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DIRECT AND CROSS-EXAMINATION OF WITNESSES

FRANCIS X. BUSCH*

Skillful conduct of a civil trial comprises several stages. Each is important. Effective direct examination, and successful cross-examination when undertaken, presuppose accurate and sufficiently comprehensive pleading, full utilization of discovery and of any necessary depositions, ready command of pretrial motions whenever appropriate, employment of pretrial conference procedure in jurisdictions where it is available, and efforts at settlement whenever feasible. Motions during and after trial are likewise important, as is the summation. Execution procedures and appellate argument, both written and oral, are at times vital to one's cause from a practical standpoint. This article emphasizes the jury trial and deals with one important phase of it — that phase which perhaps is most publicized and has the most color.

DIRECT EXAMINATION

Cross-examination is not always necessary and at times is harmful; but direct examination, pedestrian though it may seem to the young advocate, is essential. It merits close attention in every case.

Order of Presenting Evidence

In my mind, before the direct examination of any of the witnesses is commenced, a most important decision confronting the trial lawyer is a determination of the order in which his evidence will be presented.

The skilled advocate, desirous of making the most effective presentation of his case, appreciates the importance of the order in

*In response to numerous requests the Editors are happy to present this article by the famous advocate, professor, dean and author, whose several works include the outstanding and intensely practical treatise *LAW AND TACTICS IN JURY TRIALS* (Bobbs-Merrill Co., Indianapolis, 1949). The article is adapted from portions of this treatise and from an address delivered at the College of Law during the Institute on Civil Trials, Feb. 20-21, 1953, sponsored by The Florida Bar, The Bar Association of the Eighth Judicial Circuit of Florida, the General Extension Division of the University of Florida, and the College of Law. Other articles based on these Institute addresses will follow in later issues when manuscripts become available.

which his witnesses and his written evidence are presented before the jury. In arranging the order in which to present his witnesses, the advocate will be governed by various considerations. The witnesses should be arranged so far as possible to present the case in its own natural and chronological sequence.

The creation of a good initial impression is highly important. To accomplish this, a good witness should be selected to "lead off." By a good witness is meant one who possesses important information and will speak with certainty of the facts within his knowledge, and go no further. His associations, employment and past record must be such as to place him beyond the range of impeachment as to his general credibility. If possible, he should be one who has made no oral or written statements of the case to representatives of the opposite party. His education or native alertness should be such that he will be quick to catch the import and sense the significance of the questions asked him both on direct and on cross-examination. He must possess the rare virtue of thinking before speaking, and must in speaking express himself intelligently and clearly and in the fewest possible words. While his manner should be pleasant and courteous, it should also suggest confidence in himself and in his testimony, as well as his appreciation of the seriousness of his function as a witness. If this suggests a rare ideal, one should be selected as the first witness who most nearly approaches these specifications.

Selecting a person as a first witness because of his ability to express himself does not necessarily mean a choice, as between two witnesses, of the one with the greater education. A man with little formal education may possess the faculty of expressing himself intelligently and forcefully, and his very lack of education may evoke answers couched in such challenging language that the jury will remember it to the exclusion of answers stated in more orthodox terms.

There is a reason, other than attempting to make and fix the valuable first impression, which argues for commencing the case with such a witness. Every experienced trial lawyer knows that the first "occurrence" witness called meets the most detailed and exhaustive cross-examination. Almost invariably he is taken through every major and minor phase of the transaction; he is asked to fix directions, to identify structures, to estimate distances, to describe weather conditions, and to answer questions directed to many other details and circumstances. Ordinarily no subsequent witness is subjected to anything like as extensive a cross-examination. Moreover, the jurors hear the story for

the first time from him. They are curious, and therefore alert and interested. Later witnesses may testify to the same facts, but the testimony which is fixed in their minds is the original rather than the duplicated, or cumulative, testimony. Unless high-lighted by skillful cross-examination, the jury is not likely to perceive or remember so well the testimony of subsequent witnesses which may have lacked the exactness and vigor of that of the first witness.

