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THE ART OF JURY PERSUASION
FRANCIS X. BUSCH

Honest lawsuits—meaning thereby controversies in which both litigants are sincere in their contentions—necessarily involve disputes either as to facts or applicable law. If the dispute involves the determination of applicable law, it will be resolved at some stage of the proceedings by the court. If it involves a determination of questions of fact, that determination must be by jury or by the court sitting as a trier of the fact. This article concerns the trial of disputed questions of fact by jurors summoned and selected pursuant to law, and is directed particularly to the graduate student or young lawyer who has decided to specialize in trial work.

The presentation of the evidence from which the facts in dispute are to be determined is or should be the function of the trained advocate or trial lawyer.

Worthwhile advocacy, as related to the representation by a lawyer of a client in the trial of contested issues, demands more than mere appearance and plea. Applied to a jury case it should embrace (1) an adequate preparation of the law and the facts to determine upon a sustainable theory of recovery or defense; (2) the selection of a fair and impartial jury; (3) a carefully thought out and persuasive opening statement; (4) an orderly, logical and persuasive presentation of the evidence; (5) as to the opponent’s case, an intelligent and persuasive cross-examination; (6) an orderly, pertinent, logical and persuasive argument; and (7) to the extent permitted, seeing to it that after the evidence and arguments are closed, the jury is fairly and fully instructed by the court.

Each of the above steps should be approached and taken with the

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idea dominant that everything an advocate says or does makes an impression on a juror's mind. The aim of the skilled trial lawyer is to persuade the jury, as the result of these successive and cumulating impressions, (a) that his client's cause is just and (b) that he (the lawyer) has presented it fairly.

1. ADEQUATE PREPARATION OF THE LAW AND THE FACTS

Preparation is the *sine qua non* of successful advocacy. There is no novelty in this suggestion. It has been the theme of successful trial lawyers from the time of Cicero; of law writers since the days of Coke. Advocacy alone, however brilliant, cannot supply deficiencies in preparation. This applies to every step in a trial: the examination of the jury, the opening statement, presentation of the case, cross-examination and argument.

Obviously, the first task confronting the lawyer who is consulted by a client as to a possible right of recovery or defense to a charge or claim asserted against him, is to determine, provisionally on the basis of what is told him by his client, whether he has a legally recognized right of action or defense. If the facts, as stated, fall in the more usual categories, i.e., civil actions for damages for breach of simple contract, assault and battery, trespass, negligence, trover, replevin, false arrest, malicious prosecution, and criminal prosecutions for murder, arson, rape, burglary, robbery, or larceny, little preliminary investigation of the law is indicated. On the other hand, where the facts of a stated case, civil or criminal, are more complicated, and not covered by the more familiar rules of law which should be known to every practitioner, the careful advocate should make an examination of the law sufficient to enable him to form a provisional theory of recovery and know what facts must exist to bring the case within it.

The theory of recovery or defense having been determined upon, the investigation of the facts should be proceeded with, thoroughly and carefully. Space will only permit a suggestion, without elaboration, of the avenues of investigation.

First: A thorough examination of one's client;
Second: Viewing the *locus in quo* or the instrumentalities involved in the dispute;
Third: Interviewing all known witnesses (whether friendly or hostile) and securing signed statements from them, whenever possible;
Fourth: The taking of full advantage of statutory and code provisions permitting the preliminary examination of adverse parties. their
agents or employees, requiring identification and disclosure of written evidence in the possession of adverse parties; and requiring sworn answers of adverse parties or their agents to pertinent interrogatories or requested admissions.

Where the case is of a nature to be aided thereby, the taking of photographs of places, persons or instrumentalities, and the preparation of illustrative maps, plats, models or experimental apparatus, will become an essential part of pre-trial preparation.

Item Fourth, enumerated above, is of major importance. Within the last thirty years, the Federal Government and practically every state in the Union have adopted new practice acts or authorized rules of court providing for pre-trial discovery. Every lawyer intending to engage in trial work should make himself intimately familiar with his local practice act, the Federal Rules of Civil and Criminal Procedure, the procedural rules of his local courts, and the decisions under such acts and rules indicating the extent to which they may be used in pre-trial preparation.

The foregoing suggested preparation should prove adequate as a basis for drafting pleadings or amending pleadings which will present the issues of fact to be tried.

Later pre-trial preparation should include (i) a careful study of all facts accumulated to develop admissible circumstantial (as distinguished from direct) evidence from which legitimate inferences may be drawn to corroborate direct evidence, (2) in an appropriate case, the intelligent selection of experts and the preparation of their testimony, and (3) the preparation of intended witnesses for the giving of their testimony.

Pre-trial examination of witnesses.—If the lawyer is to make an adequate presentation of his case, he must, wherever possible, know exactly what facts lie within the knowledge of particular witnesses. In no other way can he formulate pertinent questions. This knowledge can only be obtained by talking with the witnesses before trial and ascertaining the extent of their knowledge. The pre-trial examination of witnesses is not only proper; it is essential to the orderly administration of justice, and the highest judicial authority has expressly approved it.¹

To what extent may a witness be advised or cautioned (1) as to his manner while on the witness stand, and (2) as to what he may be asked on cross-examination? If a witness is naturally timid or nervous, he may properly be told there is nothing for him to fear or be apprehensive

¹ Storm v. United States, 94 U.S. 76 (1876).
about if he tells the truth. If he is inclined to flippancy or the use of improper or slang expressions, he may properly be told that such an attitude and such language are not proper in a courtroom. If he is given to making quick and unconsidered answers, he may properly be told to listen to the questions asked and be sure he understands them before he answers. He may properly be asked what his answer on cross-examination will be if he is asked a particular question. One of the common traps laid by some cross-examiners is to assume a belligerent, finger-shaking attitude and demand in a loud voice, "Whom have you talked to about this case?" A frightened witness, suspecting some sinister implication in the case, will often reply, "No one." And then the question, "Not even your lawyer?" and the answer "No." Later the cross-examiner will argue that the witness lacks credibility because it is obvious he never would have been called to the stand unless he had told someone that he knew something about the case. Certainly, a lawyer has a right to suggest to a witness before trial that he may be asked this question on cross-examination. If the prospective witness replies to the lawyer that he has not talked to anyone, he should be reminded that he is even at that moment talking to the lawyer about it and that if asked that question at the trial, he should answer it, as every other question, truthfully, giving the name of everyone he may have talked to about the case. A similar situation is presented in another trick practiced by some advocates: a rapid question on cross-examination, "Have you been paid anything for your testimony?" The implication is plain. If, however, the witness has been paid or promised payment for his lost time and traveling expense (a justifiable procedure), he may answer, "Yes" and fail to qualify his answer. It is certainly ethical practice to suggest to the witness that if he is asked that question to tell the truth and the whole truth: that he has not been paid anything for his testimony, but he has been paid or promised payment for his lost time and actual expenses going to and from court.

