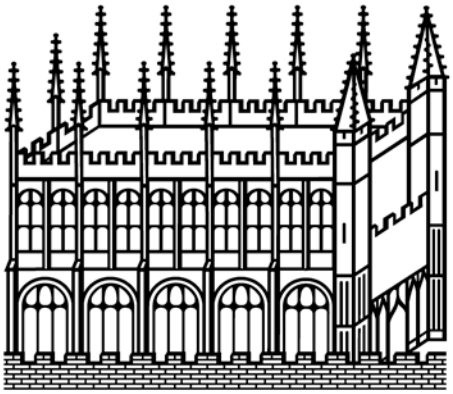
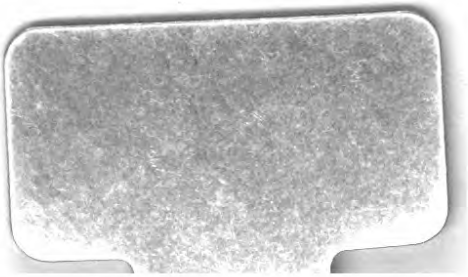


FOURTH EDITION
FURTHER REVISED & ENLARGED

HINTS ON ADVOCACY

5/-

LONDON
WATERLOW BROS & LAYTON



HINTS

ON

ADVOCACY

(USEFUL FOR PRACTICE IN ANY OF THE COURTS),

WITH SUGGESTIONS

AS TO OPENING THE PLAINTIFF'S CASE,

EXAMINATION-IN-CHIEF, CROSS-EXAMINATION,

CLASSES OF WITNESSES AND MODE OF CROSS-EXAMINING THEM,

RE-EXAMINATION

OPENING AND SUMMING-UP THE DEFENDANT'S CASE.

REPLY.

CONDUCT OF A PROSECUTION AND DEFENCE IN A CRIMINAL TRIAL,

WITH ILLUSTRATIVE CASES THAT HAVE OCCURRED;

ANALYSIS OF THE OPENING SPEECH OF SIR ALEXANDER COCKBURN,

IN THE PROSECUTION OF PALMER,

EXAMPLES OF REPLY, PERORATION, &c., &c.

A WORD ON THE APPOINTMENT OF A PUBLIC PROSECUTOR,

AND THE UTILITY OF THE GRAND JURY.

By RICHARD HARRIS,

BARRISTER-AT-LAW,

Of the Middle Temple and Midland Circuit.

FOURTH EDITION

(FURTHER REVISED AND ENLARGED.)

LONDON:

WATERLOW BROS. & LAYTON,

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1880.

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PRINTED BY WATERLOW BROS. AND LAYTON,
24, BIRCHIN LANE, E.C.

A HINT

TO MY AMERICAN COUSINS AND BROTHERS-IN-LAW.

While confessing to a feeling of gratification that my work has been deemed worthy of reproduction in the United States, I cannot help thinking that the courtesy of a formal acknowledgment would have enhanced the compliment.—(*See* Review of American Edition, page 369).

RICHARD HARRIS.

Lamb Building,
Temple, London,
June 1*st*, 1880.

PREFACE TO THE FIRST EDITION.

THERE is no SCHOOL OF ADVOCACY: there are no LECTURES ON ADVOCACY; and so far as I have been able to ascertain, there is no book on the subject. The newly-called Barrister has to find his way as he best can, very often to the sacrifice of important interests and many unfortunate clients. As he has never learnt anything of the *Art of Advocacy*, he is no more fitted for the task of advocating their rights than the clients themselves, except in so far as his knowledge of law will assist him in the purely legal aspects of the question. It seems to me lamentable that no instruction should ever be given in an art which requires an almost infinite amount of knowlege. Tact cannot be taught, but it will follow from experience, and a good deal of experience may be condensed into the form of rules. "*I never felt so much in want of a leader as I did when I had to cross-examine that doctor,*"

said a talented junior of considerable standing, the other day. Why should this have been? What he had to cross-examine about was simple enough, although the question involved was the sanity or insanity of an individual at a particular time. But he had no rule or principle to guide him, and was simply *adrift*. It is with the hope that some of the observations I have made in the course of my experience may be of some little service to beginners in the profession, and whose want of knowledge of this great practical branch of it is no fault of theirs, that I have ventured to offer them the following "Hints."

TEMPLE,

September 17*th*, 1879.

* * * *

NOTE.

The limits of this book prevent any observations on the Reply in the Palmer Trial, or on the speech of the Solicitor-General (now Lord Coleridge) in the first Tichborne trial, or the Reply of the present Solicitor-General in a recent case at the Central Criminal Court; all of which, I need scarcely say, are masterpieces of Forensic Advocacy, and the leading features of which, should my efforts be appreciated I hope in a future Edition to present to the reader.

PREFACE TO THE SECOND EDITION.

THE unexpected success of my "Hints onAdvocacy" left me no time to fulfil the promise contained in the Note to the Preface of the First Edition. I hope, however, to do so in the future.

It has been suggested that I ought to give some "Hints" as to the conduct of a Prosecution, especially as so many junior members of the bar are often engaged in that important duty. I have accordingly endeavoured to do so to the best of my ability, and trust that some of the observations may be found useful.

I have also, by way of illustration, introduced into this edition three cases of considerable importance, which were tried during the time that the first was passing through the press. I hope they will show, as they are intended to do, the practical application of the observations made with reference to the "Conduct of a Defence in a Criminal Trial."

There are also added, by way of illustration, a "Horse-stealing Case," and an examination-in-chief on the part of the prosecution, by which a man's life was miraculously saved; with observations on the subject of evidence to character and the mode and manner of putting questions for the purpose of establishing it. There is also another type of witness introduced into the Chapter on cross-examination, namely, "*The Stupid Witness.*"

I have also added to my remarks on the subject of a Public Prosecutor a few words on the important question as to whether the Grand Jury should be abolished or not; and I trust it may be not without avail to suggest that the uses of the Grand Jury may be preserved while its abuses are swept away, by the aid of a short Act of Parliament and the Public Prosecutor.

TEMPLE,

November 12*th*, 1879.

PREFACE TO THE THIRD EDITION.

THIS Edition of "HINTS ON ADVOCACY" contains the following additional matter:—Chapters on "Opening the Defendant's Case," and "Summing-up the Evidence;" also another Illustrative Case, namely, "An Action for Malicious Prosecution." Two new witnesses have been added, "The Semi-Professional" and "The Official Witness." A speech, called "Bubble and Squeak," has been inserted for the purpose of showing what pronunciation often is when no thought has been given to the subject of elocution. Let it be said, once for all, that it is not intended as a "take off" on any one, nor is it in the least invented by way of ridicule. I have merely spelt an imaginary speech as many of us are very apt to pronounce it. If any one thinks it exaggerated, I would ask him to take the opinion of any gentleman who reports speeches, either in the House of Commons or elsewhere.

The Acrobatic Performance in cross-examination is new.

The witnesses hitherto included in the Chapter on Cross-Examination, having received very much more consideration than I ever anticipated, have now been arranged in a separate Chapter.

In the notice of the First Edition by *The Whitehall Review*, it was shrewdly pointed out with reference to my remarks on "A False Alibi," that the day before Good Friday being Maunday Thursday, the people might be coming out of church on that day as well as on the Friday. I was on the point of changing the day for the purpose of the illustration, but on second thoughts it struck me that *The Whitehall Review*, in its observations on this point, has furnished as good an example as it is possible to offer of the value and nature of *re-examination*. I therefore have made no alteration in this, but at the same time thank the *Review* for pointing it out.

RICHARD HARRIS.

LAMB BUILDING,
TEMPLE, LONDON,
February 23*rd*, 1880.

CONTENTS.

"This man," observes Mirabeau, "will do somewhat; he believes every word he says."—CARLYLE'S "FRENCH REVOLUTION."

HINTS ON ADVOCACY.

CHAPTER I.

AS TO OPENING THE PLAINTIFF'S CASE.

It was with considerable diffidence that I placed the following "Hints on Advocacy" in the hands of the publisher. It seemed at first somewhat presumptuous on my part to offer any remarks on such an important subject. On further consideration, however, I came to the conclusion that one need not arrogate to himself the character of a great advocate, merely because he offers, for the benefit of students, a few observations which are the result of a careful study of the modes pursued by the leaders of the profession. It is not necessary to possess the highest qualities of a writer in order to criticise a book; or of a painter, to treat with discriminating ability the productions of the greatest masters displayed from time to time on the walls of the Royal Academy. It did not require an artist, but a very commonplace individual, to perceive that a great painter had produced a live *red lobster* in a basket of newly-caught fish. Why then should it be

presumed that I claim anything more than an ordinarily observant mind to detect a blunder or perceive a grace in the exercise of the profession, by those whom I have had the privilege to study under?

I have seen very many excellences to admire, and, if haply, to profit by; and I have seen many a *red lobster*, painted by others, which I am afraid has not deterred me from producing some myself of the most beautiful vermilion. And it is because I do not know of any book which may be considered as a guide to the youthful aspirant to the honours of the profession (the greatest of which is to be a *master of advocacy*), that I have taken upon myself to offer the following remarks for his consideration. They are not put forward in a dogmatic spirit, but, on the contrary, with a full consciousness of their imperfections and of their incompleteness when the great subject of which they treat is considered in its vastness and sublimity: but if they should be useful in discovering to the young advocate a dangerous pitfall, or in giving a direction to his unpractised energies, I shall be pleased that I overcame my scruples as to publishing them.

I shall begin with a proposition, which I do not think will be seriously disputed, namely, that *Common Sense* is the foundation of good advocacy. A man may be brilliant as an advocate, and even successful, but the mere dazzle of his splendour will be no light to lighten the path of the inexperienced. On the contrary, it may mislead him by its fascinations, and conduct him into dangerous errors. A brilliant advocate may be

bold and win by it; or, if he fail, may cover his defeat by masterly and striking efforts, whereas an ordinary person, failing in his attempted imitation, would present but a clumsy appearance in his overthrow. *Common Sense*, invaluable in all human pursuits, is of the utmost importance in advocacy. It is the one quality without which all others are useless, and with which almost all others are superfluous.

Experience smooths the way in all professions; but I have seen so many *accidents* brought about for want of it, that it may be useful to note some of those principles which seem to guide the leaders of the bar, and which have presented themselves by means of their constant applicability and usefulness, to my mind, in the form of rules, unwritten, but nevertheless capable of being codified, and certainly deserving of obedience.

I suppose no one will deny that many a good case has been lost by an inexperienced advocate, and many a bad case gained by a skilful one. There is a good deal "*in the play*," even when you hold an indifferent hand. Anything, therefore, in the shape of a rule which may be useful to a young advocate either by preventing him from committing a blunder, or assisting him to conduct his case in a fairly creditable manner, must be of some service.

An advocate is always dealing with human nature. It is the instrument he works with, and it is the field of his labours. Whether he measures his opponent, or estimates the qualities of the jury, or probes the mind and character of the witness, a knowledge of human nature or human character

is the key to success. To treat mankind as mere machines, as some advocates occasionally do, is to show an utter absence of that knowledge which is the best acquirement and the first necessity of an advocate. The worst thing a man can do is to treat the jury as though they were composed of so many fools. Whatever may be their mental capacity, whether you have a stupid or a wise jury, to treat them as unworthy your respect is probably to lose your case, and to discover yourself a man of very little wisdom. There are almost sure to be one or two shrewd men on the commonest of common juries, and inasmuch as they will in all probability lead the rest, you must beware of making them your enemies, as you undoubtedly will, if you let them suppose, by word or manner, that you consider them of little understanding.

A jury is a difficult body to handle, and the more experienced an advocate becomes, the more delicately will he treat the men who have to decide the fate of his cause. The persuasive is better than the roaring style. I have never known a bawling advocate a successful one in getting verdicts. Juries invariably endeavour to do what they think right and to decide justly: it is inherent in human nature that they should; the danger you have frequently to guard against is, that their very desire to do what is just leads them at times to an unjust conclusion. They often set up a rough kind of justice among themselves, and then determine to administer it. The advocate who knows that his client's rights are opposed to this rude theory of justice must convince the jury, and bring them, if

possible, to a more legal view. This is not to be accomplished by declamation, but by reason—by combating the notion that has taken possession of their minds; it may be an extremely false or an erroneous one. Before you can succeed in this, you must ascertain what that idea is, and this you can only gather by a process of reasoning based upon a knowledge of human nature. You may or may not touch the right point; if you do, and are skilful in your mode of address, you will probably overcome it; if you cannot determine what is influencing the jury, so much the worse for your client. Your knowledge of human nature is at fault, and you may as well sit down, for you will be something like Tony Lumpkin's mother, driven round and round in the dark, without getting a step farther on the road.

There is nothing that makes the jury feel more keenly your small appreciation of their mental capacity than flattering them. When I say flattering, I mean the coarse and fulsome style exhibited in such expressions as an "intellectual jury," a "jury of Englishmen," and kindred phrases. There is a flattery that is soothing, pleasing and winning; but to flatter well is an art and a gift that few possess. It consists in using language which does not itself directly flatter, but leads the hearers to flatter themselves. It is as subtle and irresistible as it is charming and delightful. If you watch a jury while an advocate is telling them that they are something out of the common run of human nature, you will see the same expression on their features that you observe in the faces of the crowd that listens

to a "cheap Jack" while he is praising his wares. In both cases the hearers know as well as you do that you are, to use a common phrase, "humbugging them." But in the latter case the listeners are amused without being annoyed; in the former they are generally disgusted, and contemn you as a shallow impostor, who would cheat them if you could. Nothing can be achieved at the bar by artifice, except a contemptible reputation. But you may accomplish everything by earnestness and an honest employment of those arts without which Genius itself would be but a brilliant failure.

The most effective way to secure the attention of the jury is to be in earnest, or at least appear to be. If you are really so (as you should be), you will communicate something of your own feeling to them. This is the art of speaking: the carrying your hearers with you in mind and sentiment.

The next thing to observe is to be logical; without this you will not be even intelligible. Some things you say may be understood, but your address generally will be a jumble of words and a confusion of ideas.

I do not by any means imply that you must put *both sides* logically; by so doing you may reason yourself out of Court. It is your *own case* that I speak of, and it matters little whether you are addressing an educated or an uneducated audience: the mind is a reasoning machine, and it will the more readily grasp arguments that are put logically than those which are presented with unnatural distortions of premiss and sequence.

A skilful and experienced advocate will quickly perceive the master mind of the jury, and to him

he will first address himself. Nor will he be long in ascertaining whether he has made an impression or not. If he succeed, he need not trouble himself very much about the rest, unless there are those on the jury who have prejudices against his case. If there are, these prejudices must be attacked, and if possible beaten down, for it will not be sufficient to enlist the intelligence of one or two minds against the prejudices of others. Intelligence and prejudice are the two master influences on the jury. If there be no prejudice you win by convincing the best mind. If you cannot gain the strongest try and secure the weakest, for if you succeed here you will not lose your case. When trumps are out, the weakest card may take the trick, and you have as much right to win with an uneducated Hodge as with a philosophical Mill. The jury are there for you to gain over to your side if you can by fair and legal argument, and by presenting your case agreeably to their minds and sentiments. I do not say you ought to appeal to the passions or sympathies of a jury, but it is perfectly allowable to leave the jury to make that appeal for themselves. The man who would directly solicit compassion is a poor advocate, but he who would present the facts of his case so that the jury may regard his client with that sentiment is a great one. The one knows human nature, the other does not. The one awakens your sympathy, the other rouses your contempt.

One great evil to avoid, if you would be understood and appreciated, either by a common jury or a special, is *fine talking*. Fine language will not stand the wear and tear of an ordinary *nisi prius*

contest, and nowhere (except, perhaps, in the ears of a romantic female) is it so powerful and effective as good well-chosen homely words. It is as unnatural as the spangled dress of the acrobat, and as utterly unfitted for the ordinary business of a work-a-day life. One has often seen advocates mystify their meaning in phrases which were more like a girlish novelist's hysterical utterances than the sound language of a man and a scholar. It will take a good and gifted speaker a long time, and will require a great deal of practice, before he can venture to embellish his address with the figures or the fancies of rhetoric; indeed, the most gifted and the most finished speaker will only use them in a limited manner; profuseness of ornamentation, like a redundancy of words, being at all times more calculated to obscure the meaning than to elucidate it; and above all things affectation should be avoided. Every listener detests it, and cannot help feeling some degree of contempt for the person who indulges in it. Affectation is a weakness even with strong minds, and although it is sometimes tolerated in a clever man it is never admired; when an ordinary individual indulges in it—he is simply despised.

A quiet style is always more powerful than a noisy one. I have never seen a verdict obtained by noise; foam has no weight, fury of language no force. I by no means say that a conversational style is powerful; on the contrary, you might just as well attempt to set fire to a bed of growing bullrushes with a piece of tinder as to rouse a jury by a feeble speech.

But at the bar, except in rare cases, the higher

gifts of oratory are out of place. It is a limited field; it has its beaten tracks, and along these men must travel. Oratory is not one of its paths; in other words attempts at what is commonly called oratory are to be avoided. What a figure an advocate would present who should attempt the flights of Burke or Sheridan in a "running down" case! What is really required is a well-told simple narrative of the facts in opening your case to the jury! The fewer the words the better, and the less argument the more likely is your statement to be believed. It must seem a strange story to the jury that requires arguing upon before the other side have had a syllable to say in contradiction! An advocate will sometimes tell the jury in his opening that the plaintiff was on his proper side of the way, and that he will convince them that that *must have been so, because*, &c., &c. This is as bad as an opening can be, because it casts a doubt at the very commencement upon the truth of his own story. I was about to fall into the same error by saying if any one doubt my assertion, let him go to Westminster Hall and listen; but it seems too great a blunder to require further comment. The best reason for the jury's believing your story before contradiction is that your witnesses swear to it. When the other side have brought facts or arguments in conflict with it, your time of argument will have arrived, and your arguments will have a freshness which, if used before, they would not possess; they will work as if their edge had not been taken off by a clumsy use of them when there was nothing to cut. When there is no grist the miller stops his mill.

Another advantage from not arguing too soon will be, that your adversary will not be able to turn your arguments against yourself, or to fit his own in accordance with your theories. In other words, you had better obtain some knowledge of your opponent's hand before throwing away your best cards.

At the expense of repetition, I have endeavoured to impress this point upon the student's attention, because it seems to me of the greatest importance; a good case may be thrown away by a weak and indiscreet opening.

The first thing to be done in opening a case is to impress the jury with the idea that at least you believe in it yourself. This may seem almost too obvious a truism to mention, and no doubt it is present to the mind of every advocate. We all know it, or believe we do. The student himself will say, "Of course you must make the jury believe that you think your case is an honest one. Everybody knows that." Granted; but it is not the *knowing* it that I am inculcating, but a very different thing, viz., the *making the jury believe this.* I have seen advocates whose manner was such that they scarcely ever seemed to believe in their own case. A want of seriousness characterised their tone and language. This is a fatal blunder of style. There is nothing which a jury so much detests in the person addressing them as an air of jaunty frivolity. One need hardly say that this is quite a distinguishable quality from humour, for which it is often intended. Humour, when it can be introduced with propriety, is one of the most insinuating of qualities; is almost always accept-

able, and is one of the most fascinating as well as successful of an advocate's gifts. But you must have the genuine article and not the spurious imitation, between which there is as much difference as between a hearty laugh and the grin of a dog that runs about through the city. There is another evil—not the least under the sun in advocacy—which consists in constantly anticipating your opponent's case. It is a similar fault to that of arguing in defence of your assertions before they are attacked, but a trifle perhaps more dangerous. Some advocates think it proper to anticipate the defence and attempt to demolish it. It would be doubtless an excellent mode of warfare if you could accomplish it: but it is not given to every one to be a David and to catch your opponent "on the hop." Besides, the law now-a-days does not permit it; he has the right to present his case, and it will be your duty, if you can, to demolish it afterwards. Even if you know the exact line he is going to take, it is not always advisable to meet him half-way. But in ninety-nine cases out of a hundred you do not know the manner in which his case will be presented, although you may know what his defence is. *After* he has placed it before you and employed his arguments, you know the exact line he has taken; and if you cannot beat him then, it is quite certain you could not have done so before. Do not spring at your adversary before he is over the ditch, otherwise you may find yourself uncomfortably landed in the middle.

One often hears a youthful (and sometimes a not youthful) advocate say, "he cannot conceive what defence his learned friend can have"—that

"it's really, gentlemen, an undefended case." And yet, very often these remarks are followed, more often than not, with a verdict for the learned friend who has no case or no defence. It is impossible to conceive of anything more ineffective than this. Such assertions are worse than useless. They are no part of the opening; they are not argument; they lend no emphasis to the statement; and they are *not true*. They impress neither judge nor jury; but they sometimes make the counsel who utters them look extremely ridiculous. If the learned gentleman on the other side has no case, it will appear without your saying so. If he has a case, your saying he has none will not alter the fact. This is nothing more than an old, worn-out "dodge" of an almost extinct school of advocacy. It is a selfish assumption and an overbearing piece of arrogance on the part of the advocate employing it, as though he would not only proclaim himself the judge and jury in his own cause, but even deprive his opponent of the right of being heard in his defence.

It would be out of place perhaps to say anything further with regard to redundancy of expression, were it not a prominent fault with many young advocates. It is a pleasant thing no doubt to air one's eloquence in public, but it reminds one of the process of airing other articles—it shows a good many weak places. The fewest words, as a rule, make the best speech. All the language not required to convey ideas is surplusage, and if used at all, should be of the very best; if not required for use, it should be employed for the purpose of lending dignity or moderate embellishment. It

may be said that baldness of expression is not compatible with excellence. That may be true, and I am not unaware that the graces of eloquence lend a charm to the speaker as well as the speech. These doubtless should be cultivated and employed when in a state of cultivation, but not before. Redundancy, however, is not a grace, but a deformity, and the way to cultivate that is to cut it off altogether. Poverty of language is one thing, choice of words another, and there may be the greatest poverty of language with the greatest redundancy of words. One has often heard speakers talk for half-an-hour without making a single sentence, reminding one of a muddy rivulet after a deluge, winding its way wherever it can find an outlet or an inlet, making a great fuss, and never coming to a single stop or a conclusion.

Of course no one would say that ornamentation is to be ignored. On the contrary, it should be carefully used, but not so as to smother that which it should only render more attractive.

Illustration sparingly employed is an effective ornament; and so much so, that there is often a danger of even truth and reason being sacrificed to it. Minds are apt to be carried away by a beautiful simile, and because *that* is true, are prone to consider that the argument illustrated must be true also. But in an opening speech illustration should be *utterly abandoned*. Fact, and fact alone, is the strength of an opening speech; although when I come to deal with the examples further on, I will endeavour to point out how the facts may be commented upon when necessary by way of explanation, connection, or emphasis.

The principal thing in an opening speech is *arrangement and order*. No really good statement can be made without this; and time will never be wasted in noting up and arranging a case so as to present it chronologically to the jury. A fine example of arrangement—indeed, one of the finest on record—is presented in the famous trial of Palmer, the Rugely poisoner, referred to hereafter.

It may be said no one doubts that order and arrangement are necessary to make a good opening statement. It is so true, that everyone knows it and no one denies it; but so long as so many advocates act as if they did not know it, and neglect not only all order, method, and arrangement, but confuse facts and dates to the annoyance of jury and judge and to the disparagement of their client, it seems not unnecessary to insist that the strictest attention should be paid to the order of time, the order of facts, and the arrangement of causes and effects. Every statement should be as free from confusion as if the facts had been mapped out on paper with the utmost faithfulness. Every series of facts should be brought down in the strictest order; and if there be many series operating apart, but exercising an influence upon the main action of the drama, they should be brought down in their natural order and sequence until they are all centered upon the common point. In the most complicated and tangled circumstances there should be no confusion. It is the business of the advocate and the art of advocacy to separate them, and to show their relations to one another, their bearings upon each other, and their influence upon the main action. Irrelevant matter therefore should

be carefully excluded—by no means so easy a task as it at first sight appears, and only to be accomplished by diligent study and thoughtful practice.

What is understood by irrelevant matter is matter which attaches itself to or mixes itself up with the circumstances of the case without any natural connection with or bearing upon the case itself. There are always facts which, in one sense, may be said to be irrelevant, but which in reality are not so. And examples might be given in cases of actions for malicious prosecution, where events or conversations that operated upon the mind of the prosecutor have to be considered. So in cases of libel; and so, in fact, in most inquiries where the state of mind of an individual is either the main subject of inquiry or has to be considered.

What is the *issue*, and *upon what evidence will it depend?* Determine that first, and then the evidence will arrange itself almost naturally. But in many cases, that which should be first settled in the advocate's mind is never distinctly perceived.

As an instance, take the following pleadings:—A. endeavours to set up a lost will. He alleges that it was made and executed on a certain day five years ago, and that it never was revoked. The defendant denies the making in accordance with the requirements of the statute. He says that the alleged testator was not of sound mind, memory and understanding; that the will was afterwards destroyed while he *was* of sound mind, memory and understanding, with the intention of revoking it, and that the plaintiff is not a legatee. Now it will be obvious here that many issues will present

themselves; but it may be equally apparent to the counsel for the plaintiff that the whole question may ultimately resolve itself into this, whether some particular witness saw the will at a particular time. This will perhaps depend not upon the accuracy of the witness's memory, but upon his credibility. The decision therefore may depend entirely upon the question as to whether a witness can be believed or not. The execution may be past all question; the sanity of the testator indisputable upon the evidence; the contents proveable by some draft or otherwise; the question of destruction or no by the testator, up to a given moment, uncontroverted; the insanity of the testator from a given time also placed beyond doubt; the issue therefore will resolve itself into the question whether the will was in existence between two given periods, and that must depend upon the evidence to this fact of the person who saw it in the meantime. If he be believed, verdict for the plaintiff; if disbelieved, for the defendant.

Now, it will be obvious that to lay much stress upon those points which will be placed beyond all dispute as the evidence is unfolded would be wasted energy. The facts should of course be stated with due precision and conciseness, but to dwell upon them would only be wearying the jury to no purpose, and diverting their attention from the proper object of inquiry. The thing really to be done is to impress them with the reliability of your witness; if they disbelieve him, your case is lost; therefore you must guard him against the assaults of your opponent, whose skill will be directed to breaking him down. He will know that this is the key

of your position. But how is the witness to be strengthened? If you have no corroboration, must he not stand by himself? By no means. A hundred incidents in the story to which your witness speaks may be corroborated by other testimony, and this will tend to show his truthfulness. You must search for this kind of corroboration when you have no other, and if you find that he is generally supported by other and it may be totally independent witnesses, upon points which neither he nor they deemed material; if you find that the story is consistent in itself, and is likewise compatible with the probabilities of the case, you may rely upon it that the verdict will be yours.

It might not be out of place here to mention that this will show the absolute necessity of a careful examination-in-chief. If that be clumsy and disconnected, if only half the story should be told, the very probabilities I have been speaking of will become improbabilities, and your witness will not only be unsupported but weakened. It will be seen also from this illustration, how important a part reason exercises in matters of this kind. The jury will neither believe nor disbelieve a witness without a reason satisfactory to their own minds. You must therefore take care that every fact upon which a fair argument in favour of your theory can be based is not only elicited in examination-in-chief, but stored up in your memory to be reproduced to the jury for the purpose of influencing their judgment.

And here, it may be observed, there is a mode of creating an impression on the mind of a jury without in the least appearing to desire it, and which is of all others the most effective. All men

are more or less vain, and every man gives himself credit for a deal of discernment. He loves to find out things for himself—to guess the answer to a riddle better than to be told it—to think he can see as far into an opaque substance as most people.

In many instances jurymen will see farther into a case than either judge or counsel, and will sometimes correctly decide upon a cause for some reason that is not apparent and is never ascertained. The most experienced counsel is often puzzled at a verdict, the reasons for which are sound and good, and yet which arose from no efforts on his part or that of his opponent, but simply out of a common sense view of the facts as they presented themselves to the unprofessional mind. If you want a point thoroughly to impress the jury, don't actually make it, if you can effect your object by a less direct means; let the jury make it for themselves, only be sure that it is made. You may be too venturesome and too clever, which is a great deal worse than not being clever enough.

Mystery is an excellent wrapper for an important fact, especially when you let the jury undo it for themselves. Say that a will mysteriously disappears between two given times. If your case is that A. B., who took no share under it, and who would be benefitted by its destruction, in all probability took the will away, you need go no further than state that there is no evidence as to the disappearance of the instrument; that the niece who was interested in its preservation and the doctor were the only persons who were in the house between those times. If then you show that A. B., for ever so brief a moment, came to the house, the

jury will as a matter of course come to the conclusion in their own minds, without any direct charge on your part, that A. B. destroyed it, and upon very slight evidence indeed give a verdict in favour of the non-destruction of the will by the testator. The jury in fact will draw all necessary inferences for themselves.

This is not a mere "trick" of advocacy; if it were, it would be better not to mention it. Tricks are the resource of feeble advocates, and the worst or the best feature of a trick is that it always fails in its object. It is known instantly, and damages the cause it is intended to serve, like the advertisements of a quack doctor, which proclaim his imposture.

What is the use of endeavouring to prejudice the cause of your opponent by saying, "Gentlemen, I don't say that the defendant has obtained these goods by false pretences, but I say his mode of dealing will not commend itself to your minds." This is a trick—an impoverished one, it is true; but so would every other trick seem if I were to write it down. Look at the following: "I don't think much of such and such a transaction; I merely call your attention to it in passing; or the fact that the defendant did or said so and so." These are devices which do not approach to the pretensions of art, and are unworthy of a good speaker. They are not the truth—not the words of sincerity; and when you have neither truth nor sincerity, although you may have acting, you cannot have the highest and best speaking. Truth and sincerity are among the charms and graces of eloquence, and they are the power that stirs and impresses an audience. I am far from saying that

there are not two ways of presenting a sound proposition or an incontrovertible argument. Truth and sincerity themselves may, in an uncultured and inartistic speaker, be made to look absolutely offensive, and not only to look so, but to be so. Therefore it is absolutely necessary, if you would impress your hearers, that art should come to the aid of reason; the same idea and the same truth may be conveyed in coarse as well as in cultured language. One need not say in which it will be transmitted most effectively; but the tricks referred to are apart from both, and partake more of the style appropriate to the conjuror or wizard at a fair than to an advocate speaking at the bar.

Tricks of expression or facial distortions are nearly allied to tricks of gesture, and every one must lament to observe them in these refined and polished times. Some advocates twist their faces into a look of extreme anguish when they address a jury, as though the weight of their task caused them physical torture. Others attempt to screw their features into looks of supreme contempt, anger, or scorn. It is not every one who can convey his feelings by a *look*. The face takes its expression from the feelings; and you can no more give it a natural look which does not spring from that natural source than you could make the face of an india-rubber doll beam with pleasure. It is only by dint of labour and study that the sculptor can obtain an expression upon the marble which faintly represents the emotions. It is quite clear every one is not artist enough to put the right muscles in motion to produce a corresponding

effect upon his own features whenever he desires it. Attempts of this kind are not only ludicrous but foolish. I have seen an advocate, in trying to look angry, cause a titter all round the court, and set the jury on the grin. He was attempting a piece of acting, and not being an actor, failed. He pulled the wrong muscles of his face, if I may be permitted the expression. A photographer is often blamed for not producing a "good likeness," when the fault is with the sitter, who either attempts to look learned, or interesting, or heroic, or anything, in short, but what he is. Do you suppose every one could put his face in a hole in the canvass and look a good likeness of himself? I think not. Men are such poor actors as a rule, that they cannot even "look themselves" if they try to. I have seen another shake his head very much, and stoop to the jury in a mode which must have suggested to Dickens the "jury droop," and turn up his eyes to watch the effect; this was intended for *pathos*. It did not answer; a bad actor and a grinning audience was all it came to.

All acting that shows itself to be acting is bad, and at the bar perhaps is more out of place than anywhere else. The instant the jury suspect you of attempting to deceive them, their confidence in you will be gone, and they will pay no attention to any argument you may use. They will suspect the most sound and plausible as being only the more deceitful.

If you feel in earnest—as you should, whatever your cause—your features will exhibit all the emotions they are intended by nature to display without any effort or contrivance on your part.

And this you may be sure of, that if you do not attempt any facial display you will never pull the wrong muscles.

It is perhaps as well here to warn the young advocate against a very common and fascinating error—that of *imitation*. A really good advocate has a style of his own, and an individuality which would be utterly spoilt were he to attempt to blend it with that of another. To imitate a successful man's style is like a short man putting on a tall man's coat. However well it fitted the one, it is sure to look ridiculous on the other. Style is born with a man as much as his mental capacity itself. Nor should it be forgotten that imitators, as a rule, adopt the failings and not the excellencies of their models. Affectations of speech and mannerisms are what generally catch the eye of the imitator. Besides this, imitations are bad in themselves. As a rule, they are grotesque and frequently little more than burlesques of the original. It is at once apparent that they are no part of the imitator's individuality, however well they may be done.

It does not of course follow that the best advocates are not therefore to be accurately studied. On the contrary, it is servile imitation that is to be deprecated, and not the careful study of the graces and excellencies of the best men. The smooth unruffled demeanour, the courtesy, the polished ease, the unexaggerated eloquence, the order and arrangement of speeches, the skilful and subtle modes of cross-examination, the fearless independence of the masters of advocacy should be studiously considered. Imitate these—*if you can*. But wherever you see an extravagance of style,

even though it may be fascinating in the advocate, to whom it is natural, never be tempted for a moment to imitate that. An imitator must of necessity be a second or third-rate man, and is generally below even that.

In opening a case, *moderation* is more forcible than exaggeration. The latter indeed is weakness. To open a strong case is not to prove it. What you should strive to do is to give the substance (somewhat more than an outline) of the case you intend to prove. This should be done so that when the evidence, usually in disjointed and often in widely-separated pieces, is presented piece by piece to the jury, they may see the bearings of each upon that which has gone before and afterwards upon the whole, and appreciate its value. I will give an instance by-and-bye, which presents itself to my mind as one of the best examples of modern times, indeed I do not think it is in human possibility to surpass it. I mean the opening speech of Sir Alexander Cockburn in the trial before referred to.

Suppose you have a number of witnesses to prove various facts, totally separate and apparently disconnected from one another, but yet having a bearing directly or indirectly upon the main issue? These witnesses represent numerous facts distinct and separate, occurring at different times and in different places, yet all working towards a common centre, confirming and corroborating one another, leading up to, and indeed forcing on the main event of the story. It is obvious that in opening a case of this kind, if you would make the narrative clear, you must deal completely with one set of facts at

a time—the earliest in date will probably be the best to commence with. These should be made plain and intelligible to the jury merely as facts, and no attempt should be made to show their bearing upon the main point of the case until the other branches of the subject are in like manner made intelligible. If this be done too early the effect will be lost, the narrative will be disturbed, and the minds of the hearers confused. The first set of facts should be stated and left ready to be fitted in at the right time. The next, and the next will follow in proper order, until at last the whole of your materials will be ready to be built up into the structure you intend to form.

The jury, having thus seen the separate parts of your narrative, will perceive readily what position each will occupy, and what relation it will bear to the others.

It need scarcely be said, that if you make any part out of due proportion to the rest by exaggeration, it will not fit in, and will spoil the symmetry of the whole; nor should the statement be flimsily adorned with superfluous eloquence, as they dress out an animal with tawdry ribands when the creature is about to be baited; nor overlaid with prejudice, which is equally unnecessary in a good case or a bad one. No advocate need attempt to infuse prejudice, but on the contrary, should be on his guard to prevent its influence. You should seek only to make your statement appear truthful and natural. Short of this the opening will be a failure; beyond this the evidence will be.

Moderation is Power.—It sounds a little like a copy-book text, but I do not think it the less worth

remembering on that account. "Your opening," said a distinguished Queen's counsel to his opponent, "was admirable; it combined moderation with such wonderful force." The moderation, in fact, was its force. It was a case in which there were a multitude of facts, and various sets of them; but in which, if two facts were true the whole must be, because the relations of these two to the remainder were such that the fabric could not exist without them, and must exist in its entirety if those facts occupied the respective positions assigned to them. While speaking of moderation, it may be as well to say that it is equally necessary to moderate the tone as the style. It enables a speaker the better to exhibit the most beautiful of all the graces of eloquence, namely, that of modulation. This is the music of speaking, little cultivated I fear at the bar, or anywhere else except the stage, but one which is of inestimable value in forensic speaking, and one that ought to be practised with the utmost diligence. There are some few orators still living who possess this charm in perfection. Those who have heard our public speakers will readily understand whom I refer to.

There is another fault which it is equally well to guard against as loud speaking, and that is *soft* speaking. Speak out, my man! don't mumble and drawl your words out as though they were tape you were selling by the yard, and were not certain how much you had in stock. A man who bellows may get on at the bar to a certain extent, but if you are afflicted with an inaudible voice you will not get on at all. One does not like to see the expression of pain on a juryman's face, as, with

his hand behind his ear, and his mouth open (as though he might catch something in that way), he is straining to hear what the advocate is talking about. Sometimes diffidence produces softness of speech, if so, perseverance will overcome it; but it is doubtful if the diffident young advocate will have much opportunity for perseverance in Court. But there are places where he may persevere as much as he likes. There are seashores and windy commons.

But the most trying, and by no means the least useful of places for practice, is the quiet room. To speak to one's self requires some energy, and a considerable amount of courage. You have to surmount the idea of the foolishness of the situation, and it constantly presses upon you; you have to listen to the tones of your own voice, and these, unless you stand excessively high in your own opinion, sound like self-reproaches; you are sometimes carried away by a wild flight of extravagant oratory, like one going up in a balloon; and then it suddenly collapses; and as you come down you cannot, for the life of you, help thinking what an eccentric person you are. But it is because of all these thoughts and feelings arising out of the absurdity of the situation, and the grotesqueness of the fact of a man's declaiming to himself, that the exercise is so useful; and if one can conquer his diffidence in his own room, he will be sure to master it in public. Besides this, the being able to listen to and criticise one's own words will be of immense benefit; and if he have any power at all of modulating the voice, he will be able to exercise it here, where no other sound interposes.

It is here, if anywhere, he will be able to tune it, and to test its capabilities.

There is, doubtless, too little attention paid to this branch of advocacy. A good many proceed as if men were universally gifted with a fine flexible voice, with sweet eloquence, and the art of using both to perfection. Whereas, the gift of a rich voice is one of the rarest, and requires cultivation before it can be rendered perfect. How much more is it necessary to tune those voices that are not rich and very often are not even pleasant?

An organ-grinder endeavours to get the pleasantest organ he can, knowing it will bring him most success; as the organ we use at the bar is one which we have to work with for the same object, it is necessary that we should make it as pleasant as possible, and develope it to the utmost of its capacity.

It may not be superfluous, in concluding this chapter, to say that a speaker in opening a case should never be rapid. As a rule rapidity of utterance is not a common fault, but there are many who talk too fast, and as a necessary consequence say too little. It is difficult for all who are not the most finished speakers to make a sentence, and it is not easy for juries to follow at times deliberate speakers who can form sentences; but what must their difficulty be in following a man who speaks with great volubility, and never makes a sentence at all? "Can't make head or tail of him," said a juror after a flippant junior had sat down, "talks too fast." "What's the haction for?" asked another. "Is he for pla-antive or defendant?" inquired a third. An advocate had better not open his case at all if

he cannot leave a better impression than this—he is simply injuring his client.

Slow, sure, and short, is a good motto for young advocates. A long opening is wearisome and unnecessary, and it can only be made so by repetition. Not that you can deal out speeches by the yard, and cut them off in lengths as required. I am speaking with reference to verbiage rather than time. A speech may be very long that occupies twenty minutes; it may be admirably concise and take six hours in its delivery. The opening in the Tichborne trial for perjury occupied some days, yet it is a model of neatness, arrangement, and concise narrative.

A short speech is more powerful than a long one, and when jurymen tap the ledge of their desk with impatient fingers, you may take it for granted you have been already too long, and every additional word may be not only a burden to them but also to your client. Consistently therefore with those graces of diction without which language would sometimes be offensively bald, the fewer words you employ the better. It by no means follows that you should speak in telegrams, but that mere verbiage should be pruned away, so that there may be greater strength and a more symmetrical and cultured beauty.

The jury care little for the advocate's conceits; they want the facts of the case, and it is precisely because they require these only that you must present them in a form that will not only impress them upon their memory, but induce an acceptance of them in accordance with your view and your client's interest.

Another error to avoid is that of attempting pathos; it is almost sure to make the jury laugh. A weeping advocate and a laughing audience is a scene for farce and not for a Court of justice. The power of moving the passions is the highest and rarest gift that nature bestows on an orator. It is so great that it may be called oratory itself. But this mastery over the feelings does not come by practice; it cannot be acquired, nor is a speaker pathetic by choice. He may weep, if he be weak enough, but that is not pathos; he may shake his head, hold up his hands, do anything else to mimic feeling, but he will not move his audience. Fortunately it is a gift little needed at the bar; on the contrary, if one be endowed with it, it will be his duty to suppress rather than to encourage it. To attempt an appeal to the passions without possessing the power, is but to declare yourself an impostor, and to show that you would act unfairly if you could. There may be occasions when an advocate's cause appeals to the deepest feelings of our nature. Those are times when, if you have the power, you may use it legitimately and even nobly on behalf of the oppressed or the injured; but if you have not the high gift, you had better not spoil the pathos of facts by a ridiculous burlesque of sublime sentiment.

In conclusion, it may be remarked that men who have attained eminence as speakers have reached it only by immense labour, by unwearied practice, and by a diligent study of the greatest masters. It may seem superfluous to go through so severe a training merely to become a *Nisi Prius* advocate, but when one considers that to speak well

is almost to ensure success, it must be conceded, I think, that success is worth all the labour of our lives to achieve. And further, it must not be forgotten that a time may come when the occasion will demand the exercise of those powers which have been stored up by the labours of our early years.

CHAPTER II.

AS TO EXAMINATION-IN-CHIEF.

One of the most important branches of advocacy is the examination of a witness in-chief. As a rule, a young barrister, if he be bold, and he may be bold through fear, throws himself into his work like one who plunges into the water before he can swim. There must under such circumstances be much floundering and confusion. The nervousness that is necessarily felt when he rises in Court before an experienced judge, whose eye is like a microscope for his faults, and who is not always tender in his criticism, would be a terrible drawback, even if the junior were master of his work. As a rule, however, he has very little notion as to how a witness should be examined. He feels, too, that there are around him those who are too prone to "mark what is done amiss," not from ill-nature, by any means, but from habit. His nervousness increases in proportion as his want of practical experience makes itself more and more manifest to himself. One can scarcely conceive of a situation more unenviable than this.

I do not pretend that any observations about to be made will cure all this, or give him experience; but it is hoped that some of my remarks will so far be advantageous as to enable him to avoid many errors, and to keep in the well-trodden

path of experienced advocates. One fact should be remembered to start with, and it is this, the witness whom he has to examine has probably a plain straightforward story to tell, and that upon the telling it depends the belief or disbelief of the jury, and their consequent verdict. If it were to be told amid a social circle of friends it would be narrated with more or less circumlocution and considerable exactness. But *all the facts would come out;* and that is the first thing to ensure if the case be, as I must all along assume it to be, an honest one. I have often known half a story told, and that the worse half too, the rest having to be got out by the leader in re-examination, if he have the opportunity. If the story were being told as I have suggested, in private, all the company would understand it, and if the narrator were known as a man of truth, all would believe him. It would require no advocate to elicit the facts or to confuse the dates; the events would flow pretty much in their natural order. Now change the audience; let the same man attempt to tell the same story in a Court of justice. His first feeling is that he must not tell it in his own way. He is going to be *examined* upon it; he is to have it dragged out of him piecemeal, disjointedly, by a series of questions—in fact, he is to be interrupted at every point in a worse manner than if everybody in the room, one after another, had questioned him about what he was going to tell, instead of waiting till he had told it. It is not unlike a *post mortem;* only the witness is alive, which seems almost a misfortune to him. He knows, too, hat every word he says will probably be

disputed, if not flatly contradicted. He has never had his word doubted before perhaps, but now it is very likely to be suggested that he is committing rank perjury.

This is pretty nearly the state of mind of many a witness, when for the first time he enters the box to be examined. In the first place then he is in the worst possible frame of mind to be *examined*—he is agitated, confused and bewildered. Now put to examine him an agitated, confused and bewildered young advocate, and you have got the worst of all elements together for the production of what is wanted, namely, *evidence.* First of all the man is asked his name, as if he were going to say his catechism, and much confusion there often is about that, the witness feeling sometimes that he is blamed by the judge for not having a more agreeable one, or for having a name at all. He looks, however, as if he could not by any possibility have helped it, and thinks he has got off remarkably well so far. Then he faces the young counsel, and wonders what will be the next question.

Now the best thing the advocate can do under these circumstances is to remember that the witness has something to tell, and that but for him the advocate, would probably tell it very well, "in his own way." *The fewer interruptions therefore the better;* and *the fewer questions the less questions will be needed.* Watching should be the chief work; especially to see that the story be not confused with extraneous and irrelevant matter. The chief error the witness will be likely to fall into will be hearsay evidence, either he says to somebody, or somebody says to him something which is

inadmissible and delays the progress of events. But the witness being very tender, you must be careful how you check the progress of his "he says, says he's," or you may turn off the stream altogether. Pass him over those parts as though you were franking him through a turnstile, and then show him where he is; or as if you were putting a blind man with his face in the direction he wished to go, then leave him to feel his way alone.

The most useful questions for eliciting facts are the most commonplace. "What took place next?" being infinitely better than putting a question from the narrative in your brief, which leads the witness to contradict you. The interrogative "Yes?" as it asks nothing and yet everything is better than a rigmarole phrase, such as, "Do you remember what the defendant did or said upon that?" The witness after such a question generally feels puzzled, as if you were asking him a conundrum which is to be passed on to the next person after he has given it up.

Judges frequently rebuke juniors for putting a question in this form: "*Do you remember the 29th of February last?*" In the first place, it is not the *day* that has to be remembered at all, and whether the witness recollects it or not is immaterial. It is generally the *facts* that took place about that time you want deposed to, and if the date is at all material, you are putting the question in the worst possible form to get it. A witness so interrogated begins to wonder whether he remembers the day, or whether he does not, and becomes puzzled. You might just as well ask if he remembers the 1st May, 1816 (the day on which he was born), in-

stead of asking him the date of his birth. This is one of the commonest, and at the same time one of the stupidest blunders that can be made. I will, therefore, at the risk of repetition, give one more illustration. Suppose you ask a witness if he remembers the 10th June, 1874; he probably does not, and both he and you are bewildered, and think you are at cross purposes; but ask him if he was at Niagara in that year, and you will get the answer without hesitation; inquire when it was, and he will tell you the 10th of June. In this way you avoid taxing a witness's memory; always a dangerous proceeding, and much more within the province of cross-examination than examination-in-chief. Many a good case has been lost—and many more will be—by clumsy questions of this kind at the commencement of a witness's examination. If you leave his mind in a state of bewilderment and confusion, your work will only need to be followed up by a well delivered question or two in cross-examination to demolish the whole of his evidence; and then, in all probability, the advocate will think he would certainly have won if he had not had so stupid a witness.

Incalculable mischief is done by a clumsy examination, and yet as little attention is paid to this branch of advocacy as to any. Everyone thinks it is so easy, that a blunder is impossible. I believe it to be the most difficult task of all—it certainly is the most important; because your evidence is your case. It may seem unnecessary to observe that no sign of *irritability* should be manifested towards the witness. If he be stupid your vexation will by no means assist him, nor will a sharp rebuke, such as

one too often hears administered. The more stupid he, the more patient should the advocate be. A stick is a bad thing to help a lame dog over a stile with; and further, the stupidity is not always on the side of the witness. Every question should not only be intelligible and relevant in itself, but it should be put in such a form that its relevancy to the case may be apparent to *him*. A question, without being leading, should be a *reminder* of events rather than a test of the witness's recollection. I will give an illustration which will show how easy it is to blunder, and how necessary it is to avoid blundering.

A man brings an action against a railway company for false imprisonment. The facts are these: He lost his ticket and refused to pay; the porter on the platform called the inspector, who sent for a policeman and then gave him into custody. The best way not to get the facts out is to examime him in the following manner:—

"Were you asked for your ticket?—Yes."

"Did you produce it?—No."

"Why not?—I had lost it."

"Are you sure you took it?—Quite."

"Positive? (This is a good opening, surely, for the thin edge of the wedge of cross-examination—a doubt thrown on your own witness).—I am quite sure."

"What did the defendants say then; I mean the porter? (This blunder ought not to have been made). At this point the witness is in a hopeless muddle, and says:—I was given into custody."

The story is not half told, although it is one of the simplest to tell.

Now the counsel contradicts by way of explanation, and says "No, no; do attend." Witness strokes his chin as though about to be shaved. Judge glances at him, and wonders if he's lying. Counsel for the defendants (sure to be eminent) smile, and the jury look knowingly at one another, and begin to think it's a trumped-up attorney's action.

Now start again with another qnestion.

"When the train stopped you got out?—I didn't get out afore it stopped, sir."

"Did any one ask you for your ticket?—They did;" emphatically, as though he knows now where he is.

"Who?—I'm sure I don't know who he is; never see the man before in my life."

"Well, well, did he *do* anything?—No, sir, he didn't do nothin' as I knows of;" evidently puzzled, as if he had forgotten some important event upon which the whole case turns.

This looks so ridiculous on paper that it is possible some readers will doubt if it ever happened. I can only say there are many much more ridiculous incidents that occur in Courts of Justice when young counsel have what is called a "stupid" witness in the box. In Court the stupidity always seems to be that of the witness. On paper it looks as if the learned counsel could establish a better title to it. This leads me to notice a cardinal rule in examination-in-chief. It is seldom regarded as such by beginners, and only seems to be observed as the result of experience. Why it should not be learnt at once and implicitly obeyed I do not know, except it be that it has never been written down.

The rule I refer to is, that in examining a witness *the order of time ought always to be observed.*

Stated in writing it looks simple enough, and everybody says "of course." Plain as one of the ten commandments, and as often violated by young advocates. Just step into Court and you will see events running over one another like ants on an ant-hill. Not only is the rule not acted upon, it is never even considered. True, the principal events in a story are generally placed in something like order, because the judge requires that his notes should be correct. But with what difficulty this is accomplished when an inexperienced junior gets out a detail here and a detail there and mixes them up with wrong events and dates, leaving the judge to match them as if he were playing a game of "Patience!"

While a witness is telling his story in a natural manner (which he will generally do if left to himself and with due attention to the order of time), counsel suddenly breaks in with some such observation as this: "One moment. What was said when you spoke to the defendant?"

The thread of the story is immediately broken; the witness's mind is carried back like a wounded soldier to the rear, and it is some time before he can be brought to the front again. Nor is this all. The judge is angry (if a judge can be), and the mind of the jury is prevented from following the course of the narrative. If the question be of importance the judge's notes must be altered, and probably will be confused. Had the order of time been observed the notes would have required no correction, and it is quite possible that the subse-

quent events take a different colour from the answer. Besides this, the breach of this rule tends to multiply itself. The question having been interposed at the wrong time, the judge asks: "When was that said?" The witness becomes confused, tries to recollect, and very likely puts it in in the wrong place after all, is reminded that that cannot be, is ordered to recollect himself and *be careful*, and so on, to the confusion of everybody except the opposing counsel, into whose hands the inexperienced junior is playing. It shows the necessity of every event being placed in its natural order, and of every material circumstance and conversation accompanying that event being given in connection with it, so that everything is exhausted as the story proceeds. If this be not done the client had better have been without your services.

Let therefore the events be told in the order in which they occurred, with the accompanying conversations, if important and admissible, and their minor incidents, if material.

Another fault of too frequent occurrence is the repetition of the phrases: "You must not tell us what was said, but what was done." "Did he say anything to you? Don't tell us what it was." The jury, who know very little of the rules of evidence, must sometimes think from the tone as well as the language that the counsel is afraid of something being told that would be adverse to his case, and must wonder at an advocate who asks if somebody said something, but anxiously cautions the witness not to tell what it was. It may be said the caution was necessary, so it might be; but it need not be made the prominent feature in

the examination. There need not be a fuss about it, as though you wanted to impress the world with your vast knowledge of the rules of evidence. In ninety-nine cases out of a hundred, it is obvious that something was said; the fact will not be disputed, and a leading question will pass the witness over the difficulty, and not confuse his mind by sending it upon an inquiry as to why he must not give the conversation.

Another rule to observe is this:

Never cross-examine your own witness. This, again, seems remarkably obvious. But it requires an effort to obey it nevertheless. You will hear an advocate cross-examine his witness over and over again without knowing it, if he have not the restraining hand of his leader to check him.

Before Mr. Justice Hawkins, not long since, a junior was conducting a case, which seemed pretty clear upon the bare statement of the prosecutor. But he was asked: "Are you *sure* of so and so?" "Yes," said the witness. "Quite?" inquired the counsel. "Quite," said the witness. "You have no doubt?" persisted the counsel, thinking he was making assurance doubly sure; "Well," said the witness, "I haven't much doubt, because I asked my wife."

Mr. Justice Hawkins: "You asked your wife in order to be sure in your own mind?" "Quite so, my lord." "Then you had some doubt before?" "Well, I may have had a little, my lord."

This ended the case, because the whole question turned upon the absolute certainty of this witness's mind. Of course, it is not suggested that a fact should be suppressed that is necessary for the

ascertainment of truth, and in this particular instance the learned counsel was quite right in pressing the witness upon a material point upon which the prosecution rested; but it is no part of an advocate's duty to endeavour to shake his witness's testimony to pieces if he believes it to have been honestly given. Nay, more. A cross-examination of one's own witness may most unjustly bring about a disastrous result. A witness may get confused, and although at first might feel absolutely positive, and be justly positive, yet, by the perpetually harassing him, he may begin to doubt whether he is positive or not, and leave an impression that he is doubtful. Such questions as: "Are you quite sure, now? Are you certain?" are cross-examination, and do not fall properly within the scope of an examination-in-chief. "Are you quite sure you have the money in your hand?" would be certain to raise a doubt in the mind if a conjuror asked the question.

Leading a witness in material matters is a blunder which is not likely to be permitted by your opponent; but if he do, *it is generally a disadvantage.* Evidence that is given in answer to leading questions is of the weakest character. The mere answers of a witness are nothing; it is the effect they have that makes them valuable or otherwise, and a jury always distrusts evidence which comes rather from the mouth of the counsel than that of the witness. As a matter of policy, therefore, apart from the violation of the rules of advocacy or the practice of the Courts, leading questions upon material matters should be carefully avoided.

Except under particular circumstances, an advocate should not examine from his brief. The most complicated story is best unravelled in the ordinary and natural manner. Your brief is a statement of facts for your information, not for that of the witness. Let him tell his own story with as little interruption from you as possible, and in all probability he will tell it well enough if you do not confuse him with your brief. If you find he is omitting a material point, your duty will be to bring him to it at once.

There is nothing more common with beginners than going *too fast*. They are frequently told by the judge that they forget that he has to take down the answers; and the importance of your evidence looking well on the judge's notes cannot be exaggerated when you are supporting or showing cause against a rule for a new trial. When the evidence is coming well, there is no doubt a great temptation to let it run too fast, but you must take care it does its proper work, otherwise it will be like a rush of water which shoots over the mill-wheel instead of turning it.

Unless there be a doubt as to what an answer was, you do not require it to be given twice. "*Let well alone,*" was said by a judge to a junior, who was so enamoured with a witness's answer that he must needs hear it again and again. Another form of reproof was, "I shall not take it down more than twice, Mr. Jones, if you get the answer repeated a dozen times."

But although it is by far the best to let a witness tell his story in his own way as much as possible, it is absolutely necessary to prevent him

from rambling into irrelevant matter. Most uneducated witnesses begin a story with some utterly irrelevant observation, such as, if they are going to tell what took place at a fire, they will say, "I was just fastening up my back door, when I heard a shout." But when you once get the witness at the scene the evidence will come with little trouble.