Furthermore, if the first witness called is one who can adequately cover all or nearly all of the material facts of a transaction or occurrence, opposing counsel on cross-examination is likely to indicate his line of defense. In that event, the presenting advocate in his direct examination of subsequent witnesses may be enabled to apprehend and forestall their cross-examination on such points. What has been said about the desirability of selecting a good witness to commence complainant's testimony applies with even greater force to the defendant.

The arrangement of subsequent witnesses will necessarily depend upon the circumstances of the particular case, and the order of their presentation must be adapted to such circumstances. Whenever a party has several occurrence or transaction witnesses, and a number of witnesses as to minor or single points, it is generally considered advisable to "sandwich" the "short witnesses" in between the general occurrence witnesses; the tendency of this arrangement is to prolong the jury's interest in the main story.

If the nature of the case admits of it, the evidence should finish on a high note. Nothing is more apparent to the experienced judge or trial lawyer than the case which starts off in high gear and progressively slows down to a virtual stop. The less experienced juror, while he may not be so alert to the cause, is bound to be influenced by the effect of such a presentation. With several occurrence witnesses available, it is of course possible to save until the last the best of those who remain after the first witness has been called.

Preparation of the Witness

The witness, before being put on the stand, should be prepared for his ordeal as a witness. Being a witness is a novel experience for most laymen. For many persons their appearance as a witness is their first experience in a courtroom in any capacity. The environment engenders feelings of timidity and embarrassment. Their superficial

knowledge of court procedure and the ways of lawyers conjures up curious apprehensions. If placed upon the witness stand without any previous acquaintance with a courtroom or court procedure, some naturally nervous persons become more nervous, or even tongue-tied. Of course, an advocate may properly explain to a prospective witness in simple terms the routine of court procedure, and can assure him that there is no cause for apprehension and that he will be protected against any abuse or unfairness which may be attempted by that imagined ogre, "the lawyer on the other side." Such measures may serve their intended purpose. In many cases, however, trial lawyers make it a practice to take their witnesses to court well in advance of the time their particular case is called and let them sit in the courtroom as spectators at a trial where other witnesses are being examined and cross-examined. Except in unusual situations this practice does aid in dispelling the witness' misgivings and enhances his confidence in himself and his appreciation of his importance as a participant in the trial.

Securing Effective Presentation by the Witness

The examination of the witness necessarily commences with non-controversial preliminary questions, such as those relating to name, residence, age and employment. These should not be asked in a perfunctory, hurried manner, but rather deliberately, so that the witness may have a chance "to get his bearings." If a particular situation seems to require that the witness have a little more time for this purpose, this part of the examination may be extended by inquiry into former residences and employments, the nature of the latter, and similar questions.

When the witness has fairly begun his testimony, the advocate can determine whether he is being easily heard. If he is talking so low or indistinctly that the jurors are straining to catch what he is saying, he should be kindly admonished to speak a little louder so that "the last man in the jury box" can hear him without difficulty. The testimony of the best informed witness is of no value unless it is heard. If, as examination proceeds, the advocate become apprehensive that not all of the jurors are hearing the witness, he may, addressing the jury generally, inquire, "Can all of you gentlemen hear him without difficulty?"

If a witness talks too rapidly, the effect of all that he is saying may

be lost on the jury. A witness may be cautioned in a friendly fashion to speak more slowly. Another tactic practiced by some advocates is to wait until the witness has finished a long, rapidly spoken answer and then ask the court stenographer to read it. This has a dual purpose: it halts the witness for a short period, and when the examination is resumed he will usually answer more slowly; it also serves to determine whether the court stenographer is "getting" everything that the witness says. It is no criticism of the amazing proficiency of court reporters as a class to observe that trial lawyers are sometimes seriously embarrassed by the inability of a particular reporter to keep pace with a fast-speaking witness.

