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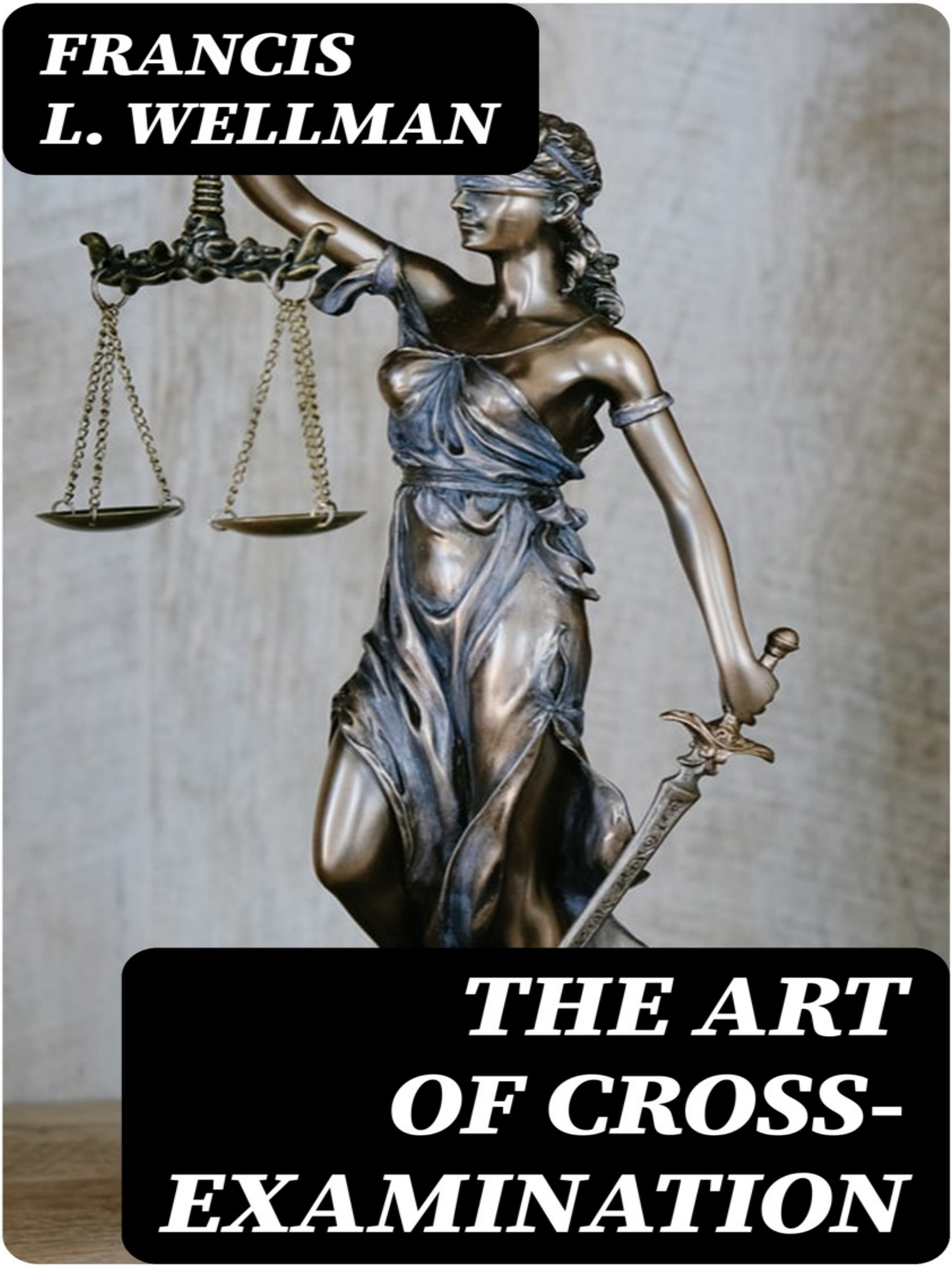

THE ART OF CROSS-EXAMINATION

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The Art of Cross-Examination

With the Cross-Examinations of Important Witnesses in Some Celebrated Cases

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Table of Contents

PREFACE

Table of Contents

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

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

BAR HARBOR, MAINE,
September 1, 1903.

CHAPTER I

Table of Contents

INTRODUCTORY

Table of Contents

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

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

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

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

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

To such as these a book of this nature can have but little interest. It is to those who by choice or chance are, or intend to become, engaged in that most laborious of all forms of

legal business, the trial of cases in court, that the suggestions and experiences which follow are especially addressed.

