**THE ART OF CROSS-EXAMINATION**

“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

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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 crossexamination.”

This is the conclusion arrived at by one of England’s greatest

advocates at the close of a long and eventful career at the Bar.

It was written some fifty years ago and at a time when oratory

in public trials was at its height. It is even more true at the

present time, when what was once commonly reputed a “great

speech “is seldom heard in our courts, because the modern

methods of practising our profession have had a tendency to

discourage court oratory and the development of orators. The

old-fashioned orators who were wont to “grasp the

thunderbolt “are now less in favor than formerly. With our

modern jurymen the arts of oratory, “law-papers on fire,” as

Lord Brougham’s speeches used to be called, though still

enjoyed as impassioned literary efforts, have become almost

useless as persuasive arguments or as a “summing up “as they

are now called.

Modern juries, especially in large cities, are composed of

practical business men accustomed to think tor themselves,

experienced in the ways of life, capable of forming estimates

and making nice distinctions, unmoved by the passions and

prejudices to which court oratory is nearly always directed.

Nowadays, jurymen, as a rule, are wont to bestow upon

testimony the most intelligent and painstaking attention, and

have a keen scent for truth. It is not intended to maintain that

juries are no longer human, or that in certain cases they do not

still go widely astray, led on by their prejudices if not by their

passions. Nevertheless, in the vast majority of trials, the

modern juryman, and especially the modern city juryman, it is

in our large cities that the greatest number of litigated cases is

tried, comes as near being the model arbiter of fact as the

most optimistic champion of the institution of trial by jury

could desire.

I am aware that many members of my profession still sneer at

trial by jury. Such men, however, when not among the

unsuccessful and disgruntled, will, with but few exceptions,

be found to have had but little practice themselves in court, or

else to belong to that ever growing class in our profession who

have relinquished their court practice and are building up

fortunes such as were never dreamed of in the legal

profession a decade ago, by becoming what may be styled

business lawyers men who are learned in the law as a

profession, but who through opportunity, combined with rare

commercial ability, have come to apply their learning especially

their knowledge of corporate law to great commercial

enterprises, combinations, organizations, and reorganizations,

and have thus come to practise law as a business.

To such as these a book of this nature can have but little

interest. It is to those who by choice or chance are, or intend

to become, engaged in that most laborious of all forms of legal

business, the trial of cases in court, that the suggestions and

experiences which follow are especially addressed.

It is often truly said that many of our best lawyers I am

speaking now especially of New York City are withdrawing

from court practice because the nature of the litigation is

changing. To such an extent is this change taking place in

some localities that the more important commercial cases rarely

reach a court decision. Our merchants prefer to compromise

their difficulties, or to write off their losses, rather than enter

into litigations that must remain dormant in the courts for

upward of three years awaiting their turn for a hearing on the

overcrowded court calendars. And yet fully six thousand

cases of one kind or another are tried or disposed of yearly in

the Borough of Manhattan alone.

This congestion is not wholly due to lack of judges, or that

they are not capable and industrious men; but is largely, it

seems to me, the fault of the system in vogue in all our

American courts of allowing any lawyer, duly enrolled as a

member of the Bar, to practise in the highest courts. In the

United States we recognize no distinction between barrister

and solicitor; we are all barristers and solicitors by turn. One

has but to frequent the courts to become convinced that, so

long as the ten thousand members at the New York County

Bar all avail themselves of their privilege to appear in court and

try their own clients’ cases, the great majority of the trials will

be poorly conducted, and much valuable time wasted.

The conduct of a case in court is a peculiar art for which many

men, however learned in the law, are not fitted; and where a

lawyer has but one or even a dozen experiences in court in

each year, he can never become a competent trial lawyer. I am

not addressing myself to clients, who often assume that,

because we are duly qualified as lawyers, we are therefore

competent to try their cases; I am speaking in behalf of our

courts, against the congestion of the calendars, and the

consequent crowding out of weighty commercial litigations.

One experienced in the trial of causes will not require, at the

utmost, more than a quarter of the time taken by the most

learned inexperienced lawyer in developing his facts. His

case will be thoroughly prepared and understood before the

trial begins. His points of law and issues of fact will be clearly

defined and presented to the court and jury in the fewest

possible words. He will in this way avoid many of the

erroneous rulings on questions of law and evidence which are

now upsetting so many verdicts on appeal. He will not only

complete his trial in shorter time, but he will be likely to bring

about an equitable verdict in the case which may not be

appealed from at all, or, if appealed, will be sustained by a

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higher court, instead of being sent back for a retrial and the

consequent consumption of the time of another judge and

jury in doing the work all over again.1

These facts are being more and more appreciated each year,

and in our local courts there is already an ever increasing

coterie of trial lawyers, who are devoting the principal part of

their time to court practice.

A few lawyers have gone so far as to refuse direct

communication with clients excepting as they come

represented by their own attorneys. It is pleasing to note that

some of our leading advocates who, having been called away

from large and active law practice to enter the government

service, have expressed their intention, when they resume the

practice of the law, to refuse all cases where clients are not

already represented by competent attorneys, recognizing, at

least in their own practice, the English distinction between the

barrister and solicitor. We are thus beginning to appreciate in

this country what the English courts have so long recognized:

that the only way to insure speedy and intelligently

conducted litigations is to inaugurate a custom of confining

court practice to a comparatively limited number of trained trial

lawyers.

The distinction between general practitioners and specialists

is already established in the medical profession and largely

accepted by the public. Who would think nowadays of

submitting himself to a serious operation at the hands of his

family physician, instead of calling in an experienced surgeon

to handle the knife? And yet the family physician may have

once been competent to play the part of surgeon, and

doubtless has had, years ago, his quota of hospital

experience. But he so infrequently enters the domain of

surgery that he shrinks from undertaking it, except under

circumstances where there is no alternative. There should be

a similar distinction in the legal profession. The family lawyer

may have once been competent to conduct the litigation; but

he is out of practice he is not “in training “for the competition.

There is no short cut, no royal road to proficiency, in the art of

advocacy. It is experience, and one might almost say

experience alone, that brings success. I am not speaking of

that small minority of men in all walks of life who have been

touched by the magic wand of genius, but of men of average

endowments and even special aptitude for the calling of

advocacy; with them it is a race of experience. The

experienced advocate can look back upon those less

advanced in years or experience, and rest content in the

thought that they are just so many cases behind him; that if he

keeps on, with equal opportunities in court, they can never

overtake him. Some day the public will recognize this fact. But

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 retrial

as shown by the court statistics.

at present, what does the ordinary litigant know of the

advantages of having counsel to conduct his case who is “at

home “in the court room, and perhaps even acquainted with

the very panel of jurors before whom his case is to be heard,

through having already tried one or more cases for other

clients before the same men? How little can the ordinary

business man realize the value to himself of having a lawyer

who understands the habits of thought and of looking at

evidence the bent of mind of the very judge who is to preside

at the trial of his case. Not that our judges are not eminently

fair-minded in the conduct of trials; but they are men for all

that, oftentimes very human men; and the trial lawyer who

knows his judge, starts with an advantage that the

inexperienced practitioner little appreciates. How much, too,

does experience count in the selection of the jury itself one of

the “fine arts” of the advocate! These are but a few of the

many similar advantages one might enumerate, were they not

apart from the subject we are now concerned with the skill of

the advocate in conducting the trial itself, once the jury has

been chosen.

When the public realizes that a good trial lawyer is the

outcome, one might say of generations of witnesses, when

clients fully appreciate the dangers they run in intrusting their

litigations to so-called “office lawyers “with little or no

experience in court, they will insist upon their briefs being

intrusted to those who make a specialty of court practice,

advised and assisted, if you will, by their own private

attorneys. One of the chief disadvantages of our present

system will be suddenly swept away; the court calendars will

be cleared by speedily conducted trials; issues will be tried

within a reasonable time after they are framed; the commercial

cases, now disadvantageously settled out of court or

abandoned altogether, will return to our courts to the

satisfaction both of the legal profession and of the business

community at large; causes will be more skilfully tried the art of

cross-examination more thoroughly understood.

**CHAPTER II :**

**THE MANNER OF CROSS-EXAMINATION**

It needs but the simple statement of the nature of crossexamination

to demonstrate its indispensable character in all

trials of questions of fact. No cause reaches the stage of

litigation unless there are two sides to it. If the witnesses on

one side deny or qualify the statements made by those on

the other, which side is telling the truth? Not necessarily

which side is offering perjured testimony, there is far less

intentional perjury in the courts than the inexperienced would

believe, but which side is honestly mistaken? for, on the other

hand, evidence itself is far less trustworthy than the public

usually realizes. The opinions of which side are warped by

prejudice or blinded by ignorance? Which side has had the

power or opportunity of correct observation? How shall we

tell, how make it apparent to a jury of disinterested men who

are to decide between the litigants? Obviously, by the

means of cross-examination.

If all witnesses had the honesty and intelligence to come

forward and scrupulously follow the letter as well as the spirit

of the oath, “to tell the truth, the whole truth, and nothing but

the truth,” and if all advocates on either side had the necessary

experience, combined with honesty and intelligence, and

were similarly sworn to develop the whole truth and nothing

but the truth, of course there would be no occasion for crossexamination,

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 allimportant

prerequisite of a competent trial lawyer.

It requires the greatest ingenuity; a habit of logical thought;

clearness of perception in general; infinite patience and selfcontrol;

power to read men’s minds intuitively, to judge of

their characters by their faces, to appreciate their motives;

ability to act with force and precision; a masterful knowledge

of the subject-matter itself; an extreme caution; and, above all,

the instinct to discover the weak point in the witness under

examination.

One has to deal with a prodigious variety of witnesses

testifying under an infinite number of differing circumstances.

It involves all shades and complexions of human morals, human

passions, and human intelligence. It is a mental duel between

counsel and witness.

In discussing the methods to employ when cross-examining a

witness, let us imagine ourselves at work in the trial of a cause,

and at the close of the direct examination of a witness called

by our adversary. The first inquiry would naturally be, Has

the witness testified to anything that is material against us?

Has his testimony injured our side of the case? Has he made

an impression with the jury against us? Is it necessary for us to

cross-examine him at all?

Before dismissing a witness, however, the possibility of being

able to elicit some new facts in our own favor should be taken

into consideration. If the witness is apparently truthful and

candid, this can be readily done by asking plain,

straightforward questions. If, however, there is any reason to

doubt the willingness of the witness to help develop the

truth, it may be necessary to proceed with more caution, and

possibly to put the witness in a position where it will appear

to the jury that he could tell a good deal if he wanted to, and

then leave him. The jury will thus draw the inference that, had

he spoken, it would have been in our favor.

But suppose the witness has testified to material facts against

us, and it becomes our duty to break the force of his

testimony, or abandon all hope of a jury verdict. How shall we

begin? How shall we tell whether the witness has made an

honest mistake, or has committed perjury? The methods in

his cross-examination in the two instances would naturally be

very different. There is a marked distinction between

discrediting the testimony and discrediting the witness. It is

largely a matter of instinct on the part of the examiner. Some

people call it the language of the eye, or the tone of the voice,

or the countenance of the witness, or his manner of testifying,

or all combined, that betrays the wilful perjurer. It is difficult

to say exactly what it is, excepting that constant practice seems

to enable a trial lawyer to form a fairly accurate judgment on

this point. A skilful cross-examiner seldom takes his eye from

an important witness while he is being examined by his

adversary. Every expression of his face, especially his mouth,

even every movement of his hands, his manner of expressing

himself, his whole bearing all help the examiner to arrive at an

accurate estimate of his integrity.

Let us assume, then, that we have been correct in our

judgment of this particular witness, and that he is trying to

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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 fairminded spirit, which, if the cross-examiner is

clever, will soon disclose the weak points in the testimony.

The sympathies of the jury are invariably on the side of the

witness, and they are quick to resent any discourtesy toward

him. They are willing to admit his mistakes, if you can make

them apparent, but are slow to believe him guilty of perjury.

Alas, how often this is lost sight of in our daily court

experiences! One is constantly brought face to face with

lawyers who act as if they thought that every one who testifies

against their side of the case is committing willful perjury. No

wonder they accomplish so little with their CROSSexamination!

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 fairminded juryman

against their side of the case, and as likely as not it has brought

to light some important fact favorable to the other side which

had been overlooked in the examination-in-chief.

There is a story told of Reverdy Johnson, who once, in the trial

of a case, twitted a brother lawyer with feebleness of memory,

and received the prompt retort, “Yes, Mr. Johnson; but you

will please remember that, unlike the lion in the play, I have

something more to do than roar”

The only lawyer I ever heard employ this roaring method

successfully was Benjamin F. Butler. With him politeness, or

even humanity, was out of the question. And it has been said

of him that “concealment and equivocation were scarcely

possible to a witness under the operation of his methods.”

But Butler had a wonderful personality. He was aggressive

and even pugnacious, but picturesque withal witnesses were

afraid of him. Butler was popular with the masses; he usually

had the numerous “hangers-on “in the court room on his side

of the case from the start, and each little point he would make

with a witness met with their ready and audible approval.

This greatly increased the embarrassment of the witness and

gave Butler a decided advantage. It must be remembered also

that Butler had a contempt for scruple which would hardly

stand him in good stead at the present time. Once he was

cross questioning a witness in his characteristic manner. The

judge interrupted to remind him that the witness was a

Harvard professor. “I know it, your Honor,” replied Butler; “we

hanged one of them the other day.” 2

On the other hand, it has been said of Rufus Choate, whose

art and graceful qualities of mind certainly entitle him to the

foremost rank among American advocates, that in the crossexamination

of witnesses, “He never aroused opposition on

the part of the witness by attacking him, but disarmed him by

the quiet and courteous manner in which he pursued his

examination. He was quite sure, before giving him up, to

expose the weak parts of his testimony or the bias, if any,

which detracted from the confidence to be given it.” 3 [One of

Choate’s bon mots was that “a lawyer’s vacation consisted of

the space between the question put to a witness and his

answer.” ]

Judah P. Benjamin, “the eminent lawyer of two continents,”

used to cross-examine with his eyes. “No witness could look

into Benjamin’s black, piercing eyes and maintain a lie.”

Among the English barristers, Sir James Scarlett, Lord Abinger,

had the reputation, as a cross-examiner, of having outstripped

all advocates who, up to that time, had appeared at the British

Bar. “The gentlemanly ease, the polished courtesy, and the

Christian urbanity and affection, with which he proceeded to

the task, did infinite mischief to the testimony of witnesses

who were striving to deceive, or upon whom he found it

expedient to fasten a suspicion.”

A good advocate should be a good actor. The most cautious

cross-examiner will often elicit a damaging answer. Now is the

time for the greatest self-control. If you show by your face

how the answer hurt, you may lose your case by that one

point alone. How often one sees the cross-examiner fairly

staggered by such an answer. He pauses, perhaps blushes,

and after he has allowed the answer to have its full effect,

finally regains his self-possession, but seldom his control of

the witness. With the really experienced trial lawyer, such

answers, instead of appearing to surprise or disconcert him,

2 “Life Sketches of Eminent Lawyers,” G. J. Clark, Esq.

3 “Memories of Rufus Choate,” Neilson.

**10** Francis H. Wellman

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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 crossexamining

the witness, and in his argument made not the least

allusion to his testimony. When the opposing counsel, in his

close, came to that part of his case in his argument, he was so

impressed with the idea that Mr. Choate had discovered that

there was something in that testimony which made in his favor,

although he could not see how, that he contented himself with

merely remarking that though Mr. Choate had seemed to think

that the testimony bore in favor of his client, it seemed to him

that it went to sustain the opposite side, and then went on

with the other parts of his case.” 4

It is the love of combat which every man possesses that

fastens the attention of the jury upon the progress of the trial.

The counsel who has a pleasant personality; who speaks with

apparent frankness; who appears to be an earnest searcher

after truth; who is courteous to those who testify against him;

who avoids delaying constantly the progress of the trial by

innumerable objections and exceptions to perhaps

incompetent but harmless evidence; who seems to know what

he is about and sits down when he has accomplished it,

exhibiting a spirit of fair play on all occasions he it is who

creates an atmosphere in favor of the side which he

represents, a powerful though unconscious influence with the

jury in arriving at their verdict. Even if, owing to the weight of

testimony, the verdict is against him, yet the amount will be far

less than the client had schooled himself to expect.

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

jury with endless and pointless cross-examinations; who is

constantly losing his temper and showing his teeth to the

witnesses; who wears a sour, anxious expression; who

possesses a monotonous, rasping, penetrating voice; who

presents a slovenly, unkempt personal appearance; who is

prone to take unfair advantage of witness or counsel, and

seems determined to win at all hazards soon prejudices a jury

against himself and the client he represents, entirely

irrespective of the sworn testimony in the case.

The evidence often seems to be going all one way, when in

reality it is not so at all. The cleverness of the cross-examiner

4 “Memories of Rufus Choate,” Neilson.

has a great deal to do with this; he can often create an

atmosphere which will obscure much evidence that would

otherwise tell against him. This is part of the “generalship of a

case “in its progress to the argument, which is of such vast

consequence. There is eloquence displayed in the

examination of witnesses as well as on the argument. “There is

matter in manner? I do not mean to advocate that exaggerated

manner one often meets with, which divides the attention of

your hearers between yourself and your question, which

often diverts the attention of the jury from the point you are

trying to make and centres it upon your own idiosyncrasies of

manner and speech. As the man who was somewhat deaf and

could not get near enough to Henry Clay in one of his finest

efforts, exclaimed, “I didn’t hear a word he said, but, great

Jehovah, didn’t he make the motions!”

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

cross-examiner can be made to produce a marked effect upon

the jury and enable them to appreciate fully a point they

might otherwise lose altogether.

“Once, when cross-examining a witness by the name of

Sampson, who was sued for libel as editor of the Referee,

Russell asked the witness a question which he did not answer.

‘Did you hear my question?’ said Russell in a low voice. ‘I did,’

said Sampson. ‘Did you understand it?’ asked Russell, in a still

lower voice. ‘I did,’ said Sampson. ‘Then,’ said Russell, raising

his voice to its highest pitch, and looking as if he would spring

from his place and seize the witness by the throat, ‘why have

you not answered it? Tell the jury why you have not

answered it.’ A thrill of excitement ran through the court room.

Sampson was overwhelmed, and he never pulled himself

together again.”5

Speak distinctly yourself, and compel your witness to do so.

Bring out your points so clearly that men of the most ordinary

intelligence can understand them. Keep your audience the

jury ^always interested and on the alert. Remember it is the

minds of the jury you are addressing, even though your

question is put to the witness. Suit the modulations of your

voice to the subject under discussion. Rufus Choate’s voice

would seem to take hold of the witness, to exercise a certain

sway over him, and to silence the audience into a hush. He

allowed his rich voice to exhibit in the examination of

witnesses, much of its variety and all of its resonance. The

contrast between his tone in examining and that of the counsel

who followed him was very marked.

“Mr. Choate’s appeal to the jury began long before his final

argument; it began when he first took his seat before them

and looked into their eyes. He generally contrived to get his

seat as near them as was convenient, if possible having his

table close to the Bar, in front of their seats, and separated

from them only by a narrow space for passage. There he sat,

5 “Life of Lord Russell,” O’Brien.

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calm, contemplative; in the midst of occasional noise and

confusion solemnly unruffled; always making some little

headway either with the jury, the court, or the witness; never

doing a single thing which could by possibility lose him favor,

ever doing some little thing to win it; smiling benignantly upon

the counsel when a good thing was said; smiling

sympathizingly upon the jury when any juryman laughed or

made an inquiry; wooing them all the time with his magnetic

glances as a lover might woo his mistress; seeming to preside

over the whole scene with an air of easy superiority; exercising

from the very first moment an indefinable sway and influence

upon the minds of all before and around him. His manner to

the jury was that of a friend, a friend solicitous to help them

through their tedious investigation; never that of an expert

combatant, intent on victory, and looking upon them as only

instruments for its attainment.” 6

6 “Reminiscences of Rufus Choate,” Parker.

**CHAPTER III :**

**THE MATTER OF CROSS-EXAMINATION**

If by experience we have learned the first lesson of our art, to

control our manner toward the witness even under the most

trying circumstances, it then becomes important that we

should turn our attention to the matter of our crossexamination.

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 crossexamination

that we can hope to destroy him.

What shall be our first mode of attack? Shall we adopt the

fatal method of those we see around us daily in the courts,

and proceed to take the witness over the same story that he

has already given our adversary, in the absurd hope that he is

going to change it in the repetition, and not retell it with

double effect upon the jury? Or shall we rather avoid

carefully his original story, except in so far as is necessary to

refer to it in order to point out its weak spots? Whatever we

do, let us do it with quiet dignity, with absolute fairness to the

witness; and let us frame our questions in such simple

language that there can be no misunderstanding or confusion.

Let us imagine ourselves in the jury box, so that we may see

the evidence from their standpoint. We are not trying to make

a reputation for ourselves with the audience as “smart “crossexaminers.

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. Unskillful 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 crossexamination?

Did we detect the weak spot in his narrative? If

so, let us waste no time, but go direct to the point. It may be

that the witness’s situation in respect to the parties or the

subject-matter of the suit should be disclosed to the jury, as

one reason why his testimony has been shaded somewhat in

favor of the side on which he testifies. It may be that he has a

direct interest in the result of the litigation, or is to receive

some indirect benefit therefrom. Or he may have some other

tangible motive which he can gently be made to disclose.

Perhaps the witness is only suffering from that partisanship, so

fatal to fair evidence, of which oftentimes the witness himself

is not conscious. It may even be that, if the jury only knew the

scanty means the witness has had for obtaining a correct and

certain knowledge of the very facts to which he has sworn so

glibly, aided by the adroit questioning of the opposing

counsel, this in itself would go far toward weakening the effect

of his testimony. It may appear, on the other hand, that the

witness had the best possible opportunity to observe the

facts he speaks of, but had not the intelligence to observe

these facts correctly. Two people may witness the same

occurrence and yet take away with them an entirely different

impression of it; but each, when called to the witness stand,

may be willing to swear to that impression as a fact.

Obviously, both accounts of the same transaction cannot be

true; whose impressions were wrong? Which had the better

opportunity to see? Which had the keener power of

perception? All this we may very properly term the matter of

our cross-examination.

It is one thing to have the opportunity of observation, or even

the intelligence to observe correctly, but it is still another to be

able to retain accurately, for any length of time, what we have

once seen or heard, and what is perhaps more difficult still to

be able to describe it intelligibly. Many witnesses have seen

one part of a transaction and heard about another part, and

later on become confused in their own minds, or perhaps only

in their modes of expression, as to what they have seen

themselves and what they have heard from others. All

witnesses are prone to exaggerate to enlarge or minimize the

facts to which they, take oath.

A very common type of witness, met with almost daily, is the

man who, having witnessed some event years ago, suddenly

finds that he is to be called as a court witness. He immediately

attempts to recall his original impressions; and gradually, as he

talks with the attorney who is to examine him, he amplifies his

story with new details which he leads himself, or is led, to

believe are recollections and which he finally swears to as

facts. Many people seem to fear that an “I don’t know “answer

will be attributed to ignorance on their part. Although

perfectly honest in intention, they are apt, in consequence, to

complete their story by recourse to their imagination. And

few witnesses fail, at least in some part of their story, to

entangle facts with their own beliefs and inferences.

All these considerations should readily suggest a line of

questions, varying with each witness examined, that will, if

closely followed, be likely to separate appearance from reality

and to reduce exaggerations to their proper proportions. It

must further be borne in mind that the jury should not merely

see the mistake; they should be made to appreciate at the

time why and whence it arose. It is fresher then and makes a

more lasting effect than if left until the summing up, and then

drawn to the attention of the jury.