Form of Questions

Questions should, so far as the nature of the inquiry will permit, be phrased in simple, definite and clearly understandable language. They should be interrogations and not assertions. They should be concise and certain, not ambiguous or misleading. They should be confined to a single item, and should not combine two or more separate inquiries. They should not be argumentative. Except in special circumstances, they should not contain recitals and repetitions of answers previously given. They should avoid assumptions of unproved or disputed facts. They should call for answers of fact rather than conclusions or opinions. Except in certain circumstances, questions asked upon direct examination cannot be leading.

Questions should be plainly stated. The late Albert S. Osborne, eminent handwriting expert, has pertinently stressed the desirability of using a juror's language rather than a lawyer's language in the courtroom.¹ Particularly, he urges avoiding, where possible, legal terms such as "issue joined," "burden of proof," "onus," and "in lieu of." In the examination of witnesses he recommends the use of "before" rather than "prior," of "after" as preferable to "subsequent," of "paper" or "letter" rather than "instrument" or "document" if the more common words will satisfy the record equally well; of "go ahead and tell us what happened" instead of the more formal "describe all of the circumstances connected with this occurrence."

In this connection a humorous incident comes to my mind. A very obese, slatternly colored woman was the plaintiff in a damage suit

¹OSBORNE, *THE MIND OF THE JUROR* (1937).

against the City of Chicago for alleged injuries sustained from a fall upon a defective sidewalk. Her lawyer was a white man, noted for his fastidious dress, bombastic manner and penchant for unusual language. Instead of asking the witness in plain English, "What is your name?" he began her examination with, "Madam, state to the jury your cognomen." The witness rolled her eyes, pushed her neck out from its successive rolls of fat, and said: "Lookahere, Mr. Lawyer, you gotta talk plain to me cuz I'm powerfully iggorant, see?"

Questions on direct or cross-examination should relate to a single subject. Compound questions, such as "State whether or not there was any conversation between you and, if so, what?" rarely provoke a completely responsive answer. How much easier to separate the inquiry into two short questions.

The Vice of Leading Questions. Many advocates are careless in the matter of avoiding leading questions. They are apt to regard the practice as a harmless one, believing that, if objection is made and sustained, they will be permitted to reframe the question. It is my opinion that the advocate who is keen to insure that the presentation of his evidence and every feature connected with it shall impress the jury will, to the greatest extent possible, avoid leading questions.

A jury, particularly if objections to leading questions are aptly phrased, will quickly get the impression from the repetition of such questions that it is the lawyer, rather than the witness, who is doing the testifying; that the witness is merely a "yes man." Moreover, such questions, by provoking objections, necessitate court rulings which interrupt and destroy that continuity of examination which is one of the essentials to jury persuasion.

General versus Specific Questions. The direct examiner is presented with a choice of two general methods of examination: either, after the preliminary questions, to put a general question to the witness and invite him to tell his entire story "in his own way," or to elicit his knowledge by a series of separate questions and answers. The advantage of one method over the other depends a great deal upon the nature of the particular case.

If the case involves an occurrence which can be fully described in a brief statement, it may be advantageous to put a general question to the witness and let him tell the whole story without interruption. On the other hand, if the case involves a central, important occurrence

or transaction, and also a number of associated, important details, it may be preferable to elicit the testimony by successive questions. Some advocates practice a combination of both methods, that is, putting a general question to the witness and getting as much of his story as possible by his answer, and then following with specific questions directed to the omitted details.

As a general postulate, it must be conceded that the spontaneous statements of the witness which reflect his knowledge of the facts carry more weight with a jury than answers which appear "tailor-made" to fit a lawyer's questions. Giving a witness free rein to tell his story in his own way, however, entails greater risk than asking specific questions. His answer may not be responsive, or may be freighted with irrelevant matters which may suggest material for unnecessary and disconcerting cross-examination.