Miracles are not common now-a-days, and events follow one another in a natural course; and as one is often the cause and another the effect, the most important results may depend upon the merest trifle. Take the familiar "running-down case." Two vehicles come into collision, and the respective drivers no less so in their evidence. Each throws the blame on the other, and if both were believed, there could have been no accident at all, because each would have been upon his proper side of the road close to the kerb, with the whole width of the road between them. They cannot, therefore, both be accurate. Other witnesses give other impossible stories. The very position of the vehicles after the accident may be a disputed point, and therefore no assistance to the jury. But there may be a very trifling scratch or indentation on a wheel or a shaft which may be all-important; and what it was produced by may be more important still. Its direction and shape may also be material, and will show how necessary it is in examination-in-chief to get out every fact, however trifling, that may be of importance to your case. An instance of this kind occurred not long since, when a hansom cab, proceeding down Regent Street, came in contact with a

brougham which was crossing at right angles. The probabilities were all immensely in favour of the brougham. It was not likely the coachman would drive a valuable horse across a crowded street with such utter recklessness as to dash into a vehicle. The lady in the brougham said the cabman was inebriated; the coachman said he was drunk; and the police who took him to the station charged him with being drunk and incapable. The divisional surgeon reported him as "the worse for liquor; not unable to walk, but *unable to manage a cab.*" This was an extremely strong case on the part of the brougham, and it was a serious one, as the valuable horse had to be killed on the spot.

All the evidence was as conflicting and contradictory as to the accident as could well be, and to make it the worse for the cabman, the gentlemen he was driving were not called to give evidence on his behalf. He had to rely upon passing cabmen and the driver of a hearse, who deposed as to *pace.* There was however in the midst of all this confusion one point of evidence which could not be contradicted. The verdict did not depend upon the "inebriety" or the "drunkenness" of the cabman, or the pace of the cab, or the evidence of the witnesses, but upon a *small scratch* which had been made on the off-side of the cab by the point of the shaft of the brougham. On this piece of evidence alone there was a verdict for the defendant.

Another common error is worth noting, and that is the not permitting a witness to finish his answer, or tell all he knows on a material matter. In the very midst of an important answer a witness

is very often interrupted by a frivolous question upon something utterly immaterial. This seems so absurd on paper that it needs an example: A witness is giving an answer when some such question as this is interposed: "What time was this?" or, "Had you seen Mr. Smith before this?" A question is often left half answered by such interruptions, the better half perhaps being untold. "He never asked me about that," says the witness after the case is over; or, "I could have explained that if he had let me." If the question be material, by all means let the answer be taken down; if immaterial, it ought not to have been asked; but once asked, you had better have the answer, lest something should be inferred against you.

Before concluding this chapter I will give an instance how *not* to examine a witness. It is an almost verbatim report of what actually occurred recently at a trial when an experienced junior was examining a witness.

"Were you present at the meeting of the trustees when an agreement was entered into between them and the plaintiff?"—Answer, "Yes."

Q.—"Will you be kind enough to tell us what took place between the parties with reference to the agreement that was then entered into between them?"

This is an instance of verbosity, which shows that in putting questions, *long-drawn sentences should be avoided.* The more neatly a question is put the better, as it has to be understood not only by the witness but by the jury. All that was

necessary to be asked might have been put in the following words:—

"Was an agreement entered into between the trustees and the plaintiff?"

"What was it?"

It will appear even more strange perhaps when I say, that after the answer was given by one witness, which was all that was necessary to prove that part of the case, the question was repeated to another with additional verbiage.

"Will you be good enough to inform us what took place upon that occasion between the parties, as nearly as you can, with reference to the agreement that was then, as you have stated, entered into between them. Please tell us, not exactly, but as nearly as you can in your own way what his exact words were?"

It is obvious that, if an advocate would take as much trouble to study advocacy as a boy does to learn the multiplication table, such a question would no more be asked at the bar, than a boy of twelve would find out how many nine times nine are by counting them on his fingers.

There is no doubt that the time of the jury is frequently wasted to an unwarrantable extent from a want of knowing how to examine a witness-in-chief. To frame a question well is a most important matter; and this can only be done by careful study. Practice alone is not enough, and indeed, will do very little towards effecting this object; it is more likely to confirm tendencies to verbosity than to diminish them. I am speaking now of length of questions, and not of the time in putting them. It is a very little fault to be slow

in this particular, provided they are put well and tersely. It is a far greater fault, and a more dangerous one, to be impetuous; more tantalising to judge and jury, and more ruinous to the interests of your client. You had better, if you have a case at all, be too slow with a witness than too fast. If his evidence be necessary, or, as is sometimes the case, unavoidable, you must call him; if called, you should examine him as though you believed what he says. If you are afraid of the cross-examination, that can be no excuse for a slovenly and slurring examination-in-chief. You need not cross-examine your own witness; but if you are to examine him at all, do so boldly, and not as if you distrusted him. If in cross-examination he brings you to the ground the fault will not be yours. You need not blush to lose a case which your witnesses cannot support. A worse thing may happen to a client than losing a bad case—he may win it.

CHAPTER III.

AS TO CROSS-EXAMINATION.

NEXT to examination-in-chief nothing is more important or difficult in advocacy than cross-examination. It is infinitely the most dangerous branch, inasmuch as its errors are almost always irremediable. It is in advocacy very like what "cutting out" is in naval warfare, and you require a good many of the same qualities; courage with caution, boldness with dexterity, as well as judgment and discrimination. You must not go too steadily and with too direct a course, lest the enemy should measure your distance, and taking advantage of a steady aim, sink you with a single shot. Nor must you loiter too long in a place. You must circumvent a good deal, firing a shot here and a shot there, until, maybe, you can catch your adversary unawares and leap on board. It has been likened to a two-edged sword, but it is infinitely more dangerous than that. It is more like some terrible piece of machinery—a threshing machine for instance—into which an unskilful advocate is more likely to throw his own case than his opponent's.

It might be as well, before proceeding to discuss the qualities necessary for a good cross-examiner, to point out some of the dangers attendant on cross-examination.

"With a view to practical utility," says Whately, "the consideration of dangers to be guarded against is incomparably the most important, because to men in each respective profession the beneficial results will usually take place, even without their thinking about them, whereas the dangers require to be carefully noted and habitually contemplated, in order that they may be effectually guarded against. A physician, who had a friend about to settle in a hot climate, would be not so likely to dwell on the benefits he would derive spontaneously from breathing a warmer air as to warn him of the dangers of sunstrokes and marsh exhalations."

The dangers of cross-examination, it may be observed, are so subtle that they lurk around the questions of the most skilful. These are like the *marsh exhalations*—invisible but destructive; while there be often *sunstrokes* which I have seen the most robustuous and youthful succumb to.

These dangers will doubtless be guarded against by experienced counsel in every possible manner, and in most cases warded off; nevertheless they are there, and what has been said as to the marks of a great general will to some extent equally apply to the advocate—"he is the greatest who makes the fewest blunders."

A mistake in cross-examination may be fatal to your case. A single question may make an opening for a flood of evidence which may overwhelm you. Suppose a conversation to have taken place which is not admissible as evidence-in-chief, but which, if admitted, may have the effect of prejudicing the jury, or of introducing matter otherwise irrelevant,

but which, nevertheless, must in some degree influence their minds, it would be the height of folly to put a question which would admit it in re-examination. "Of course no one would think of doing it," is the obvious remark; "there is no need to warn the youngest advocate against a danger so apparent." No one would *think* of doing it, but it is done unthinkingly every day, and is one of the most frequent blunders made by young advocates. It is a danger very often too obvious to be noticed. In a recent case a plaintiff sued for several sums of money lent to the defendant during a period of five years. The justice of the claim to some or all of the several sums was in dispute. The man had advanced moneys. Whether he had lent all or not was one question; whether he had been paid all that were admitted to have been advanced was another. The accounts were of the loosest possible kind. Now here it was obvious that a trifling circumstance might influence the mind of the jury. It was very important on the one side to get *in* evidence for the purpose of influencing them and making them believe that *all* the moneys had been advanced and were unpaid; it was equally the duty of the defendant, who believed he had not received some, and had paid the remainder (a certain sum having been paid into Court), to shut out all that was not strictly in the nature of evidence. "You claim," the defendant says "certain sums which I say I do not owe. Prove it. And I shall keep you to the strictest proof that the laws of evidence require. I shall take every advantage in resisting what I believe to be either a mistaken or an unjust claim." This he was legally entitled to do.

Now, it happened in this case (which was tried before Mr. Justice Denman) that the plaintiff had either kept no account-books or had lost them. He depended upon his memory for his accuracy as to the various sums said to have been lent and for the dates, which were not only at wide intervals, but also, many of them, long ago. In examination-in-chief, he was asked if he had an account. He said yes. Made when? Some time ago. How made? From memoranda which were not in Court. The account therefore was objected to.

Now it was quite possible, if that account had been placed before the jury, it might have wrongly influenced their minds, and it was right to shut it out. The plaintiff was thrown, therefore, upon the resources of his memory, and, with regard to two items only, he was tolerably clear as to the dates and circumstances.

In cross-examination he was asked, "Have you any account or memorandum showing the several sums you claim?" He said, "Yes, it is here," again producing the copy of his account. It was again objected to. Question: "In what sums was it advanced?" Plaintiff looked at his document and said, two sums of twenty-five pounds each, and *(here he was stopped as he was reading from his memorandum)*. Plaintiff's counsel then claimed that the document was in and could be shown to the jury. Mr. Justice Denman held that it was not in evidence, and that no question had been asked respecting its contents.

It will be seen from this—and one illustration is perhaps as good as twenty—that a single question in cross-examination might have made that

evidence, which by no possibility could have been so made by the other side.

Another danger to avoid is that of *strengthening your opponent's case by eliciting answers that have more effect upon the jury when they come by way of cross-examination than in-chief.* A question is sometimes omitted fairly enough, and for good reasons, by the counsel examining-in-chief. If the cross-examining counsel be inexperienced, he will perhaps rush in and get the answer for his opponent. The greater weight attaching to it need scarcely be pointed out.

Again, you may get in a conversation that may be fatal to your case. Suppose the question to be the contents of a lost will. A legatee under it gives the following evidence :—I remember the fact of the testator making his will. I saw him writing it and I read it at the time. I was left a thousand pounds by it and my two brothers were left severally the same amount. I last saw the will two months ago. Now it might be that the whole case depended upon the accuracy of the witness's memory, or upon that coupled with his credibility. Plaintiff's counsel is desirous of showing that on the day the will was made the witness went for a doctor and told him, *at that time*, the contents of the will. If this statement could be given, and it were identical with that made in the witness-box years after, it is clear that it would go a long way to establish the accuracy of the witness's memory as well as his credibility. But it is not admissible as evidence-in-chief. A question however in cross-examination would admit every word.

Nor does the danger cease when this witness

leaves the box. The doctor, a witness to the will, may be called. He may not have read it, but an inadvertent question may enable him to say what the last witness told him on the occasion in question.

There is another danger not to be lightly regarded, and that is of persisting in pressing a question upon a reluctant witness. When you find a witness unwilling to give the evidence you seek, and you have drawn him as near to the point as there is any hope of his being drawn or driven, it is always dangerous to attempt to urge him further. If you have nearly got an affirmative, and you press him over much, you may irritate him into giving you a direct negative.

The dangers thus indicated will doubtless suggest many others to a mind anxious to master the rudiments of advocacy. They can only be avoided by careful study. Practice itself is a slow teacher, and an unfortunate blunder may retard the advocate's progress in this branch of learning, and may lose him many a client.

Cross-examination may almost be regarded as a mental duel between advocate and witness. The first requisite therefore on the part of the attacking party (namely, the advocate) is a knowledge of human character. This is the first requisite, and it is an indispensable one. But as I suppose almost everyone conceives himself to be a master of this science, and as if he be not it is impossible by any means at my disposal to add to his knowledge in that respect, I shall proceed on the assumption that the reader will appreciate many observations which would not be quite so intelligible were he ignorant of this profoundest of all learning.

It will be clear that to cross-examine with anything like success the most thoroughly good temper should be preserved. An ill-tempered advocate would be something like a gibbing horse, he would do everything but go along smoothly. On his hind legs (I mean the advocate) in an instant. A calm imperturbable temper is the very triumph of self-command, and one of the very foremost qualities of a good advocate. It is useless to make excuses for a bad temper, as sensitiveness, indigestion, or what not. Good temper is the demand of your client, and in mere justice to him you are bound to preserve it. Even if you should be a constitutionally irritable man, you must absolutely conquer your irritability for the time being. You must never even appear to lose your temper, for no one ever believes that a man in the heat of temper means what he says. "Allowance" is always made for this infirmity. But when the jury have reason to make this allowance the chances are that your case is gone—in all probability your client also.

Nor should it be forgotten that nothing more quickly manifests itself to the jury than a man's temper. It is almost an instantaneous betrayer in the home circle. The smallest child perceives it in a moment. It cannot be disguised. It is as perceptible as the effect of a sudden breeze passing over a smooth lake. I would sooner have a cause fought by a good-humoured plodding advocate, than by a brilliant and ill-tempered one. In the former circumstances, if my case were good, I could scarcely lose it; in the latter it would be almost impossible to win it.

Assuming then that you have some knowledge

of human nature, you will be able to divine, while the witness is being examined-in-chief, the kind of man you have to deal with. You will determine whether he has learnt his story by heart; if so, it is probably not *all* true, especially if it be a long and intricate one. This however is by no means an unerring test. It may be true nevertheless. Many policemen learn their evidence and give it off verbatim; yet it is more often than not substantially true. But you will gather from the witness's manner, his mode of answering, his looks, his tone, his language, his very glances, whether he be a false witness or one who is telling a story partly true and partly false, the most difficult of all witnesses to deal with.

But besides determining in your own mind whether he be false or true, or partly one and partly the other, you will also ascertain whether he has a strong bias one way or the other. If he have a strong leaning to the side of your opponent you will have the less difficulty in disposing of him, because it will be easy to lead him on until his bias becomes so manifest and overpowering that the jury will discount his evidence, and that to so great an extent, that if the case depended upon him they would throw it over altogether. A strong interest weakens the side on which it lies. It will therefore be clear that in cross-examining a witness of this kind it will be proper to elicit this at the earliest opportunity. If it comes last it will be far weaker, because it will not altogether undo the effect which his evidence may have made upon the minds of the jury. *The interest a witness has in a case should therefore be shown early in the*

cross-examination if it has not been made manifest before. Of course your opponent will not leave you this card to play if he can avoid it; but he cannot help your overtrumping him by placing it more prominently before the jury than he would ever permit himself to do; and this it will be your duty to accomplish.

But it may be the witness has no interest. He may nevertheless be a partisan; and partisanship is often stronger than self-interest, although the latter has somewhat erroneously, as it seems to me, been described as the most powerful principle influencing human actions.

You may take it for granted that if your opponent should sometimes anticipate you in showing his witness's interest in a cause, he will never be eager to acknowledge him a partisan. You will therefore generally be left master of the field in this respect, and at liberty to choose your time, place and mode of attack; and so that it be early, you may do it as you like. In a great number of cases there is something of partisanship, and you may take it as a rule that an absolutely unbiassed witness is rare. The strong partisan, however, is only produced by public questions, parochial disputes, boundary questions, quasi-political inquiries, medical cases, rating matters, running-down causes and other investigations, where the witnesses seem naturally to take sides. You should remember that though a man may go into the witness-box under compulsion, he never gives his evidence without a motive. It may be a strong or a weak one, but it exists; find that out, and you will be able to do so if you watch and listen attentively.

The man whose motive is simply to speak what he knows, manifests it in every tone, look and word. You will not have much difficulty in dealing with him. If you believe in your own case you may believe in this witness not to injure it if you are discreet in examining him; that is, if you examine in such a manner that his answers cannot be misunderstood. But what are you to ask him? Listen to his evidence, if it agrees with your case, *nothing;* if not, note the points that are against you. And in dealing with the modes of cross-examining the different kinds of witnesses further on, I will endeavour to point out the manner of dealing with a witness who has a pure motive, but whose evidence conflicts with your case.

But suppose the witness has some other motive in giving his evidence. You will endeavour to ascertain what it is. If you watch minutely you will find a difference in tone and manner when he is speaking more directly from the particular motive. Suppose it's revenge? Any point which seems more particularly to damage his adversary will be laid stress upon. Any answer that he makes which he thinks will damage him, will be uttered in a more ready tone and with evident satisfaction. It will manifest itself in his voice, in his look, and his whole demeanour. *That* therefore must be stamped upon the mind of the jury by your cross-examination. But there are subtle motives, by no means apparent to every observer, which will nevertheless be discovered if you set yourself to the task of finding them out. And whatever the motive be, there is some ground-work for cross-examination, which must be clumsily administered indeed, if it

do not in some measure help your case—*if you have one.*

With respect to style, as before remarked, every man has his own, or should have. When he borrows he may show good powers of imitation, but he lacks that which is necessary to carry a man to the highest eminence in any art, namely, originality. With regard to manner, a man should imitate the best. The most eminent are generally the most unaffected, and the quiet, moderate manner is generally the most effective. I do not intend to imply that bluster and a high tone will not sometimes unnerve a timid witness, but this is not cross-examination or true advocacy. It is not art, but bullying—not intellectual power, but mere physical momentum. Nor would I say that an advocate should at all times treat a witness with the gentleness of a dove. Severity of tone and manner, compatible with self-respect, is frequently necessary to keep a witness in check, and to draw or drive the truth out of him if he have any; but the severity will lose none of its force, but rather receive an increase of it, by being furbished with the polish of courtesy instead of being roughened with the language of uncompromising rudeness. Instances of the latter kind are extremely rare at the English bar. But they do occasionally appear and are usually followed by a public outcry against them; they do not however cast discredit on the great body of a profession which is as jealous of its high reputation for courtesy and honour as it is deserving of it.

I make these observations because I am about to quote a passage from Archbishop Whately's

"*Elements of Rhetoric*" *on Cross-Examination*, wherein he passes a severe stricture upon advocates generally, and which I am sure, so far as my own experience and observation go, is utterly undeserved. At page 165, he says:—

"In oral examination of witnesses a skilful cross-examiner will often elicit from a reluctant witness most important truths which the witness is desirous of concealing or disguising. There is another kind of skill, which consists in so alarming, misleading or bewildering an *honest* witness as to throw discredit on his testimony, or pervert the effect of it. Of this kind of art, which may be characterised as the most, or one of the most, base and depraved of all possible employments of intellectual power I shall only make one further observation."

I pause here for a moment to say that so far as my experience of the bar is concerned, and I think it must be greater than that of the Right Reverend Father in God who penned these words, that a more undeserved slander against a body of honourable men was never penned even by a Churchman. He proceeds to say:—

"I am convinced that the most effectual mode of eliciting truth is quite different from that by which an honest, simple-minded witness is most easily baffled and confused. I have seen the experiment tried of subjecting a witness to such a kind of cross-examination by a practised lawyer as would have been, I am convinced, the most likely to alarm and perplex many an honest witness without any effect in shaking his testimony." According to the Archbishop's views the course

the most likely to alarm and perplex an honest witness has no effect upon the dishonest one. This falls in with my own experience so far, but I think it is impossible to "shake" an honest witness's testimony except by the means I have endeavoured to indicate. But we have only the Archbishop's word for the "practised lawyer." His Grace proceeds:—

"And afterwards, by a totally opposite mode of examination, such as would not have at all perplexed one who was honestly telling the truth" (nothing it seems will perplex an honest witness but an alarming style)—"that same witness was drawn on step by step to acknowledge the utter falsity of the whole. Generally speaking, I believe that a quiet, gentle and straightforward—though full and careful—examination, will be the most adapted to elicit truth, and that the manœuvres and the browbeating which are the most adapted to confuse an honest witness are just what the dishonest one is the best prepared for."

When I read those wordy sentences I could not help thinking it was a pity that the archbishop did not confine himself to theology. He seems to think an honest witness easily baffled and frightened into telling a lie, and to imagine that a brutal liar is best induced to tell the truth by wooing him with sweet words, and by a *straightforward*, *full*, and careful examination. I can only say his acquaintance with truthful witnesses must have been small indeed, and the hypocrisy practised upon his gentle questioning must have misled him into the falsest views of human nature ever formed even by those who assume to be the best acquainted with man's

spiritual existence. I have made these quotations because I think some students are apt to take very much that is said on the subject of human nature for granted, including even slanders upon the profession to which they aspire to belong. Whately quotes largely from a book called "*Licence of Counsel*," and his quotations are evidently intended to detract from the reputation of the bar. Nothing could be farther from the truth than those quotations, and I do not think it necessary to say anything further on the calumnies there collected.

SOME RULES FOR CROSS-EXAMINATION.

It is a good rule in cross-examining a witness *never to ask a question the answer to which may be adverse to your case.* Nothing but absolute necessity should induce a departure from this. There are so many ways of framing a question or a series of questions, that it would disclose a poverty of ingenuity indeed if you asked one that might involve the fate of your client. It may be said "every one knows that." True, but strange enough every one does not practise it. Junior barristers, both at *Nisi Prius* and at Quarter Sessions, constantly put questions and elicit answers dangerous and often fatal to their case; whereas, with the exercise of a little ingenuity, they might, by small portions at a time, as if they were enticing a shy

bird with crumbs, obtain little by little that which they require as a whole. Too little attention is paid to small matters in advocacy, the minutest point being frequently the pivot upon which the whole case will turn.

But when you have once got the whole, remember that *you can have no more*, and whether it comes to you in crumbs or slices, avoid placing the whole before the witness, otherwise you may yet succeed in getting it denied in the lump, besides being involuntarily led into an argument with the witness. If the series of answers lead irresistibly to one conclusion, that conclusion will be obvious to the jury without directing the attention of the witness to the fact.

But not only when you are doubtful of the answer should this course be adopted, but even *when it is necessary to your case that a particular answer should be obtained.* And I would suggest it as a good and safe rule, that if you are desirous of getting an answer to a particular question, *do not put it.* The probability is that the witness will know your difficulty and avoid giving you exactly what you wish. If not altogether straightforward (and for such witnesses you should always be prepared) he will be on the alert, and unless you circumvent him will evade your question. It is in such a situation as this that the skill of the cross-examiner is shown. One advocate will sit down baffled, another will obtain all that he requires. A series of questions, not one of them indicative of, but each leading up to the point, will accomplish the work. If the fact be there you can draw it out, or if you do not so far succeed, you can put

the witness in such a position that from his very silence the inference will be obvious.

One of the greatest cross-examiners of our day advised a pupil in cross-examining a hostile witness upon a point that was material, to put ten unimportant questions to one that was important, and when he put the important one to put it as though it were the most unimportant of all. (This does not sound much like the Archbishop's style, which seems to have been invented for the purpose of eliciting untruths.) "And when" said the learned gentleman, "you have once got the answer you want, *leave it.* Divert the mind of the witness by some other question of no relevancy at all." There is no occasion to emphasise an answer while the witness is in the box if the question be properly put. The time for that will come when you sum up or reply. If the witness sees from your manner that he has said something which is detrimental to the party for whom he has given his evidence—unless he be an honest witness—he will endeavour to qualify it and perhaps succeed in neutralising its effect. If you leave it alone, it may be that your opponent may not perceive its full effect until it has passed into the region of comment. Nothing is more unskilful than repeating a question when you have obtained a favourable answer.

Counsel are sometimes so impetuous in cross-examination that they put two or three questions in rapid succession without waiting for an answer, as though they were administering interrogatories. This is an exuberance of inquisitiveness which must be restrained if you really desire to cross-examine with success.

Besides avoiding the danger of eliciting evidence which may be adverse to your client, it should be remembered that by cross-examination a colour may be given to that elicited in-chief, which may not only emphasise it, but *give it the appearance of evidence which you yourself have adduced.* Counsel should carefully avoid making his adversary's witness his own by cross-examination, as he certainly will if he obtain answers favourable to the other side.

It is a good rule *never to put a question in cross-examination without being able to give a reason for it.* Many young advocates rise to cross-examine without the least idea of what they are going to ask, and take the witness back through the evidence-in-chief, as though it had not made *effect enough* upon the jury. Nothing can be more unskilful than this. "Cross-examination," said a learned judge to a junior, "does not consist in repeating in a louder tone the examination-in-chief." This is simply the result of inexperience and a want of knowledge of the fundamental principles upon which an advocate should proceed. It is true he soon learns that it is necessary to have *an object* in asking a question, but in giving these hints I am desirous of his learning it at once, without the painful experience which comes of many blunders.

Another atom of advice I would venture to give, is *not to cross-examine for explanations*, unless the explanation is necessary for your case. No doubt there is some degree of fascination in solving a mystery, but when you find that the explanation of it is immensely to your dis-

advantage, you will not quite so much enjoy the quiet smile of your opponent when he finds that you have cleared up something which he could not, and which he has purposely left for the exercise of your ingenuity and fertility of inquiry. If you don't know whether the ice will bear you had better not venture on it.

It must not be forgotten that, apart from the nature of the questions, the *tone* in which they are asked will not only have a great effect with the jury, but with the witness himself. A cross-examining counsel should always seem in earnest; if he have the appearance of one who is simply endeavouring to amuse an audience, the jury will quickly come to the conclusion that he does not believe in his own case. From first to last, and in every stage of the case, you must make it appear that you really believe in the cause you are advocating. You may not, in reality, have much faith in it, but your own opinion may be wrong; and as you are representing the interests of another, you must, at least, appear to be serious. Manner plays a great part in advocacy. Every one knows that a question in one tone will induce an answer, where in another it will not; that the emphasis upon a particular word may produce a totally different version from that which it would cause if laid upon another. But no one can lay down a general rule on the subject of *style*. You cannot make an orator by advice, or a skilful advocate; the most one can hope for in giving hints, is to assist young advocates in developing the powers they possess, and in pointing out certain dangers to be avoided.

CHAPTER IV.

CLASSES OF WITNESSES, AND AS TO THE MODE OF CROSS-EXAMINING THEM.

1.—The Lying witness.
2.—The Flippant witness.
3.—The Dogged witness.
4.—The Hesitating witness.
5.—The Nervous witness.
6.—The Humorous witness.
7.—The Cunning witness.
8.—The Canting Hypocrite.
9.—The Witness partly true and partly false.
10.—The Positive witness.
11.—The Stupid witness ("Sprouts.")
12.—The Semi-Professional witness.
13.—The Official witness.
14.—The Police-constable.
15.—The Truthful witness.
16.—The Medical witness.

1.—THE LYING WITNESS.

HAVING said, as I think, sufficient in these observations regarding the motives of witnesses and their connection with the case, either by way of

direct interest or partisanship, I will now attempt to classify the witnesses as they usually present themselves in Courts of justice; begging you to remember, that counsel of any experience have all at a disadvantage, not excepting even the honest witness, who often flounders through nervousness and the fear of saying something that is not quite correct.

A witness whose evidence is untrue must lie with wonderful skill if he go through even his examination-in-chief without betraying himself. He is, I think, the easiest of all to dispose of, and once discovered to the jury in his true character will do more harm to a cause than half-a-dozen truthful witnesses will undo. The greatest instances in modern times of this class of witness were the notorious "CLAIMANT" and his supporter Luie. It was wonderful how Orton told the story of the wreck, of his having been rescued and conveyed to Australia, of his life in the bush, of his return and his recognition by persons who had known the real heir to the baronetcy. There was, doubtless, falsehood stamped unmistakeably upon the whole story, but what gave it the appearance of truth which it presented to some minds was, not the probability of any part of it, but the improbability that so ignorant a man could so skilfully have constructed so wonderful a story; that it should not have broken down by its own inherent weakness even while being narrated in chief to the jury. We know as a fact that it did not, and it therefore follows that a tissue of lies may support itself before a tribunal constituted for the purpose of eliciting the truth. Even after he had been discovered and exposed as

an impostor, there were thousands who believed his story, and believe it to this day. A lying witness therefore is not always to be disposed of by a flourish of the hand. In most cases, if you have had any experience, you will be able to refute his statements by his own lips. The way is simple enough to write, as it is easy enough to tell a person how to swim: plunge in, strike out with a good breast stroke, draw in and thrust back your feet and there you are, at *the bottom*.

The witness comes up with a well-concocted story, and tells it glibly enough. Now you are well aware that events in this world take place in connection with or in relation to other events. An isolated event is impossible. The story he tells is made up of facts which, if true, fit in with a great many other facts, and could not have happened without causing other facts or influencing them. If his story be untrue the matters he speaks of will not fit in with surrounding circumstances in all their details, however skilful the arrangement may be. The multitude of surrounding circumstances will *all* fit in with a true story, because that is part and parcel of those circumstances carved out from them, no matter how extraordinary it may seem; just as the oddest shaped stone you could cut from the quarry would fit in again to the place whence it was taken. It is therefore to the rock, of which it once formed a part, that you must go to to see if the block presented be genuine or false. You must, in other words, go to the surrounding circumstances. The witness, however clever he may be, cannot prepare himself for questions which he has no conception

will be put to him, and if you test his imaginary events by comparing them with real events, you will find the real and the false could not exist in their entirety, there must be a displacement of facts which have actually occurred, which is impossible.

Will a lying story fit in? It is certain it will not; but it may not be possible to obtain an accurate view of the surrounding circumstances—that is the principal difficulty. But you may almost always get at some of them, and these, however few, will answer your purpose. Did the claimant go to Wapping? Did he know the houses of the neighbourhood, and the names and trades of the respective owners? If he did, who was the claimant? Orton telling the story of himself would tell a true story, and all the surrounding circumstances would fit in and form with it a complete whole. But when he says I am Tichborne, he places there a man who from his position in life and mode of bringing up could not possibly have been acquainted with the minute details concerning the families of Wapping and its neighbourhood. Transpose the men, and you then have one whose antecedents just qualified him for possessing that knowledge which he displayed of the minute particulars of past events and persons, and which no one in any other situation of life could possess. And all this is apart from the inference which arises from the great probability that Orton would go to Wapping, and the great improbability that Tichborne should. To fit the latter in with the circumstances that surrounded Orton's life would be an impossibility, for it would amount to a displacement of facts that had actually existed.

In cross-examining such a witness, or a witness who lies, you must therefore apply the test of surrounding circumstances, and compare his testimony with that of other witnesses. The latter will be the severest and the surest test if you apply it to the smaller details. It need hardly be said, that the greater the number of witnesses to prove a concocted story the greater the certainty of exposure by a skilful cross-examiner. The main facts of a story may be so contrived as to be spoken to by all the witnesses; but they cannot agree upon details which never occurred to them, or concoct answers to suit questions which they have no conception of.

But even in this mode of cross-examination you must be careful not to obtain an apparent corroboration where you seek contradiction. The way to avoid this is *not to put the same question upon some important piece of evidence to every witness.* If you have got the first contradicted by the second, let the matter rest; the next witness may make a guess and corroborate the first, which will materially weaken the effect of the contradiction. By judiciously pursuing this line you may get all the witnesses to contradict one another. It was the great complaint of Brougham, in Queen Caroline's trial, that the story was so well concocted that two witnesses were never called upon one important fact. This, of course, was contrived so that there should be no possibility of contradiction. It is not difficult, if there are several witnesses telling an untrue story, to break them down in cross-examination; and one of the best instances I have met with is that narrated in the

story of Susannah and the Elders. This example of cross-examination further shows how necessary it is that the other witnesses should "be out of Court" while one is under examination.

It is when you have to deal with an untruthful witness who speaks only to one set of facts, and stands alone with regard to that evidence, that your skill is put to the test. How are you to shake his testimony? Assuming that character is not altogether out of the question, you will ascertain who he is, and upon this point he may not be touched; he will, probably, if a stranger, be prepared with an answer, which will render futile all further inquiries; and I will presently give an instance of one of the most remarkable liars that ever lived, baffling one of the most skilful cross-examiners who ever practised at the English bar. If you know the witness is a man of bad character (that he has been convicted, say), your task will be comparatively easy. But even then, if you are not prepared to contradict him by legal evidence, he may defeat you by indignant denials.

It may be said, "Everybody knows that." True; but even in putting questions as to a witness having been convicted, there is all the difference in the world between one mode of putting them and another. If you do it unskilfully the effect of the surprise on the jury may be lost, and in advocacy *surprise* is a powerful emotion to enlist on your side. An advocate who can surprise either a witness or a jury or his opponent by a question is a formidable adversary. But you may so unskilfully put your question as to evoke sympathy on behalf of the witness instead of contempt; whereas

if your questions are well asked you may not only show that he is not to be believed on account of his previous character, but also on the ground that his mode of answering condemns him as a false witness. You may get his conviction in short, and a lie at the same time, which will be good measure of his character for the jury.

If you show at once that you know all about him he will see that it is useless to attempt to deceive you, and out will come the answer, probably in a pathetic tone, "Unfortunately I have been convicted, but what has that to do with the case? Am I always to be told of it?" This will enlist the sympathy of the jury at once. He may be a much better actor than you and utterly baffle your efforts to exhibit him in his real character. If, however, from your mode of putting the question he thinks you have some doubt, he will take a different line, and although your mode of cross-examination may have led him first into a denial and then driven him into an admission, the fault will be his and not yours. He should have told the truth at the onset.

If you ask such a witness how many times he has been convicted, he will not deny having been convicted, but will answer, "I don't know." If, however, you ask him if he has ever been in trouble, he will hesitate, and say "No," and then "Once," thinking you are only acquainted with his last escapade.

"For bringing to light the falsehood of a witness," says Whately, "really believed to be mendacious, the more suitable, or rather the only suitable course, is to forbear to express the

impression he has inspired. Supposing his tale clear of suspicion, the witness runs on his course with fluency till he is entangled in some inextricable contradiction, at variance with other parts of his own story, or with facts notorious in themselves, or established by proofs from other sources."

If you know nothing as to character you must proceed to test him by surrounding circumstances, leading the witness on and on, until, encouraged by his apparent success, he will soon tell more than he can reconcile, either with fact or with the imagination of the jury. At a trial at Warwick some years ago a remarkably well-planned *alibi* was set up. The charge against the prisoner was burglary. An Irish witness was called for the defence, and stated that at the time the burglary was committed the prisoner was with him and four or five other persons some miles from the scene of the crime. The time of course was a material element in the case, and the witness was asked how he fixed the *exact* time. He said there was a clock in the room where he and the prisoner were, and that he looked at it when they went in and when they left. He was then told to look at the clock in Court and say what time it was. The witness stared vacantly for a considerable time, and then said it was "such a rum'un he couldn't tell."

"Can't you tell a clock?"

"Shure, sor, I can't tell that un!"

What was still more strange, the same question was put to every witness, and there was only one out of some six persons who could tell what o'clock it was. And yet they all swore to the exact time

deposed to by the first witness and repeated the answer as to how they knew it. Of course the *alibi* totally broke down and the prisoner was convicted.

I did not intend, in this place, to speak of the mode of breaking down an *alibi* where every fact deposed to by the witnesses is true, except the day on which the occurrences took place. Yet I may point to this as an instance in which it was accomplished, and will only add here that the mode in which it must be done, if at all, is by cross-examining to circumstances outside the principal facts.

During the Tichborne trial for perjury, a remarkable witness was called, named Luie. He was a shrewd man, 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 favour of that proposition that no jury would agree in finding he was Arthur Orton. The manner of giving the evidence was perfect. After the trial I accidentally met one of the jury, and asked what he thought of Luie's evidence, and if he ever attached any importance to his story. He told me that at the close of the evidence-in-chief he thought it so improbable that no credence could be given to it; "but," he added, "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 an able counsel."

The whole difficulty consisted in the fact, that the circumstances *outside the events deposed to* were so remote that all connection was destroyed. No ingenuity or ability could reach them without some connecting link. The sole spectator of the events was in the witness-box, and he took care to separate them from every other event in his life and from every circumstance that could be contradicted. No materials for cross-examination were before the eminent counsel for the prosecution, and the facts that subsequently came to light, by the merest accident in the world, were at the time absolutely inconceivable. These facts, referred to hereafter, may be interesting as well as instructive to students who have not read the Tichborne trials. I may here remark, that those trials will well repay a careful and thoughtful perusal, for they will afford illustrious examples of every branch of advocacy, and are, indeed, a mine of inexhaustible wealth to the aspiring advocate.

At the conclusion of the evidence for the defence, an attempt was made, for a reason which afterwards appeared, to prevent Luie from leaving the Court. The judges had retired, but, on a communication made by one of the solicitors for the Treasury, they returned. Mr. Hawkins said that a letter had just been received which he would hand up to the Court, and two persons were present to identify Luie. He (Mr. Hawkins), however, had no application to make upon the subject.

After reading the letter, the Lord Chief Justice said that unless the matter bore upon the case, as, for instance, by showing that Luie could not have been at the places he had mentioned, because he was elsewhere at the time, the Court did not feel called upon to interfere. If there were any persons in Court who desired to identify Luie, there he was, and they could do so, but the Court did not think it necessary specially to interpose against him.

At the next sitting of the Court, the learned counsel for the defendant said that notice had been received from the prosecution of an intention to call witnesses for the purpose of identifying Luie.

Mr. Hawkins said that the notice had been given contingently, in order to avoid possible delay in the event of the witnesses being able to prove a charge against Luie having a bearing on the case; but inasmuch as in consultation it appeared that this was not so, he had no application to make.

A complaint then was made of the "scandalous scene" which had taken place on the last day. One of the clerks to the Solicitor to the Treasury was said to have attempted to poison and corrupt the minds of the jury by getting up the scene, and Mr. Pollard was alleged to have been guilty of contempt of Court. The Lord Chief Justice, after some further discussion, said that it would be better that Mr. Pollard should make an affidavit to explain the circumstances under which he had acted, and that it would be material to state in his affidavit what the persons who had identified Luie had said, with a view of explaining what had been done on the occasion complained of. Ultimately, witnesses were called who utterly disproved Luie's

statements, and he was tried and convicted of perjury.

But it is not given to every man to be a Luie, nor to every advocate to have a Luie to deal with. Your common liar is a much less consummate actor, and by no means so acute. Give him plenty of line and you will find that his tale of lies will be proportionately great. A mile with him will become three if you let him think your object is to make it less. Darkness will become "light as day," and the moon will shine with the utmost splendour when, according to the almanack, she is nowhere. It is impossible to tell how far the downright liar will go if you only give him a little encouragement. You may not be able to contradict him upon all points, but this benefit always accompanies his evidence, that exaggeration, as a rule, requires no contradiction. Let him exaggerate and colour to the full extent of his inclination or imagination, and when he has completed the picture every one will see that it is a monstrosity, in other words, no one will believe a word he says. "A liar is not to be believed even when he speaks the truth." It is an old saying, but will never be so old as to be worthless.

But you may get an actor in the box, who for a long time will conceal his true character. He may be a man who has a spite against the plaintiff, the defendant, or the prisoner, as the case may be. Or if none against the parties to the action, he *may have a very strong feeling against some person interested in the result of the case.* If you would cross-examine to any effect, this must be ascertained. It is the very point, remember, which

he will conceal if he can, but it is also the very one that you must find out and expose. You will probably detect it during the examination-in-chief, if you are vigilant; if not, it must be ascertained in cross-examination. I would ask you to bear in mind, while on this subject, that if you want to read a man's real character, you must look at his mouth; all the other features may, to a certain extent, be controlled; but the mouth never can be sufficiently to conceal the emotions from a quick observer. All the passions manifest themselves upon and about the lips; and if you question the witness suddenly and somewhat sharply upon the subject that is most strongly operating upon his feelings and inducing his evidence, you will perceive the involuntary motion of the mouth, which will instantly betray him. A beard even cannot altogether hide this wonderful index of the mind.

Dickens, in his magnificent "Tale of Two Cities," says, "Any strongly-marked expression of face on the part of a chief actor in a scene of great interest to whom many eyes are directed, will be unconsciously imitated by the spectators."

So if you direct a witness's attention to those facts in connection with a case which you suspect have strongly roused his feelings against the plaintiff, defendant, or any other person interested in the proceedings, you will gather from the involuntary expression of his features whether you are correct in your surmise; and what is of still greater importance, the jury will perceive it as well, after you have followed up your question by another and another, for ultimately concealment will be impossible. This is part of what is called

"the demeanour of a witness," so often spoken of as of such inestimable importance as one of the tests of a witness's truth or character, so highly appreciated and yet so little understood in its subtler significance.

It might be here observed, that *whenever you have once fairly caught your witness, don't sacrifice the advantage by exhibiting him too ostentatiously.* You need not give him a second run for the purpose of going over the same ground again. Having got the answer you want, keep it, and at once go off upon another point; otherwise, if you ask him to repeat it for the purpose of directing attention to the good point you have made, he will qualify what he has said, and very likely unsay it altogether by some lying explanation. Therefore, give him no opportunity of wriggling out of what he has sworn. That is the business of your opponent, not yours.

A common liar of this kind, who lies without art, is simply to be dealt with as the woodman splits up a log; find a crack, be it ever so small, place in your wedge and drive it home; *but never put your wedge across the grain.*

2.—THE FLIPPANT WITNESS.

When a witness comes into the box with what is commonly called a "knowing" look, and with a determined pose of the head, as though he would say, "Now then, Mr. Counsellor, I'm your man,

tackle me," you may be sure you have a FLIPPANT and masterful being to deal with. He has come determined to answer concisely and sharply; means to say "no" and "yes," and no more; always to be accompanied with a lateral nod, as much as to say, "take that." But although I have used the masculine pronoun, this witness is very often a female. She has come to show herself off before her friends; she told them last night how she would do it, and feels quite equal to "any counsellor as ever wore a wig." "She'd wig him, she would." No doubt this would be quite true elsewhere—but in the witness-box! You must demolish her, my friend. There's a life and death struggle in this cross-examination; but you must win.

Now mark: the first thing she does, when you rise to cross-examine her—look you ever so meek, as you should under the circumstances,—is to toss her head. If she were going into a hand-to-hand fight with the female champion of Ratcliff Highway, she could not put on a more determined appearance. She seems to have lifted her chin from the counsel who has just sat down, and to have perched it upon the tip of your nose, with a defiant expression of "Come on." How often I have seen a learned counsel (now removed to a higher, although I doubt if to a happier sphere) come up smiling to such a witness! And I have seen him cross-examine her with a look, with a smile, a shake of the head, with a merry twinkle of his eye—just turned upon her as a policeman would surprise some dark plotter with his lantern, and *never a word!* But it would be useless to advise the young advocate to do this; *his* manner was as inimitable as it was effective.

But I have seen many a counsel put down by such a witness; a sharp answer, with a spice of wit in it, has turned the young advocate into a blushing boy, and utterly discomfited him. Perhaps a laugh has been caused by some impertinent observation. The best advice under these circumstances is, first of all, to make up your mind not to be put down. No matter what happens, you will sit down the winner. But you must preserve the most placid and unruffled demeanour, and above all things, *never reply upon the witness.* To be led into a retort, unless it were an absolutely crushing one, would betray a weakness, and show that the witness was making the running, not you. To argue with a witness is not only to abandon your high post of vantage, but to make a bad impression on the jury. You are no longer the advocate, but are reduced to the level of an ordinary disputant with a person who will probably be too much for you. Argument is not cross-examination; the time of incubation is not yet. You will be able to see what you will make of the evidence by-and-bye; at present it is your duty, by questions, to get as much as possible in your favour, or to destroy as much as possible that which has been given against you. Your arguments, if worth anything, will be better addressed to the jury than to the witness; and they will possess this advantage, that then there can be no correction or explanation by her.

In dealing with this class of witness, an advocate should carefully abstain from administering any rebuke, or attempting "to put the witness down." His object should be to keep her up as

much as possible, to encourage that fine frenzied exuberance which by-and-bye will most surely damage the case she has come to serve. A little encouragement will be of more service to you than anything that would tend to damp the ardour of this flippant fury. Besides, you will have the opportunity of animadverting upon her evidence by-and-bye, and then you will be enabled to show by the contrast of a quiet manner with her blatant and irrepressible demeanour how utterly worthless her evidence is. Any good effect which any portion of it may have produced will share the condign fate of the remainder.

And it should not be forgotten that contrast invariably has a striking effect with hearers. It produces a feeling akin to that of surprise, and whenever this is effected it is in favour of the advocate who can produce it.

But there may be a point or two which you may be anxious to elicit, even from a witness of this class, for although her evidence on behalf of the party for whom she is called may be comparatively if not entirely worthless, whatever may be elicited on your own behalf will have an importance in proportion to the degree of hostility manifested. This not only shows the danger of calling such a witness, but also the necessity of taking every advantage of the occasion when she is called. I will endeavour to point out the mode of putting a question in such a case. You will always approach her as if she were a wild animal ready to tear you if she could get near enough. Therefore, circumvent. You may be sure she will never give an answer that she supposes may be favour-

able. I have known this kind of witness so "worked up," that at last she has refused to give an answer that she may think favourable even to her own side for fear it may be made use of somehow by the other. It is necessary, therefore, to watch for a fitting opportunity, and if you allow her to make some particularly good hit against you which causes a laugh, she will be in an ecstacy of triumph. And at the moment of her triumphant excitement will be the time to put your question; but it must not be done as though you thought it a matter of importance, but rather as though you were putting it for the purpose of turning off the laugh against you. While off her guard, if your question be well worded, the answer will slide from her flippant tongue before she has had time to consider its probable effect. But having got it, pass away from the subject instantly by putting another question of no importance or relevancy whatever. This is a hint for which I am indebted to an esteemed friend, who thinks the proper study of an advocate is advocacy, and who found in repeated instances that this mode was pursued by one of the greatest cross-examiners of our time. It has also been confirmed by my own observation. You will find your advantage in the witness's triumph. It is, as my friend illustrated it, "not unlike a fencer making an overreaching thrust. Before he can recover his balance the adversary has delivered a well-directed blow."

You will have observed that your opponent has driven this splendid creature with a bearing rein. In cross-examination you will take that off and let her "have her head." "*Did I understand you to*

tell my learned friend" so and so? will be quite sufficient to set her at liberty if asked in a tone that conveys your feeling on the subject. She will require some bridling in re-examination.

3.—THE DOGGED WITNESS.

THE *Dogged* witness is the exact opposite of the one I have now been dealing with. He will shake his head rather than say no. As much as to say: "You don't catch me. You see him, gentlemen, and you see me. I'm up to him." He seems always to have the fear of perjury before his eyes, and to know that if he keeps to a nod or a shake of the head, he is safe. He is under the impression that damage the case he must, whatever he says. "A still tongue makes a wise head," has always been his maxim. How are you to deal with him? If he has said nothing against your case, you will of course leave him alone—*always unless* you wish to draw something from him in its favour. If you cross-examine at all, you must beware of letting him think that you have any design of "catching him." Most witnesses think this. And such a witness as we now have looks upon the learned counsel about to cross-examine him with similar feelings to those of the little boy whom a big boy kindly asks to be permitted to "show him London"; a personally conducted tour which consists in holding the boy heels upwards until the astonished tourist declares he can see St. Paul's. Insinuation will help you with this witness. But carefully avoid asking for too much

at the time. *Get little answers to little questions*, and you will find as a rule that answers are strung together like a row of beads within the man; and if you draw gently, so as not to break the thread, they will come with the utmost ease and without causing the patient the slightest pain. In fact, till he hears you sum up his evidence, he will have no idea of what he has been eased.

This witness, without being untruthful, is always hostile; he looks on you as a dangerous man, a sort of spy. He will become bolder as he proceeds, especially if you prove to him that you are by no means the terrible man he at first thought you. And the best way to foster this idea is to accustom him to answer. Let him see that your questions are of the simplest possible kind; even so simple and so easily answered, that it seems almost stupid to ask or answer them. "Of course," he says to one; "Certainly," to another; "No doubt about that," to a third, and so on. Presently you slip one in that is neither "of course" nor "certainly," and get your answer. Look upon him as a lump of human nature in the witness-box, out of which you may, by ingenuity and skill, extract something, be it ever so small, which may serve your purpose; something, perhaps, which you can find nowhere else in all the case.

He may be an old man (generally is), and the subject of inquiry a right of way. He may be "the oldest inhabitant." What are the moving springs of human conduct? Love of justice, which he has known from a boy upwards, and his father before him, as "*right is right, and wrong is no man's right.*" Self-approbation, or vanity, which

in him signifies "*a wonderful memory*," which has been the talk of the neighbours for years. The knowing more of bygone times than any man or woman in the place. *Selfishness*, called by him his "*uprightedness and downstraightedness;*" independence of spirit—*he cares for no man, and always paid twenty shillings in the pound.*" These are the vulnerable points in his armour; and if you cannot thrust an arrow in at any of these, you had better hang up your bow for you will never make a good archer. He will answer anything if you appeal to his memory, or if your question magnifies his independence of spirit, or brings out in all their dazzling lustre that "uprightedness and downstraightedness," of which exalted virtues he believes himself to have been ever a most distinguished example.

So that the Dogged witness may be tamed and rendered docile, even as that more sagacious creature the Elephant may be taught to stand on its head.

4.—THE HESITATING WITNESS.

A HESITATING WITNESS may be a very cautious and truthful witness, or a very great liar. You will find this out before you begin to cross-examine. In most cases the hesitating man is wondering what effect the answer will have upon the case, and not what the proper answer is. By no means hurry this individual; let him consider well the weight of his intended answer, and the scale it should go into, and in all probability he will put it into the

wrong one after all. If he should, *leave it there by all means.* I advise this, because I have so often seen young advocates take it out again and put it into the other. Besides, your giving him plenty of time will tend to confuse him—as confused he should be if he is not honest. He can't go on weighing and balancing effects without becoming bewildered as to their probable results. Nor is there any danger in being slow with this witness; he must be a much sharper man than you, and must know better than you what is passing in your mind, if you do not at last contrive to land him in an unknown region where perchance there be giants, hobgoblins, and what not.

But your cross-examination should by no means lag on his account, nor should its pace slacken. Slow questions are usually feeble. With this witness they should be *asked* at the ordinary speed, or if anything, perhaps a trifle quicker, so that the hesitation may be more apparent and the blundering more complete.

Hesitation however may result from a desire to be scrupulously accurate, in which case you must be careful that the mere strictness of language do not convey a false impression. The letter sometimes, even in advocacy, kills, where the spirit would make alive.

5.—THE NERVOUS WITNESS.

A NERVOUS WITNESS is one of the most difficult to deal with. The answers either do not come at all, or they tumble out two or three at a time;

and then they often come with opposites in close companionship. A "Yes" and a "No" together, while "I don't know" comes close behind. "I believe so," or "I don't think so," is a frequent answer with this witness, as it is with the lying and the truthful witness. They are all partial to this expression, but all from different and opposite motives.

You must deal gently with this curious specimen of human nature. He is to be encouraged. It is no use to bray him in a mortar. Counsel often get irritable and petulant, and ask such questions as these: "Pray what *do* you mean?" "You say yes and no in the same breath." "Will you be good enough to explain to those gentlemen what you mean?" This is bad, and "those gentlemen" generally dislike the soft sawder implied. Some counsel may not know it, but the fact remains that they injure their clients by observations of this kind. Besides, the rebuke and the oblique flattery to the jury do not produce the effect of restoring the witness to firmness or self-possession. You should bear in mind with this as with all witnesses, that the smallest point you can extract in your favour is worth all the trouble you may be put to in obtaining it. You should deal as gently with a weakness of this kind as you would with a shying horse; encourage and humour him, while you familiarize him with the dreaded object, which is your learned self. The nervous witness, like all others, is either to be cross-examined or not; if he be, you must do it without driving him into such a state that his answer, however favourable, will have no value in the eyes of the jury; and this

will surely be the effect of agitating him by petulant impatience. Endeavour to quiet his nerves if you think you can obtain anything serviceable to your case; if not, leave him alone altogether.

He is in a similar frame of mind to that of the fluttering fly who suddenly finds that he has involuntarily trespassed upon the spider's premises. The situation is an exceedingly anxious one, from which the unfortunate being would be glad to emerge with a humble apology. A witness's state of mind is evidence not to be separated from his answer, and great allowance is always made for a nervous witness, who invariably receives the sympathy of the jury. You have to guard, therefore, against offending that sympathy, as you undoubtedly would by a severe tone or manner.

6.—THE HUMOROUS WITNESS.

THE HUMOROUS WITNESS is mostly found in theatrical cases, where he is generally looked for; and in the majority of cases he seems to be conscious that he is expected. He scarcely ever says a good thing, although every body laughs whenever he tries to. He is generally encouraged all round, and very often the judge will say a good thing for him. This witness is a public character, and at any risk he must not disappoint an eager public. If he says a good thing it will be in to-morrow's paper, and the theatrical world will have it for breakfast. If he cannot manage

it his performance will be a failure. So he mounts the box and looks all round the Court as much as to say, "The last witness was nothing, now see what you think of me!"

No one need be told that his weak point, like that of almost all men, is vanity, and his strong one good temper. You will scarcely ever find him intentionally false, and he seldom attempts to mislead. He rarely has any interest in the case, and most frequently not the excitement incident to party feeling. As a rule he is the friend of both sides, as he is with the human family generally; for, though he may be out at elbows with all the world, he brings "railing accusation" against no one.

Supposing the action to be one of assault, you can successfully appeal to his good nature if you are for the defendant; and he will almost rub the cause of action out for you as he would a debtor account from a slate. Play him with his superabundant good humour, and lay aside the style of the cross-examiner altogether. Be with him like a schoolmaster with the boys after school, and you will find that he will jump to your conclusions if you offer him a back. He is the exact opposite of an exaggerating witness. His excessive good humour makes light of the world's annoyances; he may find few of the good things of this life, but he is always looking after them; and the disagreeables, instead of being its main features, are only passing incidents not to be bothered about.

The Humorous witness takes everything, even "the evidence you shall give to the Court and Jury," as "the Captain" takes his "three throws

a penny," not because he wants cocoa-nuts, but simply because "his honor" delights in "firing away!"

7.—THE CUNNING WITNESS.

THE CUNNING WITNESS must be dealt with cunningly. Humour would be mere pastime and straightforward questioning out of character with him. But by way of contrast, and for that only, straightforwardness may not be out of place with the jury. Whatever of honesty, whether of *appearance*, manner, tone or language, contrasts with the vulgar, self-asserting, and mendacious acting of this witness will tend to destroy him. It will be the antidote to his coarse poison. It is strange but true, that no man can be what is usually understood as a "cunning person" and conceal the fact. He is not really a shrewd man but only thinks he is, tries to be, and above all, wishes to be thought so. He always pretends that he has some deep and hidden meaning in what he says and does, which no amount of skill or perception on your part can penetrate. He would be an impostor to the world if he could, but the only person he really imposes upon is himself. Every one can see that he tries to appear what he is not, and that he pretends to know a great deal more than he does. This is the man to show to the jury in his real character. But it by no means follows that if you do they will disbelieve him altogether. They will discount his evidence, and

without some corroboration attach little weight to it. If contradicted by a respectable witness or a fact on your own side, they will discredit him altogether. You will therefore leave him to be himself; he will exaggerate and colour in his own vulgar manner, utterly unable to perceive that he is producing a distorted account which no one will believe.

If you get this witness laughed at without appearing to design it he will be at your mercy, for vanity is his moving spring also; and although he is vain of those qualities which most men despise, he is still vain and desires to be thought clever. To be laughed at for a fool therefore will be beyond endurance: his temper will be lost and his cunningly devised story and impudent repartees will fail in their effect. But the laugh should appear to be the result of an accidental surprise: something that he has brought upon himself and not that you have designed for him. I have seen this so often successfully performed by many of those no longer at the bar, as well as by many still practising, that I am sure it is a course of proceeding worth remembering. It is invariably welcome, and when skilfully brought about, one of the most enjoyable incidents that attend the presence of the cunning witness in court.

A Cunning man has a reputation to maintain; that is, a reputation which exists *in his own mind.* He is his own public, his own critic, and if he can for a moment be lowered in his own estimation, he will exhibit the same weaknesses that would characterise the greatest man in a sudden failure before *his* public—he would be *at a disadvantage.*

8.—THE CANTING HYPOCRITE.

"For Cant is itself properly a double-distilled lie, the second power of a lie."—Carlyle's "French Revolution."

