

## The Silent Revolution in Methods of Advocacy in English Courts

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# ***The Silent Revolution in Methods of Advocacy in English Courts.***

## **Abstract.**

George Keeton wrote, in 1943, about “a silent revolution in methods of advocacy as practiced by the English Bar over the last fifty years”<sup>1</sup>. Changed standards of etiquette, professional rules and greater control exerted by judges over these years led to a vast increase in courtesy in interactions with judges and between counsel. The conduct of prosecutions had also improved. They were generally no longer carried out in a sneering hectoring manner with witnesses mercilessly browbeaten or bullied. Dramatic types of 19<sup>th</sup> Century advocacy, in which counsel was prepared to use mannerisms, tricks of speech and gestures to heighten the effects of their pleas to juries, was replaced by a conversational and matter of fact tone. The idea that to cross-examine meant to examine crossly had almost vanished. Appeals to juries were now to reason combined with a controlled, subtle and focused appeal to emotion. Jury trials in civil cases had continued to decline. Advocacy before judges was concerned with facts and the law, not oratorical flourishes. Fewer criminal trials before juries took place as the jurisdiction of the magistrates had widened further. The more restrained and conversational style of advocacy before criminal juries may have been to some extent influenced by that of the civil courts, where the leaders of the bar appeared more often and increasingly without juries. Two dominant members of the bar during the first half of the 20<sup>th</sup> Century were Patrick Hastings and Norman Birkett. Their styles, because of triumphs linked with them, were influential on those of other barristers. Hastings was a master of direct forcible speech without any embellishments or ornamentation and prized brevity. Unlike Hastings, Norman Birkett believed that the advocate ought to use the full range of English speech. Other factors lay behind the mainly conversational and matter of fact advocacy that had become established. These include a widely held suspicion of rhetoric and, very importantly, better informed and greater educated juries. Jurors were less

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<sup>1</sup> G. W. Keaton, *Harris's Hints on Advocacy*, Stevens and Sons, 1943, page 10.

susceptible than their predecessors to theatrical gestures and melodrama, which had largely been replaced in literature and on the stage by introspection and realism, references to God and the Bible, elegant and flowery, but empty, speech and appeals to strong emotion and prejudice. In a more scientific age jurors expected more of an appeal to reason. The success of barristers such as Hardinge Giffard, John Holker, Charles Russell and Edward Clarke, during the closing decades of the previous century, may have been because they appreciated early on the changes that were occurring to juries. Attempting to catch the eye of the press to help create a reputation, useful to generate work, was an important factor behind the emotive, vividly worded and aggressive advocacy of the early Victorian period and afterwards. The later decline of court reporting in the newspapers, removing much of the gallery from the stage, may well have contributed to the more subdued form of speech.

## **The silent revolution.**

In 1943, during wartime Britain, G. W Keeton, then Professor of English Law and Dean of the Faculties of Laws in The University of London and at the University College, London, wrote about “a silent revolution in methods of advocacy as practised by the English Bar”<sup>2</sup> that had taken place over the previous 50 years. He observed that changed standards of professional etiquette and steadily greater dignity of the judiciary<sup>3</sup> had led to a vast increase

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<sup>2</sup> G. W. Keeton, *Harris's Hints on Advocacy*, Stevens and Sons, 1943, page 10.

<sup>3</sup> Certainly by the latter part of the Nineteenth Century most judges exerted authority over advocates in court, something not all of them had been able to do sufficiently earlier. (See George King, *Lawyers and Eloquence*, In William Andrews ed, *The Lawyer in History, Literature and Humour*, William Andrews and Co, 1896, page 264. ). Contributing to deference and courtesy shown to judges by barristers was greater respect for their intellectual and practical abilities as lawyers. Beginning in the 1860's both Conservative Lord Chancellors (Cairns) and Liberals ( Hatherley and Selborne ) sought to professionalise the judiciary and to make merit the consideration for appointment to the bench. ( Robert Stevens, *The English Judges*, Hart Publishing, Oxford and New York, 2005, Chapter One ) The movement towards meritocracy was to some extent impeded by Lord Halsbury (Hardinge Giffard) in the seventeen years he was Lord Chancellor between 1885 and 1905. His appointments were much criticised on the grounds “he appointed to the High Court, and to a lesser extent the county court, men of little or no legal learning whose previous career in public life had been largely in the service of the Conservative Party or else were relations of his own “. ( R. F. V. Heuston, *The Lives of the Lord Chancellors 1885-1940*, Oxford: Clarendon Press, 1987, page 36. ) . From Lord Haldane's Chancellorship (1912-15) legal and professional qualifications firmly became the criteria, though at first the change was not extended to the most senior appointments. However, a little later, Lord Sankey, Lord Chancellor from 1929 to 1935, when resignations occurred, replaced five Law Lords who had political backgrounds by others whose reputations rested on their professionalism as lawyers. ( J. A. G. Griffiths. *The*

in courtesy between the court and counsel and between counsel. Quarrels in court were rare and when they did occur was regarded as a departure from professional good manners rather than a normal incident of litigation<sup>4</sup>. All barristers who practised in the common law courts were required to choose a circuit in which to work and by convention to dine frequently in the circuit mess. In the last decades of the 19<sup>th</sup> Century messes grew stronger in maintaining accepted professional standards of behaviour; the expulsion of Dr Kenealy, for his conduct in the criminal Tichborne Claimant case, from the Oxford Circuit Bar mess in 1874 is an early example of their willingness to take severe sanctions if necessary. Institution of a bar mess at the Old Bailey in 1891, a step spoken about since the 1840's to improve standards, may well have contributed to better behaviour there<sup>5</sup>. The conduct of prosecutions had also improved. Unlike in the previous century, they were no longer carried out in a "sneering hectoring manner with witnesses mercilessly browbeaten and bullied if the occasion warranted"<sup>6</sup>. The idea of the prosecutor acting as a minister of justice, and therefore not striving for a conviction at any cost, was now firmly part of the etiquette of the Bar. This limited, if it did not eliminate, appeals by prosecutors to jurors' emotions.

It was widely held that Sir Richard Muir (1857-1924) was responsible for much of the improvement, especially at the Old Bailey - practice there influencing other courts - and introduced an atmosphere of fairness and impartiality in prosecutions which had never been seen before<sup>7</sup>. Underhandedness or trickiness in the task was said to be alien to him<sup>8</sup>. As a prosecutor he was regarded as the greatest of his time and represented the Crown in every trial of note in the Old Bailey from 1901 until his death. Born in Scotland, the son of a shipping broker from Greenock, he went to London with intentions of becoming an actor but, after a period working as a parliamentary reporter for The Times, abandoned his earlier

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Politics of the Judiciary, Fifth Edition, 1997, Fontana Press, Page 16. Also see, Shimon Shetreet, Judges on Trial, 1976, North Holland Publishing Company, pp. 70 – 71. )

<sup>4</sup>Great shock was felt when two barristers fought in court in 1907. The incident is described by David Pannick, Advocates, Oxford, 1993, page 54.

<sup>5</sup>Allyson May, The Bar and the Old Bailey, 1750-1850, University of North Carolina Press, Chapel Hill and London, 2003, page 242.

