APPENDIX

These hitherto unpublished notes on cross-examination, and on the characteristics and methods of three of the most famous exponents of that art, are by the late Sir Edward Clarke, K.C., who, as is well known, held one of the most highly distinguished positions in the legal hierarchy of the last generation. He was Solicitor-General, 1886–1892

Although, unfortunately, the treatise is unfinished, it comes from so high an authority that it will, I believe, be found of great interest not only to members of the legal profession, but to any who may be attracted by the subject-matter of this book.

E. W. F.

Cross-examination is one of the most popular because it is one of the most dramatic parts of the work of an advocate.

When a great trial is going on all one's friends want to know when you will be speaking, or when you will be cross-examining the principal witness on the other side, and they generally think they would like best to hear the cross-examination. This is natural, for cross-examination is a duel between the counsel and the witness, and apart from the fact that any moment may bring an answer by which the whole aspect of the case may be changed, the contest and clash of wits, the thrust and parry, the keen question, the guarded answer, a momentary loss of nerve in the witness when he stumbles and seems confused, then a clumsiness in the attack and a sudden recovery of the defence, then a gradual lessening of force on one side or the other until the witness leaves the box and the whole Court feels instinctively how important the issue of the bout must be, all this makes the listening to a fine cross-examination of an important and capable witness a real intellectual treat. And young barristers do wisely in following a strong leader from Court to Court and studying his methods.

Before I speak of those who during the half-century of my work at the Bar were the finest exponents of this branch of the art of advocacy, I think I may usefully make a few observations on the objects and the best methods of cross-examination.

The primary object of course is to destroy the effect of the evidence which the witness has given in his examination-in-chief. But an effective cross-examination goes much further than this. I am speaking of cross-examination upon material facts, not cross-examination to credit which needs to be dealt with separately. And I am speaking also of cross-examination when the case is being tried before a judge and jury. Cross-examination when it is tried by a judge alone is a much simpler matter, and that is why Common-law counsel are taken in to Chancery Courts to cross-examine important witnesses, while I never heard of an Equity counsel, however distinguished, being called in to perform the same service before a jury. When a judge is trying a case alone, with the pleadings lying before him, and is noting the evidence as it is given, and observing with an experienced eye the manner of the witness and his readiness or unreadiness to reply; when he, as the case goes on, is able to dimiss immaterial details, and often indicates the points on which his mind needs to be informed or guided, the task of the counsel, although very important, is fairly simple. But with a jury the case is entirely different. Twelve men of different occupations, different grades of intelligence, different degrees of education and different habits of thought are called out from among their fellows and made to sit for five or six hours a day, and sometimes for several days, seated on hard and uncomfortable benches, with no facilities for making any notes, however complicated the case may be, and as a rule remorselessly snubbed by the Judge if they desire to assist their puzzled minds by asking questions on their own behalf.

It has always been a matter of wonder to me that juries should so seldom disagree, and that their verdicts should so constantly be right. I have often at the moment the verdict was given thought it to be wrong, but I cannot recall half a dozen cases in which I have thought so a week later, when the inevitable bias of the advocate has had time to pass away. And if my own interests were at stake, I would sooner submit the facts to the judgment of twelve of my fellow-countrymen than to a haphazard selection from among the judges of the King's Bench Division.

But to return to the immediate subject. The deficiencies and disadvantages of a jury make them more amenable to the guidance

of a counsel whose whole object is to lead their minds to a particular conclusion. He cannot tell how the twelve minds are working, but he knows that every incident in the case and every phrase which he uses is having its influence on some of the minds whose concurrence is necessary to his success. His whole conduct of the case, his constant presence in Court, his watchful attention to every detail, should be part of a combined address to the jury in which cross-examination and speeches are the most important passages. The cross-examination of the chief witness for the plaintiff is always of great importance. It is the first opportunity which the counsel for the defence has of indicating to the jury what is the case for the defence. I say indicating, instead of presenting, because the most skilful and effective cross-examination is that which interests the jury and sets them thinking what the answer to the plaintiff's case, or the case for the prosecution, can possibly be, and by the selection and arrangement of the facts referred to, suggests the defendant's case instead of stating it.

Presently comes the speech in which the defence is formulated; and if, listening to that speech, a juryman says to himself, " Why, that is just what occurred to me when the witness was in the box," the verdict, so far as he is concerned, is safe. The conclusion which his own intelligence has suggested must be right.