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

This congestion is not wholly due to lack of judges, or that they are not capable and industrious men; but is largely, it seems to me, the fault of the system in vogue in all our American courts of allowing any lawyer, duly enrolled as a member of the Bar, to practise in the highest courts. In the United States we recognize no distinction between barrister and solicitor; we are all barristers and solicitors by turn. One has but to frequent the courts to become convinced that, so long as the ten thousand members at the New York County Bar all avail themselves of their privilege to appear in court and try their own clients' cases, the great majority of the trials will be poorly conducted, and much valuable time wasted.

The conduct of a case in court is a peculiar art for which many men, however learned in the law, are not fitted; and

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

One *experienced* in the trial of causes will not require, at the utmost, more than a quarter of the time taken by the most learned inexperienced lawyer in developing his facts. His case will be thoroughly prepared and understood before the trial begins. His points of law and issues of fact will be clearly defined and presented to the court and jury in the fewest possible words. He will in this way avoid many of the erroneous rulings on questions of law and evidence which are now upsetting so many verdicts on appeal. He will not only complete his trial in shorter time, but he will be likely to bring about an equitable verdict in the case which may not be appealed from at all, or, if appealed, will be sustained by a higher court, instead of being sent back for a retrial and the consequent consumption of the time of another judge and jury in doing the work all over again.[1]

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

A few lawyers have gone so far as to refuse direct communication with clients excepting as they come represented by their own attorneys. It is pleasing to note

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

The distinction between general practitioners and specialists is already established in the medical profession and largely accepted by the public. Who would think nowadays of submitting himself to a serious operation at the hands of his family physician, instead of calling in an experienced surgeon to handle the knife? And yet the family physician may have once been competent to play the part of surgeon, and doubtless has had, years ago, his quota of hospital experience. But he so infrequently enters the domain of surgery that he shrinks from undertaking it, except under circumstances where there is no alternative. There should be a similar distinction in the legal profession. The family lawyer may have once been competent to conduct the litigation; but he is out of practice—he is not "in training" for the competition.

There is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. I am not speaking of

that small minority of men in all walks of life who have been touched by the magic wand of genius, but of men of average endowments and even special aptitude for the calling of advocacy; with them it is a race of experience. The experienced advocate can look back upon those less advanced in years or experience, and rest content in the thought that they are just so many cases behind him; that if he keeps on, with equal opportunities in court, they can never overtake him. Some day the public will recognize this fact. But at present, what does the ordinary litigant know of the advantages of having counsel to conduct his case who is "at home" in the court room, and perhaps even acquainted with the very panel of jurors before whom his case is to be heard, through having already tried one or more cases for other clients before the same men? How little can the ordinary business man realize the value to himself of having a lawyer who understands the habits of thought and of looking at evidence—the bent of mind—of the very judge who is to preside at the trial of his case. Not that our judges are not eminently fair-minded in the conduct of trials; but they are men for all that, oftentimes very human men; and the trial lawyer who knows his judge, starts with an advantage that the inexperienced practitioner little appreciates. How much, too, does experience count in the selection of the jury itself—one of the "fine arts" of the advocate! These are but a few of the many similar advantages one might enumerate, were they not apart from the subject we are now concerned with—the skill of the advocate in conducting the trial itself, once the jury has been chosen.

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

CHAPTER II

Table of Contents

THE MANNER OF CROSS-EXAMINATION

Table of Contents

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

If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, "to tell the truth, the whole truth, and nothing but the truth," and if all advocates on either side had the necessary experience, combined with honesty and intelligence, and were similarly sworn to *develop* the whole truth and nothing but the truth, of course there would be no

occasion for cross-examination, and the occupation of the cross-examiner would be gone. But as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.

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

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

It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter itself; an extreme caution; and, above all, the *instinct to discover the weak point* in the witness under examination.

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

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

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

But suppose the witness has testified to material facts against us, and it becomes our duty to break the force of his testimony, or abandon all hope of a jury verdict. How shall we begin? How shall we tell whether the witness has made an honest mistake, or has committed perjury? The methods

in his cross-examination in the two instances would naturally be very different. There is a marked distinction between discrediting the *testimony* and discrediting the *witness*. It is largely a matter of instinct on the part of the examiner. Some people call it the language of the eye, or the tone of the voice, or the countenance of the witness, or his manner of testifying, or all combined, that betrays the wilful perjurer. It is difficult to say exactly what it is, excepting that constant practice seems to enable a trial lawyer to form a fairly accurate judgment on this point. A skilful cross-examiner seldom takes his eye from an important witness while he is being examined by his adversary. Every expression of his face, especially his mouth, even every movement of his hands, his manner of expressing himself, his whole bearing—all help the examiner to arrive at an accurate estimate of his integrity.