Striking Unresponsive Answers

The rule in most jurisdictions — frequently lost sight of — is that an unresponsive answer, otherwise competent, may be stricken only on motion of examining counsel or by the court of its own motion. The advisability of moving to strike objectionable answers for unresponsiveness is thus primarily a matter for the determination of the advocate examining on direct. This determination should be made after a careful balancing of consequent advantages and disadvantages. If the answer is not only unresponsive but totally irrelevant, he will do well to move promptly to strike it and thus apprehend possible action by the court or objection from the opposing counsel. If he moves to strike, care should be exercised so as not to disturb the mental balance of the witness. This effect is usually accomplished, after the motion has been made and ruled upon, by advising the witness in a gentle, pleasant manner that he has not answered the question, repeating it slowly and distinctly, and possibly changing a word or two which may have misled him.

The witness who displays a tendency to unresponsive and volunteered answers should never be "scolded" by the examiner. After all, he is the examiner's witness, and any direct or implied criticism of his manner of testifying weakens the effect of his evidence. If a witness' answer is relevant, although technically unresponsive, it is well to accept it and readjust one's examination accordingly.

CROSS-EXAMINATION

Jeremy Bentham, writing in the middle of the eighteenth century, characterized cross-examination as the "best possible mode of extracting testimony."² Wigmore, writing more than a century later, said:

"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

"Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."³

Scope

The scope of cross-examination is necessarily determined by whether the particular jurisdiction follows the so-called English or American rule. The English rule, introduced into this country in colonial times and still in effect in a number of states, is that a witness once called becomes a witness for all purposes and may be cross-examined upon all matters material to the issue, regardless of whether the facts cross-examined upon were brought out in the direct examination. The so-called American rule limits cross-examination to matters inquired about on, or fairly related to, the direct examination. Most states follow the American rule; and statutes in many of them prescribe this rule.

Preparation

An item in the preparation of the case frequently neglected by

²² BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 430 (1827).

³⁵ WIGMORE, *EVIDENCE* §1367 (3d ed. 1940).

inexperienced trial lawyers is preparation for the cross-examination of adversary witnesses. Regardless of the particular end to which it is directed, cross-examination is most effective when it is based upon a thorough knowledge of the asserted legal and factual issues involved in the trial and solid information concerning the witnesses who will be called to maintain or disprove them.

To this end, an effort should be made by every means at hand to discover the name and address of every witness who may be called by the other side. The following avenues and practices are suggested:

1. *The advocate's client.* In many cases, particularly those growing out of contractual relations, the client may be able to supply valuable information as to the witnesses likely to be called to oppose him.
2. *Official reports.* In tort cases, police reports and other reports required by law to be kept in public offices frequently furnish information as to the identity of adverse witnesses.
3. *Discovery.* Taking full advantage of code provisions for pre-trial discovery will frequently disclose the names of adverse witnesses.
4. *Hostile witnesses.* In tort cases a careful investigation of the case should reveal the hostile as well as the friendly witnesses.
5. *Coverage of all witnesses.* All known witnesses, whether friendly or adverse, should be interviewed.
6. *Collateral investigation of witnesses.* In many cases, after ascertainment of the names of adverse witnesses, collateral investigation of them to determine their standing and credit may be undertaken with profit.

Cross-examination based upon information in hand is the deadliest of all cross-examination. The much publicized fatal cross-examination of Oscar Wilde by Edward, afterwards Lord, Carson, in a libel action brought by Wilde against the Marquis of Queensberry, is a conspicuous case in point.⁴

No less amazing in its consequences was the cross-examination of complaining witness, State Senator Hugo Foelker, by Max Steuer in *People v. Frank Gardner*.⁵ Under a searching cross-examination, based upon facts unearthed in a most extensive investigation, Foelker

⁴See the detailed account in MARJORIBANKS, CARSON THE ADVOCATE 211-225 (1932).

⁵New York Court of General Sessions (1908), unreported.

was revealed as a hypocritical reformer who had been enabled to begin his career as a lawyer by hiring another to pose in his stead in taking a Board of Regents' examination. The cross-examination not only acquitted Steuer's client but drove Foelker out of public life.

Similarly, the masterful cross-examination of Dr. Stevenson by Sir Edward Clarke, in his successful defense of Adelaide Bartlett for murder,⁶ and of the plaintiff Tilton by William M. Evarts in the action for damages for criminal conversation brought by Tilton against Henry Ward Beecher,⁷ were based almost entirely upon information in hand as the result of industrious, painstaking, pretrial investigation.

