LAW AND LAWYERS IN LITERATURE.

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IV.

Underlying the surface of Dickens' description of the trial of Bardell against Pickwick is a mine of legal lore. The ordinary reader may well rise from a perusal of this chapter with the consciousness that it has been amusing—very amusing—but without any idea of the trouble which the author must have taken to inform himself sufficiently to enable him to give an accurate and faithful description of a trial in the Court of Common Pleas, which would stand the test of criticism by a lawyer, and without any idea of the artistic setting of the whole proceedings at the trial. Even the fact that the trial was brought in the Common Pleas is significant, for by so staging the scene, Dickens was enabled to introduce the Serjeants-at-Law, who led for the plaintiff and defendant respectively, they having the exclusive right of practising in that Court.

When the case was called, Serjeant Buzfuz and Mr. Skimpin appeared for the plaintiff, and Serjeant Snubbin and Mr. Plunky for the defendant, a leader and a junior for each party as required by the English practice. It will be noticed that the Judge always addressed the Serjeants as "brothers."

Now, who were the serjeants? The name is derived from their Latin appellation, *Servientes ad legem,* and they constituted an order amongst themselves said to have been more ancient than any other order in England. Chaucer describes one in such a concise manner that I cannot do better than quote from him as a text:—

> A serjeant of the law, ware and wise,
> That often had been at the parvis,
> There was also full rich excellence,
> Discreet he was and of great reverence,
> He seemed swiche; his words were so wise
> Justice he was ful often at assize,
> By patent, and by pleine commission,
> For his science, and for his high renown,
> Of fees and robes had he many on.

In the earliest days they were the only men learned in the law, and so were properly designated ware and wise. Upon conforming with

the formalities attendant on taking the degree of serjeant-at-law, each one was assigned a pillar in St. Paul's Church, and there, clad in their robes and having their heads covered with the coif, they gave counsel *pur son donant* to the rich and *gratio* to the poor. Hence, Chaucer represents his serjeant as having been often "at the parvis," or at his proper place in St. Paul's. (The "parvis," according to Murray's Dictionary, was an open space in the front of a church.) The serjeants of those days were advisers to the King, and, as a dispenser of the King's justice, Chaucer describes his serjeant as having been justice at assize full often, acting either under letters patent from the King, or under full commission for the holding of an assize. The practice of issuing commissions to the judges to hold assizes persisted until modern times.

From the historic fact that the serjeants were advisers to the King, and perhaps from the fact that there was originally no other body of men from which they could be selected, the King always appointed his judges from among their order. And as custom in England gradually ripens into law, it became the unalterable custom, if not the law, for every barrister who was about to be appointed to the Bench to take his degree as serjeant-at-law before being appointed. All serjeants spoke of and addressed each other as brothers, and as every judge was a serjeant, and none the less because he was a judge, all the judges spoke of each other as brothers —as they still do. The Serjeant at the Bar was also a brother to the Serjeant on the Bench; and therefore Mr. Justice Stareleigh addressed the leaders for the plaintiff and defendant as Brother Buzfuz and Brother Snubbin respectively.

I must here make what is apparently a digression. Readers of Pickwick will recollect that Mr. Pickwick went to Ipswich before the trial, and met on his journey Mr. Peter Magnus, and that they exchanged cards. Mr. Magnus called attention to his initials and said, "Curious circumstance about those initials, sir, you will observe —P. M.—post meridian. In hasty notes to intimate acquaintance, I sometimes sign myself 'Afternoon.' It amuses my friends very much, Mr. Pickwick." A writer in The Law Quarterly Review is inclined to point to the following facts as the origin of this pleasantry. Serjeant Thomas Noon Talfourd was the last name in the last batch of Serjeants created in 1833. Lord Brougham thought to abolish the order by the King's Proclamation, which however, failed of its intended effect. Meanwhile, various King's Counsel were created with precedence (as the patents always read) next after

Thomas Noon Talfourd." And they were facetiously called by their learned friends, "Afternoons." Serjeant Talfourd, according to the same writer, was a friend of Dickens, and he thinks that it was therefor probable that Dickens got the idea from Talfourd of introducing a gentleman with such initials as would enable him to reproduce the little joke.

When the judge was ready to begin and the jury were called, it appeard that there were only ten special jurymen present, whereas twelve were necessary; and Serjeant Buzfuz thereupon "prayed a *tales*." When there were not enough jurymen available, in order to avoid an adjournment, recourse was necessarily had to some persons at hand who could immediately be called on to serve, and so the practice used ti be to call *tales de circumstantibus* (the like men from the bystanders) and those men who happened to be in Court were liable to be called upon to serve. In this manner two tales-men were selected and sworn on the jury, and the number was thus rendered complete. Although I have spoken of this practice as an ancient one, it is still necessary to call tales-men when the panel is exhausted.

