CHAPTER II

THE MANNER OF CROSS-EXAMINATION

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

If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, "to tell the truth, the whole truth, and nothing but the truth," and if all advocates on either side had the necessary experience, combined with honesty and intelligence, and were similarly sworn to *develop* the whole truth and nothing but the truth, of course there would be no occasion for cross-examination, and the occupation of the cross-examiner would be gone. But as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.

The system is as old as the history of nations. Indeed, to this day, the account given by Plato of Socrates's cross-examination of his accuser, Miletus, while defending himself against the capital charge of corrupting

the youth of Athens, may be quoted as a masterpiece in the art of cross-questioning.

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

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

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

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

Before dismissing a witness, however, the possibility of being able to elicit some new facts in our own favor should be taken into consideration. If the witness is apparently truthful and candid, this can be readily done by asking plain, straightforward questions. If, however, there is any reason to doubt the willingness of the 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 skillful cross-examiner seldom takes his eye from an important witness while he is being examined by his adversary. Every expression of his face, especially his mouth, even 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 fairminded spirit, which, if the cross-examiner is clever, will soon disclose the weak

points in the testimony. The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him. They are willing to admit his *mistakes,* if you can make them apparent, but are slow to believe him *guilty of perjury.* Alas, how often this is lost sight of in our daily court experiences! One is constantly brought face to face with lawyers who act as if they thought that every one who testifies against their side of the case is committing willful perjury. No wonder they accomplish so little with their 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 fairminded juryman against their side of the case, and as likely as not it has brought to light some important fact favorable to the other side which had been overlooked in the examination-in-chief.

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

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

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

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

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

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

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

that would otherwise tell against him. This is part of the "generalship of a case" in its progress to the argument, which is of such vast consequence. There is eloquence displayed in the examination of witnesses as well as on the argument. "There is *matter* in *manner*." I do not mean to advocate that exaggerated manner one often meets with, which divides the attention of your hearers between yourself and your question, which often diverts the attention of the jury from the point you are trying to make and centres it upon your own idiosyncrasies of manner and speech. As the man who was somewhat deaf and could not get near enough to Henry Clay in one of his finest efforts, exclaimed, "I didn't hear a word he said, but, great Jehovah, didn't he make the motions!"

The very intonations of voice and the expression of face of the cross-examiner can be made to produce a marked effect upon the jury and enable them to appreciate fully a point they might otherwise lose altogether.

"Once, when cross-examining a witness by the name of Sampson, who was sued for libel as editor of the *Referee*, Russell asked the witness a question which he did not answer. 'Did you hear my question?' said Russell in a low voice. 'I did,' said Sampson. 'Did you understand it?' asked Russell, in a still lower voice. 'I did,' said Sampson. 'Then,' said Russell, raising his voice to its highest pitch, and looking as if he would spring from his place and seize the witness by the throat, 'why have you not answered it? Tell the jury why you have not answered it.' A thrill of excitement ran through the court room. Sampson was overwhelmed, and he never pulled himself together again."[5]

Speak distinctly yourself, and compel your witness to do so. Bring out your points so clearly that men of the most ordinary intelligence can understand them. Keep your audience — the jury — always interested and on the alert. Remember it is the minds of the jury you are addressing, even though your question is put to the witness. Suit the modulations of your voice to the subject under discussion. Rufus Choate's voice would seem to take hold of the witness, to exercise a certain sway over him, and to silence the audience into a hush. He allowed his rich voice to exhibit in the examination of witnesses, much of its variety and all of its resonance. The contrast between his tone in examining and that of the counsel who followed him was very marked.

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

"Mr. Choate's appeal to the jury began long before his final argument; it began when he first took his seat before them and looked into their eyes. He generally contrived to get his seat as near them as was convenient, if possible having his table close to the Bar, in front of their seats, and separated from them only by a narrow space for passage. There he sat, calm, contemplative; in the midst of occasional noise and confusion solemnly unruffled; always making some little headway either with the jury, the court, or the witness; never doing a single thing which could by possibility lose him favor, ever doing some little thing to win it; smiling benignantly upon the counsel when a good thing was said; smiling sympathizingly upon the jury when any juryman laughed or made an inquiry; wooing them all the time with his magnetic glances as a lover might woo his mistress; seeming to preside over the whole scene with an air of easy superiority; exercising from the very first moment an indefinable sway and influence upon the minds of all before and around him. His manner to the jury was that of a *friend,* a friend solicitous to help them through their tedious investigation; never that of an expert combatant, intent on victory, and looking upon them as only instruments for its attainment."[6]