<sup>6</sup>William Cornish, The Jury, Penguin Books, 1971 (revised edition) page 168. See also Leo Page First Steps in Advocacy, Faber and Faber, 1943, pp.127-128: "*Years ago the name "Old Bailey lawyer" was a term of reproach. It indicated the man who was out to get a conviction even if it meant that he had to descend to any trick or unworthy expedient for the purpose.....There has been a complete revulsion from those days when conviction was the object and the methods by which it was gained were immaterial*".

<sup>7</sup>Richard DuCann, The Art of the Advocate, Revised Edition, 1993, Penguin Books, page 115.

<sup>8</sup>See Travers Humphreys, who knew him well, Criminal Days, Hodder and Stoughton, 1946, page 81.

ambition, turned to law and was called to the Bar at Middle Temple, where he later became a Master of the Bench. Muir was known to be hard working with little apparent need for conviviality. He usually spent half the night preparing for his cases and made notes on small cards with coloured pencils- one colour for examination in chief, one for cross-examination and another for possible re-examination. It was reported Muir could check up in a moment upon any contradiction or alteration between evidence given by one witness and another at the trial and what he had said when at the police court <sup>9</sup>. These cards were noticed in court and became known as Muir's "playing cards". He asked for painstaking thoroughness from the police in obtaining evidence. When presenting cases he placed much weight on physical evidence and little on eye witness testimony, except if it would bolster more concrete evidence. It was Muir who conducted the first prosecution involving finger print evidence in 1902 <sup>10</sup>. Whilst Richard Muir deliberately avoided raising the emotional temperature, it was said that the "lucidity of his argument and the clarity with which he stated the facts in his opening speeches wove a net so tightly round the prisoner in the dock that he could never afterwards escape from it" <sup>11</sup>.

Such was his reputation for meticulousness and great diligence that Dr Crippen, on hearing that Muir was to prosecute him, said "*I wish it had been anybody else.... I fear the worst*". Muir's cross-examination of Crippen, before Lord Chief Justice Alverstone in Court No 1 at the Old Bailey, was a masterpiece of clear, direct and polite questioning, in simple language, each question dealing with one fact at a time, which conveyed to the jury the strength of the case for the prosecution. Characteristically, he saved all comment on the answers until his closing speech <sup>12</sup>.

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<sup>9</sup> Travers Humphreys, *ibid*, page 80.

<sup>10</sup> Harry Jackson was found guilty at the Old Bailey of a charge of burglary of a house and stealing billiard balls. He received seven years penal servitude. The implications of the new technique were quickly realized in prosecutions. The attitude of some judges to fingerprints was one of distrust, but the value of this evidence was placed beyond doubt when, in 1910, the Court of Criminal Appeal upheld a conviction based solely on fingerprint evidence (*R v Castleton* (1909) 3 Cr App R 74).

<sup>11</sup> Richard DuCann, *The Art of the Advocate*, Revised Edition, 1993, Penguin Books, page 72.

<sup>12</sup> Richard DuCann, *The Art of the Advocate* Revised Edition 1993, Penguin Books, pp. 126-128. For that part of Muir's cross-examination of Dr Crippen which concerned whether the human remains found in his house were those of Mrs Crippen, a vital question for the jury, see E.W. Fordham, *Notable Cross-Examinations*, Constable, 1951, Chapter XI. The influence of Edward Muir endures. Nearly a hundred years later his cross-examination of Crippen is still held, by authors of text books on acquiring the skills of advocacy, to be a model of cross-examination techniques for both prosecution and defence. See, David Ross QC (*Advocacy*, Cambridge

Dramatic types of 19th century advocacy, in which counsel was prepared to adopt mannerisms, tricks of speech and gestures, parodied in Gilbert and Sullivan's *Trial by Jury*, to heighten the effect of their plea, Professor Keeton reported in 1943 had become almost obsolete:

"A visitor straying into our courts (with the possible exception of the Central Criminal Court) might be forgiven if he imagined himself to be witnessing some unusual kind of company meeting. The tone of counsel is conversational and matter of fact. There is a *somewhat misleading air of casualness about the proceedings*"<sup>13</sup>.

Sir Norman Birkett, an eminent advocate of the first half of the last century, in an address delivered in Gray's Inn Hall said of the altered style of advocacy: "There may have been days when a flowery speech was effective, but it is no longer effective. Times change; manners change; all things change. Though the advocate of today does not seek to commend himself by flowery speech, he does seek to be persuasive"<sup>14</sup>. Advocates now sought to be persuasive by a conversational matter of fact advocacy making points earnestly, and if necessary, with persistence but rarely indulging in rhetoric in its pejorative sense of artful bombast and verbal chicanery, and normally avoiding the sorts of tricks and effects that were used previously<sup>15</sup>.

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University Press, 2007, pp.69-70. ), who quotes passages from it and Robert McPeake ( *Advocacy Manual*, Oxford University Press, 2009, pp.179-188.), who reproduces a sizeable part. Richard Muir's preparatory notes for his prosecution of Crippin, commended by David Ross as "*an example to us all*", page 18, were found and published. They appear in Louis Blom-Cooper, *The Law As Literature*, The Bodley Head, London, 1961, pp.14-33. Also see a commentary on them by Mr Justice JH Phillips, *Practical Advocacy*, ( 1988) 62 *Australian Law Journal* 627-629.

<sup>13</sup> G.W. Keeton, *Harris's Hints on Advocacy*, Stevens and Sons, 1943, page 10. Nearly three decades before, in 1915, in the Foreword to *Illustrations In Advocacy* by Richard Harris K. C, Fifth Edition, a book mainly for aspiring and newly qualified barristers, George Elliot, K.C. wrote: "It is said by many that eloquence is not now encouraged in the courts, that the artifices of advocacy are discouraged, that a plain brief statement of fact, as concise and succinct as the nature of the case will permit, is the style which best commends itself to the Bench, and the exigencies of time, whether in civil causes or in criminal trials, do not permit of those methods of advocacy which were so effective in days gone by".

<sup>14</sup> July 1st, 1957, entitled "*The Advocate*", published in *Graya*, No 46, pp. 89-96. Viscount Simon, in his forward to Leo Page's *First Steps in Advocacy*, Faber and Faber, 1943, pp. 7- 8, wrote: "A plain accurate statement arranged in the right order is worth tons of rhetoric. Juries, no less than magistrates and judges, want to do right; they are not impressed, any of them, by blather and pomposity, but are grateful for clear *exposition*".

<sup>15</sup> Leo Page, *First Steps in Advocacy*, Faber and Faber, 1943, pp.20-27, considered advocates would most likely achieve success by "simplicity, sincerity and *moderation*" in manner and matter and that persuasiveness

Giving the Haldane Memorial Lecture, in the same year that Keeton wrote about advocacy in court, Sir Gervaise Rentoul, the Chief Stipendiary Magistrate of London, stated “... anything in the nature of theatricality should be avoided , although, in a criminal trial some dramatic licence may be permissible when the emotions *of the jury are highly charged*”<sup>16</sup>. On cross--examination he said: “The old idea that to cross-examine means the same as to examine crossly has long disappeared. The successful advocate nowadays no longer thumps the desk with his brief; the rapier has taken the place of the broadsword: Sergeant Buzfuz is dead ”<sup>17</sup> .