The experienced examiner can usually tell, after a few simple

questions, what line to pursue. Picture the scene in your own

mind; closely inquire into the sources of the witness’s

information, and draw your own conclusions as to how his

mistake arose, and why he formed his erroneous impressions.

Exhibit plainly your belief in his integrity and your desire to

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be fair with him, and try to beguile him into being candid with

you. Then when the particular foible which has affected his

testimony has once been discovered, he can easily be led to

expose it to the jury. His mistakes should be drawn out often

by inference rather than by direct question, because all

witnesses have a dread of self-contradiction. If he sees the

connection between your inquiries and his own story, he will

draw upon his imagination for explanations, before you get

the chance to point out to him the inconsistency between his

later statement and his original one. It is often wise to break

the effect of a witness’s story by putting questions to him that

will acquaint the jury at once with the fact that there is another

more probable story to be told later on, to disclose to them

something of the defence, as it were. Avoid the mistake, so

common among the inexperienced, of making much of trifling

discrepancies. It has been aptly said that “juries have no

respect for small triumphs over a witness’s self-possession or

memory.” Allow the loquacious witness to talk on; he will be

sure to involve himself in difficulties from which he can never

extricate himself. Some witnesses prove altogether too much;

encourage them and lead them by degrees into exaggerations

that will conflict with the common sense of the jury. Under no

circumstances put a false construction on the words of a

witness; there are few faults in an advocate more fatal with a

jury.

If, perchance, you obtain a really favorable answer, leave it and

pass quietly to some other inquiry. The inexperienced

examiner in all probability will repeat the question with the

idea of impressing the admission upon his hearers, instead of

reserving it for the summing up, and will attribute it to bad luck

that his witness corrects his answer or modifies it in some way,

so that the point is lost. He is indeed a poor judge of human

nature who supposes that if he exults over his success during

the cross-examination, he will not quickly put the witness on

his guard to avoid all future favorable disclosures.

David Graham, a prudent and successful cross-examiner, once

said, perhaps more in jest than anything else, “A lawyer should

never ask a witness on cross-examination a question unless in

the first place he knew what the answer would be, or in the

second place he didn’t care.” This is something on the

principle of the lawyer who claimed that the result of most

trials depended upon which side perpetrated the greatest

blunders in cross-examination. Certainly no lawyer should ask

a critical question unless he is sure of the answer.

Mr. Sergeant Ballantine, in his “Experiences,” quotes an

instance in the trial of a prisoner on the charge of homicide,

where a once famous English barrister had been induced by

the urgency of an attorney, although against his own

judgment, to ask a question on cross-examination, the answer

to which convicted his client. Upon receiving the answer, he

turned to the attorney who had advised him to ask it, and said,

emphasizing every word, “Go home; cut your throat; and when

you meet your client in hell, beg his pardon.”

It is well, sometimes, in a case where you believe that the

witness is reluctant to develop the whole truth, so to put

questions that the answers you know will be elicited may

come by way of a surprise and in the light of improbability to

the jury. I remember a recent incident, illustrative of this point,

which occurred in a suit brought to recover the insurance on a

large warehouse full of goods that had been burnt to the

ground. The insurance companies had been unable to find

any stock-book which would show the amount of goods in

stock at the time of the fire. One of the witnesses to the fire

happened to be the plaintiff’s bookkeeper, who on the direct

examination testified to all the details of the fire, but nothing

about the books. The cross-examination was confined to

these few pointed questions.

“I suppose you had an iron safe in your office, in which you

kept your books of account?” “Yes, sir.” “Did that burn up?”

“Oh, no.” “Were you present when it was opened after the

fire?” “Yes, sir.” “Then won’t you be good enough to hand

me the stock-book that we may show the jury exactly what

stock you had on hand at the time of the fire on which you

claim loss? (This was the point of the case and the jury were

not prepared for the answer which followed.) “I haven’t it, sir.”

“What, haven’t the stock-book? You don’t mean you have lost

it?” “It wasn’t in the safe, sir.” “Wasn’t that the proper place

for it?’: “Yes, sir.” “How was it that the book wasn’t there?” “It

had evidently been left out the night before the fire by

mistake.” Some of the jury at once drew the inference that the

all-important stock-book was being suppressed, and refused

to agree with their fellows against the insurance companies.

The average mind is much wiser than many suppose.

Questions can be put to awitness under cross-examination, in

argumentative form, often with far greater effect upon the

minds of the jury than if the same line of reasoning were

reserved for the summing up. The juryman sees the point for

himself, as if it were his own discovery, and clings to it all the

more tenaciously. During the cross-examination of Henry

Ward Beecher, in the celebrated Tilton-Beecher case, and

after Mr. Beecher had denied his alleged intimacy with Mr.

Tilton’s wife, Judge Fullerton read a passage from one of Mr.

Beecher’s sermons to the effect that if a person commits a

great sin, the exposure of which would cause misery to others,

such a person would not be justified in confessing it, merely

to relieve his own conscience. Fullerton then looked straight

into Mr. Beecher’s eyes and said, “Do you still consider that

sound doctrine?” Mr. Beecher replied, “I do.” The inference a

juryman might draw from this question and answer would

constitute a subtle argument upon that branch of the case.

The entire effect of the testimony of an adverse witness can

sometimes be destroyed by a pleasant little passage-at-arms

in which he is finally held up to ridicule before the jury, and all

that he has previously said against you disappears in the laugh

that accompanies him from the witness box. In a recent

Metropolitan Street Railway case a witness who had been

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badgered rather persistently on cross-examination, finally

straightened himself up in the witness chair and said pertly, “I

have not come here asking you to play with me. Do you take

me for Anna Held?”7

“I was not thinking of Anna Held,” replied the counsel quietly;

“supposing you try Ananias!”

The witness was enraged, the jury laughed, and the lawyer,

who had really made nothing out of the witness up to this

time, sat down.

These little triumphs are, however, by no means always onesided.

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 horse, and a clergyman had

been called as a witness who succeeded only in giving a rather

confused account of the transaction. A blustering counsel on

the other side, after many attempts to get at the facts upon

cross-examination, blurted out, “Pray, sir, do you know the

difference between a horse and a cow?” “I acknowledge my

ignorance,” replied the clergyman; “I hardly do know the

difference between a horse and a cow, or between a bull and

a bully only a bull, I am told, has horns, and a bully (bowing

respectfully to the counsel), luckily for me, has none.”8

Reference is made in a subsequent chapter to the crossexamination

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 crossexamination

in personal damage suits where the sole object of

counsel is to reduce the amount of the jury’s verdict, and to

puncture the pitiful tale of suffering told by the plaintiff in

such cases.

A New York commission merchant, named Metts, sixty-six

years of age, was riding in a Columbus Avenue open car. As

the car neared the curve at Fifty-third Street and Seventh

Avenue, and while he was in the act of closing an open

window in the front of the car at the request of an old lady

passenger, the car gave a sudden, violent lurch, and he was

thrown into the street, receiving injuries from which, at the

time of the trial, he had suffered for three years.

Counsel for the plaintiff went into his client’s sufferings in

great detail. Plaintiff had had concussion of the brain, loss of

memory, bladder difficulties, a broken leg, nervous

7 This occurrence was at the time when the actress Anna Held

was singing her popular stage song, “Won’t you come and

play with me.”

8 “Curiosities of Law and Lawyers.”

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 halfdozen questions:

**Counsel.** “What medical name, doctor, would you give

to the plaintiff’s present ailment?”

**Doctor.** “He has what is known as ‘traumatic microsis.”

**Counsel.** “Microsis, doctor? That means, does it not,

the habit, or disease as you may call it, of making much of

ailments that an ordinary healthy man would pass by as of

no account?”

**Doctor.** “That is right, sir.”

**Counsel (smiling).** “I hope you haven’t got this disease,

doctor, have you?”

**Doctor.** “Not that I am aware of, sir.”

**Counsel.** “Then we ought to be able to get a very fair

statement from you of this man’s troubles, ought we not?”

**Doctor.** “I hope so, sir.”

The opening had been found; witness was already flattered

into agreeing with all suggestions, and warned against

exaggeration.

**Counsel.** “Let us take up the bladder trouble first. Do

not practically all men who have reached the age of sixtysix

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.”

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**Counsel (keeping the ball rolling).** “I don’t think you

have even the first symptoms of this ‘traumatic microsis,’

Doctor.”

**Doctor (pleased).** “I haven’t got it at all.”

**Counsel.** “You said Mr. Metis 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, hemorrhages of the brain. Do you

mean to tell us that he could have had hemorrhages of the

brain and be alive to-day?”

**Doctor.** “They were microscopic hemorrhages.”

**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

hemorrhages?”

**Doctor.** “I have cured him; that is right.”

**Counsel.** “You certainly were competent to set his

broken leg or you wouldn’t have attempted it; did you

get a good union?”

**Doctor.** “Yes, he has got a good, strong, healthy leg.”

Counsel having elicited, by the “smiling method,” all the

required admissions, suddenly changed his whole bearing

toward the witness, and continued pointedly:

**Counsel.** “And you said that $2500 would be a fair and

reasonable charge for your services. It is three years since

Mr. Metts was injured. Have you sent him no bill?”

**Doctor.** “Yes, sir, I have.”

**Counsel.** “Let me see it. (Turning to plaintiff’s Counsel.)

Will either of you let me have the bill?”

**Doctor.** “I haven’t it, sir.”

**Counsel (astonished).** “What was the amount of it?”

**Doctor.** “$1000.”

**Counsel (savagely).** “Why do you charge the railroad

company two and a half times as much as you charge the

patient himself?”

**Doctor (embarrassed at this sudden change on**

**part of counsel).** “You asked me what my services

were worth.”

**Counsel.** “Didn’t you charge your patient the full worth

of your services?”

**Doctor (no answer).**

**Counsel (quickly).** “How much have you been paid on

your bill on your oath?”

**Doctor.** “He paid me $100 at one time, that is, two years

ago; and at two different times since he has paid me $30.”

**Counsel.** “And he is a rich commission merchant

downtown!”(And with something between a sneer and a

laugh counsel sat down.)

An amusing incident, leading to the exposure of a manifest

fraud, occurred recently in another of the many damage suits

brought against the Metropolitan Street Railway and growing

out of a collision between two of the company’s electric cars.

The plaintiff, a laboring man, had been thrown to the street

pavement from the platform of the car by the force of the

collision, and had dislocated his shoulder. He had testified in

his own behalf that he had been permanently injured in so far

as he had not been able to follow his usual employment for

the reason that he could not raise his arm above a point parallel

with his shoulder. Upon cross-examination the attorney for

the railroad asked the witness a few sympathetic questions

about his sufferings, and upon getting on a friendly basis with

him asked him “to be good enough to show the jury the

extreme limit to which he could raise his arm since the

accident.” The plaintiff slowly and with considerable difficulty

raised his arm to the parallel of his shoulder. “Now, using the

same arm, show the jury how high you could get it up before

the accident,” quietly continued the attorney; whereupon the

witness extended his arm to its full height above his head,

amid peals of laughter from the court and jury.

In a case of murder, to which the defence of insanity was set

up, a medical witness called on behalf of the accused swore

that in his opinion the accused, at the time he killed the

deceased, was affected with a homicidal mania, and urged to

the act by an irresistible impulse. The judge, not satisfied

with this, first put the witness some questions on other

subjects, and then asked, “Do you think the accused would

have acted as he did if a policeman had been present?” to

which the witness at once answered in the negative.

Thereupon the judge remarked, “Your definition of an

irresistible impulse must then be an impulse irresistible at all

times except when a policeman is present.”

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**CHAPTER IV:**

**CROSS-EXAMINATION OF THE PERJURED WITNESS**

In the preceding chapters it was attempted to offer a few

suggestions, gathered from experience, for the proper

handling of an honest witness who, through ignorance or

partisanship, and more or less unintentionally, had testified to

a mistaken state of facts injurious to our side of the litigation. In

the present chapter it is proposed to discuss the far more

difficult task of exposing, by the arts of cross-examination, the

intentional Fraud, the perjured witness. Here it is that the

greatest ingenuity of the trial lawyer is called into play; here

rules help but little as compared with years of actual

experience. What can be conceived more difficult in advocacy

than the task of proving a witness, whom you may neither have

seen nor heard of before he gives his testimony against you,

to be a wilful perjurer, as it were out of his own mouth?

It seldom happens that a witness’s entire testimony is false

from beginning to end. Perhaps the greater part of it is true,

and only the crucial part the point, however, on which the

whole case may turn is wilfully false. If, at the end of -his direct

testimony, we conclude that the witness we have to crossexamine

to continue the imaginary trial we were conducting in

the previous chapter comes under this class, what means are

we to employ to expose him to the jury?

Let us first be certain we are right in our estimate of him that

he intends perjury. Embarrassment is one of the emblems of

perjury, but by no means always so. The novelty and

difficulty of the situation being called upon to testify before a

room full of people, with lawyers on all sides ready to ridicule

or abuse often occasions embarrassment in witnesses of the

highest integrity. Then again some people are constitutionally

nervous and could be nothing else when testifying in open

court. Let us be sure our witness is not of this type before we

subject him to the particular form of torture we have in store

for the perjurer.

Witnesses of a low grade of intelligence, when they testify

falsely, usually display it in various ways: in the voice, in a

certain vacant expression of the eyes, in a nervous twisting

about in the witness chair, in an apparent effort to recall to

mind the exact wording of their story, and especially in the

use of language not suited to their station in life. On the other

hand, there is something about the manner of an honest but

ignorant witness that makes it at once manifest to an

experienced lawyer that he is narrating only the things that he

has actually seen and heard. The expression of the face

changes with the narrative as he recalls the scene to his mind;

he looks the examiner full in the face; his eye brightens as he

recalls to mind the various incidents; he uses gestures natural

to a man in his station of life, and suits them to the part of the

story he is narrating, and he tells his tale in his own

accustomed language. If, however, the manner of the witness

and the wording of his testimony bear all the earmarks of

fabrication, it is often useful, as your first question, to ask him

to repeat his story. Usually he will repeat it in almost

identically the same words as before, showing he has learned

it by heart. Of course it is possible, though not probable, that

he has done this and still is telling the truth. Try him by taking

him to the middle of his story, and from there jump him

quickly to the beginning and then to the end of it. If he is

speaking by rote rather than from recollection, he will be sure

to succumb to this method. He has no facts with which to

associate the wording of his story; he can only call it to mind as

a whole, and not in detachments. Draw his attention to other

facts entirely disassociated with the main story as told by

himself. He will be entirely unprepared for these new

inquiries, and will draw upon his imagination for answers.

Distract his thoughts again to some new part of his main story

and then suddenly, when his mind is upon another subject,

return to those considerations to which you had first called his

attention, and ask him the same questions a second time. He

will again fall back upon his imagination and very likely will give

a different answer from the first and you have him in the net.

He cannot invent answers as fast as you can invent questions,

and at the same time remember his previous inventions

correctly; he will not keep his answers all consistent with one

another. He will soon become confused and, from that time

on, will be at your mercy. Let him go as soon as you have

made it apparent that he is not mistaken, but lying.

An amusing account is given in the Green Bag for November,

1891, of one of Jeremiah Mason’s cross-examinations of such a

witness. “The witness had previously testified to having

heard Mason’s client make a certain statement, and it was upon

the evidence of that statement that the adversary’s case was

based. Mr. Mason led the witness round to his statement, and

again it was repeated verbatim. Then, without warning, he

walked to the stand, and pointing straight at the witness said,

in his high, impassioned voice, ‘Let’s see that paper you’ve got

in your waistcoat pocket! ‘Taken completely by surprise, the

witness mechanically drew a paper from the pocket indicated,

and handed it to Mr. Mason. The lawyer slowly read the exact

words of the witness in regard to the statement, and called

attention to the fact that they were in the handwriting of the

lawyer on the other side.

“‘Mr. Mason, how under the sun did you know that paper was

there?’ asked a brother lawyer. ‘Well,’ replied Mr. Mason, ‘I

thought he gave that part of his testimony just as if he’d heard

it, and I noticed every time he repeated it he put his hand to

his waistcoat pocket, and then let it fall again when he got

through.’ ‘

Daniel Webster considered Mason the greatest lawyer that

ever practised at the New England Bar. He said of him, “I

would rather, after my own experience, meet all the lawyers I

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have ever known combined in a case, than to meet him alone

and single-handed.” Mason was always reputed to have

possessed to a marked degree “the instinct for the weak point

“in the witness he was cross-examining.

If perjured testimony in our courts were confined to the

ignorant classes, the work of cross-examining them would be a

comparatively simple matter, but unfortunately for the cause

of truth and justice this is far from the case. Perjury is

decidedly on the increase, and at the present time scarcely a

trial is conducted in which it does not appear in a more or less

flagrant form. Nothing in the trial of a cause is so difficult as to

expose the perjury of a witness whose intelligence enables

him to hide his lack of scruple. There are various methods of

attempting it, but no uniform rule can be laid down as to the

proper manner to be displayed toward such a witness. It all

depends upon the individual character you have to unmask. In

a large majority of cases the chance of success will be greatly

increased by not allowing the witness to see that you suspect

him, before you have led him to commit himself as to various

matters with which you have reason to believe you can

confront him later on.

Two famous cross-examiners at the Irish Bar were Sergeant

Sullivan, afterwards Master of the Rolls in Ireland, and

Sergeant Armstrong. Barry O’Brien, in his “Life of Lord

Russell,” describes their methods. “Sullivan,” he says,

“approached the witness quite in a friendly way, seemed to

be an impartial inquirer seeking information, looked surprised

at what the witness said, appeared even grateful for the

additional light thrown on the case. ‘Ah, indeed! Well, as you

have said so much, perhaps you can help us a little further.

Well, really, my Lord, this is a very intelligent man.’ So playing

the witness with caution and skill, drawing him stealthily on,

keeping him completely in the dark about the real point of

attack, the ‘little sergeant ‘waited until the man was in the

meshes, and then flew at him and shook him as a terrier would

a rat.

“The ‘big Sergeant’ (Armstrong) had more humor and more

power, but less dexterity and resource. His great weapon

was ridicule. He laughed at the witness and made everybody

else laugh. The witness got confused and lost his temper, and

then Armstrong pounded him like a champion in the ring.”

In some cases it is wise to confine yourself to one or two

salient points on which you feel confident you can get the

witness to contradict himself out of his own mouth. It is

seldom useful to press him on matters with which he is familiar.

It is the safer course to question him on circumstances

connected with his story, but to which he has not already

testified and for which he would not be likely to prepare

himself.

A simple but instructive example of cross-examination,

conducted along these lines, is quoted from Judge J. W.

Donovan’s “Tact in Court.” It is doubly interesting in that it

occurred in Abraham Lincoln’s first defence at a murder trial.

“Grayson was charged with shooting Lockwood at a campmeeting,

on the evening of August 9, 18 , and with running

away from the scene of the killing, which was witnessed by

Sovine. The proof was so strong that, even with an excellent

previous character, Grayson came very near being lynched on

two occasions soon after his indictment for murder.

“The mother of the accused, after failing to secure older

counsel, finally engaged young Abraham Lincoln, as he was

then called, and the trial came on to an early hearing. No

objection was made to the jury, and no cross-examination of

witnesses, save the last and only important one, who swore

that he knew the parties, saw the shot fired by Grayson, saw

him run away, and picked up the deceased, who died

instantly.

“The evidence of guilt and identity was morally certain. The

attendance was large, the interest intense. Grayson’s mother

began to wonder why ‘Abraham remained silent so long and

why he didn’t do something!’

The people finally rested. The tall lawyer (Lincoln) stood up

and eyed the strong witness in silence, without books or

notes, and slowly began his defence by these questions:

**Lincoln.** And you were with Lockwood just before and

saw the shooting?

**Witness.** Yes.

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

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

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

**Witness.** No, it was twenty feet or more!

**Lincoln.** In the open field?

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

**Lincoln.** What kind of timber?

**Witness.** Beech timber.

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

**Witness.** Rather.

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

**Witness.** It looks like it.

**Lincoln.** You could see defendant shoot see how the

barrel hung, and all about it?

**Witness.** Yes.

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

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

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**Lincoln.** Where were the lights?

**Witness.** Up by the minister’s stand.

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

**Witness.** Yes -- I answered ye twiste.

**Lincoln.** Did you not see a candle there, with Lockwood

or Grayson?

**Witness.** No! What would we want a candle for?

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

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

**Lincoln.** You saw this shooting at ten at night in beech

timber, three-quarters of a mile from the lights saw the

pistol barrel saw the man fire saw it twenty feet away saw

it all by moonlight? Saw it nearly a mile from the camp

lights?

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

The interest was now so intense that men leaned forward to

catch the smallest syllable. Then the lawyer drew out a bluecovered

almanac from his side coat pocket opened it slowly

offered it in evidence showed it to the jury and the court read

from a page with careful deliberation that the moon on that

night was unseen and only arose at one the next morning.

“Following this climax Mr. Lincoln moved the arrest of the

perjured witness as the real murderer, saying: ‘Nothing but a

motive to clear himself could have induced him to swear away

so falsely the life of one who never did him harm!’ With such

determined emphasis did Lincoln present his showing that

the court ordered Sovine arrested, and under the strain of

excitement he broke down and confessed to being the one

who fired the fatal shot himself, but denied it was intentional.”

A difficult but extremely effective method of exposing a

certain kind of perjurer is to lead him gradually to a point in his

story, where in his answer to the final question “Which?” he

will have to choose either one or the other of the only two

explanations left to him, either of which would degrade if not

entirely discredit him in the eyes of the jury.

The writer once heard the Hon. Joseph H. Choate make very

telling use of this method of examination. A stock-broker was

being sued by a married woman for the return of certain

bonds and securities in the broker’s possession, which she

alleged belonged to her. Her husband took the witnessstand

and swore that he had deposited the securities with the

stock-broker as collateral against his market speculations, but

that they did not belong to him, and that he was acting for

himself and not as agent for his wife, and had taken her

securities unknown to her.

It was the contention of Mr. Choate that, even if the bonds

belonged to the wife, she had either consented to her

husband’s use of the bonds, or else was a partner with him in

the transaction. Both of these contentions were denied under

oath by the husband.

**Mr. Choate.** “When you ventured into the realm of

speculations in Wall Street I presume you contemplated

the possibility of the market going against you, did you

not?”

**Witness.** “Well, no, Mr. Choate, I went into Wall Street

to make money, not to lose it.”

**Mr. Choate.** “Quite so, sir; but you will admit, will you

not, that sometimes the stock market goes contrary to

expectations?”

**Witness.** “Oh, yes, I suppose it does.”

**Mr. Choate.** “You say the bonds were not your own

property, but your wife’s?”

**Witness.** “Yes, sir.”

**Mr. Choate.** “And you say that she did not lend them to

you for purposes of speculation, or even know you had

possession of them?”

**Witness.** “Yes, sir.”

**Mr. Choate.** “You even admit that when you deposited

the bonds with your broker as collateral against your stock

speculations, you did not acquaint him with the fact that

they were not your own property?”

**Witness.** “I did not mention whose property they were,

sir.”

**Mr. Choate (in his inimitable style).** “Well, sir, in the

event of the market going against you and your collateral

being sold to meet your losses, whom did you intend to

cheat, your broker or your wife?”

The witness could give no satisfactory answer, and for once a

New York jury was found who were willing to give a verdict

against the customer and in favor of a Wall Street broker.