**Trial brief on the law.**—In every important case involving uncommon questions of law, the trial lawyer should have an adequate trial brief, i.e., a written memorandum of authorities dealing with the competency and admissibility of proposed and anticipated evidence and, if for the plaintiff, authorities which, at the close of the evidence, will be adequate to meet an anticipated motion of his adversary that the court direct a verdict. Such a brief should also include a memorandum of all apparently antagonistic cases with an analysis indicating whatever distinction may be made between them and the case at bar, and references to later cases, if any, distinguishing or overruling them.
II. SELECTION OF THE JURY

Subject to constitutional restrictions, the methods by which persons are summoned for jury duty in the state courts are entirely within the control of the state legislatures.\(^2\) The method of selecting persons to serve in the federal courts is prescribed by a federal statute.\(^3\) While these laws differ widely in detail, there is a pattern common to all of them, viz., the creation by impartial officers of a general list of persons selected or made up from poll lists, tax lists or directories, and the selection by lot from that list of the names of particular persons which are delivered for service to the sheriff or other summoning officer. The persons so summoned constitute a panel from which trial jurors are selected.

Procedures for the examination of jurors \textit{voir dire}, i.e., to determine competency or desirability to serve in a particular case, also vary widely. In some jurisdictions, the examination is wholly by the court; in others, by the court, supplemented by such additional examination by the attorneys for the respective parties as the court in its discretion will permit;\(^4\) in others, statutes expressly give the right to attorneys to conduct such examinations;\(^5\) in numerous jurisdictions, in the absence of statute but by force of long-continued practice, the attorneys alone conduct such examinations, subject to such limitations as the court, in its discretion, may impose.\(^6\) In the absence of statutes expressly permitting attorney examination, it has been held that the court may conduct the entire examination;\(^7\) and, generally, it is held that where, either by custom, court permission or statute, counsel are permitted to examine, the character and extent of the examination lies within the sound discretion of the court, and the exercise of that discretion is reviewable on a claim of error only in cases of palpable abuse.\(^8\)

\textit{Purpose of jury examination.}—The purpose of the examination of a

\(^5\) See, as illustrative, McCrary Co. v. Phillips, 222 Ala. 117, 130 So. 805 (1930); People v. Hosier, 132 App. Div. 146, 116 N.Y. Supp. 911 (1st Dep't, 1909); State v. Lloyd, 138 Wash. 8, 244 Pac. 130 (1926).
\(^6\) Illinois is in this category.
\(^8\) Foley v. Cudahy Packing Co., 119 Iowa 246, 93 N.W. 284 (1903); Moore v. Edmonds, 384 Ill. 535, 52 N.E. 2d 216 (1943).
prospective juror is twofold: to elicit information as to the existence of legal ground for a challenge for cause, or information as to his background of association and experience from which the examiner may intelligently exercise a peremptory challenge.\(^9\)

Examination of jurors by court or counsel.—Where, under prevailing practice, the voir dire examination of jurors is conducted wholly by the trial judge, the advocate has little or no opportunity to influence either the selection or disposition of the juror. He does have the right, where the court's examination is superficial and incomplete, to submit to and ask the court to put to the juror appropriate additional questions designed to determine the juror's competency and impartiality.\(^{10}\) And, it has been held that a refusal to propound such additional questions is error.\(^{11}\) In such a situation, the advocate's approach to the court should be quiet and courteous. If possible, the suggestions should be in writing and handed to the judge. The impressions on the jury which are to be avoided are (a) that the advocate questions the court's judgment as to the eligibility of the juror, and (b) that he is trying, through the court, to pry further and unnecessarily into the juror's private affairs.

Where the practice permits a general examination to be conducted by the attorneys for the respective parties, an entirely different situation is presented. Here the expert trial lawyer has an opportunity to register a favorable initial impression. He may preface his questions with a subtly worded apology for asking any questions at all, saying that he only does so in the discharge of an obligation to his client to see that twelve men are selected who have had no associations or experiences which might at the start of the case make them lean a little more toward one side than the other. When he has exhausted the usual routine—name, address, present occupation, previous employments (generally, not specifically), acquaintance with parties and lawyers, whether he or any member of his family or close friend ever had a similar litigation, previous jury experiences, general prejudice against or sympathy for the type of case presented or for or against the particular plaintiff or defendant, etc., the skilled trial lawyer may, with a gesture or intonation of voice denoting confidence in the jury, conclude with

\(^9\) The number of permitted peremptory challenges, in both civil and criminal cases, varies widely in the different states.


\(^{11}\) Stephens v. People, 38 Mich. 739 (1878); People v. Coen, 205 Cal. 596, 271 Pac. 1074 (1928); Tubb v. State, 109 Tex. Cr. R. 455, 5 S.W. 2d 152 (1928).
a question something like this, "Now, Mr. Blank, I have asked you a lot of questions. I apologize for having asked so many. You know the state of your own mind and so, without any more specific questions, I want to put it right up to you: all either side wants here is a fair and impartial jury, one which will decide the case squarely on the law and the evidence. Do you think you are that kind of a juror?" Or, with the same preamble, "Now, I want to put it squarely up to you: if you had a case such as my client has here, would you be satisfied to accept on the jury a man who feels just the same as you do as you sit there in the jury box?" The writer, in his experience, has found that such questions not only flatter the juror, but they tend to keep his mind riveted on the ideal: fairness and strict impartiality.

When the first juror has been subjected to a rather thorough examination, most trial lawyers deem it advisable not to cover exactly the same ground with the other eleven. Such a repetition becomes monotonous, causes the jury as a whole to lose interest, and slows up the tempo of the trial. It is considered much better practice, after having asked the other eleven jurors their names, addresses, present and former employments and associations, to say, "Now, Mr. X, you heard the questions I put to Mr. Blank and the answers he gave. I don't want to waste your time or the time of the court in going all over that again. Let me ask you this: If I were to put the same questions to you that I put to Mr. Blank, would your answers be the same as his?" And, if he answers, "Yes," follow with the summary question: "Then I take it you know of no reason why you wouldn't make an absolutely fair and impartial juror in this case?"