In 1917 the governing body of the Bar, the Bar Council, adopted a number of rules to control barristers when faced with making suggestions of fraud or dishonesty or attacking the credit of witnesses they had to cross examine. Subject to minor amendments they continue today.

Under the rules barristers could not suggest that a witness, or other person, is guilty of a crime , fraud or misconduct of which their client is accused unless such allegations go to a matter in issue (including the credibility of a witness) which was material to their client’s case and which appeared to them to be supported by reasonable grounds<sup>18</sup>. Also they were prohibited from asking questions which were merely scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person<sup>19</sup> .

Serjeant Buzfuss’s spirit of heavily belabouring witnesses in cross –examination had not entirely expired and appeared in a case before a High Court judge and a jury in 1934. The higher judiciary, however, showed a determination to send it on its way. The chief protagonists on either side of the cause, Mr Lehwiss and Sir Herbert Austin respectively, were cross-examined. Measured by the shorthand note Mr Lehwiss’s examination occupied 80 pages; his cross - examination 265 pages. The examination in chief of Sir Herbert Austin occupied 39 pages and

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would be much assisted by audibility, clear articulation, inflection to avoid monotony and for emphasis and absence of studied gesture (Chapter 5 ).

<sup>16</sup> On eschewing theatricality, Leo Page, *First Steps in Advocacy*, Faber and Faber, also published in 1943, page 24 wrote: “A law court is seldom a fit place for stage business . Incidentally, the highly dramatic manner is a treacherous tool in inexperienced hands. A first-class tragedian moves us with horror and emotion, but a second – rate performer excites only *our ridicule. So it is in court*”.

<sup>17</sup> Sir Gervais Rentoul, *The Art and Ethics of Advocacy*, Haldane Memorial Lecture, 1943, page 9.

<sup>18</sup> Now contained in Bar Code of Conduct para 708(j) and Written Standards para 5.10(h). Also, concerning advocacy by solicitors see Law Society’s Code for Advocacy, Part VII para 7.1 (h) .

<sup>19</sup> Now embodied in Bar Code of Conduct para 708(h) and Written Standards para 5.10 . See also Law Society’s Code for Advocacy Part VII par 7.1 (e).

his cross-examination 148 pages. On matters of law, the case went to the Court of Appeal and on further appeal to the House of Lords<sup>20</sup>. The Lord Chancellor, Viscount Sankey, agreed with the censure of Lord Hanworth, Master of the Rolls, in the Court of Appeal, who had said “There is a tedious iteration in some of the questions asked, and prolonged emphasis is laid on some matters trivial in relation to the main issues. Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted in the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon witnesses. We desire to say that in our opinion the cross-examination in the present case did not conform to the above conditions, and at times it failed to display that measure of courtesy to the witness which is by no means inconsistent with a skilful, yet powerful, cross-examination”<sup>21</sup>.

The Lord Chancellor then went further in his criticism:

“It is right to make due allowance for the irritation caused by the strain and stress of a long and complicated case, but a protracted and irrelevant cross-examination not only adds to the cost of litigation but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted, as it was in this case, without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of law. It is not sufficient for the due administration of justice to have a learned, patient and impartial judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the Court are taking part in the great task of doing justice between man and man”<sup>22</sup>.

In the course of a lecture on advocacy at Gray’s Inn in 1938, Sir Malcolm Hilberry, then a King’s Bench judge, considered the place of emotion in jury trials. In contrast to blatantly emotional advocacy, often short on analysis of the facts - or indeed sometimes almost completely replacing it- which was much heard in the preceding century, he observed that triumphant jury

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<sup>20</sup> Mechanical and General Inventions Co. and Lehwess v. Austin and the Austin Motor Co. [1935] A.C. 346.

<sup>21</sup> Mechanical and General Inventions Co. and Lehwess v. Austin and the Austin Motor Co. [1935] A.C. 359.

<sup>22</sup> Ibid, page 360.



advocacy now made an appeal to reason combined with a subtle, restrained and focused appeal to emotion:

“*You will notice..... that the successful jury advocate always gives his address to a jury in the form of a well built argument, while the emphasis and appeal are all the time strongly emotional. The facts are marshalled to form the steps of the argument leading to the conclusion that is sought , but the nervous force of a controlled emotion passes all the while from the advocate to the jury, first to arrest their attention, then to hold it, and finally to dominate their judgment. It is in such work that rhetoric has its place and the sense of the dramatic ”*<sup>23</sup> .

In a small profession where, until the end of the 1980’s, there was very little formal instruction on it, the views of judges on advocacy, and their ability to act on them by the way they received advocates in court, and those held by senior barristers, were influential, especially on newly called members of the bar, whose main method of learning was studying more senior barristers -watching big men in court<sup>24</sup>- , following the techniques of the successful and avoiding those of the unsuccessful.

### ***Continued decline of jury trials.***

In addition to changes in professional etiquette and rules and readier acceptance by the Bar of judicial control over legal proceedings, already mentioned, a number of other reasons also account for the transformation in style that had occurred. Continued fall in civil jury trials undoubtedly played a significant part. Reduction in the use of civil juries begun in the 19th century (by the end of that century only half of civil trials in the High Court were by a

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<sup>23</sup> Duty and Art in Advocacy, a lecture delivered at Gray’s Inn in Hilary Term 1938, Graya NoXX, Easter, page 11. Largely reproduced in Sir Malcolm Hilberry, Duty and Art in Advocacy, Sweet and Maxwell, 1946. Concerning the use of controlled emotion, Leo Page, First Steps in Advocacy, Faber and Faber, 1943, pp. 128-129, wrote: “It is legitimate for defending counsel to use pathos in order to move a jury in the interests of his client. But it is not considered to be the duty of counsel for the prosecution to be vindictive or to attempt to excite the indignation of a jury against a defendant by *rhetoric*”.

<sup>24</sup> As regularly observing the performance of distinguished barristers in court was described by Leo Page First Steps in Advocacy, Page 73.

jury) gathered pace during the first half of the 20th century. After 1935 it could be asserted that the jury trials in county courts had practically ceased to exist.

At High Court level, the judicature commissioners and a departmental committee which reported in 1913 favoured a more restricted right to trial by jury in civil cases. No changes were made until the Juries Act 1918, which was principally enacted because of shortages of jurors in wartime. The Act provided that all cases in the High Court should be before a judge without a jury unless the Court saw fit to order one, subject to the right to jury trial in cases alleging fraud, libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise to marry, contested matters in divorce and heirship in probate actions. The pre-Juries Act 1918 position regarding juries was, however, restored by the Administration of Justice Act, 1925. Complaints about the cost and delays in proceedings at common law led to the re-introduction of restrictive legislation in the form of the Administration of Justice Act (Miscellaneous Provisions) Act 1933<sup>25</sup>. This Act, which encountered very little public opposition, removed an absolute right to jury trial in the King's Bench Division of the High Court. Trial by jury was to be ordered in cases of fraud, libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage unless the court was of the opinion that the trial required any prolonged examination of documents or accounts or any scientific or local investigation which could not be conveniently made with a jury. In other cases the Court had a discretion to order a jury. This was applied narrowly<sup>26</sup>. Jury trial became more and more of a rarity as litigants, forsaking the traditionally rehearsed arguments in its support, increasingly opted for trial by judges alone to avoid delay and expense. Indeed seeking trial by jury came to be regarded with suspicion: it suggested the hope of confusion in a weak case, or the expectation of exorbitant damages in cases involving distressing details or high feelings<sup>27</sup>.