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

CHAPTER III

THE MATTER OF CROSS-EXAMINATION

If by experience we have learned the first lesson of our art, — to control our *manner* toward the witness even under the most trying circumstances, — it then becomes important that we should turn our attention to the *matter* of our cross-examination. By our manner toward him we may have in a measure disarmed him, or at least put him off his guard, while his memory and conscience are being ransacked by subtle and searching questions, the scope of which shall be hardly apparent to himself; but it is only with the matter of our cross-examination that we can hope to destroy him.

What shall be our first mode of attack? Shall we adopt the fatal method of those we see around us daily in the courts, and proceed to take the witness over the same story that he has already given our adversary, in the absurd hope that he is going to change it in the repetition, and not retell it with double effect upon the jury? Or shall we rather avoid carefully his original story, except in so far as is necessary to refer to it in order to point out its weak spots? Whatever we do, let us do it with quiet dignity, with absolute fairness to the witness; and let us frame our questions in such simple language that there can be no misunderstanding or confusion. Let us imagine ourselves in the jury box, so that we may see the evidence from their standpoint. We are not trying to make a reputation for ourselves with the audience as "smart" cross-examiners. We are thinking rather of our client and our employment by him to win the jury upon his side of the case. Let us also avoid asking questions recklessly, without any definite purpose. Unskillful questions are worse than none at all, and only tend to uphold rather than to destroy the witness.

All through the direct testimony of our imaginary witness, it will be remembered, we were watching his every movement and expression. Did

we find an opening for our cross-examination? Did we detect the weak spot in his narrative? If so, let us waste no time, but go direct to the point. It may be that the witness's situation in respect to the parties or the subject-matter of the suit should be disclosed to the jury, as one reason why his testimony has been shaded somewhat in favor of the side on which he testifies. It may be that he has a direct interest in the result of the litigation, or is to receive some indirect benefit therefrom. Or he may have some other tangible motive which he can gently be made to disclose. Perhaps the witness is only suffering from that partisanship, so fatal to fair evidence, of which oftentimes the witness himself is not conscious. It may even be that, if the jury only knew the scanty means the witness has had for obtaining a correct and certain knowledge of the very facts to which he has sworn so glibly, aided by the adroit questioning of the opposing counsel, this in itself would go far toward weakening the effect of his testimony. It may appear, on the other hand, that the witness had the best possible opportunity to observe the facts he speaks of, but had not the intelligence to observe these facts correctly. Two people may witness the same occurrence and yet take away with them an entirely different impression of it; but each, when called to the witness stand, may be willing to swear to that impression as a fact. Obviously, both accounts of the same transaction cannot be true; whose impressions were wrong? Which had the better opportunity to see? Which had the keener power of perception? All this we may very properly term the matter of our cross-examination.

It is one thing to have the opportunity of observation, or even the intelligence to observe correctly, but it is still another to be able to retain accurately, for any length of time, what we have once seen or heard, and what is perhaps more difficult still — to be able to describe it intelligibly. Many witnesses have seen one part of a transaction and heard about another part, and later on become confused in their own minds, or perhaps only in their modes of expression, as to what they have seen themselves and what they have heard from others. All witnesses are prone to exaggerate — to enlarge or minimize the facts to which they, take oath.

A very common type of witness, met with almost daily, is the man who, having witnessed some event years ago, suddenly finds that he is to be called as a court witness. He immediately attempts to recall his original impressions; and gradually, as he talks with the attorney who is to examine him, he amplifies his story with new details which he leads himself, or is led,

to believe are recollections and which he finally swears to as facts. Many people seem to fear that an "I don't know" answer will be attributed to ignorance on their part. Although perfectly honest in intention, they are apt, in consequence, to complete their story by recourse to their imagination. And few witnesses fail, at least in some part of their story, to entangle facts with their own beliefs and inferences.

All these considerations should readily suggest a line of questions, varying with each witness examined, that will, if closely followed, be likely to separate appearance from reality and to reduce exaggerations to their proper proportions. It must further be borne in mind that the jury should not merely see the mistake; they should be made to appreciate at the time why and whence it arose. It is fresher then and makes a more lasting effect than if left until the summing up, and then drawn to the attention of the jury.