THE CANTING HYPOCRITE is not the least pleasing object of creation when in the witness-box, nor is he the most difficult to cross-examine. He invariably speaks from the very best and purest of motives. His desire is only to speak the truth; no, not merely that, but without so much as an *apparent* tinge of partiality. He has no interest in the case—no feeling. It is such a pity it could not have been settled out of Court as he proposed, himself to be the arbitrator.

Here is a good man for you. It is almost a pity that necessity and a sense of duty should compel you to cross-examine such a man at all. It seems almost an insult, but it is excusable on this ground—that his extreme disinterestedness and impartiality might impose upon the jury and do your client an injustice if you did not. Now you will observe about this rogue that whenever he approaches a downright lie he shirks it. It is a part of his very character to believe he is an honest man. When he comes to a lie therefore that he dares not face, he is like a bad hunter who will not leap the fence, but looks round to see if there be a gap somewhere hard by or a somewhat *lower* fence that he may scramble over and so not do violence to himself in the event of a mishap. The hypocrite coming up to the lie, says: "I am not quite clear; I should hardly like to go so far as that." But he will wriggle over on to the other side somehow if you show him a place. So if you put it to him some-

thing in this form: "I presume I may take it, Mr. Pecksniff, that so-and-so is the case?" "Well, I think you may." Now he's fairly over. You will not fail to mark this characteristic in him, that whenever he begins to *think*, to be *not quite sure*, not *clear* and *to believe* and *presume*, and so forth, he is incubating a downright lie. He himself is a lie that needs little telling. His evidence, which may and will be always on the confines of truth, must be closely examined to see on which side of the boundary it really is. If it be on that of falsehood, it is so very near the truth that you can scarcely distinguish the dividing line, and if it be on the other side, it is equally near a lie. But you can make his evidence valueless by pushing him over sometimes on to the side of truth and sometimes to that of falsehood. He balances himself so nicely that a finger's touch is sufficient to disturb his equilibrium, and if he do not always go over, the jury will perceive his grotesque efforts to keep his position. A persuasive tone and manner, somewhat assimilated to his own, as though you were conscious that you had to deal with a very good and amiable creature, who could not possibly be made to lie even by means of thumbscrews and iron boots, and who would rather be torn to shreds with wild horses than swerve from his integrity, is the most effectual mode of dealing with this witness. He is too excellent to deny the truth if you put it to him *in infinitesimally small quantities at a time in the shape of simple leading questions*, each one carrying with it the shadow of perjury which this man will always avoid committing at any cost.

The rogue believes in two things—Religion and his own Goodness. His Religion is covetousness, which he always construes into a Special Providence; and his Goodness is exemplified in an enthusiastic worship of *Himself*. He is an eminently moral man, as every one will tell you; but his morality springs not from a genuine piety but from arrant cowardice. He would sin to his heart's content but for the dread of punishment. He is a weak sinner nevertheless, who cannot even plead a robust constitution in mitigation.

9.—THE WITNESS PARTLY TRUE AND PARTLY FALSE.

THE *witness who is partly true and partly false*, without hypocrisy, knowing that he is giving colour to some facts, suppressing others, and adding little ones to make good measure for his party, is the most difficult of all to deal with. The process of separating the true from the false requires skill as well as ingenuity and patience. You must have a delicacy of touch in manipulating evidence of this kind that comes only by actual practice. Experienced advocates are frequently deceived, and judges even fail at times to separate what is true from what is false. As some diseases are beyond all the remedies in the Pharmacopœia, so this kind of witness is beyond the reach of any one faculty the advocate can bring to bear upon him, and sometimes defies the skill of all the qualities combined. Tact, ingenuity, patience, perception, judgment, experience, are all requisite in the highest degree in dealing with this witness.

And you must bear in mind that it is not sufficient for you yourself to know the nature and character of the evidence; your task will only be half accomplished at this point. There will still remain the more difficult one of exhibiting it to the jury in the same light, and with the same aspect with which it presents itself to your own mind. The jury, untrained to sift evidence, will not so readily detect imposture and deceit as you; nor will they so easily distinguish between what is true and what is false when the ingredients are mixed up cunningly in the evidence of an artful witness of this description.

If, however, you can lay hold of any one part and expose an incongruity or an incompatibility, you will have accomplished a great deal. Expose an attempt at deception anywhere in a witness's evidence, and you have nearly, if not quite, destroyed it all. You must watch carefully to find out if there be a want of assimilation in the parts of the story; if there be a disagreement between some of the false parts and some of the true; you must ascertain if such a series of facts can naturally exist together and in connection with one another, and must cross-examine for causes and effects, so as to determine if these agree with facts stated by other witnesses. Men do not gather "figs of thistles," and if you find the same cause producing opposite effects there is falsehood somewhere.

Improbabilities always have great weight with a jury; and if you cross-examine for these in a witness who tells a story partly true and partly false, you may succeed in detecting some. Of course, much that has been said with regard to the

mode of cross-examining one witness will apply to others; and it may be that, apart from showing the intrinsic weakness and improbability of the story as a whole, you may be able to break the witness down altogether, by showing that he is quite unworthy of belief. If so, you need cross-examine no further, unless you desire to contradict him by evidence on your part.

The story told by this witness would resemble a neatly papered wall. On a general glance, such as an ordinary spectator would give, it would appear perfect; but a critical examiner would discover that the pattern was broken here and there to meet the requirements or shape of the wall, notwithstanding that considerable skill had been employed to make the broken portions fit in so as to deceive the eye. As a whole, it looks complete; examined in detail, the patchwork is apparent; the *pattern* is not preserved in an integral condition.

The greatest liar is not the man who invents but the one who adapts. An invented falsehood seldom answers, but a set of facts twisted out of their original shape and adapted to the deceiver's purpose often accomplishes his object. He is the greatest liar who mixes the smallest portion of falsehood with his facts.

10.—THE POSITIVE WITNESS.

THERE is another class of witness which may be mentioned, and that is the POSITIVE WITNESS (generally a female or of female tendencies). It

is usually very difficult to make the witness unsay anything she has said, however mistaken she may be; but you may sometimes lead her by small degrees to modify her statements, or induce her to say a great deal more in her positive way; and the great deal more may be capable of contradiction, or may itself contradict what has been said before by the same witness. If you deal with her skilfully, she will in all probability be equally positive about two or three matters which cannot exist together. She is the worst witness to unsay anything, but the best to lead into a contradiction of what she has said.

Her idea of an oath is not that it should be a restraint upon her mendacity, but that it should give force to her positive assertions—a stamp of genuineness like the Queen's head on a bad shilling. She would unhesitatingly have sworn that Abel struck the first blow if she had been called on the side of Cain. She always stands up for what she calls "her own side." Beware how you try to convince her that she must be wrong. Such questions as "how can that be?" will only draw the answer, "I don't know how it can be, but I know it is." You might just as well try to convince a street mongrel that barking is done away with, as attempt to persuade her that she ought not to be quite so positive.

11.—"SPROUTS," THE STUPID WITNESS.

ANOTHER class of witness not infrequently met with in Court is the STUPID WITNESS. There are many kinds of stupid witnesses, but the particular

specimen upon which I would fix the reader's attention is that civil and agreeable being who agrees with everybody for fear of disagreeing. He belongs to no exalted rank in society you may be sure, and is not assisted in his worldly pursuits with a superabundance of the highest intellect. Enough, perhaps, to enable him to currycomb a horse or wheel a barrow.

Now, if you think you have a witness whose evidence you can mould to any shape you like, you think rightly, as you may make a piece of dough into a boat, but the important question is—will it swim? Will the evidence, manipulated by your utmost skill, be serviceable to your case? You may easily enough get this witness to unsay all he has said, as if you were undoing a piece of knitting or crochet work, but what will be the effect of that on the jury? As a rule it will be this: they will smile and think what a piece of *conjuring* advocacy is, especially cross-examination! They saw the first conjuror place a *goose* under the hat and now you have turned it into a *parrot*. They shake their heads accordingly, pleased enough with the amusement. "It's as good as a play!" But still they know the goose was there, and if they are asked to find which animal was first under the hat, their verdict will be "goose."

In other words it is of no use whatever to manipulate this evidence into downright contradictions. The jury will put down one half of the result to the advocate's ability, and the other half to the witness's stupidity, and unless other reasons intervene will credit the first account given by him and laugh at the rest.

This witness is respectful to a fault, and that fault is *timidity*. Suppose the action to be for trespass and injury to a horse, and the Statement of Claim alleges that the defendant wrongfully took a horse belonging to the plaintiff, out of the plaintiff's stable, and rode it for a long distance at full speed, whereby it became broken-winded and useless. Defence: permission to ride the animal when not required by the plaintiff: riding in accordance with permission, and denial of improper pace, broken-windedness, and so on.

Sprouts, the "odd man," is called for the plaintiff, and says he found the stable door open and the horse gone. He "never gave no leave to take it, and the horse come back all in a lather and broken-winded like."

Now Sprouts is not so much actuated by a desire to tell the truth as by a wish to be agreeable all round: Sprouts is a man of the world, and desires to offend nobody; above all desires to keep his place. Since the day he interposed his friendly offices between Snooks and his wife he has never interfered in other people's business, and would not have come here to-day if he had not been obliged. You ask him:—

Q. It was a fine morning, I think you said, Sprouts?

A. Yes, sir.

Q. Not *very* wet, was it?

A. Not *very*, sir.

Q. What you call muggy, I think—damp and close?

A. It was, sir.

Q. The sort of weather to make a horse perspire a good deal?

A. Make him what, sir?

Q. Perspire.

A. Prespire! yes, it would, sir; it would that.

Q. I believe the horse has not been clipped?

A. No, he haven't, sir.

Q. He would naturally get warm?

A. He'd smoke a bit, sir.

Q. I think you smoke, Sprouts?

Sprouts is in a cloud at once—enveloped—you can hardly see him; but what you do see of him is grinning with the utmost civility.

Q. Sometimes, I suppose, Sprouts?—the more you "Sprouts" him the more agreeable he becomes.

Q. Were you smoking at the time the plaintiff came up to you?

A. I believe I was, sir.

Q. And did he not say he was sorry he had given the defendant leave to take the horse, as he was such a regular madcap he didn't know where he'd ride him to? Set a beggar on horse-back, he'd ride to—— Well, we won't mention names, Sprouts. Did he say that?

Sprouts laughs through the smoke, and begins to rub his cheek.

Q. Did he say so?

A. Something of the sort, sir.

Q. Did he say that?

A. Not all, sir.

Q. Judge: Which part did he not say?

Sprouts forgets what the question was.

Q. Counsel: Did he say the part about madcap?

A. He did, sir.

Q. And that he was sorry?

A. He wur terrible sorry, sir, sure enough.

Q. And do you mean to say, Sprouts—will you pledge yourself he did not say, he was sorry he had given him leave to take the horse, or words to that effect?

A. I won't say he did, and I won't say he didn't. I won't tell no lie if I knows it," says Sprouts.

Q. I don't pledge you to the very words, Sprouts; but I ask whether he did not use words to that effect?

That last *Sprouts* was so in accordance with the native civility of the witness, that he strokes his chin tenderly, and says—

A. He might.

This is not a far-fetched specimen of the evidence of the genus "Sprouts." But a cross-examination which leads to such results is useless. The jury will take the evidence-in-chief as true, and will not accept seriously the answers elicited by such a mode of questioning. I have many times seen it fail in the cases where weak and stupid witnesses have been examined. The line to take is not that which leads this kind of witness into mere inane contradictions of all he has said before. With a sharp person this would result in the overthrow of the evidence altogether. Not so, however, with that of the stupid witness; Sprouts's evidence is essentially weak, unsupportable of its own fibre, and if you have noticed carefully you will have seen how tenderly it was drawn out, like the delicate haulm of the pea, and how carefully it was propped up with a forensic stick. What you have to do is *to take away its artificial support.* It need not be rooted up. *It simply is not what it seems.* Alter its appearance and *tendency*, and you will have done enough.

If I may take a cricketing figure, I would say: Sprouts is not a hard wicket to take. You know there are batsmen with whom a "twisting ball" or "a shooter" will be effective. Sprouts generally comes out "leg before wicket;" he never blocks, never hits to "leg." You need not trouble about "length balls" with him; just straight to the wicket and you will be sure to take him presently.

Now suppose you have had *a quiet conversation with him*, just by way of getting *explanations* of various things he has said, you will both have enjoyed the few minutes of pleasant intercourse. Just as you are about to part, in fact as you are sitting down, as a sort of "bye, bye, Sprouts," you bethink you of the question:—

Q. *The horse is not much damaged, I hope?*

A. No, says Sprouts, he's all right now.

Straight ball for Sprouts—*leg before wicket!*

In the case I have supposed, the last answer of the witness must be taken to really represent the *fact*. For it will require no stretch of imagination to divine that in horse cases you can manufacture broken winds as in certain trades you can manufacture broken china.

There is a way of reserving *the* question you wish answered till your witness is in the *humour* to answer it. Most friends are amicable when they part.

12.—THE SEMI-PROFESSIONAL WITNESS.

ANOTHER class of witness deserving of notice is that of the *Semi-professional*. He is in fact Semi-everything. He is half religious and half libertine; half teetotaller and half drunkard; half veracious and half liar; his word is positive and his respectability comparative.

I have in my mind a little, lean old man, with a high, narrow forehead and a much-underhanging lip, a mouth that twitches with self-importance, and an impatience of contradiction. He wears glasses that shut up, and waves them with an air of consequence when he answers a question, putting them on and taking them off with his hand in front of his face when he wishes to evade your question. This gentleman always seems to have a map or plan of something before him, for he calls himself a surveyor, although his principal business is that of an undertaker.

He is a great authority on party-walls, boundary fences, old drains, and the locality of disused cess-pools. A case of dilapidation could no more get along without him than a German band could proceed harmoniously without its most prominent instrument, the trombone. In fact, but for this worthy gentleman, there would probably have been no action at all, for he usually combines the greed of a pettifogging lawyer with the quarrelsome faculty of the parochial meddler.

Now this man is full of "purlines," "bressimers," "architraves," "buttresses," and other architectural expressions. With these and his eye-glasses he could prove any case against anybody if you did not cross-examine him. He combines within himself all the qualities which make up a deceptive witness — truthful, false, dogmatic, opiniative, clever, cunning and courteous. You could no more bully this man into telling a lie than you could persuade him to tell the truth. You can no more demolish his respectability than you can deprive him of his honest intentions.

How then will you cross-examine a man who has all the goodness of the canting hypocrite with all the pretensions of the scientific witness?

Tenacity of opinion is his weakness. He will sacrifice truth itself rather than give up his opinion. Drive him into that net and you have him a safe captive.

If you attempt to show that his opinion is valueless because he has not been articled to a surveyor, you will lamentably fail. The jury always resent an attack upon a man made solely because his knowledge has not been acquired in the orthodox red tape manner. There are almost sure to be "self-made" and "self-taught" men on the jury. If, therefore, you begin with such a question as—

"I believe you are not a Surveyor, Mr. Scraper?"—they will think you are putting the question for the purpose of insulting him. And indeed it will be absurd from every point of view; because if he *knows* what he is talking about the jury will not care how he acquired his knowledge.

If Mr. Scraper is not a surveyor in the professional eye, it will not affect his evidence if that be correct; and if his evidence be incorrect or absurd, it will not improve it though he were the prince of surveyors.

In all probability any one could do what Mr. Scraper is called upon to perform, namely, tell how many slates are off, how many windows broken, and how many doors require hinges. But in whatever circumstances this individual may appear, if you wish to attack his knowledge, cross-examine about *facts*, and you will soon learn whether he knows his business or not. If you yourself know nothing of what you are cross-examining to, he will beat you unmercifully at every point; if you do know something you will plumb the depth of his scientific ignorance very soon.

You will be on safe ground when you strengthen his opinion by a judicious, but not too strong an attack upon it. He fights a good battle, does this lean old gentleman in the white cravat and high, stiff shirt collar. He has been attacked in the vestry for the last forty years. He gives one an idea of Wellington within the lines of Torres Vedras. He is never beaten, for if he does not prevail, it is not because he is wrong, but because *you* are.

So he stands with his glasses in one hand and his compasses in the other, and the map before him, defining the boundary of some institution whose wall is supposed to have encroached upon the plaintiff's premises. He will tell you how it has "canted over" out of the upright, and how the fault was with the foundations, which could

never have been good, and how that recently there must have been a subsidence and another "canting over," and so on.

Now, if you touch such a scientific person upon damages in this particular case, he will manifest unconcern and disinterestedness with a wave of the compasses. He knows nothing of damages; his *client* is a market gardener, and he, the semi-professional, knows nothing of the value of cabbages. He would tell you what it would cost to throw a viaduct across the English Channel, if you like—but, cabbages! As this old gentleman peeps over the ledge of the witness-box, and maintains his opinion to the death that the foundation of the wall was not good and sufficient, you will elicit that he cares nothing for all the opinions of all the scientific men of the day: it does not matter to him that the wall has stood for a hundred years at least. He will maintain that the superstructure (be sure and feed him with long words) must have been sound, or it would not have stood so long. And when he has agreed with others that there is not a crack to be found in all the wall, he will maintain his opinion with greater obstinacy than ever, *because it is necessary*, the wall having lately encroached or canted over several inches; and when he is forced to admit that *it bulges into a circle without a crack*, he would rather believe in the capacity of the bricks to stretch or bend than in any part of the mortar to break. So he proves either that the wall was originally built as it is, or that every brick has stretched and bent in a miraculous manner. Such proof was given not long ago by the semi-professional witness.

As a scientific man the semi-professional is nowhere. Like some politicians, he believes that the true principle consists (as in an "interpleader issue") in boldly affirming what somebody else denies.

13.—THE OFFICIAL WITNESS.

A WITNESS by no means of rare occurrence is the Official witness. He is a man of many callings and varied appearances, but is of one type and not even like any other.

He may be a subordinate in the Civil Service, or attached to a Military Department, to the Naval Reserve, or, as in the present case, he may be an "OFFICER OF THE FORCE." One "in authority" he must be, and in the service of the State. No mere offspring of a Railway Company could possess the air of self-importance, combined with ignorance, which belongs to the "*State Official.*" The Directors of the Bank of England are but men in comparison with this individual, and the only approach to him is that renowned and illustrious creature whom the world reveres as "BUMBLE."

THE SUPERINTENDENT OF A DIVISION, let us suppose, is a witness against you—he is sure to be an important one. He has come to give evidence of what the prisoner stated "in my presence"—a presence of six feet four and of proportionate breadth. We will suppose the question to be a bank robbery; the accused a man of high character

and large family. This is the case in which the Official Witness magnifies himself out of all recognition. There is not only Official Authority to confront, but Official Arrogance puffed out with Official Ignorance.

An inexperienced counsel must needs look small before such a being as this; and whatever may be his mode of attack, yonder human citadel has survived similar assaults, and is prepared to stand a siege of questions from the oldest veteran in the field.

The mode which the Official Witness adopts to defeat the cross-examination of a young advocate is to fall upon him with all the weight of his official arrogance. Brusque and loud as the tone of a drill Serjeant to an awkward squad are the answers he throws at the inexperienced advocate; and every time this crushing force has been exercised, the Huge Mass of Authority lifts up its head above the official cravat and poses itself with a well-defined expression of "I am ready for you again if you require any more, sir."

With the experienced and skilful advocate, especially if he be a *serjeant*, his manner is that of a courteous and somewhat obliging personage, who will get you an interview with Majesty itself if it can be accomplished, that is, if Majesty be at home. I may add that these Official Authorities usually regard the serjeant-at-law as equivalent in degree to an Inspector in the "Force."

Now, observe the "Authority" in his examination-in-chief. Many of my friends will recall the specimen.

Q. You are a Superintendent of the O Division?

A. Yes, I ham!

Q. Did you apprehend the prisoner?

A. Hi did.

(He seems to have apprehended all the h's that have ever been cast loose upon society).

Q. Where did you apprehend him?

A. Hon board the Handelushuer, houtward bound.

Q. Did you recognise him when you saw him?

A. Himmejitly.

Q. What did you say to him?

A. Ho! 'ere you har! I won't be quite sure whether I said 'ere you har, or har! you har 'ere, Mr. Biggs; but hif I may refresh my memory, my lord (turning to the Bench and drawing in his horns as though he were an Official Snail) with my notes (taking out his book)—

Inexperienced Jones: Stop, stop! what are you going to refer to?

A. My notes (with a violent lateral nod).

Jones. Made at the time?

A. Himmejately, sir, with an official sneer. Then referring to his book. Ho! 'ere it his, hi find hime not quite hackerit, my lord; it was, ho! yeu har eah—not hoh! eah yeu har, as hi formerly hobserved.

Jones. I wish you would be careful, Mr. Ham.

A. Hi ham, sir.

Judge (smiling). I think he is. (Great laughter, in which all join except the Superintendent, who draws himself out like a telescope and then looks through it with a sneer at the blushing junior.)

Q. Now tell us what took place?

A. May hi read from my notes? (He knows he may perfectly well, if the evidence may be given at all; but he asks this in the tone of an injured person whom Jones has been unmercifully putting down for the last half-hour.)

Prosecuting Counsel: *Cer*tainly.

Rash and inexperienced Jones. Stop! did you caution him?

Witness (blandly): *Cer*taintly.

Jones. Do you really mean—

Prosecuting Counsel (sharply); Please tell us what you said, Ham, when you cautioned him?

This causes Jones to subside.

Witness: Hi said (waiting for his lordship's pen) whathever you say will be taking down hin writin, hand will be heused in hevidence against yeu hon yeur trial.

Judge nods, and the Official Dignitary sends the nod on to the young advocate with accelerated force and accompanied with a bitter sneer.

Then the statement is read and the prosecuting counsel asks, "How long were you with him?" to which Official Dignity replies:—

"Habout a hour."

How to cross-examine this gentleman is the question. To which I answer—the largest balloon will burst if you force too much gas into it. Self-inflated with the responsibilities of his office, you may increase him more and more until the domineering ascendency in the witness-box will be an indication of the domineering arrogance he would exercise over a prisoner.

His exhibition of accuracy is only a fraud, a clear indication that he wishes every word he says

to be taken for granted. He will be the less likely, therefore, to stand the test of an analytical cross-examination. You will make him writhe by *appearing* to dispute his evidence, and will soon intoxicate him with his self importance if you administer it in suitable doses. When he becomes too great for the witness-box, the jury will see that he's out of proportion, and when he most protests by his manner that he ought to be believed without question, the jury will most distrust him, always supposing that he has to rely upon the strength of his own veracity, which is not very strong. Indeed, it may be said of him, as Carlyle observed of a very different personage, if he does not lie, it is because he has not sufficient truth to make a lie out of.

The "brief authority" with which he is clad does not say much for his tailor. He lacks the refinement that alone prevents Authority from degenerating into Insult, and Power from resolving itself into its original shape of brute force. The official superiority of his existence is constantly proclaimed when he comes in contact with the inferior creatures whom he supposes he is to "keep in order," rather than protect. But his dual nature of cringing arrogance is never more apparent than in the witness box. This type is not confined to the "Force," but is found among every body of men where Ignorance is invested with Authority.

14.—THE POLICE CONSTABLE.

EVERY one who conducts a defence in a criminal trial has to deal with police testimony, and as a class of evidence it figures more conspicuously in criminal courts than any other. Again I shall commence by saying, as far as possible leave them alone. They are dangerous persons. They are *professional witnesses*, and in a sense that no other class of witnesses can be said to be. Their answers generally may be said to be stereotyped. All the ordinary questions have been answered scores of times by the well disciplined, "active and intelligent officer." Don't imagine, my young friend, that you are going to trip him up upon the path where his beat has been for many a year. He will perceive you coming while you are a long way off, and in all probability go out and meet you. Perhaps before you were born he answered the question you have just put. He knows what you will ask him next if you are no better than the rank and file of Quarter Sessions cross-examiners.

But try him with something just a little out of the common line by way of experiment. You see he looks at you as though he had got the sun in his eyes. He cannot quite see what you are about. And you must keep him with the sun in his eyes if you desire to make anything of him. Without accusing him even by implication of having no reverence for the sanctity of an oath,

I must say that if he see the drift of your questions, the chances are against your getting the answers you want, or in the form in which you would like them. He thinks it his duty to baffle you, and if you do not get an answer you don't want, it will probably be because the policeman is as young and inexperienced as you are.

To be effective with a policeman your questions must be rapidly put. Although he has a trained mind for the witness-box, it is trained in a very narrow groove; it moves as he himself moves, slowly and ponderously along its particular beat; it travels slowly because of its discipline, and is by no means able to keep pace with yours, or ought not to be. You should not permit him to trace the connection between one question and another when you desire that he should not do so. If you ask him whether it was a very dark night, and the darkness has nothing whatever to do with the issue, he will commence a process of reasoning (invented at Scotland Yard) as to your motive, and what might possibly be the effect of his answer. While this mental exertion is going on, interrupt him suddenly with a question you have a good reason for putting, and in all probability you will get something near the answer you require.

Policemen have a great deal of knowledge about the case, and a great deal of *belief*. The former you will find bad enough to deal with, but you must be careful not to elicit a large quantity of the latter; if you do, you may rest assured it will look so like a fact that it will pass with the jury as such. You will be fortunate if it do not condense itself into a fact by the time you get it.

"What did you say when you apprehended the prisoner?" asked Jones, eager for the display of his severe ability in cross-examination.

"Oh!" said the active and intelligent, "I forgot that, my lord"—(always taking my lord into his confidence). "I beg your lordship's pardon. I said, now Sykes, when you come out from doin' the last seven year, you told me you meant to turn over a new leaf, and 'ere you are agin."

And there the learned counsel was again!

Unless certain of the answer, never under any circumstances ask a policeman as to character. Your client may have the best, but policemen have such a high standard that no man in the dock can ever come up to it. The highest character he can give a respectable man will be, that he "does not know anything against him." I have often heard them reprimanded for this answer by the judges, and asked if they know anything in his favour. So if a man said something while tipsy, and a policeman be asked, "He was very drunk, wasn't he?" The answer will be, "He knowed what he was about, Sir."

Furthermore, it is dangerous to put "fishing" questions to this class of witness. You are almost sure to catch the wrong answer. Your safer course will be to cross-examine for contradictions and improbabilities, and also where it is necessary to give the witness the opportunity of denying anything upon which you intend to contradict him. Cross-examine for prejudices, and as to opportunities, remembering always that there is often as much in the manner as in the matter of cross-

examination, and much more at times in silence than in both.

The Police Constable is not below human nature generally. The parent of many of his faults is the fact that subordinate judges, as a rule, think he must be protected *by an implicit belief in his veracity*. As a natural consequence he falls into the error of believing in his own infallibility.

15.—THE TRUTHFUL WITNESS.

THE TRUTHFUL WITNESS has been said to be the most difficult of all to cross-examine. I cannot help differing so much from that opinion as to say that I have always regarded him as the easiest of any. When I say truthful, I do not intend to imply that his evidence is necessarily true. If it were so, it would be idle to cross-examine at all. What I mean by a truthful witness is one who believes and intends his evidence to be true. He is the easiest to deal with, because he does not equivocate or prevaricate. He has no secret meaning, and gives his answers readily and without mental reserve. He desires to tell you all he knows, and his credibility, I will assume, is unimpeachable.

The first thing to ascertain in cross-examining a witness of this class, is whether he has any strong *bias* or *prejudice* in the matter under inquiry. One or two carefully worded questions

will discover this, if you have not already learnt it from his answers-in-chief. Suppose, for example, he is a clergyman, and the question is as to a certain place of entertainment being a nuisance, either as being badly conducted or conducing to immorality. He tells you truthfully enough what he has seen and speaks with indignant or pathetic tones of the vicious example to the inhabitants of the neighbourhood. In his evidence-in-chief he will speak in general terms, probably, and not descend to particular instances; but you will learn by closely watching whether he has any particular examples of debauchery or profligacy to depose to. I do not mean that *you* are to draw these from him if he have any; this of course you will carefully avoid, but if he has not referred to particular instances, you may safely proceed to lead him to condemn all places of public amusement of a similar kind. If you lead him gently he will follow with remarkable docility. I have seen this course pursued by eminent leaders with great success. A man who condemns all alike is not the witness to impress a jury with the value of his evidence in the particular instance, especially where it is far more a matter of opinion than fact. Even fact itself may be represented as so shocking by a witness of this kind as to create laughter instead of indignation. I once heard a highly respectable and pious individual tell a bench of magistrates at Quarter Sessions that all dancing licenses ought to be taken away because they prevented gentlemen from getting good housemaids. A clergyman described the conduct of two individuals as debased and disgusting; when

questioned as to what they were doing, he said with great solemnity "he saw the man kiss the girl and hold her hand." On being asked if he had never been guilty of similar conduct in his earlier days he declined to answer, and amid an outburst of laughter said, "*But the girl was a Sunday School Teacher.*" This not being enough to produce the horrible effect he anticipated, he threw into the scale, as a final circumstance of depravity, the fact that, at the time, the young man was paying his addresses to another young woman.

A truthful witness may be called to give evidence, let us suppose, in a "running-down" case, and may state positively what he saw. It is almost too obvious to remark that you must cross-examine as to his exact position, the moment as to when his attention was called to the particular occurrence, his opportunities for observing what took place, as to when his attention was subsequently called to the matter, what was said and in what way his mind was directed to it—in short, you will test his *memory* and his *accuracy*. It will be strange if he be not brought into collision with some other witness equally accurate but with no less a tendency to blunder, or with some material and perhaps undisputed incidents of the occurrence, and though ever so truthful he may be utterly broken down.

Sometimes a truthful witness will unconsciously colour a transaction if he be closely connected, either by relationship or friendship, with a party to the action, and this is highly important to remember in cross-examining a truthful witness.

It frequently occurs that some circumstance is

omitted in the examination-in-chief (and this should always be watched for) which, if supplied, would give a totally different aspect to the transaction; and this may be the case with regard to the effect producible on the minds of the jury when it would be otherwise as to the mode in which it would operate upon that of the witness. As you never can tell what point may at any time influence a jury, it is safe to say that you ought to elicit *every circumstance that cannot operate to your prejudice.* A witness's *appreciation* of the matters he speaks to is often extremely important to ascertain. He may utterly fail to understand the bearings of his own evidence, and may give a totally erroneous and misleading version of the facts, often mistaking his own construction of them for the events themselves. Especially is this the case with scientific evidence, and all matters involving opinion; men argue from opinion to facts and back again from facts or supposed facts to opinion. The cause of death has been the subject of infinite blunders and wrong conclusions. Effects and causes are often confounded. Opinions are formed from hearsay, or from a supposititious state of facts, and then the facts are sought to be proved from the opinion so expressed. Medical witnesses should be carefully watched in these respects. They are witnesses of *theory*, and are most tenacious of their opinions. They take opposite sides, and arrive at opposite and adverse conclusions, not exactly from the same premises, but from a different conception of the premises, or from regarding them from a different standpoint. It will be acknowledged that it makes all the difference in the world

whether these witnesses form an opinion from the facts, or whether they start with a theory and then endeavour to make the facts square with it.

A truthful witness often misleads by a too strict adherence to actual words without giving the meaning that was conveyed or intended; or by a statement of facts without the knowledge of some antecedent fact which might give a totally different construction to the statement.

A knowledge of "the world," or of the qualifying matter, can alone assist the cross-examiner in these circumstances.

16.—THE MEDICAL WITNESS.

With regard to the value of medical opinion when not based upon admitted or incontrovertible facts, a striking instance occurred in a recent case (which was admirably commented on in the *Daily Telegraph*) where a woman was indicted for the manslaughter of a young girl by starvation. Several witnesses deposed that they were inmates of the "*Home*" where the child had died; that they had been kept without proper food, and had been allowed to go about in rags infested with vermin, and that they had been cruelly flogged. There was the evidence of the mistress of a Board School, of an inspector of police, and of the relieving officer against the management of the Home. After this came the scientific evidence upon which the prosecution (which was taken up by the Government) mainly relied. One of the most eminent doctors in London said that he had *heard the evidence and seen*

the certificate that the deaths of the child and other children at the same Home arose from what is known as consumption of the bowels. The technical term was "*tabes mesenterica*," and it was a very unusual disease. He had never known three deaths occur from "*tabes mesenterica*" in one house before in three months. From his own experience he was clearly of opinion that the food supplied to these children was totally inadequate to support life, and was calculated to lead to a fatal result. (This certainly seems a little tautological, but it may be scientific.) He attributed the illness and death to be entirely owing to improper and insufficient food and want of warmth. In his opinion she died of *starvation.*

Nothing could be clearer than the learned doctor's statement or more positive than his *evidence,* if evidence it were. Unfortunately, however, for his theory, it was not. In cross-examination he admitted that he had arrived at his scientific conclusions "solely *from what he had heard of the evidence,* and not from any personal knowledge in reference to this particular case." In other words, he was assuming the functions of the jury, whose duty alone it was to say whether upon the *evidence* they were of opinion the death was owing to improper and insufficient food and want of warmth.

I mention another medical gentleman's *evidence* in the same case to illustrate another point, namely, the danger of a well-intended question in cross-examination, even where the evidence is worthless in examination-in-chief. He had said that when the children were removed from the Home they presented every indication of having been im-

properly fed, and that their clothing was totally insufficient to protect them from the cold. He was asked, in cross-examination, whether he had been in the habit of visiting the dwellings of poor working people, and replied that he had. At this answer the curtain should have dropped. It boded no good; but, on being further examined, he said "*he had never found any instance of such bedding being used as was found in the 'Home' in question.*"

I do not for a moment say the learned counsel who put these questions was to blame, taking the strictest view of advocacy, because no man, however clever, can be absolutely on his guard at all times, and it was almost inconceivable that the answer should have been what it was. One can only say that the learned doctor's experience of the homes of the poor must be limited, indeed, if he has not seen squalor and wretchedness and nakedness in the loathsomest forms. The question was not wrong, but it brought a wrong answer, a result all advocates, even the most eminent, experience at times.

CROSS-EXAMINATION OF A MEDICAL WITNESS.

In the trial of Palmer, where the question was whether the deceased died of *traumatic tetanus* or from *idiopathic*, or from *tetanus* produced by *strychnine*, and in respect of which every particle of evidence was on the side of death by strychnine, one conscientious medical man gave it as his

opinion that he died from convulsions arising from no constitutional symptoms, but partly from syphilis—the fact being that he died from tetanus produced by strychnine.

It may be useful to the student to quote the cross-examination by the Attorney-General, Sir Alexander Cockburn, of a scientific witness in that case. He was called for the prisoner, and gave his evidence, based on some medical theory of his own, in utter contradiction to the highest scientific opinions of the day. I quote it because it illustrates what I say as to *a witness's appreciation of the matters he speaks to being of the utmost importance to ascertain*, and because I regard it as one of the finest specimens of the cross-examination of a medical witness that can be met with.

By the ATTORNEY-GENERAL:—

"In Cook's case the lungs were described as not congested. Emphysema is of two kinds, one of them consists of dilation of the cells, the other of a rupture of the cells. When animals die from strychnine emphysema occurs. I do not know the character of the emphysema in Cook's case. It did not occur to me to have the question put to the witnesses who described the *post mortem* examination."

Q. "To what constitutional symptoms about Cook do you ascribe the convulsions from which he died?—A. Not to any."

Q. "Was not the fact of his having syphilis an important ingredient in your judgment upon his case?—A. It was. I judge that he died from convulsions, by the combination of symptoms."

Q. "What evidence have you to lead you to

suppose that he was liable to excitement and depression of spirits?—A. The fact that after winning the race he could not speak for three minutes."

Q. "Anything else?—A. Mr. Jones stated that he was subject to mental depression. Excitement will produce a state of brain which will be followed at some distance by convulsions. I think Dr. Bamford made a mistake when he said the brain was perfectly healthy."

Q. "Do you mean to set up that opinion against that of Dr. Devonshire and Dr. Harland who were present at the *post mortem?*—A. My opinion is founded in part on the evidence taken at the inquest, in part on the depositions. With the brain and the system in the condition in which Cook's were, I believe it is quite possible for convulsions to come on and destroy a person. I do not believe that he died from apoplexy. He was under the influence of morphia. I don't ascribe his death to morphia, except that it might assist in producing a convulsive attack. I should think morphia was not very good treatment, considering the state of excitement he was in."

Q. "Do you mean to say, on your oath, that you think he was in a state of excitement at Rugeley?—A. I wish to give my evidence honestly. Morphia, when given in an injured state of the brain, often disagrees with the patient."

Q. "But what evidence have you as to the injured state of the brain?—A. Sickness often indicates it. I can't say whether the attack on Sunday night was an attack of convulsions. I think that the Sunday attack was one of a similar

character, but not so intense as the attack of Tuesday, in which he died. I don't think he had convulsions on the Sunday, but he was in that condition which often precedes convulsions. I think he was mistaken when he stated that he was awoke by a noise. I believe he was delirious. That is one of the symptoms on which I formed my opinion. Any intestinal irritation will produce convulsions in a tetanic form. I have known instances in children. I have not seen an instance in an animal. Medical writers state that such instances do occur. I know no name for convulsions of that kind."

Q. "Have you ever known a case of convulsions of that kind terminating in death in which the patient remained conscious to the last?—A. I have not. Where epilepsy terminates in death consciousness is gone. I have known four cases of traumatic, and five or six of idiopathic tetanus."

Q. "You heard Mr. Jones make this statement of the symptoms of Cook after the commencement of the paroxysms:—After he swallowed the pills he uttered loud screams, threw himself back in the bed and was dreadfully convulsed. He said, 'raise me up; I shall be suffocated.' The convulsions affected every muscle of the body, and were accompanied by stiffening of the limbs. I endeavoured to raise Cook with the assistance of Palmer, but found it quite impossible, owing to the rigidity of the limbs. When Cook found we could not raise him up he asked me to turn him over. He was then quite sensible. I turned him on to his side. I listened to the action of his heart. I found that it gradually weakened, and

asked Palmer to fetch some spirits of ammonia to be used as a stimulant. When he returned the pulsations of the heart were gradually ceasing, and life was almost extinct. Cook died very quietly a very short time afterwards. When he threw himself back in bed he clenched his hands and they remained clenched after death. When I was rubbing his neck his head and neck were unnaturally bent back by the spasmodic action of the muscles. After death his body was so twisted or bowed, that if I had placed it upon the back it would have rested upon the head and the feet."

Q. "Now, I ask you to distinguish in any one particular between those symptoms and the symptoms of tetanic convulsions.—A. It is not tetanus at all; not idiopathic tetanus."

The ATTORNEY GENERAL:—

"I quite agree with you that it is not idiopathic tetanus; but point out any distinction that you can see between these symptoms and those of real tetanus.—A. I do not know that there is any distinction, except that in a case of tetanus I never saw rigidity continue till death and afterwards."

Q. "Can you tell me of any case of death from convulsions in which the patient was conscious to the last?—A. I do not know of any. Convulsions occuring after poison has been taken are properly called tetanic."

"The ATTORNEY-GENERAL: We are told by Sir Benjamin Brodie that, while the paroxysms of tetanic convulsion last, there is no difference between those which arise from strychnine and those which arise from tetanus, properly so called, but

the difference was in the course the symptoms took. Now, what do you say is the difference between tetanus arising from strychnine and ordinary tetanus?—A. The hands are less violently contracted; the effect of the spasm is less in ordinary tetanus. The convulsion, too, never entirely passes away. I have stated that tetanus is a disease of days, strychnine of hours and minutes; that convulsive twitchings are in strychnine the first symptoms, the last in tetanus; that in tetanus the hands, feet and legs, are usually the last affected, while in strychnine they are the first. I gave that opinion after the symptoms in the case of the lady at Leeds, which were described by the witness Witham, and I still adhere to it. I never said that Cook's case was one of idiopathic tetanus. I do not think it was a case of tetanus in any sense of the word. It differed from the course of tetanus from strychnine in the particulars I have already mentioned."

"The ATTORNEY-GENERAL: Repeat them.—A. There was the sudden accession of the convulsions."

Q. "Sudden—after what?—A. After the rousing by Jones. There was also the power of talking."

Q. "Don't you know that Mrs. Smyth talked and retained her consciousness to the end? that her last words were 'turn me over?'" [There was undoubtedly poison by strychnine in the case of Mrs. Smyth.]—A. "She did say something of that kind. No doubt those were the words she used. I believe that in poison tetanus the symptoms are first observed in the legs and feet. In the animals upon which I have experimented, twitchings in

the ears and difficulty of breathing have been the premonitory symptoms."

Q. "When Cook felt a stiffness and a difficulty of breathing, and said that he should be suffocated on the first night, what were those but premonitory symptoms?—A. Well, he asked to be rubbed; but as far as my experience goes with regard to animals—"

"The ATTORNEY-GENERAL: They can't ask to have their ears rubbed, of course" (a laugh).—A. In no single instance could the animals bear to be touched."

Q. "Did not Mrs. Smyth ask to have her legs and arms rubbed?—A. In the Leeds case, the lady asked to be rubbed before the convulsions came on, but afterwards she could not bear it, and begged that she might not be touched."

Q. "Can you point out in any one point, after the premonitory symptoms, in which the symptoms in this case differ from those of strychnine tetanus?—A. There is the power of swallowing, which is taken away by inability to move the jaw."

Q. "But have you not stated that lockjaw is the last symptom that occurs in strychnine tetanus?—A. I have. I don't deny that it may be. I am speaking of the general rule. In the Leeds case it came on very early, more than two hours before death, the paroxysms having continued about two hours and a-half. In that case we believed that the dose was four times repeated. Poison might probably be extracted by chemical process from the tissues, but I never tried it, except in one case of an animal. I am not sure whether poison was in that case given through the mouth. We killed

four animals with reference to the Leeds case, and in every instance we found strychnine in the contents of the stomach. In one case we administered it by two processes, and one failed and the other succeeded."

With regard to medical opinion, Sir Alexander Cockburn said: "A medical man ought to be asked his opinion on the supposition only that certain symptoms existed."

I quote this passage as an authority for saying that medical testimony should be based not upon a mere theory with a view to fit in the facts of a particular case to it, but that the theory should be constructed from the *proved facts*. Given certain symptoms, or, as I will call them, facts, the scientific opinion should be given upon them, and upon them only.

SCIENTIFIC DEFINITION OF A "BLACK EYE."

A great deal of what is termed medical evidence is not medical evidence in any sense of the term, except that it is given by a medical practitioner; and in the same sense as a woman's might be said to be "female evidence." Much that a scientific witness gives might be given as well by an ordinary person, and very often a great deal better. "I discovered considerable ecchymosis under the left orbit, caused by extravasation of blood beneath the cuticle," said a young house surgeon in a case of assault at the assizes.

"Baron BRAMWELL: I suppose you mean the

man had a black eye?—Scientific witness: Precisely, my lord."

"Baron BRAMWELL: Perhaps if you said so in plain English, those gentlemen would better understand you?—Precisely, my lord," answered the learned surgeon, evidently delighted that the judge understood his meaning.

If you look at a plain fact through the lens of scientific language its shape usually becomes distorted. Giving a man a "black eye" may be considered a trifling offence, and a jury might acquit; but impress them with the idea that the prisoner caused "extravasation of blood under the left cuticle," and he is regarded as a monster of cruelty to whom no mercy can be shown.

MEDICAL CERTAINTY.

An eminent Queen's counsel told me, *apropos* of the quickness with which medical practitioners sometimes arrive at a conclusion, of a case that occurred some years ago. A woman who had cohabited with a tradesman in a country village suddenly disappeared. Her paramour gave out that she had gone to America. Some years after a skeleton was found in the garden of the house where she had lived. On examination by a medical man he at once pronounced it to be that of the missing woman. He formed this opinion from the circumstance that one of the teeth was gone, and that he had extracted the corresponding one from the woman some years before. Upon this the prosecution was instituted, and the man was com-

mitted for trial to the assizes. Fortunately, there was time before the trial came on for a further investigation of the garden where the skeleton was found, and on digging near the spot another skeleton was discovered, and then another, and another; then several more. This threw some doubt upon the identification of the bones in question, and on further inquiries being made it turned out that the garden had once been a gipsey burial-ground. It need scarcely be added that the prosecution, which had been vigorously taken up by the government, was at once vigorously abandoned.

An instance of a witness being broken down in cross-examination by a single question occurs to me. She was doubtless a truthful witness and desirous of telling all she knew. Her daughter, the prosecutrix, had charged a man with rape. Her evidence, from some cause or other, was unshaken, or at all events not sufficiently so to break down the case for the prosecution. She denied everything that could cast a doubt upon her own conduct, and spoke positively upon every point that told against the prisoner. The mother was then called, to prove that the prosecutrix had promptly complained of the prisoner's conduct. She was cross-examined as to whether her daughter had not made similar complaints to her about other men. She said "Yes, sure had she; she were always complainin' o' bein raped by one and t'other of 'em and that was why she brought the prisoner up, she wur determined to make a sample o' one on

'em, and wanted to show 'em as they must leave her alone." It was as much the manner of putting the question which drew this answer as the mode in which it was framed which was so effective.

Many other instances of the force of a single, well-directed question could be given, but enough has, I think, been said to show that as a little key will open a great door, so will the smallest circumstance (an inadvertent answer even) sometimes solve the most complicated problem of facts in a Court of Justice.

There are other witnesses, doubtless, slightly varying in their peculiarities of disposition and temper, but these the reader will easily note from his own observation, and I doubt not will find, on examination, that most of them may be included within the classes enumerated.

But of whatever types they may be, and however much they may differ from each other, there is one weakness which runs through them all, and that is vanity. No human being is exempt from its influence; and the only difference between one man and another in this respect is the object of his vanity and the effect of it upon the other attributes of his nature. One man's vanity may impel him to aspire to a coronet, another's only to wear his hat a little on one side and to put his thumbs in the armholes of his waistcoat.

CHAPTER V.

A FALSE ALIBI AND AS TO THE MODE OF DEALING WITH IT.

I COME now to a subject which has always been considered, in criminal cases especially, one of the most difficult tasks that presents itself to the cross-examiner. It is that which is known under the title of a *false alibi;* that is, where an *alibi* is set up, and every fact is true except the *date.* It has been said that you cannot break down an *alibi* of this kind. That, I think, is an erroneous idea: and although it is a difficult task, I believe, in the majority of cases, it can be accomplished. A false *alibi* may be described in this way. A has committed a burglary say, between the hours of eleven and twelve on a particular night. B, C and D are resolved to secure his acquittal, and undertake to prove that, at the time mentioned, the prisoner was in their company ten miles away from the scene of the crime. If this be proved, and the witnesses withstand the cross-examination, they will succeed.

They know that they will be cross-examined apart as to the main events of their meeting as well as the minor circumstances—the time they started, the road they took, where they stopped, what

refreshments they had, how they were employed, and even the relative position each individual occupied with regard to his companions. If the meeting were altogether imaginary, nothing would be more easy than to demolish the whole story. But if A, B, C and D went on some other day for the purpose of subsequently describing their proceedings, each would be able to stand against the most subtle cross-examination that could be administered, as to the circumstances of their meeting. All would be true, and the more they were cross-examined the more clearly the truth would appear. The only thing they would have to make up their minds upon and remember would be that it occurred upon the night of the burglary. This was doubtless an ingenious device, and must have succeeded for a considerable time. It must have been exposed, however, on the first occasion, when it was discovered that the events were all true and yet the prisoner was guilty. It could be capable of one explanation only. Then came the question, "How is such an *alibi* to be broken down?" The time-worn questions, such as, "Where were you the day before? The day after?" and so on, were obviously too weak as well as too clumsy to succeed. It could not be doubted that there must be a way to break down such an *alibi*, but for a long time no one seemed to have formed any scientific mode of proceeding, although the best cross-examiners have furnished portions of a system which I have endeavoured to piece together.

In the first place it must be ascertained whether the *alibi* be true or false (a very different thing from *proving* it to be one or the other), and this

will be easily accomplished by a skilful advocate in three or four questions, for as spurious metal answers to the test, so a fictitious story will discover its nature to a good cross-examiner. Having satisfied yourself on this point, the next question and the only one will be how to break down the witnesses as to *date?* As all the incidents deposed to actually occurred, cross-examination as to them will be not only a waste of time, but will tend, as before observed, to prove their truth. You must, consequently, proceed to the incidents which are *outside* the witness's story.

If I take an absolutely obvious example by way of illustration, it will probably be more useful than any attempt to define a theory by reasoning. I will suppose, then, the burglary to have been committed on the Thursday immediately preceding Good Friday, in a country village, and that the meeting for the purpose of concocting the *alibi* took place on Good Friday. The witnesses will have come prepared to speak of the incidents of that meeting. They will surmise that, in all probability, they will be asked, because it is a common, and, as it seems to me, a clumsy question, "Where were you the day before?" and, "When were you with the prisoner before that?" These questions and many others of a similar kind are as familiar to the class of persons now referred to as they are to the counsel asking them. "I knowed what he was going to arx," said one of them on an occasion of the kind. They are obvious, every-day, stereotyped questions, and the witnesses come prepared to answer them accordingly.

But suppose you take him entirely out of the

circumstances, and ask something which he does *not* anticipate. In the first place, he will be afraid to answer, for fear you are laying a trap, and the more the question is unconnected with the circumstances of the case the greater will be his alarm. Follow that up by another and another alike incomprehensible to his baffled mind, and then ask him where he was *in the morning*. That is quite far enough from the time he has deposed to to set him wondering what it has to do with eleven o'clock at night. As he cannot guess your meaning he will be puzzled what answer to return, and as he will be afraid, on the spur of the moment, to attempt to invent a story, and may not be ingenious enough to do so, he will probably tell the truth. Having got thus far, you start with a *fact*. By the same process you may get another and another fact. He will be drawn on to give you facts, because he does not know what answers his companions may give. He will feel sure that you will put the same questions to them. Presently, you may get from him, if a little caution and skill be used, what people he met, and where and at what time—what they did and where they went. He has not come, by any means, prepared to set up a dozen *alibis* at once—some for himself and some for his friends—so he must necessarily become confused, and as he will tell the truth and lie at the same time you will find him pretty much at your mercy. It may be that he saw several people on that morning, and he may place so many of them together, by a little gentle humouring, that you may, at least, safely put the question, "Were not the people coming out of church?" Outwitted, the rogue will smile

and say no, *it was Thursday!* but the effect of this, if done with tact, will utterly destroy the whole story. The jury will readily accept the suggestion which, indeed, you may be able to prove by independent testimony—that *the day he is speaking of must, from the incidents you have drawn from him, have been Good Friday and not the preceding Thursday.*

But you will not rest there: at present you have only gone a little portion of the way. The next witness will fall into the same blunder and may add another minute fact to the particles of evidence. Suppose Thursday was a fine and Friday a wet day. Here is a field for the exercise of ingenuity which counsel should hail with delight; and he ought not to sit down till he has proved from the witness that the day he and his companions were together was a *wet day.* Of course you will not be able to elicit this by direct questions or in so many words; but answers do not always consist in words, they are frequently conveyed unwillingly by manner and demeanour; are given when there is no intention to give them and when the witness is utterly ignorant of their effect. And the effect will be the same, if your examination be skilful, as though he answered you in actual words. You would not be weak enough to let him suspect that you were cross-examining for a rainy day, otherwise you would fail; it is only by keeping him in the dark that you can succeed. His mind will be working intensely the whole time you are questioning him, and his great object will be to find out what you are aiming at, yours must be to conceal it. As a policeman once said of an eminent friend of mine on the Midland

circuit, "He's a good cross-examiner, sir, he never lets you know what he's driving at."

If you succeed in getting from these two witnesses an incident, however small, that even *tends* to show that the meeting took place on Friday you will have almost demolished the *alibi*. But C comes into the box, and may by a stretch of memory recollect for whom he worked at the time and what particular work he was engaged upon; and it might possibly have happened that some portion of the machinery broke on that particular morning. Nothing outside the case is too trivial if it throw but the faintest gleam upon it. If he answers flippantly he will be caught in two or three questions without much difficulty. If he answers over cautiously he will betray himself by his demeanour, and you may follow him up and give him line like a pike that has taken the bait. But if no work was done and no machinery broken you will still be able to find out his *habits*, his *mode of living*, and his surroundings, and it will be strange, if from all these you do not lay hold of some event which will be shown by its connection with some other event to have happened on the latter and not the former of the days in question. *The smallest incident may be linked to a greater, which may be either patent of itself or notorious as to the day of the week on which it took place.* Other witnesses may be dealt with in like manner, *none of them being cross-examined to the same facts unless for the purpose of contradiction*, but all of them questioned as to incidents which, small though they be, will in their united strength destroy the *alibi* altogether.

I have now exceeded the limits I had allotted for my remarks on cross-examination. That the modes hinted at are useful is a matter not of speculation but of experience; that they may be useful to others I have no reason to doubt. Many of these hints may appear to be commonplace suggestions, but it is nevertheless true that commonplace ideas more often than not come to us only after long experience or through the kindness of an experienced friend. Many come after wearying disappointments and heartfelt rebukes. I have noted these down with the hope of saving some the weary and watchful labours that so many have undergone.

I have nowhere attempted to throw out a hint for the purpose of enabling an advocate to confound or entrap the honest and truthful witness, around whom every protection should be thrown; but my endeavour has been to suggest modes of dealing with the artful and the vicious in order that deceit should be baffled and imposture exposed.

Having said so much, I would add another word. Having studied your hardest to learn how to cross-examine, your next lesson should be how to do as little of it as you can; you should never cross-examine if you can safely avoid it, and when you do, let your questions be few and with a purpose. The best cross-examiner is generally the shortest.

CHAPTER VI.

AS TO RE-EXAMINATION.

This branch of advocacy will not require very elaborate treatment. Not that it is by any means an unimportant subject or a small matter in the conduct of a case; on the contrary, it is worthy of the most careful study, and the following hints may be of some use, while they show the dangers as well as the advantages of re-examination. If it were not necessary, cross-examination would be useless. To restore the ravages that have been made by that destructive engine is the principal duty of this portion of the advocate's work.

If you have watched the cross-examination with that unceasing vigilance which you ought to have bestowed upon it, you will have observed and noted the points that have been made against you. Some of your evidence has disappeared altogether; other portions have received such a shock that they exist in a very rickety and dilapidated form; some other parts have received a coating of interpretation, if I may use the expression, which must be removed; other fragments lie here and there in a mass of confusion from which they must be

extricated if you desire to re-establish your case. A hurricane seems to have swept over your homestead, destroying some of your less-substantial outbuildings and threatening even the mansion-house itself. In such a state of affairs as this you will find much to do, and where to begin is the first question. At the beginning I would say as nearly as you can. Begin to repair where the first breach was made. The witness may have given an answer he did not intend, and very much of the subsequent mischief may have flowed from that unfortunate mistake. If therefore you set that right you will easily pass along and repair the damages which have resulted from it. Strict order and arrangement in this branch as in all others should be observed; everything done by design and nothing left to chance. Proceed in your work of repair as the destroyer proceeded in his task of destruction. Explanations in this stage of the case often make your evidence the stronger for the confusion in which it has been temporarily involved.

But unless re-examination be absolutely necessary it should never be used. It is not every trifle that should induce you to commence afresh with your witness. If a trivial and unimportant point has been made, but the leading facts of the case are left undisturbed, leave the matter to the jury. But the point may be small, and yet not unimportant. Its position may give it effect. A particle of dust in one's eye may cause much annoyance; if it be on the heel of one's boot it will not do much harm. If there be "matter in the wrong place," remove it; but don't bring a

barrow and shovel if a mere flick with your handkerchief will do. By not re-examining when you are not obliged to, the danger of cross-examining your own witness will be avoided. You are not required to explain everything. It sometimes happens that a witness, from natural suspicion of the intentions of the cross-examining counsel, will not answer intelligibly, will hesitate or stumble. It is not, however, necessary that you should fly to pick him up before he is down. If his evidence-in-chief have been fairly given, the jury will be sure to make allowance for subsequent manœuvres to upset him. Whereas, if you rush to the rescue unnecessarily, and endeavour to obtain explanations not vouchsafed to your opponent, the witness will think you are anxious for his answers, and, recovering from his nervousness, will fill up the gaps your opponent has left. In other words, you will complete his cross-examination, with this additional advantage to him that the evidence will look like evidence-in-chief, and not like that extracted by a hostile examiner.

