miss Martinez. "Nor on my part either."

This gave Mr. Choate an opportunity for this final shaft at the plaintiff in his summing up:—

"You see, gentlemen, what an immense advantage it would be for her, for this family, if they could make this 'consolidated Virginia,' in the form of my client, their own. They had no possible means of support; he hove in sight, a craft laden, as they supposed, with treasure for themselves. If there had been this engagement of marriage, the world would have heard of it. I don't mean the *World* newspaper—it hears of everything—but all the world that surrounds the Henriques and

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Martinez family. The news would have spread that they had captured a prize and brought it into court for condemnation!"

After deliberating for twenty-six hours the jury returned a verdict in favor of the plaintiff, and assessed the damages at \$50.

CHAPTER XIII

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

PROBABLY one of the most dramatic and successful of the more celebrated cross-examinations in the history of the English courts is Sir Charles 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.

This cross-examination is in marked contrast with the method used by Mr. Choate in his cross-examination of the plaintiff in the Martinez case in the preceding chapter. During the entire cross-examination of Miss Martinez, Mr. Choate carefully concealed from her the fact that he had in his possession a letter written by her, with which he intended to and did destroy her, in his summing up.

But here the opposite method was adopted by Sir Charles Russell, and after adroitly leading Pigott to commit himself irretrievably to certain absolute statements, Russell suddenly confronted him with his own letters in a way that was masterly and deadly to Pigott.

The case is also an admirable illustration of the

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importance of so using a damaging letter that a dishonest witness cannot escape its effect by ready and ingenious explanations, when given an opportunity, as is often done by an unskilful cross-examiner. Attention has already been drawn to this vital point in the chapter upon the proper "Sequence of Cross-Examination." The cross-examination of Pigott shows that Sir Charles Russell thoroughly understood this branch of the art, for he read to Pigott only a portion of his damaging letter, and then mercilessly impaled him upon the sharp points of his questions before dragging him forward in a bleeding condition to face other portions of his letter, and repeated the process until Pigott was cut to pieces.

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 Phoenix 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

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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

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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:—

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“‘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,

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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

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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.'

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"*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

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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

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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

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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?’

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"*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

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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.’

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“*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 effectually 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 effectually 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

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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

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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.

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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?’

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“*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.

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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 XIV

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

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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

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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

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one of the capsules, had substituted morphine in sufficient quantities to kill, *in place of* the $4\frac{1}{2}$ 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

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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

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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.

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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

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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?"

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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

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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?"

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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-*

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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-

¹The 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.

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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 XV

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

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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.

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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

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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

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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

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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

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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."

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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

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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."

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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

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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

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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?"

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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?"

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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?"

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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

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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

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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.*"

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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

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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?"

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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*?"

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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?"

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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

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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

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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."

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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?"

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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-

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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

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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

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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

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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

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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

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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 XVI

THE CROSS-EXAMINATION OF GUTEAU, THE ASSASSIN OF PRESIDENT GARFIELD, BY MR. JOHN K. PORTER

THE trial of Charles J. Guiteau for the assassination of President Garfield was in many respects one of the most remarkable trials in the history of our American courts. Guiteau's claim was that he shot the President acting upon what he believed to be an inspiration,—a divine command, which controlled his conscience, overpowered his will, and which it was impossible for him to resist. Guiteau openly avowed the act of killing, but imputed the blame to the Almighty. The defence, therefore, was moral insanity.

The trial was conducted in the June term of the Supreme Court of the District of Columbia, in the year 1881. It lasted two months. The court room was daily filled with the scum of Washington,—negroes, prostitutes, and curiosity seekers of all kinds. On account of the crowds, the doors of the court were kept shut, and many of the expert physicians became ill in consequence of the excessively foul air. One doctor died from the effects of the long infection.

The prisoner, although represented by counsel, **was**

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permitted to address the jury in his own behalf. He was also allowed to interrupt the proceedings practically at will. Each day's session was opened with a tirade from the prisoner, in which he heaped upon the counsel representing the Government, abuse, calumny, and vituperation unequalled in the proceedings of any court of justice in the history of the country. The evidence of the different witnesses was given amid clamor, objections, interruptions, and blasphemy upon the part of the prisoner.

Guiteau's attitude in court and in the jail prior to the trial were very different. In the latter, while being examined by the experts, all his replies were intelligent and he talked freely upon every subject but the murder, concerning which his set reply was, "I beg your pardon, gentlemen, but you will have to excuse me from talking about a subject which involves my legal rights."

Only eighty copies of the Record of the Guiteau Trial were preserved by the Government for distribution. Every capital in Europe applied for a copy, only to be told that there were not any supplied by the Government for general distribution. A resolution in Congress providing for the printing of a large number of copies was opposed and defeated in the Senate by Senator Sherman, upon the ground that he did not believe in perpetuating the history of Guiteau's act in documentary form.

The cross-examination of Guiteau by Mr. John K.

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Porter is often spoken of as one of the great masterpieces of forensic skill. It would be impracticable to give more than a few extracts from the examination. The record of the trial covers over twenty-five hundred closely printed pages in Government print, equal to about five thousand pages of ordinary print. All together, the report of the trial constitutes probably the most complete contribution on the subject of the legal responsibility of persons having diseased minds or insane habits.