The jury having been sworn, it became the duty of junior counsel to "open the case" to the jury, *i.e.*, to explain what it was about. And Mr. Skimpin's opening is described by Dickens as follows: "He kept such particulars as he knew, completely to himself, and sat down, after a lapse of three minutes, leaving the jury in precisely the same advanced stage of wisdom as they were in before." This is strongly redolent of the same kind of humour as Lewis Carroll treats us to in "The Hunting of the Snark." In "The Barrister's Dream" he writes:—

> The indictment had never been clearly expressed,
> And it seemed that the Snark had begun
> And had spoken three hours before anyone guessed
> What the pig was supposed to have done.

Serjeant Buzfuz then addressed the jury, as leader for the plaintiff, submitting to them particulars of what he would subsequently prove. The ordinary reader of Dickens may regard this speech as simply amusing, or as supremely ridiculous, or even as a piece of buffoonery, and Serjeant Buzfuz as a bombastic buffoon. But, while it must be conceded to be both amusing and ridiculous, there is a good deal more in it than mere amusement. As an address to a jury based upon very slender evidence, it is confined within legitimate bounds, modelled carefully on approved lines, and is a skilful display of Forensic oratory in a case where the imagination is called upon in

aid of the reasoning powers upon a poverty of evidence; and yet this is so done as not to transgress any established rules. In opening to a jury, counsel must scrupulously avoid stating to them any fact pertinent to the case which he cannot prove. But he is not precluded from enlarging upon either important or unimportant facts which, with skilful handling, will excite the sympathy of the jury for his own client or awaken their resentment towards the opposing party—provided always that his address does not in its ardour reach a degree which might be called inflammatory. It will be noticed then that Serjeant Buzfuz does not mention that he will prove a single fact except Mr. Pickwick's kindness to the plaintiff's son, the written communications from Mr. Pickwick to Mrs. Bardell, and the incriminating fact of Mrs. Bardell's having been seen enveloped in Mr. Pickwick's arms. The reference to Mrs. Bardell's lonely condition when she put up her sign offering lodgings to single gentlemen, to Mr. Pickwick, as a single gentleman entering her paradise and trifling with her affections, to his affectionate treatment of her little boy, are skilfully woven in with the fact of the fainting fit in such manner that if the jury accept the latter as proof of the conduct of an accepted suitor their resentment of his inhuman conduct will secure their giving handsome damages. The speech is said, by the writer in The Law Quarterly Review already referred to, to have been modelled, to some extent at least, upon that of counsel for the plaintiff in a case of *Norton* v. *Melbourne*, in which fragmentary documentary evidence in the way of correspondence was used with effect, not so much for what openly appeared upon its face, as for the covert references to what the artful villain had left out. Serjeant Buzfuz made a similar use of the celebrated letters of Mr. Pickwick to Mrs. Bardell. "Chops and tomato sauce." What is the significance of this? Serjeant Buzfuz did not attempt to resolve the criptic words, but Mrs. Sanders unexpectedly (and perhaps upon a previous hint from Dodson and Fogg) supplied an explanation in her evidence. Mr. Sanders, in his ante-nuptial correspondence, often called her a duck, and he was very fond of ducks, but if he had been as fond of chops and tomato sauce as he was of ducks he might have called her by that name as a term of endearment. But he did attempt to interpret to the jury the other letter. "Slow coach" he presented to them as an undoubted reference to Mr. Pickwick's hesitation to implement his promise to Mrs. Bardell, though he ran the risk of getting his wheels greased in this proceeding. "Don't trouble yourself about the warming pan"—an innocent and useful article; but why should he introduce a warming pan unless as a "cover for

hidden fire," a substitute for some endearing word or promise. The whole speech is remarkable for the ingenuity displayed in making the most of the only facts which could be proved, and weaving into the web unimportant facts with sufficient and appropriate colouring to harmonize with the truth, and so make one harmonious whole. If I may continue the simile, it constitutes the very best extant example of a story manufactured out of whole cloth.

When the witnesses come to be examined Dickens again displays great familiarity with the methods of examination and cross-examination, crude and unskilful as they are, which are adopted by some counsel with the object of impressing the jury. It is to be observed first, however, that Serjeant Snubbin, with great wisdom, declined to cross-examine the first witness, Elizabeth Cluppins, because she told the truth, and could not be broken down. The cross-examination of such a witness would only intensify and emphasize his evidence, and he is therefore wisely left alone—a fact not always appreciated by counsel. There is only one other case, to my mind, in which cross-examination may be avoided, and that is when a witness tells a story which is so extravagantly improbable that no one would believe it. But even then a skilful counsel will sometimes raise the improbability to the power by a few well directed questions.