Manner of jury examination.—The skilled examiner so places himself as to face directly the juror being interrogated and to engage his undivided attention. He concentrates but affects an outward appearance of complete relaxation so that he may put the juror at ease. The tone of his speech is quiet and well-modulated, but properly emphasized to avoid the monotony which inevitably loosens the hold on the juror's attention and weakens the effectiveness of the interrogation. He phrases his questions in good but simple English. He speaks distinctly and fluently. Without noticeable pause or change of manner, he follows each answer of the juror with another pertinent question. The examination is conducted as rapidly as the circumstances will permit; and this for a number of sufficient reasons. The rapid examination is not only better calculated to maintain the attention of the juror under examination but, if skillfully conducted, arrests the attention of the
remaining jurors. By such an examination the advocate creates the impression of not unnecessarily wasting time; yet, by asking as many questions as the limited time permits, he accomplishes the result toward which all such inquiry is directed—the revelation of as much of the juror's frame of mind as it is possible to get.

III. OPENING STATEMENT

Under prevailing American practice, an opening statement, whether made by plaintiff or defendant, is virtually restricted to a statement of the evidence to be introduced in support of the claim or defense.12

The experienced trial lawyer representing a plaintiff realizes the value of an opening statement. It is his first real opportunity to place his client's cause and himself before the jurors. They are in an ideal state of mind to receive an impression. They are, as yet, entirely ignorant of the facts of the case in which they have been selected and sworn. The brief statement by court or counsel which may have preceded their voir dire has told them little more than that they have been called into the box to try a particular kind of a civil or criminal case. Their interest is probably keener at this time than it will be at any subsequent stage of the trial. The skilled advocate takes full advantage of the situation.

He may not argue his case,13 but an unelaborated statement of provable facts, so logically arranged and forcefully presented as to compel a desired conclusion, if not in itself an argument, can be as effective in fixing an initial impression which may become ultimate conviction. A well conceived opening statement on behalf of the plaintiff can be made for a jury what the plans and specifications of an architect are for the builder; the jury is unconsciously undergoing persuasion as each witness makes his expected contribution to the planned structure.

The position of the defendant's advocate is quite different but he, too, will weigh carefully the possibilities of advancing his client's cause by an appropriate opening statement made at the proper time. He may, because of the facts in the particular case, waive the making of an opening statement altogether; he may reserve it until the completion of the

12 The English practice, which is followed in a few of the American states, permits a statement of wider scope, i.e., a statement of the claim or defense, and an outline of the evidence by which it is hoped to establish the one or the other, the legal grounds and authorities in favor of the claim or proposed defense, and an anticipation and answer (by facts or law) of an expected defense. Chitty's Practice § 881 (15th ed., 1874).

plaintiff's or prosecutor's case; or he may, if he considers he has a complete defense, decide it is the better tactic to follow the plaintiff's statement immediately with his own statement of what he expects to prove. Where this can be done, it is highly desirable. The jury then, before any evidence is introduced, will have both the claim and the defense in mind and will naturally receive the plaintiff's evidence with the reservation that final judgment must be withheld until the defense has been heard.

**Pre-trial preparation of opening statement.**—The opening statement, whether made by the plaintiff or the defendant, should be carefully thought out before trial. Some trial lawyers in important cases make it a part of their pre-trial preparation to dictate such a statement to a stenographer in the same free style they would employ in addressing a jury, and then examine a transcript of the dictation for omissions and errors in content and style. The purpose of this is definitely not to memorize such a statement, but to fix its content and orderly sequence in mind.

**Avoid overstatement of case.**—The cardinal rule as to opening statements is that they should not overstate the advocate's case. In the first place, the deliberate inclusion in an opening statement of matters which cannot be established by admissible evidence may constitute reversible error. Secondly, if the stated facts are not proved, an alert opponent may argue a failure of proof, even though what has actually been proved is sufficient to make a case. Such an argument is often persuasive. Thirdly, and not the least important, a failure on the part of an advocate to "make good" on his promise of expected proof weakens the jurors' confidence in him and his client's cause. It is far better to understate one's case than to overstate it. Indeed, some trial lawyers make it a rule deliberately to understate their expected evidence, so they may later argue that not only does the evidence sustain every averment of the opening statement, but goes further and makes an even stronger case.

**Proper content and form of opening statement.**—The opening statement should be a statement of facts provable by competent evidence. It should be in summary form, and not recite the particular testimony of identified witnesses or detail by reading the precise contents of docu-
ments. The language of the statement should be plain. It should be del-
erivered fluently, without hesitation or breaks. Above all, it should be
given with complete assurance and in a manner conveying that assur-
ance. A preparation which steeps the advocate in the facts of his case,
and a pre-trial preparation such as has been suggested of the statement
itself, are the best means of engendering that assurance.

IV. PRESENTATION OF EVIDENCE; DIRECT EXAMINATION

Evidence presented to a jury may be by a view of the premises or
instrumentality involved in the case, by sworn witnesses to facts in
issue, by material writings properly authenticated, and by physical ob-
jects (real evidence) properly identified.

Of the many requirements and responsibilities of the advocate, the
most important is the effective presentation of the available testimonial
and documentary evidence to sustain an asserted claim or defense. It is
on the basis of that presentation that he will ask for the jury’s verdict
and the court’s judgment. “Effective,” as used here, connotes two
things: (1) a presentation by which the successive testimonial and eviden-
tiary impacts become cumulatively persuasive, and (2) an ultimate
“record” in which all of the available evidence clearly appears.

Motion for the separation of witnesses.—By the common law and
statutes in many states either party to an action may, before any evi-
dence is offered, move the court for a rule to exclude from the court-
room all of the witnesses except the one undergoing examination. When requested, the order, although not a matter of right, is rarely
withheld. Greenleaf characterized the rule as one “devised for the
discovery of truth and the exposure of falsehood and well adapted to
the ends designed.” Specifically, the motion for the rule is prompted
by the belief that where there are a number of witnesses to an occur-
rence they will, if permitted to hear each other’s testimony, conscious-
ly or unconsciously harmonize their stories, and if one of them falls a
victim to a sharp cross-examination the others will be forewarned and
avoid the same pitfall. Whether the advocate should move for the rule
should depend upon the situation in the particular case in hand. If, for
example, there are on each side a substantially equal number of wit-
nesses to the principal facts an order of exclusion would not appear to

16 Pietsch v. Pietsch, 245 Ill. 454, 92 N.E. 325 (1910); Scripps v. Reilly, 35 Mich.
17 Ryan v. Couch, 66 Ala. 244 (1880); Noone v. Olehy, 297 Ill. 160, 130 N.E. 476
(1921).
18 Greenleaf, Evidence § 432 (13th ed., 1876).
advantage either side; on the other hand, if the movant's proof is largely written evidence, and he is opposed by a number of witnesses, he may consider that an advantage is to be gained by an order of exclusion.

**Pre-trial determination of the order in which witnesses are to be called.**—A feature in the presentation of evidence, often neglected, is a careful pre-trial consideration by the advocate of the order in which he will offer his witnesses and documentary proof. 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 natural and logical sequence. This builds up the case step by step to its logical conclusion. Documentary proof should, wherever possible, be associated with the testimony of a particular witness and offered in connection with his testimony.