In the great majority of cases, however, the most skilful efforts

of the cross-examiner will fail to lead the witness into such

“traps” as these. If you have accomplished one such coup, be

content with the point you have made; do not try to make

another with the same witness; sit down and let the witness

leave the stand.

But let us suppose you are examining a witness with whom no

such climax is possible. Here you will require infinite patience

and industry. Try to show that his story is inconsistent with

itself, or with other known facts in the case, or with the

ordinary experience of mankind. There is a wonderful power

in persistence. If you fail in one quarter, abandon it and try

something else. There is surely a weak spot somewhere, if the

story is perjured. Frame your questions skilfully. Ask them as

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if you wanted a certain answer, when in reality you desire just

the opposite one. “Hold your own temper while you lead the

witness to lose his “is a Golden Rule on all such occasions. If

you allow the witness a chance to give his reasons or

explanations, you may be sure they will be damaging to you,

not to him. If you can succeed in tiring out the witness or

driving him to the point of sullenness, you have produced the

effect of lying.

But it is not intended to advocate the practice of lengthy

cross-examinations because the effect of them, unless the

witness is broken down, is to lead the jury to exaggerate the

importance of evidence given by a witness who requires so

much cross-examination in the attempt to upset him. “During

the Tichborne trial for perjury, a remarkable man named Luie

was called to testify. He was a shrewd witness and told his

tale with wonderful precision and apparent accuracy. That it

was untrue there could hardly be a question, but that it could

be proved untrue was extremely doubtful and an almost

hopeless task. It was an improbable story, but still was not an

absolutely impossible one. If true, however, the claimant was

the veritable Roger Tichborne, or at least the probabilities

would be so immensely in favor of that supposition that no

jury would agree in finding that he was Arthur Orton. His

manner of giving his evidence was perfect. After the trial one

of the jurors was asked what he thought of Luie’s evidence,

and if he ever attached any importance to his story. He

replied that at the close of the evidence-in-chief he thought it

so improbable that no credence could be given to it. But after

Mr. Hawkins had been at him for a day and could not shake

him, I began to think, if such a cross-examiner as that cannot

touch him, there must be something in what he says, and I

began to waver. I could not understand how it was that, if it

was all lies, it did not break down under such able counsel.” 9

The presiding judge, whose slightest word is weightier than

the eloquence of counsel, will often interrupt an aimless and

prolonged cross-examination with an abrupt, “Mr. ----------, I

think we are wasting time,” or “I shall not allow you to pursue

that subject further,” or “I cannot see the object of this

examination.” This is a setback from which only the most

experienced advocate can readily recover. Before the judge

spoke, the jury, perhaps, were already a little tired and

inattentive and anxious to finish the case; they were just in the

mood to agree with the remark of his Honor, and the

“ATMOSPHERE of the case,” as I have always termed it, was

fast becoming unfavorable to the delinquent attorney’s client.

How important a part in the final outcome of every trial this

atmosphere of the case usually plays! Many jurymen lose sight

of the parties to the litigation our clients in their absorption

over the conflict of wits going on between their respective

lawyers.

9 “Hints on Advocacy,” Harris.

It is in criminal prosecutions where local politics are involved,

that the jury system is perhaps put to its severest test. The

ordinary juryman is so apt to be blinded by his political

prejudices that where the guilt or innocence of the prisoner at

the Bar turns upon the question as to whether the prisoner

did or did not perform some act, involving a supposed

advantage to his political party, the jury is apt to be divided

upon political lines.

About ten years ago, when a wave of political reform was

sweeping over New York City, the Good Government Clubs

caused the arrest of about fifty inspectors of election for

violations of the election laws. These men were all brought up

for trial in the Supreme Court criminal term, before Mr. Justice

Barrett. The prisoners were to be defended by various

leading trial lawyers, and everything depended upon the

result of the first few cases tried. If these trials resulted in

acquittals, it was anticipated that there would be acquittals all

along the line; if the first offenders put on trial were convicted

and sentenced to severe terms in prison, the great majority of

the others would plead guilty, and few would escape.

At that time the county of New York was divided, for

purposes of voting, into 1067 election districts, and on an

average perhaps 250 votes were cast in each district. An

inspector of one of the election districts was the first man

called for trial. The charge against him was the failure to record

correctly the vote cast in his district for the Republican

candidate for alderman. In this particular election district there

had been 167 ballots cast, and it was the duty of the

inspectors to count them and return the result of their count to

police headquarters.

At the trial twelve respectable citizens took the witness chair,

one after another, and affirmed that they lived in the

prisoner’s election district, and had all cast their ballots on

election day for the Republican candidate. The official count

for that district, signed by the prisoner, was then put in

evidence, which read: Democratic votes, 167; Republican, 0.

There were a number of witnesses called by the defence who

were Democrats. The case began to take on a political aspect,

which was likely to result in a divided jury and no conviction,

since it had been shown that the prisoner had a most excellent

reputation and had never been suspected of wrong-doing

before. Finally the prisoner himself was sworn in his own

behalf.

It was the attempt of the cross-examiner to leave the witness in

such a position before the jury that no matter what their

politics might be, they could not avoid convicting him. There

were but five questions asked.

**Counsel.** “You have told us, sir, that you have a wife and

seven children depending upon you for support. I

presume your desire is not to be obliged to leave them; is

it not?”

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**Prisoner.** “Most assuredly, sir.”

**Counsel.** “Apart from that consideration I presume you

have no particular desire to spend a term of years in Sing

Sing prison?”

**Prisoner.** “Certainly not, sir.”

**Counsel.** “Well, you have heard twelve respectable

citizens take the witness-stand and swear they voted the

Republican ticket in your district, have you not?”

**Prisoner.** “Yes, sir.”

**Counsel (pointing to the jury).** “And you see these

twelve respectable gentlemen sitting here ready to pass

judgment upon the question of your liberty, do you

not?”

**Prisoner.** “I do, sir.”

**Counsel (impressively, but quietly).** “Well, now, Mr.

---------, you will please explain to these twelve gentlemen

(pointing to jury) how it was that the ballots cast by the

other twelve gentlemen were not counted by you, and

then you can take your hat and walk right out of the court

room a free man.”

The witness hesitated, cast down his eyes, but made no

answer and counsel sat down.

Of course a conviction followed. The prisoner was sentenced

to five years in state prison. During the following few days

nearly thirty defendants, indicted for similar offences,

pleaded guilty, and the entire work of the court was

completed within a few weeks. There was not a single

acquittal or disagreement.

Occasionally, when sufficient knowledge of facts about the

witness or about the details of his direct testimony can be

correctly anticipated, a trap may be set into which even a

clever witness, as in the illustration that follows, will be likely to

fall.

During the lifetime of Dr. J.W. Ranney there were few

physicians in this country who were so frequently seen on the

witness-stand, especially in damage suits. So expert a witness

had he become that Chief Justice Van Brunt many years ago is

said to have remarked, “Any lawyer who attempts to crossexamine

Dr. Ranney is a fool.” A case occurred a few years

before Dr. Ranney died, however, where a failure to crossexamine

would have been tantamount to a confession of

judgment, and the trial lawyer having the case in charge,

though fully aware of the dangers, was left no alternative, and

as so often happens where “fools rush in,” made one of those

lucky “bull’s eyes “that is perhaps worth recording.

It was a damage case brought against the city by a lady who,

on her way from church one spring morning, had tripped over

an obscure encumbrance in the street, and had, in

consequence, been practically bedridden for the three years

leading up to the day of trial. She was brought into the court

room in a chair and was placed in front of the jury, a pallid,

pitiable object, surrounded by her women friends, who acted

upon this occasion as nurses, constantly bathing her hands

and face with ill-smelling ointments, and administering

restoratives, with marked effect upon the jury.

Her counsel, Ex-chief Justice Noah Davis, claimed that her

spine had been permanently injured, and asked the jury for

$50,000 damages.

It appeared that Dr. Ranney had been in constant attendance

upon the patient ever since the day of her accident. He

testified that he had visited her some three hundred times

and had examined her minutely at least two hundred times in

order to make up his mind as to the absolutely correct

diagnosis of her case, which he was now thoroughly satisfied

was one of genuine disease of the spinal marrow itself. Judge

Davis asked him a few preliminary questions, and then gave

the doctor his head and let him “turn to the jury and tell them

all about it.” Dr. Ranney spoke uninterruptedly for nearly

three-quarters of an hour. He described in detail the

sufferings of his patient since she had been under his care; his

efforts to relieve her pain; the hopeless nature of her malady.

He then proceeded in a most impressive way to picture to the

jury the gradual and relentless progress of the disease as it

assumed the form of creeping paralysis, involving the

destruction of one organ after another until death became a

blessed relief. At the close of this recital, without a question

more, Judge Davis said in a calm but triumphant tone, “Do you

wish to cross-examine?”

Now the point in dispute there was no defence on the merits

was the nature of the patient’s malady. The city’s medical

witnesses were unanimous that the lady had not, and could

not have, contracted spinal disease from the slight injury she

had received. They styled her complaint as “hysterical,”

existing in the patient’s mind alone, and not indicating nor

involving a single diseased organ; but the jury evidently all

believed Dr. Ranney, and were anxious to render a verdict on

his testimony. He must be cross-examined. Absolute failure

could be no worse than silence, though it was evident that,

along expected lines, questions relating to his direct evidence

would be worse than useless. Counsel was well aware of the

doctor’s reputed fertility of resource, and quickly decided

upon his tactics.

The cross-examiner first directed his questions toward

developing before the jury the fact that the witness had been

the medical expert for the New York, New Haven, and

Hartford R.R. thirty-five years, for the New York Central R.R.

forty years, for the New York and Harlem River R.R. twenty

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years, for the Erie R.R. fifteen years, and so on until the doctor

was forced to admit that he was so much in court as a witness

in defence of these various railroads, and was so occupied

with their affairs that he had but comparatively little time to

devote to his reading and private practice.

**Counsel (perfectly quietly).** “Are you able to give us,

doctor, the name of any medical authority that agrees with

you when you say that the particular group of symptoms

existing in this case points to one disease and one only?”

**Doctor.** “Oh, yes, Dr. Ericson agrees with me.”

**Counsel.** “Who is Dr. Ericson, if you please?”

**Doctor (with a patronizing smile).** “Well, Mr. ---------

---- , Ericson was probably one of the most famous

surgeons that England has ever produced.” (There was a

titter in the audience at the expense of counsel.)

**Counsel.** “What book has he written?”

**Doctor (still smiling).** “He has written a book called

‘Ericson on the Spine,’ which is altogether the best known

work on the subject.” (The titter among the audience

grew louder.)

**Counsel.** “When was this book published?”

**Doctor.** “About ten years ago.”

**Counsel.** “Well, how is it that a man whose time is so

much occupied as you have told us yours is, has leisure

enough to look up medical authorities to see if they agree

with him?”

**Doctor (fairly beaming on counsel).** “Well, Mr. -------

----------, to tell you the truth, I have often heard of you,

and I half suspected you would ask me some such foolish

question; so this morning after my breakfast, and before

starting for court, I took down from my library my copy of

Ericson’s book, and found that he agreed entirely with my

diagnosis in this case.” (Loud laughter at expense of

counsel, in which the jury joined.)

**Counsel (reaching under the counsel table and**

**taking up his own copy of “Ericson on the Spine,”**

**and walking deliberately up to the witness).**

“Won’t you be good enough to point out to me where

Ericson adopts your view of this case?”

**Doctor (embarrassed).** “Oh, I can’t do it now; it is a

very thick book.”

**Counsel (still holding out the book to the**

**witness).** “But you forget, doctor, that thinking I might

ask you some such foolish question, you examined your

volume of Ericson this very morning after breakfast and

before coming to court.”

**Doctor (becoming more embarrassed and still**

**refusing to take the book).** “I have not time to do it

now.”

**Counsel.** “Time! Why there is all the time in the world.”

**Doctor.** (no answer)

Counsel and witness eye each other closely.

**Counsel (sitting down, still eying witness).** “I am

sure the court will allow me to suspend my examination

until you shall have had time to turn to the place you read

this morning in that book, and can reread it now aloud to

the jury.”

**Doctor.** (no answer)

The court room was in deathly silence for fully three minutes.

The witness wouldn’t say anything, counsel for plaintiff didn’t

dare to say anything, and counsel for the city didn’t want to

say anything; he saw that he had caught the witness in a

manifest falsehood, and that the doctor’s whole testimony was

discredited with the jury unless he could open to the

paragraph referred to which counsel well knew did not exist in

the whole work of Ericson.

At the expiration of a few minutes, Mr. Justice Barrett, who was

presiding at the trial, turned quietly to the witness and asked

him if he desired to answer the question, and upon his

replying that he did not intend to answer it any further than

he had already done, he was excused from the witness-stand

amid almost breathless silence in the court room. As he

passed from the witness chair to his seat, he stooped and

whispered into the ear of counsel, “You are the ------est most

impertinent man I have ever met.”

After a ten days’ trial the jury were unable to forget the

collapse of the plaintiff’s principal witness, and failed to agree

upon a verdict.

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**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 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 crossexamination

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.

Attention is also called to the distinction between mere

matters of scientific fact and mere matters of opinion. For

example: certain medical experts may be called to establish

certain medical facts which are not mere matters of opinion.

On such facts the experts could not disagree; but in the

province of mere opinion it is well known that the experts

differ so much among themselves that but little credit is given

to mere expert opinion as such.

As a general thing, it is unwise for the cross-examiner to

attempt to cope with a specialist in his own field of inquiry.

Lengthy cross-examinations along the lines of the expert’s

theory are usually disastrous and should rarely be attempted.

Many lawyers, for example, undertake to cope with a medical

or handwriting expert on his own ground, surgery, correct

diagnosis, or the intricacies of penmanship. In some rare

instances (more especially with poorly educated physicians)

this method of cross-questioning is productive of results.

More frequently, however, it only affords an opportunity for

the doctor to enlarge upon the testimony he has already

given, and to explain what might otherwise have been

misunderstood or even entirely overlooked by the jury.

Experience has led me to believe that a physician should

rarely be cross-examined on his own specialty, unless the

importance of the case has warranted so close a study by the

counsel of the particular subject under discussion as to justify

the experiment; and then only when the lawyer’s research of

the medical authorities, which he should have with him in

court, convinces him that he can expose the doctor’s

erroneous conclusions, not only to himself, but to a jury who

will not readily comprehend the abstract theories of

physiology upon which even the medical profession itself is

divided.

On the other hand, some careful and judicious questions,

seeking to bring out separate facts and separate points from

the knowledge and experience of the expert, which will tend

to support the theory of the attorney’s own side of the case,

are usually productive of good results. In other words, the art

of the cross-examiner should be directed to bring out such

scientific facts from the knowledge of the expert as will help

his own case, and thus tend to destroy the weight of the

opinion of the expert given against him.

Another suggestion which should always be borne in mind is

that no question should be put to an expert which is in any

way so broad as to give the expert an opportunity to expatiate

upon his own views, and thus afford him an opportunity in his

answer to give his reasons, in his own way, for his opinions,

which counsel calling him as an expert might not otherwise

have fully brought out in his examination.

It was in the trial of Dr. Buchanan on the charge of murdering

his wife, that a single, ill-advised question put upon crossexamination

to the physician who had attended Mrs.

Buchanan upon her death-bed, and who had given it as his

opinion that her death was due to natural causes, which

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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 deathbed,

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 witnessstand and

questioned him concerning the symptoms he had observed

during his treatment of Mrs. Buchanan just prior to her death,

and developed the fact that the doctor had made out a death

certificate in which he had certified that in his opinion

apoplexy was the sole cause of death. The doctor was then

turned over to the lawyers for the defence for crossexamination.

One of the prisoner’s counsel, who had far more knowledge

of medicine than of the art of cross-examination, was assigned

the important duty of cross-examining this witness. After

badgering the doctor for an hour or so with technical medical

questions more or less remote from the subject under

discussion, and tending to show the erudition of the lawyer

who was conducting the examination rather than to throw light

upon the inquiry uppermost in the minds of the jury, the

cross-examiner finally reproduced the death certificate and

put it in evidence, and calling the doctor’s attention to the

statement therein made that death was the result of apoplexy

exclaimed, while flourishing the paper in the air:

“Now, doctor, you have told us what this lady’s symptoms

were, you have told us what you then believed was the cause

of her death; I now ask you, has anything transpired since Mrs.

Buchanan’s death which would lead you to change your

opinion as it is expressed in this paper?”

The doctor settled back in his chair and slowly repeated the

question asked: “Has -- anything -- transpired -- since -- Mrs.

Buchanan’s -- death – which -- would -- lead -- me -- to --

change -- my -- opinion -- as -- it -- is -- expressed -- in -- this –

paper?” The witness turned to the judge and inquired if in

answer to such a question he would be allowed to speak of

matters that had come to his knowledge since he wrote the

certificate. The judge replied: “The question is a broad one.

Counsel asks you if you know of any reason why you should

change your former opinion?”

The witness leaned forward to the stenographer and

requested him to read the question over again. This was

done. The attention of everybody in court was by this time

focused upon the witness, intent upon his answer. It seemed

to appear to the jury as if this must be the turning point of the

case.

The doctor having heard the question read a second time,

paused for a moment, and then straightening himself in his

chair, turned to the cross-examiner and said, “I wish to ask you

a question, Has the report of the chemist telling of his

discovery of atropine and morphine in the contents of this

woman’s stomach been offered in evidence yet?”The court

answered, “It has not.”

“One more question,” said the doctor, “Has the report of the

pathologist yet been received in evidence?”The court

replied, “No.”

“Then? said the doctor, rising in his chair, “I can answer your

question truthfully, that as yet in the absence of the

pathological report and in the absence of the chemical report I

know of no legal evidence which would cause me to alter the

opinion expressed in my death certificate.”

It is impossible to exaggerate the impression made upon the

court and jury by these answers. All the advantage that the

prisoner might have derived from the original death certificate

was entirely swept away.

The trial lasted for fully two weeks after this episode. When

the jury retired to their consultation room at the end of the

trial, they found they were utterly unable to agree upon a

verdict. They argued among themselves for twenty-four

hours without coming to any conclusion. At the expiration of

this time the jury returned to the court room and asked to have

the testimony of this doctor reread to them by the

stenographer. The stenographer, as he read from his notes,

reproduced the entire scene which had been enacted two

weeks before. The jury retired a second time and

immediately agreed upon their verdict of death.

The cross-examinations of the medical witnesses in the

Buchanan case conducted by this same “Medico-legal

Wonder” were the subject of very extended newspaper

praise at the time, one daily paper devoting the entire front

page of its Sunday edition to his portrait.

How expert witnesses have been discredited with juries in

the past, should serve as practical guides for the future. The

whole effect of the testimony of an expert witness may

sometimes effectually be destroyed by putting the witness to

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some unexpected and offhand test at the trial, as to his

experience, his ability and discrimination as an expert, so that

in case of his failure to meet the test he can be held up to

ridicule before the jury, and thus the laughter at his expense

will cause the jury to forget anything of weight that he has said

against you.

I have always found this to be the most effective method to

cross-examine a certain type of professional medical witnesses

now so frequently seen in our courts. A striking instance of

the efficacy of this style of cross-examination was experienced

by the writer in a damage suit against the city of New York,

tried in the Supreme Court sometime in 1887.

A very prominent physician, president of one of our leading

clubs at the time, but now dead, had advised a woman who

had been his housekeeper for thirty years, and who had

broken her ankle in consequence of stepping into an

unprotected hole in the street pavement, to bring suit against

the city to recover $40,000 damages. There was very little

defence to the principal cause of action: the hole in the street

was there, and the plaintiff had stepped into it; but her right

to recover substantial damages was vigorously contested.

Her principal, in fact her only medical witness was her

employer, the famous physician. The doctor testified to the

plaintiff’s sufferings, described the fracture of her ankle,

explained how he had himself set the broken bones and

attended the patient, but affirmed that all his efforts were of

no avail as he could bring about nothing but a most imperfect

union of the bones, and that his housekeeper, a most

respectable and estimable lady, would be lame for life. His

manner on the witness stand was exceedingly dignified and

frank, and evidently impressed the jury. A large verdict of

fully $15,000 was certain to be the result unless this witness’s

hold upon the jury could be broken on his cross-examination.

There was no reason known to counsel why this ankle should

not have healed promptly, as such fractures usually do; but

how to make the jury realize the fact was the question. The

intimate personal acquaintance between the cross-examiner

and the witness was another embarrassment.

The cross-examination began by showing that the witness,

although a graduate of Harvard, had not immediately entered

a medical school, but on the contrary had started in business

in Wall Street, had later been manager of several business

enterprises, and had not begun the study of medicine until he

was forty years old. The examination then continued in the

most amiable manner possible, each question being asked in a

tone almost of apology.

**Counsel.** “We all know, doctor, that you have a large

and lucrative family practice as a general practitioner; but

is it not a fact that in this great city, where accidents are of

such common occurrence, surgical cases are usually taken

to the hospitals and cared for by experienced surgeons?”

**Doctor.** “Yes, sir, that is so.”

**Counsel.** “You do not even claim to be an experienced

surgeon?”

**Doctor.** “Oh, no, sir. I have the experience of any

general practitioner.”

Counsel. “What would be the surgical name for the

particular form of fracture that this lady suffered?”

**Doctor.** “What is known as a ‘Potts fracture of the ankle.’

“

**Counsel** “That is a well-recognized form of fracture, is it

not?”

**Doctor.** “Oh, yes.”

**Counsel (chancing it).** “Would you mind telling the

jury about when you had a fracture of this nature in your

regular practice, the last before this one?”

**Doctor (dodging).** “I should not feel at liberty to

disclose the names of my patients.”

**Counsel (encouraged).** “I am not asking for names and

secrets of patients far from it. I am only asking for the

date, doctor; but on your oath.”

**Doctor.** “I couldn’t possibly give you the date, sir.”

**Counsel (still feeling his way).** “Was it within the year

preceding this one?”

**Doctor (hesitating).** “I would not like to say, sir.”

**Counsel (still more encouraged).** “I am sorry to press

you, sir; but I am obliged to demand a positive answer

from you whether or not you had had a similar case of

‘Potts fracture of the ankle’ the year preceding this one?”

**Doctor.** “Well, no, I cannot remember that I had.”

**Counsel.** “Did you have one two years before?”

**Doctor.** “I cannot say.”

**Counsel (forcing the issue).** “Did you have one within

five years preceding the plaintiff’s case?”

**Doctor.** “I am unable to say positively.”

**Counsel,** (appreciating the danger of pressing the

inquiry further, but as a last resort). “Will you swear that

you ever had a case of ‘Potts fracture ‘within your own

practice before this one? I tell you frankly, if you say you

have, I shall ask you day and date, time, place, and

circumstance.”

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**Doctor (much embarrassed).** “Your question is an

embarrassing one. I should want time to search my

memory.”

**Counsel.** “I am only asking you for your best memory as

a gentleman, and under oath.”

**Doctor.** “If you put it that way, I will say I cannot now

remember of any case previous to the one in question,

excepting as a student in the hospitals.”

**Counsel.** “But does it not require a great deal of

practice and experience to attend successfully so serious

a fracture as that involving the ankle joint?”

**Doctor.** “Oh, yes.”

**Counsel.** “Well, doctor, speaking frankly, won’t you

admit that ‘Potts fractures ‘are daily being attended to in

our hospitals by experienced men, and the use of the

ankle fully restored in a few months’ time?”

**Doctor.** “That may be, but much depends upon the age

of the patient; and again, in some cases, nothing seems to

make the bones unite.”