I knew in my earlier years at the Bar three great masters of the art of cross-examination. They were Ballantine, Hawkins and Coleridge. I have no doubt that we have their equals in the Courts today; at all events, the equals of two of them. Young members of the Bar now have the same admiration for Simon and F. E. Smith as I had for Hawkins and Coleridge, and with as good reason. A man always looks larger when he stands on a pedestal of age and experience higher than one's own.

The three I have mentioned were very different in style, but the secret of success with each of them was this, that he always tried to interest the jury, was never tedious, and never forgot that the object of cross-examination was not the collection of a complete series of facts, but the placing selected facts in such a light as to lead to a particular conclusion. And he never showed the violence and harshness which in the case of Sergeant Parry, and Charles Russell often spoiled a shrewd and powerful cross-

examination. It is fatal if the jury get the impression that the witness is being unfairly treated: they take the side of the witness against the counsel, and the decision is with them.

During the first twelve years of my practice Henry Hawkins was one of the most powerful leaders of the Common Law Bar, and as, through my friendship with W. R. Stevens, who was my fellow student at the City of London College, and was then a clerk in the office of the solicitor to the South-Eastern Railway, I obtained quite early some work in compensation cases, I saw more of him than of most of the other leaders. He was a man of middle height, with keen clean-shaven face, cold grey eyes, thin pitiless lips and a clear incisive voice; absolutely devoid of sympathy or enthusiasm, but with early cultivated dramatic art which enabled him to simulate with success either pity or indignation, while the cold accuracy of his intellectual processes was never disturbed by any emotion. He had prodigious industry, and no interest in life—artistic or literary or political—except that of making as much money as possible by his professional work; and he was always absolutely master of the facts of his cases. And he had the special weapon of a quaint and quizzical humour which noted and used improbabilities and inconsistencies, and constantly made the phrasing of a question, or a few words of irregular but excusable comment, serve the purpose at once of argument and of amusement.

John Duke Coleridge was in every respect—in appearance, in character, in his tastes and in his methods—a striking contrast to Hawkins. He was tall and graceful, moving always with a certain slow dignity. His face was of classic outline, and the clear complexion and the soft blue eyes gave it something of feminine beauty. A drawing of this face with its benign and almost holy expression would have served as a likeness of the "Seraphic Doctor", and it was not strange that the Western circuit should have called Coleridge "good John", while they called Karslake "handsome John". But seen from the back he made a very different impression. He had a curiously long and shiny neck and I never walked behind him without thinking of the angel who brought down on the species which he for the moment employed as his disguise the decree that on their bellies

should they go thenceforth, and wondering why an exception should have been made in this case. And indeed Coleridge was more subtle than any counsel at the Bar. His cross-examination was always painstaking and ingenious, and the more closely the witness was entangled in the net the more suave and gentle was the manner of the cross-examiner. But the main characteristic of the process was its studious unfairness. Coleridge was in the habit of repeating a witness's answer or quoting it in a subsequent question. And somehow the phrase as repeated or quoted was not exactly the same as the witness had first used. The change was very slight, not sufficient to provoke comment. The witness, led quietly along from one admission to another, did not realise until the operation was over how completely he had given his case away.

William Ballantine, " The Sergeant " as he was called, although there were other Sergeants practising in his time—Parry, Atkinson, O'Brien and Simon among them—was the most remarkable man I ever knew at the Bar. He knew little of law or literature, he was not industrious, and his habits of life made him a rather unsafe leader in cases which lasted several days and involved any prolonged investigation of complicated detail. But as a cross-examiner he was supreme. It was not with him an art diligently studied and carefully applied. It was an instinct. He had a strong but not a handsome face; his voice had not the clear precision of Hawkins, or the musical sweetness of Coleridge, but had a wider range of tone than either, and was helped in its passages of pathos or sarcasm by a peculiar and habitual drawl. One could not say in what his personal charm resided. But it was unquestionably there. Whenever Ballantine appeared in Court he was the principal person there, and whether he was speaking or cross-examining, or only sitting watchful, awaiting his time for either, jury and counsel and judge were more interested in him than in any one else. During my first few years I used every morning to go into one of the Courts five minutes before the judge took his seat. It was the habit of leading silks then to accept small briefs and take as many as their clerks could collect. The last time I was with Huddleston, his clerk told me he had eleven jury cases in that day's cause list. As the judge came

in, the clerk of the leader, or of the busy junior, if the leader was there, would ask some young barrister to take a note, and in that way I got much practise in note-taking and made useful acquaintance with busy counsel and their clients. It was the taking of a note in this way which got me the first of a very long series of briefs from Mr. Lewis, afterwards the famous Sir George. But if I found I was not wanted I used to go to the Court where Ballantine was appearing and watch his conduct of the case.

