## PRACTICAL NOTES ON CROSS-EXAMINATION

It is common ground that while cross-examination is the trial lawyer's most powerful weapon, it may weaken and even destroy his case if put to unskilful use. To know just when and how that weapon should be employed is something which can be learned only by practice. Of considerable assistance, however, in acquiring that knowledge, is a study of the methods employed by counsel whose names will long be associated with the art of successful cross-examination. The following notes refer to some of those counsel and their methods, and without any pretence at exhaustiveness, aim to stress several points which experience has shown to be of importance in cross-examining witnesses.

It is elementary that no questions should be asked unless there is some definite object to be gained by doing so. The objects may be:—(1) to destroy or weaken the effect of the evidence-in-chief; (2) to adduce evidence in favour of one's client; (3) to discredit the witness. Useless cross-examination is quite common, and frequently is disastrous. A good advocate is not afraid to say "No Questions."

The result of a cross-examination will depend to a large extent on manner and approach. Bullying methods are out of date; and while severe treatment is permissible with dishonest witnesses,[1] the best advocates make a general rule of adopting a polite approach. Rough tactics, on the other hand, tend to strengthen a witness' resolution to resist, and may antagonize a jury.

The commonest fault in cross-examining— and one of which every advocate has been guilty at some time—is failure to sit down at the right moment and leave well enough alone. Serjeant Ballantyne (who has been described as "probably the most adroit advocate of his time"),[2] expressed the rule in this way:—

> It ought above all things to be remembered by the advocate, that when he has succeeded in making a point he should leave it alone until his turn comes to address the jury upon it.

But even experienced counsel sometimes fail to "leave it alone". Take, for instance, the cross-examination of the Crown's Analyst, Sir William Willcox by Sir Edward Marshall Hall in the Seddon

[1] "It must not be forgotten that in many cases the issues are of such a nature that severe and even very wounding cross-examination is required in the sacred interest of justice itself. . . . . It would be very difficult, for instance, to cross-examine a professional blackmailer or a card cheat without rnning the risk of hurting his feelings"—The Earl of Birkenhead in *"Law Life and Letters"* (1927) Vol. 1, p. 242.

[2] Sir Chartres Biron in *"Without Prejudice"* (1938), p. 52.

arsenic-murder trial.[3] Hall had discovered medical authority to the effect that if arsenic is found in the human hair it indicates that the poison has been consumed for a considerable time. In order to succeed, the Crown had to prove that Seddon had administered a fatal dose within 24 hours of the victim's death. Hall first got Willcox to admit the presence of arsenic in the hair, and then had him make the sensational admission that that might mean that arsenic had been taken several months before. If at that point he had sat down, Seddon might have gone free,—at least that was the opinion of a lawyer who made a close study of the case.[4] Fortunately for the sake of justice, Hall did not sit down, but continued to labour the point for the benefit of the jury. This gave Willcox an opportunity to think of the true explanation —that arsenic had reached the hair, not internally, but through contamination by fluid in the victim's coffin.

Another fault is a tendency to cover too many points in cross-examination. Sometimes this is done to satisfy clients, but too often it leads to confusion. Lord Carson believed that one fact rammed home was worth more than a dozen banalities, and he followed that principle regardless of clients' wishes. In one case a collector for a gas company, who had been unsuccessfully prosecuted for embezzlement, sued his employer for malicious prosecution. Carson, who appeared for the employer, concluded that the prosecution had failed because the jurors had been presented with a mass of figures which they did not understand. Accordingly, he laid aside his instructions, and by concentrating his cross-examination on one item of the collector's accounts, he convinced the jury that the man was a fraud.[5]

Cross-examination of an expert generally requires the assistance of at least one other equally qualified expert in the same line, who helps in the preparation of the case and later attends at Court. Not only should he be able to offer useful suggestions for cross-examination, but his presence in Court tends to keep the evidence of the opposing expert within reasonable bounds. This is especially true of doctors.