Mr. Porter's cross-examination showed Guiteau to be a beggar, a hypocrite, a swindler; cunning and crafty, remorseless, utterly selfish from his youth up, low and brutal in his instincts, inordinate in his love of notoriety, eaten up by a love of money; a lawyer who, after many years of practice in two large cities, had never won a case; a man who left in every state through which he passed a trail of knavery, fraud, and imposition. His cross-examination made apparent to everybody that Guiteau's vanity was inordinate, his spirit of selfishness, jealousy, and hatred absolutely unbounded. He was cleverly led to picture himself to the civilized world as a moral monstrosity.

Mr. Porter. "Did you say, as Mr. John R. Scott swears, on leaving the depot on the day of the murder of the President, 'General Arthur is now the President of the United States'?"

Guiteau. "I decline to say whether I did or not."

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Mr. Porter. "You thought so, did you not? You are a man of truth?"

Guiteau. "I think I made a statement to that effect."

Mr. Porter. "You thought you had killed President Garfield?"

Guiteau. "I supposed so at the time."

Mr. Porter. "You intended to kill him?"

Guiteau. "I thought the Deity and I had done it, sir."

Mr. Porter. "Who bought the pistol, the Deity or you?"

Guiteau (excitedly). "I say the Deity inspired the act, and the Deity will take care of it."

Mr. Porter. "Who bought the pistol, the Deity or you?"

Guiteau. "The Deity furnished the money by which I bought it, as the agent of the Deity."

Mr. Porter. "I thought it was somebody else who furnished the money?"

Guiteau. "I say the Deity furnished the money."

Mr. Porter. "Did Mr. Maynard lend you the money?"

Guiteau. "He loaned me \$15, — yes, sir; and I used \$10 of it to buy the pistol."

Mr. Porter. "Were you inspired to borrow the \$15 of Mr. Maynard?"

Guiteau. "It was of no consequence whether I got it from him or somebody else."

Mr. Porter. "Were you inspired to buy that British bull-dog pistol?"

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Guiteau. "I had to use my ordinary judgment as to ways and means to accomplish the Deity's will."

Mr. Porter. "Were you inspired to remove the President by murder?"

Guiteau. "I was inspired to execute the divine will."

Mr. Porter. "By murder?"

Guiteau. "Yes, sir, so-called murder."

Mr. Porter. "You intended to do it?"

Guiteau. "I intended to execute the divine will, sir."

Mr. Porter. "You did not succeed?"

Guiteau. "I think the doctors did the work."

Mr. Porter. "The Deity tried, and you tried, and both failed, but the doctors succeeded?"

Guiteau. "The Deity confirmed my act by letting the President down as gently as He did."

Mr. Porter. "Do you think that it was letting him down gently to allow him to suffer with torture, over which you professed to feel so much solicitude, during those long months?"

Guiteau. "The whole matter was in the hands of the Deity. I do not wish to discuss it any further."

Mr. Porter. "Did you believe it was the will of God that you should murder him?"

Guiteau. "I believe that it was the will of God that he should be removed, and that I was the appointed agent to do it."

Mr. Porter. "Did He give you the commission in writing?"

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Guiteau. "No, sir."

Mr. Porter. "Did He give it in an audible tone of voice?"

Guiteau. "He gave it to me by his pressure upon me."

Mr. Porter. "Did He give it to you in a vision of the night?"

Guiteau. "I don't get my inspirations in that way."

Mr. Porter. "Did you contemplate the President's removal otherwise than by murder?"

Guiteau. "No, sir, I do not like the word murder. I don't like that word. If I had shot the President of the United States on my own personal account, no punishment would be too severe or too quick for me; but acting as the agent of the Deity puts an entirely different construction upon the act, and that is the thing that I want to put into this court and the jury and the opposing counsel. I say this was an absolute necessity in view of the political situation, for the good of the American people, and to save the nation from another war. That is the view I want you to entertain, and not settle down on a cold-blooded idea of murder."

Mr. Porter. "Do you feel under great obligations to the American people?"

Guiteau. "I think the American people may sometime consider themselves under great obligations to me, sir."

Mr. Porter. "Did the Republican party ever give you an office?"

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Guiteau. " I never held any kind of political office in my life, and never drew one cent from the Government."

Mr. Porter. " And never desired an office, did you? "

Guiteau. " I had some thought about the Paris consulship. That is the only office that I ever had any serious thought about."

Mr. Porter. " That was the one which resulted in the inspiration, wasn't it? "

Guiteau. " No, sir, most decidedly not. My getting it or not getting it had no relation to my duty to God and to the American people."

* * * * *

Mr. Porter. " On the 16th of June, in an address to the American people, which you intended to be found on your person after you had shot the President, you said, ' I conceived the idea of removing the President four weeks ago.' Was that a lie? "

Guiteau. " I conceived it, but my mind was not fully settled on it. There is a difference in the idea of conceiving things and actually fixing your mind on them. You may conceive the idea that you will go to Europe in a month, and you may not go. That is no point at all."

Mr. Porter. " Then there was no inspiration in the preceding May, as you have described? "

Guiteau. " It was a mere flash."

Mr. Porter. " It was an embryo inspiration? "

Guiteau. " A mere impression that came into my

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mind that possibly it might have to be done. I got the thought, and that is all I did get at that time."

Mr. Porter. "Don't you know when you were inspired to kill the President?"

Guiteau. "I have stated all I have got to say on that subject. If you do not see it, I will not argue it."

Mr. Porter. "Do you think you do not know when you were inspired to do the act?"