The creation of a good initial impression is a long step toward ultimate persuasion. To accomplish this, one of the best, if not the best, witnesses should be selected to "lead off." The ideal first witness is an alert person of keen perception, whose background places him beyond the range of impeachment as to his general credibility; one whose disposition is to think before he speaks, and who possesses the ability to express himself intelligently and clearly, and in the fewest possible words. If possible, he should be a witness who has not been interviewed by the other side.

There are sound reasons for calling your best witness first. Every experienced trial lawyer knows that the first occurrence witness called is subjected to the most searching cross-examination. Almost invariably, he is taken over every major and minor phase of the transaction; he is asked to fix directions, identify structures, estimate distances, describe weather conditions, and answer questions directed to many other details. Ordinarily, no subsequent witness is subjected to such an exhaustive cross-examination. Moreover, the jurors are hearing the story for the first time. They are curious and therefore alert and prepared to pay close attention to everything which the first witness says. If his direct testimony is clear-cut and positive, and he successfully survives cross-examination, it will be hard to erase from the jurors' minds the impression which his testimony has made.

What has been said about the desirability of selecting a good witness to commence the plaintiff's evidence applies with even greater force to the defendant. Despite such cautions as may have been given the jurors by the court or defendant's counsel to reserve judgment until they have heard all of the evidence, the fact remains that the jurors have heard
the plaintiff's evidence first, and if it has been well presented, the defendant must overcome the handicap of more or less fixed impressions. Many trial lawyers representing a defendant believe there is no better way to do this than to commence the presentation of their evidence either with a devastating piece of written evidence or the testimony of their best witness. If such a witness "stands up" under cross-examination (and, as in the case of the plaintiff's first witness, he will ordinarily have the cross-examiner's heaviest ordnance turned upon him), the defendant will have laid a foundation upon which to complete what he hopes will be a sufficient defense.

It is quite as important to finish the presentation of one's case on a high note. If the situation in the particular case permits it, the evidence should close with a strong witness or with a strong piece of written evidence. The build-up to a climax is sound strategy. As the late Max Steuer, the great New York trial lawyer, once remarked, "Your case should unfold like a well written novel, chapter by chapter, not only sustaining but increasing interest until the climax." Such a presentation is calculated to persuade.

Presentation of documentary evidence.—In many cases a considerable part of a plaintiff's or defendant's evidence is documentary. It is in connection with the presentation of such evidence that the inexperienced advocate often sacrifices a legitimate advantage. Many times such evidence—letters, telegrams, book entries and the like—are merely identified without reading or showing them to the jury. If they are directly vital in character, they will, of course, be read or referred to and discussed in argument. Frequently, however, such evidence, while not in itself determinative, has a distinct collateral value, but is not even referred to in the argument. It is true that when the evidence and arguments are closed, all of the exhibits usually go with the jurors to their jury room, but there, in the confusion of a haphazard discussion, written evidence which has not been specifically called to their attention may or may not be read. The result may well be a verdict in which such evidence has never been understood or considered. If a piece of documentary evidence is important enough to justify its offer as evidence, surely it must be of sufficient importance to require that the jury understand and know what it is. When a paper is offered and received in evidence, it should either be clearly and distinctly read into the record or passed to the jurors so they may read it; and, if in no more than a dozen words, it should be referred to in the argument and the jurors invited to read and consider it when they retire for their deliberations.
Making sure that the witnesses are heard.—The best testimony is of no value unless it is heard by the jury. The failure of a witness to make himself heard is usually the fault of the advocate. If the examiner sits down opposite about the center of the jury box and faces the witness, the witness is naturally going to talk to him and, ordinarily, only loud enough for the lawyer to hear him. The result is that the jurors, well to the right or left of the lawyer, and some of them behind him, do not hear the witness. This can be avoided if the examiner will take a standing position at the end of the jury box furthest removed from the witness so that he puts the entire jury between and on a line with him and the witness, and then makes the witness talk up so that he can easily hear him. If the witness talks low or lets his voice drop, he can ask him to speak up. If he is in doubt, from the actions of some of the jurors, whether they are all hearing him, it is permissible to put a general inquiry to the jurors, if they are all able to hear the witness. If the witness talks so rapidly that the advocate fears that the effect of some of his testimony is being lost on the jury, he should ask him to talk more slowly. A tactic sometimes employed by trial lawyers in examining a rapid-talking witness is to wait until he has finished a long answer, and then ask the court reporter to read it. This serves a dual purpose: it halts the witness temporarily, and when the examination is resumed he will, for a time at least, talk more slowly; it also serves to determine whether the court stenographer is getting for the record everything that the witness says.

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 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. Except where opinion evidence is admissible, they should call for answers of facts rather than conclusions or opinions. Except in exceptional circumstances, questions asked on direct examination should not be leading.

Avoid leading questions.—It is not within the scope of this article to discuss what are and what are not leading questions. It is pertinent to discuss the vice of leading questions as a factor in the art of persuasion. The advocate who is keen that the presentation of his evidence and every feature connected with it shall impress the jury will, to the great-
est extent possible, avoid leading questions. It is not that such questions are in themselves consequential; if objected to they can be reframed and put to the witness in proper form. Their vice lies in the fact that they provoke unnecessary objections which subject the examiner to needless interruptions. These tend to destroy the effectiveness of the story necessarily produced through question and answer which he is trying to unfold for the information and interest of the jury and for the benefit of his client.

_Do not repeat previous answers._—No habit in the examination of witnesses, whether it be on direct or cross-examination, is more pernicious than that of repeating all or part of the previous answer. The least important objection to it is that it unnecessarily extends the record. The principal objection to it is that by this repetition the _new matter_ in the question is obscured from both the witness and the jurors, and the effect of continuity which might be obtained from following one question with another question, uncomplicated by repetition, is lost.

_Real evidence._—As an incident to direct examination it is sometimes necessary or considered desirable to offer relevant physical objects (real evidence), such, for example, as the weapons or other objects claimed to have been used in the commission of a crime,19 clothes worn at the time of an occurrence,20 a ladder found near the home of the victim of a kidnapping,21 a bottle of liquor in a prosecution for its illegal sale,22 a piece of iron in a civil action for damages for injuries allegedly due to a defect.23 In all such cases where physical objects are involved as incidents to direct examination, proof of their authenticity and relevance must be made.24 When such proof is made, they may be exhibited to the jury and offered in evidence.25 Where such real evidence is available and admissible, its persuasiveness with a jury cannot be overestimated. Such objects fix the testimony to which they relate in the minds of the jurors and their presence before them throughout the trial, and in the jury room (where, by local practice or statute, such articles are permitted to go to the jury room) are a continual visual re-
minder of that testimony. The examination to qualify such objects should be carefully planned in advance of trial to apprehend expected technical objections and so that it will be presented to the jury in a manner which will arouse its interest.