If an answer be elicited in cross-examination which is favourable to your case, it is highly important that you should not appear to be so fascinated with it as to re-examine upon *that*. Something else may be admissible in consequence, and this opportunity should be watched for and seized. If you re-examine upon the *very* fact obtained for you, this result may follow: that your opponent who discreetly enough declined to pursue the subject further, may have the satisfaction of hearing you get an explanation which may neutralise the effect of his mistake.

"*Leave well alone.*" A favourable answer to you elicited in cross-examination is not a subject to re-examine upon of itself, but to be made the most of in your reply.

As you watch carefully the cross-examination of your witness, you will probably be made aware for the first time of many weak points in your case. If there should be one which you have flattered yourself has been passed cleverly by in your examination-in-chief, you may certainly anticipate a well-directed blow in *that* quarter at all events. You must watch therefore, like a second in a pugilistic encounter, for when it comes your witness will in all probability require picking up. How to do it is more than I can tell, as I am not holding your brief and know nothing of the facts. It is in the remedying of such a misadventure that the art of re-examination consists; and it is only by an intimate *knowledge of your facts* and *their relative bearings* that you will be enabled to set your witness up when his evidence has been thus battered.

Sometimes a cross-examination has been so effective that the evidence of a particular witness has been hopelessly demolished. An experienced advocate, under such circumstances, will resign him to his fate. If he have other witnesses upon whom he can rely, his task will be with them; if not, the case must fall with the witness.

Next to carefully watching for any points that may be made against you, a no less important duty will be to see *how you may turn any answer to your advantage.* Your adversary may not be a very skilful or experienced advocate; he may be an

indifferent cross-examiner; in which event you may safely trust him to play into your hands. He will get portions of conversations which will make the remainder admissible; perhaps put in documents which will give you the same advantage, besides affording you the right of reply; and if you have been considerate, you will have left him to follow up a question or two put for the express purpose. This does not imply that you will have left anything out in your examination-in-chief which it was material to prove; that would be the height of folly. You must always assume that your opponent will not prove your case for you. I speak only of matters which you yourself cannot get in, and which may nevertheless have an important bearing upon your case.

You must watch also to see whether any attack be made upon your witness in cross-examination. If his credibility be assailed you must be prepared to re-establish it if necessary, for that is the foundation upon which his evidence rests; and you must do it by questions that will elicit explanations of circumstances left doubtful, by removing the grounds of suspicion, and giving the real character to a transaction capable of two constructions. When this is properly done, nothing is more effective with a jury; they will feel as though they had been relieved of a burden. They will be pleased to find suspicion removed from a person whom they desire to believe; and not only this, the impression of having been imposed upon will also be removed, and their minds, temporarily disturbed, will settle down as it were into a state of tranquillity and satisfaction.

Cross-examination as to character is at most times an uncertain performance. You never can be sure as to the view the jury will take. It is the part of an advocate's duty which they least like. A personal suspicion arises that their own characters would not be secure from attack if once they were compelled to enter the witness-box. Every delinquency might be laid bare and his most tender feelings outraged by an unscrupulous and unfeeling advocate. All this might be quite unfounded as a suspicion, but that matters little if the suspicion exists. I need not say it is your bounden duty to protect your witness to the utmost of your power. Sometimes you may do it by way of objection, but if not, you must exercise your best skill to effect your purpose by re-examination.

I will give one instance out of many where character was once in my hearing cruelly assailed in cross-examination by an inexperienced advocate, and upon whom it recoiled with crushing severity. He asked a witness if he had not been convicted of felony. In vain the unfortunate victim in the box protested that it had nothing to do with the case. "Have you not been convicted of felony?" persisted the counsel. "Must I answer, my lord?" "I am afraid you must," answered his lordship. "There is no help. It will be better to answer it, as your refusal in any event would be as bad as the answer." "I have," murmured the witness, under a sense of shame and confusion I never saw more painfully manifest. The triumphant junior sat down. Not long, however, was his satisfaction.

In re-examination the witness was asked: "When was it?—A. *Twenty-nine years ago!*"

The Judge: "You were only a boy?"—Witness: "Yes, my lord."

It need scarcely be added that a just and manly indignation burst from all parts of the Court, and the comments of the learned judge were anything but complimentary to the injudicious advocate.

Sometimes a question will be put in cross-examination which produces an answer not unfavourable to either side, but which it may not be considered safe to follow up by another. You will have to consider whether it will be safe on your part to take it up where your opponent has left it, and you will best consider this by weighing the whole of the facts of your case and *the effect of the answer whatever it might be:* or you might put a question or two by way of test, and then abandon it or not as the answers warranted.

Again, your opponent may have put a question which has "let in" something for you in re-examination; or, on the other hand, *he may have put one which tempts you to follow it up* and by that means may have let *you* in. The utmost caution therefore is necessary in pursuing anything that has been started for you by your adversary. He is by no means a safe guide to follow, and the less you keep company with him the better.

It might be observed here that one should not be too ready to object to questions put by way of cross-examination. *Sometimes they are asked for the very purpose of inducing you to object,* and when this is the case and you fall into the snare it is obvious that an unfavourable effect will be produced by you on the jury. They will imagine at once that there must be something in the background which you

are endeavouring to conceal. You will lose their confidence, and in all probability rouse within them a feeling that they are being imposed upon and deceived.

When questions have been asked as to character and have failed, it is far better to deal with the matter in your address to the jury than to put the stereotyped question in re-examination: "Is there any pretence for suggesting, &c., &c.?" The first denial answers all purposes for the time being, and the mere repetition of it adds no weight; besides, the natural indignation arising from the circumstance will be all the better for not being exploded too soon. A quiet and indignant protest to the jury will be all that is necessary. Above all things it should be remembered, that *re-examination does not consist in repeating the evidence-in-chief, or in explaining answers that are in your favour.* If your case be a good one and your witnesses honest, very little will be left to do at this stage of the proceedings. If it be a bad case and your witnesses the reverse of truthful, all the re-examination in the world will not set them up as they were before. It is of immense importance, and indeed necessary for the purpose of explaining something which has been left obscure, or removing an erroneous impression, or supplementing some matter which, taken by itself, looks to your disadvantage; for most other purposes it would be worse than a waste of time since it would unquestionably injure your cause.

Re-examination arises from a right to explain. It is often so advantageous that a case may be won by its judicious exercise, while it is usually so

innocent of evil that it would require the utmost ingenuity of the most inexperienced counsel to make it the means of losing one. You must have a thorough knowledge of your facts, and have watched every question of the cross-examination with the utmost vigilance, to take the full benefit of your right and to make your case stand out in the bolder relief which the cross-examination will afford to it. But nothing is more tedious or more irritating to judge or jury than to see an advocate floundering in re-examination among facts which he only displaces and confuses, thinking he must needs ask something because there has been a long and it may be severe cross-examination. First *ascertain what fact has been displaced or obscured*, and *what new matter introduced*, and then you will know what requires to be re-arranged and what to be explained before you rise to put a single question.

In re-examination as in cross-examination, after learning thoroughly *how to do it*, the next branch of learning to which the student had best direct his assiduous attention is—How NOT TO DO IT!

CHAPTER VII.

AS TO OPENING THE DEFENDANT'S CASE.

This is a matter of great importance, and differs materially in its method from that of opening the case for the plaintiff.

In the latter the path is generally clear; in the former there is every obstacle that the circumstances of the case or the ingenuity of your opponent can interpose.

You take up your position like a general in the field, and survey the opposing forces and the situation of the enemy. You look carefully for his weak points, and should you find them, will direct your efforts accordingly.

If ever a case looks hopeless, it should be your own at this present moment. The jury, if they had to determine the case now, should be unanimous in favour of your opponent. If the facts are not strong, however, or the counsel is not strong, or has not made the most of his case, the jury will be divided, but none of them, as I once heard a juryman say, "very unanimous" in the plaintiff's favour. In these circumstances your verdict is as good as won. Disaster awaits the advocate who has not the jury with him at this stage of the case.

In a season of such depression you will often find an extraordinary accession of good feeling take possession of his breast.

Wouldn't it be better for all parties to agree and an amicable arrangement be come to? If the defendant's counsel be wise, he will yield to no such blandishments. The flag of truce is but the signal of distress, and he should push on his advantages to their legitimate conclusion.

I once heard a defendant's counsel say, in circumstances like these, when his opponent asked if he could suggest any course:—

"Yes," said he, "I can—a verdict for the defendant."

You should not capitulate when you have won the battle, or surrender when the enemy is in full retreat. I have seen a good many do this without knowing it. It is not, however, invariably the fact that a weak case for the plaintiff is at its strongest at the close. I have frequently seen the defendant's counsel strengthen it materially. I have also seen the cross-examination of his own witnesses *absolutely prove it.*

It follows, therefore, that very great discretion and skill are requisite in opening the case for the defendant. It is surrounded with obstacles, and is a far more difficult task than opening that for the plaintiff.

The first thing to decide is at what point to commence the attack. A great deal may depend upon this. You may expend much energy in fruitless work. The weak places are undoubtedly attractive, but, as a rule, should be reserved, because at a later period the effect will be greater and the

demolition *appear* to be more complete. Attack, therefore, the strong points first, but not by direct blows. You cannot knock down a substantial wall by butting your head against it. There are improbabilities and inconsistences, perhaps, or partialities to deal with. You may possibly get at these and shake the very foundations on which the whole fabric rests.

If you have accomplished anything by cross-examination, it will be of inestimable service at this period of the case. But your speech must be directed first to weaken before you bring to bear the reserved forces which you have stored up as the result of your cross-examination.

That which was to be avoided in opening a case for the plaintiff is the strength of the defendant's opening—namely, argument. I do not mean to affirm that you can demolish an isolated fact by argument; but a series of facts, some of which may be true and some false, may be made to demolish one another. You may always make the lean kine devour the fat, and one cadaverous-looking fact has been known to swallow up even the substance of an honest case. If you can show that, assuming all the facts to be true, they do not *necessarily* prove the plaintiff's case, you will have gone a long way to establish your own.

By this mode of proceeding you will already have dealt with the strongest portions of the case against you. When you arrive at the weaker parts avoid above all things a furious and vehement onslaught; otherwise they will appear more formidable than they really are. You scarcely want a sledge hammer to drive home a tin-tack. Let the

force be proportioned to the task. A well-worded argument will be infinitely more effective than fiery declamation, which often reminds me of the process of hiving a new swarm of bees, namely, an incessant beating on a hollow pan.

By removing some of your opponent's points in a quiet but effective manner, the jury will believe you must be right with regard to many others that you have not removed. You will gain credit for a great deal more than you have actually accomplished, and your success will have a retrospective effect. In other words, the more respectable facts will get a bad character by being found in company with those which you prove to be weak and corrupt. Association, whether of ideas, facts, or people, has a great influence on spectators, even as the surroundings of our life impress it for good or evil, for happiness or misery.

It often happens that a witness is called for the plaintiff whose evidence is worthless. It may not be valueless to you. But by no means be over eager to attack him. He is like a short man in a crowd, and if you want to make use of him don't tread him down but carefully *hold him up*. Keep him as a surprise for the end of your comments on the plaintiff's witnesses, and then hold him up above the crowd and make him the principal figure in the group. Whatever he has said in your favour will of course materially assist and confirm your argument. You will, in fact, be proving your case by the opponent's witnesses—a happy mode of conducting a cause to a successful conclusion, when you are permitted to do so. An admission against the party making it possesses a force which belongs to no other class of evidence except documentary.

A bad speech will impoverish the best of cases. It is like dressing a millionaire in rags. Your case will in all probability be judged by the speech with which it is introduced, and first impressions are not easily removed. A bad speaker hoists the flag of distress at the outset, and although he may excite a good deal of commiseration, no one will come to his rescue.

On the other hand, I have seen many a case won by the opening speech for the defendant. Everything seemed to be swept away before it, and a clear field left for the evidence that was to follow. And it may be said, if once the defendant's counsel gets a thorough hold upon the jury in his opening speech, the case is as good as won. The evidence will appear to be merely supplementary, to confirm the jury in the opinion they will have formed. It is true facts are more powerful than argument, but when argument and eloquence lay hold of a fact that is not absolutely sound, they will press it out of all recognition, and dispose of it as though it were a bubble.

There is scarcely any subject that men study less, or know so little about as speaking. There is nothing they cannot measure more accurately than its influence on the human mind. The best case may be ruined by a bad speech, as a splendid fortune may be thrown away by a fool; while a good speech will impart, or appear to impart to a bad case, something of its own excellencies. There is nothing of art in the speeches of ordinary advocates, but where it is judiciously employed against an advocate who has none, the result will scarcely be doubtful, other chances being equal. It is a breech-loader to a popgun.

The fact of a reply looming in the distance should always be borne in mind. You must anticipate it at every step, and so shape your own arguments, that they will receive as little damage as possible from the approaching simoom. A fallacious argument is bad enough, but it sometimes wins; a false one is dangerous and generally fatal. It will place you in the position of being detected in an act of deception. So will opening a piece of evidence that you cannot prove, or asserting that something has not been proved which in reality has been. These are blunders in advocacy which are constantly being made to the detriment of clients; not made from want of practice, but for lack of studying advocacy as an art. Practice will not cure these errors. The carpenter who makes a door too small may have made many doors, but his blunder comes from inaccurate measurement. When you commence to address the jury, they will adjust themselves to the task of listening as though they were about to be entertained with the second act of an amusing drama. They will readily yield you their attention, and be curious to know what answer you will make to all that has been urged on the other side. I have seldom known them make up their minds at this stage of the case. They may or may not believe all the evidence, but whether they do or not they will accord you a patient hearing. But the curiosity of the jury may be quickly gratified. You may lose their attention and your case by a few sentences, or by hobbling along as though you were doing penance for your client.

After a few unimportant but engaging sen-

tences, a good speaker will contrive to stimulate the curiosity of his hearers by some remark which either wins their admiration or throws a flash of light upon some unobserved part of the case. Persistently exciting anew the attention is one of the great principles of the art of speaking. A new simile, an original remark, or a well turned period are all means to this end in a well conceived speech.

Having disposed of the weaker points of your opponent's case and attacked the strong ones by well arranged argument, the next duty will be to present your own facts, and in doing this the great rule to observe is *to arrange them with due regard to probabilities*. This is not always done; it is sometimes not even thought of. The same facts may be so ill arranged, that collateral circumstances (never to be lost sight of, although irrelevant as evidence) may raise the strongest improbabilities against you. On the other hand, by a skilful arrangement the opposite effect will be produced.

A great deal will depend upon an artistic arrangement of your evidence at this stage; so that it may not only stand out in the best light, but be so placed that its position may cast your opponent's as much as possible into the shade. As before observed, contrast plays a great part in advocacy. But mere naked contrast is not all that you can make of your facts if they are in contradiction to those of your opponent. You will have but half learnt your art if you rest here. Contrast the opposing facts as forcibly as you can by all means, but *so place them that your own will appear to be the more natural when regarded in connection with surrounding circumstances*. If you place two

young people of opposite sexes near a church door, it will look much more like a wedding than if you seat them in the stalls of a theatre. And if you make the bells ring while they are coming from the church, the jury will undoubtedly believe they have just been married, though neither the church nor the bells would be evidence of the marriage.

When you have to deal with evidence which is eccentric or absurdly exaggerated, you need not labour as though it were worthy of the gravest consideration—simply point out its grotesqueness, as though the matter were worthy of notice on that account only.

If a witness has sworn something contrary to all human experience, you need not weary the jury by arguing that such evidence is unreliable. It is when you approach facts within the range of probability, and deposed to by trustworthy witnesses, that your powers of argument will be put to the test. Probabilities must here be relied upon, and the smallest circumstance will often prove of the greatest importance. The case will resemble a puzzle composed of a number of pieces which fit into one another. If there were duplicates of some which did not belong to it, you would examine the *edges*, the *colour*, and the *grain of the wood*, in order to detect the true from the false. In like manner you must deal with the facts of your opponent's case where they conflict with yours, and yet seem to fit in with surrounding circumstances.

But in whatever difficulties you may find yourself, there should be no distressful labouring. A ship makes little progress when she labours.

If your witnesses are respectable, you need not detract from their respectability by over-proclaiming it. The jury will believe your witnesses to be ordinarily respectable unless you take overmuch pains to convince them of it. It is only counterfeit character that, like counterfeit beauty, requires a good deal of touching up.

When a good witness is cross-examined to character, it is as good as vouched for by the other side.

If you saw a man being led down Fleet Street by another who kept shouting, "Here's an honest man! Look at this honest man!" you would suspect the pair of some roguish design upon your credulity. The worst recommendation a man can have is too much praise, and there is no worse advocacy than making a person impossibly good.

The next thing to observe is to introduce your evidence *with a view to effect.* "Of course, of course," I hear on all sides. But it is not of course. This, like a good many other hints, is as much needed by many experienced advocates as it is by juniors. Practice is not sufficient to perfect an advocate. Take an illustration (if not too humble) from a well-arranged shop window, where many costly articles are exhibited. The arrangement is a matter of art and study; mere practice would not produce its effect. It pleases, and you scarcely know why. It is because no one thing offends the eye by obtruding itself upon your notice. The harmony produced by the artistic arrangement such, that *the leading objects attract your attention without appearing to do so, and are set off by the surrounding articles.* There is no crowding, and everything is displayed. If you can as artistically

arrange your evidence in your speech, you will produce an effect which will not be easily removed. The very "setting out" of your case may win it.

I will go one step further, and affirm that if the plaintiff have somewhat the better case, but yours be the better advocated, the chances will be immensely in your favour.

Avoid parentheses as much as possible; but if you employ one, let it be for the purpose of emphasis. It requires some skill (not so much the skill that comes of practice, but that which is produced by careful study) to do this effectively. If done well, your parenthesis will stand out like the principal object of a brilliant pyrotechnic display; but if ill performed, it will be more like a damp centre piece, which becomes a failure and the darkest spot of all.

The best-worded sentence you can form should end your speech. A pleasant rhetorical flourish is always acceptable, while a well constructed peroration has many redeeming qualities. It will smooth over many a rugged point that has discovered itself during the progress of your speech, and hearers often persuade themselves that that is a good address which *ends well.* The jaded horse pricks up his ears at the end of a long journey. Nor should it be forgotten that speaking does not consist in mere words; the effect produced on the mind by a piece of real oratory *is a succession of images.* Men do not *hear* a great speech so much as they *see* and *feel* it. Hence it is that they weary of words which produce no images. The child turning over a book without pictures is exactly what an audience is to the mere spouter of words.

The orator is gifted with a magician's wand,

which, waved before his audience, produces scenes in which the hearers are not merely spectators, but actors. Their sensations are quickened, so that they feel the influence of the events brought before them, and participate in the joys and sorrows by which they are surrounded.

I do not mean that a jury should be artificially or hysterically excited, but that, by a proper employment of art, you should cause them, not merely to hear what you say, but to perceive the picture passing through your own mind, and to be quickened with the impulse of your own sensations.

This is the art of opening the defendant's case. If effectively performed, you need not fear the reply, although you will utter no syllable without a thoughtful regard to it.

CHAPTER VIII.

AS TO SUMMING-UP THE DEFENDANT'S CASE.

A FEW words will suffice for this subject. Not that it is by any means an unimportant branch of advocacy. On the contrary, it is as invaluable as any privilege the advocate possesses. It should be remembered that summing-up your evidence is not a repetition of the opening speech, in which you analysed the plaintiff's evidence with sufficient skill to show how worthless some of it was, and what residuum was left to be disposed of by your own witnesses. If you performed that duty half as well as I conceive you did, the parts that you eliminated are gone for ever. It only remained, therefore, to meet the matters that required answering with evidence on your part. You have now abundant scope for your powers of reasoning and for analytical comparison. There may be some opportunity also for something of declamation, of eloquence and earnestness—it may be of *pathos* itself. But if so, remember it is the *pathos of facts* and the *eloquence of facts*, too, that you most need; if these fail, you might just as well beat a tambourine and imagine you are an orchestra.

It is not absolutely forbidden to argue upon

evidence antecedent to your own, although you have but the bare right to "sum up." The sum total may be not only your own evidence, but your evidence supplemented in matter *and* weight by the evidence of the plaintiff and his witnesses. No rule can be laid down in this particular, nor will the judge be over strict in keeping you upon the direct line of your evidence.

As the reply will follow your speech, you will of course calculate what are the points likely to be made against you, and if you have any knowledge of character at all, you will know what points have most impressed your adversary. Nearly all the cards having been played, you ought to know exactly what are left in your opponent's hand. You must, as a matter of course, strengthen those points which are likely to be assailed, and bring into strong prominence those portions of your case which are established beyond the reach of eloquence.

If you have kept your eyes open, you will not be misled by any feint that may have been made by your opponent. If he has discovered a weakness in your case which you did not perceive, it will be little short of a calamity for your client when he comes to reply. This so often happens, that the greatest vigilance is necessary from the moment the case is launched till the last witness has been re-examined.

What word or remark of a witness may be the turning-point in a case you can never tell. What may be the test which the jury will apply to the evidence you can but surmise; but that no word should escape your attention is as certain as, that,

in surveying the ocean bed, no rock or prominence can be left unnoted with safety to the mariner.

One further observation I will make. In summing up, be sure you exhibit the qualities of a good arithmetician, otherwise you may upset the calculations of your own witnesses. The jury will tolerate no false casting-up. They will require a correct total, whatever they may think of the individual items. Some they may disallow, others they may admit, if your total be accurate; if not, they may reject the whole with disgust, or even disappointment.

Bear also in mind that if you have two twos you need not labour to convince the jury that the total is four; and above all things be careful that you do not attempt to prove that it amounts to five.

CHAPTER IX.

AS TO THE REPLY.

"The touchstone by which men try us is most often their own vanity."—ROMOLA.

THE reply is always of great importance, and a struggle is frequently made for the "last word." Many persons affect to disbelieve in it, but certainly not those who are able by their eloquence to avail themselves fully of its advantages. Even evidence itself is sometimes sacrificed for the sake of the reply, although I am not sure that if the evidence be of the smallest value this is a course which ought to be pursued. However powerful arguments may be, facts are more powerful still. Nevertheless, it is frequently a question whether the advocate will rely on his address for the verdict or call witnesses and give the reply to his opponent. Under any circumstances however—except in a case where one advocate is powerful and the other weak of speech—the reply is a valuable privilege. Some speeches doubtless, are worse than none at all, and may even assist the other side by means of contrast.

No one will doubt, I presume, that the first thing to do is to secure the attention of the jury. The next, that of the judge. Although I call this

second, it is very often of the first importance, as frequently, when you have not the jury with you, you may win by having the judge. He is always a powerful advocate to follow on your side; therefore gain his attention if you can. I heard not long ago a defeated advocate say to his successful opponent "the judge got you the verdict;" "yes," replied the latter, "but I got the judge."

If he take your view of law and facts the verdict follows either there or elsewhere. He will however take at times a somewhat different view from yours, both of the facts and the law; and then in spite of opposition you must endeavour to win your way to the jury. This is the object of the reply as of the other processes of the case. And how to accomplish it is a question on the consideration of which too much time and study cannot well be bestowed.

The hints here given—based upon observation and experience—may be useful, although no number of "hints" of themselves will ever make an advocate. The art of speaking, logical reasoning and rhetoric, are all involved in this branch of an advocate's duty. It must however be assumed that the reader has made these the subject of considerable study. If he have not he had better turn his attention to them without delay and with the most assiduous care. The art of speaking, I am quite sure, is by no means cultivated as it should be, and a ridiculous fashion has sprung up of late years of undervaluing it as a means of advocacy. The fact however remains that the best speaker is still the most successful advocate as a rule, and if a man is to make anything either

of himself or his case by addressing a jury, the more perfectly he can speak the better it will be for both. No pains or labour should be spared upon this branch of an advocate's duty. To speak well is to succeed, and the better you can speak the fewer competitors you will find in the field against you.

In conciliating a jury so as to put them on good terms with you and secure their attention, you should be careful, as I have before observed, not to adopt a practice too common with young advocates, namely, that of *flattering them.* You must not forget that their nature is by no means changed because they are in the jury-box. *Stroking* a jury is not a dignified proceeding; talking about their intelligence, as though it were necessary to remind them that they are not altogether fools, is the worst means to make them believe in *your* intelligence or knowledge of mankind. Nor do they need to be informed that they are Englishmen; those who are know the fact; those who are not take it as no compliment to their nationality.

Again, obtruding upon them the information that they are *sensible* men, will not improve their opinion of you or interest them in any way. What you have to do is not to convince them that *they* are sensible, but—that *you* are! Nor is it necessary to remind them that you are "quite certain that they will take an honest and impartial view of the facts;" this is not replying, nor is it rhetoric, it is the flimsiest of claptrap. Hackneyed expressions are always ineffective, stale and irritating; they show a poverty of idea as well as language,

and exhibit the weakest style of advocacy. There is no necessity to argue with the jury upon their honesty, as though there were some doubt about it; or their impartiality, as if you had a suspicion that they were being influenced by a strong interest on the other side. To put it shortly, you must not let the jury imagine that you are attempting to humbug them. Any observations will be simply foolish that have for their object the inducing the jury to believe in themselves; a far better attempt will be to make them believe in *you!*

"If," says Whately, "the pleader can induce a jury to believe not only in his own general integrity of character, but also in his sincere conviction of the justice of his client's cause, this will give great additional weight to his pleading, since he will thus be regarded as a sort of witness in the cause. And this accordingly is aimed at, and often with success, by practised advocates. They employ the language and assume the manner of full belief and strong feeling."

Another bad way of beginning a reply is to attack your opponent or his solicitor, or the client. The jury care for none of them. You have to demolish the case of your opponent, not *him*. Besides, abuse is neither argument nor advocacy; and any personal attack is mere abuse, except when it is used to denounce a witness whose evidence requires to be so dealt with.

Junius says in one of his letters:—"The choice at least announced to us a man of superior capacity and knowledge. Whether he be so or not let his dispatches as far as they have appeared—let his measures as far as they have operated—determine

for him. In the former we have seen strong assertions without proof, declamation without argument, and violent censures without dignity or moderation, but neither correctness in the composition nor judgment in the design."

Nor will it assist your case to answer any attacks which your opponent may foolishly have made upon you. Avoid being drawn from legitimate argument into a personal encounter. The dispute is not yours but your client's, and it is extremely selfish to indulge in a personal conflict at his expense. If anything has been said which required an answer from you, the time for giving it was at the moment of its utterance. When you reply it is not *your* case but that of your client that demands the undivided attention of the jury.

Securing this attention is as much due to the manner in which you address your hearers as the substance of what you say. The most thorough earnestness is the all-important quality either to possess or to assume. A quiet colloquial sentence or two, with not too much of solemnity, uttered as if you had the fullest confidence in them without telling them so, and as if you also had the fullest confidence in yourself, without asserting it, will be pretty sure to establish a good understanding between you and the jury at the commencement. If you cannot succeed in this your address will have little effect, however powerful; whereas if you do succeed, every argument will have weight in proportion to its relevancy to the issue.

The next thing to be attended to now, although it was the first thing to prepare before you rose, is

the order and arrangement of your speech. No address can be good without this, and it cannot be altogether bad with it. The minds of your hearers will more easily follow and appreciate when you take them along the order of circumstances as they occurred, or, as I would say, the main road, than if you led them a steeplechase across country. You should so arrange the arguments that they can see what is to follow as you advance along the line of facts, and it will appear as if it must be correct, because the one fact follows so naturally upon another. The mind better understands a map of a country where the counties are plainly marked than where the boundaries are undefined. The whole case is spread out before the jury like a map, and the better its divisions are traced the more fully will their relative bearings be understood. This will be the result of a due order and arrangement of your speech. Your opponent has made his comments upon the case; has put prominently forward his own facts and placed yours as far as possible in the shade; has damaged some and demolished others. You must now not only perform a like process with regard to his, but must throw light into the dark places and draw out your own facts from their temporary obscurity.

Observation has taught me that the best advocates (who invariably proceed by system) as a general rule adopt the course of grappling with their opponent's case first. It is fresh in the minds of the jury, and the best time to deal with it is before it has been long enough there to make a deep impression. If you return to it after dealing with your own case, you attack instead of

removing it, and may leave it still the last and deepest impression.

In doing this, care must always be taken to *avoid dwelling on minor discrepancies in your opponent's evidence or upon the trivialities of the case.* Minute criticisms impair the force of your address like grains of dust in the wheels of machinery. They produce friction and retard instead of advancing your cause. The jury are apt to think you have nothing better to urge, and when you come to greater matters, will be jaded and wearied, and a good deal of the effect of your speech will be lost. You cannot assign any position in which trivial criticism should be placed, and the probability is, therefore, that it will be out of place anywhere. If you attempt it before coming to your main arguments the jury will be wearied, and if after, your arguments will lose some of their force. Besides this, you endow trifles with a fictitious importance. You place them before the jury and magnify them as though you brought them under a lens. Whately says:—"Too earnest and elaborate a refutation of arguments which are really insignificant, or which their opponent wishes to represent as such, will frequently have the effect of giving them importance. Whatever is slightly noticed and afterwards passed by with contempt, many readers and hearers will very often conclude (sometimes for no better reason) to be really contemptible. But if they are assured of this again and again with great earnestness they often begin to doubt it."

It should also be borne in mind in replying, that what you have really to deal with is not the

testimony of the witnesses, but the *effect* of it, or the real *evidence* to which it is reduced by the process of examination. As an illustration of this distinction, I may mention a case tried some time since by Mr. Justice (now Lord Justice) Brett. The action was brought by the owner of a valuable horse, against a farrier, for negligence, by improperly shoeing; in consequence whereof the horse fell lame and had to be killed. The plaintiff endeavoured to prove that the hind shoes of horses were, to use a familiar expression, "rights and lefts." The defendant swore that this was a totally erroneous supposition. His witnesses testified to the same effect. Perjury was not attributed to any of them. They seemed to believe their own testimony, and the plaintiff was not prepared with evidence to the contrary, as the point arose during the trial from an examination of the shoe by the counsel, who placed it in the hands of the defendant, and asked whether it was not made for the near foot. The witness said it would do for either the near or off foot. He was then pressed as to whether he would put it on either the one or the other, as it might chance. He answered, yes. The nails were now placed through the holes, which, being properly bevilled, gave to their points on the one limb of the shoe an outward direction, and on the other side a different inclination. The defendant was asked whether, looking at that fact, he was prepared to say the shoe was not made for the near foot. He said it was not. He was then asked how it was that the nails in the two sides pointed at different angles? Answer: "It was the fashion." The Judge: "The fashion with all farriers?" Answer: "Yes."

In summing up, the learned judge (taking the testimony of the witnesses, and judging it, not by its truth but from its effect) said, "If you find a general mode of doing a particular thing, you may depend upon it there is some good reason for so doing it, especially where it obtains universally in some mechanical business. If all farriers make horse-shoes with bevilled holes slanting in one direction on one side, and in another direction on the other, you may be sure that is not done from mere caprice. What is the effect of the testimony? It is to show that if the shoe on which the nails slant in a particular direction be placed on the off-foot, that they will come out through the hoof and enable the farrier to clench them; but if the shoe be fixed on to the near foot, they will have a tendency to penetrate the frog of the foot, and so cause pain and lameness to the animal. The question is, was that the case here? Was a shoe, intended for the off-foot, fastened to the near one?" The jury came to the conclusion that that had been the case from *the effect of the evidence;* the testimony, uncontradicted, being directly the contrary.

If you can deal with the effect of the evidence instead of with the truthfulness of a witness, I need hardly say it will be so much the better for your case; so, if, instead of attacking the credibility of a witness, you dispute his accuracy, his memory, or judgment. "Men are apt," says Whately, "to judge amiss of situations, persons, and circumstances, concerning which they have no exact knowledge, by applying to these the measure of their own feelings and experience, the result of

which is that a correct account of these will often appear to them unnatural and an erroneous one natural." Juries never like to believe that a witness has committed perjury, especially if he have no interest in the case. Nor does it please them to hear character assailed. If you fall foul of the jury in these respects, you may as well sit down for all the good you can do your client.

The *effect of the testimony* then is what you have to deal with in reply. But if it becomes necessary, as it sometimes must, to ask the jury to disbelieve a witness, and you can put it on no easier ground than that he is untruthful, you should avoid doing it by denunciation: that is only to be used in extreme cases where virtuous indignation will do some mischief to the inner man if pent-up longer; but you will find "half steam up," as a friend of mine calls it, will carry you along quite fast enough in any event. Your just indignation should only be sufficiently let off, that it may communicate itself to the pent-up indignation of the jury, and let that off with it in the shape of a verdict. The best way of asking a jury to disbelieve an opponent's witness is to call attention to the evidence of one or two of your own. Some matters will depend partly upon the facts and partly upon the witness's judgment, or understanding of those facts to which he speaks; his view may be entirely wrong, and his conclusion, which he puts forward as a fact, wrong also. I again have recourse to Whately, who confirms me upon this point. "If," he says, "a person states he saw in the East Indies a number of persons who had been sleeping exposed to the

moon's rays, afflicted with certain symptoms, and that after taking a certain medicine they recovered, he is bearing testimony as to simple matters of fact; but if he declares that the patients were so affected in consequence of the moon's rays—that such is the *general* effect of them in that climate, his testimony, however worthy of credit, is borne to a different kind of conclusion, namely, not an individual but a *general* conclusion, and one which will rest not solely on the veracity, but also on the judgment of the witness."

"Even in the other case, however, when the question relates to what is strictly a matter of fact, the intellectual character of the witness is not to be wholly left out of the account. A man may be strongly influenced by prejudice—to which the weakest men are ever the most liable—may even fancy he sees what he does not."

Intellectual character and capacity ought always to be taken into account whenever the question involves intelligence above the commonest understanding. Positiveness generally increases in proportion to the ignorance of the witness. An ignorant person might swear the sun goes round the earth merely because it seems to. That, no doubt, is an extreme mode of putting it; but very common instances of persons swearing to what *seems to be*, and mistaking it for what is, might be given, if they did not readily suggest themselves to the mind of the reader.

"*Le vrai n'est pas toujours le vraisemblable*," is an adage worth remembering in reply. It is worth conveying to the minds of the jury, for they are very apt to judge by appearances themselves, and

they are never better pleased than when enjoying the surprise of having been deceived by some illusive form. They experience the sensation of having been told the answer to a riddle which they were unable to guess. If you can awaken that sensation you will be pretty sure of your verdict.

Probabilities are of more value than possibilities. Juries, like other people, attach more weight to them. They are extremely valuable in reply, and should be made the most of. Opportunities which the witnesses had of seeing or knowing that which they depose to is also a matter of the highest moment. The means of forming a judgment is another, and all these may be used with a jury in short and terse argument for the purpose of obtaining an adverse opinion to the evidence, without the necessity of asking them to say it is perjured. Exhaust all argument before you come to that, unless you know that perjury has been committed, and then come to it boldly and at once, without giving the perjurer an opportunity of escape. You will have observed that you have left for a momer t, but for a moment only, the line marked out, of dealing with your opponent's case before presenting your own. But it is necessary, in order to contrast the evidence, and will materially assist you in dealing with that of your opponent. It will not interfere with the course of your argument, but will be advantageous to it when you come to review the facts of your own case.

It need scarcely be said that in examining the opposing evidence you will not fail to remark the points of contradiction or any important variance in the versions of the different witnesses, or neglect

to point out the improbabilities of the theory advanced on the other side, or to show that the case does not cover the ground occupied by your own.

Having gone through the material witnesses and disposed of them as far as possible, or left them to be routed by-and-bye, the next duty will be to bring your own evidence to the front and once more present your case to the jury. You may now collate your testimony as given by the several witnesses and show the case in its completeness and consistency.

At all times you should be concise, but especially at this stage, and as short as may be. If you are not a good speaker it will be better to be brief, because indifferent speaking does not tell very much; and you may well be brief if you are a good speaker because good speaking tells a good deal. A good speech however short goes all the way, but a stretch of mere windy talk invariably stops short of its object. But even a good speaker should guard against smothering his points with too many words; the most fluent advocates require most pruning at the commencement. All you want is to so place your facts that they will stand out boldly defined, like fruit upon a wall-tree where there is not too much wood. Almost a barrenness of language rather than an exuberance will be beneficial. You must avoid clothing a fact with the drapery of fine language, and also the making too many points at once. Don't present them like a bunch of grapes, or half of them will be unseen. Let each be made distinctly and separately, as though it were a work of art and made

for the jury's critical examination; and when once made let it alone.

Having thus presented your points in detail and made the best exhibition of them separately, you may now marshal them together and bring them up once for all in a body. To use a military phrase, which doubtless most of my readers will understand, you may have a "march past" to conclude with, and that, to my judgment, is a most effective mode of showing the strength and equipment of your forces.

There is a matter which, but for its constant recurrence, I should not think it necessary to mention, and that is, that conventional phrases should as a rule be avoided; so should stale adages, which from common use become only one remove from slang itself; they show a poverty of ideas and a lack of originality, besides enfeebling your address. A man does not do himself justice when he has recourse to a commonplace saying for the purpose of illustrating a point. It is neither ornamental nor argumentative, and is more adapted to the Peep-show than the Forum. But the great danger attending commonplaces is that they are so feeble and so easily demolished. What is the use of "Gentlemen, there is an old saying that good wine needs no bush," &c., &c., against a speaker who follows with sound logical argument; or if it be a matter of pure inference, who meets such rubbish with the strong and forcible language of common sense? The "old saying" may provoke a laugh, but the new saying is the one that will make the impression.

Not that illustrations are to be ignored; they

are among the most useful of all the means employed by the rhetorician. They bring home your meaning with a force and power that nothing can surpass; but the illustration, if nothing else, should be original. It should be a flash from your own mind, not a mere reflection of some one else's lantern, however brilliantly it may burn. Whately says: "There is very little, comparatively, of energy produced by any metaphor or simile that is in common use and already familiar to the hearer." An illustration, however homely, if original and apt is always pleasing and forcible.

I have already advised the advocate against a too liberal exhibition of emotion. It need scarcely be added, that appealing to the passions of a jury in reply in a direct manner is out of place and unfair. They are not to determine by passion or feeling, and attempts to rouse the emotions may mislead the judgment. The sympathies of the jury are a proper subject to reach if you can do it by the facts and not by meretricious sentiment; this is a legitimate exercise of the art of advocacy and of the powers of eloquence; and the art consists in so presenting the facts that they will accomplish that which you are forbidden to attempt. But it would be presumptuous in me to discuss those higher gifts of the orator, which can never be learnt or acquired. All I intend to say is, that any attempt to influence a jury by an appeal to their feelings is certain to meet with reprobation. It is clumsy and coarse at the best, and as bad as an open act of intimidation; if you cannot reach their sympathies without a violent attack you had better rest upon your facts and reserve your pathos for your client.

Nor will you ever succeed in getting the judge with you if you openly attempt to introduce prejudice. It is a kind of rhetorical burglary, which none but those who cannot effect their object by other means would ever perpetrate. It is logically wrong as well as morally. If the circumstances are such as naturally excite the sympathies of the jury in favour of your client, you have no need to make a flourish of trumpets to announce the fact; if they are not such, you will fail to move them by the employment of feeble arts for that purpose; besides which, you will probably set the judge against you, if not against your case; for you may be sure that in his desire to do justice between the parties, he will do his best to prevent your winning by unfair means; if it unhappily follow that you lose a good case by his endeavour to defeat an unfair attempt to win it, the fault will not be his, but yours.

A reply should be comprehensive and compact; it should be temperate as well as bold. In its moderation will be its strength. Violence of language is invariably weak; loudness of tone but a noisy accompaniment at the best, which stuns the ear instead of making the speaker heard. With a tone always above the natural key there can be no modulation, which I take to be the music of oratory; the effect of which is to entertain while the feast of reason proceeds.

Lord Brougham said of Erskine, that "Juries have declared that they felt it impossible to remove their looks from him when he had riveted, and as it were, fascinated them by his first glance. Then hear his voice of surpassing sweetness, clear,

flexible, though exquisitely fitted to strains of earnestness."

"His action," says Espinasse, "was always appropriate, chaste, easy, natural . . . . the tones of his voice, though sharp, were full, destitute of any tinge of Scotch accent, and adequate to any emergency—*almost scientifically modulated to the occasion.*"

Speaking of action, I may say, that all the advice ever given by would-be teachers of the art of speaking, as to *gesture*, is absolutely worthless. A good speaker has a natural and appropriate gesture; a bad speaker has none at all. You can no more learn gesture than you can learn to be handsome.

"Whatever you exaggerate, you weaken," said the present Solicitor-General, in consultation a short time since; a maxim worth remembering, both in opening a case and replying. You may overdo your own facts, or say too much against those of your opponent; and it is a good thing at the bar, as soon as you can do so, to "let your moderation be known unto all men." And moderation in voice is no less pleasing than in language. I have heard some men shout so in reply, that you would have thought the jury some poor shipwrecked wretches on a rock, while one from shore were trying to make himself heard above the tempest, and I have wondered what the feelings of the shipwrecked ones must be as they listened to this thundering Genius of the storm.

A word as to the Peroration, which should not, like the end of a squib, be all bang, nor like the finish of a rocket, all stars above every one's head.

What it *should* be is, a common-sense and pleasant finish—attractive, impressive and as polished as may be. It should leave upon the mind a pleasing recollection. It should be well constructed, appropriate and short. As the exordium is intended, with a few well-chosen words, to secure the hearer's attention, so the peroration is designed to leave upon his mind the satisfaction that his attention has been well bestowed. One or two instances of well-turned forensic perorations by eminent advocates I have selected as examples of conciseness, brevity and beauty, and will be found in another chapter.

I have thought it right to conclude this subject by referring to the extraordinary language used by Lord Brougham in a very celebrated case, which, I believe, has misled many an inexperienced advocate, and is calculated to mislead a great many more, to the danger of their unfortunate clients as well as the peril of their own prospects. The young are too apt to believe what a great man says, especially if he be an authority in the profession they follow. Great men often utter small sayings, which would not be listened to if ordinary men said them, and nothing is more foolish than to take even a wise man's sayings without examining them for ourselves. The poor man, it is true, will not weigh the coin which the rich man throws him but if it have an appearance calculated to excite suspicion, he will at least ring it on the table, if he have ordinary prudence, otherwise his reputation may suffer by an attempt to pass it as genuine. It is not because a great or a wise man says a thing that we are to implicitly believe and

blindly follow it; and I take leave to say that an honourable man, if he think seriously, must disagree with the following propositions of Lord Brougham, who was certainly impetuous, however great.

"There are many whom it may be needful to remind, that an advocate—by the sacred duty of his connection with his client—knows, in the discharge of that office, but one person in the world—that client and none other. To serve that client by all expedient means, to protect that client at all hazards and costs to all others (even the party already injured), and, amongst others, to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any others. Nay, separating even the duties of a patriot from those of an advocate, he must go on, reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client."

Although some portion of this sweeping proposition might be assented to, and especially in the circumstances which called them forth, there is surely much that an honourable man would shrink from even though he give full scope to the meaning of the word "expedient." In the impetuosity of advocacy such as Brougham was stirred up by the occasion to employ, it might have been excusable to use such language; but if it be examined its propositions can scarcely be assented to.

An advocate can hardly claim a higher privilege than his client could claim for himself were he defending his own cause. Would he be permitted

to disregard the suffering, the torment, the destruction which he might bring upon others? And under what circumstances could the expediency of bringing down such overwhelming calamities arise? If it could never be expedient, all the rest of the sentence, with its catalogue of evils, might have been left out. If it could be expedient, when?

Assume a witness to have been thirty years ago sentenced to transportation; that he had become since a flourishing merchant in England; were surrounded with a family, and enjoyed the society of many friends, to all of whom the history of his early life was happily unknown. He comes into the witness box to depose to some fact material to the issue, and gives his evidence. Would it be tolerated that counsel should ask if thirty years ago he was transported? But suppose the counsel thought it "expedient" to bring it out. I presume he is to be the sole judge of the expediency. What would follow? the ruin perhaps of the witness, the shame of his friends, and the misery of his family! No one else on earth is to be considered but the client who is bringing his action, it may be on a paltry bill of exchange. It seems to me that such a course of advocacy would be cruel and unjustifiable.

An advocate should be tender of the feelings of others, although engaged in the "sacred service" of his client; and above all things he ought to be the guardian, and not the destroyer of private character; he should observe the golden rule of "doing unto others as he would be done by," nor should he lose or suspend the feelings of a Christian

and a gentleman; he should regard "the alarm, the suffering, the torment, the destruction which he may bring upon others;" "to serve his client" may be "his highest duty as an advocate," but it is yet hoped it will not cause him to forget his duties as a man, or prevent him from throwing up his brief rather than do a dishonourable action. Besides this, an advocate who casts destruction broadcast may involve his client in the general ruin, and is sure in any event to injure him in the estimation of the jury.

CHAPTER X.

AS TO THE CONDUCT OF A PROSECUTION.

Prosecutions are generally the first business which counsel find themselves engaged, or perhaps I should say entangled in, after their call to the bar. A very useful regulation, which I trust will not be soon *reformed*, obtains at many of the Quarter Sessions, and consists in distributing the prosecutions, in which no solicitor is engaged, among the members of the bar present. There may be differences of opinion as to the general good of the practice, but for my own part, my experience tells me that a better plan has never yet been devised, and that incalculable good results to the junior bar from this practice, while the public are at the same time benefited.

A man does not require an Atlantic Ocean to learn to swim in. A young barrister can *learn to begin*—that is the first point—as well at sessions as at Westminster. I think a great deal better. To be thrown upon one's own resources is the best and surest mode of testing one's faculties. There is nothing like taking the young eagle from its nest, soaring aloft and dropping it into space, for trying its wings.

It may be well, therefore, to give some hints

with regard to this by no means unimportant branch of advocacy. For even as to this there is no knowledge born with a man. Indeed, I have known not a few quite elderly advocates, or as they are called "leaders," who would be none the worse for a reminder of what it was their duty to know in their younger days.

Let me say then, first of all, that above everything it is important that an advocate should exhibit no feeling in the conduct of a prosecution. He is not the offended party, nor the minister of justice, as he is sometimes erroneously called. He is the presenter of the accused at the bar of justice, and is the last person who should exhibit emotion. I say this because there has recently occurred a case where a good deal of acrimonious zeal was manifested on account of the malicious and wicked nature of the offence. Hard words, it is true, break no bones, but then neither do they prove anything except strong feeling.

There should appear no anxiety on the part of the counsel to obtain a conviction. Whoever the accused may be, and whoever the accuser, and whatsoever the nature of the charge, there should appear but one unswerving desire on the part of the advocate, namely, to *lay the facts* of the case before the tribunal which is to judge of them.

Inflexible justice is required on the part of him who, as I observed, sometimes calls himself its minister. Neither the shocking nature of the crime, nor the heinous character of the accused, nor the exalted rank of the accuser, nor any other circumstance should disturb the mind or temper of the advocate.

But it is not in prosecutions for crimes of the deeper guilt that the danger of excited feelings has to be guarded against. In these there is generally too much of the sepulchral tone and manner, as though the wretched criminal were delivering his last dying speech and confession by proxy. It is in cases such as libel, where the circumstances may be particularly aggravated, and the accuser a person of distinguished position in society; or it may be in some other misdemeanour of the social sort, where mortal vindictiveness, rather than divine justice, seems occasionally to be the inspirer if not the director of the proceedings.

But whatever may be the nature of the charge or the quality of accused or accuser, *let there be no feeling*—at least no manifestation of it.

Nothing can be worse, either as a matter of abstract justice, or as a matter of mere advocacy. A man who throws feeling into a prosecution, awakens an opposite sentiment in favour of the accused. The sense of fair play, which every Englishman is credited with possessing, is outraged by any attempt to convict a man by declamation and angry expressions. Is he guilty? that is the question. You are not to denounce the crime: that has no doubt been committed by some one, and is none the deeper or the wickeder, denounce it as you will: you are not to denounce the man: he may not be guilty; and if not, shall the innocent be denounced? He may be guilty: what, then, are you his judge or—his executioner? So that he will be none the worse, and none the better, the crime no deeper, and the charge no nearer proof by declamation or anger. "Leave off from wrath

before it be meddled with," in conducting a prosecution. I have known accused persons acquitted through a too intense desire to convict; especially in cases where self-constituted bodies of men support the public morality by public subscriptions.

The next thing to remember is, never to say the prisoner is guilty. It is an utterly useless expression, and seems to imply that you have a feeling in the matter even when you may have none. You have to lay facts before the jury from which no other inference than that of guilt can reasonably arise. Guilty is the sum total of inferences and probabilities arising from the facts, and is to be pronounced only by those who are sworn to try whether he be guilty or not guilty.

Another error to avoid is argument at the opening of the case for the prosecution. At this stage there is nothing to argue (unless you want to argue that you are telling the truth), and its principal effect will be to throw doubt on your case. Facts that require nursing the moment they are presented, must be weak indeed; and you may depend upon it such swaddling-clothes will never keep life in them. What can be stronger or healthier than a plain statement of a simple fact?

Aye, but if it be not a simple fact, but a series of compound facts, what then? It is a mere matter of arithmetic. Reduce the compounds to simples; and for such analysis there is no need for argument. The best opening of a case for the prosecution is a clear and concise statement of facts, without embellishment, without argument, and without feeling. It may be necessary to explain matters, or to separate them, or to connect

them, or to treat them in some other manner by way of elucidation; but it is never necessary, and is therefore bad advocacy, to *colour* them, or in any way to alter their appearance, or apply to them a far-fetched and possibly foreign meaning.

Again, all exaggeration is to be avoided; you should neither magnify that which you can prove, nor open a single fact that you cannot. It is not only bad as a matter of advocacy, but dishonest as a matter of morality. As the jury approaches the evidence of the case by way of examination, the facts should expand upon the view rather than diminish; as diminish they must if you exaggerate them in your opening. I have seen a jury shocked by the horrors of a charge in the opening and smile upon the evidence in support of it, and I have seen nothing left of the charge itself except the frothy reply of the advocate, who seemed angry that a man should be innocent. No art should be employed for the mere purpose of convicting a prisoner, but there should be no abandonment of it because a crime happens to be the subject of your advocacy. It is your duty to convince the jury of the guilt of the accused if you can do so fairly. To accomplish this you must present the facts in their natural order (which is art), and in the most comprehensive manner (which is art), and in the most simple manner (which also is art). But before all things, before even the conviction of the guilty, it should be your care to refrain from stating the smallest matter which in your conscience you do not believe to be capable of proof. If, inadvertently, this be done, as indeed it must sometimes from erroneous instructions, you should spare no pains to disabuse the

minds of the jury of the impression which such a statement may have made. You never can tell what effect a word may have; a verdict may be influenced by the most trifling observation. For this reason you should instantly repair any mistake which may operate against the accused.

Another error, very frequently committed, should by all means be avoided. I mean that of telling a jury that you think you shall be able to prove so-and-so; or you think you shall be able to show so-and-so. This is unfair to the prisoner if you fail, and it is extremely weak if you succeed. What you know you can prove, open, what you are doubtful about leave for the evidence.

Need it be said that expressions, such as "How on earth could the prisoner have known so-and-so?" and "How on earth could he have thought so-and-so?" should be avoided. And that language, such as "It is a lie! gentlemen," is not graceful or dignified. Nor should the counsel for the prosecution assume to himself the office of defending the prosecutor or prosecutrix, as the case may be. He may do so in the most efficient manner, if he be a skilful advocate; but that must not appear to be the main object of the prosecution. If Cæsar's wife be above suspicion, she will need no defender; and it will be no compliment to her to say that you are there for the purpose of vindicating her character.

I make these observations because I have known the expressions quoted to be employed by counsel not at the junior bar, and I desire to bear witness to the fact that all the blunders made, and all the ungraceful language used are not on the side of the juniors.

Seniors are not immaculate, and do many things that in juniors would be almost treason; but no junior, if surpassed by his leaders in experience, need ever fear being distanced by them in the art of speaking, if only they study it as an art. Good speaking belongs as much to youth as to age, and so does the skill of opening a case and conducting a prosecution, if these branches of advocacy be *studied*. Nor will cross-examination lag behind if well considered. It is practice that gives the leaders their great advantage, but careful study will make up for even want of practice to a very great extent. At all events, pure and simple diction, arrangement of a speech, marshalling your evidence, examination-in-chief, may be done in no very remote day as well as they ever need be in an ordinary case, if you have only common sense and will condescend to use it. There is nothing very difficult in advocacy, any more than there is in arithmetic; it requires no genius, and very little more than ordinary brains and an honest straightforwardness of purpose. If you have a highly exalted client, your case is not exalted in consequence, your duties are none the more dignified. The platform of advocacy is the highest a man can occupy, whether it be to advocate the claims of an individual or the rights of a nation. It cannot be on a different level, whether the cause be that of poor or rich. You may change sides, from representing a prince to the defence of a peasant, but the dignity of your duty is not changed. You may be the advocate of both; your profession derives no additional lustre from the one, and suffers no detraction from the other.

With the clear understanding, then, that there is to be no *struggle* for a verdict, as though iniquitous vehemence were not unbecoming the "minister of justice," let us see what course of proceeding is best adapted to the object of the prosecution—namely, that of *the ascertainment of the truth.*

In the first place, the *charge* against the prisoner should be stated clearly and concisely. Start not, my junior friend, it is not always stated clearly and concisely; nor is it always stated; and be not surprised if I say that it *seldom is.* The judge, generally, has to tell the jury, after all the speeches and all the evidence, what the charge is against him, and what is the *nature* of the charge. It has often struck me as remarkable that young advocates, as a rule, both in prosecuting and defending, leave out the offence stated in the indictment. I have known many a man acquitted almost as soon as the nature of the charge has been stated upon the authority of the judge.

Now, there are many ways of stating a charge, but there is only one way to inform the minds of the jury of the offence which the accused is alleged to have committed. And the first necessary is to strip it of the legal jargon in which it is enfolded. Since the days of Babel was no mortal language less "understanded" of the people than the lawyers' dialect; no man, however deep in linguistics, will ever be deep enough to get to the bottom of that unfathomable vortex. If you want to enjoy a piece of real humour, watch a jury while they listen to a prisoner being "given in charge" on some skilfully worded indictment with complications enough to baffle the father of all worldly complications himself.

But your duty is clear; you are the interpreter of this unknown thing to the people or "the country" before you. Inwrapped as the simple matter is in the manifold incumbrances and technicalities of the law, how is a mortal common-sense jury to know whether the enfolded thing before them be a wolf or one's grandmother? But do not think you have made it intelligible until you have reduced it to the poor phraseology of common sense; if it is ever necessary to call a spade a spade it is among people who use it, and if "*guilty knowledge*" or "*fraudulent intent*" be the essence of the charge, you must not merely say so, but tell the jury in common parlance the legal meaning of the terms. Unless they understand the nature of the charge they will never appreciate thoroughly the finer points of the evidence, which may be so important to lead them to a just conclusion. You need not, however, twaddle on to an unnecessary length, like a horse that is kept going by many bells with unmeaning music: you must *learn* to put the meaning of indictments into every-day language, and then you will reduce it to simplicity in a few words.

You will next consider whether the condition, situation or circumstances of the prisoner be necessary to describe, for be sure that whatever is unnecessary to be done in a prosecution should *not* be done. It may be that out of the *circumstances* of the accused springs the motive of the crime, if so, probabilities spring too from the same root, and that is important to bring before the jury at the earliest moment. From his *position* opportunity may be given, if so, there is proba-

bility growing up and strengthened. From the *situation* of the accused, temptation—fatalest enemy—may be discovered. The crime first, therefore, the position of the accused next; in other words, *crime, motive, opportunity.*

Now come the facts; but be it remembered that nothing is to be stated, remote or near, that has not a *direct bearing upon the issue.* Everything that may prejudice the jury—as you love an easy conscience and value your own character for honesty—must be carefully excluded; and above all things avoid doing in an oblique manner that which it would be unfair to do directly; I would prefer a bold sinner to a cowardly one. Nor is this warning unnecessary; I have seen many err inadvertently in their zeal for the "administration of justice," who, in a matter of private and social concern, would guard themselves from the faintest appearance of unfairness. You are not to be what is known in some proceedings as a "devil's advocate," employed, I believe, when they desire to "canonize a lady or gentleman." You are not required to canonize the prisoner, but to do him as much justice as if you had some sorrow for his situation.