Guiteau. "After I got the conception, my mind was being gradually transformed. I was finding out whether it was the Lord's will or not. Do you understand that? And in the end I made up my mind that it was His will. That is the way I test the Lord."

Mr. Porter. "What was your doubt about?"

Guiteau. "Because all my natural feelings were opposed to the act, just as any man's would be."

Mr. Porter. "You regarded it as murder, then?"

Guiteau. "So called, yes, sir."

Mr. Porter. "You knew it was forbidden by human law?"

Guiteau. "I expected the Deity would take care of that. I never had any conception of the matter as a murder."

Mr. Porter. "Why then were you in doubt?"

Guiteau. "My mind is a perfect blank on that subject, and has been."

Mr. Porter. "The two weeks of doubt I am referring to, your mind is not a blank as to that; for you told us

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this morning how during those two weeks you walked and prayed. During that time did you believe that killing the President was forbidden by human law?"

Guiteau. "I cannot make myself understood any more than I have. If that is not satisfactory, I cannot do it any better."

* * * * *

Mr. Porter. "You mentioned the other day that you never struck a man in your life. Was that true?"

Guiteau. "I do not recall ever striking a man, sir. I have always been a peace man, naturally very cowardly, and always kept away from any physical danger."

Mr. Porter. "But morally brave and determined?"

Guiteau. "I presume so, especially when I am sure the Deity is back of me."

Mr. Porter. "When did you become sure of that?"

Guiteau. "I became sure of it about the first of June as far as this case is concerned."

Mr. Porter. "Before that you did not think He was back of you? Who did you think was back of you with a suggestion of murder?"

Guiteau. "It was the Deity, sir, that made the original suggestion."

Mr. Porter. "I thought you said that the Deity did not make the suggestion until the first of June?"

Guiteau. "I say that the Deity did make the suggestion about the middle of May, and that I was weighing the proposition for the two weeks succeeding.

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I was positive it was the will of the Deity about the first of June."

Mr. Porter. "Whose will did you think it was before that?"

Guiteau. "It was the Deity's will. No doubt about that."

Mr. Porter. "But you were in doubt as to its being His will?"

Guiteau. "I was not in any doubt."

Mr. Porter. "Not even the first two weeks?"

Guiteau. "There was no doubt as to the inception of the act from the Deity; as to the feasibility of the act, I was in doubt."

Mr. Porter. "You differed in opinion, then, from the Deity?"

Guiteau. "No, sir, I was testing the feasibility of the act, — whether it would be feasible."

Mr. Porter. "Did you suppose that the Supreme Ruler of the Universe would order you to do a thing which was not feasible?"

Guiteau. "No, sir, in a certain sense I did not suppose it. He directed me to remove the President for the good of the American people."

Mr. Porter. "Did He use the word 'remove'?"

Guiteau. "That is the way it always came to my mind. If two men quarrel, and one kills the other, that is murder. This was not even a homicide, for I say the Deity killed the President, and not me."

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Mr. Porter. "Passing from that, your friend Thomas North —"

Guiteau (interrupting). "He is no friend of mine."

Mr. Porter (continuing). "At page 422 of the evidence, Thomas North says that in 1859 you struck your father from behind his back. Is that true?"

Guiteau. "I know nothing about it, sir."

Mr. Porter. "He swears that you clinched your father after he had risen, and that several blows were interchanged. Is that true?"

Guiteau. "I have no recollection of any such experience, sir, at any time. I have no recollection about it."

Mr. Porter. "Your sister swears that in 1876, when you were thirty-five years old, that at her place, while you were an inmate of her family, you raised an axe against her life. Is that true?"

Guiteau. "I don't know anything about it, sir."

Mr. Porter. "You heard the testimony, didn't you?"

Guiteau. "I heard it."

Mr. Porter. "You heard your lawyer, in his opening, allude to that evidence, and you shouted out at the time that it was false?"

Guiteau. "That is what I did say, but you need not look so fierce on me. I do not care a snap for your fierce look. Just cool right down. I am not afraid of you, just understand that. Go a little slow. Make your statements in a quiet, genial way."

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Mr. Porter. "Well, it comes to this then, you thought God needed your assistance in order to kill President Garfield?"

Guiteau. "I decline to discuss this matter with you any further."

Mr. Porter. "You thought that the Supreme Power, which holds the gifts of life and death, wanted to send the President to Paradise for breaking the *unity* of the Republican party, and for ingratitude to General Grant and Senator Conkling?"

Guiteau. "I think his Christian character had nothing to do whatever with his political record. Please put that down. His political record was in my opinion very poor, but his Christian character was good. I myself looked upon him as a good Christian man. But he was President of the United States, and he was in condition to do this republic vast harm, and for this reason the Lord wanted him removed, and asked me to do it."

Mr. Porter. "Have you any communication with the Deity as to your daily acts?"

Guiteau. "Only on extraordinary actions. He supervises my private affairs, I hope, to some extent."

Mr. Porter. "Was He with you when you were a lawyer?"

Guiteau. "Not especially, sir."

Mr. Porter. "When you were an unsuccessful lawyer?"

Guiteau. "Not especially, sir."

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Mr. Porter. "Was He with you when you were a pamphlet pedler?"

Guteau. "I think He was, and took very good care of me."

Mr. Porter. "He left your board bills unpaid?"