**Counsel** (stooping under the table and taking up the

two lower bones of the leg attached and approaching the

witness). “Will you please take these, doctor, and tell the

jury whether in life they constituted the bones of a

woman’s leg or a man’s leg?”

**Doctor.** “It is difficult to tell, sir.”

**Counsel.** “What, can’t you tell the skeleton of a woman’s

leg from a man’s, doctor?”

**Doctor.** “Oh, yes, I should say it was a woman’s leg.”

**Counsel (smiling and looking pleased).** “So in your

opinion, doctor, this was a woman s leg?” [It was a

woman’s leg.]

**Doctor (observing counsel’s face and thinking he**

**had made a mistake).** “Oh, I beg your pardon, it is a

man’s leg, of course. I had not examined it carefully.”

By this time the jury were all sitting upright in their seats and

evinced much amusement at the doctor’s increasing

embarrassment.

**Counsel (still smiling).** “Would you be good enough

to tell the jury if it is the right leg or the left leg?”

**Doctor (quietly, but hesitatingly).** [It is very difficult

for the inexperienced to distinguish right from left] “This

is the right leg.”

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

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

leg.”

**Counsel.** “Were you not right the first time, doctor. Is it

not in fact the right leg?”

**Doctor.** “I don’t think so; no, it is the left leg.”

**Counsel** (again stooping and bringing from under the

table the bones of the foot attached together, and

handing it to the doctor). “Please put the skeleton of the

foot into the ankle joint of the bones you already have in

your hand, and then tell me whether it is the right or left

leg.”

**Doctor (confidently).** “Yes, it is the left leg, as I said

before.”

**Counsel (uproariously).** “But, doctor, don’t you see

you have inserted the foot into the knee joint? Is that the

way it is in life?”

The doctor, amid roars of laughter from the jury, in which the

entire court room joined, hastily readjusted the bones and sat

blushing to the roots of his hair. Counsel waited until the

laughter had subsided, and then said quietly, “I think I will not

trouble you further, doctor.”

This incident is not the least bit exaggerated; on the contrary,

the impression made by the occurrence is difficult to present

adequately on paper. Counsel on both sides proceeded to

sum up the case, and upon the part of the defence no allusion

whatsoever was made to the incident just described. The jury

appreciated the fact, and returned a verdict for the plaintiff for

$240. Next day the learned doctor wrote a four-page letter of

thanks and appreciation that the results of his “stage fright

“had not been spread before the jury in the closing speech.

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

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evidently framed his whole cross-examination of Mrs. Noeme

upon these letters, and made a final effort to introduce them

in evidence by calling Professor Ames, the well-known expert

in handwriting. He deposed to having closely studied the

letter in question, in conjunction with an admittedly genuine

specimen of the lady’s handwriting, and gave it as his opinion

that they were all written by the same hand. Mr. 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?”

**Witness.** “Oh, yes, sir; they might vary somewhat.”

**District Attorney** (taking a second letter from his files,

also folding over the signature and handing to the

witness). “Won’t you kindly take this letter, also, and

compare it with the others you have?”

**Witness** (examining the letter). “Yes, sir, that is a variety

of the same penmanship.”

**District Attorney.** “Would you be willing to give it as

your opinion that it was written by the same person?”

**Witness.** “I certainly would, sir.”

**District Attorney** (taking a third letter from his files,

again folding over the signature, and handing to the

witness). “Be good enough to take just one more sample I

don’t want to weary you and say if this last one is also in

the lady’s handwriting.”

**Witness** (appearing to examine it closely, leaving the

witness-chair and going to the window to complete his

inspection). “Yes, sir; you understand I am not swearing

to a fact, only an opinion.”

**District Attorney** (good-naturedly). “Of course I

understand; but is it your honest opinion as an expert,

that these three letters are all in the same handwriting?”

**Witness.** “I say yes, it is my honest opinion.”

**District Attorney.** “Now, sir, won’t you please turn

down the edge where I folded over the signature to the

first letter I handed you, and read aloud to the jury the

signature?”

**Witness** (unfolding the letter and reading triumphantly).

“Lila 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!”10

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 lawyers, including Mr. Ogden Hoffman,

associated with him upon the side of the government.

10 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 he use of the three letters in the

cross-examination.

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Recorder Vaux, of Philadelphia, was called to the witnessstand

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.”

**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, reexamined 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 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.11

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 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

11 “Pleasantries about Courts and Lawyers,” Edwards.

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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 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. Claflin & 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

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 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 “middleear 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 doctor

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

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$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 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 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 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 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.

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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 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 crossexamination

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 Me Lane Hamilton, who was present as

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.”

**Coitnsel.** “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” (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.”

**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:

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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?”

**Witness.** “I was.”

**Counsel.** “Did you see him about the courtroom 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?”

**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 coordinating power over the muscles which were

used in making that signature.”

In answer to a hypothetical question describing the 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:

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**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?”

**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?”

**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.”

**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

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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.”

**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 witnessstand

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.”

**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.”

**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.”

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**Counsel**. “So the defendant and you are quits again on that;

is that right?”

**Witness**. “I admit no slowness and hesitancy. I am 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.”

**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 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 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 today?” “Did you tell your

counsel about it?” “Were you intending to deceive him?”

“What was your object in trying to mislead the jury?”12

12 In Chapter XI (infra) is given in detail the cross-examination of

the witness Pigott by Sir Charles Russell, which affords a most

“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 enable you to

obtain from him truthful answers on subjects about which you

are not prepared to contradict him.

I have seen the most determined witness completely lose his

presence of mind after two or three well-directed blows given

at the very start of his cross-examination, and become as docile

in the examiner’s hands as if he were his own witness. This is

the time to lead the witness back to his original story and give

him the opportunity to tone it down or retint it, as it were;

possibly even to switch him over until he finds himself

supporting your side of the controversy. This taming of a

hostile witness, and forcing him to tell the truth against his will,

is one of the triumphs of the cross-examiner’s art. In a speech

to the jury, Choate once said of such a witness, “I brand him a

vagabond and a villain; they brought him to curse, and,

behold, he hath blessed us altogether.”

Some witnesses, under this style of examination, lose their

tempers completely, and if the examiner only keeps his own

and puts his questions rapidly enough, he will be sure to lead

the witness into such a web of contradictions as entirely to

discredit him with any fair-minded jury. A witness, in anger,

often forgets himself and speaks the truth. His passion

benumbs his power to deceive. Still another sort of witness

displays his temper on such occasions by becoming sullen; he

begins by giving evasive answers, and ends by refusing to

answer at all. He might as well go a little farther and admit his

perjury at once, so far as the effect on the jury is concerned.

striking example of the most effective use that can be made of

an incriminating letter.

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When, however, you have not the material at hand with which

to frighten the witness into correcting his perjured narrative,

and yet you have concluded that a cross-examination is

necessary, never waste time by putting questions which will

enable him to repeat his original testimony in the sequence in

which he first gave it. You can accomplish nothing with him

unless you abandon the train of ideas he followed in giving his

main story. Select the weakest points of his testimony and the

attendant circumstances he would be least likely to prepare

for. Do not ask your questions in logical order, lest he invent

conveniently as he goes along; but dodge him about in his

story and pin him down to precise answers on all the

accidental circumstances indirectly associated with his main

narrative. As he begins to invent his answers, put your

questions more rapidly, asking many unimportant ones to one

important one, and all in the same voice. If he is not telling the

truth, and answering from memory and associated ideas rather

than from imagination, he will never be able to invent his

answers as quickly as you can frame your questions, and at the

same time correctly estimate the bearing his present answer

may have upon those that have preceded it. If you have the

requisite skill to pursue this method of questioning, you will

be sure to land him in a maze of self-contradictions from which

he will never be able to extricate himself.

Some witnesses, though unwilling to perjure themselves, are

yet determined not to tell the whole truth if they can help it,

owing to some personal interest in, or relationship to, the

party on whose behalf they are called to testify. If you are

instructed that such a witness (generally a woman) is in

possession of the fact you want and can help you if she

chooses, it is your duty to draw it out of her. This requires

much patience and ingenuity. If you put the direct question

to her at once, you will probably receive a “don’t remember

“answer, or she may even indulge her conscience in a mental

reservation and pretend a willingness but inability to answer.

You must approach the subject by slow stages. Begin with

matters remotely connected with the important fact you are

aiming at. She will relate these, not perhaps realizing on the

spur of the moment exactly where they will lead her. Having

admitted that much, you can lead her nearer and nearer by

successive approaches to the gist of the matter, until you have

her in such a dilemma that she must either tell you what she

had intended to conceal or else openly commit perjury.

When she leaves the witness-chair, you can almost hear her

whisper to her friends, “I never intended to tell it, but that man

put me in such a position I simply had to tell or admit that I was

lying.”

In all your cross-examinations never lose control of the witness;

confine his answers to the exact questions you ask. He will try

to dodge direct answers, or if forced to answer directly, will

attempt to add a qualification or an explanation which will rob

his answer of the benefit it might otherwise be to you. And

lastly, most important of all, let me repeat the injunction to be

ever on the alert for a good place to stop. Nothing can be

more important than to close your examination with a triumph.

So many lawyers succeed in catching a witness in a serious

contradiction; but, not satisfied with this, go on asking

questions, and taper off their examination until the effect

upon the jury of their former advantage is lost altogether.

“Stop with a victory “is one of the maxims of cross-examination.

If you have done nothing more than to expose an attempt to

deceive on the part of the witness, you have gone a long way

toward discrediting him with your jury. Jurymen are apt to

regard a witness as a whole either they believe him or they

don’t. If they distrust him, they are likely to disregard his

testimony altogether, though much of it may have been true.

The fact that remains uppermost in their minds is that he

attempted to deceive them, or that he left the witness-stand

with a lie upon his lips, or after he had displayed his ignorance

to such an extent that the entire audience laughed at him.

Thereafter his evidence is dismissed from the case so far as

they are concerned.

Erskine once wasted a whole day in trying to expose to a jury

the lack of mental balance of a witness, until a physician who

was assisting him suggested that Erskine ask the witness

whether he did not believe himself to be Jesus Christ. This

question was put by Erskine very cautiously and with studied

humility, accompanied by a request for forgiveness for the

indecency of the question. The witness, who was at once

taken unawares, amid breathless silence and with great

solemnity exclaimed, “I am the Christ,” which soon ended the

case.13

13 “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 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-inchief

it seems that she will be more than a match for the crossexaminer,

it often works like a charm with the jury to practise

upon her what may be styled the silent cross-examination.

Rise suddenly, as if you intended to cross-examine. The

witness will turn a determined face toward you, preparatory

to demolishing you with her first answer. This is the signal for

you to hesitate a moment. Look her over good-naturedly and

as if you were in doubt whether it would be worth while to

question her and sit down. It can be done by a good actor in

such a manner as to be equivalent to saying to the jury,

“What’s the use? she is only a woman.”

John Philpot Curran, known as the most popular advocate of

his time, and second only to Erskine as a jury lawyer, once

indulged himself in this silent mode of cross-examination, but

made the mistake of speaking his thoughts aloud before he sat

down. “There is no use asking you questions, for I see the

villain in your face.” “Do you, sir?” replied the witness with a

smile, “I never knew before that my face was a looking-glass.”

Since the sole object of cross-examination is to break the force

of the adverse testimony, it must be remembered that a futile

attempt only strengthens the witness with the jury. It cannot

be too often repeated, therefore, that saying nothing will

frequently accomplish more than hours of questioning. It is

experience alone that can teach us which method to adopt.

An amusing instance of this occurred in the trial of Alphonse

Stephani, indicted for the murder of Clinton G. Reynolds, a

prominent lawyer in New York, who had had the management

and settlement of his father’s estate. The defence was

insanity; but the prisoner, though evidently suffering from the

early stages of some serious brain disorder, was still not insane

in the legal acceptation of the term. He was convicted of

murder in the second degree and sentenced to a life

imprisonment.

Stephani was defended by the late William F. Howe, Esq.,

who was certainly one of the most successful lawyers of his

time in criminal cases. Howe was not a great lawyer, but the

kind of witnesses ordinarily met with in such cases he usually

handled with a skill that was little short of positive genius.

Dr. Allan McLane Hamilton, the eminent alienist, had made a

special study of Stephani’s case, had visited him for weeks at

the Tombs Prison, and had prepared himself for a most

exhaustive exposition of his mental condition. Dr. Hamilton

had been retained by Mr. Howe, and was to be put forward

by the defence as their chief witness. Upon calling him to the

witness-chair, however, he did not question his witness so as

to lay before the jury the extent of his experience in mental

disorders and his familiarity with all forms of insanity, nor

develop before them the doctor’s peculiar opportunities for

judging correctly of the prisoner’s present condition. The

wily advocate evidently looked upon District Attorney

DeLancey Nicoll and his associates, who were opposed to

him, as a lot of inexperienced youngsters, who would crossexamine

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

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 crossexamination,

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. 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.

“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 heavy and you must

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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.

“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 might be a

case of murder after all, especially as there were two bulletwounds

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.

“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.’

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“There was sensation enough for the drop scene. More crossexamination

was necessary now to get rid of the business of

the scar, and some reexamination, 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 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 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 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.14 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.”15 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.

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.16 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 power of keeping some

considerations out of view, and thereby diminishes their force,

14 “Illusions,” Sully (in part).

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

16 “Mental Philosophy,” Carpenter (in part).

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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 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.17

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 rise in our

minds at such times will bear the stamp of our present modes

17 “Campbell’s Mental Physiology” (in great part).

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 mf 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.

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.18

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, 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

18 “Illusions,” p. 264 (in part).

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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 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,”19 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 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.”

19 Vol. II, p. 165.

A writer in the Quarterly Review20 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 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 unconsciously

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.

20 Quarterly Review, vol. ciii., p. 292.

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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. 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 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 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, 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.”21 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 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.”22

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

21 Proverbs xxvii. 19.

22 Austin Abbott, Esq., in The Daily Register, December, 1886.

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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 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 crossexamination,

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, counselor,” 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 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 respectability 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 crossexamination.

**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?”

**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**. “Hit it.”

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**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!”

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.”

**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 Hoar says: “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

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the ground which belonged to the tribunal he was

addressing.”23

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 courthouse.

“No gambler ever hankered for the feverish delight of the

gaming-table as Choate did for the absorbing game, halfchance,

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.”24

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 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

23 “Autobiography of Seventy Years,” Hoar.

24 “Autobiography of Seventy Years,” Hoar.

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 crossexamination,

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 crossexaminer’s

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

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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 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 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-examiner’s art. The lawyer who allows himself to

become the mouthpiece of the spite or revenge of his client

may inflict untold suffering and unwarranted torture. Such

questions may be within the legal rights of counsel in certain

instances, but the lawyer who allows himself to be led astray

by his zeal or by the solicitations of his client, at his elbow,

ready to make any sacrifice to humiliate his adversary, thereby

debauches his profession and surrenders his self-respect, for

which an occasional verdict, won from an impressionable jury

by such methods, is a poor recompense.

To warrant an investigation into matters irrelevant to the main

issues in the case, and calculated to disgrace the witness or

prejudice him in the eyes of the jury, they must at least be

such as tend to impeach his general moral character and his

credibility as a witness. There can be no sanction for

questions that tend simply to degrade the witness personally,

and which can have no possible bearing upon his veracity.

In all that has preceded we have gone upon the presumption

that the cross-examiner’s art would be used to further his

client’s cause by all fair and legitimate means, not by

misrepresentation, insinuation, or by knowingly putting a

witness in a false light before a jury. These methods

doubtless succeed at times, but he who practises them

acquires the reputation, with astounding rapidity, of being

“smart,” and finds himself discredited not only with the court,

but in some almost unaccountable way, with the very juries

before whom he appears. Let him once get the reputation of

being “unfair” among the habitués of the court-house, and his

usefulness to clients as a trial lawyer is gone forever. Honesty

is the best policy quite as much with the advocate as in any of

the walks of life.

Counsel may have in his possession material for injuring the

witness, but the propriety of using it often becomes a serious

question even in cases where its use is otherwise perfectly

legitimate. An outrage to the feelings of a witness may be

quickly resented by a jury, and sympathy take the place of

disgust. Then, too, one has to reckon with the judge, and the

indignation of a strong judge is not wisely provoked. Nothing

could be more unprofessional than for counsel to ask

questions which disgrace not only the witness, but a host of

innocent persons, for the mere reason that the client wishes

them to be asked.

There could be no better example of the folly of yielding to a

client’s hatred or desire for revenge than the outcome of the

famous case in which Mrs. Edwin Forrest was granted a

divorce against her husband, the distinguished tragedian.

Mrs. Forrest, a lady of culture and refinement, demanded her

divorce upon the ground of adultery, and her husband had

made counter-charges against her. At the trial (1851) Charles

O’Connor, counsel for Mrs. Forrest, called as his first witness

the husband himself, and asked him concerning his infidelities

in connection with a certain actress. John Van Buren, who

appeared for Edwin Forrest, objected to the question on the

ground that it required his client to testify to matters that

might incriminate him. The question was not allowed, and the

husband left the witness-stand. After calling a few

unimportant witnesses, O’Connor rested the case for plaintiff

without having elicited any tangible proof against the

husband. Had a motion to take the case from the jury been

made at this time, it would of necessity have been granted,

and the wife’s suit would have failed. It is said that when Mr.

Van Buren was about to make such a motion and end the case,

Mr. Forrest directed him to proceed with the testimony for the

defence, and develop the nauseating evidence he had

accumulated against his wife. Van Buren yielded to his client’s

wishes, and for days and weeks continued to call witness after

witness to the disgusting details of Mrs. Forrest’s alleged

debauchery. The case attracted great public attention and

was widely reported by the newspapers. The public, as so

often happens, took the opposite view of the evidence from

the one the husband had anticipated. Its very revolting

character aroused universal sympathy on the wife’s behalf.

Mr. O’Connor soon found himself flooded with offers of

evidence, anonymous and otherwise, against the husband,

and when Van Buren finally closed his attack upon the wife,

O’Connor was enabled, in rebuttal, to bring such an avalanche

of convincing testimony against the defendant that the jury

promptly exonerated Mrs. Forrest and granted her the

divorce. At the end of the first day’s trial the case could have

been decided in favor of the husband, had a simple motion to

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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.25

The abuse of cross-examination has been widely discussed in

England in recent years, partly in consequence of the crossexamination

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 bullies,” and complained of as

“lending the authority of their example to the abuse of crossexamination

to credit which was quickly followed by barristers

of inferior positions, among whom the practice was spreading

of assailing witnesses with what was not unfairly called a

system of innuendoes, suggestions, and bullying from which

sensitive persons recoil.” And Mr. Charles Gill, one of the

many imitators of Russell’s domineering style, was criticised as

“bettering the instructions of his elders.”

The complaint’ against Russell was that by his practices as

displayed in the Osborne case robbery of jewels not only

may a man’s, or a woman’s, whole past be laid bare to

malignant comment and public curiosity, but there is no means

afforded by the courts of showing how the facts really stood

or of producing evidence to repel the damaging charges.

Lord Bramwell, in an article published originally in Nineteenth

Century for February, 1892, and republished in legal

periodicals all over the world, strongly defends the methods

of Sir Charles Russell and his imitators. Lord Bramwell claimed

to speak after an experience of forty-seven years’ practice at

the Bar and on the bench, and long acquaintance with the legal

profession.

“A judge’s sentence for a crime, however much repented of, is

not the only punishment; there is the consequent loss of

character in addition, which should confront such a person

whenever called to the witness stand.” “Women who carry on

illicit intercourse, and whose husbands die of poison, must not

complain at having the veil that ordinarily screens a woman’s

life from public inquiry rudely torn aside.” “It is well for the

25 “Extraordinary Cases,” H. L. Clinton.

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 crossexamination

in our English courts. Watch the tremor that

passes the frames of many persons as they enter the witnessbox.

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.”26

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.27

26 “Irish Law Times,” 1874

27 Sir James Stephen’s Evidence Act

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A judge, however, to whose discretion such questions are

addressed in the first instance, can have but an imperfect

knowledge of either side of the case before him. He cannot

always be sure, without hearing all the facts, whether the

questions asked would or would not tend to develop the

truth rather than simply degrade the Witness. Then, again,

the mischief is often done by the mere asking of the question,

even if the judge directs the witness not to answer. The

insinuation has been made publicly the dirt has been thrown.

The discretion must therefore after all be largely left to the

lawyer himself. He is bound in honor, and out of respect to

his profession, to consider whether the question ought in

conscience to be asked whether in his own honest judgment it

renders the witness unworthy of belief under oath before he

allows himself to ask it. It is much safer, for example, to

proceed upon the principle that the relations between the

sexes has no bearing whatever upon the probability of the

witness telling the truth, unless in the extreme case of an

abandoned woman.

In criminal prosecutions the district attorney is usually

regarded by the jury much in the light of a judicial officer and,

as such, unprejudiced and impartial. Any slur or suggestion

adverse to a prisoner’s witness coming from this source,

therefore, has an added power for evil, and is calculated to do

injustice to the defendant. There have been many flagrant

abuses of this character in the criminal courts of our own city.

“Is it not a fact that you were not there at all?” “Has all this

been written out for you?” “Is it not a fact that you and your

husband have concocted this whole story?” “You have been a

witness for your husband in every lawsuit he has had, have

you not?” were all questions that were recently criticised by

the court, on appeal, as “innuendo,” and calculated to

prejudice the defendant by the Michigan Supreme Court in

the People vs. Cahoon and held sufficient, in connection with

other similar errors, to set the conviction aside.

Assuming that the material with which you propose to assail

the credibility of a witness fully justifies the attack, the

question then arises, How to use this material to the best

advantage? The sympathies of juries are keen toward those

obliged to confess their crimes on the witness-stand. The

same matters may be handled to the advantage or positive

disadvantage of the cross-examiner. If you hold in your

possession the evidence of the witness’s conviction, for

example, but allow him to understand that you know his

history, he will surely get the better of you. Conceal it from

him, and he will likely try to conceal it from you, or lie about it if

necessary. “I don’t suppose you have ever been in trouble,

have you?” will bring a quick reply, “What trouble?” “Oh, I

can’t refer to any particular trouble. I mean generally, have you

ever been in jail? “The witness will believe you know nothing

about him and deny it, or if he has been many times convicted,

will admit some small offence and attempt to conceal

everything 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 crossexamination

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 character. It was

his striking personality, added to his skill and adroitness,

which seemed to give him his over, whelming influence over

the witnesses whom he cross-examined. Russell is said to

have had a wonderful faculty for using the brain and

knowledge of other men. Others might possess a knowledge

of the subject far in excess of Russell, but he had the

reputation of being able to make that knowledge valuable and

use it in his examination of a witness in a way altogether

unexpected and unique.

Unlike Rufus Choate, “The Ruler of the Twelve,” and by far

the greatest advocate of the century on this side of the water,

Russell read but little. He belonged to the category of famous

men who “neither found nor pretended to find any real solace

in books.” With Choate, his library of some eight thousand

volumes was his home, and “his authors were the loves of his

life.” Choate used to read at his meals and while walking in the

streets, for books were his only pastime. Neither was Russell

a great orator, while Choate was ranked as “the first orator of

his time in any quarter of the globe where the English

language was spoken, or who was ever seen standing before a

jury panel.”

Both Russell and Choate were consummate actors; they were

both men of genius in their advocacy. Each knew the precise

points upon which to seize; each watched every turn of the

jury, knew at a glance what was telling with them, knew how to

use to the best advantage every accident that might arise in

the progress of the case.