The experienced examiner can usually tell, after a few simple questions, what line to pursue. Picture the scene in your own mind; closely inquire into the sources of the witness's information, and draw your own conclusions as to how his mistake arose, and why he formed his erroneous impressions. Exhibit plainly your belief in his integrity and your desire to be fair with him, and try to beguile him into being candid with you. Then when the particular foible which has affected his testimony has once been discovered, he can easily be led to expose it to the jury. His mistakes should be drawn out often by inference rather than by direct question, because all witnesses have a dread of self-contradiction. If he sees the connection between your inquiries and his own story, he will draw upon his imagination for explanations, before you get the chance to point out to him the inconsistency between his later statement and his original one. It is often wise to break the effect of a witness's story by putting questions to him that will acquaint the jury at once with the fact that there is another more probable story to be told later on, to disclose to them something of the defence, as it were. Avoid the mistake, so common among the inexperienced, of making much of trifling discrepancies. It has been aptly said that "juries have no respect for small triumphs over a witness's self-possession or memory." Allow the loquacious witness to talk on; he will be sure to involve himself in difficulties from which he can never extricate himself. Some witnesses prove altogether too much; encourage them and lead them by degrees into exaggerations that will conflict with the common sense of the jury. Under no circumstances put a false construction on the words of a witness; there are few faults in an advocate more fatal with a jury.

If, perchance, you obtain a really favorable answer, leave it and pass quietly to some other inquiry. The inexperienced examiner in all probability will repeat the question with the idea of impressing the admission upon his hearers, instead of reserving it for the summing up, and will attribute it to bad luck that his witness corrects his answer or modifies it in some way, so that the point is lost. He is indeed a poor judge of human nature who supposes that if he exults over his success during the cross-examination, he will not quickly put the witness on his guard to avoid all future favorable disclosures.

David Graham, a prudent and successful cross-examiner, once said, perhaps more in jest than anything else, "A lawyer should never ask a witness on cross-examination a question unless in the first place he knew what the answer would be, or in the second place he didn't care." This is something on the principle of the lawyer who claimed that the result of most trials depended upon which side perpetrated the greatest blunders in cross-examination. Certainly no lawyer should ask a *critical* question unless he is sure of the answer.

Mr. Sergeant Ballantine, in his "Experiences," quotes an instance in the trial of a prisoner on the charge of homicide, where a once famous English barrister had been induced by the urgency of an attorney, although against his own judgment, to ask a question on cross-examination, the answer to which convicted his client. Upon receiving the answer, he turned to the attorney who had advised him to ask it, and said, emphasizing every word, "Go home; cut your throat; and when you meet your client in hell, beg his pardon."

It is well, sometimes, in a case where you believe that the witness is reluctant to develop the whole truth, so to put questions that the answers you know will be elicited may come by way of a surprise and in the light of improbability to the jury. I remember a recent incident, illustrative of this point, which occurred in a suit brought to recover the insurance on a large warehouse full of goods that had been burnt to the ground. The insurance companies had been unable to find any stock-book which would show the amount of goods in stock at the time of the fire. One of the witnesses to the fire happened to be the plaintiff's bookkeeper, who on the direct examination testified to all the details of the fire, but nothing about the books. The cross-examination was confined to these few pointed questions.

"I suppose you had an iron safe in your office, in which you kept your books of account?" "Yes, sir." — "Did that burn up?" "Oh, no." — "Were you

present when it was opened after the fire?" "Yes, sir." — "Then won't you be good enough to hand me the stock-book that we may show the jury exactly what stock you had on hand at the time of the fire on which you claim loss? (This was the point of the case and the jury were not prepared for the answer which followed.) "I haven't it, sir." — "What, haven't the stock-book? You don't mean you have lost it?" "It wasn't in the safe, sir." — "Wasn't that the proper place for it?" "Yes, sir." — "How was it that the book wasn't there?" "It had evidently been left out the night before the fire by mistake." Some of the jury at once drew the inference that the all-important stock-book was being suppressed, and refused to agree with their fellows against the insurance companies.