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<sup>25</sup> For a closely contemporary analysis of the Act's provisions for civil jury trials see R. M. Jackson, Incidence of Jury Trial During the Past Century, *Modern Law Review*, Volume 1, No 2, Sept. 1937, pp. 141 – 142.

<sup>26</sup> Under the present law, Section 69 of the Supreme Court Act 1981, the right to jury trial is limited to only four specific areas: fraud, defamation, malicious prosecution and false imprisonment ( Similar provisions are contained in the County Courts Act 1984. ) Even in these matters, the right is not absolute and can be denied by a judge, under Section 69 ( i ) where the case involves any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.

<sup>27</sup> The temporary prohibition on civil jury service in the Second World War was a later blow from which civil juries never recovered. J. H. Baker, *An Introduction to English Legal History*, Butterworths, 2002, page 92.

Decline of trial by jury amounted to a revolution in practice <sup>28</sup> . Persuasiveness in front of Judges with no jury needed advocates to concentrate clearly on the facts in issue, an ability to argue relevant law, and a brisk unrepentant delivery. It did not require oratorical embellishment. A view from the judiciary on this point was clearly put by Mr Justice Hilbery in his address on advocacy at Gray's Inn Hall in 1938:

“A Judge is rendered uneasy by oratorical flourishes. Let the language there conform to the standards of the best prose. In the words of Robert Louis Stevenson "Beware of purple passages". *Wed yourself to a cold 'austerity'*”. Continuing, Hilbery then told an amusing story about Mr Justice Swift <sup>29</sup>:

“A counsel, much given to emotional rhetoric began to open a case before the learned Judge sitting alone. He had not gone far before he was giving full rein to his oratory. Mr. Justice Swift tapped his desk; "Mr. Blank", he said, "there is no jury." There came the appropriate apology but again counsel was soon indulging in rolling periods and high-flown declamation. For some time the judge suffered it, then there came the tap of his pencil on the desk. "Usher", he said, "switch on the light over the jury box - Mr. Blank does not believe me" <sup>30</sup> .

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<sup>28</sup> A. H. Manchester, *A Modern Legal History of England and Wales 1750 – 1950*, Butterworths, 1980, page, 95.

<sup>29</sup> For more on Rigby Swift see E. S. Fay, *The Life of Mr. Justice Swift*, Methuen, 1939.

<sup>30</sup> In similar vein, though from the perspective of the Bar, Sir Patrick Hastings wrote: “The judge has been at the game too long. His every instinct struggles against the possibility that he may be influenced against the true letter of the law by a speech however artistically or impressively it may be phrased. The decision is to be his and his alone; he knows the law, and he desires to know the facts; and after that he infinitely *prefers to be left alone*”. Patrick Hastings, *Cases in Court*, William Heinemann 1949, page 10. Lord Bingham, before his retirement as Senior Law Lord, in *The Role of the Advocate in a Common Law System*, The Inaugural Birkenhead Lecture Given in Gray's Inn Hall in 2008 ( seventy years after Mr Justice Hilbery's lecture on advocacy), *Graya*, No 122, Hilary 2009, pp. 17-24, said whilst “ an advocate *might reasonably hope to touch the heartstrings of the jury more readily than those of a judge..... even judges were not the unfeeling decision-making machines they might sometimes appear; they responded to considerations of justice and injustice, right and wrong, human frailty and human need; there was often treasure there, which understated eloquence could unlock*”. When interviewed at the House of Lords on 23<sup>rd</sup> October, 2007, Lord Bingham said it would be wrong to think that judges in earlier times were never influenced by such considerations, carefully and subtly put by advocates.

Opportunities for criminal trials before juries lessened in 1925 when the Criminal Justice Act of that year brought a large number of offences previously triable only by a judge and jury within the jurisdiction of magistrates at petty sessions <sup>31</sup> .

### ***Impact of leading members of the bar.***

G. W Keeton saw the more restrained and conversational advocacy that had emerged in criminal jury trials to have been influenced by the style of advocates in civil cases: “In as much as the most influential members of the bar who set fashions in advocacy appear most frequently in civil cases, the methods followed by them tend to become general ” <sup>32</sup> . As an example of this, he mentions the effect of Rufus Isaacs, the great majority of whose cases were civil. When he was a Law Officer and appeared in criminal cases, Sir Rufus was never rude to the prisoner in his cross-examination. Rather, he was courteous, almost deferential, but the effect of his questions was to build up a case of deadly significance, as was clearly seen in his prosecution of the poisoner Arthur Seddon in 1912. Keaton saw these traditions being carried over to the present day and “being firmly established in our advocacy”.

Two influential and fashion setting members of the Bar during the first half of the 20<sup>th</sup> Century were Patrick Hastings and Norman Birkett, each will now be discussed.

### **Sir Patrick Hastings and his effect on advocacy.**

Sir Patrick Hastings (1880- 1952), who was made a King’s Counsel in 1919, became one of the leading barristers of his time, and, at the top of his profession, earned very considerable fees <sup>33</sup> . In 1912 he led for the defence of John Williams in the Eastbourne “*Case of the Hooded Man*”, which made national headlines. Although Williams was convicted, Hastings’s highly intelligent and focused defence strategy was much admired. His practice afterwards was almost

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<sup>31</sup> Sir Thomas Skyrme, *The Changing Image of the Magistracy*, MacMillan Press, London, 1979, page. 5. See, also, R. M. Jackson, *Incidence of Jury Trial During the Past Century*, *Modern Law Review*, Vol. 1, no 2, September, 1937, page 137.

<sup>32</sup> G.W. Keeton, *Harris’s Hints on Advocacy*, Stevens and Sons, London.1943, page 11.

<sup>33</sup> Hastings’s biographer, H.Montgomery Hyde: *Sir Patrick Hastings. His Life and Cases*, Heinemann, 1960, stated that for many years he earned more than £40,000.

completely in the civil courts in divorce, libel and fraud cases, often before juries. Mostly unlike other barristers, his style of advocacy, may, to some extent, have followed Charles Russell and Edward Carson, at least in cross-examination<sup>34</sup>. He was known to be contemptuous of the passionate appeals made to juries by advocates like Marshall Hall. Hastings was a master of direct forcible speech without any embellishments or ornamentation and recognized the immense value of brevity. According to Sir Norman Birkett, a friend and who frequently opposed him in court, Patrick Hastings was not a great speaker in the conventional sense:

“He was certainly not in the tradition of Sheridan, Charles James Fox and Edmund Burke. He was not a great reader and his mind was not stored with the riches of English literature or the great speeches of orators in ancient and modern times”. (This may, partly, have been because of an interrupted public school education at Charterhouse. When the Second Boer War, 1889- 1902, broke out he had enlisted in the British Army) " It was quite characteristic of him that he should affect to be scornful of forensic oratory of the flamboyant range because it was quite alien to his style of advocacy, and really outside his range; for in all that he did he seemed to want to put himself in a category of his own ”<sup>35</sup> .