And now, let me again say, "*order and arrangement,*" if you wish the jury thoroughly to understand the statement you have to make: as you open your case so should the witnesses be called to prove it; the continuity of circumstances must not be broken, although there may be divers branches of the subject; there may be many chapters, but they were enacted in order, in the real history you are unfolding. If you want a model,

go to the trial of Castro for perjury: observe its chapters, its situations, its development.

You will sometimes find that the depositions are confused and complicated. Before the magistrates, where evidence is taken in portions, as it is obtained, and in the course of many adjournments or remands, it is next to impossible to follow any rule in this respect. But it will be your duty to separate and arrange the various portions of evidence before presenting them to the jury.

It is extremely important that you should not allege too much, or you may in consequence prove too little. Nor is it a small matter that you should attempt to prove more than you can. Better succeed in reaching a moderate height than fail in grasping what is beyond your compass. Every failure produces disappointment. It disappoints expectation and detracts from the merits of the case, if not from the merits of the counsel.

"Overlaying the case," as it is called, is a dangerous proceeding. It is like taking a feather-bed, bolster and two pillows to smother a mouse with, when the feather-bed would be amply sufficient if well applied. A number of witnesses cannot agree on all points; I do not mean in words, because that would at once damn their evidence, but I mean as to facts themselves; and if you call a number of witnesses, the chances are that you will call a number of contradictions, and the moment you get one witness to contradict another upon any point how little material soever, if it be material, the jury, as a rule, will determine that portion of the evidence in favour of the accused, unless other circumstances lead them to a different

conclusion. You will have given him already the benefit of one doubt.

Then again, among your multitude may creep in some one or two of a disreputable kind; you may not know them, but your "learned friend," if he have any skill, will soon introduce them to you; and if their character or evidence be "shaky," as it is called forensically, it will lower the average of the whole; at all events, the merits of your case will sink with it. It requires a number of respectable witnesses to buoy up a case laden with one whose character renders him unworthy of belief.

I may here mention (with all reverence) one great prosecuting institution which is very apt to overlay its infants and that is THE CROWN. I remember one very important case in which the Crown was cruelly hoodwinked, and I have always had a feeling of deep sympathy with the Crown ever since. It was a case of murder. A very bad case. Horribly brutal. The public were shocked and intensely interested throughout the length and breadth of the land. It was a murder that ranks among the great murders of the world. In consequence whereof there was more bungling among the police, and more conflict among police authorities than usual. Borough police and Scotland Yard almost taking one another up if not knocking one another down. All this is as a thing of yesterday to one's recollection. And I also remember when the police had laid hold of the supposed murderer what scenes were enacted at the Police Court day by day, and how the conflicting "authorities," with official and non-official jealousy, proceeded on the uneven tenour of their way as

well as other people's way. For it was a great and notable murder.

But what is more to our point is not the notoriety or jealousy, or the degrees of activity or non-activity of intelligent or non-intelligent officers, but the CROWN INSTITUTION itself and its staff for taking down the "proofs." The "proofs" came thick and fast you may be sure; almost everybody had a "proof." The whole country seemed to have been called from its avocations to see the murder done. The prisoner was seen here and seen there; he was buying in this shop and visiting in that; he was singing in one place and dancing in another; courting in one lonely spot and murdering in another. There never were so many "clues" to a single crime. At last the perpetrator of one horrible murder, at all events, to the satisfaction of one section of the police, would be brought to justice. It would make up for many undiscovered and thrilling crimes. Let no one henceforth say the police cannot "find out anything."

Into the office where they take the evidence, or "proofs," there stepped in witness after witness —scores of witnesses. Evidence was taken down, sifted, weighed, measured, as it might have been by the yard; and there stepped in among the crowd one or two of the simplest-looking, "innocentest" looking young men that could be found in all London, and an innocent looking woman or two, if I remember rightly. Now the Crown being incapable of doing any wrong, is equally incapable of thinking any evil; so it thought none of these interesting witnesses who gave their story with solemn faces, and went away with proper sub-

pœnas in their pockets, proper Crown Office sub-pœnas.

The trial came on, as, after so much elaborate preparation, it was only proper that it should; and the evidence looked uncommonly black against the unhappy prisoner. An anxious and highly sensational public watched for justice to be avenged. But it was curious that amid the Crown witnesses, interspersed, were witnesses who made some matters deposed to impossible, who undid fastenings and knocked the heads off several of the Government rivets; in fact, who seemed altogether to upset the elaborately constructed evidence of the prosecution. Crown became confused, looked at the notes taken down at the Institution, compared them with the evidence in Court to-day, questioned the witnesses —no use, there were contradictions, irreconcileable disagreements, all in favour of the prisoner. Dates were wrong; prisoner was in two or three places at once. And so it went on, until the judge summed up. The judge did not reconcile the discrepancies—could not, in fact; jury never attempted to. So the man was acquitted. Evidence not sufficient because too much.

It is just as well, perhaps, not to convict an innocent man, so there is no occasion for overmuch zeal. Justice is not vindicated by the sacrifice of a victim, but by the condemnation of the guilty. She may be blind, but she would much rather withhold the rod until you can assure her by unimpeachable evidence that it will not fall on the innocent. Be careful, therefore, not to try to vindicate her too much; in fact, in conducting a prosecution, do not try to vindicate anything.

One other matter there is to be on one's guard against, and that is, being overdone by police testimony. Very few policemen are really untruthful, I believe; and very few would unnecessarily "pile on the evidence" against a man; but all are zealous, and zeal is a force, as we all know, that will sometimes impel us beyond the boundary line of discretion. They require to be kept with a steady and firm hand; for much zeal on their part, like too much anxiety on yours, is sure to operate against what the prosecution invariably calls "the interests of public justice."

In proceeding with your statement there is often a danger of being led into an anticipation of the defence that will be set up either to the whole or to any portion of it. This ought never in a prosecution to be yielded to, if for no other reason, at least for the very obvious one that, if the prisoner be defended, you have the right either of summing up or of replying. Such expressions as, "It may be said by my learned friend," &c., &c., are not legitimately a part of an opening statement. But it is by no means improper in *favour* of the accused to present that view of a fact which you find yourself obliged to deal with and dispose of. The moment you show yourself eager to convict, the jury will suspect you or the prosecutor of vindictive feeling, one of the worst symptoms to manifest itself either at the bar or in the witness-box.

There are two answers only to a charge—one in law, the other in fact. These resolve themselves in practice to three:—1. The prisoner is not the man (mistaken identity): 2. No intention to com-

mit the act: or, 3. The act was never committed. I am speaking now of the nature of crimes and misdemeanours generally with which advocates have to deal at Assizes or Quarter Sessions; but I am not certain that I should not be perfectly accurate if I applied the statement to the whole of the offences in the statute book and at common law.

It is under one or other of these heads that the various "defences" will range themselves. Insanity; No proof of property; No guilty knowledge; Consent; and so on. This being the case, the first step in arranging and pointing the evidence is to ascertain what can be disputed and what is incapable of denial. A prisoner perhaps cannot deny that he did a certain act. He is either justified then in law, or excused on the ground of insanity, or affirms that he had no guilty knowledge or intent, or that there was consent to what was done. It will be easily perceived where the points of the prosecution will require to be made good. If you expend the force of your evidence to prove identity when the main defence is no guilty knowledge, or intent to defraud, a rogue may escape from justice for want of mere forensic skill on your part, as he may from a policeman for want of handcuffs.

Do not think such an event unlikely to happen, or flatter yourself it will not happen to you; you will be a miracle of an advocate, or will never have a case at all, if it do not. The simple rule to observe then is, that you must *take care while you are watching one hole that the prisoner do not escape out of another.*

I once saw a man tried for embezzling money, the price of hay which he had taken from a rick

belonging to his employer and sold. There was no proof that he had ever had the money, and if he had there was no proof that he had received it *for and on account of his master*. It was contended that if it was anything it was stealing the hay. So he was acquitted and charged with stealing the hay. Argued that if it was anything it was embezzling the money, for he had authority to sell the hay. Acquitted. Not because he was not guilty.

As an example of the necessity of a clear exposition of the charge against the prisoner, and of a lucid and well-arranged statement of facts in opening, together with a proper marshalling of evidence in proof, take the common case of a conspiracy, the indictment for which runs to the following effect: that Brown, Jones, Robinson, and Tompkins, "being evil-disposed persons, and wickedly devising and intending to defraud and prejudice certain persons hereafter mentioned, on the 1st of April, did amongst themselves conspire, combine, confederate and agree *together*, falsely and fraudulently to cheat and defraud certain," &c.

Now I doubt if one man in a hundred would ever know, while unenlightened as to the *legal* meaning of legal phraseology, and only viewing the above words through the medium of common sense, *when* if ever he would be in a position to say "guilty" or "not guilty." He might come to a very definite conclusion that Brown, Jones, Robinson and Tompkins (the latter trading as Tompkins & Co.) were as thorough a set of rascals as ever lived; but whether they did "conspire, combine, confederate

and agree *together*," they all being as it appears so very far apart is the difficulty. Whether the law combines things by a process of separation and makes them agree together by confederating them at the four most distant points of Great Britain, the unforensic mind, desirous of doing justice even to the unjust, cannot well perceive. Necessary is it therefore, before collecting your evidence from the four winds and laying it in front of the jury-box, to explain to the jury that "*together*" may mean *apart* and "combine" may include *dispersion*. That being taken for granted and good law, though not understood, you may proceed to bring in by way of statement your first piece of evidence, which being very likely a written document—an order, perhaps, for goods—and not couched in legal phraseology, but in commercial language, the jury will understand well enough and see in it the inception of a fraud. So your documentary evidence and your verbal evidence, and your evidence as to *acts*, properly assorted and collated, will show at least that this worthy firm of "Tompkins & Co." was doing a large and varied business, although perhaps not upon the most approved ready-money principles. Miscellaneous dealings in all sorts and all quarters, steady to no single purpose or principle, except one—that of never paying anybody—and, to parody the language of the indictment, steadfast only in never being anywhere, the jury will have no difficulty in coming to the conclusion that this distinguished firm of "Tompkins & Co." did "wickedly devising and intending to defraud, amongst themselves conspire, combine, confederate and agree together, falsely and fraudulently to

cheat and defraud," &c., as you so learnedly put it, according to the ingenious and elastic nature of the language of the law.

There is nothing more wearisome and useless than dwelling on the extreme details of a case, unless they are of importance. It may be that some infinitesimally small matter may be of infinite importance; but a common-sense advocate will discern between the important and the merely frivolous. I have seen hours wasted in an examination before magistrates where minutes would have been sufficient for every purpose under the sun, whether to ease the minds of your witnesses or to hang your man—*or somebody else's man*—as the case might be.

Q. "Well, you went up to the door?"

A. "Yes, sir," (meekly).

Q. "What did you do then—did any one else go with you?"

A. "Mrs. Brown, sir."

Q. "Mrs. Brown, who's Mrs. Brown?"

A. "A neighbour, sir."

Q. "Where does she live?"

A. "Next door to Mrs. Macdoodle's, sir."

Q. "Well, how came Mrs. Brown to go?"

A. "She came up with me, sir."

Q. "Did you see where she came from?"

A. "No, sir."

Q. "Well, you went to the door?"

A. "Yes, sir."

Q. "Was anybody there?"

A. "Yes, sir."

Q. "Who?"

A. "A man."

Q. "What was he doing?"

A. "Smoking, sir."

Q. "Smoking—nothing else?"

A. "Yes, sir, he had his hands in his pockets."

Q. "O, he had his hands in his pockets—did you know who he was?"

A. "No, sir."

Q. "Don't know who he was?"

A. "No, sir."

Q. "Ever seen him before?"

A. "Yes, sir."

Q. "How many times?"

A. "Once, sir."

Q. "Where was that?"

A. "When I went to take home the mangling, sir."

Q. "Where was he?"

A. "In a publikouse, sir."

Q. "Well, what did you do when you got up to the door?"

A. "I knocked, sir."

Q. "Did you knock more than once?"

A. "No, sir."

Now, all this time has been taken up for no reason whatever, except to get that knock, and now we have it, it is perfectly useless, except to enable us to get inside where we want to get, for the purpose of examining the state of affairs there. I need not say that such microscopic evidence indicates "wilful murder," and that there is a "body" in the house.

It is not necessary to repeat what has been said in a former part of this work with reference to the cross-examination for the prisoner. You may be

sure that a copious shower of questions from your opponent will rain down some fact or other which will assist the prosecution. He must be a skilful advocate indeed, who in a long cross-examination elicits no fact against himself, or lets in no evidence which will add a burden to his defence. You will, therefore, watch every question, and note the answer if it requires to be re-examined upon or commented upon in the summing-up or reply. I have seen men convicted by being defended by injudicious advocates, although they themselves may not have known it, and may have forced the questions which brought their destruction. The greatest lawyer that ever lived might be no advocate, and it is difficult to conceive of a very young advocate being a very good one. At the same time he must get experience somewhere; somebody must be the patient for him to practise upon for the benefit of the healthy body corporate. But he should learn as far as possible by the blunders of others rather than his own, and will have a fair opportunity of doing so while engaged in a prosecution by carefully watching and noting where a question is clumsy merely, and where it is wrong; by considering how questions should be asked, and, more important still, how they should be *framed*, so as to bring no harm to your case and as much good as possible. Law only will not make an advocate any more than a balance-pole will enable you to walk a tight-rope. You might put a fine sword into the hand of a rustic, but he would be somewhat awkward, I fancy, in the use of it. A prosecution is of immense use in teaching a young advocate how to defend. Not that very many will

be useful if one be not; some men never become skilful in defending, although they have many prosecutions; it is not *merely* the conducting the case that will help you any more than you could learn to bowl by always being at the wicket.

I should not think it necessary to say a word as to the reply in a criminal case, but that I have seen advocates so vehement both in denunciation and "earnest appeals," that one almost forgot that an unhappy wretch in custody was the occasion of it. Calm and temperate should at all times be the voice that asks for the condemnation of a fellow-creature. Every allowance should be made for the common infirmities that beset us; every portion of the case not absolutely covered by the prosecution should be left unmolested, if haply his trembling foot may find a resting-place thereon; and nothing should be asked of the jury except the exercise of an impartial judgment upon the facts before them.

CHAPTER XI.

AS TO THE CONDUCT OF A DEFENCE IN A CRIMINAL TRIAL.

ALTHOUGH most of the remarks I have made apply equally to criminal as to civil cases, it may be useful to give some hints especially directed to the conduct of a Criminal Defence.

As inexperienced advocates are frequently before the magistrates, in their professional capacity, it may not be without advantage if I make a few observations on the conduct of a case in those Courts. The mode in which persons charged with crime are defended at the Police Court has often appeared to me a kind of preliminary retribution to that which is to come. A young advocate, who has had nothing of a more serious nature to defend than a charge of drunkenness or assault, is suddenly called upon to *pose* before the public, in a case of wilful murder or some other offence, where a committal is absolutely certain. How is he to do justice to his client? There is only one way, and that is, to hold his tongue. One would think advocacy the easiest thing in the world, requiring neither training, knowledge nor experience, to see how perfectly ready the young advocate is to step

into the arena and do battle in the interests of the accused; as if an advocate were made by being called to the bar, or admitted on the roll of solicitors, or by being articled as a solicitors' clerk. You might just as well expect the indentures of an apprentice to impart a knowledge of his handicraft. When a young solicitor or clerk is *instructed* to defend before the magistrate under the circumstances indicated, I should unhesitatingly advise him to preserve an unbroken silence. Otherwise he is almost sure to do mischief; and the worst mischief is that he will most likely tie up the hands of the counsel engaged to defend before the ultimate tribunal.

It is possible that it may be desirable to have a fact or two upon the depositions, but if so, it will require an advocate of some experience to ascertain what those facts shall be. The greatest discretion should be used as to whether a question should be asked or not. With a very few exceptions, no cross-examination should be administered when the case is to go for trial.

Instead of this course being pursued, a long cross-examination is often indulged in, or the young gentleman who thinks he is defending, puts as many questions as he can, under the impression that questioning is cross-examination, and then answers are elicited detrimental if not destructive to every chance of acquittal. For the purpose of convicting unfortunate wretches who are charged with offences, the Government need not establish public prosecutors while young advocates defend, for these gentlemen can administer questions which the law forbids the prosecuting counsel to

put; and what is more, they can *privately* question the prisoner, and then by giving the information so obtained in the shape of questions to the witnesses, may display a knowledge of circumstances only consistent with the prisoner's guilt, as by showing that he was present at the scene of the crime, when probably the defence is to be an *alibi!*

I am afraid, too, that a good many innocent persons have succumbed to a powerful cross-examination of this kind. Many juvenile advocates seem to consider that cross-examination consists in repeating the questions of the prosecution with the prefatory query uttered in as severe a tone as a youth can assume when the voice has hardly broken "*—will you swear, sir,*"—or by way of variation so as to show some degree of originality—"*On your oath, sir?*"

There may, nevertheless, be cases where it is possible to avoid a committal by bringing all the facts before the magistrate. And this may be done sometimes even in the most serious charges. But no inexperienced advocate should be intrusted to *defend* under such circumstances. It was successfully done some time since in a case which attracted considerable attention from its remarkable circumstances. A woman had been murdered in a very shocking manner in a house of ill-fame near Oxford Street. The police, as is customary, obtained the all-important clue, and it was therefore necessary to obtain a prisoner. They followed it up with that remarkable intelligence which always characterises the "Force" in heavy cases; and losing the clue for a moment on board a

vessel which was outward bound, found it again almost immediately afterwards in the spot where they had missed it. Instead, however, of arresting the man they were after, "from information received," they pounced upon an inoffensive and mild-looking clergyman and charged him with wilful murder. Witnesses were soon obtained (the supply in London always being equal to the demand whatever may be the commodity you require), who saw the rev. gentleman leave the brothel where the deceased woman was found immediately after. The singular part of the story was, that he so exactly corresponded with the man whom they did *not see* leave the house, and whom the police were after in the first instance, and when they boarded the vessel. Of course it was of the utmost importance that this gentleman should not be committed for trial, although a conviction would have been utterly impossible. It was consequently necessary to cross-examine the witnesses and to call evidence. This was accordingly done, and it was clearly established that the reverend prisoner was perfectly innocent of the charge; that he was elsewhere at the time he was said to have been in the street; and that there was no single circumstance even that required explanation.

Many cases there are where a judicious examination in the first instance before the magistrate would ensure the discharge of the accused, but in all these cases an advocate of some experience should be retained. It may be taken as a good rule that where a case is going for trial no defence should be raised. It should be carefully watched,

and a question here and there judiciously interposed where something is *certain* to be obtained favourable to the accused. Where the answer is doubtful it should never be risked. Severe cross-examinations and magnificent police-court speeches can only be useful to the prosecution.

If, however, the case of the accused rests upon his calling witnesses, this will necessitate their being before the magistrate, otherwise it will operate to the prejudice of the defence at the trial. The prisoner, moreover, if they are "bound over," will have the advantage of their expenses being provided for if the judge considers their evidence material and trustworthy.

But if called it is only necessary to give the outline of their evidence, a full outline it may be, but the details should be judiciously reserved. It is a good plan sometimes to have witnesses before the magistrate and not call them if you can avoid it. It takes the sting from the question, "Were you before the magistrate? or "When were you asked to give evidence?" This is very often, as Brougham would say, "*expedient.*"

Let it now be assumed that your client has been duly committed for trial, and that a "True Bill" has been found by the Grand Jury. It is the first business of the counsel instructed to defend to see what charges the indictment contains. I am afraid this duty is more often than not neglected by junior barristers, and the consequence sometimes is that a prisoner is convicted on a bad indictment. It contains, perhaps, no offence known to the law, or it contains too many offences; something is not set out which should

be, or there may be a great deal too much set out. There may in short be some "flaw" which, if taken advantage of in a proper manner, would ensure the acquittal of the accused. This is by no means of such rare occurrence, notwithstanding the powers of amendment and the improved method of pleading, as to make it a matter of little moment to examine minutely the indictment.

Taking for granted that I am writing now to advocates who are good lawyers, I will assume that, having carefully and critically perused the indictment, you know exactly what it contains, and I conclude that you will not move without strong necessity to have it quashed—(as this is by no means a safe proceeding)—that you will give no opportunity of amending, where by taking objection at the proper time, you will compel your opponent to "elect" as to which of the counts he will proceed upon; and that you will not prematurely take an objection where you should reserve your attack for the forlorn hope of a motion in arrest of judgment.

These points having been carefully considered, and having thoroughly made up your mind as to *what* the defence is to be, remembering always that one good defence is better than two, you must now watch carefully the opening of the case for the prosecution. If your adversary open too much it will be a point in your favour. "A guilty man," says Whately, "may often escape"—(I hope not often)—"by having too much laid to his charge; so he may by having too much evidence against him, *i.e.*, some that is not itself satisfactory; thus

a prisoner may sometimes obtain an acquittal by showing that one of the witnesses against him is an infamous informer and spy, though perhaps if that part of the evidence had been omitted the rest would have been sufficient for conviction."—*Elements of Logic*, B. III. sec. 18.

Again, if your opponent inadvertently open a case differing materially from the evidence of the witnesses, or any of them, it will be matter for observation which will not be without its effect. It is not your business to object; you do not know what he can prove, and if his proof fall short so much the better for your client. But you must narrowly watch *and* object if counsel for the prosecution propose to read any letter or document, or state any conversation which, when the proper time comes, may not be admissible. It is useless after the mischief has been done, and the impression made on the minds of the jury for the judge to say, "I shall tell the jury that that document or that conversation is not evidence, and that they are to dismiss it from their minds." They cannot dismiss it from their minds, and it *is* evidence, no matter whether you call it so or not, when once before them, and will in all human probability have an influence on their judgment. It is like the village lawyer telling the man that they could not put him in the stocks; the irrefutable answer was, "but I *am* here."

You must further take care that if you succeed in shutting out a document you exclude also all observations upon it, for nothing is more unfair than to allude to matter which is not in evidence; although it is often inadvertently done.

You will not trouble yourself to take down the evidence, but as it is given, follow closely the deposition which the witness has made before the magistrate, not with a view of verbal criticism, or of establishing some trivial error or discrepancy; but to see that there are no material differences or contradictions. These, if there be any, you will note and call attention to in cross-examination. Unless you do this, you will not be able to bring them to the mind of the jury. But upon this subject I will say a word more particularly hereafter, as the mode of doing it is a matter of the greatest importance. With a wily witness the contradictions or variances may be artfully reconciled, or sufficiently so to impose upon the jury, unless great care is used in dealing with him. Your object is not to reconcile or give him an opportunity of explaining, but to impress the difference in the statements on the jury, and widen the gap rather than close it.

Besides remarking the difference between the testimony now given and that deposed before the magistrate, you must be equally careful to note the points of difference between the witnesses as well as the points of agreement. For observe: they may agree upon some point in your favour and disagree as to something which is against you; and indeed, any disagreement may be turned to advantage. With a little experience and a good deal of observation you will be able to distinguish between those matters of detail which sometimes betray perjured testimony, and details which are of no importance whatever; as also to distinguish between mere inaccuracies in the evidence, arising

from a slovenly habit of thought, and inaccuracies which are artfully contrived to deceive.

Inaccurate witnesses, when properly cross-examined, will often destroy the effect of the most accurate, as they will raise a doubt where none would otherwise exist. Inaccuracies, therefore, as to date, time, place, position of the parties, what was said, by whom, and other matters of a like kind, ought not to be overlooked, due regard being had to what was before observed as to mere discrepancies.

While you exercise the utmost vigilance to prevent the admission of matter which is not evidence, care should be taken not to object to every question on that account, or because it may be put in a leading form or in a form that may be otherwise objectionable. Too many objections have the bad effect of wasting time and of raising an unjust suspicion in the mind of the jury.

That you should preserve the most even and calm demeanour in conducting a criminal defence it is hardly necessary to observe. It is, indeed, a part, and no unimportant part, of your case. Irritation and querulousness are bad accompaniments of the best defence; and if you win, it will be in spite of them, and not by their assistance.

Let the worst be stated against you, but if possible, do not let the worst be proved. This must be your object in following closely the witnesses for the prosecution.

In cross-examination, I will repeat, the utmost care should be exercised, otherwise the facts, instead of being toned down, will stand out the more clearly. The danger is so great to the

unfortunate object whose fate may be determined by an injudicious question, that you had better not cross-examine at all if you have not perfect confidence in the line you are taking, and that the answers will not endanger his liberty or life. If you don't know what to ask, ask nothing.

I do not think any advocate, however clever he may be, should take upon himself a defence of any importance till he has had some experience. No man without it can cross-examine unless at great risk. He may ask questions and get answers, but he will be a wonderfully fortunate man if he do not inflict more damage upon his client than upon the witness. It has often occurred that after a spirited cross-examination by a young advocate, he has made the observation, "I think I have settled him, haven't I?" In the civility of my heart I have answered "Yes, *I think you have.*" At the same time, I have no doubt we were speaking of two very different persons, he referring to the witness and I thinking of his client. The best preparation a man can have to qualify himself to cross-examine is to study carefully the mode in which the best men proceed, and to acquire a knowledge of character, of human nature, of what is called "the world." One man may have a greater aptitude than another, but with the most gifted it requires years of training and observation to arrive at anything like perfection. With the ordinary individual, therefore, too much study cannot be given to acquiring sound knowledge of the art. While your cross-examination is proceeding, the counsel for the prosecution will watch for supplemental evidence, or for an opening through

which he may drag some in. Frequently, he would have few materials to ask a verdict upon without this so-called cross-examination, and that being so, ask as little as you possibly can. If you cannot serve your client, avoid injuring him. Of course, the more ability you possess and the more knowledge you acquire, the more you will be able to accomplish with the fewest questions.

At the commencement it is a good plan to throw out one or two trifling and harmless questions in order to ascertain the temper and feeling of the witness. It will tend also to put him on good terms with you if there be a necessity for it. He may have been brought into Court against his will and obliged to say what he has said; but with a little encouragement and a little gentle leading he will probably follow you with the docility of a friendly witness. He may know a great deal more than he has said, and what he knows may throw much light on what has gone before. He may be a well-disposed witness after all, and likely enough will give a different colour to the case. You know how greatly a coat of colouring changes the appearance of a bare wall, so it does the aspect of a *bare fact*. But if you commence by treating this witness in a hostile spirit, as though, being a witness for the prosecution, he must necessarily be adverse in feeling to the prisoner, you will lose the benefit of all the kind things he may be able to say in your behalf.

If on the other hand you perceive that a witness has a strong feeling in the matter, the less you have to do with him the better. He will drive every nail home which the prosecution may not

have struck forcibly enough. Ask him one question he will answer as if you had asked him half-a-dozen, and every answer will be unfavourable. You might as well butt the witness-box with your head with a view to making evidence (and better for your client's sake) as question a witness of this kind. If you should get anything favourable it will be by accident, and because he does not perceive the drift of your question. Everything you ask gives him the opportunity for a speech against the prisoner. If you *can show his strong feeling* by a well-conceived question, it is all that you ought to attempt with a witness of this kind, unless, indeed, you can *convict him of an untruth.* These are your only chances with him.

But many hostile witnesses may be treated in a different manner according to their degrees of hostility and their temperament. You may sometimes destroy the effect of the evidence of an adverse witness by making him appear more hostile still. You may make him exaggerate or unsay something and say it again. If you cannot pull him off his high horse on one side you may perhaps push him over on the other, and so long as you get him off it does not much matter on which side you land him. Perhaps he will show himself *spiteful*, and lose his temper at the same time; if so, it will be in your favour, for juries dislike above all things to see spite in the witness-box.

Every question must be asked with a view to *the theory of the defence.* Mere contradictions will not serve unless you can show that they are in opposition to the probabilities of your case.

Having completed your duty in this respect,

you will not be indiscreet enough to "submit to the Court that there is no evidence to go to the jury" if there be some; but will consider whether you will call witnesses, if you should not have made up your mind at an earlier stage of the case. If the evidence against you be weak, and your own not strong, you ought not to call any. By doing so, you will lose the last word, and, what is perhaps of far greater importance, run the risk of strengthening the case against you on the cross-examination by the counsel for the prosecution. This has often been done to the ruin of the accused.

If at length you find that you ought to call witnesses, avoid calling too many; or rather, I should say, too many to the same subject-matter. One good witness is worth a dozen indifferent ones, and it is much more easy to get contradictions from a dozen than from two or three; you always run the risk of witnesses contradicting one another, however truthful they may be. Remember, too, that a contradiction in your witnesses will be a much more serious affair than a contradiction among those of the other side; for though the law presumes every man innocent until he be proved guilty, the jury presume every man on his trial to be guilty until the evidence fails to convict him. They will look in most cases with some suspicion upon the evidence for the defence, and every weak point in it will be magnified accordingly. In most cases, the witnesses for a prisoner either save or convict him. If they are good witnesses, and honest, they are of inestimable importance, but if they are shady they will almost always be shaky, and infinitely worse than none at all.

But whether you call them or not, you will at last come to that very important part of your duty, namely, your speech on behalf of your client. How to speak it is not within the province of this work to teach, even if I were equal to the task. But I will assume that you have made that branch of advocacy your careful and assiduous study; that you have attended debating societies, have spoken at public meetings, at the sea-side, and in your private room; that you have practised the art with all the enthusiasm of one desirous of becoming eminent in your profession; and with all the care that you could possibly bestow upon its cultivation; that you have, in short, done all in your power to make yourself efficient in this fascinating branch of your professional duties.

You will now in the pleasantest manner but with due gravity commence your defence, and if the accused be a person of character, especially if he occupy any position in the social scale, you will do so by bringing those facts prominently before the jury. Nothing is more calculated to engage their attention and enlist their sympathies than this, besides which, you excite as well as gratify their curiosity. This feeling is akin to surprise, and nothing takes a firmer hold of the attention. At the same time you will almost have excited the *hopes* of the jury on behalf of the accused. The prosecutor will have passed from their minds and a new object presented itself, namely, that of a respectable well-educated man in the dock. Imagination deepens the disgrace and awakens still tenderer sympathies on his behalf. They are sure to think, without any reminder on your part,

of those belonging to him and of the hearts that beat in unison with his own. This is a part which should not be hurried, for you want to give the feelings time to play. Now bring forward the charge; if it be one of enormous guilt, or of a mean and despicable kind, or one revolting to humanity, what a contrast is produced between the character and the crime! There is an inherent improbability against such a man committing such an offence! That is a good contrast to start with.

And, here again, be careful not to hurry the jury away from so good a situation in the drama. If you have performed this part of your defence with art and skill, you have already prepared the mind for the impressions that are to come. A little lingering round the scene, without too much to say, only to give time before you address yourself to argument, will be beneficial. Let them just have time to contemplate the scene and take in its misery.

Connected with the improbabilities will be, possibly, absence of motive. If so, the subject comes in naturally at this point. If a motive have been suggested it must be grappled with, and should be as soon as possible; if not, it is a happy circumstance to be commented upon briefly but with fervour.

The jury, you will find, are following you sentence by sentence and word for word, and the stronger your arguments the more intently they listen. If now you can point out how they may acquit consistently with their oaths they will feel inclined to do so. If you can explain away satisfactorily one or two awkward points in the evidence, the verdict will be yours. It has reduced

itself to this already. Without the employment of any claptrap you have gone a long way on your road. You have reached the feelings of the jury and they *wish* to acquit.

Now it is your duty to show how it can be done. Bring up the evidence for the prosecution, not like a tender delicate creature, to be nurtured as it was by the counsel on the other side, but like a hideous thing to be looked at and put away out of sight. What is this evidence? Can you proceed to show that it is not consistent as a truthful story should be, but a patchwork performance of many pieces and many colours, a thing of no pattern? If so, it begins to lose its hold upon the jury; the improbabilities thicken and strengthen; there is increasing sympathy for the accused as each juryman begins to think he may be the victim of a terrible mistake, or, worse, of a horrible conspiracy! Encourage that feeling, not by saying that it is so, but by leading their minds to form the conclusion for themselves. Surely such a charge should, if made, be supported by conclusive and unimpeachable evidence, not such as is open to the observations you are making; not by evidence every part of which seems to be giving way under examination. And can you not point out how a man with an estimable character should not be destroyed by witnesses without any character at all? If there be one such among the witnesses for the prosecution it will answer your purpose. It may be the prosecutor is a rapacious money-lender and the accused a man who borrows. The prosecutor may be a wrecker of homes and the prisoner a man whose home is wrecked, and who is prosecuted for

obtaining money by some false pretence upon a bill of sale. Accuser and accused may thus be brought into contrast, until at last the one will be looked upon with compassion and the other with contempt.

Perhaps you will discover some motive for the prosecution apart from the divine "interests of justice;" if so, that is a kind of torpedo which, when you explode, will blow the honest prosecutor out of the water. Having reached this point, now will be the time for a display of your powers of declamation. So you may prepare to use them without delay, for you have Innocence in the dock and Guilt in the witness-box! Such at least in the eyes of the jury is the last situation of the drama. And here you may resume your seat while I drop the curtain.

If any one thinks my picture exaggerated or overdrawn, I can only answer it is from the life. Many an eloquent advocate past and present has accomplished all that I have said by the same or similar means. And whenever you reach a point in a defence where the minds of the jury are wavering, and where you can honestly excite a prejudice against the prosecutor or his witnesses, a few heart-warm sentences of well-timed declamation are all that is necessary to demolish the case for the prosecution. Declamation, judiciously employed, is like cavalry in battle dashing in just as the enemy is on the point of yielding, and sweeping him from the field.

William Howitt, in speaking of Erskine as an advocate, says, "Lord Erskine has been pronounced by other distinguished lawyers the greatest forensic

orator that England has ever produced, but his fiery and electric eloquence was not more remarkable than the warm and noble impulses of his heart. They were his humanity and patriotism, his indignation against whatever was unjust and oppressive, which kindled and inspired his great intellect, and *their expression carried irresistibly the souls of his hearers along with him.* Under the fervid outgush of his intense love of right, his vehement hatred of human wrong, the dullest hearts caught a new life and fire, and he drew verdicts from men who, without his communicated spirit, would have never dreamed of the sublime heights of truth and justice to which he carried them. The secret of his triumphs was the possession of a noble heart vivifying a quick and instinct-like intellect. He seemed to spring at once to the truth of the case submitted to him, and he hurried his hearers with him almost unconsciously to the same goal. It is rare to see a mind like Erskine's surviving all the cold cautions and technical sophistries of a legal education, and seeking its triumphs only in the triumphs of humanity; a mind unseduced by royal favour or party, much less by selfish individual interests; exulting in securing the victory of truth, even at the highest peril of self-sacrifice. Such men may have their weaknesses, as Erskine had his, but they have a strength to which no mere intellect or learning can ever reach. For this reason there is no life of any lawyer which I ever read with the same delight as I have read that of Thomas Erskine."

If you have called witnesses, of course your obvious duty will be to point out the contrast

between their evidence and that of the witnesses for the Crown, as well as the fact of its being more compatible with the character of the accused.

You will perceive that character stands prominently forward again and again without any ostentatious display. It should not be used as though in so many words you asked the jury to acquit because the prisoner bore a good character; it is of great weight where probabilities are balanced and circumstances are doubtful—where they may receive a construction either favourable or unfavourable to the person charged. It should play its part like the principal character in a drama, appearing always at the right time and in the appropriate scene. It is the one thing that has saved many a rogue from his well-deserved doom, but it has also saved many an honest man unjustly charged from ruin. It has preserved many a family from misery and degradation. If you have this ally the enemy must be strong who defeats you. Of course there are cases where character does not come in; but there are so many where it does that it cannot be out of place to insist upon it as though there were hardly an exception.

I do not for a moment imply that facts go for little where the sympathies of a jury are strongly roused in a prisoner's behalf. It is the view they are induced to take of the evidence through the medium of character, after *balancing the probabilities*, that makes character of such inestimable value. To rouse the feelings without laying hold of the judgment would be idle. You might obtain a recommendation to mercy, but you would scarcely ever get a verdict of acquittal.

It may be that the judgment is more easily deceived when the passions are roused, but if so you are not responsible. Human nature was, I presume, intended to be what it is, and when it gets into the jury-box it is the duty of the advocate to make the best use of it he fairly can in the interests of his client. What are sometimes called its weaknesses may be ranked amongst its noblest virtues, and I think an advocate is entitled to lay hold of them firmly when he is engaged, as he sometimes is, in doing battle with its meanest vices.

The student will not suppose that I have portrayed what will be the general result of his efforts in criminal defences, but I trust it will be very frequently within his happy experience. My picture may seem to some overdrawn, and probably would be open to the charge were it not that it has been so often verified in the experience of many eminent counsel of our day.

CHAPTER XII.

ILLUSTRATIVE CASES.

WHILE the first edition was passing through the press, and within ten days of one another, the following cases were tried, and, as they seem to illustrate what has been said with reference to the conduct of a defence in a criminal case, I give the facts deposed to in evidence and the points made in cross-examination. It will be observed that no witnesses were called for the prisoners as to fact (except in the Bookbinder's Case), and character was strongly relied upon.

Of course, no one case can be a precedent for another; but every good defence is a model upon the lines of which other defences may be laid. Facts will and must be different, but the object of the combination of facts in all cases on the part of the prosecution is to obtain a conviction. The object of the defence is to disintegrate the mass of facts or to ward off the probable result.

1.—THE POSTMAN'S CASE.

A POSTMAN was indicted for stealing a shilling. A second indictment charged him with obtaining it by false pretences, with intent to defraud. This was the charge upon which he was tried.

EVIDENCE: He received as a letter-carrier on

the 10th April from the post-office, a letter to deliver on his ordinary round. It was directed "Miss Brown, No. 50, Grayham Street." The letter was a soldier's letter from Zululand, and was entitled to come post-free.

The prisoner inquired of a Mrs. Smith where Miss Brown lived, as she had removed from No. 50.

Mrs. Smith would show him.

The prisoner said "there is a shilling to pay." Some one, but not the post-office authorities, had marked the letter 1/– in pencil; evidence tended to prove prisoner had marked it himself.

Mrs. Smith took the prisoner to a Mrs. Jones and said that was where Miss Brown had removed to. On arriving, Mrs. Smith said to Mrs. Jones "here is a letter for Miss Brown and there is a shilling to pay," whereupon the prisoner handed in the letter and received the shilling; Mrs. Jones remarking that Miss Brown would be only too glad to pay the shilling, for "the letter was one she was expecting from her brother from the wars." Mrs. Smith said, jocularly, "let us spend the shilling." "No," answered the conscientious postman, "it does not belong to me, I have got to pay it in."

Both these witnesses knew the prisoner; and the would-be spendthrift, Smith, knew him well, as would seem from her familiarity.

A day or two after, the prisoner was on his round and again saw the witnesses, whom one might not irreverently call the "merry wives," and Miss Brown.

Mrs. Smith said, "this is the postman who brought that letter from Zululand." "Yes," answered the prisoner, "and if it had'nt been for

me she would never have had it at all, for it had been kicking about for several days."

The prisoner was identified by several witnesses, by a whole population one might say. It was a Government Prosecution.

Two months after, in consequence of Miss Brown reporting to the post-office authorities the circumstances above stated, a letter was addressed by them to the prisoner calling his attention to the facts and asking for an explanation.

The prisoner replied (and his letter was in evidence), that, undoubtedly, he must have been on that district at the time and on the particular delivery when the letter was given out, but he had no recollection of it at all, and certainly *never received the shilling;* he gave the lie direct to that, and that was the awkward point in the case.

The post-office sheets were produced to prove the nonpayment over by the prisoner.

This was the case for the prosecution, except the witnesses to identify; and certainly, on paper, it does look a somewhat hopeless one to defend.

The counsel for the defence commenced cross-examining as to identity; the prosecution having taken so much trouble and called so many witnesses to prove it, it was worth disputing as you will see. It was made the chief point on behalf of the Crown. If they established that, all other defences must be hopeless—so they established it.

It was very curious that the point fixed upon by the prosecution as their strength was thought by them the wrong point to attack on the part of the defence.

But it was cross-examined to so far as two or three witnesses were concerned and then dropped.

The points elicited in cross-examination were these:—

1. The letter had been given out by the post-office authorities on the morning in question without being stamped—an *oversight* on their part.

2. There was another oversight on the part of the authorities at another post-office with regard to the same letter.

3. There was nothing to show it was a soldier's letter and entitled to come free.

4. The prisoner might under the circumstances have thought a shilling was due upon it, which would be the postage from Zululand.

5. If he had charged a shilling and then paid it over, it would, although irregular, have been the right and proper thing to do.

6. The sheet for the 11th April was not produced, and although the shilling did not appear in the pay-sheet of the 10th, the witness would not absolutely swear it was never paid in.

(Probabilities, however, strong the other way, inasmuch as prisoner said *he had never had it.*)

7. The post-office was sometimes guilty of oversights, and the failure to enter the shilling might have been one.

8. The prisoner might by an oversight have omitted to pay it over.

9. His attention was not called to the circumstances till two months after.

10. Multitude of letters, some requiring payment, others not, had passed through his hands since that time.

11. His frank avowal that he must have received the letter, but did not remember the circumstances.

The learned counsel for the prosecution was, perhaps, justified in thinking from the apparently *main line* of cross-examination that identity was the only defence, and he accordingly made it the principal subject of comment in his summing-up. It was, however, stated on behalf of the prisoner, that there was no question as to identity, as he himself had *admitted it in his own handwriting.* The real question was, whether the prisoner, who bore a most excellent character, and had been in the service of the post-office for ten years, had received the shilling *with intent to defraud,* or whether he had received it and then have forgotten to pay it over, and forgotten indeed all about it; or whether he may not even have paid it over and its entry be on some other sheet. It was not probable that a young man with so valuable a character would sell it for a shilling.

Witnesses to the young man's goodness were called, and the jury without hesitation acquitted. Without saying that the counsel for the prosecution were wrong in the line they took, it is just within the range of possibility that if the cross-examination had not been to identity at all that matter would have been taken as proved in the summing-up. The eloquence would have been expended on those minor incidents and trifling theories which looked so insignificant while they were being blown about by a breezy cross-examination, but which took root at last, nevertheless, and grew to be such great probabilities under the ripening influence of a warm

and genial speech. And then character lit them all up with such pleasant sunshine that the jury could never look on the dungeon shadows again—and so acquitted.

This was a dreadfully woe-begone case to look at; but where character is to be had, bad cases in appearance are scarcely ever altogether hopeless. And it might be here remarked that in calling witnesses to character, it is better, in my opinion, to call many than one. One snow-flake may not be whiter than another, but an accumulation of flakes gives weight and consistency, and sometimes irresistibility. It is often said by the judge, "You cannot carry character any higher, Mr. Jones, can you, if you call twenty?" No, my lord, not so far as your logical mind is concerned; and to your lordship the forty-seventh proposition might be abundantly clear by the ordinary process of demonstration; but the jury might like to see the two squares measured and cut up, and placed on the big one. How then, my lord? In that case I would say, call your witnesses; two or three of them may not have made much impression, but here comes one between whom and some of the jury there may be a bond of sympathy or good-fellowship, or of some other equally excellent material; and they may attach very great weight to his opinion, and very little to the opinion of some of the others. I would therefore say, call all your witnesses to character, especially if you have got nothing else to rely upon. If it comes to nothing, you may as well have plenty of it. This case will also show that it is not always wise to let your cross-examination reveal all your points. It should be used for the

purposes of *defence*, not for those of the prosecution. You must elicit your points in cross-examintion, but you need not gibbet them; otherwise you may find them turned into scarecrows by the speech for the prosecution.

This case further illustrates the theory that "*the Crown can do no wrong.*" It was not enough to prove that the letter of the Postman was in his handwriting with all its admissions; but it was considered necessary to subpœna a multitude of witnesses to prove that the Postman was *the* Postman who admitted he was the *particular* Postman to whom he referred in his letter of admission as the Postman who delivered the letter. In other words, to prove that the man was himself and not somebody else.

2.—THE POLICEMAN'S CASE.

THE next case was that of a policeman who was indicted for stealing the sum of nine shillings and tenpence halfpenny. The facts deposed to by the witnesses were as follow:—In company with a sergeant of the ——— Regiment, he had arrested a deserter, and after delivering him up to the authorities, went into a public-house and called for two glasses of ale. On being served, he paid three penny pieces to the landlady. At this time a man whom I will name Lounger was standing with his elbow leaning on the counter, and almost facing the prisoner and the sergeant. He also had some ale before him. While these persons were in front of the bar, a woman came in, called for a glass of ale, and placed on the counter a

half-sovereign. The landlady took the coin into a parlour behind the bar for the purpose of getting change. Meanwhile the woman took her ale and went into a room on the opposite side of the bar. After a minute or so had elapsed the landlady returned with the change (the sum in question), consisting of silver and copper, and placed it on the counter between the policeman and the sergeant, where it lay for about five minutes. The landlady, who was a respectable woman, and unimpeachable as to character, swore that after the lapse of that time she saw the policeman take up the change and put it in his pocket. She made no remark as he did so, because she had forgotten whose change it was. The soldier and the sergeant then quickly finished their ale and went away. In about a minute or so the woman to whom it belonged came to the counter and asked for her money. Upon that, the landlady, immediately calling to mind the circumstance, exclaimed, "Why, the policeman has got it!" Lounger then, aroused to the liveliness of the situation, said, "Yes he has; I saw him take it."

Upon this they all went to the door, and the sergeant, who lived in barracks nearly opposite, was not in sight; but the policeman was seen going along some hundred yards from the house. Lounger was then told by the landlady to go and bring him back.

Instead of Lounger going to the police-constable it appeared that he went to the sergeant. And the landlady, before the magistrates, had said no more than that she sent him to the prisoner, but did not see him again till nearly nine o'clock at night. (This point should be borne in mind.) Lounger's evidence, in addition to his saying that he saw the

money taken, was, that he went to the sergeant and then returned to the public-house and afterwards went after the prisoner, whom he saw at the police station; that he gave information against him, upon which he was taken into custody. The sergeant was called and said that he saw the money lying on the counter a minute before he and the prisoner left the house. He *could not say if it was there when they left.*

This was the case for the prosecution. Upon this evidence it looks somewhat hopeless. If either of the two witnesses, the landlady or Lounger could be believed, there was no answer to be made.

There were no witnesses to fact for the prisoner. The defence therefore must rest upon the cross-examination and the improbability of the story being true arising mainly from the good character of the person charged.

I will now state the points made in cross-examination, and the reader will do well to remember the exact facts narrated above as given in the evidence-in-chief.

1st. The woman who had given the half-sovereign was cross-examined.

Q. "Who was in the bar when you went in?"

A. "No one, I believe."

Q. "You placed the half-sovereign on the counter?"

A. "I did."

This was the whole of her evidence.

2nd. The next witness cross-examined was the landlady.

Q. "How long is the counter?"

A. "Five feet."

Q. "Who came into the house first?"

A. "Lounger."

Q. "Who next?"

A. "The two men."

Q. "And then?"

A. "The woman."

Q. "Did the men come to the counter as soon as they came in?"

A. "Yes."

The Witness: "The woman may not have seen the men when she came in."

Q. "Why do you say that?"

No answer.

Q. "Do you know what the last witness has sworn?"

A. "She may not have seen them."

This observation on the part of the witness doubtless arose from the fact that she had talked the matter over and knew she was contradicted upon the depositions. It was, of course, not pursued on behalf of the prisoner. It was a point made, and being taken in connection with the want of memory of the prosecutrix, as to whom the change belonged, was not without value.

Q. "Were there glasses on the counter, between you and the prisoner?"

A. "There were."

Q. "And the handles of the beer-engine?"

A. "Yes."

Q. "Six of them?"

A. "Yes."

Q. "They would reach two-thirds of the way along the middle of the counter?"

A. "Yes."

Q. "Did you leave the bar after the prisoner and the sergeant were gone?"

A. "I did."

Q. "Who was left?"

A. "Lounger."

Q. "And no one else?"

A. "No one."

Q. "Were you busy serving other customers in other parts of the house while the money was on the counter?"

A. "I was."

Here I should pause a moment to call the reader's attention to a somewhat common blunder which might have been made by a very inexperienced counsel. The temptation to ask the following question would have been very great to beginners:—

"*Might not someone else have taken it?*"

The answer would have been "No!" to a certainty, with much emphasis. This was matter of argument for the jury, and unless you cut the ground away from you by putting such a question, there would arise in their minds a strong inference that it might be so.

The next question was:—

Q. "Did you send Lounger after the prisoner?"

A. "I sent him to the sergeant."

Q. "Is that the same as you deposed before the magistrate?"

A. "It is."

Depositions produced; found to be *not* the same. It was there stated in accordance with last question, which makes something more than a slight discrepancy; the effect made on the jury being not unimportant.

Q. "That is what you swore?"

A. "It is; but I sent him to the sergeant, not to the prisoner."

Here is not only a contradiction but an improbability, as well as an unreasonable piece of conduct, all which the jury notice as becomes them.

Q. "Did you authorise Lounger to give the policeman into custody?" Question put in a tone that makes her afraid of the consequences, so she answers with considerable emphasis and no little indignation,

A. "*Certainly* not!"

Q. "Nor to take any proceedings against the man?"

A. "I did not!!" with at least two notes of indignation.

Lounger is next cross-examined, and states that he was sent to the sergeant and not to the prisoner.

Asked what the latter did with the money after he had taken it from the counter, he said:—

"How do I know? He might ha' put it in his 'at for what I know!"

This was a foolish answer for the prosecution, but I am inclined to think that one or two stupid-looking questions had worked Lounger into giving a stupid answer, as will sometimes happen.

The sergeant was cross-examined simply as follows:—

Q. "You have been in the army many years?"

A. "Ten."

Q. "And have risen to the position of sergeant?"

A. "Yes."

Q. "Were you on duty on this day with the prisoner, in apprehending a deserter?"

A. "Yes."

Q. "You stood close to him and were talking to him while the change was lying on the counter?"

A. "Yes."

Q. "Did he touch it?"

A. "I never saw him."

Q. "Could he have taken it up without your seeing him?"

A. "He could not."

Then came the character of the prisoner: not exhibited sensationally like a dancing creature on a tight-rope with a balance-pole, but in a commonplace manner and in every-day costume, arranging as it were the probabilities and the improbabilities; not attempting to captivate the weakness of the jury, but appealing only to their good common sense: which good common sense after short deliberation returned a verdict of *not guilty*.

It was said afterwards by the chief authority of the police in the county that his belief was that Lounger did not go to the policeman in the first instance, as stated in the original depositions, for fear the policeman should apprehend him on the same charge, which, perhaps, would have been awkward for Lounger.

Be that as it may, there was immense importance in this discrepancy between the statements, and it led, among other matters, to the successful result which followed.

Whenever some one else may have done something with which your client is charged, you are at a point where two ways meet; almost every-

thing depends upon the road counsel takes, and that depends upon what in a lower animal would be called an "unerring instinct;"—in man it is called "reason," and is often wrong.

3.—THE BOOKBINDER'S CASE.

THE next case is one of a very different character, but I think equally useful by way of illustration. The evidence is less direct, but the circumstantiality of it rendered it dangerous. And it may be here remarked, with regard to circumstantial evidence generally, that although it is often said that it cannot lie, it possesses the more dangerous quality of being able to deceive by its apparent truthfulness. Circumstances, facts as they are, not to be got rid of in the concrete by physical strength are sometimes dangerously deceptive. You cannot cross-examine a fact, but you may give a different complexion to it; you may divest it of a false covering or remove an unnatural colouring; you may examine it and ascertain its quality; above all, you may *weigh* it. There may be an appearance of weight and substantiality by reason of its mere bulk, but you may find it after all light as a bubble; it may even be floated away from the case altogether. I will now give the circumstances that had to be disposed of in the case alluded to.

A highly-respected tradesman, whom I will call Marks, was indicted with a man herein named Pincher, for stealing and receiving eighty tablets, which were the *titles* of books to be affixed to the

covers, and about twenty books of gold leaf. The prosecutor was in a large way of business in the same trade as Marks, and Pincher was in his employment. The prosecutor's evidence was to this effect:—Ten of the tablets I bought at a certain sale. They have a peculiar mark. I bought all that were in stock. Those produced are some of them. The gold-leaf books (three or four) produced, had *a private mark* made by a pin; it was made because we were being robbed. Several other tablets were sworn to as his because they had been *stamped with a tool which had a peculiar flaw in it.* None had ever been sold, and the tool was produced. Pincher had pleaded guilty to stealing the whole of the articles, and from information given by him a detective went to Marks' house. Upon a board at the prosecutor's house he had found the words of a *label* in gold leaf which the *prisoner Marks was using for the completion of an order.* On the detective going into the prisoner's house, he said, "I have come to see some books which you are binding and lettering for the A. B. C. Board."

"What books?" exclaimed Marks; "I have no books."

The detective then said, "As you have given me that answer, I shall search your house," and thereupon proceeded to do so. At this time a person came in to see Marks, and the latter invited him to go and have a glass of ale. The detective went with them, and they all returned together. "Then," said the detective, "I saw Marks give his son a *peculiar look;* I told him so, and said I should now examine everything in the house. He found

a great number of lettered tablets, among them *those produced*, and sworn to by the prosecutor as having been *stamped with the tool which contained the flaw*. On these being found, Marks said, "Oh, I have had them *four or five years*."

It was proved that the tool had only had the flaw in it for five or six months.

Found also were other tablets, containing *the particular mark*, and sworn to as having been purchased by the prosecutor. On going into a room in the basement, the detective's attention was attracted to the fact of something burning, and on removing a kind of tray which had been placed against the stove, a *number of gold-leaf books* were found burning; gold was also scattered on the floor.

"What is this?" inquired the detective.

"Oh, we are going to tea," said one of the women.

"Do you have gold-leaf tea?" asked the facetious officer; "if you do it must come expensive."

He then drew out from the fire *three or four books, with the private mark of the prosecutor on them*, as described. Marks was then taken into custody.

This was the evidence for the prosecution: chain of circumstances very strong, if it will only bear the strain of cross-examination.

First the prosecutor to the following effect in cross-examination:—

Pincher worked for me at binding and lettering. He was in the habit of using the tool with the flaw in it. He had no right to work in his leisure for anyone else: I should have discharged him if I had known it. But if Pincher, being a skilful workman, had worked for anyone else, he *might*

have taken the tool with the flaw in it, and used it on someone else's tablets. This was, of course, self-evident, but worth emphasising by the mouth of the prosecutor.

That was one point, therefore, tolerably well disposed of, if the jury could be got to take that view, which the character of the accused will undoubtedly persuade them to do, provided always we can dispose of the other awkward-looking facts of the case, especially the gold-leaf tea. The next question was with regard to the tablets marked with a particular mark, consisting of *another flaw in one of the golden lines* caused by another defective tool. These, as stated, were bought at a sale—at a Mr. Meredith's sale. But on cross-examination it turned out that Mr. Meredith having become bankrupt, there was a great sale of the stock-in-trade, which all respectable bookbinders could attend, the defendant among the rest; and as for the prosecutor saying that he bought *all* the tablets in stock on that occasion, that did not seem to satisfy the counsel for the defence, who implied by certain questions that some other goods of like character and quality, and with the self-same flaw in them, might have been on hand *before the sale by auction*, some of which Mr. Marks might have purchased. The prosecutor himself could not deny that there was the possibility of this being the case, and the jury seemed to think there was *probability* as well. As before observed, if possibility, probability perhaps. Another point therefore immensely in favour of the prisoner. Still there was that gold-leaf tea yet to dispose of. *The books with the private marks on them*, and *on the fire!* How can you get over

that? Let us see. Was the defendant or his son in the room at the time of the burning?—The detective says, No.

Had Marks ever been out of the detective's custody?

No.

Clearly then, *he* had not burnt nor given any directions to burn these old books.

Had any word been mentioned up to that moment about books of leaf gold?

