## CHAPTER V.—The Re-Examination.



Heard's Crim. Plead. 222 et seq.
Dutton v. Woodman, 9 Cush. 255

This branch of advocacy will not require very elaborate treatment. Not that it is by any means an unimportant subject or a small matter in the conduct of a case; on the contrary, it is worthy of the most careful study, and the following hints may be of some use, while they show the dangers as well as the advantages of re-examination. If it were not necessary, cross-examination would be useless. To restore the ravages that have been made by that destructive engine, is the principal duty of this portion of the advocate's work.

§ 60. *Effects of Cross-Examination.*—If you have watched the cross-examination with that unceasing vigilance which you ought to have bestowed upon it, you will have observed and noted the points that have been made against you. Some of your evidence has disappeared altogether; other portions have received such a shock that they exist in a very rickety and dilapidated form; some other parts have received a coating of interpretation, if I may use the expression, which must be removed; other fragments lie here and there in a mass of confusion from which they must be extricated if you desire to re-establish your case. A hurricane seems to have swept over your homestead, destroying

some of your less substantial outbuildings and threatening even the mansion house itself. In such a state of affairs as this you will find much to do, and where to begin is the first question. At the beginning, I would say, as nearly as you can. Begin to repair where the first breach was made. The witness may have given an answer he did not intend, and very much of the subsequent mischief may have flowed from that unfortunate mistake. If, therefore, you set that right, you will easily pass along and repair the damages which have resulted from it. Strict order and arrangement in this branch, as in all others, should be observed; everything done by design, and nothing left to chance. Proceed in your work of repair as the destroyer proceeded in his task of destruction. Explanations in this stage of the case often make your evidence the stronger for the confusion in which it has been temporarily involved.

§ 61. *Do not Re-Examine unless Necessary.* — But unless re-examination be absolutely necessary it should never be used. It is not every trifle that should induce you to commence afresh with you witness. If a trivial and unimportant point has been made, but the leading facts of the case are left undisturbed, leave the matter to the jury. But the point may be small, and yet not unimportant. Its position may give it effect. By not re-examining when you are not obliged to, the danger of cross-examining you own witness will be avoided. You are not required to explain everything. It sometimes happens that a witness, from natural suspicion of the intention of the cross-examining counsel, will not answer intelligibly, will hesitate or stumble. It is not, however, necessary that you should fly to pick him up before he is down. If his evidence in chief has been fairly given, the jury will be sure to make allowance for subsequent manœuvres to upset him. Whereas if you rush to the rescue unnecessarily, and endeavor to obtain explanations not vouchsafed to your opponent, the witness will think you are anxious for his answers, and recovering from his nervousness, will fill up the gaps your opponent has left. In other words, you will complete his cross-examination,

with this additional advantage to him, that the evidence will look like evidence in chief, and not like that extracted by a hostile examiner.

If an answer be elicited in cross-examination which is favorable to your case, it is highly important that you should not appear to be so fascinated with it as to re-examine upon that. Something else may be admissible in consequence, and this opportunity should be watched for and seized. If you re-examine upon the very fact obtained for you, this result may follow, that your opponent, who discreetly enough declined to pursue the subject further, may have the satisfaction of hearing you get an explanation which may neutralize the effect of his mistake. "*Leave well alone.*" An answer favorable to you, elicited in cross-examination, is not a subject to re-examine upon of itself, but to be made the most of in your reply.

§ 62. *Rules for Re-examination.*—As you watch carefully the cross-examination of your witness, you will probably be made aware for the first time of many weak points in your case. If there should be one which you have flattered yourself has been passed cleverly by in your examination in chief, you may certainly anticipate a well-directed blow in *that* quarter, at all events. You must watch, therefore, like a second in a pugilistic encounter; for when it comes, your witness will in all probability require picking up. How to do it is more than I can tell, as I am not holding your brief and know nothing of the facts. It is in the remedying of such a misadventure that the art of re-examination consists; and it is only by an intimate *knowledge of your facts and their relative bearings* that you will be enabled to set your witness up when his evidence has been thus battered.

Sometimes a cross-examination has been so effective that the evidence of a particular witness has been hopelessly demolished. An experienced advocate, under such circumstances, will resign him to his fate. If he have other witnesses upon whom he can rely, his task will be with them; if not, the case must fall with the witness.

Next to carefully watching for any points that may be made against you, a no less important duty will be to see *how you may turn any answer to your advantage.* Your adversary may not be a very skillful or experienced advocate; he may be an indifferent cross-examiner; in which event you may safely trust him to play into your hands. He will get portions of conversations which will make the remainder admissible; perhaps put in documents which will give you the same advantage, besides affording you the right of reply; and if you have been considerate, you will have left him to follow up a question or two put for the express purpose. This does not imply that you will have left anything out in your examination in chief which it was material to prove; that would be the height of folly. You must always assume that your opponent will not prove your case for you. I speak only of matters which you yourself can not get in, and which may, nevertheless, have an important bearing upon your case

You must watch, also, to see whether any attack be made upon your witness in cross-examination. If his credibility be assailed, you must be prepared to re-establish it, if necessary; for that is the foundation upon which his evidence rests; and you must do it by questions that will elicit explanations of circumstances left doubtful, by removing the grounds of suspicion, and giving the real character to a transaction capable of two constructions. When this is properly done, nothing is more effective with a jury; they will feel as though they had been relieved of a burden. They will be pleased to find suspicion removed from a person whom they desire to believe; and not only this, the impression of having been imposed upon will also be removed, and their minds, temporarily disturbed, will settle down, as it were, into a state of tranquility and satisfaction.