One of the most useful pieces of advice I ever received was when Hawkins, quite early in my acquaintance with him, said, "Never examine or cross-examine from your brief. Know your brief and examine from your head." The marvel about Ballantine was that it did not seem necessary that he should know his brief. This, indeed, he seldom did. I remember being his junior in a special jury case tried at Kingston in which the South Eastern Railway Co. was tried for negligence causing injury to a passenger. These actions and actions for losses by fire formed a substantial part of an assize cause-list, for insurance companies had not then adopted the compulsory arbitration clause, and the medical man who was also the agent of the company to try and settle the claim was not as well known as he is now. Sergeant Ballantine was cross-examining the Plaintiff, and, not having read his brief, was making an inaccurate suggestion as to the facts. I spoke to him to point out this mistake. He took no notice, so I spoke to him again, whereupon he turned round to me and said in his loudest tones, "Damn you, Sir! Are you conducting this case or am I?" He made the handsomest apology afterwards in his speech, and told the jury that I knew the facts much better than he did, and that he ought to have thanked me, instead of losing his temper. (Let me say in a parenthesis that the reason why we juniors all liked Ballantine was that if we were helpful to him he always acknowledged it, and sometimes publicly. I have again and again heard him say in quoting a case that he was indebted for it to the industry of his junior, whom he would name.) Whether Ballantine knew his brief or not, when he came into court before the case had gone on long he seemed to dominate the whole discussion. I do not think I ever heard him quarrel with a judge or with a counsel

(although Huddleston's black-kid gloves and his other little mannerisms used to irritate him sorely), and he never lost the attention of the jury. The cross-examination that I remember best was that of the principal witness for the prosecution in the case of the brothers Reid, who were tried at the Old Bailey on a charge of having set fire to their wharf, the Barry Wharf at Rotherhithe. One of their workmen came and related that he, hidden in a corner of the wharf, had heard them arrange how the crime was to be committed. The Sergeant simply tore the witness to shreds and trampled him out of court.

The closing years of Ballantine's life were sorely troubled. His powers were somewhat failing and his practice was beginning to fall off when he was tempted by a fee of ten thousand guineas to go to India to defend the Gaekwar of Baroda, who was accused of having attempted to poison the British Resident at his court. The brief was offered to Hawkins, who rejected it, and would not be tempted by the offer to increase the fee to fifteen thousand. He told me he did not want to go, and therefore asked twenty thousand guineas, which he rightly thought would be prohibitive. Ballantine went, and succeeded in preventing a decision against the Gaekwar. But the incident was practically the end of his career. He did not bring back to England the whole of his big fee. Much of it was spent, as Henry Matthews said, upon the "nauchty girls". And he never recovered a large practice. Presently his difficulties were so great that he had to leave England to escape arrest. His son Walter, who had married a rich widow, and was looking forward to a Parliamentary career, allowed him three hundred pounds a year, and another three hundred was made up by six barristers, each of whom gave fifty. I only know the names of four of them—Hardinge Giffard, Arthur Cohen, H. B. Poland and Montagu Williams. On this income Ballantine lived at Boulogne. Once I heard he was in London, and I got from Montagu Williams, his close and staunch friend, an address in Suffolk Street, Pall Mall. But when I enquired there I was told that he had left, and that he might be heard of at Jack Straw's Castle, Hampstead. I did not waste time in looking for him there.

Once, when I was staying with my wife and children at Folke-

stone, I met the Sergeant on the pier, and we spent an hour together. He told me that now and then he came over from Boulogne by one boat and went back by the next, running the risk of being arrested for the sake of having a walk upon English soil. He felt his exile keenly, and complained bitterly that he was treated as an outlaw. One of his old friends had asked him to come and spend a night in London, and instead of proposing that they should dine at his club, had suggested their going to Gatti's Restaurant in the Strand. It was a cruel blow. . . .