Guteau. "Some of them are paid. If the Lord wanted me to go around preaching the gospel as I was doing as a pamphlet pedler, I had to do my work, and let Him look for the result. That is the way the Saviour and Paul got in their work. They did not get any money in their business, and I was doing the same kind of work."

Mr. Porter. "I think you were kind enough to say that the Saviour and Paul were vagabonds on earth?"

Guteau. "That is the fact, I suppose, from the record. They did not have any money or any friends."

Mr. Porter. "Do you think that is irreverent?"

Guteau. "Not in this case. I think it is decidedly proper, because the Saviour Himself said that He had nowhere to lay His head. Is not that being a vagabond?"

Mr. Porter. "Did you think it was irreverent when you said you belonged to the firm, or were working for the firm, of 'Jesus Christ and Company'?"

Guteau. "It is barely possible I may have used that expression in one of my letters years ago."

Mr. Porter. "Did you not hear such a letter read on this trial?"

Guteau. "If I wrote it, I thought so."

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Mr. Porter. "In your letter to the American people, written on the sixteenth of June, more than two weeks before the assassination, did you say, 'It will make my friend Arthur President'?"

Guiteau. "I considered General Arthur my friend at that time, and do now. He was a Stalwart, and I had more intimate personal relations with him than I did with Garfield."

Mr. Porter. "Had General Arthur, now President, ever done anything for you?"

Guiteau. "Not especially, but I was with him every day and night during the canvass in New York except Sundays. We were Christian men there and we did no work on Sundays."

Mr. Porter. "You never had any conversation with him about murder, did you?"

Guiteau. "No, sir, I did not."

Mr. Porter. "Did you, in this letter of the sixteenth of June, say, 'I have sacrificed only one'?"

Guiteau. "I said one life. The word 'life' should be put in."

Mr. Porter. "That is implied, but not expressed?"

Guiteau. "Now I object to your picking out sentences here and there in my letter. You want to read the entire letter. I said something there about General Arthur and General Grant. You have left all that out. You are giving a twist on one word. I decline to talk with a man of that character."

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Mr. Porter. "Did you think you had sacrificed one life?"

Guiteau. "I can remember it. This is the way [dramatically],— This is not murder. It is a political necessity. It will make my friend Arthur President and save the republic. Grant, during the war, sacrificed thousands of lives to save the republic. I have sacrificed only one. [Coolly.] Put it in that shape and then you will get sense out of it."

Mr. Porter. "When you sacrificed that one life, it was by shooting him with the bull-dog pistol you bought?"

Guiteau. "Yes, sir, it was. That should have been my inspiration. Those are the words that ought to go in there, meaning the Deity and me, and then you would have got the full and accurate statement. I did not do this work on my own account, and you cannot persuade this court and the American people ever to believe I did. The Deity inspired the act. He has taken care of it so far, and He will take care of it."

Mr. Porter. "Did the American people kill General Garfield?"

Guiteau. "I decline to talk to you on that subject, sir. You are a very mean man and a very dishonest man to try to make my letters say what they do not say. That is my opinion of you, Judge Porter. I know something about you when in New York. I have seen you shake your bony fingers at the jury

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and the court, and I repudiate your whole theory on this business."

Mr. Porter. "Did it occur to you that there was a commandment, 'Thou shalt not kill'?"

Guiteau. "It did. The divine authority overcame the written law."

Mr. Porter. "Is there any higher divine authority than the authority that spoke in the commandments?"

Guiteau. "To me there was, sir."

Mr. Porter. "It spoke to you?"

Guiteau. "A special divine authority to do that particular act, sir."

Mr. Porter. "And when you pointed that pistol at General Garfield and sent that bullet into his backbone, you believed that it was not you, but God, that pulled that trigger?"

Guiteau. "He used me as an agent to pull the trigger, —put it in that shape,—but I had no option in the matter. If I had, I would not have done it. Put that down."

Mr. Porter. "Did you walk back and forth in front of the door of the ladies' room, watching for the entrance of the President?"

Guiteau. "I walked backwards and forwards, working myself up, as I knew the hour had come."

Mr. Porter. "Was it necessary to do that to obey God?"

Guiteau. "I told you I had all I could possibly do

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to do the act anyway. I had to work myself up and rouse myself up."

Mr. Porter. "Why?"

Guiteau. "Because all my natural feelings were against the act, but I had to obey God Almighty if I died the next second, and God had put the work on to me, and I had to do it."

Mr. Porter. "Did you mind about dying the next second?"

Guiteau. "I knew nothing about what would become of me, sir."

Mr. Porter. "Why did you engage that colored man? Was it to drive you to a place of safety?"

Guiteau. "I engaged him to drive me to the jail."

Mr. Porter. "Did you think you would be safer there?"

Guiteau. "I did not know but what I would be torn to pieces before I got there."

Mr. Porter. "Weren't you a little afraid of it after you got there?"

Guiteau. "I had no fear about it at all, sir."

Mr. Porter. "Why did you write to General Sherman to send troops?"

Guiteau. "I wanted protection, sir."

Mr. Porter. "Protection where there was no danger?"

Guiteau. "I expected there would be danger, of course."

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Mr. Porter. "Why should there be danger?"

Guiteau. "I knew the people would not understand my view about it, and would not understand my idea of inspiration, that they would look upon me as a horrible wretch for shooting the President of the United States."

Mr. Porter. "As a murderer?"

Guiteau. "Yes, I suppose that is so."