§ 63. *Evidence as to Character — an Effective Re-examination.* — Cross-examination as to character is at most times an uncertain performance. You never can be sure as to the view the jury will take. It is the part of an advocate's duty which they least like. A personal suspicion arises that

their own characters would not be secure from attack, if once they were compelled to enter the witness-box. Every delinquency might be laid bare, and his most tender feelings outraged by an unscrupulous and unfeeling advocate. All this might be quite unfounded as a suspicion, but that matters little if the suspicion exists. I need not say it is your bounden duty to protect your witness to the utmost of your power. Sometimes you may do it by way of objection, but if not, you must exercise your best skill to effect your purpose by re-examination.

I will give one instance where character was once in my hearing cruelly assailed in cross-examination by an inexperienced advocate, and upon whom it recoiled with crushing severity. He asked a witness if he had not been convicted of felony. In vain the unfortunate victim in the box protested that it had nothing to do with the case. "Have you not been convicted of felony?" persisted the counsel. "Must I answer, my lord?" "I am afraid you must," answered his lordship, "There is no help. It will be better to answer it, as your refusal in any event would be as bad as the answer." "I have," murmured the witness, under a sense of shame and confusion I never saw more painfully manifest. The triumphant junior sat down. Not long, however was his satisfaction. In re-examination the witness was asked: "When was it?" A. "*Twenty-nine years ago!*" The Judge: "You were only a boy?" Witness: "Yes, my lord." It need scarcely be added that a just and manly indignation burst from all parts of the court, and the comments of the learned judge were anything but complimentary to the injudicious advocate.

§ 64. *Dangers to be Avoided.—Sometimes a question will be put in cross-examination which produces an answer not unfavorable to either side, but which it may not be considered safe to follow up by another.* You will have to consider whether it will be safe on your part to take it up where your opponent has left it, and you will best consider this by weighing the whole of the facts of your case and the effect of the answer whatever it might be; or you might put a

question or two by way of test, and then abandon it or not, as the answers warranted.

Again, your opponent may have put a question which has "let in" something for you in re-examination; or, on the other hand, he may have put one which tempts you to follow it up, and by that means may have let you in. The utmost caution, therefore, is necessary in pursuing anything that has been started for you by your adversary. He is by no means a safe guide to follow, and the less you keep company with him, the better.

It might be observed here that one should not be too ready to object to questions put by way of cross-examination. *Sometimes they are asked for the very purpose of inducing you to object*, and when this is the case, and you fall into the snare, it is obvious that an unfavorable effect will be produced by you on the jury. They imagine at once that there must be something in the background which you are endeavoring to conceal. You lose their confidence, and in all probability rouse within them a feeling that they are being imposed upon and deceived.

When questions have been asked as to character and have failed, it is far better to deal with the matter in your address to the jury, than to put the stereotyped question in re-examination: "Is there any pretense for suggesting?" etc. The first denial answers all purposes for the time being, and the mere repetition of it adds no weight; besides, the natural indignation arising from the circumstance will be all the better for not being exploded too soon. A quiet and indignant protest to the jury will be all that is necessary. Above all things, it should be remembered, that *re-examination does not consist in repeating the evidence in chief, or in explaining answers that are in your favor.* If your case be a good one, and your witnesses honest, very little will be left to do at this stage of the proceedings. If it be a bad case, and your witnesses the reverse of truthful, all the re-examination in the world will not set them up as they were before. It is of immense importance, and indeed necessary for the purpose of explaining something which has been left

obscure, or removing an erroneous impression, or supplementing some matter which, taken by itself, looks to your disadvantage; for most other purposes it would be worse than a waste of time, since it would unquestionably injure your cause.

§ 65. *Additional Suggestions.* — Re-examination arises from a right to explain. It is often so advantageous that a case may be won by its judicious exercise, while it is usually so innocent of evil that it would require the utmost ingenuity of the most experienced counsel to make it the means of losing one. You must have a thorough knowledge of your facts, and have watched every question of the cross-examination with the utmost vigilance, to take the full benefit of your right, and to make your case stand out in the bolder relief which the cross-examination will afford to it. But nothing is more tedious, or more irritating to judge or jury, than to see an advocate floundering in re-examination among facts which he only displaces and confuses, thinking he must needs ask something because there has been a long, and it may be, severe cross-examination. First *ascertain what fact has been displaced or obscured*, and *what new matter introduced*, and then you will know what requires to be re-arranged and what to be explained, before you rise to put a single question.

In re-examination, as in cross-examination, after learning thoroughly how to do it, the next branch of learning to which the student had best direct his assidious attention is —*How not to do it*!