“One day a junior was taking a note in the orthodox fashion.

Russell was taking no note, but he was thoroughly on the alert,

glancing about the court, sometimes at the judge, sometimes

at the jury, sometimes at the witness or the counsel on the

other side. Suddenly he turned to the junior and said, ‘What

are you doing?’ ‘Taking a note,’ was the answer. ‘What the

devil do you mean by saying you are taking a note? Why

don’t you watch the case?’ he burst out. He had been

‘watching’ the case. Something had happened to make a

change of front necessary, and he wheeled his colleagues

around almost before they had time to grasp the new

situation.”28

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 deepset

eyes, widely opened, and that searching glance which

pierced the very soul. ‘Russell,’ said a member of the

Northern Circuit, ‘produced 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 crossexamination.

‘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 reconnoitering 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 counselor at the Boston Bar with decided

disapprobation, Choate said, ‘This man goes at a witness in

such a way that he inevitably gets the jury all on the side of the

28 “Life of Lord Russell,” Barry O’Brien.

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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.”29

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 of his case, he then puts forth the

outline of his grounds of argument. He plays the overture,

which hints at or announces all the airs of the coming opera. All

the rest is mere filling up: answering objections, giving one

juryman little arguments with which to answer the objections

of his fellows, etc. Indeed, this may be taken as a fixed rule,

that the popular mind can never be vigorously addressed,

deeply moved, and stirred and fixed more than one hour in

any single address.”

What Choate was to America, and Erskine, and later Russell, to

England, John Philpot Curran was to Ireland. He ranked as a

jury lawyer next to Erskine. The son of a peasant, he became

Master of Rolls for Ireland in 1806. He had a small, slim body,

a stuttering, harsh, shrill voice, originally of such a diffident

nature that in the midst of his first case he became speechless

and dropped his brief to the floor, and yet by perseverance

and experience he became one of the most eloquent and

powerful forensic advocates of the world. As a cross-examiner

it was said of Curran that “he could unravel the most ingenious

web which perjury ever spun, he could seize on every fault

and inconsistency, and build on them a denunciation terrible

in its earnestness.”30

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 concerned. Scarlett used to wheedle

the juries over the weak places in his case. Choate would rush

29 “Reminiscences of Rufus Choate,” Parker

30 “Life Sketches of Eminent Lawyers,” Gilbert J. Clark.

them right over with that enthusiasm which he put into

everything, “with fire in his eye and fury on his tongue.”

Scarlett would level himself right down to each juryman, while

he flattered and won them. In his cross-examinations “he

would take those he had to examine, as it were by the hand,

made them his friends, entered into familiar conversation with

them, encouraged them to tell him what would best answer

his purpose, and thus secured a victory without appearing to

commence a conflict.”

A story is told about Scarlett by Justice Wightman who was

leaving his court one day and found himself walking in a crowd

alongside a countryman, whom he had seen, day by day,

serving as a juryman, and to whom he could not help speaking.

Liking the look of the man, and finding that this was the first

occasion on which he had been at the court, Judge Wightman

asked him what he thought of the leading Counsel. “Well,”

said the countryman, “that lawyer Brougham be a wonderful

man, he can talk, he can, but I don’t think nowt of Lawyer

Scarlett.” “Indeed!” exclaimed the judge, “you surprise me,

for you have given him all the verdicts.” “Oh, there’s nowt in

that,” was the reply, “he be so lucky, you see, he be always on

the right side.” 31

Choate also had a way of getting himself “into the jury-box,”

and has been known to address a single jury man, who he

feared was against him, for an hour at a time. After he had

piled up proof and persuasion all together, one of his favorite

expressions was, “But this is only half my case, gentlemen, I go

now to the main body of my proofs.”

Like Scarlett, Erskine was of medium height and slender, but

he was handsome and magnetic, quick and nervous, “his

motions resembled those of a blood horse < as light, as limber,

as much betokening strength and speed.” He, too, lacked the

advantage of a college education and was at first painfully

unready of speech. In his maiden effort he would have

abandoned his case, had he not felt, as he said, that his

children were tugging at his gown. “In later years,” Choate

once said of him, “he spoke the best English ever spoken by

an advocate.” Once, when the presiding judge threatened to

commit him for contempt, he replied, “Your Lordship may

proceed in what manner you think fit; I know my duty as well

as your Lordship knows yours.” His simple grace of diction,

quiet and natural passion, was in marked contrast to Rufus

Choate, whose delivery has been described as “a musical flow

of rhythm and cadence, more like a long, rising, and swelling

song than a talk or an argument.” To one of his clients who was

dissatisfied with Erskine’s efforts in his behalf, and who had

written his counsellor on a slip of paper, “I’ll be hanged if I

don’t plead my own cause,” Erskine quietly replied, “You’ll be

hanged if you do.” Erskine boasted that in twenty years he

had never been kept a day from court by ill health. And it is

said of Curran that he has been known to rise before a jury,

31 “Curiosities of Law and Lawyers.”

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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.”32 Sir Richard Webster was another great crossexaminer.

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

sophistry, 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 tweedledee, and a

discourse on ‘the fixation of points ‘so deep and fine as to lose

itself in obscurity, showed the jury there was a heaven-wide

difference between them. ‘But,’ said Mr. Webster, and his

great eyes opened wide and black, as he stared at the big

twin wheels before him, ‘gentlemen of the jury, there they are

look at ‘em; ‘and as he pronounced this answer, in tones of vast

volume, the distorted wheels seemed to shrink back again into

their original similarity, and the long argument on the ‘fixation

of points ‘died a natural death. It was an example of the

ascendency of mere character over mere intellectuality; but so

much greater, nevertheless, the intellectuality? 33

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 been,

probably, but few equals of Judge William Fuller ton as a

cross-examiner. He was famous for his calmness and mildness

32 “Life Sketches of Eminent Lawyers,” Clark.

33 “Reminiscences of Rufus Choate,” Parker.

of manner, his rapidly repeated questions; his sallies of wit

interwoven with his questions, and an ingenuity of method

quite his own.

Fullerton’s cross-examinations in the celebrated Tilton vs.

Henry Ward Beecher case gave him an international

reputation, and were considered the best ever heard in this

country. And yet these very examinations, laborious and

brilliant, were singularly unproductive of results, owing

probably to the unusual intelligence and shrewdness of the

witnesses themselves. The trial as a whole was by far the most

celebrated of its kind the New York courts have ever

witnessed. One of the most eminent of Christian preachers

was charged with using the persuasive powers of his

eloquence, strengthened by his religious influence, to alienate

the affections and destroy the probity of a member of his

church a devout and theretofore pure-souled woman, the wife

of a long-loved friend. He was charged with continuing the

guilty relation during the period of a year and a half, and of

cloaking the offence to his own conscience and to hers under

specious words of piety; of invoking first divine blessing on it,

and then divine guidance out of it; and finally of adding

perjury to seduction in order to escape the consequences.

His accusers, moreover, Mr. Tilton and Mr. Moulton, were

persons of public reputation and honorable station in life.

The length and complexity of Fullerton’s cross-examinations

preclude any minute mention of them here. Once when he

found fault with Mr. Beecher for not answering his questions

more freely and directly, the reply was frankly made, “I am

afraid of you!”

While cross-examining Beecher about the celebrated “ragged

letter,” Fullerton asked why he had not made an explanation to

the church, if he was innocent. Beecher answered that he was

keeping his part of the compact of silence, and added that he

did not believe the others were keeping theirs. There was

audible laughter throughout the court room at this remark, and

Judge Neilson ordered the court officer to remove from the

court room any person found offending “Except the counsel,”

spoke up Mr. Fullerton. Later the cross-examiner exclaimed

impatiently to Mr. Beecher that he was bound to find out all

about these things before he got through, to which Beecher

retorted, “I don’t think you are succeeding very well.”

**Mr. Fullerton** (in a voice like thunder). “Why did you

not rise up and deny the charge?”

**Mr. Beecher** (putting into his voice all that marvellous

magnetic force, which so distinguished him from other

men of his time). “Mr. Fullerton, that is not my habit of

mind, nor my manner of dealing with men and things.”

**Mr. Fullerton.** “So I observe. You say that Theodore

Tilton’s charge of intimacy with his wife, and the charges

made by your church and by the committee of your

church, made no impression on you?”

**58** Francis H. Wellman

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**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 its a sermon.”

**Mr. Fullerton.** “I would do so if I thought I could convert

brother Sherman.”

**Mr. Beecher** (quietly). “I will be happy to give you the

use of my pulpit.”

**Mr. Fullerton** (laughing). “Brother Sherman is the only

audience I shall want.”

**Mr. Beecher** (sarcastically). “Perhaps he is the only

audience you can get.”

**Mr. Fullerton.** “If I succeed in converting brother

Sherman, I will consider my work as a Christian minister

complete.”

Mr. Fullerton then read a passage from the sermon, the effect

of which was that if a person commits a great sin, and the

exposure of it would cause misery, such a person would not

be justified in confessing it, merely to relieve his own

conscience. Mr. Beecher admitted that he still considered that

“sound doctrine.”

At this point Mr. Fullerton turned to the court, and pointing to

the clock, said, “Nothing comes after the sermon, I believe, but

the benediction.” His Honor took the hint, and the

proceedings adjourned.34

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 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

preeminent in the quality of his humor and keenness of satire.

His whole conduct of a case, his treatment of witnesses, of the

court, of opposing counsel, and especially of the jury, were so

irresistibly fascinating and winning that he carried everything

before him. One would emerge from a three weeks’ contest

with Choate in a state almost of mental exhilaration, despite

the jury’s verdict.

It was not so with the late Edward C. James; a contest with him

meant great mental and physical fatigue for his opponent.

James was ponderous and indefatigable. His crossexaminations

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

34 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.

The Art of Cross-Examination **59**

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case until the foreman of the jury told him so. Even then he

would want the jury polled to see if there was not some

mistake. James never smiled except in triumph and when his

opponent frowned. When Mr. Choate smiled, you couldn’t

help smiling with him. During the last ten years of his life

James was found on one side or the other of most of the

important cases that were tried. He owed his success to his

industrious and indefatigable qualities as a fighter; not, I think,

to his art.

James T. Brady was called “the Curran of the New York Bar.”

His success was almost entirely due to his courtesy and the

marvellous skill of his cross-examinations. He had a serene,

captivating manner in court, and was one of the foremost

orators of his time. He has the proud record of having

defended fifty men on trial for their lives, and of saving every

one of them from the gallows.

On the other hand, William A. Beech, “the Hamlet of the

American Bar,” was a poor cross-examiner. He treated all his

witnesses alike. He was methodical, but of a domineering

manner. He was slow to attune himself to an unexpected turn

in a case he might be conducting. He lost many cases and was

not fitted to conduct a desperate one. It was as a court orator

that he was preeminent. 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-examination 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.”35

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

35 “Extraordinary Cases,” Henry Lauran Clinton.

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 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 steamengine,

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 crossexamination

was his chief weapon. Here he was fertile in

resource and stratagem to a degree attained by few others.

Choate had mastered all the little tricks of the trial lawyer, but

he attained also to the grander thoughts and the logical

powers of the really great advocate. Butler’s success

depended upon zeal, combined with shrewdness and not

overconscientious trickery.

In his autobiography, Butler gives several examples of what he

was pleased to call his legerdemain, and to believe were

illustrations of his skill as a cross-examiner. They are quoted

from “Butler’s Book,” but are not reprinted as illustrations of

the subtler forms of cross-examination, but rather as indicative

of the tricks to which Butler owed much of his success before

country juries.

**60** Francis H. Wellman

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“When I was quite a young man I was called upon to defend a

man for homicide. He and his associate had been engaged in

a quarrel which proceeded to blows and at last to stones. My

client, with a sharp stone, struck the deceased in the head on

that part usually called the temple. The man went and sat

down on the curbstone, the blood streaming from his face,

and shortly afterward fell over dead.

“The theory of the government was that he died from the

wound in the temporal artery. My theory was that the man

died of apoplexy, and that if he had bled more from the

temporal artery, he might have been saved a wide enough

difference in the theories of the cause of death.

“Of course to be enabled to carry out my proposition I must

know all about the temporal artery, its location, its functions, its

capabilities to allow the blood to pass through it, and in how

short a time a man could bleed to death through the temporal

artery; also, how far excitement in a body stirred almost to

frenzy in an embittered conflict, and largely under the

influence of liquor on a hot day, would tend to produce

apoplexy. I was relieved on these two points in my subject,

but relied wholly upon the testimony of a surgeon that the

man bled to death from the cut on the temporal artery from a

stone in the hand of my client. That surgeon was one of those

whom we sometimes see on the stand, who think that what

they don’t know on the subject of their profession is not

worth knowing. He testified positively and distinctly that

there was and could be no other cause for death except the

bleeding from the temporal artery, and he described the

action of the bleeding and the amount of blood discharged.

“Upon all these questions I had thoroughly prepared myself.

**“Mr. Butler.** ‘Doctor, you have talked a great deal about

the temporal artery; now will you please describe it and

its functions? I suppose the temporal artery is so called

because it supplies the flesh on the outside of the skull,

especially that part we call the temples, with blood.’

**“Witness.** ‘Yes; that is so.’

**“Mr. Butler.** ‘Very well. Where does the temporal

artery take its rise in the system? Is it at the heart?”

**“Witness.** ‘No, the aorta is the only artery leaving the

heart which carries blood toward the head. Branches

from it carry the blood up through the opening into the

skull at the neck, and the temporal artery branches from

one of these.’

**“Mr. Butler.** ‘Doctor, where does it branch off from it?

on the inside or the outside of the skull?’

**“Witness.** ‘On the inside.’

**“Mr. Butler.** ‘Does it have anything to do inside with

supplying the brain?’

**“Witness.** ‘No.’

**“Mr. Butler.** ‘Well, doctor, how does it get outside to

supply the head and temples?’

**“Witness.** ‘Oh, it passes out through its appropriate

opening in the skull.’

**“Mr. Butler.** ‘Is that through the eyes?’

**“Witness.** ‘No.’

**“Mr. Butler.** ‘The ears?’

**“Witness.** ‘No.’

**“Mr. Butler.** ‘It would be inconvenient to go through

the mouth, would it not, doctor?’

“Here I produced from my green bag a skull. ‘I cannot find any

opening on this skull which I think is appropriate to the

temporal artery. Will you please point out the appropriate

opening through which the temporal artery passes from the

inside to the outside of the skull?’

“He was utterly unable so to do.

**“Mr. Butler.** ‘Doctor, I don’t think I will trouble you any

further; you can step down.’ He did so, and my client’s

life was saved on that point.

“The temporal artery doesn’t go inside the skull at all.

“I had a young client who was on a railroad car when it was

derailed by a broken switch. The car ran at considerable

speed over the cross-ties for some distance, and my client was

thrown up and down with great violence on his seat. After the

accident, when he recovered from the bruising, it was found

that his nervous system had been wholly shattered, and that

he could not control his nerves in the slightest degree by any

act of his will. When the case came to trial, the production of

the pin by which the position of the switch was controlled,

twothirds 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.

The Art of Cross-Examination **61**

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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.’ ” 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 va-Tepa?’

**“Witness.** ‘It may be.’

**“Mr. Butler.** ‘Don’t say it may, doctor; isn’t it? Isn’t an

exact translation of the Greek word vcrre/m the English

word “womb “?’

**“Witness.** ‘You are right, sir.’

**“Mr. Butler.** ‘Well, doctor, this morning when you

examined this young man here,’ pointing to my client, ‘did

you find that he had a womb? I was not aware of it

before, but I will have him examined over again and see if I

can find it. That is all, doctor; you may step down.’ ‘

Robert Ingersoll took part in numerous noted lawsuits in all

parts of the country. But he was almost helpless in court

without a competent junior. He was a born orator if ever there

was one. Henry Ward Beecher regarded him as “the most

brilliant speaker of the English tongue in any land on the

globe.” He was not a profound lawyer, however, and hardly

the equal of the most mediocre trial lawyer in the examination

of witnesses. Of the art of cross-examining witnesses he knew

practically nothing. His definition of a lawyer, to use his own

words, was “a sort of intellectual strumpet.” “My ideal of a

great lawyer,” he once wrote, “is that great English attorney

who accumulated a fortune of a million pounds, and left it all in

his will to make a home for idiots, declaring that he wanted to

give it back to the people from whom he took it.”

Judge Walter H. Sanborn relates a conversation he had with

Judge Miller of the United States Court about Ingersoll. “Just

after Colonel Ingersoll had concluded an argument before Mr.

Justice Miller, while on Circuit I came into the court and

remarked to Judge Miller that I wished I had got there a little

sooner, as I had never heard Colonel Ingersoll make a legal

argument.” --- “Well,” said Judge Miller, “you never will.”36

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 infantry 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 kino;.

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

36 “Life Sketches of Eminent Lawyers,” Gilbert J. Clark.

**62** Francis H. Wellman

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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 crossexaminers,

as exhibited in actual practice, in the crossexamination

of important witnesses in famous trials.

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 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

recordo (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 recordo 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 excitement, 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 Eugenie 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.37

37 When 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.

**64** Francis H. Wellman

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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 habitues of the court-house. To quote

from the daily press, “All those who cannot find seats within

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 20th Street 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.”

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

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

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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 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 20th 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.”

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 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 ill. He

said that my letter had made him sick, and he asked, ‘What

could induce you to write such a letter, Eugenie? 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.

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“I laughed at the idea, but finally consented to leave 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 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 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 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 20th Street and Broadway?

The plaintiff had stated in substance that after three weeks

the defendant proposed marriage and she accepted 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

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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 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 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 letter38 were false, and judging from

statements 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.** “Eugenie 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.”

38 “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 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.** “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.”

**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: ---

**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.”

**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

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pitfalls which she confidingly 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 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, 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 exanimation, 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 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.”

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**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 20th

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?”

**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. 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.”

**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.”

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**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?”

**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?”

**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?”

**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

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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?’

**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

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:39

**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.”

**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?”

39 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.** “You yourself.”

**Miss Martinez**. “I never went to that jewellery store but

once in my life arid 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 stepfather’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’?”40

**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?”

**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

40 Mr. Choate took as one theme for his summing up: “The

woman who possesses an alias in the big cities of the world.”

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.41

**\* \* \* \* \* \* \* \* \* \* \* \***

**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.”

**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.”

41 The jury remained locked up for twenty-six hours unable to

agree upon a verdict, several of them voting for large damages.

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**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

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. CJwate. “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.”

**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.”

**Mr. Choate**. “How often did Mr. del Valle visit you at

this time?”

**Miss Martinez**. “Four or five times a week.”

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**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?”

**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 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.

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

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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 juryman 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.42 She

said 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 crossquestioned

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

42 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 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.”

seen by the bell-boys in her room at the Hotel Royal, at which

times the door of her bedroom 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, 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’?”

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**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.”43

**Mr. Choate**. “And you do not know how or by whom

your name was registered in that hotel book?”

**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 assumed

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:

43 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?”

“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.”

**Mr. Choate**. “I wish you would tell us again precisely

what it was that induced you to go to this strange hoteJ

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?”

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**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?”

**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.”44

**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

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.”

44 All 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?”

**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.”

**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

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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 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 I4th of January, when you first

made Mr. del Valle’s acquaintance, he was uniformly kind and

courteous?”

**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.”45

**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?”

45 Mr. Choate had in his hand at the time of this examination a

letter written by Adele, the plaintiffs 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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**Miss Martinez**. “Immediately after.”

**Mr. Choate**. “Did you go alone?”

**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?\* 1

**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.”

**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 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?”

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**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?”

**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.”

**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.”

**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?”

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**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? Y ‘

**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.”

**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 gentletempered

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?”

**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 tc Mr. del

Valle.”

**Mr. Choate**. “Everything was agreeable and pleasant, was

it?”

**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?”

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**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.”

**\* \* \* \* \* \* \* \* \* \* \* \***

**Mr. Choate**. “Miss Martinez, did you write a letter, dated

September 8, to Mr. del Valle?”46

**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.”

46 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.

**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?”

**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

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of those four days of June with all the previous hours of your

life?”

**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?”

**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? 5:

**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?”

**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.”

**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 matinee?”

**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 matinees, 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?”

**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?”

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**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.”

**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 juryman, 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 Solan’s for all sorts of

purposes. Men go there with ladies, ladies with ladies, men

with men, theatre parties, family parties, matinee 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 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 matinee.”47

47 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 no suggestion of

evidence that anybody saw these parties together acting

towards each other as though they were engaged.”

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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?”

**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

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 case is also an admirable illustration of the

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 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 crossexamine

him. Mr. O’Brien writes: “Pigott’s evidence in chief, so

far as the letter was concerned, came practically to this: he had

been employed by the Irish Loyal and Patriotic Union to hunt

up documents which might incriminate Parnell, and he had

bought the facsimile letter, with other letters, in Paris from an

agent of the Clan-na-Gael, who had no objection to injuring

Parnell for a valuable consideration....

“During the whole week or more Russell had looked pale,

worn, anxious, nervous, distressed. He was impatient,

irritable, at times disagreeable. Even at luncheon., half an hour

before, he seemed to be thoroughly out of sorts, and gave

you the idea rather of a young junior with his first brief than of

the most formidable advocate at the Bar. Now all was

changed. As he stood facing Pigott, he was a picture of

calmness, self-possession, strength; there was no sign of

impatience or irritability; not a trace of illness, anxiety, or care; a

slight tinge of color lighted up the face, the eyes sparkled, and

a pleasant smile played about the mouth. The whole bearing

and manner of the man, as he proudly turned his head toward

the box, showed courage, resolution, confidence. Addressing

the witness with much courtesy, while a profound silence fell

upon the crowded court, he began: ‘Mr. Pigott, would you be

good enough, with my Lords’ permission, to write some

words on that sheet of paper for me? Perhaps you will sit

down in order to do so?’ A sheet of paper was then handed

to the witness. I thought he looked for a moment surprised.

This clearly was not the beginning that he had expected. He

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hesitated, seemed confused. Perhaps Russell observed it. At

all events he added quickly:

“‘Would you like to sit down?’

“‘Oh, no, thanks,’ replied Pigott, a little flurried.

**“The President.** ‘Well, but I think it is better that you

should sit down. Here is a table upon which you can

write in the ordinary way the course you always pursue.’

“Pigott sat down and seemed to recover his equilibrium.

**“Russell.** ‘Will you write the word “livelihood”?’

“Pigott wrote.

**“Russell.** ‘Just leave a space. Will you write the word

“likelihood”?’

“Pigott wrote.

**“Russell.** ‘Will you write your own name? Will you

write the word “proselytism,” and finally (I think I will not

trouble you at present with any more) “Patrick Egan” and

“P. Egan”?’

“He uttered these last words with emphasis, as if they

imported something of great importance. Then, when Pigott

had written, he added carelessly, ‘There is one word I had

forgotten. Lower down, please, leaving spaces, write the

word “hesitancy.” Then, as Pigott was about to write, he

added, as if this were the vital point, ‘with a small “h.” Pigott

wrote and looked relieved.

**“Russell.** ‘Will you kindly give me the sheet?’

“Pigott took up a bit of blotting paper to lay on the sheet,

when Russell, with a sharp ring in his voice, said rapidly, ‘Don’t

blot it, please.’ It seemed to me that the sharp ring in Russell’s

voice startled Pigott. While writing he had looked composed;

now again he looked flurried, and nervously handed back the

sheet. The attorney general looked keenly at it, and then said,

with the air of a man who had himself scored, ‘My Lords, I

suggest that had better be photographed, if your Lordships

see no objection.’