Mr. Skimpin's examination of Mr. Winkle is a very good illustration of the not very creditable attempt of counsel to intimate to a jury, by a bullying course of conduct towards a witness who might not be considered favourable, that the witness is trying to evade the questions, when as a matter of fact he is trying to answer truly, combined with a display of his own skill and ultimate triumph in having at last extracted by his own efforts what the witness was always ready to say if he had been allowed. It is also a good example of how counsel, when trying to find out how often a witness has seen some person, or how often he has done something, or how many days elapsed after a certain event, will take a minimum and maximum number, and will start at the minimum, like a basso running up the scale until he balks at a note too high for him, and then will start at the maximum like a tenor running down the scale until he balks at a note too low for him, until finally the unfortunate witness fixes on some number or time which everyone knows is not correct merely that he may relieve himself from the torture.

In Mr. Plunky's cross-examination of Mr. Winkle there is an excellent example of how cross-examining counsel may go too far. Having elicited the information that Mr. Pickwick's behaviour to-

wards females had always been to treat them only as a father might treat his daughters, and no doubt feeling somewhat elated, he endeavoured (though Serjeant Snubbin was winking at him to stop there) he endeavoured to intensify the situation by asking Mr. Winkle if he had ever noticed anything in Mr. Pickwick's conduct towards any female which was in the least degree suspicious. Whereupon Mr. Winkle reluctantly admits that there was one trifling occasion, which, however, could be easily explained. Seeing that he had put his foot into a bad place he stopped, but Serjeant Buzfuz took full advantage of the mistake, and then the whole scene of Mr. Pickwick's getting into the wrong room at the Ipswich Inn came out—much to the damage of the defendant's case. A similar instance is where Serjeant Buzfuz is examining Sam Weller, thought to extract from him that he had made some damaging admission when he went to Mrs. Bardell's rooms to pay the rent and give notice to quit. Here, he was fishing in unknown waters, and, imprudently pressing Sam Weller, instead of landing the fish that he expected he elicited the interesting, but damaging, information that Dodson and Fogg had taken up the case on speculation.

It may have occurred to the ordinary reader of Pickwick that it would have been shorter and more to the purpose if Mrs. Bardell and Mr. Pickwick had been put in the witness-box to tell their stories, leaving it to the jury to say which one they believed. But at this period the parties to an action were not competent witnesses. The law considered their interest in the result so overpowering that they might be tempted to distort the truth; and it charitably refused to allow them to be placed in a position where they might run the risk of perjuring themselves. This was foreshadowed at the interview between Mr. Pickwick and Mr. Perker before the trial. "They have subpœnaed my three friends" said Mr. Pickwick. "Ah! Of course they would. Important witnesses saw you in a delicate situation." "But," said Mr. Pickwick, "she fainted of her own accord. She threw herself into my arms." "Very likely, my dear sir," said Mr. Perker, "very likely and very natural. Nothing more so, my dear Sir, nothing. But who's to prove it?" Mrs. Bardell knew that she was posing, and would no doubt have broken down on cross-examination, if it had been possible to cross-examine her; and Mr. Pickwick was quite right in what he said, and could have cleared up the whole situation, if it had been possible to examine him. But neither of them could be called as witnesses. And so, poor Mr. Pickwick having no witnesses, Mr. Perker advised him that their only course was to throw dust in the eyes of the judge and themselves on

the jury. It will be remembered also that Serjeant Buzfuz in his address to the jury said that it would have been more becoming in Mr. Pickwick to have stopped away. A party to an action in those days need not have been present in Court at its trial. The fact that the parties to an action could not be called as witnesses afforded Dickens an opportunity to stage a ridiculous scene, and to show how the cause of justice could be perverted by the very rules which were laid down for its preservation.

The reference of Mr. Justice Stareleigh to his notes to prove that Mr. Winkle must have given his name as Daniel is a sly hit at the sacredness of the judge's notes. Before the practice arose of evidence being taken down in shorthand, the judge's notes and those of junior counsel were the only record of what passed in evidence, and if there was any dispute as to what had been said, the judge's notes constituted the infallible record.

There is also an amusing, but improbable instance of the judge's ruling on the admissibility of evidence. When Sam Weller illustrated his answer by adding "as the soldier said, etc.," the learned judge told him that he must not say what the soldier, or any other man said—it was not evidence. Hearsay evidence, or what the witness has heard another say, cannot be given in Court, because what the other person said to the witness was not said on oath, and had not been the subject of cross-examination. The evidence must be first hand, and not filtered through another's brain with the risk of being misinterpreted in the process.

Finally, Serjeant Snubbin addressed the jury, and no reply was made. This is strictly in accordance with the practice. When no witnesses are called for the defence, counsel for the defendant has the right to sum up to the jury, and counsel for the plaintiff has the right to reply. But when the defendant offers no evidence, he alone has the right to address the jury, and the plaintiff is not entitled to reply.

As I have said before, the ordinary reader finds in this chapter nothing but an amusing scene; the lawyer finds it teeming with matters of the greatest interest to him, and cannot withhold admiration for the absolute accuracy of everything that Dickens describes, and the skilful setting of the whole scene from beginning to end.

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