Determination of Advisability

To cross-examine or not to cross-examine — that is always a question. The wrong answer to this question may seriously affect the result of a case. Nothing more definitely reveals the inexperienced advocate than his cross-examination of every witness presented by his adversary, usually following orderly notes of the witness' testimony on direct. Conversely, nothing more clearly reveals the experienced trial lawyer than his refusal to cross-examine needlessly.

Most experienced advocates consider it a good rule never to cross-examine if the witness has done no particular harm in his direct examination and the examiner has no definite information that the witness has held back information of value to the case. Even when the witness has done some slight harm it is wise to consider whether that harm can not be better remedied by reliance upon the contradictory testimony of the examiner's own witnesses than by risking a cross-examination which may aggravate the injury already done.

The risks of cross-examination are many. The lawyer is not always smarter than the witness; and the witness who is honest, who acts fairly and is obviously trying to tell the truth as he understands it, has the jury on his side. Its sympathy will usually remain with him even though he may, under a clever cross-examination, become confused as to details. Many old practitioners have been led by their experience to adopt a rule never to cross-examine unless they feel they must and, in such cross-examination as they feel compelled to

⁶See the detailed account in *TRIAL OF ADELAIDE BARTLETT* (Hall ed. 1927), in the Notable British Trials series.

⁷See *REPORT OF TRIAL OF TILTON V. BEECHER* (McDevitt Campbell & Co., New York, 1875).

undertake, never to ask a question unless the answer reasonably to be expected will aid their cause. Some even go so far as to say: Never gamble on the unknown in a lawsuit; never ask a question on cross-examination unless you know what the answer is going to be. There is sound logic in this extreme position. A clear-cut, forceful answer given by a witness on cross-examination is much deadlier in its effect upon a jury than the same answer given on the direct; and unless the witness is called under special statute or rule this type of answer is binding upon the examiner. Similarly, the unexpected answer, made possible by an unnecessary question on cross-examination, may have a devastating effect.

Purposes

While the well-known commentators on the law of evidence employ varying language to state the purposes of cross-examination and sometimes emphasize the relative importance of one over the other, the consensus of their views as to such purposes, without attempting to state them in priority of importance, may be thus stated:

1. To explain, supplement or qualify the testimony given on direct, or to compel admission of facts inconsistent with or contradictory to it.
2. To elicit new matter favorable to the cross-examiner's case, in those jurisdictions where this practice is permitted.
3. To discredit or weaken the effect of the story told by the witness.
4. To discredit or destroy the witness by showing him unworthy of credence.

To discredit the story told by the witness, the cross-examination may be directed to showing his lack of knowledge of the facts, inadequacy of perceptive faculties, inaccurate recollection, inability to express accurately what he has perceived or remembered, tendency to exaggerate, and unsoundness of judgment of such things as time and distance, as well as the inherent improbability of the truth of all or portions of his direct testimony.

To discredit or destroy the witness himself, the cross-examination may be directed to showing his interest, direct or indirect, in the party for whom he appears or in the outcome of the litigation, his motives, his relationship to or association with the party calling him, his friend-

ship, hostility, bias or prejudice, his improper conduct in the case, such as attempting improperly to influence other witnesses or jurors, his conviction of a crime rendering him unworthy of belief, his commission of such a crime, in those jurisdictions permitting such inquiry, and, to the extent permitted in particular jurisdictions, his moral delinquencies or misconduct of a type affecting his credibility as a witness.

Cross-examination, if undertaken, should have at least one of these objects in view. If it is apparent that none of them can be accomplished, cross-examination is worse than useless. Nothing does an advocate's case more harm with a jury than a long, aimless and fruitless cross-examination.

Subject Order

The determination of the order in which to take up various subjects on cross-examination must depend largely upon the circumstances of each particular case. A cross-examination which follows literally the order in which the subject matter of the direct was presented is least calculated to produce a satisfactory result. The witness, through pretrial preparation and his direct examination, has learned this sequence and is usually ready with his answer before the cross-examiner's question is finished.