No.

Had there been any search for such books?—There had not.

This question must have been based on knowledge of the fact, or it would have been dangerous. It is not necessary to point out why. The answer was important, as it showed two things clearly enough—first, it was not in consequence of any inquiry for such books that a sudden alarm was raised, lest they should be found; if it had been, guilty knowledge would be manifest enough: secondly, the thief, who had given information, could not have told the detective that he had stolen any books of gold-leaf.

Those two points then are well established. No confession of stealing and no fear of the detective finding any stolen books. Still the private mark *and* the burning. If the mark stood alone, it would conclusively prove that the books were or had been the property of the prosecutor, does not the burning show guilty knowledge? Not if the defendant did not authorise the burning. The private mark then stands, as I take it, thus: if it can be shown that the books may have come

into the house of defendant *without his knowledge*, he is clearly entitled to be acquitted on all points. To show this, it was opened and proved by unimpeachable testimony that, however wrong it might be, Pincher, being an adept at labelling with gold leaf, was employed in the evening by the defendant to letter for him; further that Pincher always brought his own tools, and *among them the tool in question with the flaw in it.* It was proved that defendant, when his workmen wanted gold-leaf, would give them the money to buy it, and that sometimes they would fetch it and be paid after; that Pincher was left to work late at night and was given money, as the others were, to get leaf if required. What more was wanted than this common-sense argument, that Pincher, although having been provided with money to get the leaf with, *stole the books from his master* instead of purchasing at the proper place and paying for them? If this were so, there would be no guilty knowledge on the defendant's part.

There remains, then, the *burning* to get over, for, although it is fully explained that neither the defendant nor his son was present or could have given instructions at the time, it is an awkward and suspicious fact and must be answered somehow.

The jury would like, above all things, to have that point explained, if explained it can be. About which they do not yet despair, seeing how guilty at one time the other two points looked. They know now that Innocence itself in the hands of an active and intelligent officer may be so dressed up as to look a very Guy Faux of iniquity. There is no explaining the "gold-leaf tea" without witnesses,

so the best witnesses are called, namely:—The workwomen who *made the fire* with the books. These, examined apart, agree on three important points. That they had *no orders or intimations* of any kind to throw those old books on the fire. That, it being tea time, *they had to light a fire* to boil the kettle. That the detective in great detective earnestness and activity, rummaged about everywhere, if haply, he might find materials to work up into a case; and, in so rummaging, looked upon a nest of shelves, where old papers and rubbish were, *just over the stove*, and knocked down a small quantity of the said rubbish, among it the valueless old gold-leaf books in question. This was caught up by one of the women and thrown on to the fire, hence the blaze! "Behold, how great a matter a little fire kindleth!" Truly, it was nigh making a very hell of this man's life, that small fire behind the teaboard.

The jury smile, as they needs must, to see a case that looked so black, frittered away in this manner, and coming to nothing after all. They see something else than *ingenuity* in the defence—that would be a poor set-off against facts and is never of much use when *visible*. Ingenuity should be always kept out of sight like the machinery that produces the electric light. They see *probability*. It looks very natural and the more you look at it the more natural it grows. It is what scientists perhaps would call a "protoplasm," which, if vivified by *character*, will grow into shape and real existence. So a number of witnesses are called to character, a dozen at least, every one *seeming* to add something to the probability of the man's innocence. The

improbability of such a man's lending himself to such a transaction grows absurd, till at last innocence once more quickens into life and the man is pronounced "not guilty" by his country.

There is no class of men that the police take so much delight in "running in" as the respectable tradesman. They are as proud as the astronomer who captures a wandering comet, or the naturalist who claps his hat on some peculiar butterfly. You will therefore find a proportionate eagerness in the witness-box. *Avail yourself of it*, for your client's sake. He is the cause, let him have the benefit of it.

With regard to calling witnesses to character I would make this further observation. There is all the difference in the world between one mode of examining them and another. One advocate will examine so as to give the utmost weight to the evidence, another will make it look so light that it will be rejected as counterfeit. The one in fact never sends the character into the jury-box, the other never lets it come out. Much depends on the striker whether you make a cannon or send the ball wildly devious all over the table.

This case illustrates also the usefulness of that principle laid down by Lord Justice Bramwell, and which has not yet got into good working order among either the judges or the bar, namely, that it is *not* what one prisoner may say in the presence of another that is evidence against him; and it is not what a prisoner says to a policeman or other

person, and repeated ever so accurately to another prisoner that is evidence against him. And if it be considered for a moment, this must be so. If not evidence in his *absence*, how does his *presence* make it evidence? How does the repetition of it alter its nature and give it a new character? "What," said the learned judge, "is evidence is the *conduct of the accused*," in whose presence another person accused makes a statement, or to whom such statement is repeated, "*the answer he makes on hearing it is evidence;* if he denies it it comes to nothing and is *not evidence* against him."

The case last given will also be an illustration of what has been said as to cross-examining for explanations or reasons. The detective, had he been "severely" cross-examined, would probably have given many dangerous answers, rendering an acquittal extremely difficult. The question, (after discovering a contradiction between the depositions and the evidence at the trial), "Why did you not say so-and-so before the magistrate?" will be sure to bring an awkward and sometimes a fatal answer.

Let it also be said that a question may be capable of two opposite answers, both equally true or equally false according to the tone in which it is asked or answered, or the emphasis on some particular word. Not only, therefore, should the words of a question be well selected, but they should be accompanied with *the tone and emphasis best calculated to elicit the exact answer you require.*

In addressing the jury I have known them reply to a question from the counsel, and say, ironically, "We will tell you presently, sir, what we think." A change in the line of argument has, however, completely altered the effect of the evidence on their minds, and they have returned a verdict of acquittal.

After a little practice, it will be comparatively easy to read the minds of the jury, or at least some of them, and to ascertain, not merely whether they think your argument plausible and ingenious —that would not be sufficient—but whether it falls in *with the line of their own reasoning*, or opens up a probable solution which they can adopt.

4.—AN IMPORTANT QUESTION IN A MURDER CASE.

SOME years ago a junior was engaged for the prosecution in a case of murder, and he certainly should have been presented by the Royal Humane Society with the medal which it awards to those who have been instrumental in saving human life. Whether their gift applies to cases of hanging as well as drowning I do not know.

The prisoner had committed a very atrocious murder (I think it was of his wife), and the main evidence against him was the "*dying declaration*" of his victim. Made in his absence it could only be given in evidence after proof that it was made "with a full consciousness of approaching death."

The medical man who attended her was called to prepare the way for the piece of evidence which, if given, would undoubtedly have hanged the prisoner. The humane junior asked—

"Did she *fear* death?"—"No," said the doctor.

Life-saving junior looked at his attorney, then at his brief, then at the witness.

The witness was perfectly cool, as most doctors are in the witness-box, and knew well enough what answer was required. There was not a motion, however, of assistance.

The ingenious young counsel however *repeated* the question.

"Did she *fear* death?"—Answer: "O dear no, not at all!"

The Judge: "You cannot put in the statement; that will do, doctor." And you cannot find a verdict of guilty, gentlemen, it must be manslaughter!

Manslaughter accordingly!

An instructive lesson this to all juniors to ask the right question; and an excellent lesson to all juniors then present (and to come, now it's published) NOT to cross-examine upon all occasions. One little question put by the counsel for the defence *would have hanged the prisoner;* properly, no doubt, (I am not writing in a humane vein), but it was not the *duty* of the counsel who defended the wretch to hang him.

This occurred almost as soon as I was called to the bar, and the scene is as fresh to my mind at this moment as it was then. The blank look on the face of the counsel; the sagacious smile of the judge, who evidently thought the right question would be put next; the quick perceptive glance of the witness, who stood leaning on the witness-box with his hands carelessly folded, and who had just the expression of face which an intelligent being

has who asks you to guess something, and finds your answer very near and yet a very long way off —all this is still before me. And I have a vivid sense of the excitement I experienced as I wondered whether the right question would be put or not. I am sorry to confess to a feeling of disappointment when it was not, for according to my judgment, if if ever a man deserved the full benefit of a dying declaration it was the devil-man in the dock, who escaped only through the blunder of an inexperienced advocate.

Never was *red lobster* more certainly *alive*. The answer of the doctor was undoubtedly both true and untrue. In the letter it was true, in the *meaning* of the question it was untrue; because the woman was unquestionably *conscious of her approaching dissolution*. In a case, however, where life and death hang upon a word, it seems to me the doctor was right in answering according to the letter. Let us at least be accurate and precise in our language where life or death depends upon it.

Did she fear, or did she know, or was she conscious that death was near might be said to convey the same meaning. Out of Court perhaps they would, but in Court words are fetters, they restrain human action and limit human intention. It might be well if language could at all times accurately define the idea, for it is through the elasticity of words capable of being stretched so as to embrace opposite meanings that half the quarrels of the world arise, especially its *legal quarrels*.

5.—A HORSE-STEALING CASE.

THE following case, which occurred at Sessions, is a remarkable defence in which humour played a prominent part.

A man was charged with stealing a horse. He was found riding the animal into a market town some three or four miles away from the meadow where the horse had been turned out to graze. A policeman stopped him and took man and beast in charge.

CROSS-EXAMINATION: There was a gap in the hedge of the meadow which abutted on the highway.

Horse was going very fast when the policeman met him.

(Artful policeman made him go at a *terrific* pace. These police officers are so subtle in the witness-box.)

There was a piece of halter round the *neck* of the animal, to which the prisoner was holding.

Prisoner did not stop when policeman shouted out.

Q. "Did the horse?"

A. "No, sir."

Q. "Horse knew the town well, did he not?—was accustomed to be put up at an inn there and baited?"

A. "Can't say, sir."

Q. "Can't say, don't you know it as a fact?"

A. "I believe he did, but I don't know."

Q. "You have said the prisoner gave no account of how he became possessed of the horse?"

A. "No, sir."

Q. "Did he not say he had come a long way that morning?"

A. "He did say that, sir."

(Look this way, if you please, policeman.)

It is always better for men who are engaged in a personal contest (pugilistic or otherwise) to look each other in the face.

Q. "Did he not say he had been looking after work at the town of———?"

(Policeman laughs and strokes his chin.)

A. "I don't think he did, sir."

Q. "Don't think he did, are you sure he did not?"

A. "I aint quite sure, sir. I think he said he'd been lookin' after work."

Q. "Yes, and that he had not got any that day?"

A. "He did, sir."

Q. "And was returning to ———?"

A. "He did say that, sir."

Q. "Where was it he said he had been after work?"

(Policeman hesitates, and again rubs his chin—this time with effect, for he says)—

A. "I think he *did* say the town of ———, sir?"

(The jury smile at one another, and shake their heads. This looks uncommonly like equivocation on the part of the active and intelligent one. But let us get on.)

Q. "How far is the town of H——— from the town of W———?"

A. "A matter of fourteen mile, sir."

Q. "Did he say he had walked all the way?"

A. "He did."

Q. "And was tired?"

A. "He might have done."

Q. "But did he?"

A. "Well I believe he did, sir."

Q. "And that the horse was feeding in the highway?"

A. "Yes, he said that, I believe."

Q. "Believe, but you know he did?"

A. "Well, he did."

Q. "And that there was a bit of halter on his neck?"

A. "I believe he did say something of that sort; I won't be sure."

Q. "Oh, yes you will—quite sure—try again?"

A. "Well, he did."

Q. "And that he got up to have a ride?"

Policeman sees the drift, and grins—jury smiles—everybody smiles, including judge.

JUDGE: Q. "Did he say so, witness?"

A. "He might have done, your honour" (with a big H).

Q. "And that the horse ran away with him?"

Here there was a roar of laughter, at which the intelligent one shakes his head.

Q. "He *was* running away, you know?"

Policeman (laughing;)

A. "He was *that*, sir."

Q. "Who was running away?"

(Policeman, after considerable hesitation and chin stroking, and amid great laughter.)

A. "The horse, I suppose, sir."

Q. "And did he say he could not stop him, because he had not the cord in the animal's mouth?"

A. "I believe he did; I won't be sure."

Q. "Why not be sure—he said it, you know."

A. (Vehemently) "Well, he *did*, if you like to have it so!"

The mode in which this was done I cannot pretend to give; but after a somewhat humorous speech, the jury were in a state of excellent spirits. The Chairman did not sum up greatly against the prisoner, who was a mechanic out of employ, and who in all probability did not steal the horse, although it did look somewhat like it.

Points were made as to his being known in the neighbourhood, and as to the animal having a large circle of acquaintance in the market town. Above all the prisoner had a good character, and the horse a bad one.

Verdict of acquittal.

6.—AN ACTION FOR MALICIOUS PROSECUTION.

A Mr. Goldy became acquainted with a Mr. Flowery, who described in mellifluous language a wonderful process he had discovered for making Dietetic and Digestive Buns and Crumpets. His earnest desire was to obtain from Goldy an uncertain amount of spare capital which the latter might possess at any time during the continuance of the Bun and Crumpet Company.

Goldy, anxious to improve the class of buns and crumpets for the national benefit, and to avoid

liability as a partner, obtained a book which is the standard authority when a man is desirous of raising a lawyer on his own ground.

"*Every man his own Lawyer*" was purchased, and Goldly, following its instructions, soon threw out legal sprouts, and developed day by day under his own frame until at length he was fit to cut. In other words (less horticultural) he was ripe for the market, which market was "*The National Dietetic and Digestive Bun and Crumpet Company.*"

So accomplished had he become as a lawyer, that he devised a deed of loan between him and Flowery, which was to exclude all idea of partnership on his, the one part, and all idea of Flowery's liability to repay him on the other. Upon the strength of this deed he advanced, as a first instalment, £260, which sum was intended as a nest-egg, which being duly incubated by Flowery, was at last to be hatched into "The National Dietetic and Digestive Bun and Crumpet Company." It should be also noticed that Goldy had reserved to himself the right to advance money to an unlimited extent and without the incumbrance of any security.

He not only became his own lawyer, but Flowery's too; the latter leaving to him, with magnanimous generosity, the privilege of finding cash at whatever times he, Flowery, might require it. In proportion to the profits was to be the amount of interest, payable at no particular period.

When Flowery took Goldy's cheque to the bank for the purpose of opening an account in the name of "The National Dietetic and Digestive Bun and

Crumpet Company," the banker sagaciously observed that it required something more than one person to constitute a Company—one man is not a regiment, it seems. "His own lawyer" was consequently sent for, and came at once with his own client. It being a "*matter of form only*," as Flowery explained with the greatest frankness, down went the name of Goldy as one of the "*Proprietors*" of "The National Dietetic and Digestive Bun and Crumpet Company." A thousand Pounds soon went the way of the £260, and a *Manager* was obtained by Flowery of the name of Downy. Downy was not by profession a Muffin man or a Crumpet man, but an advertising agent who sold immortal fame. As the £260 produced the Company, so the Thousand produced Downy, who soon discovered a remarkable aptitude for managing the business, and in a few weeks had so extended its operations that fifteen hundred Pounds more were required. This sum was also advanced *under the powers of the Deed of Loan.* Under which deed, too, it was consumed. That egg produced nothing, not even a Bun. At this juncture of affairs, Downy discovered that a sum of Five Hundred Pounds had *actually disappeared* without a shadow of a trace being left behind. One would almost have thought, but for the honesty of all parties concerned, that it had been stolen. This opened Downy's eyes, hitherto closed, it seems, and he wisely determined to have no more to do with the management of this National Institution unless he had the *sole right to draw cheques in his own name.* Flowery demurred to this a good deal, but Goldy, being a determined man, as well as a

far-seeing one, persuaded Flowery to give up the reins to the more competent hands of Downy.

Arrangements were then made to start afresh. Goldy lent more money, and Downy (whose pay was thirty shillings a week) condescended to advance £200 to the Company and take Goldy's *personal guarantee* for payment in addition to the acceptance of the Company. It may be proper to state that when the fund was transferred into the name of Downy, Goldy again signed the bank books as "PROPRIETOR."

In a short time Downy again discovered that there was no money, and having generously advanced another £50 himself, was determined to make Goldy liable *for all the debts of the concern.* Comes down accordingly with a writ for the £200, which Goldy pays. Comes down with a writ for the other £50 upon Goldy *as a partner*, which Goldy does not pay.

Goldy now makes Flowery a bankrupt, and proves for £300; then Downy puts up certain creditors of the National Company to sue Goldy as a partner. The first case is heard in a county court, where Downy swears hard and fast that he never heard Goldy say he was *not* a partner. So swears Flowery. Verdict for plaintiff. "His own lawyer" lost his client's case. Then all the creditors come down upon Goldy, but fortunately they are obliged to sue in the Superior Court; and Goldy (changing his lawyer) beats down these clamorous creditors in detail; wins every verdict in fact, although in each and all Downy is the principal witness. Downy then sues for his £50 and loses.

In the meanwhile, for his hard-and-fast swear-

ing at the County Court, Downy is prosecuted for perjury. The magistrate dismisses the case, and Goldy persists in his right to go before the grand jury under the Vexatious Indictments Act and prefer his indictment. A bill is found. Flowery first and Downy after are tried and acquitted.

Out of this very fertile soil grows Downy's action for malicious prosecution. And certainly never prosecution looked more malicious and less encumbered with reasonable and probable cause. It was what a speculative solicitor would call a *good case*, as a compound fracture, or some other serious injury would be termed by young doctors "a beautiful case." It looked so bad, that a settlement seemed the only way out of it, which meant throwing yourself headlong into the sea to lighten the ship.

"Well, Jones," said the leading counsel to his junior, "what about this case? We *must* lose!"

"I think we must," answered Jones, with great meekness.

"There is just one chance, however."

"What is that?"

"Cross-examine Downy into a cocked hat."

"Good heavens!" exclaims the leader, with a good-natured sneer, "Downy cross-examined into a cocked hat!"

Now it happened that the plaintiff had asked in his Statement of Claim, among other things, for damages for loss of *reputation* and *situation*. The latter loss had been inquired into and found to be mythical. When Downy cleared for action and stood once more to be cross-examined, the first question raked him fore and aft.

Q. You say you lost your situation through this prosecution?

A. Yes and no.

A strange answer truly, but probably owing to the fact that his employer was standing hard by, and Downy was *still in his employment.*

Perceiving the danger of the adversary's flank movement, the counsel for the plaintiff gallantly sprang forward to the rescue of his client, and in order to save him nearly threw him overboard at once.

"*My lord,*" he exclaimed, "*we abandon all claim for loss of character and situation,* and will confine our demand to the legal expenses occasioned by the prosecution."

"Then your character is gone, Mr. Downy, is it, and your situation kept?"

"I claim nothing for loss of character," repeated the counsel.

"Or the situation," rejoined his opponent—then you have *not* lost it?"

"I don't claim."

"But you do claim!"

All the cargo, provisions and tackle were now overboard, and the ship so much the lighter. Let us see how she rides.

Q. You were the manager when the £500 were lost?

A. I was manager.

Q. The defendant has paid £1,500 into the concern?

A. I suppose so.

Q. And has never taken a farthing out?

A. I know nothing about his affairs.

Q. Don't you?

A. I suppose it is so—I have nothing to do with his money. I was only manager.

Q. You managed the money?

A. I lent money to the firm.

Q. What were your wages?

A. Thirty shillings a-week.

Q. Did you swear you had never heard Goldy say he was not a partner?

A. I did not.

Q. It would have been true if you had, would it not?

A. It would up to a certain time.

Q. It would have been to your interest to swear it, would it not?

A. To the interest of the case, perhaps.

Q. And to yours?

A. In what way?

Because if you could have fixed him with liability as a partner you would have got your fifty Pounds.

[N.B.—It is always dangerous for your witness to ask the cross-examining counsel a question.]

This was an effective answer. The case now stands thus:

Firstly. The character of the plaintiff has not suffered.

Secondly. He has not lost his situation.

Thirdly. *He has claimed unjustly for both.*

Fourthly. There was a direct interest, which he pretends not to have seen, in swearing that which he was prosecuted for swearing.

There's a good deal more with reference to the £500 and other matters, but enough has been done to open the eyes of the jury to the nature of the

transactions which were brought out in cross-examination. It only needed to be followed by Goldy's account of the circumstances, and then, notwithstanding, as the Judge said, "there were two charges on the indictment and two prosecutions," the jury would not believe the man who had made a *false claim* and a *false statement*, who had *abandoned his claim for character*, and had *managed the funds of his employer to a total loss*, who *did not know what it was to his interest to swear*, and who was the *principal swearer in all the actions brought to fix Goldy with liability as a partner*. So the jury found for the defendant. "Every man his own lawyer" became somebody else's client, and a wiser, though temporarily, perhaps, a poorer man from that time. "The National Dietetic and Digestive Bun and Crumpet Company" was an institution that *existed only in the pockets of Flowery and Downy. That was the point to show in all cases where either of those gentlemen was a witness.* It never failed through all the cases that were tried, and there were many, civil *and* criminal.

The object of the plaintiff in bringing the action is often a very material point to impress on the minds of the jury. In this case the object of the action for malicious prosecution, and that of the National Dietetic and Digestive Bun and Crumpet Company *were identical.*

CHAPTER XIII.

ANALYSIS OF THE OPENING SPEECH OF SIR ALEXANDER COCKBURN, IN THE TRIAL OF PALMER, FOR THE MURDER OF J. PARSONS COOK, BY POISON (1856).

I SHALL now give some examples, by way of showing that the remarks I have made on the various branches of advocacy are not without warrant from high authority. With a view to this object, as regards the opening of a case, I cannot do better than refer the reader to that example of lucid and eloquent narrative which is to be found in the speech of Sir Alexander Cockburn, on the prosecution of Palmer, who was convicted of the murder of John Parsons Cook, by poison, in the year 1856.

One cannot help remarking, at the outset, the fine rhetorical simplicity of the exordium: "Gentlemen of the jury, the duty which you are called upon to discharge is the most solemn which a man can by possibility be called upon to perform; it is to sit in judgment and to decide an issue on which depends the life of a fellow-creature, who stands charged with the highest crime for which man can be arraigned before a worldly tribunal."

If the student will examine these words, he

will perhaps come to the conclusion that nothing could be better adapted to impress the jury with the solemnity of the occasion, and the awful nature of the case which was to demand their unwearied and painful attention. It was the most solemn duty man could be called upon to discharge, and it was the highest crime man could be arraigned for before a worldly tribunal. After a word or two as to preconceived opinions of the guilt or innocence of the prisoner, this solemn injunction is laid upon them (for it was impossible to tell, after such discussions as had taken place with regard to a crime of such world-wide notoriety, what prejudices might have insinuated themselves into the jury-box on the one side or the other): "Your duty, your bounden duty, is to try this case according to the evidence which *shall* be brought before you, and according to that alone. You must discard from your minds anything that you may have heard or read, or any opinion that you may have formed. If the evidence shall satisfy you of the prisoner's guilt, you will discharge your duty to *society*, to your *consciences*, and to the *oaths* which you have taken, by fearlessly pronouncing your verdict accordingly; but if the evidence fail to produce a reasonable conviction of guilt in your minds, God forbid that the scale of justice should be inclined against the prisoner by anything of prejudice or of preconceived opinion."

Having thus exhorted them to the fearless discharge of their duty, to whatever result it might impel them, he next proceeds to introduce the persons of the drama, if I may use the expression. They are told that the prisoner was

a medical practitioner, that he carried on his profession at Rugeley, in Staffordshire, and that he had done so for a number of years. Then comes what I think is an impressive observation, introduced in a narrative form, but well calculated to open up solemn reflections in the minds of the jury. "In later years, however, he became addicted to turf pursuits, which gradually drew off his attention and weaned him from his profession. Within the last two or three years he made over his business to a person named Thirlby, formerly his assistant, who now carries it on."

Immediately before this the Attorney-General had told the jury that the facts were somewhat complicated, that they ranged over a considerable period of time, and that it would be necessary not merely to look at the circumstances immediately connected with the accusation, but to go back to matters of an antecedent date.

Whatever the complication of facts or their number, here was a fact impressed upon the minds of the jury at the very commencement, namely, that the prisoner had given up practically a respectable profession for a calling of at least a doubtful character, and one which often led, aye, even impelled, its votaries to crime.

I ask the student to mark the sentence after that which says that antecedent circumstances must be brought before the jury.

"I may safely say, however, that in my conscience I believe *there is not a fact*, to which I am about to ask your patient attention, *which has not an immediate and most important* bearing on this case."

No irrelevant matter, therefore, was to be introduced; however distant from each other the facts might be, and however remote in date, they were to be simply those that tended in one direction and ultimately converged to a common centre.

In the course of his pursuits connected with the turf, the jury are told that Palmer became intimate with the man "whose death forms the subject of this inquiry—Mr. John Parsons Cook."

The suddenness with which the catastrophe is presented in this place certainly strikes me as an exhibition of art of the highest kind. The being weaned from the profession, the final abandonment of it, the turf pursuits, the intimate connection between Palmer and Cook in consequence, and the death of the latter, is like lifting the veil partially from the distant and terrible scene which we are coming to presently, and with which the drama is to close.

Who Cook was is briefly told; he was young and had inherited property; he kept racehorses, and betted, and became familiarly intimate with Palmer "*in the course of his operations.*" And now we have the fact that "it is for the *murder* of that Mr. John Parsons Cook, that the prisoner stands indicted to-day; the charge against him being that he took away that man's life by poison."

The gauntlet now is thrown down. The next thing necessary to tell the jury was "the circumstances in which Palmer was placed, and the position in which he stood relatively to the deceased Cook."

The case is then suddenly epitomised. "The

case which on the part of the prosecution I have to urge against Palmer is this—that being in desperate circumstances, with ruin, disgrace and punishment staring him in the face, which could only be averted by means of money, he took advantage of his intimacy with Cook, when Cook had become the winner of a considerable sum, to destroy him, in order to obtain possession of his money. Out of the circumstances of Palmer, at that time arose, as we say, *the motive* which induced him to commit this crime."

That is why the circumstances, and some of the remote circumstances too, are so important; the *motive* for so terrible a crime springs from them; and if motive, probability perhaps. As it is put further on, "if there are strong motives, the more readily shall we be led to believe in the probability of the crime having been committed; but if we find an absence of motive, the probability is the other way."

I must now ask the reader to remark what the Attorney-General says as to chronological order: "In this case, the motive will be matter for serious consideration; and inasmuch as the circumstances out of which we say that the motive arose come first in *the order of time*, I will deal with them before I come to that which is the more immediate subject-matter of our inquiry. It seems to me that it would be most convenient that I should follow *the chronological order of events*, and I will therefore pursue that course."

The jury are then told that so far back as 1853 Palmer had got into difficulties, and that he began to raise money on bills. In 1854, his circumstances were worse; he was indebted to several

persons in a large sum of money. Among the bills on which Palmer raised money in 1854, was one for £2,000, which he discounted with Mr. Padwick. That bill bore the acceptance of *Palmer's mother*, Mrs. Sarah Palmer. The acceptance was *forged*. There were other acceptances of the same character. In 1854 he owed a very large sum; his wife died in the September of that year, and he had an insurance on her life to the extent of £13,000; the amount was realised, and some of his most pressing liabilities were paid off. For this purpose he employed a solicitor named Pratt, who was in the habit of discounting bills. This gentleman received for Palmer a sum of £8,000, and disposed of it in the payment of liabilities on bills which were in the hands of Pratt's clients. A Mr. Wright of Birmingham, a solicitor, who had also advanced money to the prisoner, received £5,000, and thus, altogether the £13,000 of debt was disposed of; but that still left Palmer with considerable liabilities, and among others, the bill already mentioned of £2,000, discounted by Padwick, remained unpaid.

In the same year he effected another insurance on his brother's life, and on the strength of the policy Palmer issued fresh bills, which were discounted by Pratt at 60 per cent., Pratt keeping the policy as collateral security. The bills, which were discounted in that year, amounted to £12,500. In March, 1855, two bills were discounted for £2,000 each, with the proceeds of which Palmer bought two racehorses "*Nettle*" and "*Chicken.*" These bills were renewed in June: one became due on the 28th of September, and the other on the 2nd of October, when they were again renewed.

Then follows a list of the bill transactions of the year down to November, when the Shrewsbury races took place. "There was a pressure of £11,500 of liabilities, with not a shilling in the world to meet them, and the still greater pressure resulting from a consciousness that the moment when he could no longer go on, and his mother was resorted to for payment, the fact of those forgeries would at once become manifest, and would bring upon him 'the peril of the law for the crime of forgery.'" "The prisoner's brother died in August, 1855. His life had been insured, and the policy for £13,000 had been assigned to the prisoner, who of course expected that the proceeds of that insurance would pay off his liabilities; but the office in which the insurance was effected declined to pay, and consequently there was no assistance to be derived from that source." Then there follows an account of some minor transactions, in which Cook becomes mixed up in one or two bill transactions. Palmer, still wanting money, proposed to Pratt an assignment by Cook of two racehorses, *Polestar*, which won at the Shrewsbury races, and *Sirius*. Cook made the assignment in favour of Pratt, and was entitled to the money raised by that security, which realised £375 in cash, and a wine warrant for £65. Palmer contrived that the money and the warrant should be sent to him, and not to Cook. Pratt sent a cheque payable to the order of Cook. Palmer, however, *forged Cook's name* and obtained the money. "Cook never received the money, and you will see that within ten days from the period when he came to his end, the bill in respect of that transaction, which was

at three months, would have fallen due, when it must have become apparent that Palmer received the money, and that in order to obtain it *he had forged the indorsement of Cook.*"

Then comes an account of how Palmer induced a man of the name of Bates, a "*hanger-on in his stables,*" to propose an insurance on his life for £25,000, Cook attesting the proposal, Palmer filling it in, and referred to as Bates's medical attendant, and Thirlby acting as general referee. This was unsuccessful with the office applied to, and so was another proposal for a less amount at another office.

"All these circumstances," says the Attorney-General, "are important, *because they show the desperate straits in which the prisoner at that time found himself.*"

Then followed letters from Pratt to Palmer pressing upon him the necessity of meeting the numerous bills bearing the acceptance of *Sarah Palmer.*

On the 6th November, Pratt issued two writs for £4,000, one against Palmer and the other against his mother. The writs, however, were held back for a time, Palmer being constantly pressed by Pratt to raise money. On the 13th November Pratt wrote urging Palmer to raise £1,000 to meet the bills due on the 9th.

"That being the state of things at that time," continues the Attorney-General, "We now come to the events connected with the Shrewsbury races. *Polestar* (Cook's horse) won the Shrewsbury Handicap on the 13th, and Cook had betted largely on the event. On that day Cook had in his pocket a sum amounting to about £700 or £800. He was

entitled to about £380, the value of the stakes, and together with his bets, a total sum of £2,050."

These are the circumstances which the learned Attorney-General referred to as *not immediately connected with the accusation but which it would be necessary to look to. They are those out of which the motive arose and they come first in the order of time.* When he comes to the last transaction referred to, he makes the brief but pregnant remark, "*Within a week from that time Mr. Cook died.*" Then he says, keeping logically and impressively straight to the main issue, as if that were never to be lost sight of for a single moment, whatever the complication of circumstances through which he must pass: "the important inquiry which we have now to make is *how he came by his death*, whether by natural causes or by the hand of man, and if the latter, by whose hand?"

That was the question.

Then the state of Cook's health when he went to Shrewsbury is mentioned, and his general physical condition for some time before; nothing concealed or left to be brought out to surprise the jury in cross-examination.

Next follows a description of the excitement of Cook at having won the race and his money, his dinner to celebrate the event, and his condition after; his state of health on going to bed, his occupation on the following day. Then is mentioned "*a remarkable incident*," to which the attention of the jury is particularly called, given in these words: "A friend of his (Cook's), a Mr. Fisher, and a Mr. Herring were at the Shrewsbury races; and Fisher, who besides being

a sporting man, was an agent for receiving winnings, and who received Cook's bets on the settling day at Tattersalls', occupied the room next to that occupied by Cook. Late in the evening Fisher went into a room in which he found Palmer and Cook drinking brandy-and-water. Cook gave him something to drink and said to Palmer, 'You'll have some more, won't you?' Palmer replied, 'Not unless you finish your glass.' Cook said, 'I'll soon do that,' and he finished it at a gulp, leaving only about a teaspoonful at the bottom of the glass. He had hardly swallowed it when he exclaimed, 'Good God! there's something in it; it burns my throat.' Palmer immediately took up the glass, and drinking what remained, said: 'Nonsense, there's nothing in it,' and then pushing the glass to Fisher and another person who had come in, said: 'Cook fancies there is something in the brandy-and-water; there's nothing in it; taste it.' On which one of them replied, 'How can we taste it? You've drunk it all.' Cook suddenly rose and left the room and called Fisher out, saying that he was taken seriously ill. He was seized with most violent vomiting and became so bad that after a little while it was necessary to take him to bed. He vomited there again and again in the most violent way, and as the sickness continued after the lapse of a couple of hours a medical man was sent for."

He continued bad all night, and gave Fisher between £800 and £900 in notes to take care of for him. His state of health on the following day was improved, and he went on the course. Next,

Palmer's pecuniary condition at this time is spoken of. He borrowed £25 to take him to Shrewsbury. His horse lost, and he lost bets upon the race. He and Cook left Shrewsbury together and went to Rugeley, Palmer going home and Cook going to the "Talbot Arms Hotel," "*exactly opposite the prisoner's house.*" Then comes "*an incident connected with the occurrence at Shrewsbury,*" which has to be mentioned, and that was that "about eleven o'clock that night, a Mrs. Brooks, who betted on commission, and had an establishment of jockeys, went to speak to the deceased on some racing business, and in the lobby she saw Palmer holding up a tumbler to the light, and having looked at it through the gas he withdrew to an outer room, and presently returned with the glass in his hand and went into the room where Cook was, and in which room he drank the brandy-and-water, from which, I suppose, you will infer that the sickness came on."

The reader will see that here the order of time is not quite strictly followed, otherwise this incident would have come *before* the drinking of the liquid; but he will observe the force of this mode of filling in an important circumstance, which, standing utterly by itself, may be taken and fitted into its place at any moment, and certainly attracts more attention by halting in the narrative for the purpose of doing so.

"I do not charge," the Attorney-General continues, "that by anything which caused that sickness Cook's death was occasioned; but I shall show you that throughout the ensuing days at Rugeley he constantly received things from the prisoner,

and that during those days that sickness was continued. I shall show you that after he died antimony was found in the tissues of his body and in his blood—antimony administered in the form of tartar-emetic, which, if continued to be applied, will maintain sickness. It was not that however of which this man died. *The charge is* that, *having been prepared by antimony, he was killed by strychnine.*"

Now, up to this time, strychnine had not been mentioned, and if the jury had been thinking that antimony was the agent employed to take away Cook's life they must have been greatly surprised when they were told that it was not; and their surprise must have been greater still, and enhanced with the sense of gratified curiosity, when they were told the *reason of its having been* used and the *real poison* which caused the deceased's death. I cannot help thinking this is worthy of study for its rhetorical effect.

Next comes a description of strychnine, its source, nature, and effects upon animal life; and particularly the fact, that from *half to three quarters of a grain will destroy life.* Then a description of the nervous organisation of man upon which this subtle poison exercises its deadly power. Here is manifested a power and skill which the reader cannot too carefully study. It was necessary to make plain to ordinary minds the *mode* in which this poison does its work—to make them to some extent acquainted with that wonderful and delicate system in the organisation of man called the nervous system, and to separate its parts so as to thoroughly inform the minds of the jury of the

exact effect of the evidence to be produced. He says:—"In the human organisation the nervous system may be divided into two main parts—the nerves of sensation, by which a consciousness of all external sensations is conveyed to the brain; and the nerves of motion, which are, as it were, the agents between the intellectual power of man and the physical action which arises from his organisation. Those are the two main branches having their origin in the immediate vicinity of the seat of man's intellectual existence. They are entirely distinct in their allocations, and one set of nerves may be affected while the other is left undisturbed. You may paralyse the nerves of sensation, and may leave the nerves which act upon the voluntary muscles of movement wholly unaffected; or you may reverse that state of things, and may affect the nerves and muscles of volition, leaving the nerves of sensation wholly unaffected."

"Strychnine affects the nerves which act on the voluntary muscles, and it leaves wholly unaffected the nerves on which human consciousness depends, and *it is important to bear this in mind*—some poisons produce a total absence of consciousness, but the poison to which I refer, affects the voluntary action of the muscles of the body, and leaves unimpaired the power of consciousness."

This was the point in the case, as will appear hereafter; and it was extracted from the mass of circumstances as skilfully as the subtle poison is extracted by the "skill of the operative chemist from the vegetable product known as *nux vomica*."

"Now the way in which strychnine acting upon the voluntary muscles is fatal to life is, that it

produces the most intense excitement of all those muscles, violent convulsions take place—spasms, which affect the whole body, and which end in rigidity; all the muscles become fixed, and the respiratory muscles in which the lungs have play are fixed with an immoveable rigidity; respiration consequently is suspended, and death ensues. These symptoms are known to medical men under the term of *tetanus*. There are other forms of tetanus which produce death, and which arise from other causes than the taking of strychnine; but *there is a wide difference between the various forms of the same disease which prevents the possibility of mistake.*"

To prevent that possibility, the learned counsel distinguished between the different forms of *tetanus*, and described their symptoms, one form being known as *traumatic*, and the other as *idiopathic;* one characteristic of tetanus from strychnine being that "the paroxysms commence with all their power at the very first, and terminate, after a few short minutes of fearful agony and struggles, in the dissolution of the victim."

Having described the nature of strychnine and its operations, he proceeds to show that Palmer, as a medical man, knew of them, and produces one of Palmer's books, "*A Manual for Students,*" in which is the remark, in Palmer's handwriting, "Strychnine kills by causing tetanic fixing of the respiratory muscles."

This point in the opening speech being arrived at, the reader will have observed that all is now ready for the plain matter-of-fact evidence. Everything is prepared for it. All the branches of fact

are placed in order and converge to a common centre; the jury know all about the turf propensities and gambling inclinations of the prisoner; they know that he had forged his mother's name, that he was in danger of being convicted of felony; they more than suspect that he took away his brother's life; that he intended to destroy Bates; they have a suspicion that the £13,000 which he obtained from the insurance office was the price of his wife's life; they know that Cook was an easy, foolish man, and that the prisoner was a cunning and rapacious knave; they know that Palmer put the antimony into the brandy-and-water; they know all about the two sets of nerves, what strychnine is, and how it kills by *tetanus;* they know that there are three kinds of *tetanus,* and that two sorts always commence with mild symptoms gradually increasing, while the *tetanus* produced by strychnine comes on *all at once and kills very quickly.* They can't mistake *traumatic* and *idiopathic* from the tetanus produced by poison. They will discern the difference in a moment when they see the symptoms.

All that remains to be done now, therefore, is—apart from the ingenious defence that will be set up—to show that Cook died from tetanus; (and the administration of strychnine, in ever such a small quantity, even "from a half to three quarters of a grain, kills," which announcement made every juryman draw his breath and twitch as if he had at least a grain in his hollow tooth); that the symptoms were not those of traumatic or idiopathic tetanus; and, lastly, that the prisoner's was the hand that administered the strychnine; or if not

absolutely this, to show circumstances from which no other presumption is possible.

Palmer attended on Cook for days, and during the whole time Cook's sickness continued. Whatever was sent by Palmer had the same effect. A woman at the inn who tasted some broth that had been sent over from Palmer's house was taken ill immediately after. On the Saturday a Dr. Bamford was called in, and Palmer told him that Cook had been dining too freely, and had a bilious attack. This was false, and unnecessarily false, if Palmer was innocent. And this led the Attorney-General to the task of *proving* that it was false, by showing that *there was no bilious symptom whatever during the whole time of Cook's sickness.* Coffee, brought up at four, when Palmer was present, produced vomiting; barley-water, at six, when he was not there, did not have the same effect; at eight, when he was present again, vomiting was once more produced by arrowroot.

The Attorney-General says: "These may be coincidences, but they are facts, which, of whatever interpretation they may be susceptible, *are well deserving of attention.*"

On Monday, 19th, Palmer goes to London, after giving Cook a kind of stirrup-cup, which produced the usual result. After he was gone, and until he returned, a great improvement took place in Cook.

Leaving him in his room, up and dressed, and in conversation with two of his jockeys, who had called to see him, no doubt, about other races to come off in the future; the Attorney-General follows the prisoner to London to see what he is about there, and to inform the jury thereon. This

is the natural and proper order of things, an observation which I should not think it necessary to make, but that I am writing for those whom practice has not yet perfected in the most difficult art of simple narrative. It seems that Palmer "had written to a man named Herring, to meet him at Beaufort-buildings. Herring was a man on the turf, and had been to Shrewsbury races."

I will pause for a moment to call attention to the mode of expression which the Attorney-General so often adopts; so often indeed, that I take it to be by design. He does not say, "He wrote to Herring, a man on the turf, to meet him, &c. But he wrote to Herring to meet him, &c., and then observes Herring was a man on the turf." The latter seems to me to be infinitely the more striking mode of telling the circumstance; it causes a momentary break, and with a slight abruptness which gives emphasis to it, points the remark.

Cook's health is inquired of; Palmer says he is all right, he has had a dose of calomel and must not come out, and "what I want to see you about is the settling his accounts." A man named Fisher was usually Cook's man employed to settle his accounts, but Palmer said nothing about him. He produced a list of sums which Cook was entitled to receive, and mentioned the names of the persons liable. The amount was £1,020. Palmer told Herring to pay himself £6, and a man named Shelly £30, and "if you see Bill tell him Cook will pay him on Thursday or Friday;" he asked how much that would make the balance, Herring said £984. Palmer remarked that it was

right. "I will give you £16, and that will make £1,000; pay yourself the £200 that I owe you for my bill; pay Padwick £350 and Pratt £450; thus applying Cook's money to the payment of his own debts; "*established beyond all controversy*," the Attorney-General says. An awkward fact that for the prisoner! At this interview, too, he paid some money he owed Herring (£5), and to do so produced a £50 note. The letters written by Herring to Cook with reference to these matters were intercepted by the postmaster.

In the evening Palmer returned to Rugeley, arriving at about 9 o'clock; visited Cook, and from 10 till 11 was constantly in and out of Cook's room. Just at this point, while he is in and out of Cook's room, the learned counsel informs the jury that "in the course of the evening he went to a man named Newton, assistant to a surgeon named Salt, and applied for three grains of strychnine, which Newton, knowing Palmer to be a medical man, did not hesitate to give him. And," he continued, "Dr. Bamford had sent on this day the same kind of pills that he had sent on Saturday and Sunday. I believe it was the doctor's habit to take the pills himself to the 'Talbot Arms' and entrust them to the care of the housekeeper, who carried them upstairs; but it was Palmer's practice to come in afterwards, and evening after evening to administer medicine to the patient. There is no doubt that Cook took pills on Monday night. Whether he took the pills prepared for him by Dr. Bamford, and similar to those which he had taken on Saturday and Sunday, or whether Palmer substituted for Dr. Bamford's pills some of his own con-

coction, consisting in some measure of strychnine, I must leave to the jury to determine."

Then at 12 o'clock at night Cook screams and is taken with convulsions, but he was *conscious*—one of the symptoms, as the jury have got well into their minds, of *tetanus produced by strychnine.* Palmer comes, gives him more medicine, and he vomits. The patient became more calm, and begged the women to rub his limbs. They did so, and found them cold and rigid; (another symptom of tetanus produced by strychnine).

"The next morning, between 11 and 12," the learned counsel proceeds, "there occurred *a very remarkable incident.* Palmer went to the shop of a certain Mr. Hawkins, a druggist, at Rugeley. He had not dealt with him for two years before, it being his practice during that period to purchase such drugs as he required from Mr. Thirlby, a former assistant of Mr. Hawkins, who had set up in business for himself. But on this day Palmer went to Mr. Hawkins's shop, and, producing a bottle, informed the assistant that he wanted two drachms of prussic acid. While it was being prepared for him, Mr. Newton, the same man from whom he had on a former occasion obtained strychnine, came into the shop, whereupon Palmer seized him by the arm, and observing that he had something particular to say to him, hurried him into the street, where he kept talking to him on a matter of *the smallest possible importance*" (which now becomes a matter of the very greatest importance apparently); "A gentleman named Brassington came up, whereupon Mr. Newton turned aside to say a few words to him. Palmer, relieved by this acci-

dent, went back into the shop, and asked in addition for *six grains of strychnine* and a certain quantity of 'Batley's Liquor of Opium.' He obtained them and went away. Presently Mr. Newton returned, and being struck with the fact of Palmer's dealing with Hawkins"—here is a small circumstance not thought too insignificant to be mentioned, and not without its importance hereafter—" asked out of passing curiosity what he had come for, and was informed."

Now comes a difficulty, as if for the purpose of showing the student how to deal with it. "And here, I must mention a fact of some importance respecting Mr. Newton. When examined before the coroner, that gentleman only deposed to one purchase of strychnine by Palmer; and it was only as recently as yesterday that, with many expressions of contrition for not having been more explicit, he communicated to the Crown the fact that Palmer had also bought strychnine on Monday night."

An awkward circumstance, truly, and one you may be sure that was mentioned at the consultation. It was not by any means to be brought out in cross-examination, nor, indeed, must it even be postponed to so late a period as the examination-in-chief. It must be done in the opening, and must be fairly placed before the jury with an intimation that "they must deal with it." It was absolutely certain that this gun must be surrendered to the enemy, but before doing so it was advisable to spike it. Spiked accordingly.

"It is for you, gentlemen," the Attorney-General continued, "to decide the amount of credit

to be attached to his evidence; but you will bear in mind that, whatever you may think of Mr. Newton's testimony, that of Mr. Roberts, on whom there is no taint or shadow of suspicion, is decisive with respect to the purchase which the prisoner made on Tuesday at the shop of Mr. Hawkins."

The episode of Newton, therefore, may be left out altogether, now that it has been opened in this way; but it could not so well have been omitted if the Attorney-General had not mentioned it. This little difficulty thus arranged, the story is resumed.

"Cook was entitled to receive the stakes won at Shrewsbury. Palmer sends for Cheshire, the postmaster, to whom he owed £7. Cheshire comes with a receipt, thinking he is to be paid, instead of which he is asked by Palmer, as Cook is too ill to write himself, to draw a cheque on Weatherby's in Palmer's favour for £350. Cheshire does so, fills up the body of the cheque and concludes with the words, 'and place the same to my account.' Then Palmer says he must get Cook's signature to this." The Attorney-General doesn't know what became of it after, but says that of this there is no question, that by that night's post Palmer sent up to Weatherby's a cheque which was returned dishonoured. Whether it was genuine or like so many other papers with which Palmer had to do —forged—is a question which you will have to determine."

That point is made, therefore, and left for the jury who will not forget it.

The learned counsel having been away from the patient upon these matters of business which come in their proper order, now "returns to Cook,"

and mentions to the jury the fact that in the course of that morning coffee and broth were sent over by Palmer, and that they produced the usual result, namely, vomiting, which vomiting continued all the afternoon.

And now "a new person makes his appearance on the stage." This new person is a Mr. Jones, a surgeon and personal friend of Cook's. Palmer had written to this gentleman and foolishly enough stated that Cook was "*suffering from a severe bilious attack, accompanied with diarrhœa,*" adding, "it is desirable for you to come to see him as soon as possible." This is considered by the learned counsel "*worthy of remark.*" And this is how the remark is made: "Whether this communication is to be interpreted in a sense favourable to the prisoner, or whether it is to be taken as indicating *a deep design to give colour to* the idea that Cook died a natural death, it is at least certain that the statement that Cook had been suffering from bilious attack, accompanied with diarrhœa, as stated, was *utterly untrue.*"

That's something, at all events, and another point for the prosecution not to be easily disposed of by the prisoner's counsel.

Jones saw at once it was not a bilious attack. At seven o'clock Dr. Bamford called, the patient doing pretty well. Then comes a consultation of the medical men, Palmer of course being included, poor Cook exclaiming, "Mind, I'll have no more pills or medicine to-night." He evidently did not believe that they did him any good. Palmer was for more pills, and with characteristic kindness said, "Let us not tell him what they contain, as

he fears the same results that have already given him such pain : " results produced by strychnine—the jury know all about that. Dr. Bamford was to make up the pills, and went to his surgery for that purpose, followed by Palmer, who asked him to write the directions as to how they were to be taken. "Dr. Bamford, *though unable to understand the necessity* of his doing so," wrote that they were to be taken at bed-time. Palmer takes them away, and gives either those pills or *some others* to Cook that night. Now comes something "*remarkable*"—(only remarkable)—"*half or three-quarters of an hour elapsed from the time he left Dr. Bamford's surgery until he brought the pills to Cook.*" When he does come, he calls Mr. Jones's especial attention to the directions on the lid, observing how distinct and vigorous the writing was for a man upwards of 80.

"If the prisoner be guilty," says the Attorney-General, "it is a natural presumption that he made this observation with the view of identifying the pill-box as having come from Dr. Bamford, and so averting suspicion from himself."

But if he be not guilty, Mr. Attorney, he leaves some other "natural presumption" to be drawn by the other side. It is now half-past ten at night. The pills are offered, and Cook is refractory; he is as obstinate as a spoilt child; "*they had made him ill,*" *he says,* "*the night before.*" But Palmer insists, and at last conquers his friend's repugnance to take his medicine. He is sick immediately, but the pills are not brought up. Jones goes down to supper, and what he will have to say is, that "up to the period when the pills were administered,

Cook had been *easy and cheerful*, and presented *no symptom* of the approach of disease, much *less of death*." Not an insignificant point that, coupled with what is to follow, and placed in the best possible position to be seen by the jury. You know the best painting will hardly show in a bad light; you must get the spectator in a proper position. This is what the Attorney-General always does. Jones was to sleep in Cook's room. In about fifteen or twenty minutes he was aroused by a sudden exclamation and a frightful scream from Cook, who, starting up, said, 'Send for the doctor immediately, I am going to be ill, as I was last night.'" At this point the instructive lessons given to the jury will come in admirably, and they will recollect in a moment that "*you may affect the nerves and muscles of volition, leaving the nerves of sensation wholly unaffected;*" and that "*strychnine affects the nerves which act on the voluntary muscles, and it leaves wholly unaffected the nerves on which human consciousness depends.*" They were *told to bear this in mind.* The chambermaid goes for Palmer; in a moment Palmer is at his window. He is told Cook is ill again. "In *two minutes* he was by the bedside of the sick man, and strangely volunteered the observation, 'I never dressed so quickly in my life.'" "*It is for you, gentlemen, to say whether you think he had had time to dress at all.*" If not, perhaps the jury might come to the conclusion that Palmer was *waiting* for the final catastrophe. It almost looks as if the Attorney-General meant that by his last observation.

Now then the all-important symptoms are described. Much depends on these being accu-

rately noted, otherwise the *tetanus*, if *tetanus* it be, may be *traumatic* or *idiopathic*. "Cook was found in the same condition, with the *same symptoms* as the night before; gasping for breath, screaming violently; his body convulsed with cramps and spasms, and his neck rigid. He asked Palmer for the remedy that had relieved him the night before. Palmer goes to fetch it; and on one of the maids saying Cook was as bad as he had been the night before, says "he is not within fifty times as bad as he was last night." And "what a game this is to be at every night." Game, indeed! such as the jury never heard of mortal man playing at before. He comes back with two pills, which he says are ammonia, though the Attorney-General was "assured that it is a drug that requires much time in the preparation, and can with difficulty be made into pills."

A point very small, but not beneath notice, and not without significance, becoming larger in connection with other points; and not being a point which the other side can contradict, becoming, at last, a tremendous *fact!* He dresses in the twinkling of an eye, and he prepares and makes ammonia into pills, in a few minutes, including the time occupied in going to and from the surgery. They were taken by the playful patient, and brought up again immediately.

We all know with what dramatic effect a man dies on the stage when a great tragedian has the part. Let us see how a man dies at the hands of a great master of narrative, when the mind has been prepared for the scene and the circumstances. "And now ensued a terrible scene. He was in-

stantly seized with violent convulsions; by degrees his body began to stiffen out; then suffocation commenced. Agonised with pain, he repeatedly entreated to be raised. They tried to raise him, but it was not possible. The body had become rigid as iron, and it could not be done. He then said, "pray turn me over." They did turn him over on the right side. He gasped for breath, but could utter no more. In a few moments all was tranquil—the tide of life was ebbing fast. Jones leant over him to listen to the action of the heart: Gradually the pulse ceased—all was over—he was dead!"

Now comes the great point, made the central object in this dramatic scene.

"I will show you that his was a death referable in its symptoms to the *tetanus* produced by strychnine, *and not to any other possible form of tetanus.*"

Here I might stop in analysing this case; but it may be useful, as many students may not have read the account of the trial, if I briefly notice the remaining incidents. It is all straight running now, and comparatively easy going, if I may be allowed the figure. But the subsequent circumstances are noted with the most exact precision, and nothing that can throw a gleam of light on past events is omitted. Palmer engages the women to lay out the corpse; he is found by them searching the pockets of Cook's coat and hunting under his pillow and bolster. Letters were on the mantelpiece, but subsequently nothing was ever heard of those letters, or Cook's betting-book or his account-books. Cheshire is sent for, and told

that a paper produced is Cook's acknowledgment that bills to the amount of £4,000 had been negotiated for Cook's benefit, and in respect of them Palmer had received no consideration whatever. "Such was the paper to which, 48 hours after the death of the man whose name it bore, Palmer did not hesitate to ask Cheshire to be an attesting witness." Cheshire refused, when Palmer said: "It is of no consequence; I daresay the signature will not be disputed, but it occurred to me it would look more regular if it were attested." When Cook's father-in-law (Mr. Stevens) comes down, Palmer shows this paper to him. Mr. Stevens expresses his amazement, and says there will not be 4,000 shillings for the holders of the bills. Then Palmer is eager for the funeral, and orders the shell and coffin before Mr. Stevens could so much as think about it. The betting-book cannot be found; and Palmer says: "It would be of no use if you found it, for the bets are void by his death." Mr. Stevens insisted that it must be found, when Palmer replied: "O, I dare say it will turn up." Stevens goes back to London, and subsequently returns and tells Palmer he shall have a *post-mortem* examination. Palmer offers to nominate the surgeon who should conduct it, but Mr. Stevens declines to accept his friendly advice. Palmer then goes to Dr. Bamford for a certificate of the cause of death. The doctor says: "Why, he was your patient!" Palmer importuned him, and Bamford at last filled up the certificate, and entered the cause of death as "apoplexy."

This was a circumstance not in favour of the

prosecution, and the learned Attorney-General deals with it on the spot. "Dr. Bamford is upwards of 80, and I hope that it is to some infirmity connected with his great age that this most unjustifiable act is to be attributed. However, he shall be produced in Court, and he will tell you that apoplexy has never been known to produce tetanus."

In fact he should be his own *antidote*. Perhaps that was a better thing to do than to get some one else to contradict his certificate.

Palmer sends for Newton, and singularly enough at this time wants to know how much strychnine will kill a dog, and "*how much would be found in the tissues and intestines after death.*" Awkward questions for the defence to deal with, certainly. Newton replied none at all; "but that is a point," says the Attorney-General "on which I will produce important evidence." Palmer tells the medical men who conducted the *post-mortem* that Cook had had epileptic fits; that they would find "old disease in the heart and head;" that the poor fellow was "full of disease," and had "all kinds of complaints." All these statements were completely disproved by the *post-mortem* examination. Liver, lungs and kidneys all healthy. And there was nothing to cause death; not a trace of poison was found, not even at the second examination, after the exhumation of the body sometime afterwards. "Palmer was delighted, and turning to Dr. Bamford exclaimed, "Doctor, they won't hang us yet!" (Not just yet, but its not so far off.) The stomach and intestines were placed in a jar; Palmer pushes against it and tries

to upset the contents, but fails. It was then covered with skins, tied down and sealed, and curiously enough it disappeared suddenly, and "presently one of the medical men turned round, and finding that the jar had disappeared, asked what had become of it. It was *found at a distance, near a different door from that through which people usually passed in and out,* and Palmer exclaimed, 'its all right. It was I who removed it. I thought it would be more convenient for you to have it here, that you might lay your hands readily on it as you went out.'" (This of course was wonderfully considerate conduct.) "When the jar was recovered, it was found that two slits had been cut in the skins with a knife. The slits however were clean; so, *whatever his object may have been in making the incisions,* it is certain that nothing was taken out of the jar." Then Palmer remonstrates with Dr. Bamford, and says he does not think we ought to allow them (the jars) to be taken away. This is another point. "If he had been an ignorant person," says the Attorney-General, "not familiar with the course likely to be pursued by medical men under such circumstances, there might be some excuse for this; but it is for you to ask yourselves whether Palmer, himself a medical man, knowing that the contents of the jars were to be submitted to an analysis, might not have relied with confidence on the honour and integrity of the profession to which he belonged. You must say whether his anxiety to prevent the removal of the jars was not a *sign of a guilty conscience.*"

"But the case does not stop here," he says: "It was to be conveyed to the Stafford station in

a fly, driven by a post-boy. Palmer asks the boy if he is going to take the jars. The boy says 'Yes.' Palmer observes, 'they have no business to take them; one does not know what they may put in them:'" (as if it were a matter of very great concern to the boy). "'Can't you manage to upset the fly and break them? I will give you £10, and make it all right for you.'" The man or "boy" refused.