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

It is absurd to suppose that any witness who has sworn positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People as a rule do not reflect upon their meagre opportunities for observing facts, and rarely suspect the

frailty of their own powers of observation. They come to court, when summoned as witnesses, prepared to tell what they think they know; and in the beginning they resent an attack upon their story as they would one upon their integrity.

If the cross-examiner allows the witness to see, by his manner toward him at the start, that he distrusts his integrity, he will straighten himself in the witness chair and mentally defy him at once. If, on the other hand, the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly be induced to enter into a discussion of his testimony in a fair-minded spirit, which, if the cross-examiner is clever, will soon disclose the weak points in the testimony. The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him. They are willing to admit his *mistakes*, if you can make them apparent, but are slow to believe him *guilty of perjury*. Alas, how often this is lost sight of in our daily court experiences! One is constantly brought face to face with lawyers who act as if they thought that every one who testifies against their side of the case is committing wilful perjury. No wonder they accomplish so little with their CROSS-examination! By their shouting, brow-beating style they often confuse the wits of the witness, it is true; but they fail to discredit him with the jury. On the contrary, they elicit sympathy for the witness they are attacking, and little realize that their "vigorous cross-examination," at the end of which they sit down with evident self-satisfaction, has only served to close effectually

the mind of at least one fair-minded juryman against their side of the case, and as likely as not it has brought to light some important fact favorable to the other side which had been overlooked in the examination-in-chief.

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

The only lawyer I ever heard employ this roaring method successfully was Benjamin F. Butler. With him politeness, or even humanity, was out of the question. And it has been said of him that "concealment and equivocation were scarcely possible to a witness under the operation of his methods." But Butler had a wonderful personality. He was aggressive and even pugnacious, but picturesque withal—witnesses were afraid of him. Butler was popular with the masses; he usually had the numerous "hangers-on" in the court room on his side of the case from the start, and each little point he would make with a witness met with their ready and audible approval. This greatly increased the embarrassment of the witness and gave Butler a decided advantage. It must be remembered also that Butler had a contempt for scruple which would hardly stand him in good stead at the present time. Once he was cross-questioning a witness in his characteristic manner. The judge interrupted to remind him that the witness was a Harvard professor. "I know it, your Honor," replied Butler; "we hanged one of them the other day."[2]

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

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

Among the English barristers, Sir James Scarlett, Lord Abinger, had the reputation, as a cross-examiner, of having outstripped all advocates who, up to that time, had appeared at the British Bar. "The gentlemanly ease, the polished courtesy, and the Christian urbanity and affection, with which he proceeded to the task, did infinite mischief to the testimony of witnesses who were striving to deceive, or upon whom he found it expedient to fasten a suspicion."

A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If you show by your face how the answer hurt, you may lose your case by that one point alone. How often one sees the cross-examiner fairly staggered by such an answer. He pauses,

perhaps blushes, and after he has allowed the answer to have its full effect, finally regains his self-possession, but seldom his control of the witness. With the really experienced trial lawyer, such answers, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a minute?"

An anecdote apropos of this point is told of Rufus Choate. "A witness for his antagonist let fall, with no particular emphasis, a statement of a most important fact from which he saw that inferences greatly damaging to his client's case might be drawn if skilfully used. He suffered the witness to go through his statement and then, as if he saw in it something of great value to himself, requested him to repeat it carefully that he might take it down correctly. He as carefully avoided cross-examining the witness, and in his argument made not the least allusion to his testimony. When the opposing counsel, in his close, came to that part of his case in his argument, he was so impressed with the idea that Mr. Choate had discovered that there was something in that testimony which made in his favor, although he could not see how, that he contented himself with merely remarking that though Mr. Choate had seemed to think that the testimony bore in favor of his client, it seemed to him that it went to sustain the opposite side, and then went on with the other parts of his case."[4]

It is the love of combat which every man possesses that fastens the attention of the jury upon the progress of the

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

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

The evidence often *seems* to be going all one way, when in reality it is not so at all. The cleverness of the cross-examiner has a great deal to do with this; he can often create an atmosphere which will obscure much evidence that would otherwise tell against him. This is part of the "generalship of a case" in its progress to the argument,