In his openings, whether for the plaintiff or the defendant , he was never long and rarely stylish. In print, the words chosen would appear to be random. Such an impression would have been entirely false as they were selected with great care to bring the case within the limits that Hastings wished to be set for it. He was able to do this by having complete mastery of his brief<sup>36</sup> .

Hastings stood straight and still in court, kept his eyes fixed on whoever he was speaking to, very rarely gestured with his hands, and avoided distractions, sometimes made deliberately by other barristers, such as jangling coins in his pockets, fiddling with the ribbon on a brief or taking numerous drinks of water from a tumbler. He always spoke in a good clear voice. Great preparation ensured he was in complete command of his

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<sup>34</sup> N. Birkett, *Six Great Advocates*, Penguin, page 23.

<sup>35</sup> Birkett, *ibid*, pp. 23-24.

<sup>36</sup> Richard DuCann, *The Art of the Advocate*, Penguin, Revised Edition, 1993, pp. 84 – 85.

brief, had no need to refer to papers during trial and could carefully observe the jury for small but significant signs<sup>37</sup>.

His examination in chief, much resembling that of Sir Frank Lockwood earlier, appeared to be a conversation with the witness. Hastings would smile at some answer as though it had come to him by surprise, when it was really the answer he wanted and expected.

The outstanding strength of Hastings was in cross-examination. His frequent opponent, Sir Norman Birkett, recalled:

“He could destroy a witness with quite shattering power with his direct, incisive and penetrating questions that came with the precision and speed of a machine gun. Remorselessly and relentlessly he broke down all defences, and when the triumph was complete he would make the briefest possible speech and sit down ”<sup>38</sup>.

Hastings regarded cross-examination as “the great, perhaps the final, test of advocacy”. Although he said that he selected the one essential element, without which all others are completely useless, he wished to deal with, Hastings claimed that he did not prepare specific questions beforehand. He preferred to wait until such time he had carefully decided, by listening to examination in chief, whether a witness, “was truthful or dishonest, stupid or cunning, intelligent or foolish ”<sup>39</sup>. The ability to assess accurately and almost instantaneously the personality and mentality of the witness facing him was to him the key skill in cross-examination; very different to the indiscriminate and loud “blunderbuss” approach in cross-examinations, much heard in Victorian times and earlier.

On his experience of being cross-examined by Hastings, in the libel case of *Laski v The Newark Advertiser and Parlby* in 1946<sup>40</sup>, in which he sued the Nottinghamshire paper in libel

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<sup>37</sup> Brian Gibbens QC, who, early in his career, watched Patrick Hastings in court, compared him with other advocates who perpetually turned to the jury when they were examining witnesses. He recounted that the intensity of Hastings’s gaze and manner towards hostile witnesses was devastating. Brian Gibbens, *Elements of Modern Advocacy*, New Law Cassettes, Butterworths, London, 1979.

<sup>38</sup> Norman Birkett, Address to the Holdsworth Club of the Faculty of Law, University of Birmingham, 7<sup>th</sup> May, 1954.

<sup>39</sup> Sir Patrick Hastings, *Cases in Court*, Pan Books, 1954, pp. 252 – 254.

<sup>40</sup> Unreported in the law reports, but see a verbatim account published by the Daily Express London, 1947.

for a report that he advocated violence to achieve socialism at a public general election meeting in Newark, in 1945, Harold Laski wrote:

“He performs his war dance about you like a dervish intoxicated by the sheer ecstasy of his skill in performance, ardent in his knowledge that, if you trip for one second, his *knife is at your throat.....He moves between the lines of sarcasm and insult. It is an effort to tear off, piece by piece, the skin which he declares no more than a mask behind which any man of understanding could have grasped the foulness of your purpose. He treats you not as a human being , but as a surgeon might treat some specimen he is demonstrating to students in a dissecting room*”<sup>41</sup> .

Like Sir Edward Carson, whose style may well have consciously or sub-conscientiously shape his own, Patrick Hastings excelled in the arts of denigration, especially ridicule<sup>42</sup>.

Writing in the 1960’s, the eminent barrister and writer on advocacy Richard DuCann QC (1929 – 1994) considered Patrick Hastings was the finest cross-examiner before the English Courts in the 20<sup>th</sup> Century. Nonetheless, he strongly criticized him for ruthlessness and gross discourtesy which was unfair to witnesses and on occasions led to courts drawing the wrong conclusions<sup>43</sup>. Concerning this behaviour, which went un-rebuked wherever he practiced, DuCann gives the example of Hastings’s cross-examination of Air Marshall Sir Hugh Vivian de Crespigny, who had been the Labour candidate for Newark and present when Laski spoke at the meeting. DuCann. presents the whole of the short cross-examination<sup>44</sup> :

Hastings: “*Do you recognize this expression: ‘It did not lie in the mouth of any member of the Tory party, who helped to organize the mutiny in the British Army over Home Rule in 1914, to discuss the question of violence? Do you remember anything like that being said by anyone*”?

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<sup>41</sup> Richard DuCann, *The Art of the Advocate*, Revised Edition 1993, Penguin Books ,1993., page 21.

<sup>42</sup> Marshall Hall, from whose style and approach Hastings wished to distance himself, employed this weapon only very infrequently.

<sup>43</sup> At one point DuCann describes his style as brusque and tyrannical, *The Art of the Advocate*, Penguin ,1993, page 154.

<sup>44</sup> DuCann, *ibid*, pp.116 – 117.

Sir Hugh: “No I do not . That does not mean it was not said ”.

Hastings: “Many things may have *been said that you did not hear?*”

Sir Hugh: “*Sir Patrick.....*”

Lord Chief Justice Goddard: “Will you try and answer the question Yes or No. We really must try and get on with this case”.

Sir Hugh: “There was nothing *vital that I would not have heard*”.

Hastings: “If you did not hear it, how did you know whether it was vital or not?”

Sir Hugh: “I must ask your permission to elucidate this so as not to give the wrong *impression...* ”...

Hastings: “No thank you ” (sitting down)

Slade: “I have no questions in re-examination ” <sup>45</sup>.

In effect, Hastings had refused to let the witness give the evidence he wanted to and also, of course, the jury the opportunity of hearing it<sup>46</sup>. Remarkably, Gerald Slade KC, leading counsel for Laski, and later a Judge of the High Court, did not seek to rectify this in re-examination, nor did Lord Chief Justice Goddard intervene.

Sir Patrick Hastings was invariably short in cross-examination, partly, perhaps because of a realization that a jury may quickly spot an advocate’s failure to undermine a witness and as a result attach a disproportionate importance to his or her evidence. He also had the gift, possessed by Sir Edward Carson with whom he had worked, of crystallizing in a few questions the whole of the case he wished to advance and the bravery to do so:

“The ability to pick out the one real point of a case is not itself enough; it is the courage required to seize upon that point to the exclusion of all others that is of real importance . Painstaking solicitors will place before counsel perhaps fifty different points, all of them prepared with skill and care; it must indeed cause bitter disappointment to find them disregarded and the whole trial proceeding as though there was only one solitary element that was really worthy of consideration. It requires some courage in an advocate to stake

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<sup>45</sup> For a verbatim account of the case see *Laski v Newark Advertiser Ltd and Parlby*. Published by the Daily Express, London, 1947.