This is the last great point, but there are yet some "points of minor importance, which I ought not altogether to pass over, as nothing connected *with the conduct of a* man, conscious that an imputation of this kind rests upon him, can be immaterial." Scarcely, one would think.

After the *post-mortem* comes a coroner's inquest, and Palmer on two or three occasions sends *presents to the coroner*. A letter sent by Dr. Taylor (who analysed the stomach) to Mr. Gardner, stating the result of the investigation, was betrayed to Palmer by the Postmaster Cheshire, and Palmer wrote to the coroner telling him that Dr. Taylor and Dr. Rees had "failed in finding traces of poison," and asking him to take a certain course with respect to the evidence. The learned counsel asks, "Why should he have done this if there had not been a feeling of uneasiness upon his mind?" Very well put; why, indeed! no one else seems to have taken half the interest in the question. "These matters must not be wholly overlooked, although I will not ask you to give them any undue importance. I should have told you, in addition, that the prisoner had no money prior to Shrewsbury races, while afterwards he was flush of cash."

This was a good way, no doubt, of impressing it more forcibly on the mind of the jury. But they could have gathered almost as much from what he said before about Palmer's having to borrow £30 to take him to Shrewsbury.

This is the case as presented by the opening speech, one of the clearest and one of the best, if not the best, that I can find recorded; and which to be duly appreciated, must be read as a whole. And now comes "*the way in which it stands,*" which leads to a brief and logical resumé of all that has been said; a summary of the circumstances, showing Palmer's position and how he was reduced to the desperate extreme of forging acceptances. "With ruin staring him in the face, you, gentlemen, must say whether he had not sufficient inducement to commit the crime." But there was a further object; "the claim of £4,000 which he said he had against Cook for bills; and he wanted Polestar;" further, "the fact, too, that Cook was mixed up in the insurance of Bates may lead one to surmise that he was in possession of secrets relating to the desperate expedients to which this man had resorted to obtain money. I will leave you to say whether this combination of motives may not have led to the crime with which he is charged. This you will only have to consider supposing the case to be balanced between probabilites; but if you believe the evidence that will be given as to what took place on the Monday and the Tuesday; if you believe the paroxysms of the Monday, the mortal agony of the Tuesday, I shall show that things were administered on both those days by the hand of

Palmer by a degree of evidence almost amounting to certainty."

The learned Attorney-General then observes upon the fact that no strychnine was found, and points out that it cannot always be found, and that it depends on circumstances; shows how the poison must be absorbed into the system to destroy life; that if it be presented in a fluid state absorption is rapid, if not, the effects are longer in presenting themselves. The result of experiments is then given to show the symptoms produced by strychnine, and that in cases where death has resulted the poison would be found in one animal and not in another.

"It has been repeated, over and over again, that the scientific men employed in this case had come to the conclusion that the presence of strychnine cannot be detected by any tests known to science. They have been grievously misunderstood. They never made any such assertion. What they have asserted is this—the detection of its presence, where its administration is a matter of certainty, is a matter of the greatest uncertainty. It would, indeed, be a fatal thing to sanction the notion that strychnine, administered for the purpose of taking away life, cannot afterwards be detected. Lamentable enough is the uncertainty of detection. Happily, Providence, which has placed this fatal agent at the disposition of man, has marked its effects with *characteristic symptoms*, distinguishable from those of all other agents by the eye of science. It will be for you to say whether *the testimony that will be laid before you with regard to those symptoms* does not lead your minds to the conclusion that the

deceased came to his death by poison administered to him by the prisoner. There is a circumstance which throws great light upon this part of the case. Some days before his death this man was constantly vomiting. The analysis made of his body failed to produce evidence of the presence of strychnine, but did not fail to produce evidence of the presence of antimony. Now, antimony was not administered by the medical men, and unless taken in a considerable quantity, it produces no effect and is perfectly soluble. It is an irritant which produces exactly the symptoms which were produced in this case. The man was sick for a week, and antimony was found in his body afterwards. For what purpose can it have been administered? It may be that the original intention was to destroy him by means of antimony; it may be that the only object was to bring about an appearance of disease, so as to account for death. One is lost in speculation. But the question is, whether you have any doubt *that strychnine was administered on the Monday and still more on the Tuesday, when death ensued*? And if you are satisfied with the evidence that will be adduced on that point, you must then determine whether it was not administered by the prisoner's hand. I shall produce testimony before you in proof of the statements I have made which I am afraid must occupy some considerable portion of your time; but in such an inquiry time cannot be wasted, and I am sure you will give it your most patient attention. I have the satisfaction of knowing that the prisoner will be defended by one of the most eloquent and able men who ever adorned the bar of this country or any other forum, and

that everything will be done for him that can be done. If, in the end, all should fail in satisfying you of his guilt, in God's name let not the innocent suffer. If, on the other hand, the facts that will be presented to you should lead you to the conclusion that he is guilty, *the best interests of society demand his conviction.*"

CHAPTER XIV.

EXAMPLES OF REPLY, PERORATION, ETC.

As an instance of cross-examination under adverse circumstances, and an example of re-examination, I will quote the following from the same trial. John Thomas Harland, a physician at Stafford, gave evidence to the effect that the internal organs were healthy and natural, and that there was nothing in the appearance of the spine to account for death.

In cross-examination he said, "At the base of the tongue I observed some enlarged mucous follicles. They were not pustules containing matter, but enlarged mucous follicles of long standing. There were a good many of them, but I do not suppose they would occasion much inconvenience. They might cause some degree of pain, but I think that it would be slight. I do not believe that they were enlarged glands. I should not say that deceased's lungs were diseased, although they were not in their normal state. The lungs were full of blood and the heart empty. . . . . If we had found a softening of the spinal cord, I do not think it would have been sufficient to have caused Mr. Cook's death. A

softening of the spinal cord would not produce *tetanus*. It might produce paralysis. I do not think, as a medical man investigating the cause of death, that it was necessary carefully to examine the spinal cord. I do not know who suggested that there should be an examination of the spinal cord two months after death. There were some appearances of decomposition when we examined the spinal cord, but I do not think that there was sufficient to interfere with our examination. I examined the body to ascertain if there was any trace of venereal disease. I did find certain indications of that description, and the marks of old excoriation, which were cicatrised over."

There was little evidence, therefore, of wounds which would cause *tetanus*.

Re-examined by the Attorney-General: "There were no indications of wounds or sores such as could by possibility produce *tetanus*. There was no disease of the lungs to account for death. The heart was healthy, and its emptiness I attribute to spasmodic action. The heart being empty, of course death ensued. The convulsive spasmodic action of the muscles of the body, which was deposed to yesterday by Mr. Jones, would, in my judgment, occasion the emptiness of the heart. There was nothing whatever in the brain to indicate the presence of any disease of any sort, but if there had been I never heard or read of any disease of the brain ever producing *tetanus*. There was no relaxation of the spinal cord, which would account for the symptoms accompanying Mr. Cook's death, as they have been described. In fact there was no relaxation of the spinal cord at all, and there is no

disease of the spinal cord with which I am acquainted which would produce *tetanus*."

An undergraduate of the University of London, who made the first *post-mortem* examination of the body of Cook, was examined. The cross-examination, by Mr. Grove, Q.C., was as follows:—"*Tetanic* convulsions are considered to proceed from derangement of the spine, and from complaints that affect the spine. These derangements are not always capable of being detected by examination. In examining the body of a person supposed to have died from *tetanus*, the spinal cord would be the first organ looked to. About half-an-inch of the spinal cord, exterior to the aperture of the cranium, was examined on the first occasion. I was not present when the granules were discovered on the second examination."

Baron Alderson interposed, and said, "When you have all the medical men in London here, you had better not examine an undergraduate of the University of London upon such points, I should think."

So also seem to have thought the counsel for the prosecution. There was no further cross-examination of this witness, and no re-examination at all. I introduce this, because it may possibly be useful as a guide in the matter of *evidence*. It was not that the gentleman was not a trustworthy witness, so far as his veracity was concerned; it was his want of experience that made his opinion comparatively valueless in the presence of the great medical authorities who were waiting to give evidence. Probably this witness would not have been called but for the fact of his

having been present at the first *post-mortem*. It must have been matter of strong comment if he had been kept back. And it frequently happens that a witness must be called who is useless for anything he may prove as to fact, and also for any evidence he may give as to opinion.

As to what is matter for cross-examination and what for comment to the jury, the following incident may perhaps serve as an illustration :—

Mr. Serjt. Shee, in cross-examination, asked Sir Benjamin Brodie this question : "Considering how rare cases of *tetanus* are, do you think that the description given by a chambermaid and by a provincial medical man, who had never seen but one case, is sufficient to enable you to form an opinion as to the nature of the case?—Sir B. Brodie: "I must say, I thought that the description was very clearly given."

Mr. Serjt. Shee : "Supposing that they differed in their description, which would you rely upon, the medical man or the chambermaid?"

Baron Alderson : "That is hardly a question to put to a medical witness, although it may be a very proper observation for you to make."

Having already exceeded the limits I had assigned for these "Hints," I shall only quote, as an example of reply, that portion of the speech in this trial which deals with Dr. Nunnelly's evidence. It not only shows the bearings of the cross-examination, but is a good instance of terseness, brevity, and force in this portion of an advocate's duties.

"They say that Cook was a man of a delicate constitution, subject to excitement, that he had

something the matter with his chest; that in addition to having something the matter with his chest, he had a diseased condition of the throat; and putting all these things together, they say that if the man had taken cold he might have got idiopathic *tetanus*. We are here launched into a sea of speculations and possibilities. Dr. Nunnelly, who comes here for the purpose of inducing you to believe there was something like idiopathic *tetanus*, goes through the bead-roll of Cook's supposed infirmities, talks about his excitability, his delicacy of chest, his affection of the throat, and says these things would predispose to idiopathic *tetanus* if he took cold. But what evidence is there that he did take cold? Not the slightest in the world. There is not the smallest pretence that he even complained of a cold or was treated for a cold. I cannot help saying that it is a scandal upon a learned, distinguished and liberal profession that men should come forward with speculations and conjectures such as these, and that they should misinterpret facts, and extract from them sophistical and unwarrantable conclusions with the view of deceiving a jury. I have the greatest respect for science. No man can have a greater. But I cannot repress my indignation and abhorrence when I see it perverted and prostituted to the prejudice of truth in a Court of justice."

Cicero's Oration for Roscius accused of the murder of his father, and some of Erskine's defences, are the authorities I quote for many of the observations I have made on the conduct of a criminal defence.

I have already given one instance of a peroration which is simple and forcible; I will give one more from Erskine's speech for the Bishop of Bangor, which may be useful as something more than a mere example of a peroration.

"I cannot endure the humiliation of fighting with a shadow and the imprudence of giving importance to what I hold to be *nothing*, by putting *anything* in the scale against it, a conduct which would amount to a confession that *something* had been proved which demanded an answer. How far those from whom my instructions come may think me warranted in pursuing this course I do not know; but the decision of that question will not rest with either of us, if your good sense and consciences should, as I am persuaded they will, give an immediate and seasonable sanction to this conclusion of the trial."

CHAPTER XV.

AN ACROBATIC PERFORMANCE IN CROSS-EXAMINATION.

An example of injudicious cross-examination will illustrate many observations I have made upon that subject.

An action was brought against a lessee for non-repair, and the damages claimed were something like £300. The witnesses for the plaintiff had proved a tolerably fair case, had shown a want of wind-tightness and water-tightness, with other aggravated evils, sufficient to raise the expectations of any young counsel who could restrain his powers of cross-examination. But it is one of the most extraordinary features in advocacy that few can resist the temptation to evil that lurks in this fascinating privilege. In this case witnesses were called for the defence, and if a few immaterial questions had been asked in cross-examination, no harm would have been done to the plaintiff's case. There would have been a conflict of testimony, and the jury would have given damages somewhere between the lowest estimate of the defendant and the highest claim of the plaintiff.

Instead of which the enterprising counsel for

the plaintiff performed an acrobatic feat of cross-examination, and attempting to turn a double somersault, alighted on his head. Not an unusual performance in courts of justice.

Witness for defendant had said that the house *was in a fair state of tenantable repair.*

Cross-Examination.

Q. It was in *splendid condition*, was'nt it?

(Imagine such a question after the moderate statement of the witness. And imagine, if you can, that it is cross-examination).

A. I did not say it was in *splendid* condition. I said it was in *tenantable* repair.

Q. *Then what has been said by the witnesses for the plaintiff is pure imagination?*

(This looked something like plunging into metaphysics; at all events, it opened up a wide field of inquiry in some direction or another).

A. I don't know about pure imagination; I know it's a *got-up job* (laughter).

Here, you observe, the witness, like a skilful arguer (and far too good for his opponent), limited his answer by appropriate terms.

As to the metaphysical nature of the inquiry, he does not commit himself. The human mind, especially when you are dealing with its powers of imagination, seems to be beyond the witness' compass. So the far-reaching cross-examiner learns nothing, notwithstanding his thirst for knowledge, except that it is a "*got-up job.*" As though the witness had answered in the following terms:—"As to what is pure imagination or the poetical faculty, or what is called ideality, I know

nothing, but if you seriously desire to elicit my opinion of the evidence you have adduced, although your question is ambiguously worded, I will tell you."

The laughter was occasioned by the incongruity between the common-sense answer and the philosophical nature of the inquiry.

Then the cross-examiner, in order to show that he was not the least moved or annoyed by this upsetting of his case, remarks, "I don't mind your saying that" (renewed laughter), "it doesn't hurt me; but I think it would be better for your case if you did not come here and make yourself ridicklous by those 'bsurd observations." (Renewed laughter—everybody so pleased he wasn't hurt by the upsetting of his forensic coach.)

Here you will observe, also, was manifested a deep anxiety for his opponent's case: a generous enthusiasm in fact. But he was quite wrong in his conclusions, for the witness's answer was the best thing *that could have happened for the defendant*, inasmuch as the jury believed it. The cross-examiner, moreover, although at first he was not aware of being hurt, had in fact received severe internal injuries, and his case was soon pronounced quite hopeless.

The jury gave only the trifling damages which were admitted by the defendant himself.

The answer lost the case.

BUBBLE-AND-SQUEAK.

The learned "Jones" is not a genius—only a man with a faint instinct.

DICKENS, in his American Notes, observes:—"The learned gentleman, like a few of his English brethren, was desperately long-winded, and had a remarkable capacity of saying the same thing over and over again. His great theme was 'Warner, the eng*ine* driver,' whom he pressed into the service of every sentence he uttered. I listened to him for about a quarter of an hour, and coming out of court at the expiration of that time without the faintest ray of enlightenment as to the merits of the case, felt as if I were at home again."

It may not be uninteresting or uninstructive to give a speech not infrequently delivered at *Nisi Prius*, and which, with slight alteration, would serve for any ordinary case, civil or criminal. Its adaptability in fact is its chief merit, and if you could manage to infuse into it a little pathos, it would answer admirably in a case of breach of promise; only you must have a care to take away all allusions to the *pace of the van*, as these would scarcely fit in with so sentimental a cause. It looks, perhaps, a little absurd on paper, but when spoken it is always impressive, and if any one will get a friend to read it to him exactly as it is written, he will probably acknowledge that at least it is no exaggeration. I will guarantee the spelling, if the reader will take care of the elocution.

THE SPEECH.

M't pleas y'r Ludship gentlemnth' jura—

M'l'rnd friend's called sev'l witnesses to prove tht th plntff was passng long Flit Stret 'thalf pass nin 'n th mornin an that (now letm' say 'twunce gnlmn I do'n' say twas 'bsurd'n th part m'l'rn'd frien (who no daught acktd 'n 'cordance withs 'nstruckshns (nim not heah t say gnlemen) far from it on th contrry, I say nothing kn b' farth from me than t'say that m' l'rn'd frien's witnsses (although perhaps I could not gosfars to say I admire them) have come heah to kmit wlfl an dlbret an dibolkl perjry bt those whonstructed m'l'rn'd frien' gnlmn (an I do not hesitate t' sayt or shrink from th responsblty 'v saying it when 'tis said whatever those consqunces may be or may not be gnlemn) I sayts puffeckly 'bsurd ('ts all very well tsay genlemn th plntff's van was going 't th rate 'v fiv miles n' ar an t tell gentlmn vure comn sens an 'ntellgence o th Cit of Londn (but I shall call witnsss befor you gntlmn who'll tll yu (and less th witnss I shll callrall prjrers of the most diabolcl kind) (which I don think fra single moment twelv 'nttlgnt gntlemn o th Cit of Lond who are quaintd wi the world) I say I shall call those witnsss b'f'r yu (one I b'lieve's my s'liciter tlls me Mr. Sk'nflnt o' th' firm 'v Sk'nfl'nt and Bleedem a highly respectabl firm reminds me's a gentleman veminence 'n th' Citio' London (being a churchward'n o' St. Bumble) a man who camesiunderstand to London with only halfcrown's pocket) an' these witn'ss's'll tell you (nless I'm wrongly in-

struct'd) (but you will judg' o' their vracity when yu heah thevidence) but I am 'nstruct'd th't 'nstead of fiv' miles 'narh th't the pl'nt'ff's van was going (y'u'll remembah his appearance in that box) (great emphasis on the word *that*), (an' I daah say that ppearance did not k'mend itself to yuah notice as respect'ble gentl'm'n) I sh'll show you he was going instead o' fiv' miles narh, he was going at the rate o' farteen miles narh't the very least an' was thrash'n sorses wi' th' butt end ovs whip all down Cheapside and what is moah (why fiv' miles 'narh gentl'm'n 't's 'bsurd 't's puffuckly 'bsurd an' ridickl'us 't'san insult t' tell twelve respect'bl' gentl'm'n vure int'l'gence o' th' citeo'lond'n thatavan was going 't th' rate o' five miles 'narh when Mr. Tomkins—a most respect'ble man—(you will see 'm 'n th' box and heah's evidence) an' yu will say wheth'r he comes heah t' 'kmit w'lf'l an' d'l'b'ret p'rj're or wheth'r he does not he hasn fact no int'r'st 'v any sortorkind in th' case, any more than any one vu gentl'm'n o' th' citeo'lond'n an' I d'fy m'l'rn'd friend with all 's skill (an' I don't d'ny that m'l'n'd friend has a cert'n mount o' skill 'n this pa'tickler class 'v case no one more so perhaps) but the same time you gentl'm'n w'll not b'led away b' theloquence 'v m' l'rn'd friend but will give your verdict 'cording t' the'vidence, like impartial gentl'm'n o' th' cit' o' London, who (f I prove befor' you what I m nstructed I certainly shall prove) will, I m puffec'ly cert'n, give a v'rdict f'r th' defend'nt unless you come t' th' knclusion [this with a very impressive smile, that seems to carry conviction] (which I am quite

shuah yu will hesitate a ver' long time befoah you do) I may say (in fact unless my client be guilty 'v th' most ab'm'n'ble p'rj're that ever was kmitted in th' witness-box 'v a court of justice) th' facts I shall 'stablish befor' you 'pun th' most unimpeachable testimony will ('fi 'm properly 'nstructed) show beyond all doubt 'v any sortorkind that's puffecktly 'bsurd to say as the plaintiff has said 'pon his oath in that box [strong emphasis on the word that] that 'twas only going 't th' rate o' five miles an arh, your knowledge of human nature gentlemen 'll t'll you th't th' ord'nry pace (m' l'rn'd friend says ordinry pace has nothing to do wi' th' case—no g'ntl'm'n [another impressive smile] (m' l'rn'd friend's puffeckly right 'twas not an ord'nry pace—) it was a most *ex*traordinry pace I quite agree with m' l'rned frien' (of course I'm not blaming m' l'rn'd frien' he's acting 'n 'cordance with 's nstructions the same as I am an' th' same 's we all do) but when m' l'rned frien' talks 'bout five miles an *owah* the thing 's puffeckly 'bsurd an' redicklous on the face of it 'n I'll tell you why gentl'm'n I dare say most 'vu keep a caridge o' something o' th' sort it may be a cart 's m' friend suggests (but I don't think m' l'rn'd friend 's very wise in's suggestion f'r I respect a man's much in a cart sido in th' finest karidge perhaps moah! [Applause in the gallery] Certainly moarh! [A thump on the desk] these 'ntruptions won't serve m' l'rn'd friend with me nor yet with you gentlemen I am shuah 'se'll soon find a cart will do v'rey well gentlmn for the infrance I wish to draw and keepin that karidge or cart or

vekel or whatever it may be gentlemn you'll know 'vure own knowledge what fivemilesanarh means why it means gentlmn (but itsidle itsan insult ture commn sens t' tell gentl'm'n vure 'ntlgence what it means)—it means *anything* [another heavy blow on the desk]—(sensation)—it means that thole case is trumped up from begin'ng toend a trumped-up attorney's action to put money into's pocket and du think 'f the plaintiff got a verdict fu could do anything so 'bsurd and idiotic an' ridicklous—(but I have too much respect for you t' suppose anything o' th' sort)—would the plaintiff get one single solitary farthing? (suppressed emotion in Court) I don't wisht' be effensive—far from it I rather dsire t'conciliate but I ask you (why I suppose m' l'rn'd friend or rather his witnesses would sayf they sawn express traint full speed ift suited their purps (this with a sneer)—would sayt was only going 't th' rate o' five miles anowah (great laughter) which might be true gentlem'n (a smile) fu cut off the nought (renewed laughter) but those noughts make up th' sum vuman things gentlemen and as kmrshll men youkn no more cut them off with honesty than youkn cut off anything else with impunity (applause) but I will not detain you gentl'm'n I hope I've not detained you longer than was necessary to place the facts o' my case clearly an'telligibly befor' you and to mak such obser-shuns as naturally and logicly arise and unless you k'nvict my client 'v th' grossest perjry which as gentl'm'n o' cit' of London I'm sure you will not m' l'rn'd friend sabsolutely no case no singl' shadowvashadevacasevanysorterkind. (Applause,

which the usher of the court vainly endeavours to suppress.)

This speech, uttered with much volubility, always makes a great sensation, the interlacing of parentheses having a remarkably fine effect. The worst of it, however, is that it generally produces the verdict which the eloquent advocate declares the jury incapable of returning. On paper it does not look quite like a masterpiece of rhetoric, but I have often heard the advocate delivering it extolled as "*a werry fine speaker, sir, who med the g'n'lman be?*"

CHAPTER XVI.

A WORD ON THE APPOINTMENT OF A PUBLIC PROSECUTOR.

As closely connected with the subject of Advocacy, I should like to make an observation with reference to that much discussed question of the expediency of appointing a Public Prosecutor. It has always seemed to me that the evil of the present system lies just where it is never, so far as I know, looked for. Most of the arguments in favour of a change have been based on the assumption that many guilty persons escape through the failure of private prosecutors to carry on the proceedings, the charges being hushed up and abandoned on payment. It never seems to be considered that on the other hand many innocent persons are threatened with prosecutions for the sole purpose of extorting money; that any one who is dishonest enough has the power of setting the criminal law in motion for that very object; and that the present system is the fruitful parent of false charges and extortionate threats.

It would be interesting to know how many summonses are issued in criminal matters during the year, and what proportion of them are ever

heard of after. A man has a trifling claim and a great deal of spite against another. He goes to an ingenious solicitor, who is a sort of jobbing engine-driver to the government criminal works, and with the simplest touch of his finger the whole machine is set in motion.

A coating of criminality, no matter how thin, is laid over a simple commercial transaction, and a man of honour and respectability, with wife and family, and all that he has are liable to be swept away to perdition by some rascal who has neither conscience nor consideration. The probability of course is, that the more respectable and the more innocent a man may be, the more readily will he succumb to the demands of the "Prosecutor." I will give one case from my own experience out of many. A gentleman of very high respectability had a claim against another. He brought his action, and obtained his verdict. Immediately after, and before execution could issue, a summons for perjury was taken out by the defendant against the successful plaintiff. Imagine, if you can, the distress of mind of this man, whose whole existence as a commercial man depended upon his integrity and honour! Go into a police-court to *prove his innocence* was more than he could endure even to contemplate. He would pay anything rather than face such an ordeal; and at length agreed to pay as much as a *Thousand Pounds* (those being the moderate terms of compromise offered by the solicitor on "the other side") for the summons to be withdrawn. No less a sum than *three hundred* of it was to be paid to the afore-mentioned engine-driver for working the machine—his *wages*, called "*costs*"

—the wages of *sin*, but not quite in full. Fortunately, however, it was necessary that the accused should consult his solicitors before the "settlement" could take place. The moment the bare-faced scheme was propounded to them, they, as a respectable firm, repudiated with indignation the proposal, and would hear of nothing but the defendant boldly facing the charge. This he did, and as might be expected, there was not a shadow of a case against him.

If this were a solitary instance, it would of course be no argument against a system which operates generally; but unfortunately it is part of a system of corruption, extortion and fraud, operating upon the fears and weaknesses of mankind.

When the question of administering public justice is discussed by persons whose duty it is to perfect the law as far as possible, I think the protection of the innocent from those who "dare to do injustice by a law," is at least as much worthy of consideration as securing the punishment of the guilty.

CHAPTER XVII.

AS TO THE UTILITY OF THE GRAND JURY.

To abolish the Grand Jury would be a retrograde step in the cause of liberty. They are the only really independent tribunal of the country; the only one that in any time of great political, or if you will, revolutionary excitement, would occupy an independent position between the Crown and the subject. Their usefulness is manifested at every Assize and Quarter Sessions. Many an innocent man has been saved the degradation and misery of being placed in the dock by the timely intervention of the Grand Jury; Governor Eyre was a notable instance in this respect, and many others could be cited if one were not sufficient in a question where the liberty of the subject is concerned.

But what the Legislature ought to guard against is the abuse of this institution for the purposes of vengeance or extortion. A recent case has brought this matter prominently before the public mind. A hundred persons in humble position might have been unjustly placed upon their trial by means of the Grand Jury, and nothing would have been heard of the injustice of the system. When, however, it strikes at the liberty

of a subject who has greater means of enjoying it than the hundred, it focuses the public mind upon the point.

Take the offences enumerated in the "Vexatious Indictments' Act," an Act which, from its title as well as its operation, you would justly conclude was passed expressly for the vexation of innocent men. After a case has been thoroughly sifted by a competent tribunal, after both sides have been heard, and after it has been *dismissed*, the prosecutor is allowed to go before the Grand Jury, and *in the absence of the accused* tell his own one-sided story, obtain his bill of indictment, and compel his victim to be tried before the petty jury in open court. This is "hunting him down" with a vengeance; but it must strike every one as a cowardly and iniquitous proceeding. We are a sportful nation it is true, but we like fairness even in sport; men do not shoot a sitting hare. A fair field and no favour if you like, but at least a fair field.

And all this is so easy of remedy if you only decree that no man shall be placed on his trial without being heard in his defence, if he wishes it; at least that no private individual shall be allowed to go behind the back of his victim before a Grand Jury without a committal by a magistrate, or the sanction of some competent authority, such as the Public Prosecutor should be. More especially should he be prevented from doing so, after the case has been thoroughly sifted on both sides by a competent tribunal. It might be said that after such an inquiry, a grand jury is unnecessary. I do not agree with that proposition. It may be

that false swearing has taken place before the tribunal of first instance, and the false swearer will not face the Grand Jury; it may be that some among the large body of gentlemen who constitute it may have the means of dissipating the flimsy theory of the prosecution, which the first Court had not; it may even be that twenty three heads are wiser than one or two, and may come to the conclusion that the accused ought not to be subjected to the indignity of a trial after all; and I think we might fairly trust their judgment, as we can rely upon their honour, in this respect.

At least, as it seems to me, we had better regulate than destroy one of the greatest bulwarks of the people's liberty.

See to it Mr. Attorney, whether Whig, Tory, Conservative, Liberal, or whatsoever hue and colour of political hole-picking you may assume;—here is work for a MAN. In the name of common sense and common justice, in the name of common humanity, and of whatsoever else is common or uncommon, so that it be connected with human nature, abolish even this "bulwark of liberty" if you cannot take away its power for mischief. If men did but know the law as well as the law presumes that they know it, the facilities of oppression afforded by the Grand Jury system would soon bring in a reign of terror for all honest and peaceable men. It is capable of being turned into a kind of "Secret Inquisition," which would enable Vengeance to denounce Innocence and torture honest men with a public trial. There is work then, Mr. Attorney, if not for a politician, for a *man*. If well regulated, nothing could be a

better protection for liberty. As it is, nothing could be better calculated, if so worked, for its destruction.

And will you provide as great facilities for pursuing our remedies in a civil Court as there are for the accommodation of criminals?

Would that some Speedy Trial system obtained for suitors in civil cases! But it is not so at present; civil work must needs come to a stand-still in London because some individual who lives by defying law and human rights demands his trial at Bodmin!

So far have we advanced in *Law Reform at* present!

OPINIONS OF THE PRESS

ON THE FIRST EDITION.

"THE LAW TIMES,"

Saturday, April 24th, 1880.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Brothers & Layton.)—This little volume has lain for some time upon our table unnoticed. It deals with a subject more or less interesting to members of the Bar, but not of much practical moment to anyone else. Whether it is more than simply interesting to the Bar is the question upon the answer to which depends its value. Mr. Richard Harris, we believe, is the author, and he shows by his writings that he has watched carefully and intelligently the proceedings of our legal tribunals for the disposal of Nisi Prius business and criminal trials. We should conclude that he knows how to examine a witness, that he would be slow to blunder in cross-examination, and that his speeches, if not brilliant, would not be inflictions. We do not say that his speeches are not brilliant; our only means of forming an estimate is the little volume before us. But he appears to us to have formed an opinion that public speaking may be taught in a treatise. We cannot agree with him. Nothing is more true than that orators are born; and we believe that no written directions can make an elegant out of an inelegant speaker. Nor can we agree that in the present day 'to speak well is almost to insure success.' There are some excellent speakers at present at the Bar who are without business; there are barristers overburdened with work whose articulation and delivery are both defective. Nevertheless, we should say with our author that those who can speak would never cease to labour—that 'it must not be forgotten that the time may come when some great occasion will demand, whether at the bar or elsewhere, the latent powers which have been stored up by the earnest labours of one's early years.' That is not a very happy phrase, but we see what is meant, and agree with it. Much care and thought have been bestowed upon this *brochure*, a remarkable feature in which is a very close and critical analysis of the opening speech of Sir Alexander Cockburn in the trial of Palmer. We anticipate that Mr. Harris will have a wide circle of readers. Young barristers must profit by a perusal of his hints; old barristers, being incorrigible, will be entertained by them."

"THE SOLICITORS' JOURNAL,"

Saturday, April 24th, 1880.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton).—A modest and unpretentious little book, full of good sense and just observation, set out with much humour and many apt illustrations. The 'hints' contained in it form a very complete manual of the advocate's art in trial by jury, and the plain, good-humoured, and unaffected style in which they are conveyed makes them the more acceptable and the easier to digest and assimilate. There is only one caution that the reader who reads for profit should take with him. In every art, but prominently in advocacy, as in war, the practice must be a fresh and living one; circumstances do not repeat themselves precisely, and an illustration, however apt, is likely to lead astray one who is looking out for an opportunity of reproducing it. Let the young advocate read and re-read this little work (he will find it to his profit), but let him allow its rules, maxims, observations, and examples to rest quietly in his mind, and guide him by an unseen influence, rather than attempt to deck himself with them as if they were a suit of clothes.

"The plan of the book is well conceived. It takes in order the successive steps of a trial, and gives hints and directions appropriate to each; and a special chapter is appropriated to the defence in a criminal trial. It is true that the Opening and Summing up of the defendant's Case in a civil action, which have their peculiar points, are not specifically dealt with;* but the chapter on the plaintiff's opening and reply afford ample material which common sense will easily adapt. Some specimens of forensic pleading follow. *Nascitur non fit* is a motto which many may be disposed to apply to advocacy as to poetry; but in the one case or in the other the motto is true only of efforts of the highest kinds, and such as result in enduring monuments of the art. With the ordinary wayfarer much may be accomplished by care and attention applied by practice; and the author of this little work may fairly claim the position of a judicious master in the art of teaching. His circle of readers, however, will probably not be limited to those who read for instruction. If any of our readers are in want of a little book to fill up a vacant hour, they will be secure of finding here what will engage their attention and amuse their leisure."

[* These have been added in the Third Edition.—The AUTHOR.]

"THE LAW STUDENTS' JOURNAL,"

Thursday, January, 1st, 1880.

"'HINTS ON ADVOCACY,' with suggestions as to opening a Case, Examination in Chief, Cross-Examination, Reply, Conduct of a Defence, &c., &c. By a Barrister. (London: Waterlow Bros. & Layton. 1879).—We have perused the pages of this little work

with a considerable amount of pleasure, for the idea of it is excellent, and the execution of the idea is to be commended. The author is modest, and merely offers 'for the benefit of students a few observations which are the result of a careful study of the modes pursued by the leaders of the profession,' and we can candidly say these observations will be found of use to all just entering on a career of intended advocacy, and to many already some way on the road of that career. How many a young barrister fancies that because he is 'called,' his powers as an advocate will come at once by some influence of nature; he gives no study to a system of advocacy, but leaves the matter to providence, and providence is not always kind. In an essay in these columns in June last, on the 'Study of the Law for the Profession of a Barrister,' the necessity of some means of instruction in the art of speaking was strongly pointed out, and the author of the present work seems fully to have shared our views. He endeavours throughout his work, by precepts and examples, to guide the student in the course he should pursue as an advocate in the various positions in which he is placed, and throughout his remarks are useful and most evidently the result of thought and care. Take as an instance his opening advice on page 11, where he warns the advocate against coarse and injudicious flattery of a jury; again, on page 47, where he warns the beginner against going too fast in his examination-in-chief; again, on page 59, where he presses the importance of observing a thoroughly good temper in cross-examination, and yet again, on page 129, where, with regard to re-examination, he says, 'Above all things it should be remembered that re-examination does not consist in repeating the evidence-in-chief or in explaining answers that are in your favour.' How many an advocate would benefit by a practical taking to heart of this important rule. The classification of the different kinds of witnesses given on page 63 also calls for special commendation.

"We could with ease devote considerable space to urging the advantages of this work to the student, but must rest content with what little we have said, and with a hearty recommendation of it, not only to those of our readers who are bar students and young barristers, but also to articled clerks and young solicitors who may at times have the duties of advocates cast upon them. We confidently expect that the book will meet with that approval and success which it, in our opinion, undoubtedly deserves."

"THE ARTICLED CLERKS' JOURNAL AND EXAMINER,"

Monday, December 15th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton, 1879).—Seldom has it been our fortune to read a more useful or entertaining work than 'Hints on Advocacy,' by a Barrister. The chapters on examination-in-chief and cross-examination should, we think, not only be read, but seriously reflected on by every student, whether of the lower or higher

branch of the profession, and are fully as applicable to the practice of County Courts and proceedings before Justices, as to that of the Superior or Central Criminal Courts.

"An interesting analysis of the opening speech of Sir Alexander Cockburn in the trial of Palmer, in which the author calls the student's attention to the more salient points, in a manner calculated to be of the greatest use; some examples of reply and peroration, which like the rest of the contents should be by no means hastily passed over; and a short chapter on the appointment of a public prosecutor, bring to a close a volume of most reasonable compass, valuable alike to the student and practitioner.

"It is to be hoped that this work may meet with the ready appreciation at the hands of the public which it undoubtedly deserves, the more particularly as we glean from a note at the end of the Preface, the author may be induced to give us in a second edition the benefit of his observations on, among other masterpieces of forensic advocacy, the speech of the then Solicitor-General in the Tichborne trial."

"THE IRISH LAW TIMES AND SOLICITORS' JOURNAL,"

Saturday, December 13th, 1879.

"'HINTS ON ADVOCACY,' with Suggestions as to Opening a Case, Examination-in-Chief, Cross-Examination, Re-Examination, Reply, Conduct of a Defence in a Criminal Trial, Analysis of the Opening Speech of Sir Alexander Cockburn in the Prosecution of Palmer, Examples of Reply, Peroration, &c., &c. A word on the Appointment of a Public Prosecutor. By a Barrister. (London: Waterlow Bros. & Layton, Birchin Lane and Lime Street. Pp. 218. 1879).—'There is no school of advocacy; there are no lectures on advocacy; and, so far as I have been able to ascertain, there is no book on the subject,' writes our author. To law students, however, 'The Advocate,' by the late Serjeant Cox, is not unfamiliar, and we hope that 'Hints on Advocacy,' by a Barrister, will attain an equal success. No doubt this little treatise might well be more methodical in arrangement, and is in itself not quite a model of style; yet it teaches both method and style, and much more besides that to anyone who has never learned anything of the art of advocacy will not be found amiss. This, indeed, is 'something,' as even the exacting critic in Hans Andersen's Tale might possibly admit, although, not without reason, he could not fail to wish for more. We, too, wish for more—we wish that this treatise may soon reach a new edition, and that, standing on its own merits, improved as it is sure to be by an author who, in a path so little trodden before, has exhibited so much discrimination and discernment, it will then need no other 'advocate.' But we shall abstain from giving any particular 'hints' as to what constitutes our idea of perfection in such a treatise, lest the author should only fare like J. F. Cooper, who, in his preface to the 'Pioneers,' tells us:

'Just as I have made up my mind to adopt the very sagacious hints of one learned reviewer, a pamphlet is put into my hands, containing the remarks of another, who condemns all that his rival praises, and praises all that his rival condemns. There I am, left like an ass between two locks of hay; so that I have determined to relinquish my animate nature, and remain stationary, like a lock of hay between two asses.' It is more to the point, however, to turn to such merits as we find in the book as it is. It tells the young lawyer what to do and what to avoid, in the practical conduct of a trial—how to open his case, to examine and cross-examine the witnesses, and to reply to evidence; and all this it does in such a way that the young lawyer might well desire that he could have the advantage of observing some advocate putting all those admirable precepts into practice. That is just what he most needs. No book will of itself make him a judicious and effective advocate. 'You cannot make an orator by advice, or a skilful advocate,' observes the author himself (p. 114); 'the most one can hope for in giving hints is to assist young advocates in developing the powers they possess, and in pointing out certain dangers to be avoided.' But, in addition to this, the suggestions and instructions given by 'A Barrister' will have the effect especially of opening the student's eyes and ears to what, though most worthy of his attention and imitation, he might not otherwise see or hear, when the great masters of the art of advocacy are engaged in screwing truth out of the witness-box and hammering it into the jury-box."

"THE BIRMINGHAM DAILY GAZETTE,"

Wednesday, 10*th December*, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton, 1879).—Although this little work is chiefly designed for the use of persons who contemplate devoting themselves to the profession of legal advocacy, it will nevertheless be found highly interesting and instructive to all classes of educated and intelligent people. To the former it is most invaluable, for, as the author remarks in his Preface, there is no school of advocacy, no lectures on advocacy, and hitherto there has been no book on the subject. Law students, whether in the higher or lower branches of the profession, who have triumphantly passed all their examinations and given satisfactory proofs of their knowledge of the law, are in the matter of legal advocacy cast loose upon the Courts without an idea beyond what they may be able to pick up from personal observation on the important subject of the art and mystery, as it may justly be called, of advocacy of the legal kind. This great deficiency is to a large extent made good by the really admirable 'Hints on Advocacy,' supplied by a 'Barrister.' Who the author is we cannot say, but he is evidently a barrister of long experience, great skill, and we should suppose, considerable eminence in his profession. One wonders, while

perusing his extremely valuable hints, at the generosity or unselfishness which allows him to freely disclose the secrets of his art, which must have cost him years of observation, reflection, and practice to acquire; and it is certain that a little careful study of the couple of hundred pages of this book cannot but give the young advocate an insight into his art, which otherwise could only be secured by long experience. It is not possible, in the limits of a notice such as this, to show the character of the book by freely quoting from its contents, but we can find space for one extract, indifferently chosen, by way of illustrating the style of the author. On page 45 he lays down and enforces the rule, 'Never cross-examine your own witness. This, again, seems remarkably obvious, but it requires an effort to obey it nevertheless. You will hear an advocate cross-examine his witness over and over again without knowing it, if he have not the restraining hand of his leader to check him. Before Mr. Justice Hawkins, not long since, a junior was conducting a case which seemed pretty clear upon the bare statement of the prosecutor. But he was asked, 'Are you quite sure of so and so?' 'Yes,' said the witness. 'Quite?' inquired the counsel, 'Quite,' said the witness. 'You have no doubt?' persisted the counsel. 'Well,' said the witness, 'I haven't much doubt, because I asked my wife.' Mr. Justice Hawkins: 'You asked your wife in order to be sure in your own mind?' 'Quite so, my lord.' 'Then you had some doubt before?' 'Well, I may have had a little, my lord.' This ended the case, because the whole question turned upon the absolute certainty of this witness's mind.' The observations of the author on the subject of cross-examination, and his exposition of the comparative ease with which a lying witness can be found out, are very interesting; but where there is so much that is admirable it is difficult to single out any particular part for special praise."

"PUBLIC OPINION,"

Saturday, November 29th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow Bros. & Layton).—Notwithstanding that the profession of an advocate is well nigh as ancient as the law itself, 'A Barrister' tells us that, so far as he has been able to ascertain, 'there is no book on the subject.' This reticence on the part of lawyers, on a question in which they are so deeply interested, is probably as much a proof of their wisdom as a departure from it by the author is an evidence of his boldness. It seems to him 'lamentable that no instructions should ever be given in an art which requires an almost infinite amount of knowledge.' He says: 'A jury is a difficult body to handle, and the more experienced an advocate becomes the more delicately will he treat the men who have to decide the fate of his cause.' Having thus suggested the difficulty of the task under-

taken by the inexperienced advocate, the first rule laid down for his guidance is that 'the most effective way to secure the attention of the jury is to be in earnest, *or, at least, appear to be.*' This piece of advice leads to many curious reflections, which the space at our disposal does not permit us to pursue. Towards the close of the volume, 'A Barrister' gives us a very short chapter on the appointment of a public prosecutor. It is very properly remarked that—

"Most of the arguments in favour of a change have been based on the assumption that many guilty persons escape through the failure of private prosecutors to carry on the proceedings, the charges being hushed up and abandoned on payment. It never seems to be considered that on the other hand many innocent persons are threatened with prosecutions for the sole purpose of extorting money; that anyone who is dishonest enough has the power of setting the criminal law in motion for that very object; and that the present system is the fruitful parent of false charges and extortionate threats.'

"There are, however, other reforms quite as much called for and equally within the scope of the present work to which no allusion is made by the author, but which might suitably find a place in a future edition."

"THE SCOTSMAN,"

Friday, November 28th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton).—This unpretentious little volume of 'Hints on Advocacy,' will supply a want which must often have been felt by young barristers. Without assuming to possess exceptional profundity of knowledge or range of experience, the author lays down the rules and principles which should always be kept in view by counsel in opening a case, examining, cross-examining, re-examining, replying on the case, managing a defence and so forth. He offers suggestions as to the best way of handling the various types of witnesses, and of getting the ear of the judge and the jury. The general inference to be drawn from his remarks is that tact, command of temper, and readiness of resource are more valuable qualities in a barrister than the loftiest oratorical powers, or even than the greatest intellectual acuteness. As a model of an opening statement in a criminal prosecution, our author takes Sir Alexander Cockburn's famous speech in the trial of Palmer, the Rugeley poisoner, and furnishes a skilful and interesting analysis of it. Few barristers will not be able to profit by some one or other of the many hints and suggestions contained in this book."

"SATURDAY REVIEW,"

November 29th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton).—Among the voluminous literature which exists

for the special use of the learned professions, it is curious how little is to be found to smooth the way of a beginner entering on the practice of any of them. It is only too easy to fill a whole library with books of divinity, medicine, or law. But those may be counted on one's fingers in which the clergyman will find any advice worth having as to public reading or the ordinary work of a country parish, or the physician as to his professional dealings with patients and colleagues, or the lawyer as to the conduct of a case in Court. Various reasons might be alleged for this dearth of public information on matters which are of considerable interest to large numbers of persons. It may be said, amongst other things, that successful men do not often care to publish the secret of their success; it may be added, and perhaps this is more to the point, that for the most part they could not if they would. For knowledge insensibly picked up in the course of a long experience, and in the mind of the possessor himself, manifest not in the form of propositions or precepts, but as a kind of special sense or tact indicating the right thing to be done in the particular juncture, is extremely difficult to reduce to a shape that can be of much use to any one else. Besides this, there is common to nearly all arts and mysteries (as the old term itself implies) a certain jealousy of the outside world, which is distinct from any individual reticence produced by the fear of competition. It is a corporate point of honour to keep up the methods of the craft by way of internal tradition, and not let the world see too much of them. In this feeling the supposition that the world will admire the results more in proportion as it knows the means less is not improbably mingled with relics of extremely ancient superstitions. But these customs of secresy are not easy to keep up at the present day. The age is curious and critical, and as the extent of men's business increases, the old methods of oral tradition are no longer sufficient for the wants of the professions themselves. The time comes when the cherished traditions have to be committed to paper and print; and being once given to the press, they are given to the multitude.

"'Hints on Advocacy,' by a Barrister, who does not further disclose himself, is practical in intention, sensible in execution, and not unfrequently amusing by accident. The 'Barrister' announces in a short and, we believe, quite correct statement, the want he desires to provide for. 'There is no school of advocacy; there are no lectures on advocacy; and so far as I have been able to ascertain, there is no book on the subject.' He then says, very justly, 'Tact cannot be taught, but it will follow from experience, and a good deal of experience may be condensed into the form of rules;' and so he offers the results of his experience for the use of beginners

"The reader will find careful and emphatic warning against a variety of blunders in the minor tactics of examination-in-chief, which on paper, as the writer says, look too obvious for anybody to fall into, but in the excitement of action are not always escaped even by counsel of some experience. To bring out the witness's

story in the natural order; to give him time to tell all material facts; not to worry or cross-examine your own witness; not to ask long-winded and confusing questions—these things appear very simple to enjoin, but are not so easy as they look to be observed. Much might be said of the different kinds of witnesses and the different ways in which their minds are best unlocked by the cross-examiner. The 'Barrister' gives an elaborate classification, and pursues it at some length. One thing admitted by all who have seriously considered the subject, the 'Barrister' among them, is that blustering and violence in cross-examination are bad art and bad policy."

"DERBYSHIRE ADVERTISER AND JOURNAL,"

November 21*st*, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton).—The author of this book bases advocacy, as Sir William Hamilton does metaphysics, on common sense. And the book is an example of the quality on which the writer insists that success in advocacy, as indeed success in almost everything else, depends. It is sensible, reasonable, well-balanced, and, moreover, inspired by a high principle of self-respect. It is written, of course, specially for young barristers, and it is well adapted to guide a young aspirant for legal distinction, and to warn him off the many shoals that beset the path of the advocate. It condenses into a small volume the hints gathered in a life of careful observation, and it is no mere collection of dry, didactic maxims, but takes the reader to the root of the matter, and teaches him to think and observe for himself. The author is a shrewd observer. He has a keen eye for defects and excellencies, and is master of the most minute—we do not say trifling, for nothing that helps towards success is trifling—but the most minute points which need to be borne in mind in order to make the best of a case. The book is written for advocates, but it is worthy of a far wider range of readers. As journalists, we have read it with pleasure, and the speaker, the writer of every kind, indeed, any man who desires to attain the art of expressing himself with clearness and force, and of finding out what is in other men's minds, will read this little book with advantage.

"On one point we must differ from the writer. He quotes Whately again and again, in support of points he desires to urge, but where the shrewd archbishop denounces the abuse of advocacy, the author dissents with warmth. Now we cannot suppose that he would himself sanction the abuses against which Whately directs his censure, for all through the book he warns the young advocate against them; but that the position of advocate is often abused, and that the license of the bar is not unfrequently made a shield, under the protection of which a vulgar bully abuses people far better than himself, most people who have frequented Courts of justice will confess. The book warns the young advocate

against beslavering the jury with flattery—a very necessary hint—indeed we often wonder that juries do not resent the insult involved in the gross flattery addressed to them."

"THE WHITEHALL REVIEW,"

Saturday, December 13*th*, 1879.

"'HINTS ON ADVOCACY,' by a Barrister (Waterlow Brcs. & Layton), is a little volume which will not only be useful as a text-book, though undoubtedly that is its prior intent, but it is extremely amusing, as the author, whoever he may be, has a genuine vein of dry humour and a felicitous style. His classification of the several kinds of witnesses, and category of their several peculiarities, is most diverting, and will be recognised by all who have been in the habit of attending courts of law as singularly true to nature; the best are the 'flippant witness' and the 'canting hypocrite.' But for the dignity of the profession, the author might have enlisted the services of some first-rate caricaturist to embody his presentations; we can imagine how funny Keene or Barnard would have made them. But the book is a serious one, in spite of its wit. The analysis of Sir Alexander Cockburn's opening speech in the Palmer case is masterly, and the hints to young advocates are evidently the work of a practised hand. Is not 'David' (at page 17) a misprint for 'Daniel,' and 'hap' for 'hip'? Surely the reference is to Portia, Gratiano and Shylock. And, again, at page 118, the example is not happily chosen, because people would be coming from church on Maundy Thursday as well as on Good Friday, so that the witness might have been telling the truth. It might be well to consider these points, because the book is likely to become a standard work of reference."

"THE LINCOLNSHIRE CHRONICLE,"

November 28*th*, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow Bros. & Layton, 1879).—The profession will hail the appearance of this ably written manual with satisfaction, dealing, as it does, perspicuously and comprehensively with a science that is singularly deficient in literature of an educational nature. The young practitioner has had to contend hitherto with this serious disadvantage, that while on every other branch of practice there exist text-books innumerable, on this most fascinating, as it is the most telling of his pursuits, there has been absolutely no recognised guide that he could study. Certainly an insight might be gained into leading principles by attending Assize Courts; and the young aspirant might possibly have stored his memory with more or less valuable hints received from his principal or tutor; yet there still remained so much to learn, that, in default of a text-book, it was only by experience—we had almost said by repeated failure—he

was enabled gradually to correct his errors and acquire the self-command, tact, cunning of fence, and faculty of putting his own case in the best, and his opponent's in the worst possible light, that marks the practised advocate. He might be thoroughly well up in his facts, yet be unable to state them clearly; he might be an able lawyer, yet betray the weaknesses of his case needlessly, or omit to take due advantage of an adversary's error; he might make his witnesses prove too much or too little; he might give or lose an opportunity by pursuing a mistaken line of cross-examination; in a word, for want of a system and established principles to guide him, he might fail where otherwise it was possible to have succeeded. This work aims at supplying this defect, and we can confidently recommend it as fulfilling in no small degree its purpose. Each class of cases is dealt with in all its stages, and the manual abounds in subtle suggestions and pointed instances. The chapters on examination and cross-examination are particularly happy, while the examples of perorations and replies in a later chapter afford valuable hints on the skilful balancing of phrases and the just use of words. An elaborate analysis of Sir A. Cockburn's opening speech for the prosecution on the trial of Palmer, which speech is adduced as a model of forensic and rhetorical skill, concludes a volume that will be read by experienced advocates as well as students with pleasure and advantage."

"THE GRAPHIC,"

November 15*th*, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow Bros. & Layton).—This is a very sensible and useful little manual, and on a subject, despite the multitude of law works, which we do not remember to have seen treated of before. The following are the chief divisions of the author's essay:—'Opening a Case,' 'Examination-in-Chief,' 'Cross-examination,' 'Re-examination,' 'Reply,' 'Defence in a Criminal Trial,' concluding with an analysis of the present Lord Chief Justice's famous opening speech at the trial of Palmer the poisoner. The observations on the manner of treating a jury, and on the various kinds of witnesses, show considerable powers of observation, and altogether it is a book which laymen may read with entertainment and youthful barristers with profit."

"THE NORTHAMPTON MERCURY,"

Saturday, November 15*th*, 1879.

"Gentlemen who desire to become eloquent in courts of law should peruse 'HINTS ON ADVOCACY' (Waterlow Bros. & Layton, 23, Birchin-lane), written by a barrister, and abounding with examples of how to open a case, cross-examine, sum up, reply on evidence, &c. We do not remember to have met with any other

book containing similar useful instructions. The writer himself remarks :—

"'It seems to me lamentable that no instruction should ever be given in an art which requires an almost infinite amount of knowledge. Tact cannot be taught, but it will follow from experience, and a good deal of experience may be condensed into the form of rules. "*I never felt so much in want of a leader as I did when I had to cross-examine that doctor,*" said a talented junior of considerable standing, the other day. Why should this have been? What he had to cross-examine about was simple enough, although the question involved was the sanity or insanity of an individual at a particular time. But he had no rule or principle to guide him, and was simply *adrift.*'"

"PUNCH,"

29th November, 1879.

"'Punch' has seen the announcement of a handy volume, 'by a Barrister in Actual Practice,' entitled, 'HINTS ON ADVOCACY,' *Useful for Practice in any of the Courts, with Suggestions as to Opening a Case, Examination-in-Chief, Re-Examination, Reply, Conduct of a Defence in a Criminal Trial*, &c., &c., &c. He offers his own compendium of such a manual, which, if not suited to superior temples of Themis, will, at least, be good for the County or Police Court.

"1. Find out the depth of your client's pocket, and draw your ees accordingly—*in advance.*

"2. Let your Junior Clerk take instructions. (This saves trouble.)

"3. Apply for an adjournment as soon as the case is called. (By this means you will obtain a second fee.)

"4. Let the Judge or Magistrate do all the work (they like it); and whenever His Honour (or "Worship," as the case may be) says anything funny, be convulsed with silent laughter.

"5. Say as little as you can yourself, and do not try to be the least clever or witty.

"6. Should your client gain his cause, rise and denounce his opponent, and ask for costs.

"7. Should he lose it, shrug your shoulders, and tell him he would have been worse off but for you.

"8. In any event, send in a bill for further costs, after the case is concluded.

"N.B.—By following these instructions you are sure to gain the respect and esteem of your clients and all who may come in contact with you."

"THE LINCOLN, RUTLAND, AND STAMFORD MERCURY,"

Friday, November 7th, 1879.

"'HINTS ON ADVOCACY,' by a Barrister (Waterlow Bros. & Layton), is a newly published volume, containing some very judicious advice to the younger branches of the profession, evidently based on a careful observation of the effect of various styles of advocacy

on the minds of jurors. It is a logical treatise, and is valuable for its remarks on examination, cross-examination, re-examination, statement of a case, and reply. The faults of young advocates are dissected, and it is shown how frequently imprudent questions lead to the discomfiture of the case they are intended to support. The author sets forth his advice with extreme modesty, but all who read his hints must admit that they are suggestions that cannot fail to benefit those who are inclined to carefully study them."