Neither is it ordinarily good tactics to commence a cross-examination with the subject matter last testified to by the witness on direct. This is fresh in his mind, and he is not likely to contradict it if immediately cross-examined upon it. An exception may be indicated when the cross-examiner has in his hands convincing impeachment on the subject matter last dealt with on the direct. In such case, by immediately putting the impeaching matter to the witness in a series of crisp, rapid questions, the examiner may so disconcert him as to throw him completely off balance during the remainder of the cross-examination. If material of this nature is lacking, the experienced advocate usually picks out a subject matter from about the middle of the direct examination, and, without regard to the direct sequence, "skips around" from one subject to another, not giving the witness a chance to relate his answers to the order in which he gave them on direct. This method is most likely to produce contradictions.

Manner and Style

Cross-examination must be approached with a recognition of cer-

tain general factors, as well as of facts particularly applicable to the witness presented. Witnesses are almost always biased in favor of the party calling them; more often than not they have been called because they are friends, associates, or favorably disposed toward that party. Generally, they have been rehearsed and have listened before trial to the stories told by other witnesses similarly disposed. Frequently their antagonism toward the opposing side has been aroused. Consciously or unconsciously, they have caught the spirit of the contest and, as contestants, deem themselves important actors. Such persons take the stand determined to make "good witnesses." They feel that to be good they must be positive in what they say. It is absurd to think that such a witness is going to change lightly his direct testimony, or admit that he has made a mistake. In reaching such a state of mind, the witness is not necessarily dishonest. He may be honestly mistaken in his perception and recollection of what he states as facts. To these, as has been suggested, there may have been added the warping of various associations and suggestions.

In determining how best to cross-examine a witness, an advocate must appraise the witness. There is the apparently respectable, honest witness who is mistaken about the facts as to which he has testified. There is the essentially honest witness who, because of his partisanship, has gone further than the facts warrant. There is the belligerent witness who, because of relationship, interest, prejudice or other antagonism, is determined to assist to the limit of his capacity the party who calls him. There is the "smart-aleck" witness, given to "wise-cracks," who believes he is a match for any lawyer. There is the timid, hesitant witness, as regards whom the lawyer must determine quickly whether the hesitation is due to uncertainty as to the facts or to a natural disposition. There is the ignorant witness, whose perceptive faculties are none too good and who has been over-persuaded into giving favorable direct testimony as to facts of which he has no actual knowledge or recollection. There is the evasive or reluctant witness, whose attitude suggests the concealment of facts which would weaken the direct testimony he has given. There is the artful witness, who has cleverly woven a harmful lie into a fabric of other testimony admittedly true. Finally, there is the vicious, reckless witness, who in the estimation of the advocate has wilfully sworn falsely.

The cross-examiner should appreciate, too, that ordinarily the sympathies of the jury are with the witness, who has been sworn to tell the truth and has given direct testimony. The jury may be per-

suated, by a clever cross-examination, that he has made a mistake; but it is reluctant to believe that a man will commit deliberate and wilful perjury. It is prepared to make allowances, far short of wholly discrediting the witness, for a relationship to or an interest in the party calling him. This is especially true of the witness appearing for the state in criminal cases. The ordinary jury will look sympathetically rather than otherwise upon a witness whose attitude suggests outraged feelings and a desire for retributive justice, regardless of whether he was directly aggrieved by the alleged crime.

If, in a given case, the advocate decides to cross-examine, he should appreciate that everything he says and every move he makes enters into the process of persuading the jury that the witness is to be discredited or his testimony discounted. Every feature of the advocate's conduct has its importance. First, he should take a position from which the cross-examination can be most effectively conducted. This should be a point from which he can keep the witness under his eye and at the same time observe the reactions of the jury. A cross-examination which the advocate thinks is good may be boring rather than persuading the jury. His cross-examination is directed to the jury at least as much as to the witness. He should speak distinctly and put short questions couched in simple and readily understandable English. If the question is so involved that the witness fails to understand it, it is more than likely that some juror finds himself in the same situation. Such a question gives the witness time to hedge by saying he does not understand. His evasion slows up the examination and destroys its continuity and effectiveness.