Use of photographs, maps, plats, models and other illustrative material.—Not falling within the definition of real evidence, but of a kindred nature, are photographs, maps, plats, models and other illustrative material. To be admissible, these must be proved to be accurate representations of the place or instrumentality in question. Such evidence, being something seen rather than something heard, is particularly persuasive with juries. As already stated, once offered in evidence, they are more or less constantly before them, reminding them of the testimony of the witnesses who have referred to them.

Courts have frequently declared the peculiar value of photographic evidence. Some cases have held that a verdict contrary to the physical facts disclosed by properly authenticated photographs should be set aside. X-ray photographs are commonplace in both civil and criminal trials, their admissibility unquestioned when they are properly authenticated. Authorities have characterized such photographs as “highly trustworthy evidence.” In the same category, to disprove specific claims of disability or to prove malingering, are motion pictures and motion sound pictures. The careful advocate, in his preparation, will consider and exhaust the possibilities of utilizing evidence of this demonstrative and persuasive character.

Expert testimony.—Within an article of this scope consideration cannot be given to the increasing importance of expert testimony. Suffice it to say, that the field has broadened immeasurably to take in hundreds of new articles and substances in daily use—the result of the amazing advances in industrial chemistry and the other sciences during the past fifty years. The modern advocate finds himself confronted

with trials involving plastics, electronics, atomic energy, radio and telephone transmission, airplane construction and operation, newly discovered medicinal drugs and dozens of other new discoveries of which the lawyer of the last century never heard. More often than not, such questions demand the selection and use of experts. The advocate should realize that the true value of any expert's testimony is measured by the special education and experience of the one who gives it. He will select a particular expert because he possesses the requisite education and experience, and in presenting him as a witness he will, as an essential part of his testimony, prove his qualifications. A tactic sometimes employed by a shrewd opponent to prevent a jury from learning the full extent of the qualifications of an expert called by his adversary is to tell the court he will admit the qualifications of the witness. The inexperienced lawyer will then frequently drop the line of questioning designed to show the witness' qualifications and proceed directly to the scientific question in controversy. Often the trial court intervenes to tell the examiner, "The witness' qualifications are conceded; proceed with something else." It is submitted that the examining advocate who is thus diverted from his intention to show the qualifications of his expert witness has been unjustly deprived of a persuasive item of evidence. An expert's opinion is worth just what his qualifications entitle it to and no more. The more highly qualified he is, the more his opinion is worth. The advocate who has put his client to the trouble and expense in preparation of selecting a competent expert should insist, regardless of any admission from the other side, on his right to prove such witness' qualifications. If the court, in its zeal to hurry up the trial, prevents him from doing so, he should save his exception. The validity of such an exception, so far as the writer knows, has never been passed upon by any court of last resort. When it does come before such a tribunal, the logic in favor of being allowed to complete the examination of an expert to show his qualifications would seem to be unassailable.

V. CROSS-EXAMINATION

Greenleaf says of cross-examination that it "has been justly said to be one of the principal, as it is certainly one of the most efficacious tests, which the law has devised for the discovery of truth." Wigmore declares that the test of evidence by cross-examination is a vital feature of Anglo-Saxon law; that

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 state-

32 Greenleaf, Evidence § 446 (13th ed., 1876).
ment (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 doubt the greatest legal engine ever invented for the discovery of truth.\(^{38}\)

Admitted that cross-examination is a mighty weapon, it should be emphasized that it is also a dangerous weapon in the hands of the tyro—a two-edged sword as likely to injure the inexperienced who wield it as the adversary against whom it is drawn.

Charles Hughes, a highly regarded Chicago criminal trial lawyer of an earlier day,\(^{34}\) had a set of rules respecting cross-examination which he urged the young and ambitious trial lawyer to memorize and heed. They ran something like this:

**Rule 1.**—There are definite purposes in cross-examination. Know what they are. Unless you have sound reason to hope you can accomplish one of these purposes, do not cross-examine.

**Rule 2.**—If you decide to cross-examine, keep control of your witness. Do not ask questions which give him the scope and opportunity to hurt you more than he already has on direct examination.

**Rule 3.**—Never ask a question unless you are reasonably certain what the answer is going to be, or that, whatever it may be, it is not going to hurt you.

**Rule 4.**—If you do undertake a cross-examination, know when to stop.

Sounder injunctions were never pronounced.

The purposes of cross-examination.—The purposes of cross-examination, agreed upon by most writers, are:

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

A cross-examination, if undertaken, should have at least one of these objects definitely in view. If it is apparent that none of these can be accomplished, cross-examination is worse than useless. When an advocate undertakes a cross-examination, the jury naturally expects some result from it. If that result is not forthcoming, if all the cross-examina-

\(^{38}\) Wigmore, Evidence § 1367 (3d ed., 1940).

\(^{34}\) Alumni of the Illinois College of Law (predecessor of De Paul University Law School) will remember picturesque and lovable "Judge Hughes" as the school's professor of criminal law and procedure in the ten years which preceded his death in 1911.
tion does is to repeat and emphasize what the witness has said on direct examination, the direct examination and the witness' credibility are strengthened, not weakened.

*The preparation for cross-examination.*—As in every other aspect of a trial, the material for cross-examination should, so far as possible, be assembled and prepared before the jury is called into the box. In a cross-examination directed to the opposing party, every letter he has written or statement he may have made should be ready at hand as a basis for impeaching questions. If the case has been tried before, or if, as happens in some criminal or accident cases, there has been an examination of the witness at an inquest or preliminary hearing, the earlier record should be studied and marked for use as possible impeachment. If it is intended to direct the cross-examination of any witness to his credibility, the *exact* facts relied upon should be ascertained, and be ready at hand. If an expected adverse witness has been convicted of a crime, and it is intended to use that fact as impeachment, the advocate should have in his file a certified copy of the record of such conviction and be ready with proof of the identity of the witness with the defendant named. If it is expected that physicians, questioned document examiners or other experts will testify, the advocate should, to the extent possible, familiarize himself with the general subject at inquiry and be advised of the experience of the expert, and of everything he may previously have testified to or written on the subject.

An examination of the records of famous trials will show that devastating cross-examinations are invariably the result of information in hand secured as the result of searching pre-trial investigation. Lord Carson's cross-examination of Pigott in the Parnell investigations and in the famous libel action brought against the Marquis of Queensbury by Oscar Wilde; the cross-examination of Dr. Stevenson by Sir Edward Clarke in his successful defense of Adelaide Bartlett for murder; the cross-examination of the plaintiff by Mr. William Everts in the action for damages for criminal conversation brought by Tilton against Henry Ward Beecher; and the cross-examination of State Senator Foelker by Mr. Max Steuer in his successful defense of Senator Frank Gardner for bribery, are only a few of the many instances that could be cited.