Mr. Porter. "Did you suppose they would hang you for it?"

Guiteau. "No, sir. I expected the Deity would take care of me until I could tell the American people that I simply acted as His agent; hence, I wanted protection from General Sherman until the people cooled off and got possession of my views on the matter. I was not going to put myself in the possession of the wild mob. I wanted them to have time to tone down so that they could have an opportunity to know that it was not my personal act, but it was the act of the Deity and me associated, and I wanted the protection of these troops, and the Deity has taken care of me from that day to this."

Mr. Porter. "Have you any evidence of that except your own statement?"

Guiteau. "I know it as well as I know that I am alive."

Mr. Porter. "It depends upon whether the jury believe that?"

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Guiteau. "That is just what the jury is here for, — to take into account my actions for twenty years, my traveling around the country and developing a new system of theology, and the way the Deity has taken care of me since the second of July, and then the jury are to pass upon the question whether I did this thing jointly with the Deity, or whether I did it on my own personal account. I tell you, sir, that I expect, if it is necessary, that there will be an act of God to protect me from any kind of violence, either by hanging or shooting."

Mr. Porter. "Did the Deity tell you that?"

Guiteau. "That is my impression about it, sir."

Mr. Porter. "Oh, it is your impression. Have you not had some mistaken impressions in the course of your life?"

Guiteau. "Never, sir, in this kind of work. I always test the Deity by prayer."

Mr. Porter. "Why did you think you would go to jail for obeying a command of God?"

Guiteau. "I wanted to go there for protection. I did not want a lot of wild men going to jail there. I would have been shot and hung a hundred times if it had not been for those troops."

Mr. Porter. "Would there have been any wrong in that?"

Guiteau. "I won't have any more discussion with you on this sacred subject. You are making light of a very sacred subject and I won't talk to you."

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Mr. Porter. "Did you think to shoot General Garfield without trial —"

Guiteau (interrupting). "I decline to discuss the matter with you, sir."

Mr. Porter. "Had Garfield ever been tried?"

Guiteau. "I decline to discuss the matter with you, sir."

Mr. Porter. "Did God tell you he had to be murdered?"

Guiteau. "He told me he had to be removed, sir."

Mr. Porter. "Did He tell you General Garfield had to be killed without trial?"

Guiteau. "He told me he had to be removed, sir."

Mr. Porter. "When did He tell you so?"

Guiteau. "I decline to discuss the matter with you."

Mr. Porter. "Would it incriminate you if you were to answer the jury that question?"

Guiteau. "I don't know whether it would or not."

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Mr. Porter. "What is your theory of your defence?"

Guiteau. "I have stated it very frequently. If you have not got comprehension enough to see it by this time, I won't attempt to enlighten you."

Mr. Porter. "It is that you are legally insane, and not in fact insane, is it?"

Guiteau. "The defence is, sir, that it was the Deity's act and not mine, and He will take care of it."

Mr. Porter. "Are you insane at all?"

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Guiteau. "A great many people think I am very badly insane. My father thought I was. My relatives think I am badly cranked, and always have thought I was off my base."

Mr. Porter. "You told the jury you were not in fact insane?"

Guiteau. "I am not an expert. Let the experts and the jury decide whether I am insane or not. That is what they are here for."

Mr. Porter. "Do you believe you are insane?"

Guiteau. "I decline to answer the question, sir."

Mr. Porter. "You did answer before that you were legally insane, did you not? Did you not so state in open court?"

Guiteau. "I decline to discuss that with you, sir. My opinion would not be of any value one way or the other. I am not an expert, and not a jurymen, and not the court."

CHAPTER XVII

THE CROSS-EXAMINATION OF RUSSELL SAGE IN LAIDLAW *v.*
SAGE (SECOND TRIAL) BY HON. JOSEPH H. CHOATE

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 the Hon. 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?"

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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

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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

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and product of that abuse." And the Court of Appeals unanimously took this view of the matter.

After Mr. Sage had finished his testimony in his own behalf, Mr. Choate rose from his chair to cross-examine; he sat on the table back of the counsel table, swinging his legs idly, regarded the witness smilingly, and then began in an unusually low voice.

Mr. Choate. "Where do you reside, Mr. Sage?"

Mr. Sage. "At 506 Fifth Avenue."

Mr. Choate (still in a very low tone). "And what is your age now?"

Mr. Sage (promptly). "Seventy-seven years."

Mr. Choate (with a strong raising of his voice). "Do you ordinarily hear as well as you have heard the two questions you have answered me?"

Mr. Sage (looking a bit surprised and answering in an almost inaudible voice). "Why, yes."

Mr. Choate. "Did you lose your voice by the explosion?"

Mr. Sage. "No."

Mr. Choate. "You spoke louder when you were in Congress, didn't you?"

Mr. Sage. "I may have."

Mr. Choate, resuming the conversational tone, began an unexpected line of questions by asking in a small-talk voice, "What jewelry do you ordinarily wear?" Witness answered that he was not in the habit of wearing jewelry.

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Mr. Choate. "Do you wear a watch?"

Mr. Sage. "Yes."

Mr. Choate. "And you ordinarily carry it as you carry the one you have at present in your left vest pocket?"

Mr. Sage. "Yes, I suppose so."

Mr. Choate. "Was your watch hurt by the explosion?"

Mr. Sage. "I believe not."

Mr. Choate. "It was not even stopped by the explosion which perforated your vest with missiles?"