Cross-examination should, at all times, be conducted with dignity and reserve; slang should never be resorted to, and sarcasm employed sparingly. The examiner should not appear over-smart. If he does so appear, and succeeds in eliciting a favorable answer on cross-examination, this result is apt to be attributed by the jury not so much to the unreliability of the witness as to the sharpness of the lawyer. Cross-interrogation should ordinarily be put in even, rapid sequence, and should be closely directed to one subject at a time. The purpose of putting questions rapidly is threefold: the attention of the jury is better maintained; the witness has less time to consider the effect of his answers; and rapid questioning is calculated to produce rapid answers. A witness answering rapidly is more likely to contradict himself than one who answers after having been given plenty of time to deliberate.

A hesitant, rambling cross-examination cannot be effective. Some lawyers, usually the inexperienced ones, are given to repeating all, or the last part, of every answer made by a witness. The habit is pernicious and minimizes the chances of success in an examination. This automatic repetition emphasizes the witness' answers, slows up the examination, and gives the witness an added opportunity, between an answer and the next question to weigh the effect of his latest answer and prepare for the next question.

At all times the advocate must keep in mind that the witness is entitled to courteous treatment. A jury is ordinarily quick to sense and resent a discourtesy. The most direct, searching and damning cross-examination, even of one who is hostile and deemed to be dishonest, can be conducted with an observance of proper courtesy.

A cross-examination, to be effective, must be fair to the witness. To base a question upon an unfair construction of a previous answer is usually readily detected by a jury and, if the opposing advocate is alert, can be made the basis of damaging argument. If the cross-examiner refers to previous answers of the witness, he must be sure of his own memory. Unless his own memory is better than that of the witness, he had better not cross-examine.

It is essential in cross-examination that the examiner keep control of the witness. Questions should, if possible, be so framed as to include a direct suggestion and limit the answer to an affirmation or negation of it. Some advocates believe in letting a loquacious witness talk, the idea being that, given enough rope, he will hang himself. It is submitted that such a witness, having been called by the other side, is more apt, if given his head, to blurt out something harmful rather than helpful.

The style of an advocate's cross-examination will necessarily depend to a greater or lesser extent upon his own natural disposition. The trained advocate, however, will cultivate and employ the style which he thinks is best calculated to produce effective results. Speaking generally, there are two prevailing styles: the savage, slashing, "hammer-and-tongs" method of "going after a witness to make him tell the truth"; and the smiling, soft-spoken, ingratiating method, directed to lulling the witness into a sense of security and gaining his confidence. Neither style can be adopted to the exclusion of the other for every situation that may be presented. There are many situations in which a vigorous, rapid-fire examination is likely to produce the best results, just as there are many in which a quiet, easy, friendly

examination will elicit more that is favorable to the examiner. The experienced advocate, like the seasoned baseball pitcher, relies upon his ability to change the pace to suit the varying conditions in the game.

It is submitted that in most cases the gentler approach is better calculated to elicit the concessions which the examiner desires. The savage, vehement style of cross-examination ordinarily makes the hostile witness more hostile. In some instances such an examination angers the witness to the point of impelling him to make vicious answers. While this result may weaken the effect of his direct testimony by emphasizing his partisanship and hostility, the content of the answer may be such as to lead the jury to believe that the witness is beating the examiner at his own game. Only the complete success of such an examination will keep the advocate in the jury's good graces. The repeated failure of such examinations is incalculably prejudicial. The witness is the "under dog," and the jury's sympathies are ordinarily with him.