**“Russell.** (turning sharply toward the attorney general,

and with an angry glance and an Ulster accent, which

sometimes broke out when he felt irritated). ‘Do not

interrupt my cross-examination with that request.’

“Little did the attorney general at that moment know that, in

the ten minutes or quarter of an hour which it had taken to ask

these questions, Russell had gained a decisive advantage.

Pigott had in one of his letters to Pat Egan spelt ‘hesitancy

‘thus, ‘hesitency.’ In one of the incriminatory letters ‘hesitancy

‘was so spelt; and in the sheet now handed back to Russell,

Pigott had written ‘hesitency,’ too. In fact it was Pigott ‘s

spelling of this word that had put the Irish members on his

scent. Pat Egan, seeing the word spelt with an ‘e ‘in one of the

incriminatory letters, had written to Parnell, saying in effect,

‘Pigott is the forger. In the letter ascribed to you “hesitancy ‘is

spelt “hesitency.” That is the way Pigott always spells the

word.’ These things were not dreamt of in the philosophy of

the attorney general when he interrupted Russell’s crossexamination

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 yth March, 1887?’

**“Pigott** (sturdily). ‘I do not know.’

**“Russell.** (amiably). ‘Well, you may assume that is the

date.’

**“Pigott** (carelessly). ‘I suppose so.’

**“Russell..** ‘And you were aware of the intended

publication of the correspondence, the incriminatory

letters?’

**“Pigott** (firmly). ‘No, I was not at all aware of it.’

**“Russell.** (sharply, and with the Ulster ring in his voice).

‘What?’

**“Pigott** (boldly). ‘No, certainly not.’

**\* \* \* \* \* \* \* \* \* \* \* \***

**“Russell.** ‘Were you not aware that there were grave

charges to be made against Mr. Parnell and the leading

members of the Land League?’

**“Pigott** (positively). ‘I was not aware of it until they

actually commenced.’

**“Russell.** (again with the Ulster ring). ‘What?’

**“Pigott** (defiantly). ‘I was not aware of it until the

publication actually commenced.’

**“Russell.** (pausing, and looking straight at the witness).

‘Do you swear that?’

**“Pigott** (aggressively). ‘I do.’

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**“Russell.** (making a gesture with both hands, and looking

toward the bench). ‘Very good, there is no mistake about

that.’

“Then there was a pause; Russell placed his hands beneath

the shelf in front of him, and drew from it some papers ---

Pigott, the attorney general, the judges, every one in court

looking intently at him the while. There was not a breath, not a

movement. I think it was the most dramatic scene in the whole

cross-examination, abounding as it did in dramatic scenes.

Then, handing Pigott a letter, Russell said calmly: ---

“‘Is that your letter? Do not trouble to read it; tell me if it is

your letter.’

“Pigott took the letter, and held it close to his eyes as if

reading it.

**“Russell.** (sharply). \* Do not trouble to read it.’

**“Pigott.** ‘Yes, I think it is.’

**“Russell.** (with a frown). ‘Have you any doubt of it?’

**“Pigott.** ‘No.’

**“Russell.** (addressing the judges). ‘My Lords, it is from

Anderton’s Hotel, and it is addressed by the witness to

Archbishop Walsh. The date, my Lords, is the 4th of

March, three days before the first appearance of the first

of the articles, “Parnellism and Crime.”

“He then read: ----

“‘Private and confidential.’

“‘My Lord: --- The importance of the matter about which I

write will doubtless excuse this intrusion on your Grace’s

attention. Briefly, I wish to say that I have been made aware of

the details of certain proceedings that are in preparation with

the object of destroying the influence of the Parnellite party in

Parliament.’

“Having read this much Russell turned to Pigott and said:

“‘What were the certain proceedings that were in

preparation?’

**“Pigott.** ‘I do not recollect.’

**“Russell.** (resolutely). ‘Turn to my Lords and repeat the

answer.’

**“Pigott.** ‘I do not recollect’

**“Russell.** ‘You swear that --- writing on the 4th of March,

less than two years ago?’

**“Pigott.** ‘Yes.’

**“Russell.** ‘You do not know what that referred to? \*

**“Pigott.** ‘I do not really.’

**“Russell.** ‘May I suggest to you?’

**“Pigott.** ‘Yes, you may.’

**“Russell.** ‘Did it refer to the incriminatory letters among

other things?’

**“Pigott.** ‘Oh, at that date? No, the letters had not been

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

**“Russell** (quietly and courteously). ‘I do not want to

confuse you at all, Mr. Pigott.’

**“Pigott.** ‘Would you mind giving me the date of that

letter?’

**“Russell.** ‘The 4th of March.’

**“Pigott.** ‘The 4th of March.’

**“Russell.** ‘Is it your impression that the letters had not

been obtained at that date?’

**“Pigott.** ‘Oh, yes, some of the letters had been

obtained before that date.’

**“Russell.** ‘Then, reminding you that some of the letters

had been obtained before that date, did that passage

that I have read to you in that letter refer to these letters

among other things?’

**“Pigott.** ‘No, I rather fancy they had reference to the

forthcoming articles in the Times’

**“Russell.** (glancing keenly at the witness). ‘I thought you

told us you did not know anything about the forthcoming

articles.’

**“Pigott** (looking confused). ‘Yes, I did. I find now I am

mistaken --- that I must have heard something about

them.’

**“Russell.** (severely). “Then try not to make the same

mistake again, Mr. Pigott. “Now,” you go on (continuing to

read from Pigott’s letter to the archbishop), “I cannot

enter more fully into details than to state that the

proceedings referred to consist in the publication of

certain statements purporting to prove the complicity of

Mr. Parnell himself, and some of his supporters, with

murders and outrages in Ireland, to be followed, in all

probability, by the institution of criminal proceedings

against these parties by the Government.”

“Having finished the reading, Russell laid down the letter and

said (turning toward the witness), ‘Who told you that?’

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**“Pigott.** ‘I have no idea.’

**‘‘Russell** (striking the paper energetically with his

fingers). ‘But that refers, among other things, to the

incriminatory letters.’

**“Pigott.** ‘I do not recollect that it did.’

**“Russell.** (with energy). ‘Do you swear that it did not?’

**“Pigott.** ‘I will not swear that it did not.’

**“Russell.** ‘Do you think it did?’

**“Pigott.** ‘No, I do not think it did.’

**“Russell.** ‘Do you think that these letters, if genuine,

would prove or would not prove Parnell’s complicity in

crime?’

**“Pigott.** ‘I thought they would be very likely to prove it.’

**“Russell.** ‘Now, reminding you of that opinion, I ask you

whether you did not intend to refer --- not solely, I

suggest, but among other things --- to the letters as being

the matter which would prove complicity or purport to

prove complicity?’

**“Pigott.** ‘Yes, I may have had that in my mind.’

**“Russell.** ‘You could have had hardly any doubt that

you had?’

**“Pigott.** ‘I suppose so.’

**“Russell.** ‘You suppose you may have had?’

**“Pigott.** ‘Yes.’

**“Russell.** ‘There is the letter and the statement

(reading), “Your Grace may be assured that I speak with

full knowledge, and am in a position to prove, beyond all

doubt and question, the truth of what I say.” Was that

true?’

**“Pigott.** ‘It could hardly be true.’

**“Russell.** ‘Then did you write that which was false?’

**“Pigott.** ‘I suppose it was in order to give strength to

what I said. I do not think it was warranted by what I

knew.’

**“Russell.** ‘You added the untrue statement in order to

add strength to what you said?’

**“Pigott.** ‘Yes.’

**“Russell.** ‘You believe these letters to be genuine?’

**“Pigott.** ‘I do.’

**“Russell.** ‘And did at this time?’

**“Pigott.** ‘Yes.’

**“Russell.** (reading). ‘“And I will further assure your Grace

that I am also able to point out how these designs may be

successfully combated and finally defeated.” How, if

these documents were genuine documents, and you

believed them to be such, how were you able to assure

his Grace that you were able to point out how the design

might be successfully combated and finally defeated?’

**“Pigott.** ‘Well, as I say, I had not the letters actually in

my mind at that time. So far as I can gather, I do not

recollect the letter to Archbishop Walsh at all. My

memory is really a blank on the circumstance.’

**“Russell.** ‘You told me a moment ago, after great

deliberation and consideration, you had both the

incriminatory letters and the letter to Archbishop Walsh

in your mind.’

**“Pigott.** ‘I said it was probable I did; but I say the thing has

completely faded out of my mind.’

**“Russell.** (resolutely). ‘I must press you. Assuming the

letters to be genuine, what were the means by which you

were able to assure his Grace that you could point out how

the design might be successfully combated and finally

defeated?’

**“Pigott** (helplessly). ‘I cannot conceive really.’

**“Russell.** ‘Oh, try. You must really try.’

**“Pigott** (in manifest confusion and distress). ‘I cannot.’

**“Russell.** (looking fixedly at the witness). ‘Try.’

**“Pigott.** ‘I cannot.’

**“Russell.** ‘Try.’

**“Pigott.** ‘It is no use.’

**“Russell.** (emphatically). ‘May I take it, then, your answer to

my Lords is that you cannot give any explanation?’

**“Pigott.** ‘I really cannot absolutely.’

**“Russell.** (reading). ‘“I assure your Grace that I have no other

motive except to respectfully suggest that youi 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?’

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**“Pigott.** ‘I have nothing to say except that I do not recollect

anything about it absolutely.’

**“Russell.** ‘What was the coming blow?’

**“Pigott.** ‘I suppose the coming publication.’

**“Russell.** ‘How was it to be effectively met?’

**“Pigott.** ‘I have not the slightest idea.’

**“Russell.** ‘Assuming the letters to be genuine, does it not

even now occur to your mind how it could be effectively met?’

**“Pigott.** ‘No.’

**\* \* \* \* \* \* \* \* \* \* \* \***

“Pigott now looked like a man, after the sixth round in a prize

fight, who had been knocked down in every round. But

Russell showed him no mercy. I shall take another extract.

**“Russell.** ‘Whatever the charges in “Parnellism and Crime,”

including the letters, were, did you believe them to be true or

not?’

**“Pigott.** ‘How can I say that when I say I do not know what

the charges were? I say I do not recollect that letter to the

archbishop at all, or any of the circum\* stances it refers to.’

**“Russell.** ‘First of all you knew this: that you procured and

paid for a number of letters?’

**“Pigott.** ‘Yes.’

**“Russell.** ‘Which, if genuine, you have already told me,

would gravely implicate the parties from whom these were

supposed to come.’

**“Pigott.** ‘Yes, gravely implicate.’

**“Russell.** ‘You would regard that, I suppose, as a serious

charge?’

**“Pigott.** ‘Yes.’

**“Russell.** \* Did you believe that charge to be true or false?’

**“Pigott.** ‘I believed that charge to be true.’

**“Russell.** ‘You believed that to be true?’

**“Pigott.** ‘I do.’

**“Russell.** \* Now I will read this passage [from Pigott’s letter

to the archbishop], “I need hardly add that, did I consider the

parties really guilty of the things charged against them, I

should not dream of suggesting that your Grace should take

part in an effort to shield them; I only wish to impress on your

Grace that the evidence is apparently convincing, and would

probably be sufficient to secure conviction if submitted to an

English jury.” What do you say to that, Mr. Pigott?’

**“Pigott** (bewildered). \* I say nothing, except that I am sure I

could not have had the letters in my mind when I said that,

because I do not think the letters conveyed a sufficiently

serious charge to cause me to write in that way.’

**“Russell.** ‘But you know that was the only part of the charge,

so far as you have yet told us, that you had anything to do in

getting up?’

**“Pigott.** ‘Yes, that is what I say; I must have had something

else in my mind which I cannot at present recollect --- that I

must have had other charges.’

**“Russell.** ‘What charges?’

**“Pigott.** ‘I do not know. That is what I cannot tell you.’

**“Russell.** ‘Well, let me remind you that that particular part of

the charges --- the incriminatory letters --- were letters that

you yourself knew all about.’

**“Pigott.** ‘Yes, of course.’

**“Russell.** (reading from another letter of Pigott’s to the

archbishop). ‘“I was somewhat disappointed in not having a

line from your Grace, as I ventured to expect I might have been

so far honored. I can assure your Grace that I have no other

motive in writing save to avert, if possible, a great danger to

people with whom your Grace is known to be in strong

sympathy. At the same time, should your Grace not desire to

interfere in the matter, or should you consider that they would

refuse me a hearing, I am well content, having acquitted myself

of what I conceived to be my duty in the circumstances. I will

not further trouble your Grace save to again beg that you will

not allow my name to transpire, seeing that to do so would

interfere injuriously with my prospects, without any

compensating advantage to any one. I make the request all the

more confidently because I have had no part in what is being

done to the prejudice of the Parnellite party, though I was

enabled to become acquainted with all the details.”

**“Pigott** (with a look of confusion and alarm). ‘Yes.’

**“Russell.** ‘What do you say to that?’

**“Pigott.** ‘That it appears to me clearly that I had not the

letters in my mind.’

**“Russell.** ‘Then if it appears to you clearly that you had not

the letters in your mind, what had you in your mind?’

**“Pigott.** ‘It must have been something far more serious.’

**“Russell.** ‘What was it?’

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**“Pigott** (helplessly, great beads of perspiration standing out

on his forehead and trickling down his face). ‘I cannot tell you.

I have no idea.’

**“Russell.** ‘It must have been something far more serious than

the letters?’

**“Pigott** (vacantly). ‘Far more serious.’

**“Russell.** (briskly). ‘Can you give my Lords any clew of

the most indirect kind to what it was?’

**“Pigott** (in despair). ‘I cannot.’

**“Russell.** ‘Or from whom you heard it?’

**“Pigott.** ‘No.’

**“Russell.** ‘Or when you heard it?’

**“Pigott.** \* Or when I heard it.’

**“Russell.** ‘Or where you heard it?’

**“Pigott.** ‘Or where I heard it.’

**“Russell.** ‘Have you ever mentioned this fearful matter --

- whatever it is --- to anybody?’

**“Pigott.** ‘No.’

**“Russell.** ‘Still locked up, hermetically sealed in your

own bosom?’

**“Pigott.** ‘No, because it has gone away out of my

bosom, whatever it was.’

“On receiving this answer Russell smiled, looked at the bench,

and sat down. A ripple of derisive laughter broke over the

court, and a buzz of many voices followed. The people

standing around me looked at each other and said, ‘Splendid.’

The judges rose, the great crowd melted away, and an

Irishman who mingled in the throng expressed, I think, the

general sentiment in a single word, ‘Smashed.’:

Pigott’s cross-examination was finished the following day, and

the second day he disappeared entirely, and later sent back

from Paris a confession of his guilt. admitting his perjury, and

giving the details of how he had forged the alleged Parnell

letter by tracing words and phrases from genuine Parnell

letters, placed against the window-pane, and admitting that

he had sold the forged letter for £605.

After the confession was read, the Commission “found” that it

was a forgery, and the Times withdrew the facsimile letter.

A warrant was issued for Pigott’s arrest on the charge of

perjury, but when he was tracked by the police to a hotel in

Madrid, he asked to be given time enough to collect his

belongings, and, retiring to his room, blew out his brains.

**CHAPTER 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 crossexamination,

his failure to withstand which was the turningpoint

in the entire trial. He returned to his home in

Philadelphia after he left the witness-stand, and openly

declared in public, when asked to describe his experiences in

New York, that he had “gone to New York only to make a fool

of himself and return home again.”

It is also proposed to give some of the inside history of the

case --- facts that never came out at the trial, not because they

were unknown at the time to the district attorney, nor

unsusceptible of proof, but because the strict rules of

evidence in such Cases often, as it seems to the writer,

withhold from the ears of the jury certain facts, the mere recital

of which seems to conclude the question of guilt. For

example, the rule forbidding the presentation to the jury of

anything that was said by the victim of a homicide, even to

witnesses surrounding the death-bed, unless the victim in

express terms makes known his own belief that he cannot live,

and that he has abandoned all hope or expectation of

recovery before he tells the tale of the manner in which he was

slain, or the causes that led up to it, has allowed many a guilty

prisoner, if not to escape entirely, at least to avoid the full

penalty for the crime he had undoubtedly committed.

Carlyle Harris was a gentleman’s son, with all the advantages of

education and breeding. In his twentysecond 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 4Oth 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 2Oth 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 ½ grains of quinine and 1/6 of a

grain of morphine, and had the box marked: “C. W. H.

Student. One before retiring.” Miss Potts had been

complaining of sick headaches, and Harris gave her four of

these capsules as an ostensible remedy. He then wrote to

Mrs. Potts that he would agree to her terms “unless some

other way could be found of satisfying her scruples,” and

went hurriedly to Old Point Comfort. Upon hearing from his

wife that the capsules made her worse instead of better, he

still persuaded her to continue taking them. On the day of her

death she complained to her mother about the medicine

Carlyle had given her, and threatened to throw the box with

the remaining capsule out of the window. Her mother

persuaded her to try this last one, which she promised to do.

Miss Potts slept in a room with three classmates who, on this

particular night, had gone to a symphony concert. Upon their

return they found Helen asleep, but woke her up and learned

from her that she had been having “such beautiful dreams,”

she “had been dreaming of Carl.” Then she complained of

feeling numb, and becoming frightened, begged the girls not

to let her go to sleep. She repeated that she had taken the

medicine Harris had given her, and asked them if they thought

it possible that he would give her anything to harm her. She

soon fell into a profound coma, breathing only twice to the

minute. The doctors worked over her for eleven hours

without restoring her to consciousness, when she stopped

breathing entirely.

The autopsy, fifty-six days afterward, disclosed an apparently

healthy body, and the chemical analysis of the contents of the

stomach disclosed the presence of morphine but not of

quinine, though the capsules as originally compounded by

the druggist contained twenty-seven times as much quinine as

morphine.

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This astounding discovery led to the theory of the

prosecution: that Harris had emptied the contents of one of

the capsules, had substituted morphine in sufficient

quantities to kill, in place of the 4 ½ grains of quinine (to the

eye, powdered quinine and morphine are identical), and had

placed this fatal capsule in the box with the other three

harmless ones, one to be taken each night. He had then fled

from the city, not knowing which day would brand him a

murderer.

Immediately after his wife’s death Harris went to one of his

medical friends and said: “I only gave her four capsules of the

six I had made up; the two I kept out will show that they are

perfectly harmless. No jury can convict me with those in my

possession; they can be analyzed and proved to be harmless.”

They were analyzed and it was proved that the prescription

had been correctly compounded. But oftentimes the means a

criminal uses in order to conceal his deed are the very means

that Providence employs to reveal the sin that lies hidden in

his soul. Harris failed to foresee that it was the preservation of

these capsules that would really convict him. Miss Potts had

taken all that he had given her, and no one could ever have

been certain that it was not the druggist’s awful mistake, had

not these retained capsules been analyzed. When Harris

emptied one capsule and reloaded it with morphine, he had

himself become the druggist.

It was contended that Harris never intended to recognize

Helen Potts as his wife. He married her in secret, it appeared

at the trial, --- as it were from his own lips through the medium

of conversation with a friend, --- “because he could not

accomplish her ruin in any other way.” He brought her to New

York, was married to her before an alderman under assumed

names, and then having accomplished his purpose, burned

the evidence of their marriage, the false certificate. Finally,

when the day was set upon which he must acknowledge her

as his wife, he planned her death.

The late recorder, Frederick Smyth, presided at the trial with

great dignity and fairness. The prisoner was ably

represented by John A. Taylor, Esq., and William Travers

Jerome, Esq., the present district attorney of New York.

Mr. Jerome’s cross-examination of Professor Witthaus, the

leading chemist for the prosecution, was an extremely able

piece of work, and during its eight hours disclosed an amount

of technical information and research such as is seldom seen in

our courts. Had it not been for the witness’s impregnable

position, he certainly would have succumbed before the

attack. The length and technicality of the examination render

its use impracticable in this connection; but it is recommended

to all students of cross-examination who find themselves

confronted with the task of examination in so remote a branch

of the advocate’s equipment as a knowledge of chemistry.

The defence consisted entirely of medical testimony,

directed toward creating a doubt as to our theory that

morphine was the cause of death. Their cross-examination of

our witnesses was suggestive of death from natural causes:

from heart disease, a brain tumor, apoplexy, epilepsy, uremia.

In fact, the multiplicity of their defences was a great weakness.

Gradually they were forced to abandon all but two possible

causes of death, --- that by morphine poisoning and that by

uremic poisoning. This narrowed the issue down to the

question, Was it a large dose of morphine that caused death,

or was it a latent kidney disease that was superinduced and

brought to light in the form of uremic coma by small doses of

morphine, such as the one-sixth of a grain admittedly

contained in the capsules Harris administered? In one case

Harris was guilty; in the other he was innocent.

Helen Potts died in a profound coma. Was it the coma of

morphine, or that of kidney disease? Many of the leading

authorities in this city had given their convictions in favor of the

morphine theory. In reply to those, the defence was able to

call a number of young doctors, who have since made famous

names for themselves, but who at the time were almost

useless as witnesses with the jury because of their

comparative inexperience. Mr. Jerome had, however, secured

the services of one physician who, of all the others in the

country, had perhaps apparently best qualified himself by his

writings and thirty years of hospital experience to speak

authoritatively upon the subject.

His direct testimony was to the effect that basing his opinion

partly upon wide reading of the literature of the subject, and

what seemed to him to be the general consensus of

professional opinion about it, and “very largely on his own

experience” --- no living doctor can distinguish the coma of

morphine from that of kidney disease; and as the theory of the

criminal law is that, if the death can be equally as well

attributed to natural causes as to the use of poison, the jury

would be bound to give the prisoner the benefit of the doubt

and acquit him.

It was the turning-point in the trial. If any of the jurors credited

this testimony, --- the witness gave the reasons for his opinion

in a very quiet, conscientious, and impressive manner, --- there

certainly could be no conviction in the case, nothing better

than a disagreement of the jury. It was certain Harris had given

the capsules, but unless his wife had died of morphine

poisoning, he was innocent of her death.

The cross-examination that follows is much abbreviated and

given partly from memory. It was apparent that the witness

would withstand any amount of technical examination and

easily get the better of the cross-examiner if such matters

were gone into. He had made a profound impression. The

court had listened to him with breathless interest. He must be

dealt with gently and, if possible, led into self-contradictions

where he was least prepared for them.

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The cross-examiner sparred for an opening with the

determination to strike quickly and to sit down if he got in one

telling blow. The first one missed aim a little, but the second

brought a peal of laughter from the jury and the audience, and

the witness retired in great confusion. Even the lawyers for

the defence seemed to lose heart, and although two hours

before time of adjournment, begged the court for a recess till

the following day.

**Counsel** (quietly). “Do you wish the jury to understand,

doctor, that Miss Helen Potts did not die of morphine

poisoning?”

**Witness**. “I do not swear to that.”

**Counsel**. “What did she die of?”

**Witness**. “I don’t swear what she died of.”

**Counsel**. “I understood you to say that in your opinion

the symptoms of morphine could not be sworn to with

positiveness. Is that correct?”

**Witness**. “I don’t think they can, with positiveness.”

**Counsel**. “Do you wish to go out to the world as saying

that you have never diagnosed a case of morphine

poisoning excepting when you had an autopsy to

exclude kidney disease?”

**Witness**. “I do not. I have not said so.”

**Counsel**. “Then you have diagnosed a case on the

symptoms alone, yes? or no? I want a categorical answer.”