The average mind is much wiser than many suppose. Questions can be put to a witness under cross-examination, in argumentative form, often with far greater effect upon the minds of the jury than if the same line of reasoning were reserved for the summing up. The juryman sees the point for himself, as if it were his own discovery, and clings to it all the more tenaciously. During the cross-examination of Henry Ward Beecher, in the celebrated Tilton-Beecher case, and after Mr. Beecher had denied his alleged intimacy with Mr. Tilton's wife, Judge Fullerton read a passage from one of Mr. Beecher's sermons to the effect that if a person commits a great sin, the exposure of which would cause misery to others, such a person would not be justified in confessing it, merely to relieve his own conscience. Fullerton then looked straight into Mr. Beecher's eyes and said, "Do you still consider that sound doctrine?" Mr. Beecher replied, "I do." The inference a juryman might draw from this question and answer would constitute a subtle argument upon that branch of the case.

The entire effect of the testimony of an adverse witness can sometimes be destroyed by a pleasant little passage-at-arms in which he is finally held up to ridicule before the jury and all that he has previously said against you disappears in the laugh that accompanies him from the witness box. In a recent Metropolitan Street Railway case a witness who had been badgered rather persistently on cross-examination, finally straightened himself up in the witness chair and said pertly, "I have not come here asking you to *play with me*. Do you take me for Anna Held?"[7] "I was not thinking of Anna Held,"

[7] This occurrence was at the time when the actress Anna Held was singing her popular stage song, "Won't you come and play with me."

replied the counsel quietly; "supposing you try *Ananias*!" The witness was enraged, the jury laughed, and the lawyer, who had really made nothing out of the witness up to this time, sat down.

These little triumphs are, however, by no means always one-sided. Often, if the counsel gives him an opening, a clever witness will counter on him in a most humiliating fashion, certain to meet with the hearty approval of jury and audience. At the Worcester Assizes, in England, a case was being tried which involved the soundness of a horse, and a clergyman had been called as a witness who succeeded only in giving a rather confused account of the transaction. A blustering counsel on the other side, after many attempts to get at the facts upon cross-examination, blurted out, "Pray, sir, do you know the difference between a horse and a cow?" "I acknowledge my ignorance," replied the clergyman; "I hardly do know the difference between a horse and a cow, or between a bull and a bully — only a bull, I am told, has horns, and a bully (bowing respectfully to the counsel), *luckily for me,* has none."[8] Reference is made in a subsequent chapter to the cross-examination of Dr. —— in the Carlyle Harris case, where is related at length a striking example of success in this method of examination.

It may not be uninteresting to record in this connection one or two cases illustrative of matter that is valuable in cross-examination in personal damage suits where the sole object of counsel is to reduce the amount of the jury's verdict, and to puncture the pitiful tale of suffering told by the plaintiff in such cases.

A New York commission merchant, named Metts, sixty-six years of age, was riding in a Columbus Avenue open car. As the car neared the curve at Fifty-third Street and Seventh Avenue, and while he was in the act of closing an open window in the front of the car at the request of an old lady passenger, the car gave a sudden, violent lurch, and he was thrown into the street, receiving injuries from which, at the time of the trial, he had suffered for three years.

Counsel for the plaintiff went into his client's sufferings in great detail. Plaintiff had had concussion of the brain, loss of memory, bladder difficulties, a broken leg, nervous prostration, constant pain in his back. And the attempt to alleviate the pain attendant upon all these difficulties was gone

[8] "Curiosities of Law and Lawyers."

into with great detail. To cap all, the attending physician had testified that the reasonable value of his professional services was the modest sum of $2500.

Counsel for the railroad, before cross-examining, had made a critical examination of the doctor's face and bearing in the witness chair, and had concluded that, if pleasantly handled, he could be made to testify pretty nearly to the truth, whatever it might be. He concluded to spar for an opening, and it came within the first halfdozen questions: —

Counsel: "What medical name, doctor, would you give to the plaintiff's present ailment?"

Doctor: "He has what is known as 'traumatic microsis.' "

Counsel: "*Microsis*, doctor? That means, does it not, the habit, or disease as you may call it, of making much of ailments that an ordinary healthy man would pass by as of no account?"

Doctor: "That is right, sir."

Counsel (smiling): "I hope you haven't got this disease, doctor, have you?"

Doctor: "Not that I am aware of, sir."

Counsel: "Then we ought to be able to get a very fair statement from you of this man's troubles, ought we not?"

Doctor: "I hope so, sir."

The opening had been found; witness was already flattered into agreeing with all suggestions, and warned against exaggeration.