<sup>46</sup> Richard DuCann, *The Art of the Advocate*, Penguin, 1993, pp.116-117.



his own opinion perhaps against that of all who are assisting him; it is a great risk. But in a proper case he must be prepared to take it ” <sup>47</sup> .

Infelicitous or inappropriate replies of witnesses were quickly seized upon. A distinctive feature of Hastings’s style of cross-examination was use of comment after a witness had answered a question. Many of his contemporaries refrained from any comment on answers given in cross-examination until their closing speech. Sir Edward Carson, who Hastings greatly admired and was said to be influenced by, almost always put his comments within the framework of his questions. Hastings was different and showed this clearly, in 1913, soon after being made a Kings Counsel, when he was called upon to cross-examine Bob Sievier who had brought an action in libel against Richard Wootton, a race horse owner and trainer<sup>48</sup>. Sievier, a pugnacious, witty and flamboyant character, represented himself. Carson, who had been leading Hastings, was called to Ireland in the middle of examining the plaintiff. In cross-examining Sievier, Hastings matched every jest with biting comment as this brief extract shows:

Hastings: “Did you marry your first wife in 1882 ”?

Sievier: “*Unfortunately for me, I did*”.

Hastings: “Unfortunately for her, too. Did she divorce you in 1886, four years later? ”

Sievier: “ She did ”.

Another vivid example, much later in his career, is provided by Hastings’s treatment of one of the witnesses in the Harold Laski libel case:

Hastings: “Did you hear anything of this sort: Great changes were so urgent in this *country that if they were not made by consent they would be made by violence?*’ Did you hear him [Laski] say that ”?

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<sup>47</sup> P. Hastings, *Cases in Court*, William Heinemann London, 1949, page 252. An indication of Patrick Hastings’s attitude in court towards solicitors’ views on how cases should be run was given in an interview with Angela Delbourgo, a barrister and a lecturer at the College of Law in London. She had known an elderly solicitor who, in his youth as an articled clerk, once accompanied Hastings in court and sat in front of him. The young man was told by Hastings he had one, and only one, function – to push a big pile of precariously balanced books onto the floor when given a dig in the shoulders, so as to make sure the judge was awake when he put his best point. Interview on 31<sup>st</sup> October, 2007.

<sup>48</sup> *Sievier v. Wootton*, 1913. 3 KB 499. See also H. Montmomery Hyde, 1960, *Sir Patrick Hastings ,his life and cases*, London, Heinemann, pp. 76-77.

Witness: “No, not in those words”.

Hastings: “Dear, oh dear, Mr Laski seems to be so unfortunate. He must have been very *good at hearing himself; he said that is what he did say... ”*”.

Richard DuCann considered the “modern fashion” for advocates to include comment either direct or indirect in cross-examination was largely due to the influence of Hastings style<sup>49</sup>. Hastings, almost without exception, made his last question in cross-examination a comment. This, too, was copied by other barristers.

In his closing speeches to juries, Hastings spoke in a simple conversational narrative, no tortuous sentences or elegance of expression, analysed the facts and made no attempt at passionate persuasion. At all times he was able to convey to jurors he was in earnest, not merely playing a part, and that he respected their independence and judgement. Lecturing, cajoling or flattery were never resorted to. The closing speech was the main place for him to use his great ability to capture the essence of a case in just a few words.

It was a device of Hastings, before juries, to lay claim to the virtues of plain speech, straightforwardness and brevity. This is prominently illustrated in his closing speech in the Laski case when he began by saying:

“May it please Your Lordship: Members of the Jury, I can start what I have to say to you with perhaps the only bit of good news you have heard so far. That is that I only going to address you for a few minutes. I want to explain why, because I do not want you to think, and I hope you will not think, that the value of anything that is to be said to you is to be measured by the number of words”.

In order to create the impression that he was about to make an appeal to their reason, rather than the sort of emotional address which had once been popular in courts, he continued:

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<sup>49</sup> The Art of the Advocate, Penguin, Revised Edition, 1993, page 128.

“You may remember in the old days it was the habit of advocates sometimes to make long and eloquent speeches on all sorts of subjects, including comments on the Goddess of Justice who sits with scales above the court.....”.

The technique of emphasizing to jurors, early in a closing speech, that reason would be engaged became much used, especially after the triumphs of Hastings and other leading advocates who employed it. The reality, though, is that emotion is frequently disguised by advocates as reason.

Three quarters through his speech Hastings said:

“I told you I was only going to be a few minutes . I have been fifteen , and I am afraid that is too long. I wish you good luck that Mr Slade will not be four times as long . Whether you will get that good luck or not, I do not know. I doubt *it*”.

In the event Slade spoke for two hours. In contrast to the tight, well constructed and stylish speech of Hastings, his was spiritless, diffuse and very repetitive. Given the jury’s decision against Laski, which left him with enormous costs, Slade’s performance came to be seen as a lesson how not to make a closing speech <sup>50</sup> .

Whilst the rather cheap gibe against opposing counsel was not widely used, the practice of promising to be brief, keeping it, thus creating the impression of a reliable guide through the evidence, and drawing a comparison, usually implicitly, with the greater length of an opponent’s closing speech, hoping to create resentment for the time taken, was a well tried method and one that was reinforced by Hastings’s successes in major cases.

A further tactic, frequently employed by him, to gain advantage over opponents by blunting the effect of theirs, was to claim (falsely) that final speeches had little or no

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<sup>50</sup> Richard DuCann, *The Art of the Advocate*, Revised Edition, 1993, Penguin Books, London , page 201.

effect on the outcome of cases. Again this is illustrated in Laski, when towards the start of his speech, Hastings told the jury:

“I may say after long experience that I have never known a case in which anything I have said has had any affect on a jury one way or another, and therefore I have come to the conclusion that the shorter the time I take in saying it the better for everyone ”.

According to Richard DuCann, an unfortunate legacy of Hastings was that many modern advocates took him seriously in doubting that closing speeches had any effect on the outcome of cases. They treat it as “*the advocate’s eleventh commandment that they do not and stumble through the odious task of addressing the Judge or jury, boring themselves almost as much as their audience*”<sup>51</sup>.

Whilst Patrick Hastings did much to distance himself from the forensic approach of Marshall Hall they shared, despite being supremely good jury advocates, not being especially learned in the law<sup>52</sup>. In this he was not seen as a model at the bar. Nor was he for his occasional losses of temper and display of personal sensitivity; traits also in common with Marshall Hall. This is perhaps best illustrated by another passage from the Laski trial . During his cross-examination of Laski, then the Chairman of the National Executive Committee of the Labour Party, Hastings, who had been appointed Attorney General in the first Labour Government in 1924, but left active politics a few years later, broke off in the middle of a question:

Hastings:” .....are there any privileged in the Labour Party? ”

Laski: “*Why indeed, Sir Patrick, when you were a member.....*”

Lord Chief Justice Goddard: “No, Mr Laski ”.

Hastings: “Do not be rude ”.

Laski: “That is the last thing I want in the worl ”.

Hastings: “It may be difficult for you to be courteous, but do not be rude ”.