Experts require cautious handling, because in most cases they are chosen for their ability to stand up to cross-examination, in addition to their technical knowledge. Above all they should be strictly confined to the issues involved, and should not be permitted to argue the case for the party who employed them. Some advocates intentionally play on the vanity of this class of

[3] *R.* v. *Seddon* (Old Bailey, March 1912).
[4] Edward Marjoribanks, M.P., in "*For the Defence*" (1929) p. 287.
[5] "*The Temple of the Nineties*" (1938) by Mr. Justice Alexander, p. 132.

witness to lead him on to some absurd conclusion, but this requires considerable skill. A polite approach will usually bring the obvious admissions that the expert has merely stated his personal opinion and, being human, that he sometimes makes mistakes. In some cases, however, it may be preferable not to cross-examine at all, or to ask only one or two questions of a kind which involves no risk. An instance of such restraint was Clarence Darrow's cross-examination of the prosecution's chief medical expert in the celebrated Massie case in Honululu. Darrow's only questions were these:"Q. Did you enjoy your trip from Los Angeles Doctor? A. Yes, I did. Q. Are you being paid for testifying in this case? A. Yes, I am."[6]

The expression "trick question" is distasteful. However, methods of questioning expressly designed to expose falsehood and reduce exaggerated statements to their proper dimensions are obviously legitimate, because that in fact is the very purpose of cross-examination. Sir Rufus Isaacs (later Lord Reading) made liberal use of memory tests. Suppose, for example, the events with which a case is concerned took place a year ago, and that a witness has testified as to those events in detail. The first step is to show, if possible, that the witness' memory is not good, and by a careful choice of questions he may often be obliged to make an admission to that effect. Later, he is asked if he made any notes. If he says he did not, the groundwork is complete, and the questioning proceeds on the following lines:—Q. You say that you made no notes at the time, so in testifying today you are relying entirely upon your memory? A. Yes. Q. And all this happened a year ago? A. Yes. Q. And a few moments ago you said your memory was poor? A. Yes.

One of Marshall Hall's favourite questions was: "Are you as sure of that as of everything else you have said?" It came immediately after a witness, in reply to a previous question, had given an answer which obviously was wrong, or which Hall knew he could prove to be wrong.

A sudden, bold question, put unexpectedly at the correct psychological moment, will sometimes lay a witness open. In his famous cross-examination of Oscar Wilde, Lord Carson after asking a few apparently unimportant questions, mentioned almost casually the name of a young man-servant at Oxford. Then with sudden emphasis he asked: "Did you ever kiss him?" Until then, Wilde had been more than a match for his cross-examiner, but the question staggered him, and soon afterwards he broke

[6] "*Clarence Darrow for the Defence*" (1941) by Irving Stone, p. 165.

down.[7] Another instance of similar tactics was in Sir Rufus Isaacs' cross-examination of Seddon in the case already referred to. After Seddon had testified that the murdered woman boarded with him and his wife for several months before her death, Isaaca suddenly asked: "Did you like her?" It was a difficult question for a murderer to answer, and before he could think of a suitable reply the prisoner echoed lamely: "Did I like her?" The confidence with which he had entered the box was visibly shaken by that unexpected query.[8]

If a witness intends to commit perjury, he has probably studied the principal points of the case, and in cross-examining him it is preferable in many instances to look for points upon which he is not so likely to be prepared. Alternatively, he may be taken over parts of his version, but not in the same sequence of events as he gave it in chief. Skipping from one part of his narrative to another is likely to confuse him if he is not telling the truth. When dishonesty is suspected, an immediate checkup by reliable investigators should be made on the witness' statements as to where he lived and worked, his connection with the party for whom he appears, etc.

The witness who "cannot remember" is always a problem. However, the elimination process is extremely useful in refreshing memories under certain circumstances. For instance:—Q. You mean to say you cannot give us even an approximate idea of when you last saw Jones? A. No, I cannot. Q. Was it a week ago or a year ago? A. Oh no. . . . Q. Was it six weeks ago or six months ago? A. It was more than six weeks ago but not six months ago. Q. Was it three months ago or four months ago? A. I would say between three and four months ago.

It goes without saying that the cross-examiner must never lose his temper, for anger comes close to admitting defeat in any intellectual combat. A witness once hurled a fearful insult at Lord Carson, but he met it with a smile and said: "It is not a bit of use your being impertinent to me. I am too old a hand to be put off by that. You'll have to answer my questions I'm afraid".[9] But in such cases Carson could attack without becoming ruffled. Once he turned on an insolent witness: "Q. I understand, my man, that you drink a good deal? A. That's my business. Q. Have you any other business?"[10]

[7] "*The Life of Lord Carson*" (1932) by Marjoribanks, M.P., p. 219.
[8] "*Rufus Isaacs*" (1943) by The Marquess of Reading, p. 216.
[9] "*The Life of Lord Carson*" (1932) by E. Marjoribanks, M.P., p. 239.
[10] "*Without Prejudice*" (1936) by Sir Chartres Biron, p. 213.

Finally, one should not lose sight of the importance of making careful notes of the witnesses' answers in cross-examination It is desirable—and in jury cases almost essential—to have an assistant for that purpose.

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