Counsel: "Let us take up the bladder trouble first. Do not practically all men who have reached the age of sixty-six have troubles of one kind or another that result in more or less irritation of the bladder?"

Doctor: "Yes, that is very common with old men."

Counsel: "You said Mr. Metts was deaf in one ear. I noticed that he seemed to hear the questions asked him in court particularly well; did you notice it?"

Doctor: "I did."

Counsel: "At the age of sixty-six are not the majority of men gradually failing in their hearing?"

Doctor: "Yes, sir, frequently."

Counsel: "Frankly, doctor, don't you think this man hears remarkably well for his age, leaving out the deaf ear altogether?"

Doctor: "I think he does."

Counsel (keeping the ball rolling): "I don't think you have even the first symptoms of this 'traumatic microsis,' Doctor."

Doctor (pleased): "I haven't got it at all."

Counsel: "You said Mr. Metts had had concussion of the brain. Has not every boy who has fallen over backward, when skating on the ice, and struck his head, also had what you physicians would call 'concussion of the brain'?"

Doctor: "Yes, sir."

Counsel: "But I understood you to say that this plaintiff had had, in addition, haemorrhages of the brain. Do you mean to tell us that he could have had haemorrhages of the brain and be alive to-day?"

Doctor: "They were microscopic haemorrhages."

Counsel: "That is to say, one would have to take a microscope to find them?"

Doctor: "That is right."

Counsel: "You do not mean us to understand, doctor, that you have not cured him of these microscopic haemorrhages?"

Doctor: "I have cured him; that is right."

Counsel: "You certainly were competent to set his broken leg or you wouldn't have attempted it; did you get a good union?"

Doctor: "Yes, he has got a good, strong, healthy leg."

Counsel having elicited, by the "smiling method," all the required admissions, suddenly changed his whole bearing toward the witness, and continued pointedly:

Counsel: "And you said that $2500 would be a fair and reasonable charge for your services. It is three years since Mr. Metts was injured. Have you sent him no bill?"

Doctor: "Yes, sir, I have."

Counsel: "Let me see it. (Turning to plaintiff's Counsel.) Will either of you let me have the bill?"

Doctor: "I haven't it, sir."

Counsel (astonished): "What was the amount of it?"

Doctor: "$1000."

Counsel (savagely): "Why do you charge the railroad company two and a half times as much as you charge the patient himself?"

Doctor (embarrassed at this sudden change on part of counsel): "You asked me what my services were worth."

Counsel: "Didn't you charge your patient the full worth of your services?"

Doctor (no answer).

Counsel (quickly): "How much have you been *paid* on your bill — on your oath?"

Doctor: "He paid me $100 at one time, that is, two years ago; and at two different times since he has paid me $30."

Counsel: "And he is a rich commission merchant downtown!" (And with something between a sneer and a laugh counsel sat down.)

An amusing incident, leading to the exposure of a manifest fraud, occurred recently in another of the many damage suits brought against the Metropolitan Street Railway and growing out of a collision between two of the company's electric cars.

The plaintiff, a laboring man, had been thrown to the street pavement from the platform of the car by the force of the collision, and had dislocated his shoulder. He had testified in his own behalf that he had been permanently injured in so far as he had not been able to follow his usual employment for the reason that he could not raise his arm above a point parallel with his

shoulder. Upon cross-examination the attorney for the railroad asked the witness a few sympathetic questions about his sufferings, and upon getting on a friendly basis with him asked him "to be good enough to show the jury the extreme limit to which he could raise his arm since the accident." The plaintiff slowly and with considerable difficulty raised his arm to the parallel of his shoulder. "Now, using the same arm, show the jury how high you could get it up before the accident," quietly continued the attorney; whereupon the witness extended his arm to its full height above his head, amid peals of laughter from the court and jury.

In a case of murder, to which the defence of insanity was set up, a medical witness called on behalf of the accused swore that in his opinion the accused, at the time he killed the deceased, was affected with a homicidal mania, and urged to the act by an *irresistible* impulse. The judge, not satisfied with this, first put the witness some questions on other subjects, and then asked, "Do you think the accused would have acted as he did if a policeman had been present?" to which the witness at once answered in the negative. Thereupon the judge remarked, "Your definition of an irresistible impulse must then be an impulse irresistible at all times except when a policeman is present."