If the witness is not particularly hostile, a slashing, finger-shaking attack is apt to terrify him and "dry him up." It is next to hopeless to expect concessions from a witness in such a state of mind. The "soft and smiling" type of cross-examination, on the other hand, is calculated to put the witness at his ease. If he knows the reputation of the examiner he may well be wary, but persistence in such an examination, skillfully conducted, will in most cases ultimately gain his confidence and even friendliness. Such an examination cannot offend the jury, and concessions obtained by an examination of this kind will ordinarily be appraised at their full value. Whenever, under such an examination, a witness is caught in inconsistencies, the slashing, bull-doing type of examination may add to the witness' confusion, but the soft-spoken type will usually get the witness to talk more volubly, and his efforts to reconcile the inconsistencies usually emphasize them.

Ending

The determination of when to end a cross-examination is even more important than the determination of when to begin it. On this score there is little room for controversy. If possible, end on a high note; in other words, drop the witness after a telling point has been scored. Cross-examination, like argument, to be effective, requires a

climax. Just as the effect of a good argument is destroyed by an anticlimax, so the legitimate advantages of a brilliant cross-examination, which has scored many hits, are thrown away by a final descent to interrogation on petty or immaterial details.

It is a mistake, when a highly favorable answer has been secured on cross-examination, to labor it in an attempt to make it stronger. The risk that the witness will retract or modify it is too great.

A classic example of not knowing when to cease cross-examining is presented by Sir Edward Marshall Hall's cross-examination of the renowned toxicologist, Dr. Wilcox, in the trial of the Seddons for murder by poisoning.⁸ There, after getting the doctor to admit that the presence of arsenic in the distal ends of the hair, that is, the part most remote from the roots, would indicate chronic arsenical poisoning — which was Hall's theory of defense — he proceeded so to labor the point and embarrass the witness that Dr. Wilcox felt constrained, after he left the stand, to conduct a series of experiments, by which he established that the arsenic had permeated the distal ends of the hair by direct contact, after death, with an arsenical solution. Dr. Wilcox was recalled and not only removed the effect of Hall's cross-examination but completely blasted his principal theory of defense.

The distinguished English advocate Lord Abinger recounts a similar tragic experience in his reminiscences. Observing, as to cross-examination, that he had always proceeded on the principle "let well enough alone," he says:⁹

"A friend of mine, a brilliant counsel . . . named W. B. Campbell, was defending a man at the Old Bailey for murder of a barmaid. Not a single word was said by any witness called by the Crown of any previous threat by the prisoner, but Campbell, confident of getting a favorable answer put to the licensee of the house the following question: 'Did you ever hear the prisoner threaten the deceased woman before the date of the alleged murder?' and the publican replied: 'Yes, many times, although I never thought the threat serious.' The prisoner was convicted and afterwards executed."

Whenever the witness is apparently an honest one, who has tried

⁸See *TRIAL OF THE SEDDONS* (Young ed. 1914), in the *Notable British Trials* series.

⁹ABINGER, *FORTY YEARS AT THE BAR* (Hutchinson & Co., Ltd., London, 1930).

to give his best recollection of an occurrence, any cross-examination undertaken should be pursued only to the point of obtaining some favorable limitation of or addition to his direct testimony. Then he should be dismissed with an air suggesting that his entire testimony lacks determinative importance.

CONCLUSION

Examination of witnesses, not only on cross but also on direct, requires a knack for sizing people up as well as a thorough familiarity with the local rules of evidence. The precise approach will of course vary with the personality and temperament of the examiner, and the completely unorthodox is admittedly effective on rare occasions.

There are, nevertheless, certain precepts in this art which have commended themselves to the vast majority of great advocates in America and England, and I have endeavored to discuss these briefly. The intrinsic value of the orderly, courteous, candid and forthright approach to examination has been obscured by the excessive publicity accorded the dramatic—even when unsuccessful—and by the over-emphasis on the glamor of flashy presentation. The long hours of painstaking investigation, study and preparation for the seemingly effortless performance in the courtroom tend to get lost in the shuffle. Once the basic technique is mastered, however, the diligent and industrious advocate will not only find cross-examination, and direct too, fascinating in themselves but will also concur in the judgment of centuries of trial experience that these tools, fairly and skillfully handled, are still the most nearly perfect implements yet devised for boring through to the truth on designated issues of fact in dispute.