**Witness** (sparring). “I would refuse to answer that question

categorically; the word ‘diagnosed ‘is used with two different

meanings. One has to make what is known as a \* working

diagnosis ‘when he is called to a case, not a positive diagnosis.”

**Counsel**. “When was your last case of opium or morphine

poisoning?”

**Witness**. “I can’t remember which was the last.”

**Counsel** (seeing an opening). “I don’t want the name of the

patient. Give me the date approximately, that is, the year ---

but under oath.”

**Witness**. “I think the last was some years ago.”

**Counsel**. “How many years ago?”

**Witness** (hesitating). “It may be eight or ten years ago.”

**Counsel**. “Was it a case of death from morphine poisoning?”

**Witness**. “Yes, sir.”

**Counsel**. “Was there an autopsy?”

**Witness**. “No, sir.”

**Counsel**. “How did you know it was a death from morphine,

if, as you said before, such symptoms cannot be

distinguished?”

**Witness**. “I found out from a druggist that the woman had

taken seven grains of morphine.”

**Counsel**. “You made no diagnosis at all until you heard from

the druggist?”

**Witness**. “I began to give artificial respiration.”

**Counsel**. “But that is just what you would do in a case of

morphine poisoning?”

**Witness** (hesitating). “Yes, sir. I made, of course, a working

diagnosis.”

**Counsel**. “Do you remember the case you had before that?”

**Witness**. “I remember another case.”

**Counsel**. “When was that?”

**Witness**. “It was a still longer time ago. I don’t know the

date,”

**Counsel**. “How many years ago, on your oath?”

**Witness**. “Fifteen, probably.”

**Counsel**. “Any others?”

**Witness**. “Yes, one other.”

**Counsel**. “When?”

**Witness**. “Twenty years ago.”

**Counsel**. “Are these three cases all you can remember in

your experience?”

**Witness**. “Yes, sir.”

**Counsel** (chancing it). “Were more than one of them deaths

from morphine?”

**Witness**. “No, sir, only one.”

**Counsel** (looking at the jury somewhat triumphantly). “Then

it all comes down to this: you have had the experience of one

case of morphine poisoning in the last twenty years?”

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

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**Counsel** (excitedly). “And are you willing to come here from

Philadelphia, and state that the New York doctors who have

already testified against you, and who swore they had had

seventy-five similar cases in their own practice, are mistaken in

their diagnoses and conclusions?”

**Witness** (embarrassed and in a low tone). “Yes, sir, I am.”

**Counsel**. “You never heard of Helen Potts until a year after

her death, did you?”

**Witness**. “No, sir.”

**Counsel**. “You heard these New York physicians say that

they attended her and observed her symptoms for eleven

hours before death?”

**Witness**. “Yes, sir.”

**Counsel**. “Are you willing to go on record, with your one

experience in twenty years, as coming here and saying that

you do not believe our doctors can tell morphine poisoning

when they see it?”

**Witness** (sheepishly). “Yes, sir.”

**Counsel**. “You have stated, have you not, that the

symptoms of morphine poisoning cannot be told with

positiveness?”

**Witness**. “Yes, sir.”

**Counsel**. “You said you based that opinion upon your

own experience, and it now turns out you have seen but

one case in twenty years.”

**Witness**. “I also base it upon my reading.”

**Counsel** (becoming almost contemptuous in manner), “Is

your reading confined to your own book?”

**Witness** (excitedly). “No, sir; I say no.”

**Counsel** (calmly). “But I presume you embodied in your

own book the results of your reading, did you not?”

**Witness** (a little apprehensively). “I tried to, sir.”

It must be explained here that the attending physicians had

said that the pupils of the eyes of Helen Potts were

contracted to a pin-point, so much so as to be practically

unrecognizable, and symmetrically contracted --- that this

symptom was the one invariably present in coma from

morphine poisoning, and distinguished it from all other forms

of death, whereas in the coma of kidney disease one pupil

would be dilated and the other contracted; they would be

unsymmetrical.

**Counsel** (continuing). “Allow me to read to you from

your own book on page 166, where you say (reading), ‘I

have thought that inequality of the pupils’ --- that is,

where they are not symmetrically contracted --- ‘is proof

that a case is not one of narcotism’ --- or morphine

poisoning --- ‘but Professor Taylor has recorded a case of

morphine poisoning in which it [the unsymmetrical

contraction of the pupils] occurred.’ Do I read it as you

intended it?”

**Witness**. “Yes, sir.”

**Counsel**. “So until you heard of the case that Professor

Taylor reported, you had always supposed symmetrical

contraction of the pupils of the eyes to be the

distinguishing 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?”48

**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 messmates 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

48 The reports of six thousand cases of morphine poisoning

had been examined by the prosecution in this case before

trial, and among them the case reported by Professor Taylor.

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not symmetrically contracted. No positive diagnosis of her

case could be made by the attending physicians until the

continued chemical examination of the contents of the body

disclosed indisputable evidence of atropine (belladonna).

Buchanan had profited by the disclosures in the Harris trial,

but had made the fatal mistake of telling his friends how it

could have been done in order to cheat science. It was this

statement of his that put the chemists on their guard, and

resulted in Buchanan’s conviction and subsequent execution.

Carlyle Harris maintained his innocence even after the Court of

Appeals had unanimously sustained his conviction, and even

as he calmly took his seat in the electric chair.

The most famous English poison case comparable to the Harris

and Buchanan cases was that of the celebrated William Palmer,

also a physician by profession, who poisoned his companion

by the use of strychnine in order to obtain his money and

collect his racing bets. The trial is referred to in detail in

another chapter.

Palmer, like Harris and Buchanan, maintained a stoical

demeanor throughout his trial and confinement in jail, awaiting

execution. The morning of his execution he ate his eggs at

breakfast as if he were going on a journey. When he was led

to the gallows, it was demanded of him in the name of God, as

was the custom in England in those days, if he was innocent or

guilty. He made no reply. Again the question was put,

“William Palmer, in the name of Almighty God, are you

innocent or guilty?” Just as the white cap came over his face he

murmured in a low breath, “Guilty,” and the bolts were drawn

with a crash.

**CHAPTER 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 u.

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 haemorrhage on both sides of the

windpipe. The coroner’s physician reported the cause of

death, as shown by the autopsy, to be strangulation. The

newspaper reporter, Minnock, claimed to have been in

Bellevue at the time, feigning insanity for newspaper

purposes; and upon his discharge from the hospital he stated

that he had seen the Frenchman strangled to death by the

nurses in charge of the Pavilion by the use of a sheet tightly

twisted around the insane man’s neck. The language used in

the newspaper articles written by Minnock to describe the

occurrences preceding the Frenchman’s death was as follows:

---

“At supper time on Wednesday evening, when the

Frenchman, Mr. Milliard, refused to eat his supper, the nurse,

Davis, started for him. Milliard 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 Milliard’s neck like a rope.

Dean was behind the bench on which Milliard had been

pulled back; he gathered up the loose ends of the sheet and

pulled the linen tight around Milliard’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 Milliard’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. Milliard’s hands clutched

frantically at the coils around his neck. ‘Keep his hands down,

can’t you?’ shouted Davis in a rage.

Dean and Marshall seized the helpless man’s hands; slowly,

remorselessly, Davis kept on twisting the sheet. Milliard

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 Milliard 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. Milliard’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 Milliard some time to

come to. When he did at last, Davis again asked him if he

would eat. Milliard 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. Milliard was unconscious at last. Davis

jerked the man to the floor and kneeled on him, but still had

the strangle hold with his knee giving him additional purchase.

He twisted the sheet until his own fingers were sore, then the

three nurses dragged the limp body to the bath-room,

heaved him into the tub with his clothes on, and turned the

cold water on him. He was dead by this time, I believe. He

was strangled to death, and the finishing touches were put on

when they had him on the floor. No big, strong, healthy man

could have lived under that awful strangling. Hilliard was weak

and feeble.”

The above article appeared in the morning Journal, a few days

after the original publication in the New York World. The

other local papers immediately took up the story, and it is easy

to imagine the pitch to which the public excitement and

indignation were aroused. The three nurses in charge of the

pavilion at the time of Hilliard’s death were immediately

indicted for manslaughter, and the head nurse, Jesse R. Davis,

was promptly put on trial in the Court of General Sessions,

before Mr. Justice Cowing and a “special jury.” The trial lasted

three weeks, and after deliberating five hours upon their

verdict, the jury acquitted the prisoner.

The intense interest taken in the case, not only by the public,

but by the medical profession, was increased by the fact that

for the first time in the criminal courts of this country two

inmates of the insane pavilion, themselves admittedly insane,

were called by the prosecution, and sworn and accepted by

the court as witnesses against the prisoner. One of these

witnesses was suffering from a form of insanity known as

paranoia, and the other from general paresis. With the

exception of the two insane witnesses and the medical

testimony founded upon the autopsy, there was no direct

evidence on which to convict the prisoner but the statement

of the newspaper reporter, Minnock. He was the one sane

witness called on behalf of the prosecution, who was an eyewitness

to the occurrence, and the issues in the case gradually

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narrowed down to a question of veracity between the

newspaper reporter and the accused prisoner, the testimony

of each of these witnesses being corroborated or

contradicted on one side or the other by various other

witnesses.

If Minnock’s testimony was credited by the jury, the prisoner’s

contradiction would naturally have no effect whatever, and the

public prejudice, indignation, and excitement ran so high that

the jury were only too ready and willing to accept the

newspaper account of the transaction. The cross-examination

of Minnock, therefore, became of the utmost importance. It

was essential that the effect of his testimony should be

broken, and counsel having his cross-examination in charge

had made the most elaborate preparations for the task.

Extracts from the cross-examination are here given as

illustrations of many of the suggestions which have been

discussed in previous chapters.

The district attorney in charge of the prosecution was Franklin

Pierce, Esq. In his opening address to the jury he stated that

he “did not believe that ever in the history of the state, or

indeed of the country, had a jury been called upon to decide

such an important case as the one on trial.” He continued:

“There is no fiction --- no ‘Hard Cash’ --- in this case. The facts

here surpass anything that fiction has ever produced. The

witnesses will describe the most terrible treatment that was

ever given to an insane man. No writer of fiction could have

put them in a book. They would appear so improbable and

monstrous that his manuscript would have been rejected as

soon as offered to a publisher.”

When the reporter, Minnock, stepped to the witness stand,

the court room was crowded, and yet so intense was the

excitement that every word the witness uttered could be

distinctly heard by everybody present. He gave his evidence

in chief clearly and calmly, and with no apparent motive but to

narrate correctly the details of the crime he had seen

committed. Any one unaware of his career would have

regarded him as an unusually clever and apparently honest

and courageous man with a keen memory and with just the

slightest touch of gratification at the important position he was

holding in the public eye in consequence of his having

unearthed the atrocities perpetrated in our public hospitals.

His direct evidence was practically a repetition of his

newspaper article already referred to, only much more in

detail. After questioning him for about an hour, the district

attorney sat down with a confident “He is your witness, if you

wish to cross-examine him.”

No one who has never experienced it can have the slightest

appreciation of the nervous excitement attendant on being

called upon to cross-examine the chief witness in a case

involving the life or liberty of a human being. If Minnock

withstood the cross-examination, the nurse Davis, apparently a

most worthy and refined young man who had just graduated

from the Mills Training School for Nurses, and about to be

married to a most estimable young lady, would have to spend

at least the next twenty years of his life at hard labor in state

prison.

The first fifteen minutes of the cross-examination were

devoted to showing that the witness was a thoroughly

educated man, twenty-five years of age, a graduate of Saint

John’s College, Fordham, New York, the Sacred Heart

Academy, the Francis Xavier, the De Lasalle Institution, and had

travelled extensively in Europe and America. The crossexamination

then proceeded: ---

**Counsel** (amiably). “Mr. Minnock, I believe you have

written the story of your life and published it in the

Bridgeport Sunday Herald as recently as last December?

I hold the original article in my hand.”

**Witness**. “It was not the story of my life.”

**Counsel**. “The article is signed by you and purports to

be a history of your life.”

**Witness**. “It is an imaginary story dealing with

hypnotism. Fiction partly, but it dealt with facts.”

**Counsel**. “That is, you mean to say you mixed fiction

and fact in the history of your life?’

**Witness**. “Yes, sir.”

**Counsel**. “In other words, you dressed up facts with

fiction to make them more interesting?”

**Witness**. “Precisely.”

**Counsel**. “When in this article you wrote that at the age

of twelve you ran away with a circus, was that dressed

up?”

**Witness**. “Yes, sir.”

**Counsel**. “It was not true?”

**Witness**. “No, sir.”

**Counsel**. “When you said that you continued with this circus

for over a year, and went with it to Belgium, there was a

particle of truth in that because you did, as a matter of fact, go

to Belgium, but not with the circus as a public clown; is that the

idea?”

**Witness**. “Yes, sir.”

**Counsel**. “So there was some little truth mixed in at this point

with the other matter?”

**Witness**. “Yes, sir.”

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**Counsel**. “When you wrote that you were introduced in

Belgium, at the Hospital General, to Charcot, the celebrated

Parisian hypnotist, was there some truth in that?”

**Witness**. “No, sir.”

**Counsel**. “You knew that Charcot was one of the originators

of hypnotism in France, didn’t you?”

**Witness**. “I knew that he was one of the original hypnotists.”

**Counsel**. “How did you come to state in the newspaper

history of your life that you were introduced to Charcot at the

Hospital General at Paris if that was not true?”

**Witness**. “While there I met a Charcot.”

**Counsel**. “Oh, I see.”

**Witness**. “But not the original Charcot.”

**Counsel**. “Which Charcot did you meet?”

**Witness**. “A woman. She was a lady assuming the name of

Charcot, claiming to be Madame Charcot.”

**Counsel**. “So that when you wrote in this article that you had

met Charcot, you intended people to understand that it was

the celebrated Professor Charcot, and it was partly true,

because there was a woman by the name of Charcot whom

you had really met?”

**Witness**. “Precisely.”

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

**Witness**. “Yes, sir.”

**Counsel**. “When in that article you said that Charcot taught

you to stand pain, was there any truth in that?”

**Witness**. “No.”

**Counsel**. “Did you as a matter of fact learn to stand pain?”

**Witness**. “No.”

**Counsel**. “When you said in this article that Charcot began

by sticking pins and knives into you little by little, so as to

accustom you to standing pain, was that all fiction?”

**Witness**. “Yes, sir.”

**Counsel**. “When you wrote that Charcot taught you to

reduce your respirations to two a minute, so as to make your

body insensible to pain, was that fiction?”

**Witness**. “Purely imagination.”

**Court** (interrupting). “Counselor, I will not allow you to go

further in this line of inquiry. The witness himself says his

article was almost entirely fiction, some of it founded upon

fact. I will allow you the greatest latitude in a proper way, but

not in this direction.”

**Counsel**. “Your Honor does not catch the point.”

**Court**. “I do not think I do.”

**Counsel**. “This prosecution was started by a newspaper

article written by the witness, and published in the morning

Journal. It is the claim of the defence that the newspaper

article was a mixture of fact and fiction, mostly fiction. The

witness has already admitted that the history of his life,

published but a few months ago, and written and signed by

himself and sold as a history of his life, was a mixture of fact

and fiction, mostly fiction. Would it not be instructive to the

jury to learn from the lips of the witness himself how far he

dressed up the pretended history of his own life, that they

may draw from it some inference as to how far he has likewise

dressed up the article which was the origin of this

prosecution?”

**Court.** “I shall grant you the greatest latitude in examination

of the witness in regard to the newspaper article which he

published in regard to this case, but I exclude all questions

relating to the witness’s newspaper history of his own life.”

**Counsel**. “Did you not have yourself photographed and

published in the newspapers in connection with the history of

your life, with your mouth and lips and ears sewed up, while

you were insensible to pain?”

**Court.** “Question excluded.”

**Counsel**. “Did you not publish a picture of yourself in

connection with the pretended history of your life,

representing yourself upon a cross, spiked hand and foot, but

insensible to pain, in consequence of the instruction you had

received from Professor Charcot?”

**Court.** “Question excluded.”

**Counsel**. “I offer these pictures and articles in evidence.”

**Court** (roughly). “Excluded.”

**Counsel**. “In the article you published in the New York

Journal, wherein you described the occurrences in the present

case, which you have just now related upon the witness-stand,

did you there have yourself represented as in the position of

the insane patient, with a sheet twisted around your neck, and

held by the hands of the hospital nurse who was strangling

you to death?”

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**Witness**. “I wrote the article, but I did not pose for the

picture. The picture was posed for by some one else who

looked like me.”

**Counsel** (stepping up to the witness and handing him the

newspaper article). “Are not these words under your picture,

‘This is how I saw it done, Thomas J. Minnock,’ a facsimile of

your handwriting?”

**Witness**. “Yes, sir, it is my handwriting.”

**Counsel**. “Referring to the history of your life again how

many imaginary articles on the subject have you written for the

newspapers throughout the country?”

**Witness**. “One.”

**Counsel**. “You have put several articles in New York papers,

have you not?”

**Witness**. “It was only the original story. It has since been

redressed, that’s all.”

**Counsel**. “Each time you signed the article and sold it to the

newspaper for money, did you not?”

**Court**. “Excluded.”

**Counsel** (with a sudden change of manner, and in a loud

voice, turning to the audience), “Is the chief of police of

Bridgeport, Connecticut, in the court room? (Turning to the

witness.) Mr. Minnock, do you know this gentleman?”

**Witness**. “I do.”

**Counsel**. “Tell the jury when you first made his

acquaintance.”

**Witness**. “It was when I was arrested in the Atlantic Hotel, in

Bridgeport, Connecticut, with my wife.”

**Counsel**. “Was she your wife at the time?”

**Witness**. “Yes, sir.”

**Counsel**. “She was but sixteen years old?”

**Witness**. “Seventeen, I guess.”

**Counsel**. “You were arrested on the ground that you were

trying to drug this sixteen-year-old girl and kidnap her to New

York. Do you deny it?”

**Witness** (doggedly). “I was arrested.”

**Counsel** (sharply). “You know the cause of the arrest to be as

I have stated? Answer yes or no!”

**Witness** (hesitating). “Yes, sir.”

**Counsel**. “You were permitted by the prosecuting attorney,

F. A. Bartlett, to be discharged without trial on your promise to

leave the state, were you not?”

**Witness**. “I don’t remember anything of that.”

**Counsel**. “Do you deny it?”

**Witness**. “I do.”

**Counsel**. “Did you have another young man with you upon

that occasion?”

**Witness**. “I did. A college chum.”

**Counsel**. “Was he also married to this sixteen-year old girl?”

**Witness** (no answer).

**Counsel** (pointedly at witness). “Was he married to this girl

also?”

**Witness**. “Why, no.”

**Counsel**. “You say you were married to her. Give me the

date of your marriage.”

**Witness** (hesitating). “I don’t remember the date.”

**Counsel**. “How many years ago was it?”

**Witness**. “I don’t remember.”

**Counsel**. “How many years ago was it?”

**Witness**. “I couldn’t say.”

**Counsel**. “What is your best memory as to how many years

ago it was?”

**Witness**. “I can’t recollect.”

**Counsel**. “Try to recollect about when you were married.”

**Witness**. “I was married twice, civil marriage and church

marriage.”

**Counsel**. “I am talking about Miss Sadie Cook. When were

you married to Sadie Cook, and where is the marriage

recorded?”

**Witness**. “I tell you I don’t remember.”

**Counsel**. “Try.”

**Witness**. “It might be five or six or seven or ten years ago.”

**Counsel**. “Then you cannot tell within five years of the time

when you were married, and you are now only twenty-five

years old?”

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**Witness**. “I cannot.”

**Counsel**. “Were you married at fifteen years of age?”

**Witness**. “I don’t think I was.”

**Counsel**. “You know, do you not, that your marriage was

several years after this arrest in Bridgeport that I have been

speaking to you about?”

**Witness**. “I know nothing of the kind.”

**Counsel** (resolutely). “Do you deny it?”

**Witness** (hesitating). “Well, no, I do not deny it.”

**Counsel**. “I hand you now what purports to be the certificate

of your marriage, three years ago. Is the date correct?”

**Witness**. “I never saw it before.”

**Counsel**. “Does the certificate correctly state the time

and place and circumstances of your marriage?”

**Witness**. “I refuse to answer the question on the ground

that it would incriminate my wife.”

The theory on which the defence was being made was that

the witness, Minnock, had manufactured the story which he

had printed in the paper, and later swore to before the grand

jury and at the trial. The effort in his cross-examination was to

show that he was the kind of man who would manufacture

such a story and sell it to the newspapers, and afterward,

when compelled to do so, swear to it in court.

Counsel next called the witness’s attention to many facts

tending to show that he had been an eye-witness to adultery

in divorce cases, and on both sides of them, first on one side,

then on the other, in the same case, and that he had been at

one time a private detective. Men whom he had robbed and

blackmailed and cheated at cards were called from the

audience, one after another, and he was confronted with

questions referring to these charges, all of which he denied in

the presence of his accusers. The presiding judge having

stated to the counsel in the hearing of the witness that

although he allowed the witness to be brought face to face

with his alleged accusers, yet he would allow no contradictions

of the witness on these collateral matters. Minnock’s former

defiant demeanor immediately returned.

The next interrogatories put to the witness developed the

fact that, feigning insanity, he had allowed himself to be taken

to Bellevue with the hope of being transferred to Ward’s

Island, with the intention of finally being discharged as cured,

and then writing sensational newspaper articles regarding

what he had seen while an inmate of the public insane

asylums; that in Bellevue Hospital he had been detected as a

malingerer by one of the attending physicians, Dr. Fitch, and

had been taken before a police magistrate where he had

stated in open court that he had found everything in Bellevue

“far better than he had expected to find it,” and that he had

“no complaint to make and nothing to criticise.”

The witness’s mind was then taken from the main subject by

questions concerning the various conversations had with the

different nurses while in the asylum, all of which conversations

he denied. The interrogatories were put in such a way as to

admit of a “yes “or “no “answer only. Gradually coming nearer

to the point desired to be made, the following questions

were asked: ---

**Counsel**. “Did the nurse Gordon ask you why you were

willing to submit to confinement as an insane patient, and

did you reply that you were a newspaper man and under

contract with a Sunday paper to write up the methods of

the asylum, but that the paper had repudiated the

contract?”

**Witness**. “No.”

**Counsel**. “Or words to that effect?”

**Witness**. “No.”

**Counsel**. “I am referring to a time subsequent to your

discharge from the asylum, and after you had returned to

take away your belongings. Did you, at that time, tell the

nurse Gordon that you had expected to be able to write

an article for which you could get $140?”

**Witness**. “I did not.”

**Counsel**. “Did the nurse say to you, ‘You got fooled this

time, didn’t you?’ And did you reply, ‘Yes, but I will try

to write up something and see if I can’t get square with

them! ‘

**Witness**. “I have no memory of it.”

**Counsel**. “Or words to that effect?”

**Witness**. “I did not.”

All that preceded had served only as a veiled introduction to

the next important question.

**Counsel** (quietly). “At that time, as a matter of fact, did

you know anything you could write about when you got

back to the Herald office?”

**Witness**. “I knew there was nothing to write.”

**Counsel**. “Did you know at that time, or have any idea,

what you would write when you got out?”

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**Witness**. “Did I at that time know? Why, I knew there

was nothing to write.”

**Counsel** (walking forward and pointing excitedly at the

witness). “Although you had seen a man choked to death

with a sheet on Wednesday night, you knew on Friday

morning that there was nothing you could write about?”

**Witness** (hesitating). “I didn’t know they had killed the

man.”