Laski: “Not in the least”.

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<sup>51</sup> DuCann, *ibid*, pp. 191-192.

<sup>52</sup> Richard DuCann, *The Art of the Advocate*, Revised Edition, 1993, Penguin Books, page 199.

Hastings: "You are rude to everyone are you not? "

Laski: "I do not think so".

Sir Patrick Hastings, in the introduction to his memoirs, published in 1949, wrote <sup>53</sup>:

"For my part, the greatest change that I have noticed during the past 40 years lies amongst members of my own profession. Ponderous oratory, once so popular, and based *undoubtedly upon Cicero's orations, has completely disappeared*. Just as Gerald du Maurier sounded the death knell of the old time school of thunderous declamation from the stage <sup>54</sup> so Edward Carson put an end to forensic platitudes and passionate but irrelevant perorations from the bar. That such a change is an improvement no wearied juryman would *deny*".

There can be little doubt that Patrick Hastings, through his numerous triumphs at the Bar, influenced advocacy in a number of ways including: the practice of cross-examination and closing speeches: the need for carefully chosen words, to support a well thought out strategy, and to use them with economy and without unnecessary repetition; forcible and direct delivery without adornment; and an emphasis on an appeal to reason, rather than apparent emotion. His plain, conversational and highly concentrated, rather than diffuse, form could well be seen as taking advocacy further than had been begun by Edward Carson, Rufus Isaacs, and F E Smith. The success of Hastings before juries, it is argued, indicates not only how he was able to speak in the language of his time but also his ability to understand the sensibilities of jurors, who were now so very different, for a variety of social factors, from those in earlier times. It is possible to speculate that his association with drama criticism and writing plays himself may have aided his comprehension of the contemporary mind.

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<sup>53</sup> Cases in Court, London: Heinemann, pp. xi- xii.

<sup>54</sup> To support himself through his studies at the Middle Temple Hastings worked as a journalist specializing in theatre gossip and reviews and in 1925, whilst contemplating an alternative career as a playwright, wrote *The River*, which was produced in London that year.

## Norman Birkett.

Lord Birkett( 1883-1962), more widely known during his lifetime as Norman Birkett, K. C. was called to bar in 1913, took silk in 1924 and became a judge in the Kings Bench Division in 1941. He was one of the British judges at the trial of major war criminals at Nuremberg. Afterwards, he was made a Lord Justice of Appeal. When at the Bar he established a great reputation as an advocate in the civil and criminal courts and was much in demand<sup>55</sup>. Notable civil clients included Lady Gladstone, Lady Mountbatten and Mrs Wallace Simpson. He appeared either for the prosecution or the defence in a number of murder trials and sensational criminal cases. Shortly before his appointment to the High Court Bench, as was the custom, at least until the 1960's, for eminent QCs about to be elevated to the judiciary to be given a notorious murder case, he was presented in 1931 with the brief to prosecute Rouse<sup>56</sup>, a motorist alleged to have murdered his passenger and then set fire to his car to destroy the body and the evidence. An expert engineer for the defence gave evidence about the fusion of two bits of metal, thereby establishing a powerful point for the accused. Birkett rose to cross-examine.

“What ” he asked in his precise, musical way,” is the co-efficient of brass?”

The witness replied “*I do not know*”.

The question had taken the expert completely unaware. It made him so wary of Birkett, that when he was asked: “*You are an engineer, aren't you?*” he said “*I suppose so!*” Quickly and devastatingly, Birkett had destroyed his credibility entirely<sup>57</sup>.

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<sup>55</sup> Whilst as KC, his income averaged £30,000 annually : H. Mountgomery Hyde, Norman Birkett: The life of Lord Birkett of Ulverston, Hamish Hamilton, 1964.

<sup>56</sup> At Northampton Assizes commencing on the 21<sup>st</sup> November, 1931.

<sup>57</sup> Birkett's destruction of the engineer's credibility in R v Rouse ( Unreported), by asking a very basic question an expert may not remember, became famous at the Bar and the technique subsequently emulated, with varying degrees of success, in cross-examining experts in numerous fields. Indeed it is still influential. Keith Evans, in his book, Advocacy in Court, Blackstone Press, 1995, which is widely read by bar students, and recommended reading at a number of colleges where the Bar Vocational Course is taught, uses it as an example of how to challenge a witnesses' expertise by making an in-depth study of just one tiny area on which to question at the beginning of cross-examination: “Nobody – perhaps not even the ultimate leader in the field- knows *everything about his subject*”, pp.165-166.

Birkett and Hastings were regularly pitted against each other much in the same way as Edward Carson and Rufus Isaacs in the previous generation and more recently Edward Marshall Hall and Henry Curtis Bennett had been. Birkett's biographer, H. Montgomery Hyde, described how differences in forensic methods employed by the two advocates were reflected in their respective styles of cross-examination, each equally effective and produced similar results:

“Hastings, with his beetling eyebrows, would fix an unfortunate witness with a severe look. ‘Now, let me see, Mr A.’ he would say and proceed to fire questions at him in such quick succession that he sometimes laid himself open to the charge of bullying. His friend Roland Pertwee, with a euphemistic touch, has described his manner in handling witnesses in court as ‘cool, concise and gently cynical’. Birkett on the other hand, had a more suave and polished approach, as well as perhaps a deceptively friendly one. ‘I wonder if you can help me, Mr. A.’ he would usually begin. But the admissions which he gradually and eventually elicited, ... .., could pulverize a prevaricating or untruthful witness as completely as Hastings’s more robust methods of questioning”<sup>58</sup>.

Later in his life he lectured, broadcast and wrote about advocacy. It can be said with certainty that he too influenced other advocates in the first half of the 20<sup>th</sup> Century and beyond.

In an address to the Holdsworth Club of the Faculty of Law in the University of Birmingham in 1954<sup>59</sup>, Lord Birkett outlined much of his views about the advocacy he had delivered and liked to hear as a judge. He acknowledged the vast importance of: mastering the facts of the case; knowledge of the relevant law; the special qualities needed for examination in chief<sup>60</sup> and cross-examination and re-examination; the selection and formulation of the arguments; the widely differing styles of advocacy required for particular tribunals, whether they be judge alone, or

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<sup>58</sup> H. Montgomery Hyde, Norman Birkett:; The Life of Lord Birkett of Ulverston, London, Hamish Hamilton, 1964, page 221.

<sup>59</sup> Delivered on 7th May, 1954.

<sup>60</sup> Birkett excelled in the ability to obtain convincing evidence from witnesses by speaking to them plainly and in simple sentences. Edgar Lustgarten, Sir Norman Birkett, BBC Radio 4, broadcast in 1970.

judge and jury, or appellate courts; and the construction and arrangement of opening and closing speeches. However, Birkett considered the over-riding quality to be – command of language:

“If the argument of the advocate is presented in clear and choice language which seems to come naturally and easily from the speaker ,and if in addition the advocate can make use of what appears to be quite natural gesture, the very argument itself seems more persuasive”.

Differing somewhat from Sir Patrick Hastings, who spoke forcibly without elegance of expression, ornamentation and embellishment, Birkett believed that:

“in the main task of advocacy, the exposition, the narrative, the summing-up, the persuasion, the advocate may use, and I think ought to use, the full range of our wonderfully flexible English speech. For there is no speech to equal it in its amazing richness of *expression.....*”.