"THE SOUTH LONDON PRESS,"

Saturday, November, 15th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton).—This book, though obviously intended for the benefit of the legal profession rather than for the general public, is really one of the most entertaining that has come before us for some time. To a lucid style the author unites keenness of perception and not a little humour; and instead of the dry, matter-of-fact details which one might expect, we get a pleasant volume abounding in useful hints, put in such a way that they at once carry conviction. The book consists of chapters on 'Opening a Case,' 'Examination-in-Chief,' 'Cross-Examination,' 'Re-Examination,' 'Reply,' and 'Conduct of a Case in a Criminal Trial.' In addition, there is a masterly analysis of the speech of Sir Alexander Cockburn in the Palmer trial, examples of reply, peroration, &c., and 'A Word on the Appointment of a Public Prosecutor.' Especially good also are the remarks on the different kinds of witnesses a counsel may have to deal with. The book is a capital one, and should be in the hands of every one who intends practising at the bar."

"LEAMINGTON ADVERTISER, WARWICKSHIRE OBSERVER AND BECK'S LIST OF VISITORS,"

Thursday, October 30th, 1879.

"'HINTS ON ADVOCACY.'—This is the title of an extremely useful book, written by a barrister, and published by Messrs. Waterlow Bros. & Layton, of London. The writer reviews, under different heads, the various duties which devolve upon an advocate, and makes numerous valuable suggestions, the result of practical and extensive experience. Many shrewd hints are given as to the objects to be gained by cross-examination, and the mode in which it should be conducted; and judicious cautions are given against eliciting needlessly what would damage a client. The different classes of witnesses generally met with are described, and suggestions given of the best mode of handling each. The book is avowedly written for young advocates, and to such it will prove useful and helpful, as, by a careful study of it, they may learn what would otherwise have to be acquired by practical experience."

"THE LEICESTER CHRONICLE AND LEICESTERSHIRE MERCURY,"

Saturday, November 22nd, 1879.

"'A Barrister' has published, through Messrs. Waterlow Bros. & Layton, of Birchin-lane, London, some useful 'HINTS ON ADVOCACY.' This is a treatise on a subject which has never yet been dealt with in this way. And yet it is not because such counsel as is here offered to the young barrister has hitherto been altogether unnecessary. Every one who has watched the proceedings of Courts of Quarter Sessions and Assizes with intelligent attention must occasionally have been startled and pained by the conspicuous floundering and blundering of some young barrister who has just been entrusted with his first brief. Utterly at a loss how to set about his duty of cross-examining his opponent's witness, his injudicious 'advocacy' has been worse than useless—it has too often been positively mischievous. To such an one the 'HINTS ON ADVOCACY' in this volume would have been simply invaluable, and would in all probability have averted failures destined to prove disastrous to many a promising opening career. The author has in this instance acquitted himself with tact and ability, and his work ought to be studied by all candidates for honours at the bar."

"THE CITY PRESS,"

Wednesday, November 19th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow Bros. & Layton).—At the outset this scarcely seems likely to prove an attractive book, even though its value should be considerable, but the author has contrived to infuse so much spirit into his remarks that they really form very pleasant reading. It is, however, mainly on the score of utility that this little volume must find acceptance, if at all, and that it will be found useful by those for whom it was intended there can be no question. Hints as to how a case is to be opened, how to conduct an examination-in-chief, or a cross-examination, are given, and other matters of a similar kind are treated at considerable length, and with great skill. An analysis is furnished of the opening speech of Sir Alexander Cockburn in the prosecution of Palmer, from which some important suggestions are drawn, applicable to the conduct of ordinary cases."

"MELTON MOWBRAY TIMES,"

Friday, 21st November, 1879.

"'HINTS ON ADVOCACY,' by a Barrister in actual practice (Waterlow Bros. & Layton, Birchin Lane, London), is the title of a work just issued. It is a valuable guide to young beginners in the law courts, as the author has evidently watched the different 'styles' in which cases are presented and carried through the courts. He

treats in such a lucid manner on the examination, cross-examination, re-examination, opening, and reply, and on things likely to crop up in cases, that it almost makes one a lawyer after perusing it. If some of those whose duty it is to conduct cases for their clients would first go through this book, it would be both better for the public and their reputation."

"THE NORTHAMPTON HERALD,"

Saturday, November 22nd, 1879.

"'HINTS ON ADVOCACY.' By a Barrister.—The writer observes in his preface that there is no school of advocacy, no lectures on advocacy, and so far as he has been able to ascertain, no book on the subject. The newly-called barrister has to find his way as best he can, very often to the sacrifice of important interests and many unfortunate clients. As he has never learnt anything of the art of advocacy, he is no more fitted for the task of advocating their rights than the clients themselves, except in so far as his knowledge of the law will assist him in the purely legal aspect of the question. It seems to the author lamentable that no instruction should ever be given in an art which requires an almost infinite amount of knowledge. He aims in the little work before us to render some service to beginners in the profession by hints as to the opening of a case, examination-in-chief, cross-examination, re-examination, reply, conduct of a defence in a criminal trial, &c. Some pertinent observations on the appointment of a public prosecutor are also appended."

"LONDON FIGARO,"

Saturday, November 1st, 1879.

"'HINTS ON ADVOCACY.' By a Barrister—is the title of a very well thought-out and ably put series of directions for young barristers. Its author is evidently a man of large experience, and displays a real knowledge of human nature as exhibited in judges, juries, witnesses, &c. He divides his work into chapters on 'Opening a Case,' 'Examination-in-Chief,' 'Cross-Examination,' 'Re-Examination,' 'Reply,' and 'Conduct of a Case in a Criminal Trial.' He also gives an able analysis of the opening speech of Sir Alexander Cockburn in the celebrated Palmer trial, and examples of reply, peroration, &c., &c. The book is published by Messrs. Waterlow Bros. & Layton."

"THE DERBY MERCURY,"

Wednesday, November 26th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton, 23, Birchin Lane).—This book appears to be

the result of extensive observation. The author has profited by seeing and hearing the failures of others; and has here gathered together some important hints for the guidance of junior counsel —hints which cannot be remembered and acted upon without good results following. In an opening chapter, the junior is shown how 'not to do it,' in opening a case, and then how to do it with the surest prospect of producing the desired effect. The author then points out the chief stumbling-blocks in the advocate's way whilst proceeding with a witness's examination-in-chief, cross-examination, and re-examination. The reply, with examples, perorations, &c., the conduct of a case in a criminal trial, are explained and illustrated; and a chapter is devoted to an analysis of the opening speech in the trial of Palmer. The book is not faultless; but its value is real, and its usefulness will be best tested by experience."

"NEWS OF THE WORLD,"

November 16*th*, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow Bros. & Layton).—There are sensible hints and suggestions in this volume, which young barristers desirous of making their way in the world may profit by. It is shown how difficulties in opening a case and examining witnesses are to be overcome, and practice in any of the Courts made easy."

"THE COLCHESTER CHRONICLE,"

Friday, November 28*th*, 1879.

"'HINTS ON ADVOCACY.' By a Barrister in actual practice.—This is a useful little work, published by Messrs. Waterlow, Bros. & Layton, for the assistance of advocates. Besides its value to the legal profession it is interesting to others as a study of character. The author, while admitting that no regular code of rules can with safety be laid down, as each individual case must of necessity be dealt with according to its own characteristics, nevertheless, in a chatty form, he gives some valuable advice capable of being followed generally in the examination, cross-examination and re-examination of witnesses, and critically deals with the evidence elicited at one or two celebrated trials. We think it a volume likely to be of service to every advocate, whether solicitor or barrister."

"THE BUCKS HERALD,"

Saturday, November 8, 1879.

'HINTS ON ADVOCACY,' by a Barrister. London: Waterlow Bros. & Layton.—These 'HINTS' include a good deal of practical advice

to the younger members of the profession upon sundry important subjects, such as the opening of cases, examinations, cross-examinations, and re-examinations, in the conduct of criminal trials and kindred matters. One of its chapters, and by no means the least instructive, contains an analysis of the opening speech of Sir Alexander Cockburn in the Rugeley poisoning case. It seems to us a masterly one. The work is one that may be advantageously studied by all advocates who have not yet made a name for themselves, and desire to do so."

"DUBLIN FREEMAN'S JOURNAL,"

Wednesday, November 12th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow, Bros. & Layton, London).—This is an interesting volume, penned by an anonymous member of the English bar, and purporting to be a series of instructions by which the advocate may attain proficiency in the arts of opening his case, examining witnesses, cross-examining the opponent's witnesses, and replying. The advice is sound, but we very much doubt that it will ever help any young gentleman to the bench. The science of law is to be learned from books, but the art of the advocate can only be acquired by careful study from the living master, and subsequent practice at the bar. At the same time, if the student or the barrister cannot gain much information from the book, he cannot fail to be interested by it. The seventh chapter, which consists of an analysis of Sir Alexander Cockburn's speech at the trial of Palmer, is a clever and interesting sketch."

"RUTLAND ECHO,"

Thursday, 20th November, 1879.

"'HINTS ON ADVOCACY' is the title of a work just issued by a barrister, and is a valuable guide to young beginners in the law Courts, as the author has evidently watched the different 'styles' in which cases are presented and carried through the Courts. The author treats in such a lucid manner on the examination, cross-examination, re-examination, opening and reply, and on things likely to crop up in cases, that it almost makes one a lawyer after perusing it. If some of those whose duty it is to conduct cases for their clients would first go through this book, it would be both better for the public and their reputation."

"THE PICTORIAL WORLD,"

November 22nd, 1879.

"'HINTS ON ADVOCACY.' (Messrs. Waterlow Bros. & Layton). —This is purely a class work, appealing to the rising generation of

barristers, for whom no 'school of advocacy' has been established. It gives in a concise form the mode of opening and conducting a case, the examination and cross-examination of witnesses, and the conduct of a defence in a criminal trial, besides many hints which cannot fail to prove useful to the young barrister. Altogether the instruction is so clear and precise, that one is tempted to jump to the conclusion that it must be very easy to become a good barrister with such a guide as the author of this work, who modestly shrouds his name under a pseudonym."

"THE WEEKLY TIMES,"

November 23rd, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton).—These hints have been very judiciously prepared from actual experience or observation, and they merit the attention of all young men entering the bar who have not had previous opportunities of hearing cases conducted in law Courts. The illustrations of defects in advocacy appear to be drawn in the majority of cases from recent trials, and all the hints founded upon them are wise, but not by any means exhaustive. In examining a witness the author gives good advice, but he omits a caution which should have preceded all those he mentions, namely, never to examine a witness from a brief.* We have heard Judges in London and on circuit on many occasions stop a young counsel, and tell him not to examine his witness in this manner; it shows a want of preparation which is sure to confuse the witness and confound the jury. Good, so far as it goes, the author might have made his book far better by giving more hints and fewer arguments."

[* This is an error of the reviewer, the subject being specially commented on at page 58.—The AUTHOR.]

"THE BUCKS ADVERTISER AND AYLESBURY NEWS,"

Saturday, November 29th, 1879.

"Gentlemen studying for the bar will find some useful aid in a volume entitled '*Hints on Advocacy*,' by a barrister in actual practice. The work, which is published by Messrs. Waterlow Bros. & Layton, treats exhaustively of the desirable way of opening a case, examining, cross-examining, replying, conducting a defence, and discharging all other functions of the pleader; and it is evidently the composition of an experienced practitioner."

"THE ILLUSTRATED SPORTING AND DRAMATIC NEWS,"

Saturday, December 20th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton.) The author of this work notes that there is no

School of Advocacy, and has no knowledge of a book on the subject; so he has endeavoured—and we must admit not without success—to supply the deficiency. His book is likely to be of much use to young cross-examiners, and will doubtless amuse the balance of humanity, even if they are not mixed up with law; though none of us knows how soon he may be cross-examined himself. The writer includes opening a case, examination-in-chief, cross-examination, re-examination, reply, &c., and the anecdotes introduced are generally very apposite."

"THE NOTTINGHAM DAILY GUARDIAN,"

Wednesday, December 10, 1879.

"'HINTS ON ADVOCACY.' By a Barrister in actual practice. London: Waterlow Bros. & Layton.—In 'Hints on Advocacy' a 'Barrister in actual practice' has attempted to supply to some extent what he regards as a 'lamentable' want. There is, he says, no school of advocacy, there are no lectures on advocacy, and he has not been able to discover even a book on the subject. The result of this is that the newly-called barrister 'has to find his way as best he can, very often to the sacrifice of important interests and many unfortunate clients.' He knows nothing of the art of advocacy—'an art which requires an almost infinite amount of knowledge'—and, except in the purely legal aspects of the case, the clients are just as well fitted to advocate their own rights. The author very truly observes, that experience will teach the advocate tact, but he thinks also, that a good deal of experience may be condensed into rules. His own experience is condensed into the little volume of 'hints' before us. He deals in succession with the art of opening a case, examination-in-chief, cross-examination, re-examination, reply, and the conduct of a defence in a criminal trial, and he gives an analysis of the opening speech of Sir Alexander Cockburn in the prosecution of Palmer, and some examples of reply and peroration. We have no great faith in works of this kind. In the art of advocacy, if in anything, a handful of experience is worth a bushel of theory; and we think young barristers will learn far more from close and intelligent observation of the leaders of their profession than from any hints or tuition that can be conveyed through the pages of a book. At the same time, the volume before us is marked by much care and intelligence, and bears also the impress of a not inconsiderable experience. Its perusal is by no means a laborious task. The author writes in a clear and concise style, and his manual is not the dry reading it would at first sight appear. In his closing chapter he writes a word on the appointment of a public prosecutor, from which we extract the following suggestive and important observations:—

"'It has always seemed to me that the evil of the present system lies just where it is never, so far as I know, looked for. Most of

the arguments in favour of a change have been based on the assumption that many guilty persons escape through the failure of private prosecutors to carry on the proceedings, the charges being hushed up and abandoned on payment. It never seems to be considered that on the other hand many innocent persons are threatened with prosecutions for the sole purpose of extorting money; that any one who is dishonest enough has the power of setting the criminal law in motion for that object; and that the present system is the fruitful parent of false charges and extortionate threats. It would be interesting to know how many summonses are issued in criminal matters during the year, and what proportion of them are ever heard of after. A man has a trifling claim and a great deal of spite against another. He goes to an ingenious solicitor, who is a sort of jobbing engine-driver to the Government criminal works, and with the simplest touch of his finger the whole machine is set in motion. A coating of criminality, no matter how thin, is laid over a simple commercial transaction, and a man of honour and respectability, with wife and family, and all that he has, are liable to be swept away to perdition by some rascal who has neither conscience nor consideration. The probability, of course, is that the more respectable and the more innocent a man may be, the more readily will he succumb to the demands of the 'prosecutor.' . . . When arguments are used by persons whose duty it is to perfect the law as far as possible, I think the protection of the innocent from those who 'dare to do injustice by a law' is at least as much worthy of consideration as securing the punishment of the guilty.'"

"THE EVENING STANDARD,"

Thursday, December 11*th*, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Brothers & Layton, 1879).—These hints to barristers who practise in the Law Courts have lately been published, and many of them are no doubt very useful and suitable, especially perhaps that which informs the young cross-examiner how he may know when a female witness is going to try and make herself disagreeable. 'Now, mark!' the writer says, 'the first thing she does when you rise to cross-examine her—look you ever so meek (as you should under the circumstances)—*is to toss her head.* When she tosses her head the counsel must understand that war is declared, and must act accordingly.'"

"THE BEDFORDSHIRE HERALD,"

Saturday, December 13*th*, 1879.

"'HINTS ON ADVOCACY.' By a Barrister.—This book is published by Waterlow Bros. & Layton, London. The volume contains hints as to opening a case, examination-in-chief, cross-examination, re-examination, reply, conduct of a defence in a criminal trial, analysis of the opening speech of Sir Alexander Cockburn in the prosecution of Palmer, examples of reply, peroration, &c., and a

word on the appointment of a public prosecutor. To the younger branches of the legal profession it will be of great interest and value, and many amongst the outer world would find in it much information and guidance."

"THE EXAMINER,"

Saturday, January 10th, 1880.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow Bros. & Layton).—It is always interesting to have from a successful and still active workman a vivid account of the manner in which he handles his tools and gets through his daily toil. Much in the same way a barrister in full practice who, in a frank and off-hand way, describes the *modus operandi* in which he conducts his cases, will generally find listeners, or, if he writes a book, will find readers to appreciate his revelations. The gentleman who has undertaken this task in the small volume called 'Hints on Advocacy' has, it is true, a more definite and practical object in view, in the shape of a desire to teach forensic oratory and forensic manœuvres to his younger brethren of the robe. But although the hints thus given are generally valuable, often novel, and always much to the point, the majority of readers will be more taken by the anecdotes which appear as illustrations than by the substance of the lectures. It is, indeed, a misnomer to use the word lectures to so light and cheery a production, which is only dull when it includes quotations of rather too great length from the Tichborne and Palmer trials."

"THE WARWICK AND WARWICKSHIRE ADVERTISER AND LEAMINGTON GAZETTE,"

Saturday, December 13th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. London: Waterlow, Brothers & Layton.—This book appears to be the result of much study and prolonged experience. The advice which it offers to young advocates is intended to teach them the best methods of discharging their duty when actually pleading in court and endeavouring to obtain verdicts for their clients. The author's instructions therefore refer to such matters as opening a case; dealing with witnesses by examination-in-chief, cross-examination, and re-examination; making an effective reply to 'the other side'; and conducting the defence in a criminal trial. The concluding portion of the volume is devoted to an analysis of Sir Alexander Cockburn's opening speech in the prosecution of Palmer, for the murder of John Parsons Cook by poisoning, followed by examples of reply, peroration, &c., and some remarks on the appointment of a public prosecutor. From this enumeration of subjects it will be inferred—and correctly—that the work is of a thoroughly practical character; and doubtless the guidance it supplies will prove very useful to the class for whom it was written. The author observes in his Preface, 'There is no school of advocacy; there are no

lectures on advocacy; and, so far as I have been able to ascertain, there is no book on the subject. The newly-called barrister has to find his way as best he can, very often to the sacrifice of important interests and many unfortunate clients. As he has never learnt anything of the art of advocacy, he is no more fitted for the task of advocating their rights than the clients themselves, except in so far as his knowledge of law will assist him in the purely legal aspects of the question. It seems to me lamentable that no instruction should ever be given in an art which requires an almost infinite amount of knowledge. Tact cannot be taught, but it will follow from experience, and a good deal of experience may be condensed into the form of rules.' The truth of this last remark is well exemplified by the author, especially in his instructions relating to cross-examination and the management of witnesses. In treating upon the different kinds of witnesses, and the different ways in which their testimony is best elicited by the cross-examiner, our author is not only instructive but occasionally amusing; for in the witness box human character is variously illustrated, and not seldom grotesquely. A conclusion arrived at by the most competent judges, our author among them, is that blustering and violence in cross-examination should be carefully avoided. Calmness of temper is one of the foremost qualities of a good advocate, and in these pages its importance as an element of success is duly recognised."

"LLOYD'S WEEKLY LONDON NEWSPAPER,"

Sunday, December 28th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow Bros. & Layton.)—The advice is excellent, and appears to be the work of a lawyer having authority; but the advocate, like the poet, *nascetur non fit.*"

"THE SURREY ADVERTISER AND COUNTY TIMES,"

Saturday, January 3rd, 1880.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton), is the work of a thoughtful and experienced writer, whose 'Hints,' in fact, carefully studied and acted on, will benefit many a member of the legal profession, both in the upper and lower branches; and in the end their interested clients. 'A Barrister' writes with modesty, but not less with force, and his illustrations and quotations are apt and to the point. The 'Hints' refer to 'opening a case,' 'examination-in-chief,' 'cross-examination,' 're-examination,' 'reply,' 'conduct of a case in a criminal trial,' 'analysis of the opening speech in the trial of Palmer,' 'examples of reply, peroration, &c.,' and 'a word on the appointment of a public prosecutor.' The author says, that 'it is with the hope that some of the observations he has made in the course of his experience may be of some little service to beginners in the profession that he ventures to offer these 'Hints,' and with many

opportunities ourselves of judging of the necessity for some such work, we can only say that we think 'A Barrister' has met a want, and met in a way sure to be highly appreciated not only in the ranks of the profession itself, but in the larger ranks outside it."

"THE GRANTHAM JOURNAL,"

Saturday, January 24th, 1880.

"'HINTS ON ADVOCACY.' (London: Waterlow Bros. & Layton).—This is the title of a work by a 'Barrister in actual practice,' which is likely to be of some service to the profession, and especially to beginners. The author regards it as a lamentable fact that 'no instructions should ever be given in an art which requires an almost infinite amount of knowledge.' There is, he says, no School of Advocacy, there are no Lectures on Advocacy, and he has not been able to discover even a book on the subject. The result of this is that 'the newly-called barrister has to find his way as best he can, very often to the sacrifice of important interests and many unfortunate clients.' He has never learnt anything of the art of advocacy, and except in the purely legal aspects of the case, the clients are just as well fitted to advocate their own rights. The author very truly observes that experience will teach the advocate tact, but he thinks, also, that a good deal of experience may be condensed into rules. His own experience is condensed into a series of useful and important 'hints.' He deals in succession with the art of opening a case, examination-in-chief, cross-examination, re-examination, reply, and the conduct of a defence in a criminal trial; he also gives an analysis of the opening speech of Sir Alexander Cockburn in the prosecution of Palmer, and some examples of reply and peroration, together with 'a word on the appointment of a Public Prosecutor.' The author has succeeded in producing a very interesting little work, and one which 'youthful aspirants' to the honours of the profession will doubtless do well to consult."

"THE NOTTINGHAM DAILY JOURNAL,"

Monday, December 8th, 1879.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton).—The author of this book has endeavoured to put his experiences, as an advocate, into practical shape for the guidance of beginners in the profession and others whose duties may require them to know something of the art. The writer gives three reasons for the publication of his treatise. (1.) There is no school of advocacy. (2.) There are no lectures on advocacy. (3.) And so far as he has ascertained, there is no book on the subject. The newly-called barrister has to grope his way as best he can, without any leading principles to guide him. The author does not profess to be a great master of advocacy himself; he simply claims to put his experiences into print as an ordinarily observant

mind that has detected the blunders and perceived the graces of those under whom he has had the privilege to study. He has divided his work into nine chapters, viz., (1.) Opening a case. (2.) Examination-in-chief. (3.) Cross-examination. (4.) Re-examination. (5.) Reply. (6.) Conduct of a case in a criminal trial. (7.) Analysis of the opening speech in the trial of Palmer. (8.) Examples of reply, peroration, &c., and (9) a word on the appointment of a public prosecutor. We have not space to spare to enter into a criticism of all these chapters in detail; but having carefully examined most of them, we can confidently state the volume will be found worthy of perusal, not only by 'newly called' barristers, but also by solicitors, magistrates, and members of debating societies. If there is any fault to be found with the author's recommendations, it is that of being too explicit. For instance, he starts with the statement that *common sense* is the foundation of good advocacy. We should have thought that such a remark was too obvious a truism to need being specially put into print. We certainly agree with the writer that the fewest words, as a rule, make the best speech. That to be earnest and logical is also necessary; and that illustration sparingly employed is an effective ornament. Another thing to be borne in mind in an opening speech is arrangement and order. It is unnecessary, however, for us to enter into further details. We have already said sufficient upon the character of 'Hints on Advocacy.'"

"THE STAFFORDSHIRE ADVERTISER,"

Saturday, January 17th, 1880.

"We have received a copy of 'HINTS ON ADVOCACY, by a Barrister,' published by Waterlow Brothers and Layton, of London. The volume is one which we can strongly recommend to all young practitioners, and there are not a few gentlemen of old standing at the bar whose reputation would not suffer were they to lay to heart the sound advice here given on many points. In a pleasant and sometimes humorous style, which makes the book quite a readable one for all who take an interest in the proceedings of our courts of law and justice, whether members of the legal profession or not, the author discourses on the opening of a case, examinations-in-chief, cross-examinations, re-examinations, replies, and the general conduct of a defence in a criminal trial. This is followed by an analysis of the remarkable opening speech of Sir Alexander Cockburn in the Palmer trial. Many of the author's illustrations are drawn from this trial, and the analysis of the speech is very able and deeply interesting. The volume closes with a few remarks on the appointment of a public prosecutor. 'A Barrister' points out one danger to be apprehended from the appointment of a functionary of that class—namely, the ease with which the criminal law may be set in motion by dishonest persons for the purpose of extorting money."

"THE BEDFORDSHIRE MERCURY,"

Saturday, March 13th, 1880.

"'HINTS ON ADVOCACY,' by a Barrister (published by Waterlow Bros. & Layton), is a book we can warmly recommend to aspirants to the bar and to speakers generally. The hints on opening a case, the examination and cross-examination of a witness, and the speech for the defence, are acute and common-sensed at one and the same time. The writer shows that the more natural and successful an advocate the more does he depend upon that art of arts, the imitation of nature, which is successful because it seems artless. A lengthy analysis of Lord Chief Justice Cockburn's address at the trial of Palmer many years since is likely to prove of great service to rising lawyers. The book may be recommended to the profession."

"THE SPECTATOR,"

Saturday, March 20th, 1880.

"'HINTS ON ADVOCACY.' By a Barrister. (Waterlow Brothers and Layton).—The 'Barrister' gives some very sensible advice to his brethren of the Bar, 'as to opening a case, examination-in-chief, cross-examination, re-examination, reply, &c.' He goes to the point at once, discourages fine language, and such commonplace artifices as 'not being able to conceive what case the opposite side can have.' His counsels about the manner of dealing with witnesses is especially good. Only it is a pity that he is so foolishly angry with Archbishop Whately. The Archbishop does but point out that there is a kind of cross-examination which has for its object the bewildering of an honest witness. What could be more certainly true? But the 'Barrister,' wholly forgetful of his own judicious cautions against fine words, bursts out:—'I pause here for a moment, to say that, so far as my own experience of the Bar is concerned, and I think that it must be greater than that of the Right Reverend Father in God who penned these words, that a more undeserved slander against a body of honourable men was never penned, even by a Churchman.' He himself has said, 'Cross-examination may almost be regarded as a mental duel between advocate and witness.' And if the witness is a truthful one, it is very clear that the advocate's duty is a very difficult one. It is mere rubbish to talk of 'a body of honourable men.' Of course, they are 'all honourable men.' So are solicitors. So are all the professions. But, for all that, the advocate has often to balance himself on a very narrow edge between right and wrong, and there are some who, from want of appreciation, or want of conscience, fall on the wrong side."

"THE SUNDAY TIMES,"

Sunday, December 7th, 1879.

"'HINTS ON ADVOCACY,' by a Barrister (Waterlow Bros. & Layton), aims at instructing counsel in the manner in which a case should be opened, witnesses examined, &c. It also vindicates the

bar from some charges brought against it. The book is well and temperately written. The best parts are those about worthless testimony and the analysis of a speech of Sir Alexander Cockburn. The famous trial for poisoning supplies much of the matter discussed."

"THE LEICESTER ADVERTISER,"

Saturday, February 28th, 1880.

"'HINTS ON ADVOCACY.' By a Barrister. (London: Waterlow Bros. & Layton.)—This is a work which, though only first published at the close of the past year, has already passed, we believe, into a third edition, and which certainly promises to be a most useful guide for all entering on the profession of the bar. So far as he knows, the author tells us, no such work has been previously published, and he has the rare advantage, therefore, of cultivating an entirely new field, and it removes all ground for the lament 'that no instruction should ever be given in an art which requires an almost infinite amount of knowledge.' The work is avowedly intended for beginners in the profession, but the author's criticism of various styles of advocacy—styles one's experience tells one even of men of position at the bar—shows that some of the 'Hints' may be taken with advantage by others than mere fledgelings in wig and gown. Indeed, the most remarkable feature about the book is what may be regarded as the enforcement of the merest common-place truisms, and yet those who know anything of courts of law will feel at once that what are here very properly laid down as the guiding principles of good advocacy are too often woefully set at nought. The work is divided into separate chapters, on the opening of a case, the examination-in-chief, cross-examination, re-examination and reply, the conduct of a case in a criminal trial; a very shrewd and instructive analysis of the opening speech by the Lord Chief Justice, then Sir Alexander Cockburn, in the celebrated trial of Palmer the poisoner, concluding, so far as the 'Hints' are concerned, with examples of replies, perorations, &c. Under each of these various heads a vast amount of really sound, practical and useful advice is given in a modest, common sense style, frequently illustrated by examples which will serve to fix the points indelibly in the mind of the reader. Not only is the young barrister told what to do, but what to avoid, and if he is fortunate to get a brief, and will be guided by the 'Hints' contained in this work, he may fairly hope to escape many of the mistakes and trials which beset him in the outset of his profession, as well as acquire knowledge which cannot fail to be useful to him in all his career at the bar, however brilliant that career may be. Altogether the work, unpretentious as it is throughout, is one of unquestionable usefulness, and though from its character specially intended for barristers, it will of course be equally serviceable to lawyers practising in the police and county courts, whilst preachers and public speakers generally will find in its pages many useful 'Hints' applicable to them also."

"THE PENNY ILLUSTRASED PAPER AND ILLUSTRATED TIMES,"

"*Saturday, February 28th*, 1880.

"Were I called upon to sum up in one phrase the great qualification of Mr. Serjeant Ballantine for advocacy, I should say the learned counsel speaks from his brief as if he were the personification of 'common sense.' And I was interested to note, in glancing over the valuable 'Hints on Advocacy,' written by an anonymous Barrister, that 'Common sense is the foundation of good advocacy.' There is a fund of sound instruction in this guide for young law students (published by Waterlow Bros. & Layton), and I have no doubt that a mastery of these useful 'Hints on Advocacy' by budding barristers would considerably reduce the number of flabby, illogical speeches these beardless youths inflict on juries."

OPINIONS OF THE PRESS
ON THE SECOND EDITION.

"THE ARTICLED CLERKS' JOURNAL AND EXAMINER,"

Monday, February 23rd, 1880.

"'HINTS ON ADVOCACY,' by a Barrister. (London: Waterlow Bros. & Layton, 1879).—We have little to add to our last notice of this work, and shall merely content ourselves with saying that our hopes of the second edition are amply fulfilled. The further illustrations of the examination-in-chief and cross-examination of different classes of witnesses may be left to speak for themselves, they are extremely amusing and cannot fail to be of service."

"THE IRISH LAW TIMES AND SOLICITORS' JOURNAL,"

Saturday, January 10th, 1880.

"'HINTS ON ADVOCACY, useful for Practice in any of the Courts; with suggestions as to Opening a Case, Examination-in-Chief, Cross-Examination, Re-Examination, Reply, Conduct of a Prosecution and of a Defence in a Criminal Trial, with Illustrative Cases that have occurred; Analysis of the Opening speech of Sir Alexander Cockburn in the Prosecution of Palmer, Examples of Reply, Peroration, &c., &c. A Word on the Appointment of a Public Prosecutor, and the Utility of the Grand Jury. By a Barrister in Actual Practice. Second Edition (Revised and Enlarged). (London: Waterlow Bros. & Layton, Birchin Lane, E.C. Pp. 296. 1879.' Sir Thomas More, indeed, makes the absence of advocates one of the characteristic features of his 'Utopia,' saying that the inhabitants 'consider them a sort of people whose profession it is to disguise matters as well as wrest laws; and therefore they think it much better that every man should plead his own cause and trust it to the judge.' But it would be utopian in the extreme to suppose that the institution of advocacy can ever become extinct in the world as it is. 'No change, practical or speculative, social, political, or economic, has any terors for the profession of the law,' in the words of Mr. Gladstone, and rightly did he hold it unlikely to be 'displaced or menaced by any of the mutations of this or a future century' (see 13 Ir. L. T. & S. J. 616, and compare 9 *id.* 349). The little treatise now before us ought, indeed,

of itself to suffice to convince anyone but a fool of the folly of attempting to act as his own advocate; for every page appears to us to prove the fallacy of the author's own statement (p. 167) that 'there is nothing very difficult in advocacy, any more than there is in arithmetic; it requires no genius, and very little more than ordinary brains, and an honest straightforwardness of purpose.' Too many, however, seem possessed by this notion, for, as the writer rather contradictorily observes elsewhere (p. 183), 'one would think advocacy the easiest thing in the world, requiring neither training, knowledge, nor experience, to see how perfectly ready the young advocate is to step into the arena and do battle in the interest of the accused; as if an advocate were made by being called to the bar, or admitted on the roll of solicitors, or by being articled as a solicitor's clerk.' Addressing the younger members of the French bar, the great chancellor of Louis XV. said, 'the most deep-seated, and perhaps most incurable, disease of your profession is the blind temerity with which men venture to engage in it without having rendered themselves worthy of it by long and laborious preparation;' and with equal truth his words might have been addressed to the bar of our own time and country. Not that preparation is altogether absent so far as regards the study of the law itself, but, that preparation, so far as regards the particular functions of advocacy, there is virtually none—a circumstance which seems in no degree to abate the overweening confidence of the advocate, although, as our author sensibly observes, 'law only will not make an advocate any more than a balance-pole will enable you to walk a tight-rope.' Laud, in his Diary, relates that Charles (then Prince) said, if he were compelled to select a profession, he would not be a lawyer, 'for I can neither defend a bad cause nor yield in a good one," to which Laud replied, 'sic in majoribus succeedas, in æternum faustus.' But what young advocate will, with equal candour, allow the possibility of his being unable to defend the worst possible cause? Where is the cause, forsooth, that the embryo Brougham cannot defend? His only doubt, indeed, is as to whether he would be justified, in the impetuosity of his brilliant advocacy, in acting on Brougham's theory of an advocate's duty. In the treatise under notice this question is cursorily dealt with (pp. 157-160); and the inquirer who desires a more thorough examination of the subject may be referred to 'The Lawyer,' by E. O'Brien, and works there cited, in addition to which he would do well to consult (*inter alia*) two well-reasoned papers in the *Cornhill Magazine*, 1861 and 1865, besides what has been said by Crampton, J., in *The Queen* v. *O'Connell* (7 Ir. L. Rep. 212-13), by Sir James Scarlett in his defence of the Wakefields (2 Town. Mod. St. Tr. 231), and by an American writer quoted in 10 Ir. L. T. & S. J. 22 (and see 12 *id.* 119). Apart from ethical considerations, our author rightly observes that 'an advocate who casts destruction broadcast may involve his client in the general ruin, and is sure in any event to injure him in the estimation of the jury.' Indeed, he takes an essentially practical view of every topic on which he touches. Thus, he observes

(p. 18) 'at the bar,' except in rare cases, the higher gifts of oratory are out of place. It is a limited field; it has its beaten tracks, and along these men must travel. Oratory is not one of its paths; in other words, attempts at what is commonly called oratory are to be avoided;' but, as he adds elsewhere (p. 141), 'The art of speaking, I am quite sure, is by no means cultivated as it should be, and a ridiculous fashion has sprung up of late years of undervaluing it as a means of advocacy. The fact however remains that the best speaker is still the most successful advocate as a rule, and if a man is to make anything either of himself or his case by addressing a jury, the more perfectly he can speak the better it will be for both.' The fact is that the advocate now-a-days, instead of Burke's description of perfect oratory as 'half poetry, half prose,' should regard it, with Blair, as 'the art of speaking in such a manner as to attain the end for which we speak.' 'A great speech,' 'O'Connell used to say, 'is a very fine thing, but, after all, the verdict is *the* thing;' and that great verdict-getter Lord Abinger, in a passage which our author might pertinently have quoted, has thus stated the result of his experience :—'It appears to me that he who seeks great reputation with the public as a speaker must not only compose his speeches,—at least as far as regards the ornamental part,—but must engraft upon the topics that belong to his cause certain generalities in morals, politics, or philosophy, which will give scope to declamation and ornament, to polished phrases and well-turned sentences, to epigram, humour, and sarcasm. These are the passages which delight the general audience, and make the speech, when published, agreeable to the reader. But they are not the passages which carry conviction to the mind, or advance the real merits of the cause with those who are to decide it. He who looks to *this* purpose must never lose sight of any important fact or argument that properly belongs to or arises out of the cause. He must show that his mind is busied about nothing else. He must be always working upon the concrete, and pointing to his conclusion. He must disdain all jest, ornament, or sarcasm that does not fall directly in his way, and seem to be so unavoidable that it must strike everybody who thinks of the facts. He must not look for a peg to hang anything upon, be it ever so precious or so fine. He must rouse in the mind of the judges or the jury all the excitement which he feels about the cause himself, and about nothing but the cause; and to that he must stick closely, and upon that reason vehemently and conclusively.' At the same time, a little high-flown rhetoric may occasionally serve a practical purpose, such as the great American orator, Rufus Choate, had in view, when, being asked how he could get over a very ugly fact with the jury, he replied, 'why, sir, I shall jump them right over it.' Something more than narrowly dealing with the facts of the case may occasionally be necessary also, in order to secure the 'ear of the court.' The way in which Demosthenes secured the attention of his volatile audience by a story which gave rise to the proverb, 'to dispute on

the shadow of an ass,' will doubtless be remembered; but, perhaps, the following anecdote is less generally known. M. Cremieux, the distinguished French advocate, was called on to reply in an important case in which his adversary had already well-nigh won the day. 'I was about to commence,' he relates, 'when I found, to my consternation, that I had not a single thought for my exordium, and that after the word 'Sirs,' I had nothing more to say. I was horrified. I leaned my head over the table; the attorney asked me what I was looking for; I was looking for my exordium. You understand, I did not answer him; but suddenly my senses returned to me; the commencement of my speech was found. 'M. Cremieux,' said the chief justice, 'I informed you that you had the floor.' I bowed, rose and said: 'If it please the court, an incident in the life of Henry IV. reverts to my mind, and I will relate it to you.' This introduction excited astonishment and curiosity. I was saved. I continued thus: 'The good king was at Rouen. He learned that the next day an important cause was to be argued in the grand chamber of the parliament. He had never attended a sitting of the court, and he desired to be present. This fact excited a great commotion in the city. When the king took his seat, and the parliament had been called to order, the counsel for the appellant commenced his address. The counsel was a famous lawyer, eloquent, replete with knowledge, of rare intelligence, a distinguished orator, the Marié of the period.' At this unexpected compliment addressed to his brother lawyer, who had been so admired, the advocate was interrupted by loud applause. He continued thus: 'He pleaded valiantly; he developed his case during an entire sitting, and charmed his audience so well that the king said: 'Well,' gentlemen, 'he has won his cause.' 'Sire,' said the chief justice, 'your majesty has not heard the counsel for the other side.' 'To-morrow, then,' replied the king, 'I shall be curious to hear what he has to say.'" The next day, the king present, and the assembly marvellously attentive, the counsel for the respondent commenced his reply. Did he plead well? Did he plead badly? I cannot myself say (laughter); but he had a just cause; right and equity sustained it. Animated by the ability displayed by his adversary, he, perhaps, surpassed himself, so well, indeed, that at the close the king exclaimed: 'Ventre saint gris, gentlemen, you must be well learned, wise and honest, to judge and pronounce judgment.' 'Thus,' says M. Cremieux, 'this exordium came to my mind, when I did not know how to commence my summing up. It was well received, and, perhaps, was not without some influence in assisting me to win my case. Believe me, it is a good thing to make the judges feel well disposed toward you.' The latter observation reminds us of some remarks of our author as to speeches in reply: —'The first thing to do is to secure the attention of the jury. The next, that of the judge. Although I call this second, it is very often of the first importance, as frequently, when you have not the jury with you, you may win by having the judge. He is always a powerful advocate to follow on your side; therefore gain

his attention if you can. I heard not long ago a defeated advocate say to his successful opponent, 'the judge got you the verdict;' 'yes,' replied the latter, 'but I got the judge'—an anecdote which reminds us of the retort of Adolphus, the eminent criminal lawyer, when Scarlett (whose influence over Lord Tenterden was very considerable) told him to remember he was not at the Old Bailey; 'I feel I am not,' he replied, 'for there the judge controls the counsel, but here the counsel controls the judge.' Our author's whole chapter on the 'Reply' is, indeed, well worth study, nor are his instructions 'As to Opening a Case' less useful and suggestive, while sometimes reminding us of remarks made by Lord Abinger on this subject. Thus, 'it may be observed,' says the author, 'there is a mode of creating an impression on the mind of a jury without in the least appearing to desire it, and which of all others is the most effective. All men are more or less vain, and every man gives himself credit for a deal of discernment. He loves to find out things for himself—to guess the answer to a riddle better than to be told it . . . If you want a point thoroughly to impress the jury, don't actually make it, if you can effect your object by a less direct means; let the jury make it for themselves.' So said Lord Abinger, 'whatever strikes the mind of a juror as the result of his own observation and discovery, makes always the strongest impression upon him, and,' he adds, 'the case in which the proof falls much below the statement is supposed for that very reason not to be proved at all.' Many other of that great advocate's utterances might have been quoted by our author with utility, such as the following in reference to his opening statements:—'I made it my business to know and remember the principal facts, to lay the unimportant wholly out of memory; to open the case, if for the plaintiff, and when I expected evidence for the defendant, in the shortest and plainest manner, with no other object than to make the jury comprehend the evidence which they would shortly hear. I very seldom thought it necessary to make any anticipation of the defendant's case. It is, indeed, oftentimes dangerous to do so, as it leads the judge and the jury to seek for support to it in the plaintiff's evidence. I found from experience as well as theory, that the most essential part of speaking is to make yourself understood. For this purpose it is absolutely necessary that the court and jury should know as early as possible *de qua re agitur*. It was my habit, therefore, to state, in the simplest form that the truth and the case would admit, the proposition of which I maintained the affirmative and the defendant's counsel the negative, and then, without reasoning upon them, the leading facts in support of my assertion. . . . Moreover, I made it a rule in general rather to understate than overstate facts as I expected to prove." How different all this from the mode of opening a recent *cause célèbre* in the Probate Court, which attracted so much unenlightened admiration. Again, he says, 'I learned by my experience that the most useful duty of an advocate is the examination of witnesses, and that much more mischief than

benefit generally results from cross-examination. I, therefore, rarely allowed that duty to be performed by my colleagues. I cross-examined in general very little, and more with a view to enforce and illustrate the facts I meant to rely upon than to affect the witness's credit—for the most part a vain attempt.' Our author's idea of the importance of the examination of the witnesses is quite in accordance with Lord Abinger's, and he gives many valuable hints as to how to do and how not to do it as it should be done; while as to cross-examination, upon which his observations are extremely acute and suggestive, he also holds that 'you should never cross-examine if you can safely avoid it.' It has been said that there are four principal objects in cross-examination. First, it may be used as the means of proving the case of the examining counsel's client out of the mouth of his adversary's witnesses; or where so much as this cannot be done, of exhibiting that case in such a way as to break the effect and pressure of evidence which would otherwise have a uniformly adverse appearance, and at once possessing the minds of the hearers of the fact that there is another and very different story, and, perhaps, a more probable and consistent one, to be told. A second object is to show, by an examination into a witness's means of knowledge and the sources of his information, by comparing his statements with one another or with others made by him elsewhere, or by confronting him with facts which he can neither deny nor explain, that his evidence is either inadmissable, or, if admissable, is inaccurate, confused, contradictory, and untrustworthy. A third object is to detect and display some motive or interest in the witness tending to warp and prejudice his testimony, and to induce him either to invent the matter of his statement, or to distort and garble his story. And, in the fourth place, cross-examination may aim at damaging the character of the witness, in matters not relating to the cause, and therefore by questions which are not relevant to the issue in any other sense than as they are relevant to the witness, but which by disclosing seme past misdeeds tend to show him to be unworthy of credit. In all these lines of cross-examination, but, of course, especially in the last, an unscrupulous advocate may exceed the limits of propriety: but we are glad to think that, apart from some extremely rare exceptions, Anthony Trollope's description is grossly overdrawn, where he says: 'A rival lawyer could find a protection on the bench when his powers of endurance were tried too far; but a witness in a court of law has no protection. He comes there unfeed, without hope of guerdon, to give such assistance to the State in repressing crime and assisting justice as his knowledge in the particular case may enable him to afford; and justice, in order to ascertain whether his testimony be true, finds it necessary to subject him to torture. One would naturally imagine that an undisturbed thread of clear evidence would be best obtained from a man whose position was made easy and whose mind was not harassed; but this is not the fact: to turn a witness to good account, he must be badgered this way and that till he is nearly mad; he

must be made a laughing-stock for the court; his very truths must be turned into falsehoods, so that he may be falsely shamed; he must be accused of all manner of villainy, threatened with all manner of punishment; he must be made to feel that he has no friend near him, that the world is all against him; he must be confounded till he forget his right hand from his left, till his mind be turned into chaos, and his heart into water; and then let him give his evidence. What will fall from his lips when in this wretched collapse must be of special value, for the best talents of practised forensic heroes are daily used to bring it about; and no member of the Humane Society interferes to protect the wretch. Some sorts of torture are, as it were, tacitly allowed even among humane people. Eels are skinned alive, and witnesses are sacrificed, and no one's blood curdles at the sight, no soft heart is sickened at the cruelty.' Our author, who quotes and severely animadverts on the better known and much milder strictures of Archbishop Whately, properly discountenances witness-badgering, while he holds that, severity of tone and manner, compatible with self-respect, is frequently necessary to keep a witness in check, and to draw or drive the truth out of him if he have any.' He cites some examples of judicious and effective cross-examination; but, perhaps the most striking illustrations of the art might be derived from the biographies of O'Connell (especially O'Neil Daunt's 'Personal Recollections'), as well as from the trial of the case of the Queen against the same great advocate. In his present edition the author has, also, added a chapter 'on the conduct of a prosecution,' in which he alludes to some recent case 'where a good deal of acrimonious zeal was manifested on the part of the prosecution.' But we are quite sure this case cannot have occurred in Ireland, at all events. 'I did never think,' said the Solicitor-General Somers, on the trial of Preston (*tem.*, W. & M.), 'that it was the part of any who were of counsel for the King in cases of this nature to aggravate the crime of the prisoners, or to put false colours on the evidence.' We commend the observation to the notice of the incriminated and acrimonious prosecutor in question, whoever he be; and we may add that, in the words of old Feltham, 'In all pleadings, *foul language*, *mallice*, *impertinence* and recriminations are ever to be avoided. The cause more than the man is to be *convinc'd*.' The chapter to which we have just referred, together with some 'illustrative cases,' with reference to the conduct of defences of prisoners, and a wholly extraneous but brief chapter on 'the utility of the grand jury,' constitute the only additional matter in the present edition. We should have mentioned, also, that four or five pages have been introduced in the chapter on cross-examination, devoted to teaching the inquisitor how to make the most of that specimen of the genus 'stupid witness,' 'who agrees with everybody for fear of disagreeing;' but, among the various classified witnesses, now to demolish whom we are minutely instructed, there is no reference to one of whom an American humourist truly said that 'the man who

knows a thing and can tell it in the fewest words is the hardest kind of a man to beat in a cross-examination.' The rest of the treatise remains identically the same as it was, even a misspelling of 'bevelled,' at p. 147, having again escaped the reader's attention—the only alteration made, in fact, being to substitute the word 'assume' for 'assuming' at p. 159. But, notwithstanding this sameness, and the short interval that has elapsed since we noticed the former edition, we have thought the treatise, being on such a subject (not treated on elsewhere, save in 'The Advocate,' by the late Sergeant Cox), worthy of a lengthened notice. That in less than two months a new edition has been demanded is a very tangible testimony to its popularity; but we should not expect its merits to have been much enhanced in so short an interim. Yet, if still imperfect, advocacy as too commonly practised is no less so; and the hints it gives cannot but be serviceable to the advocate, the fruits, as they manifestly are, of much personal observation of the practical conduct of trials, and of much sagacity and knowledge of human nature."

"THE LAW STUDENTS' JOURNAL,"

Thursday, April 1st, 1880.

"'HINTS ON ADVOCACY, &c.' By a Barrister. Second Edition (revised and enlarged). London: Waterlow Bros. & Layton, 1879. We reviewed this work, somewhat fully for us, in Januuary last. Further comment on it seems unnecessarv. We can do no more than heartily praise the idea and style, and advise all young advocates to study it. Many a one, who is now a fairly good advocate, may improve himself if he will condescend to a perusal of this work."

"THE ALBANY LAW JOURNAL" (United States of America),

Saturday, April 24th, 1880.

"'HINTS ON ADVOCACY' (useful for practice in any of the Courts), with suggestions as to Opening a Case, Examination-in-Chief, Cross-Examination, Re-Examination, Conduct of a Prosecution and Defence in a Criminal Trial, with Illustrative Cases that have occurred, Analysis of the Opening Speech of Sir Alexander Cockburn, in the Prosecution of Palmer, Examples of Reply, Peroration, &c., &c., a Word on the Appointment of a Public Prosecutor, and the Utility of the Grand Jury. By an English Barrister in Actual Practice. Second Edition (revised and enlarged). Waterlow Bros. & Layton, 24, Birchin Lane, London. Revised and adapted from the Second English Edition by an American Lawyer. St. Louis, Missouri: Wm. H. Stevenson, 'Central Law Journal,' 1880, pp. 172. This book contains, among a good many self-evident and common-place observations, some valuable 'Hints,' conveyed in a shrewd and humorous way, and indicating a large experience and knowledge of human nature. The advice about the treatment of policemen

as witnesses is remarkably good. One of the most amusing things in the book is the following cross-examination of 'Sprouts,' the Stupid Witness, in a suit for wrongfully taking and overdriving the plaintiff's horse:—'It was a fine morning, I think you said, Sprouts?'—'Yes, sir,' says Sprouts. 'Not very wet, was it?'—'Not very, sir.' 'What you call muggy, I think—damp and close?'—'It was, sir.' 'The sort of weather to make a horse perspire a good deal?'—'Make him what sir?" 'Perspire.'—'Perspire! yes it would, sir; it would that!' 'I believe the horse had not been clipped?'—'No, he haven't, sir." 'He would naturally get warm?'—'He'd smoke a bit, sir." 'I think you smoke, Sprouts?'—Sprouts is in a cloud at once—enveloped—you can hardly see him, but what you do see of him is grinning with the utmost civility. 'Sometimes, I suppose, Sprouts?' The more you 'Sprouts' him, the more agreeable he becomes. 'Were you smoking at the time the plaintiff came up to you?'—I believe I was sir.' 'And did he not say he was sorry he had given the defendant leave to take the horse, as he was such a regular madcap he didn't know where he'd rid to? Set a beggar on horseback he rid to ——; well, we won't mention names, Sprouts. Did he say that?' Sprouts laughs through the smoke, and begins to rub his cheek. 'Did he say so?' 'Something of the sort, sir,' says Sprouts. 'Did he say that?'—'Not all, sir.' Judge: 'Which part did he not say?' Sprouts forgets what the question was. Counsel: 'Did he say the part about Madcap?'—'He did, sir.' 'And that he was sorry?'—'He was terribly sorry, sir, sure enough.' 'Do you mean to say, Sprouts—will you pledge yourself he did not say he was sorry he had given him leave to take the horse, or words to that effect?'—'I won't say he did, and I won't say he didn't. I won't tell no lie if I knows it.' 'I don't pledge you to the very words, Sprouts; but I ask whether he did not use words to that effect?' That last 'Sprouts' was so in accordance with the native civility of the witness, that he strokes his chin tenderly, and says, 'He might.' Just as you are about to part; in fact, as you are sitting down, as a sort of 'Bye, bye, Sprouts,' you bethink you of *the* question—'*The horse is not much damaged, I hope?*' 'No,' says Sprous, 'he's all right now.' The author shows his wisdom by concluding—'A cross-examination which leads to such results is useless.' It seems to us that we have seen this book in American print before, but we cannot recall where."

"THE COURT CIRCULAR AND COURT NEWS,"

Saturday, January 10th, 1880.

"'HINTS ON ADVOCACY,' &c. By a Barrister. (London: Waterlow Bros. & Layton, 1879).—The success which followed the publication of the first edition of this handy little volume has induced the author to produce a second and an enlarged edition, which will, without doubt, be equally well received. There can be no doubt that some such work was greatly needed. The curious want of system in the

legal education of this country has hitherto left a young barrister to pick up his knowledge of advocacy by practice, and generally at the expense of his clients. No doubt a handbook, or, indeed, the personal instruction of a veteran pleader, will never supply the place of practice, nor will practice itself make a good advocate out of a man who has no tact; but a few words of sensible advice will save many a beginner from common blunders. Sensible advice will be found in abundance in this book. Young advocates are advised to avoid flippancy, not to bawl, not to bully their witnesses, to remember that silence is often golden, and above all, to make things clear. It would be of little use to give these general precepts without the illustration of particular cases, and this the writer has avoided doing. He gives useful hints about conducting examinations-in-chief, cross-examination, &c., and then illustrates his own notes by citing particular cases. One piece of advice which he gives is of even more general application, to wit—that beginners should study the masterpieces of ancient forensic oratory, and the speeches of the foremost men of modern times. One of these latter he has analysed at considerable length—the great address made by Sir Alexander Cockburn, then Attorney-General, on the prosecution of Palmer. The barrister goes carefully through it, showing how admirably lucid is the statement, and how often the mere statement has the force of an argument. The work ends with some sensible observations on the appointment of a public prosecutor."

"THE DAILY CHRONICLE,"

Tuesday, January 27th, 1880.

"A small volume of 'HINTS ON ADVOCACY,' by a Barrister (Waterlow Bros. & Layton), met with such speedy success that a second edition had to be brought out within two months. This fact shows the want which existed for such a book, and as the advice is of the widest and most general description, it will always prove a useful guide for young lawyers. Common sense is properly declared to be the foundation of good advocacy. The author then points out the various qualities that require to be studied in order to secure success at the Bar. The art of speaking well of course has a prominent place, and 'slow, sure, and short' is set down as a good motto for beginners. Illustrations of the styles that should be avoided prove that complaints of stupidity on the part of witnesses ought very frequently to be shared by the juniors who contrive to muddle their own cases. The best opening of a case for the prosecution is said to be a 'clear and concise statement of facts, without embellishment, without argument, and without feeling.' For the defence other and more diversified qualities have to be brought out; a special method is even suggested for examining a policeman. The 'hints' are founded upon an amount of practical experience that will render them of immense value to advocates who have yet to make their way at the Bar."

"THE BOOKSELLER,"

Saturday, January 3rd, 1880.

"'HINTS ON ADVOCACY.' By a Barrister. Second Edition, revised and enlarged.—Advocacy, or the conduct of a case in a court of justice, is a branch of the legal profession which counsel are supposed to acquire by intuition, or, at least, by imitation of their seniors: it is nowhere taught or lectured upon. The want is here to some extent supplied. The opening of a case, the examination and cross-examination of witnesses, the reply and the conduct of a prosecution or a defence, are treated of, with many examples taken from actual trial cases. An edition exhausted in two months is good evidence that the Barrister is the right man in the right place."

"THE SOUTH WALES DAILY NEWS,"

Friday, 9th January, 1880.

"'HINTS ON ADVOCACY.'—The title of this work, which has been recently published by Messrs. Waterlow Bros. & Layton, the enterprising law stationers of Birchin Lane, is sufficient in itself to obtain for it an extensive reading. We doubt not that the book will be eagerly conned by the multitudinous bevy of young men whom the badness of trade and agriculture—or the difficulty of making way in other branches of less pretentious industry—has crowded into the legal profession. If it should in any degree tend to quicken their reflective faculties, or stimulate their desire for knowledge, it will do them a service. Every young solicitor who has 'passed' thinks himself a born advocate, and rushes madly into the forensic arena, regardless of the mischief he is doing both to his client and to himself, and as little conscious of the derision of the public as of the contemptuous pity of the tribunal he addresses. Young practitioners of this class seem never to reflect that the sure foundation of good advocacy consists in extensive knowledge and matured observation. In the absence of these qualifications success is impossible. Not a few young aspirants to forensic fame will hail with delight this unpretending little volume which Messrs. Waterlow have issued from their printing establishment, but that they will derive from it the assistance and benefit they so much stand in need of we do not opine. The work is well arranged, and fairly embraces the duties which fall within the range of an advocate. Much that is written is put sensibly enough, and the first chapter on 'opening a case' possesses considerable merit. To attempt an analysis of the work would be foreign to our province, and even if it were of interest to the general reader, which we doubt, it would absorb more of our space than we can afford to spare. On the whole we are disposed to regard the treatise with approval."

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