* Determination of whether or not to cross-examine.*—As previously stated in Hughes' Rule No. 1, unless you have sound reason for believing you can aid your case by bringing out some additional facts or discredit the story told by the witness or discredit the witness himself, do
not cross-examine. Nothing more definitely reveals the inexperienced advocate than a cross-examination of every witness presented by his adversary—usually following orderly notes taken of the direct examination, and having the witness repeat everything he said on his direct. Such a cross-examination not only doubles by repetition the impression already made by the witness, but holds the hazard that the witness will clarify obscurities in his previous statements and bring in something new and much more harmful to the cross-examiner’s case than anything he has previously stated. If a witness has done no particular harm, the sound tactic is to leave him alone, not cross-examine him at all. The impression created on a jury by a refusal to cross-examine, under such circumstances, is quite apt to be that the direct testimony did not amount to much.

The subject order of cross-examination.—This must depend somewhat on 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, as the result of his pre-trial preparation and direct examination, has learned that sequence and is usually ready with his answer before the question is finished. Neither is it ordinarily good tactics to commence with the subject matter last testified to for this is fresh in his mind and he is not likely to contradict himself if immediately cross-examined on it. The most effective cross-examination is one which follows no particular order but skips from one subject to another without regard to the direct sequence, so as not to give the witness a chance to calculate the effect of a particular answer on his testimony as a whole or for its consistency with what he may have previously said.

If the cross-examiner has material in hand for impeachment, it becomes a question, depending largely upon the type of the witness, whether to put the impeaching questions to him before examining him on the details of his direct examination or afterwards. Ordinarily, the experienced advocate will adopt the latter course, and get the witness to restate and emphasize the matters for which he has the impeaching material. On the other hand, if the impeachment is of a devastating character, by putting it to the witness as a first question in his cross-examination, he may so completely confuse and embarrass the witness that he will be completely “off balance” during the remainder of the examination.

If the cross-examiner is in possession of impeaching material directed both to the story told by the witness and the witness himself, it is con-
sidered by most advocates better to attack the story first and climax the collapse of the story with the destruction of the witness.

**Cross-examination to explain, qualify or supplement the direct.**—One of the purposes in undertaking a cross-examination may be to explain, qualify or supplement the testimony given by the witness on direct examination. Indeed, if a witness has no motive or interest in misrepresenting, has apparently told what he believes to be the truth and the cross-examiner is in possession of no prior inconsistent statements or other information with which to impeach him, the only reason for cross-examination is the belief that the witness may be induced to qualify his direct examination or make some favorable addition to it. Such a belief, however, should be based upon what the examiner believes to be the actual facts as determined from his own thorough pre-trial investigation. Such a cross-examination should never be undertaken to develop trifling inconsistencies. A jury is not impressed by such a cross-examination. On the contrary, it is apt to form the impression that the cross-examiner is a mere quibbler trying to divert attention from the real issues in the case.

**Cross-examination to test memory.**—This is one of the most frequent types of cross-examination and, if deemed advisable, can usually be undertaken without fear of untoward consequences. Many witnesses in direct examination “remember too much and too well.” A precise memory for the time, place and attendant circumstances of an event a year or two remote should, and usually does, excite the suspicion that the witness has been “primed.” In such a situation, a cross-examination on collateral matters may be most effective. For instance, where a witness fixes the precise time and the details of a long prior occurrence in which he had no especial interest, questions as to where he was, what he did and who he talked to the day before or the day after may, and usually do, result in a repetition of “I don’t remembers” which certainly cast doubt upon the phenomenal memory for the details of the event about which he has given direct testimony.

**Cross-examination to affect credibility.**—The credibility of a witness may be affected by the production of overwhelming contradictory evidence, by the improbability of his testimony, by inconsistencies in it, by a showing that his perceptive senses are deficient, that some condition, such as drunkenness, interfered with the normal operation of his faculties, or that his memory and judgments are unreliable. These all go to discredit the story he tells. A cross-examination may also be undertaken (not, however, unless material in hand justifies it) to show that
the witness is of such a character, or has been guilty of such conduct as to render him unworthy of belief. The more usual of these considerations are:

1. Conviction and sentence for a felony or infamous crime.
2. Criminal or disgraceful conduct not evidenced by a previous conviction.
3. Corrupt disposition.
4. Interest in the case or one of the parties.
5. Bias or prejudice.
6. Falsity of testimony as shown by previously made contradictory statements.

There is a wide divergence of authority as to the extent to which previous criminal convictions or crimes may be shown to affect the credibility of a witness. Some courts limit the inquiry to felonies, or crimes which at common law or by statute are considered infamous, or as involving moral turpitude, or a crimen falsi. Others permit a much broader inquiry—any criminal offense or immoral conduct to the discredit of the witness. The practitioner should, before undertaking a cross-examination along this line, consult and familiarize himself with the decisions of his state and be governed accordingly. Generally, it may be observed that such a cross-examination should never be undertaken unless the evidence in hand is certain and there is no possibility of a "kick back." For instance, if the witness is middle-aged or past, and the conviction took place eighteen or twenty years before and the witness has lived an upright life since his release from prison, the resurrection of his old misfortune may be resented by the jury and recoil upon the cross-examiner. It is well to remember that in most cross-examinations the sympathy of the jury is with the witness rather than the lawyer.

Similarly, where an attempt is made by cross-examination to show the corrupt disposition of a witness, the examination should not be undertaken unless the examiner has the exact facts in hand and, if the witness denies them, has witnesses or other evidence available to prove them. An unsuccessful attempt to prove a witness corrupt cannot but discredit the cross-examiner.

38 Tla-Koo-Yel-Lee v. United States, 167 U.S. 274 (1897); People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933); People v. Johnston, 228 N.Y. 332, 127 N.E. 186 (1920).
It is always proper on cross-examination to show that the witness is related to the party calling him; that he has a direct or indirect financial interest in the case; that he is indebted to either of the parties or that either of the parties is indebted to him; or that, because of a similar action pending, or for any other reason, he might be affected by the result of the trial. Facts developed by such a cross-examination as this go directly to one of the principal elements affecting credibility, i.e., the interest or lack of interest of the witness in the case or its result.

**Impeachment by showing previous contradictory statements.**—A party or a witness may be cross-examined as to both oral and written previous contradictory statements. The scope of the written material that may be so used is broad—anything which represents a previous statement made or authorized by the witness. In addition to earlier records of testimony or written statements which relate directly to the subject matter under inquiry, resort may be had to letters written by the witness, a will, income tax returns, receipts, a diary, books of account, or other material written or kept under his direction.