Mr. Sage. "I do not remember about this."

The witness did not quite enjoy this line of questioning, and swung his eye-glasses as if he were a trifle nervous. Mr. Choate, after regarding him in silence for some time, said, "I see you wear eye-glasses." The witness closed his glasses and put them in his vest pocket, whereupon Mr. Choate resumed, "And when you do not wear them, you carry them, I see, in your vest pocket."

Mr. Choate. "Were your glasses hurt by that explosion which inflicted forty-seven wounds on your chest?"

Mr. Sage. "I do not remember."

Mr. Choate. "You certainly would remember if you had to buy a new pair?"

If the witness answered this question, his answer was lost in the laughter which the court officer could not instantly check.

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Mr. Choate. "These clothes you brought here to show, — you are sure they are the same you wore that day?"

Mr. Sage. "Yes."

Mr. Choate. "How do you know?"

Mr. Sage. "The same as you would know in a matter of that kind."

Mr. Choate. "Were you familiar with these clothes?"

Mr. Sage. "Yes, sir."

Mr. Choate. "How long had you had them?"

Mr. Sage. "Oh, some months."

Mr. Choate. "Had you had them three or four years?"

Mr. Sage. "No."

Mr. Choate. "And wore them daily except on Sundays?"

Mr. Sage. "I think not; they were too heavy for summer wear."

Mr. Choate. "Do you remember looking out of the window that morning when you got up to see if it was cloudy so you would know whether to wear the old suit or not?"

Mr. Sage. "I do not remember."

Mr. Choate. "Well, let that go now; how is your general health, — good as a man of seventy-seven could expect?"

Mr. Sage. "Good except for my hearing."

Mr. Choate. "And that is impaired to the extent demonstrated here on this cross-examination?"

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The witness did not answer this question, and after some more kindly inquiries regarding his health, Mr. Choate began an even more intimate inquiry concerning the business career of Mr. Sage.

He learned that the millionaire was born in Verona, Oneida County, went to Troy when he was eleven years old, and was in business there until 1863, when he came to this city.

Mr. Choate. "What was your business in Troy?"

Mr. Sage. "Merchant."

Mr. Choate. "What kind of a merchant?"

Mr. Sage. "A grocer, and I was afterwards engaged in banking and railroad operating."

Mr. Sage, as a railroad builder, excited Mr. Choate's liveliest interest. He wanted to know all about that,—the name of every road he had built or helped to build, when he had done this, and with whom he had been associated in doing it. He frequently outlined his questions by explaining that he did not wish to ask the witness any impudent questions, but merely wanted to test his memory. The financier would sometimes say that to answer some questions he would have to refer to his books, and then the lawyer would pretend great surprise that the witness could not remember even the names of roads he had built. Mr. Sage said, "Possibly we might differ as to what is aiding a road. Some I have aided as a director, and some as a stockholder."

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“No, we won’t differ; we will divide the question,” Mr. Choate said. “First name the roads you have aided in building as a director, and then the roads you have aided in building as a stockholder.” The witness either would not, or could not, and after worrying him with a hundred questions on this line, Mr. Choate finally exclaimed, “Well, we will let *that* go.”

Next the cross-examiner brought the witness to consider his railroad-building experience after he left Troy and came to New York, whereby he managed, under the license of testing the memory of the witness, to show the jury the intimate financial relations which had existed between Mr. Sage and Mr. Jay Gould, and finally asked the witness point blank how many roads he had assisted in building in connection with Mr. Gould as director or stockholder. After some very lively sparring the witness thought that he had been connected in one way or another in about thirty railroads. “Name them!” exclaimed Mr. Choate. The witness named three and then stopped.

Mr. Choate (looking at his list). “There are twenty-seven more. Please hurry,—you do business much faster than this in your office!”

Mr. Sage said something about a number of auxiliary roads that had been consolidated, and roads that had been merged, and unimportant roads whose directors met very seldom, and again said something about referring to his books.

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Mr. Choate. "Your books have nothing to do with what I am trying to determine, which is a question of your memory."

The witness continued to spar, and at last Mr. Choate exclaimed, "Now is it not true that you have millions and millions of dollars in roads that you have not named here?"

All of the counsel for the defence were on their feet, objecting to this question, and Mr. Choate withdrew it, and added, "It appears you cannot remember, and won't you please say so?"

The witness would not say so, and Mr. Choate exclaimed, "Well, I give *that* up," and then asked, "You say you are a banker; what kind of a bank do you run,—is it a bank of deposit?" The witness said it was not, and neither was it a bank for circulating notes. "Sometimes I have money to lend," he said.

Mr. Choate. "Oh, you are a money lender. You buy puts and calls and straddles?" The witness said that he dealt in these privileges. "Kindly explain to the jury just what puts and calls and straddles are," the lawyer said encouragingly. The witness answered: "They are means to assist men of moderate capital to operate."

Mr. Choate. "A sort of *benevolent* institution, eh?"

Mr. Sage. "It is in a sense. It gives men of moderate means an opportunity to learn the methods of business."

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Mr. Choate. "Do you refer to puts or calls?"

Mr. Sage. "To both."

Mr. Choate. "I do not understand."

Mr. Sage. "I thought you would not" (with a chuckle).

Mr. Choate affected a puzzled look, and asked slowly: "Is it something like this: they call it and you put it? If it goes down they get the chargeable benefit, but if it goes up you get it?"