**Counsel**. “Although you had seen the patient fall

unconscious several times to the floor after having been

choked with the sheet twisted around his neck, you knew

there was nothing to write about?”

**Witness**. “I knew it was my duty to go and see the charity

commissioner and tell him about that.”

**Counsel**. “But you were a newspaper reporter in the asylum,

for the purpose of writing up an article. Do you want to take

back what you said a moment ago --- that you knew there was

nothing to write about?”

**Witness**. “Certainly not. I did not know the man was dead.”

**Counsel**. “Did you not testify that the morning after you had

seen the patient choked into unconsciousness, you heard the

nurse call up the morgue to inquire if the autopsy had been

made?”

**Witness** (sheepishly.) “Well, the story that I had the contract

for with the Herald was cancelled.”

**Counsel**. “Is it not a fact that within four hours of the time you

were finally discharged from the hospital on Saturday

afternoon, you read the newspaper account of the autopsy,

and then immediately wrote your story of having seen this

patient strangled to death and offered it for sale to the New

York World?’

**Witness**. “That is right; yes, sir.”

**Counsel**. “You say you knew it was your duty to go to the

charity commissioner and tell him what you had seen. Did you

go to him?”

**Witness**. “No, not after I found out through reading the

autopsy that the man was killed.”

**Counsel**. “Instead, you went to the World, and offered them

the story in which you describe the way Milliard was killed?”

**Witness**. “Yes.”

**Counsel**. “And you did this within three or four hours of the

time you read the newspaper account of the autopsy?’

**Witness**. “Yes.”

**Counsel**. “The editors of the World refused your story

unless you would put it in the form of an affidavit, did they

not?”

**Witness**. “Yes.”

**Counsel**. “Did you put it in the form of an affidavit?”

**Witness**. “Yes.”

**Counsel**. “And that was the very night that you were

discharged from the hospital?”

**Witness**. “Yes.”

**Counsel**. “Every occurrence was then fresh in your mind, was

it not?”

**Witness** (hesitating). “What?”

**Counsel**. “Were the occurrences of the hospital fresh in your

mind at the time?”

**Witness**. “Well, not any fresher then than they are now.”

**Counsel**. “As fresh as now?”

**Witness**. “Yes, sir.”

**Counsel** (pausing, looking among his papers, selecting one

and walking up to the witness, handing it to him). “Take this

affidavit, made that Friday night, and sold to the World; show

me where there is a word in it about Davis having strangled

the Frenchman with a sheet, the way you have described it

here to-day to this jury.”

**Witness** (refusing paper). “No, I don’t think that it is there. It

is not necessary for me to look it over.”

**Counsel** (shouting). “Don’t think! You know that it is not

there, do you not?”

**Witness** (nervously). “Yes, sir; it is not there.”

**Counsel**. “Had you forgotten it when you made that

affidavit?”

**Witness**. “Yes, sir.”

**Counsel** (loudly). “You had forgotten it, although only three

days before you had seen a man strangled in your presence,

with a sheet twisted around his throat, and had seen him fall

lifeless upon the floor; you had forgotten it when you

described the incident and made the affidavit about it to the

World?”

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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?”

**Witness**. “It escaped my memory.”

**Counsel**. “You have testified as a witness before in this case,

have you not?’

**Witness**. “Yes, sir.”

**Counsel**. “Before the coroner?”

**Witness**. “Yes, sir.”

**Counsel**. “But this sheet incident escaped your memory

then?”

**Witness**. “It did not”

**Counsel** (taking in his hands the stenographer’s minutes

of the coroner’s inquest). “Do you not recollect that you

testified for two hours before the coroner without

mentioning the sheet incident, and were then excused

and were absent from the court for several days before

you returned and gave the details of the sheet incident?”

**Witness**. “Yes, sir; that is correct.”

**Counsel**. “Why did you not give an account of the sheet

incident on the first day of your testimony?’

**Witness**. “Well, it escaped my memory; I forgot it.”

**Counsel**. “Do you recollect, before beginning your

testimony before the coroner, you asked to look at the

affidavit that you had made for the World?”

**Witness**. “Yes, I had been sick, and I wanted to refresh

my memory.”

**Counsel**. “Do you mean that this scene that you have

described so glibly to-day had faded out of your mind

then, and you wanted your affidavit to refresh your

recollection?”

**Witness**. “No, it had not faded. I merely wanted to

refresh my recollection.”

**Counsel**. “Was it not rather that you had made up the

story in your affidavit, and you wanted the affidavit to

refresh your recollection as to the story you had

manufactured?”

**Witness**. “No, sir; that is not true.”

The purpose of these questions, and the use made of the

answers upon the argument, is shown by the following extract

from the summing up: ---

“My point is this, gentlemen of the jury, and it is an

unanswerable one in my judgment, Mr. District Attorney: If

Minnock, fresh from the asylum, forgot this sheet incident

when he went to sell his first newspaper article to the World;

if he also forgot it when he went to the coroner two days

afterward to make his second affidavit; if he still forgot it two

weeks later when, at the inquest, he testified for two hours,

without mentioning it, and only first recollected it when he

was recalled two days afterward, then there is but one

inference to be drawn, and that is, that he never saw it,

because he could not forget it if he had ever seen it! And the

important feature is this: he was a newspaper reporter; he was

there, as the district attorney says, ‘to observe what was going

on.’ He says that he stood by in that part of the room,

pretending to take away the dishes in order to see what was

going on. He was sane, the only sane man there. Now if he

did not see it, it is because it did not take place, and if it did

not take place, the insane men called here as witnesses could

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not have seen it. Do you see the point? Can you answer it?

Let me put it again. It is not in mortal mind to believe that this

man could have seen such a transaction as he describes and

ever have forgotten it. Forget it when he writes his article the

night he leaves the asylum and sells it to the morning World!

Forget it two days afterward when he makes a second

important affidavit! He makes still another statement, and does

not mention it, and even testifies at the coroner’s inquest two

weeks later, and leaves it out. Can the human mind draw any

other inference from these facts than that he never saw it ---

because he could not have forgotten it if he had ever seen it?

If he never saw it, it did not take place. He was on the spot,

sane, and watching everything that went on, for the very

purpose of reporting it. Now if this sheet incident did not

take place, the insane men could not have seen it. This

disposes not only of Minnock, but of all the testimony in the

People’s case. In order to say by your verdict that that sheet

incident took place, you have got to find something that is

contrary to all human experience; that is, that this man,

Minnock, having seen the horrible strangling with the sheet, as

he described, could possibly have immediately forgotten it.”

The contents of the two affidavits made to the World and the

coroner were next taken up, and the witness was first asked

what the occurrence really was as he now remembered it.

After his answers, his attention was called to what he said in

his affidavits, and upon the differences being made apparent,

he was asked whether what he then swore to, or what he now

swore to, was the actual fact; and if he was now testifying from

what he remembered to have seen, or if he was trying to

remember the facts as he made them up in the affidavit.

**Counsel**. “What was the condition of the Frenchman at

supper time? Was he as gay and chipper as when you

said that he had warmed up after he had been walking

around awhile?”

**Witness**. “Yes, sir.”

**Counsel**. “But in your affidavit you state that he seemed

to be very feeble at supper. Is that true?’

**Witness**. “Well, yes; he did seem to be feeble.”

**Counsel**. “But you said a moment ago that he warmed

up and was all right at supper time.”

**Witness**. “Oh, you just led me into that.”

**Counsel**. “Well, I won’t lead you into anything more. Tell us

how he walked to the table.”

**Witness**. “Well, slowly.”

**Counsel**. “Do you remember what you said in the affidavit?”

**Witness**, “I certainly do.”

**Counsel**. “What did you say?”

**Witness**. “I said he walked in a feeble condition.”

**Counsel**. “Are you sure that you said anything in the affidavit

about how he walked at all?”

**Witness**. “I am not sure.”

**Counsel**. “The sheet incident, which you have described so

graphically, occurred at what hour on Wednesday afternoon?”

**Witness**. “About six o’clock.”

**Counsel**. “Previous to that time, during the afternoon, had

there been any violence shown toward him?”

**Witness**. “Yes; he was shoved down several times by the

nurses.”

**Counsel**. “You mean they let him fall?”

**Witness**. “Yes, they thought it a very funny thing to let him

totter backward, and to fall down. They then picked him up.

His knees seemed to be kind of musclebound, 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.”

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The witness was led on to describe in detail this process of

holding up the patient, and allowing him to fall backward, and

then picking him up again, in order to make the contrast more

apparent with what he had said on previous occasions and

had evidently forgotten.

**Counsel**. “I now read to you from the stenographer’s

minutes what you said on this subject in your sworn

testimony given\* at the coroner’s inquest. You were

asked, ‘Was there any violence inflicted on Wednesday

before dinner time?’ And you answered, ‘I didn’t see

any.’ You were then asked if, up to dinner time at six

o’clock on Wednesday night, there had been any

violence; and you answered: ‘No, sir; no violence since

Tuesday night. There was nothing happened until

Wednesday at supper time, somewhere about six

o’clock.’ Now what have you to say as to these different

statements, both given under oath, one given at the

coroner’s inquest, and the other given here to-day?”

**Witness**. “Well, what I said about violence may have

been omitted by the coroner’s stenographer.”

**Counsel**. “But did you swear to the answers that I have

just read to you before the coroner?’

**Witness**. “I may have, and I may not have. I don’t know.”

**Counsel**. “If you swore before the coroner there was no

violence, and nothing happened until Wednesday after

supper, did you mean to say it?’

**Witness**. “I don’t remember.”

**Counsel**. “After hearing read what you swore to at the

coroner’s inquest, do you still maintain the truth of what

you have sworn to at this trial, as to seeing the nurse let

the patient fall backward four or five times, and pick him

up and laugh at him?”

**Witness**. “I certainly do.”

**Counsel**. “I again read you from the coroner’s minutes a

question asked you by the coroner himself. Question by

the coroner, ‘Did you at any time while in the office or the

large room of the asylum see Milliard fall or stumble?’

Answer, ‘No, sir; I never did.’ What have you to say to

that?”

**Witness**. “That is correct.”

**Counsel**. “Then what becomes of your statement made

to the jury but fifteen minutes ago, that you saw him

totter and fall backward several times?”

**Witness**. “It was brought out later on before the

coroner.”

**Counsel**. “Brought out later on! Let me read to you the

next question put to you before the coroner. Question,

‘Did you at any time see him try to walk or run away and

fall?’ Answer, ‘No, I never saw him fall.’ What have you to

say to that?’

**Witness**. “Well, I must have put in about the tottering in

my affidavit, and omitted it later before the coroner.”

At the beginning of the cross-examination it had been

necessary for the counsel to fight with the Court over nearly

every question asked; and question after question was ruled

out. As the examination proceeded, however, the Court

began to change its attitude entirely toward the witness. The

presiding judge constantly frowned on the witness, kept his

eyes riveted upon him, and finally broke out at this juncture:

“Let me caution you, Mr Minnock, once for all, you are here to

answer counsel’s questions. If you can’t answer them, say so;

and if you can answer them, do so; and if you have no

recollection, say so.”

**Witness**. “Well, your Honor, Mr. ----------- has been

cross-examining me very severely about my wife, which

he has no right to do.”

**Court**. “You have no right to bring that up. He has a

perfect right to cross-examine you.”

**Witness** (losing his temper completely). “That man

wouldn’t dare to ask me those questions outside. He

knows that he is under the protection of the court, or I

would break his neck.”

**Court**. “You are making a poor exhibit of yourself.

Answer the questions, sir.”

**Counsel**. “You don’t seem to have any memory at all

about this transaction. Are you testifying from memory as

to what you saw, or making up as you go along?”

**Witness** (no answer).

**Counsel**. Which is it?”

**Witness** (doggedly). “I am telling what I saw.”

**Counsel**. “Well, listen to this then. You said in your

affidavit: ‘The blood was all over the floor. It was covered

with Milliard’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?”

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**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 Milliard, 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 Milliard’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

Milliard was killed, at least a dozen times on the telephone,

and anxiously inquire what had been disclosed by the

autopsy; whereas, in fact, there was no direct telephonic

communication whatever between the morgue and the insane

pavilion; and the morgue attendants were prepared to swear

that no one had called them up concerning the Milliard

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 witnesschair

by the defence, handed to the judge a letter received

that morning from her son, who was in Philadelphia (which,

however, was not allowed to be shown to the jury) in which he

wrote that he had shaken from his feet the dust of New York

forever, and would never return; that he felt he had been

ruined, and would be arrested for perjury if he came back,

and requested money that he might travel far into the West

and commence life anew. It was altogether the most tragic

incident in the experience of the writer.

**CHAPTER XVI:**

**THE CROSS-EXAMINATION OF GUITEAU, 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

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. 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.’

**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?’

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**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?”

**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?”

**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 coldblooded

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?”

**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

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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 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 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. 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’?”

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**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.”

**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.”

**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.”

**Mr. Porter**. “Was He with you when you were a pamphlet

pedler?”

**Guiteau**. “I think He was, and took very good care of me.”

**Mr. Porter**. “He left your board bills unpaid?”

**Guiteau**. “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?”

**Guiteau**. “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?”

**Guiteau**. “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’?”

**Guiteau**. “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?”

**Guiteau**. “If I wrote it, I thought so.”

**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’?”

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**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.”

**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 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 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?”

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**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.”

**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?”

**Guiteau**. “That is just what the jury is here for, to take into

account my actions for twenty years, my travelling 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.”

**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.”

**\* \* \* \* \* \* \* \* \* \* \* \***

**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 juryman, 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 carpetbag

I hold in my hand contains ten pounds of dynamite, and if

I drop this bag on the floor it will destroy this building in ruins

and kill every human being in it. I demand twelve hundred

thousand dollars, or I will drop it. Will you give it? Yes or no?”

Mr. Sage read the letter, handed it back to Norcross, and

suggested that he had a gentleman waiting for him in his

private office, and could be through his business in a couple

of minutes when he would give the matter his attention.

Norcross responded: “Then you decline my proposition?

Will you give it to me? Yes or no?” Sage explained again why

he would have to postpone giving it to him for two or three

minutes to get rid of some one in his private office, and just at

this juncture Mr. Laidlaw entered the office, saw Norcross and

Sage without hearing the conversation, and waited in the

anteroom until Sage should be disengaged. As he waited,

Sage edged toward him and partly seating himself upon the

table near Mr. Laidlaw, and without addressing him, took him

by the left hand as if to shake hands with him, but with both

his own hands, and drew Mr. Laidlaw almost imperceptibly

around between him and Norcross. As he did so, he said to

Norcross, “If you cannot trust me, how can you expect me to

trust you?”

With that there was a terrible explosion. Norcross himself was

blown to pieces and instantly killed. Mr. Laidlaw found

himself on the floor on top of Russell Sage. He was seriously

injured, and later brought suit against Mr. Sage for damages

upon the ground that he had purposely made a shield of his

body from the expected explosion. Mr. Sage denied that he

had made a shield of Laidlaw or that he had taken him by the

hand or altered his own position so as to bring Laidlaw

between him and the explosion.

The case was tried four times. It was dismissed by Mr. Justice

Andrews, and upon appeal the judgment was reversed. On

the second trial before Mr. Justice Patterson the jury rendered

a verdict of $25,000 in favor of Mr. Laidlaw. On appeal this

judgment in turn was reversed. On a third trial, also before

Mr. Justice Patterson, the jury disagreed; and on the fourth trial

before Mr. Justice Ingraham the jury rendered a verdict in favor

of Mr. Laidlaw of $40,000, which judgment was sustained by

the General Term of the Supreme Court, but subsequently

reversed by the Court of Appeals.

Exception on this appeal was taken especially to the method

used in the cross-examination of Mr. Sage by Mr. Choate.

Thus the cross-examination is interesting, as an instance of

what the New York Court of Appeals has decided to be an

abuse of cross-examination into which, through their zeal, even

eminent counsel are sometimes led, and to which I have

referred in a previous chapter. It also shows to what lengths

Mr. Choate was permitted to go upon the pretext of testing

the witness’s memory.

It was claimed by Mr. Sage’s counsel upon the appeal that “the

right of cross-examination was abused in this case to such an

extent as to require the reversal of this monstrous judgment,

which is plainly the precipitation and product of that abuse.”

And the Court of Appeals unanimously took this view of the

matter.

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.”

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**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 smalltalk

voice, “What jewelry do you ordinarily wear?’

Witness answered that he was not in the habit of wearing

jewelry.

**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.

**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?”

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

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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.”

“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.

**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.”

**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 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?”

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**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.”

“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 threecolumn

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.

**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.

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.”

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**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 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

readymade 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.”

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

motheaten?”

**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.”

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.”

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**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 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 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.”49

49 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, for instance, --- Where do

you live? Do you know the parties? How long have you

known them? etc. And when you have restored them to their

composure, and the mind has regained its equilibrium,

proceed to the more essential features of the case, being

careful to be mild and distinct in your approaches, lest you

may again trouble the fountain from which you are to drink.

III. If the evidence of your own witnesses be unfavorable to

you (which should always be carefully guarded against),

exhibit no want of composure; for there are many minds that

form opinions of the nature or character of testimony chiefly

from the effect which it may appear to produce upon the

Counsel.

IV. If you perceive that the mind of the witness is imbued with

prejudices against your client, hope but little from such a

quarter unless there be some facts which are essential to your

client’s protection, and which that witness alone can prove,

either do not call him, or get rid of him as soon as possible. If

the opposite counsel perceive the bias to which I have

referred, he may employ it to your ruin. In judicial inquiries, of

all possible evils, the worst and the least to be resisted is an

enemy in the disguise of a friend. You cannot impeach him;

you cannot cross-examine him; you cannot disarm him; you

cannot indirectly, even, assail him; and if you exercise the only

privilege that is left to you, and call other witnesses for the

purposes of explanation, you must bear in mind that, instead

of carrying the war into the enemy’s country, the struggle is

still between sections of your own forces, and in the very

heart, perhaps, of your own camp. Avoid this, by all means.

V. Never call a witness whom your adversary will be

compelled to call. This will afford you the privilege of crossexamination,

--- take from your opponent the same privilege it

thus gives to you, --- and, in addition thereto, not only render

everything unfavorable said by the witness doubly operative

against the party calling him, but also deprive that party of the

power of counteracting the effect of the testimony.

VI. Never ask a question without an object, nor without being

able to connect that object with the case, if objected to as

irrelevant.

VII. Be careful not to put your question in such a shape that, if

opposed for informality, you cannot sustain it, or, at all events,

produce strong reason in its support. Frequent failures in the

discussions of points of evidence enfeeble your strength in

the estimation of the jury, and greatly impair your hopes in the

final result.

VIII. Never object to a question from your adversary without

being able and disposed to enforce the objection. Nothing is

so monstrous as to be constantly making and withdrawing

objections; it either indicates a want of correct perception in

making them, or a deficiency of real or of moral courage in not

making them good.

IX. Speak to your witness clearly and distinctly, as if you were

awake and engaged in a matter of interest, and make him also

speak distinctly and to your question. How can it be

supposed that the court and jury will be inclined to listen,

when the only struggle seems to be whether the counsel or

the witness shall first go to sleep?

X. Modulate your voice as circumstances may direct, “Inspire

the fearful and repress the bold.”

XI. Never begin before you are ready, and always finish when

you have done. In other words, do not question for

question’s sake, but for an answer.

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**Cross-examination**

I. Except in indifferent matters, never take your eye from that

of the witness; this is a channel of communication from mind to

mind, the loss of which nothing can compensate.

“Truth, falsehood, hatred, anger, scorn, despair,

And all the passions --- all the soul --- is there.”

II. Be not regardless, either, of the voice of the witness; next to

the eye this is perhaps the best interpreter of his mind. The

very design to screen conscience from crime --- the mental

reservation of the witness --- is often manifested in the tone or

accent or emphasis of the voice. For instance, it becoming

important to know that the witness was at the corner of Sixth

and Chestnut streets at a certain time, the question is asked,

Were you at the corner of Sixth and Chestnut streets at six

o’clock? A frank witness would answer, perhaps I was near

there. But a witness who had been there, desirous to conceal

the fact, and to defeat your object, speaking to the letter

rather than the spirit of the inquiry, answers, No; although he

may have been within a stone’s throw of the place, or at the

very place, within ten minutes of the time. The common

answer of such a witness would be, I was not at the corner at

six d clock.

Emphasis upon both words plainly implies a mental evasion or

equivocation, and gives rise with a skilful examiner to the

question, At what hour were you at the corner, or at what

place were you at six o’clock? And in nine instances out of ten

it will appear, that the witness was at the place about the time,

or at the time about the place. There is no scope for further

illustrations; but be watchful, I say, of the voice, and the

principle may be easily applied.

III. Be mild with the mild; shrewd with the crafty; confiding

with the honest; merciful to the young, the frail, or the fearful;

rough to the ruffian, and a thunderbolt to the liar. But in all

this, never be unmindful of your own dignity. Bring to bear all

the powers of your mind, not that you may shine, but that

virtue may triumph, and your cause may prosper.

IV. In a criminal, especially in a capital case, so long as your

cause stands well, ask but few questions; and be certain never

to ask any the answer to which, if against you, may destroy

your client, unless you know the witness perfectly well, and

know that his answer will be favorable equally well; or unless

you be prepared with testimony to destroy him, if he play

traitor to the truth and your expectations.

V. An equivocal question is almost as much to be avoided and

condemned as an equivocal answer; and it always leads to, or

excuses, an equivocal answer. Singleness of purpose, clearly

expressed, is the best trait in the examination of witnesses,

whether they be honest or the reverse. Falsehood is not

detected by cunning, but by the light of truth, or if by

cunning, it is the cunning of the witness, and not of the

Counsel.

VI. If the witness determine to be witty or refractory with you,

you had better settle that account with him at first, or its items

will increase with the examination. Let him have an

opportunity of satisfying himself either that he has mistaken

your power, or his own. But in any result, be careful that you

do not lose your temper; anger is always either the precursor

or evidence of assured defeat in every intellectual conflict.

VII. Like a skilful chess-player, in every move, fix your mind

upon the combinations and relations of the game --- partial

and temporary success may otherwise end in total and

remediless defeat.

VIII. Never undervalue your adversary, but stand steadily

upon your guard; a random blow may be just as fatal as though

it were directed by the most consummate skill; the negligence

of one often cures, and sometimes renders effective, the

blunders of another.

IX. Be respectful to the court and to the jury; kind to your

colleague; civil to your antagonist; but never sacrifice the

slightest principle of duty to an overweening deference

toward either.

In “The Advocate, his Training, Practice, Rights, and Duties,”

written by Cox, and published in England about a half century

ago, there is an excellent chapter on cross-examination, to

which the writer is indebted for many suggestions. Cox closes

his chapter with this final admonition to the students, to whom

his book is evidently addressed: ---

“In concluding these remarks on cross-examination, the rarest,

the most useful, and the most difficult to be acquired of the

accomplishments of the advocate, we would again urge upon

your attention the importance of calm discretion. In

addressing a jury you may sometimes talk without having

anything to say, and no harm will come of it. But in crossexamination

every question that does not advance your cause

injures it. If you have not a definite object to attain, dismiss the

witness without a word. There are no harmless questions

here; the most apparently unimportant may bring destruction

or victory. If the summit of the orator’s art has been rightly

defined to consist in knowing when to sit down, that of an

advocate may be described as knowing when to keep his seat.

Very little experience in our courts will teach you this lesson,

for every day will show to your observant eye instances of

self-destruction brought about by imprudent crossexamination.

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

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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.”