The suggested contradiction which is made the basis for the impeaching question must be clear and unequivocal.

The advantage of effective impeaching material is sometimes lost by the failure of an inexperienced advocate to lay a proper foundation for its introduction. As applied to a party to an action, no foundation need be laid. Whether asked about the alleged contradictory statement on cross-examination or not, the prevailing rule is that the statement may

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39 Chicago City Ry. Co. v. Handy, 208 Ill. 81, 69 N.E. 917 (1904); 3 Wigmore, Evidence § 949 (3d ed., 1940) and cases cited.
43 Perek v. Scott, 206 Ill. App. 44 (1917).
45 Flannigan v. State, 125 Neb. 519, 250 N.W. 908 (1933).
48 State v. Groene, 179 Minn. 187, 228 N.W. 615 (1930).
50 Seller v. Jenkins, 97 Ind. 430 (1884); Miller v. Commonwealth, 182 Ky. 438, 206 S.W. 650 (1918); Foster v. Worthing, 146 Mass. 607, 16 N.E. 572 (1888).
be offered at the appropriate time as a declaration or admission against interest.\textsuperscript{51} As to witnesses who are not parties, the rule is different. In such cases, the general rule is that the witness' attention must be specifically directed to the precise statement, the time and place when and where it is claimed to have been made, the persons present and the circumstances under which it was made.\textsuperscript{52} The purpose of this, as declared by Mr. Justice Waite in \textit{In re Steamboat Charles Morgan},\textsuperscript{53} is that "his attention [may be] particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation if he desires to make it."

The usual form of impeaching question where the supporting evidence is a transcript of testimony given upon a former trial is as follows:

Q. Mr. \textemdash, you were a witness in this case when it was tried before, were you not?
Q. That was on August 15, 1943, before his Honor, Judge Jones, in this court house, wasn't it?
Q. At that time and place were you not asked this question (quoted literally from the transcript) and did you not make this answer (also quoted literally from the transcript)?

Where such a transcript or a previous written statement is not available, a substitute for the third question above may be:

Q. At that time and place, in the presence of the persons I have named, were you not asked in substance this question (stated according to the most accurate information in hand), and did you not in substance make this answer (similarly stated)?

Where the material in hand for impeachment is in writing, either signed by the witness, or put out or authorized by him, to make such a writing competent later, his attention must be specifically directed to it.\textsuperscript{54} The paper or the part of it containing the alleged impeachment must be shown to the witness and he must be afforded an opportunity to explain or exculpate himself.

\textsuperscript{51} Illinois Central Ry. Co. v. Wade, 206 Ill. 523, 69 N.E. 365 (1903); State v. McCook, 206 Iowa 619, 221 N.W. 59 (1928); \textit{In re Bosson's Will}, 195 App. Div. 339, 186 N.Y. Supp. 782 (3d Dept, 1917); but for exceptions to this general rule, see: Young v. Brady, 94 Cal. 128, 29 Pac. 489 (1892); Brown v. Calumet River Ry. Co., 125 Ill. 600, 18 N.E. 283 (1888); State v. Martin, 56 S.W. 2d 137 (Mo., 1932).

\textsuperscript{52} Mattox v. United States, 156 U.S. 337 (1895); People v. Perri, 381 Ill. 244, 44 N.E. 2d 857 (1942).

\textsuperscript{53} 115 U.S. 69 (1885).

to accept or reject it,\textsuperscript{55} or admit or deny his signature, if it is claimed he signed it.\textsuperscript{56}

\textit{Manner and style of cross-examination.}—No general rule can be laid down for a style of cross-examination adapted to all cases. The style of an advocate's cross-examination will necessarily, to a greater or less extent, reflect the natural manner, habit and disposition of the examiner. 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 where a vigorous, rapid-fire examination is likely to produce the best results, just as there are many situations where a quiet, easy, friendly examination will elicit more that is favorable to the examiner. In most cases, it is believed, it will be found that the gentler approach is better calculated to evoke the concessions which the examiner desires. It is again emphasized that, so far as the jury is concerned, the witness is the "under dog"; its sympathies are naturally with him.

\textit{Keeping control of the witness.}—An important "don't" for the young trial lawyer is: Don't let a witness on cross-examination get beyond your control; in other words, ask your questions, so far as possible, so as to compel a "yes" or "no" answer. Some experienced advocates say: Never ask a witness a question which commences with "what" or "why," the reason being that such a question "opens the door" and permits the witness to expand and argue his direct examination. By asking properly worded questions calling for categorical answers, the witness is kept within the bounds of his direct examination. If, despite the restricted question, he attempts to give an unresponsive answer, the court, on protest, will usually strike it out and compel him to answer the question responsively. It must always be borne in mind that a damaging answer given under cross-examination makes a much deeper impression on a juror's mind than would have been the case had the same answer been given on direct examination.

\textit{Knowing when to stop.}—If the young advocate feels that he has a definite purpose in mind and must cross-examine, it is well to bear in

\textsuperscript{55} Kennedy v. State, 240 Ala. 89, 196 S. 884 (1940); State v. Stallings, 326 Mo. 1037, 33 S.W. 2d 914 (1930); Larkin v. Nassau Electric Ry. Co., 205 N.Y. 267, 98 N.E. 465 (1912).

mind the caution so often sounded by the old masters of the game: do not ask any unnecessary questions; do not ask any question unless you can be reasonably sure of what the answer is going to be; when you have gotten from the witness the admission you want, don't labor his answer in an attempt to strengthen it by repetition or greater detail or exactness (the witness may sense the significance of the admission and modify it to your disadvantage); and, finally, when you have scored your point, stop. The persuasive effect of an otherwise successful cross-examination is frequently lost when the advocate continues pointless questioning and ends on immaterialities. Wherever possible, finish on a high note.

Redirect examination.—Although not logically under this heading, a word or two on the redirect that may follow cross-examination may not be amiss. The general purposes of redirect examination are to clarify obscurities and uncertainties developed in the cross-examination and to supplement it, so that the entire examination of the witness—direct, cross and redirect—will fairly represent the complete knowledge of the witness as to the matters about which he has testified. More specifically, the purposes are:

1. To correct mistakes in the cross-examination.
2. To explain or qualify statements made on cross-examination.
3. To make necessary amplifications where only part of a transaction or statement has been elicited on cross-examination.
4. To refresh the witness' memory, where on cross-examination he has denied a recollection of certain matters.
5. To develop relevant new matter to explain, qualify or supplement matter elicited on cross-examination.
6. To state reasons as an explanation for certain answers on cross-examination.
7. To refute unjustifiable inferences created by cross-examination.
8. To rehabilitate the witness where the cross-examination has tended to discredit him.