Mr. Sage. "I only get what I am paid for the privilege."

Mr. Choate. "Now what is a straddle?"

Mr. Sage. "A straddle is the privilege of calling or putting."

"Why," exclaimed Mr. Choate, with raised eyebrows, "that seems to me like a *game of chance*."

Mr. Sage. "It is a game of the fluctuation of the market."

"That is another way of *putting* it," Mr. Choate commended, looking as if he did not intend the pun. Then he asked, "The market once went very heavy against you in this game, did it not?"

"Yes, it did," the witness replied.

Mr. Choate. "That was an occasion when your customers could *call*, but not put, eh?"

Mr. Sage looked as if he did not understand and made no reply. Mr. Choate then added: "Did you not then have a run on your office?" The witness made

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some reply, hardly audible, concerning a party of Baltimore roughs, who made a row about his office for an hour when he refused to admit them.

This phase of the question was left in that vague condition, and the cross-examiner opened a new subject and unfolded a three-column clipping from a newspaper, which was headed, "A Chat with Russell Sage."

Mr. Choate. "The reporters called on you soon after the explosion?"

Mr. Sage. "Yes."

Mr. Choate. "One visited your house?"

Mr. Sage. "Yes."

Mr. Choate. "Did you read over what he wrote?"

Mr. Sage. "No."

Mr. Choate. "Did you read this after it was printed?"

Mr. Sage. "I believe I did."

Mr. Choate. "It is correct?"

Mr. Sage. "Reporters sometimes go on their own imagination."

It developed that the article which Mr. Choate referred to was written by a grand-nephew of the witness. When it had thus been identified, Mr. Choate again asked the witness if the article was correct.

Colonel James exclaimed: "Are you asking him to swear to the correctness of an article from that paper? *Nobody* could do that."

"No," Mr. Choate quickly responded, "I am asking him to point out its errors. *Any one* can do that."

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“This,” said Colonel James, “is making a *comedy* of errors.”

The witness broke in upon this little relaxation with the remark, “The reporter who wrote that was only in my house five minutes.”

“Indeed,” exclaimed Mr. Choate, waving the three-column clipping, “he got a great deal out of you, and that is more than I have been able to do.”

The first extract from the newspaper clipping read as follows: “Mr. Sage looks hale and hearty for an old man,—looks good for many years of life yet.”

Mr. Choate. “Is that true?”

Mr. Sage. “We all try to hold our own as long as we can.”

Mr. Choate. “You speak for yourself, when you say we all try to *hold on* to all that we can.”

At this Mr. James jumped to his feet again, and there was another spirited passage at arms. When all had quieted down, Mr. Sage was next asked if the article was correct when it referred to him as looking like a “warrior after the battle.” He thought that the statement was overdrawn. The article referred to Mr. Sage’s having shaved himself that morning, which was three mornings after the explosion; and when he had read that, Mr. Choate asked: “Did you have any wounds at that time that a visitor could see?”

The witness replied that both of his hands were then bandaged.

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Mr. Choate. "You must have shaved yourself with your feet."

* * * * *

Mr. Choate. "Was it a relief to you to see Laidlaw enter the office when you were talking to Norcross?"

Mr. Sage. "No, and if Laidlaw had stayed out in the lobby instead of coming into my office, he would have been by Norcross when the explosion took place."

Mr. Choate. "Then you think Laidlaw is indebted to you for saving his life instead of your being indebted to him for saving yours?"

Mr. Sage (decidedly). "Yes, sir."

Mr. Choate. "Oh, that makes this a very simple case, then. Did you bring your clerk here to testify as to the condition of the office after the police had cleared it out?"

Mr. Sage. "I did not bring him here, my counsel did."

Mr. Choate. "I see; you do not do any barking when you have a dog to do it for you."

Lawyers Dillon and James jumped up, and Mr. James said gravely, "Which of us is referred to as a dog?"

Mr. Choate (laughingly). "Oh, all of us."

Mr. Choate seldom reproved the witness for the character of his answers, although when he was examined by Colonel James on the redirect he was treated with very much less courtesy, for the Colonel frequently requested him, and rather roughly, to be good enough to confine his answers to the question.

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Mr. Choate's next question referred to the diagram which had been in use up to that point. He asked the witness if it was correct.

Mr. Sage. "I think it is not quite correct, not quite; if the jury will go down there, I would be glad to have them,—be glad to do anything. If the jury will go down there, I would be very glad to furnish their transportation, — if they will go."

Mr. Choate. "If you won't furnish anything *but* transportation, they won't go."

Mr. Sage. "It is substantially correct. I had a diagram made and I offered an opportunity to Mr. Laidlaw's counsel to have a correct one made. I never withheld anything from anybody."

The diagram which Mr. Sage had prepared was produced, and upon examination it was seen that it contained lines indicating a wrong rule, and had some other inaccuracies which did not seem to amount to much really; but Mr. Choate appeared to be very much impressed with these differences.

"I want you," he said to the witness, "to reconcile your testimony with your own diagram."

The witness looked at the diagram for some time, and Mr. Choate, observing him, remarked, "You will have to *make a straddle* to reconcile that, won't you?"

Some marks and signs of erasures were seen on the Sage diagram, which gave Mr. Choate an opportunity to ask, in a sensational tone, if any one could inform him

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who had been tampering with it. No one could, and the diagram was dropped and the subject of a tattered suit of clothes taken up again.

Mr. Choate. "What tailor did you employ at the time of the explosion?"

Mr. Sage. "Several."

Mr. Choate. "Name them; I want to follow up these clothes."

Mr. Sage. "Tailor Jessup made the coat and vest."

Mr. Choate. "Where is his place?"

Mr. Sage. "On Broadway."

Mr. Choate. "Is he there now?"

Mr. Sage. "Oh, no, he has gone to heaven."

Mr. Choate. "To heaven where all good tailors go? Who made the trousers?"

Mr. Sage. "I cannot tell where I may have bought them."

Mr. Choate. "Bought them? You do not buy ready-made trousers, do you?"

Mr. Sage. "I do sometimes. I get a better fit."

Mr. Choate. "Get benefit?"

Mr. Sage. "No; better fit."

Mr. Choate. "Where is the receipt for them?"

Mr. Sage. "I have none."

Mr. Choate. "Do you pay money without receipts?"

Mr. Sage. "I do sometimes."

Mr. Choate. "Indeed?"

Mr. Sage. "Yes; you do not take a receipt for your hat."

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The vest was then produced, and two holes in the outer cloth were exhibited by Mr. Choate, who asked the witness if these were the places where the foreign substances entered which penetrated his body. The witness replied that they were, and Mr. Choate next asked him if he had had the vest relined. Mr. Sage replied that he had not. "How is it, then," Mr. Choate asked, passing the vest to the jury with great satisfaction, "that these holes do not penetrate the lining?" The witness said that he could not explain that, but insisted that that was the vest and it would have to speak for itself. Mr. Choate again took the vest and counted six holes on the cloth on the other side, and asked the witness if that count was right. Mr. Sage replied, "I will take your count," and then caused a laugh by suddenly reaching out for the vest, and saying, "If you have no objection, though, I would like to see it."

Mr. Choate. "Now are not three of these holes moth-eaten?"

Mr. Sage. "I think not."

Mr. Choate. "Are you a judge of moth-eaten goods?"

Mr. Sage. "No."

Mr. Choate. "Where is the shirt you wore?"

Mr. Sage. "Destroyed."

Mr. Choate. "By whom?"

Mr. Sage. "The cook."

Mr. Choate. "The cook?"

Mr. Sage. "I meant the laundress."

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The vest was passed to the jury for their inspection, and the jurymen got into an eager whispered discussion as to whether certain of the holes were moth-eaten or not. There was a tailor on the jury. Observing the discussion, Mr. Choate took back the garment and said in his most winning way, "Now we don't want the jury to disagree." He next held up the coat, which was very much more injured in the tails than in front, and asked the witness how he accounted for that.

Mr. Sage. "It is one of the freaks of electricity."

Mr. Choate. "One of those things no fellow can find out."

The witness could not recall how much he had paid for the coat or for any of the garments, and after an unsuccessful attempt to identify the maker of the trousers by the name of the button, which proved to be the name of the button-maker, the old clothes were temporarily allowed to rest, and Mr. Choate asked the witness how long he had been unconscious. He replied that he thought he was unconscious two seconds.

Mr. Choate. "How did you know you were not unconscious ten minutes?"

Mr. Sage. "Only from what Mr. Walker says."

Mr. Choate. "Where is he?"

Mr. Sage. "On the Street."

Mr. Choate. "On Chambers Street, downstairs?"

Mr. Sage. "No, on Wall Street."

Mr. Choate. "Oh, I forgot that *the* street to you means

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Wall Street. Were you not up and dressed every day after the explosion?"

Mr. Sage. "I cannot remember."

Mr. Choate. "You did business every day?"

Mr. Sage. "Colonel Slocum and my nephew called upon me about business, and my counsel looked after some missing papers and bonds."

Mr. Choate. "You then held some Missouri Pacific collateral trust bonds?"

Mr. Sage. "Yes."

Mr. Choate. "How many?"

Mr. Sage. "Cannot say."

Mr. Choate. "Can't you tell within a limit of ten to one thousand?"

Mr. Sage. "No."

Mr. Choate. "Nor within one hundred to two hundred?"

Mr. Sage. "No."

Mr. Choate. "Is it because you have too little memory or too many bonds? How many loans did you have out at that time?"

Mr. Sage. "I cannot tell."

Mr. Choate. "Can you tell within two hundred thousand of the amount then due you from your *largest* creditor?"

Mr. Sage. "Any man doing the business I am —"

Mr. Choate. "Oh, there is no other man like you in the world. No, you cannot tell within two hundred

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thousand of the amount of the largest loan you then had out, but you set up your memory against Laidlaw's?"

Mr. Sage. "I do."

Mr. Choate. "Were you not very excited?"

Mr. Sage. "I was thoughtful. I was self-poised. I did not believe his dynamite would do so much damage, or that he would sacrifice himself."

Mr. Choate. "Never heard of a man killing himself?"

Mr. Sage. "Not in that way."¹

¹ Extracts from *New York Sun*. March, 1894.

CHAPTER XVIII

GOLDEN RULES FOR THE EXAMINATION OF WITNESSES

DAVID PAUL BROWN, a very able *nisi prius* lawyer of great experience at the Philadelphia Bar, many years ago condensed his experiences into eighteen paragraphs which he 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" contain so many useful and valuable suggestions 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,

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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

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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,

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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

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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

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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.

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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

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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."

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