The determination whether or not to risk a redirect examination is a difficult one. If the witness has not been discredited or hopelessly confused, such an examination may safely be undertaken for any one of the first seven purposes above mentioned; but even in these instances the matters sought to be corrected or inquired about should be substantial. Where his witness has been badly discredited by cross-examination, the advocate must quickly balance the possibilities of rehabilitating him against the possibility of emphasizing the discrediting circumstances, and making a bad matter worse. Many times it is the better part of discretion to appear undisturbed and dismiss the witness without further questions.
VI. ARGUMENT

The argument or “summing up” is, of course, the advocate’s most direct attempt at persuasion.

It is not within the scope of this article to discuss in detail the proper content of argument in particular cases, or the manner in which particular questions may best be presented. What is pertinent is a general statement of the permissible range of argument, and the type and manner of argument most calculated to be persuasive.

The range of argument.—Nowhere has the legitimate range of argument been better stated than in the early New Hampshire case of *Tucker v. Hemmiker*.\(^\text{57}\) There the court said:

> The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. . . . The range of discussion is wide. . . . In his addresses to the jury, it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of the parties; to impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance upon the stand or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination. To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have the power to protect themselves from contempt and indecency in words or sentiments is contempt. . . . So, too, what a counsel does or says in the argument of a cause must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so.

Proper and improper argument.—What is and what is not proper argument? While the dispositions of particular courts of last resort vary, some holding a rather tight rein on counsel and some making more liberal allowance for “extravagant statements made in the heat of battle,” it can be said that an advocate may properly argue anything within the issues in the case, and supported by the record, provided he does it without resort to direct appeals to passion or prejudice.

The advocate’s presentation may be vigorous and discrediting characterizations of witnesses and testimony may be made when the record warrants them,\(^\text{58}\) but an argument of matters outside the record, or sensational appeals to arouse the passions or prejudices of the jury, defeat their own purpose. If the advocate indulging in such arguments obtains

\(^{57}\) 41 N.H. 317 (1860).

a verdict, his overstepping of the bounds may result in a new trial or a reversal on appeal. Particularly is this true in “close cases,” that is, cases in which the evidence is conflicting and fairly evenly balanced.

Avoiding error.—If during the heat of argument an objection is made to a statement as being outside of or contrary to the evidence, the speaker can usually avoid error by promptly withdrawing the statement, or by saying, “That is my recollection of the evidence, but it is for you, gentlemen of the jury, to say what the evidence is; if you find that is not the evidence, disregard my statement.” If the objection goes to what is charged to be an improper characterization of a witness or particular evidence, it is a good tactic to withdraw the statement unequivocally. Ordinarily, no claim of error can be predicated upon alleged improper argument unless it is specifically objected to, and ruling of the court obtained thereon.

A long argument often defeats its purpose.—Argument should be no longer than is necessary. Many a case is lost or harmed by over-argument. On the other hand, a case is often aided by a short crisp argument which suggests the confidence of the advocate that the evidence is so clear it needs but little exposition. A careful preparation for argument, which should include in handy reference notes an outline of essential points to be covered, will tend to keep an argument within reasonable bounds. Experience prompts the observation that a jury will listen attentively to a simply stated, well arranged and forcefully presented argument in which the main points of controversy are successively presented and the end can be foreseen, but that it is quickly bored by a slow, rambling, unplanned and undirected discourse which may lead it to wonder if it will be completed within the jury’s prescribed term of service.

Methods of persuasion.—Persuasion is an unconscious operation, and there are as many ways of inducing it as there are varieties of argument. The direct method of stating facts and conclusions deducible therefrom and asking the jury to accept those conclusions is one way. To state the facts and invite the jury to draw logical conclusions therefrom is another. Another is to suggest that certain facts are significant, in that they permit or compel certain inferences and then by interrogation leave it to the jury to answer whether one or another inference

may fairly be drawn. Speaking broadly, jurors sometimes resent the
direct, positive, dogmatic approach which carries with it the implica-
tion: “There it is; you have to take it.” Many advocates prefer the
subtler, indirect method by which the jury is invited rather than forced
to give its adherence to conclusions upon which it will base its verdict.

The use of plain English.—The desirability of the use of plain but
good English in argument cannot be overstressed. This does not imply
that jurors should be “talked down to” as though they were of an
inferior mentality; what is meant is that the advocate should use the
language of their every-day association and business. The noisy oratory
of an earlier day, in which quite ordinary transactions were couched in
classical prose or poetry and copiously embellished with historical
allusion, has largely passed. Argument is most effective which is stated
in the tone of ordinary conversation, with just enough vigor directed to
important items of evidence or circumstances to rivet them in the
minds of the jurors.

The prime essential.—If one element is to be stressed above all others
as essential to persuasion through argument, it is the earnestness and
sincerity of the advocate. An examination of the long and interesting
record of successful advocacy will reveal that the great masters of the
art have trusted to the solid ground of sincere conviction derived from
complete familiarity with the case in hand, a keen perception of its
merits or weaknesses, and their ability, through fair, logical and earnest
argument, to persuade the jury to share their convictions. Lord Camp-
bell, in his “Lives of the Chancellors,”61 gives brilliant expression to this
view in his estimate of the arguments of Thomas (Lord) Erskine, one
of the greatest advocates of all time:

In considering the characteristics of his eloquence it is observable that he was
not only free from measured sententiousness and tiresome attempts at antithesis,
but that he was not indebted for his success to riches of ornament, to felicity of
illustration, to wit, to humor, or to sarcasm.... Earnestness and energy were
ever present in his speeches—impressing his argument on the mind of his hearers
with a force which seemed to compel conviction. He never spoke at tiresome
length; throughout all his speeches no weakness, no dullness, no flagging is dis-
coverable; and we have ever a lively statement of facts—or reasoning, pointed,
logical and triumphant.

VII. CONCLUSION

The obligation of the trial lawyer engaged to try a jury case because
of his assumed superiority in the art of advocacy, is to give his client the

best possible representation and persuade the jury to a verdict in his client's favor. That obligation cannot be discharged without (a) a thorough pre-trial preparation which puts him in possession of every available fact—favorable or unfavorable—in the case; (b) a pre-trial determination upon an accurate and persuasive opening statement; (c) a pre-trial determination upon an order for the presentation of his witnesses best calculated to impress and persuade; (d) an intelligent, understandable and persuasive presentation of his evidence; (e) intelligently conceived and executed cross-examinations; and (f) argument, persuasive, and it is to be hoped, convincing, because of its proper content, its manner of statement and, above all, its sincerity.