Therefore, he held the advocate should be a student of words, knowing something at least of their history, sound, meaning, associations and, above all, the use that great masters of the tongue have made of them. In this respect Birkett considered it well to know the Authorised Version of the Bible, the Book of Common Prayer, and have a knowledge of “the great triumvirate, Chaucer, Dryden and Shakespeare – who did so much to mould the fashion the *language*”, and of writers like Swift, Sterne and Defoe,” *the great stylists*”.

To him, even in casual conversation, natural and graceful English was a desirable accomplishment, which most people found pleasant and a surprising number secretly wished to attain themselves “And how much more is it to be desired when the whole purpose of the advocate is to gain the ends he seeks by the impression he creates upon the particular *tribunal before which he appears*”.

***Factors influencing the style of advocacy that had become established.***



Other, deeper reasons, contributed to the mainly conversational and matter of fact advocacy that had become established. Taste for melodrama, strong sentiment and froth, much represented in Victorian drama and literature, had waned in the late 19<sup>th</sup> Century and was displaced by a more restrained and reflective aesthetic with an emphasis on realism. In the 1890's drama in Britain, through George Bernard Shaw and others including Henrik Ibsen, the pioneer of modern realistic drama, became a forum for considering moral, political and economic issues <sup>61</sup>.

Almost since rhetoric began in ancient Greece there was disagreement between those who saw it as a means of authenticating truth and those who saw it as a method of deception, sometimes termed "false rhetoric". Although the 19<sup>th</sup> Century was a deeply oratorical age, as the century wore on, rhetoric came to be popularly seen in a negative light. Two instances perhaps best illustrate this. As early as the 1860's, Thomas Huxley ("Darwin's Bulldog") accused the opponents of Darwin's theory of evolution of hiding behind rhetoric. In a famous speech in 1879, Disraeli, in possibly an example of the pot calling the kettle black, said of Gladstone, then the Prime Minister, that he was:

"A sophistical rhetorician, inebriated with the exuberance of his own verbosity, and gifted with an egotistical imagination that can at all times command an interminable and inconsistent series of arguments to malign an *opponent and to glorify himself*" <sup>62</sup>.

Drawing from drama, and indicative of feeling towards rhetoric at the beginning of the 20<sup>th</sup> Century, Harley Granville-Barker, in his 1905 play, *The Voysey Inheritance*, about the effects of corruption in a family firm of solicitors, has the bluff army major, Booth, say on a number of occasions, Do not speak rhetoric to me!, when he thinks others are not being straight forward with him.

Dramatic types of advocacy, in which counsel adopted mannerisms, tricks of speech, gestures, aggression and sometimes insults, became seen as a part of rhetoric, in the pejorative sense of artful bombast and verbal chicanery, and for that reason were widely disapproved. Jurors became far better informed than before, capable of seeing through it and resentful when empty rhetoric was tried on them. It may well be that the success of men such as Hardinge

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<sup>61</sup> In an address, entitled *Advocacy and Acting*, to the Oxford University Law Society, delivered in 1966, Sir James Stirling, then a High Court Judge in the Probate, Divorce and Admiralty Division, saw changes in styles of advocacy paralleling styles of acting: in both spheres the grand manner and the purple patch becoming unfashionable at roughly the same time. However he does not develop his thesis further. *Verdict*, VOL. 2. NO. 1. 1966. pp. 7 – 9.

<sup>62</sup> Quoted in *The Times*, London, July 29<sup>th</sup>, 1879.

Giffard, John Holker, Charles Russell, and Edward Clarke was partly because they recognised the change in the mood of the public towards rhetoric and altered their advocacy accordingly in the later 19<sup>th</sup> Century.

As a consequence of 19<sup>th</sup> Century reforms, education was available to more people <sup>63</sup>. Universal elementary school education, with its emphasis on the “3 Rs” (reading, writing and arithmetic), was introduced in the 1860’s. Although teaching ended at an early age, the basic literacy and numeracy provided by it gave many the means of obtaining further knowledge <sup>64</sup>.

Parliament’s decision in 1857 to create public lending libraries provided an important source. The growing number of national and municipal museums and galleries helped stimulate intellectual curiosity. Working class self improvement, though unevenly spread, was another significant cause of increase in overall educational standards<sup>65</sup>.

Dozens of new private schools, often modelled on Thomas Arnold’s Rugby School, to cater for the sons, and some daughters, of the growing middle class were opened in the latter part of the Nineteenth Century. These added to the general level of education in society.

Beyond elementary education, the content of many school curriculums expanded to encompass the burgeoning sciences with their rational enquiry. Increasing amounts of knowledge were disseminated in newspapers and , in the next century, by wireless. By the 1880’s Darwin’s theory

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<sup>63</sup> See Michael Hyndman, *Schools and Schooling in England and Wales*, a documentary history, Harper and Row, 1978, especially Chapter 10, with a chronology of principal educational reforms in the 19<sup>th</sup> and 20<sup>th</sup> Centuries.

<sup>64</sup> In assessing factors which led to a general improvement in educational standards in the 19<sup>th</sup> Century, Professor Rosemary Ashton ( University College London, Department of English Language and Literature, interviewed on 13<sup>th</sup> November, 2007 ) considered publication and wide circulation of pamphlets, magazines and books, with the purpose of educating persons of modest learning, was of significance. Such works were produced cheaply by commercial publishing houses, including John Murray, exploiting contemporary advances in printing technology and distribution . Informative and sometimes entertaining, works were also published by non commercial organisations whose aim was to promote education amongst the masses. Prominent amongst these was the Society for the Diffusion of Useful Knowledge which operated during the first half of the century.

<sup>65</sup> Jonathan Rose, *The Intellectual Life of the British Working Classes*, Yale University Press, 2001, based upon the evidence of almost two thousand published and unpublished memoirs from 19<sup>th</sup> and 20<sup>th</sup> Century Britain, portrays a picture of a working class determined to achieve self-education by reading literature, including the Roman and Greek classics, going to concerts and the theatre - Shakespeare and other classical dramatists attracted enthusiastic and rowdy working class audiences, learning to play musical instruments, setting up mutual improvement societies and establishing the Workers Educational Association in 1903. In an interview, held at the Royal Society, London, on 2<sup>nd</sup> July, 2010, Professor Rose agreed with the thesis that jurors drawn from a more educated society than previously could reasonably be supposed to have expected more of an appeal to reason and to examine evidence more closely than before. He saw working class and lower middle class self – education contributing to this.

of evolution had entered popular culture <sup>66</sup>. Religious certainty, because of scientific explanation - succinctly put, *Darwin's books* drove a cart through an older book - began to lessen from mid Victorian times. For this and other reasons, it diminished still further in the remaining part of the century and after<sup>67</sup>. The sort of impassioned appeal before juries to the deity, quotations and stories from the bible, so much used earlier, could no longer be relied upon. In short, jurors with broader perspectives expected more of an appeal to reason from advocates in a conversational and matter of fact manner, rather than one histrionically directed at their emotions and faith <sup>68</sup>. From the 1920's it has been suggested that distaste for the continental European demagogues, such as Hitler, Mussolini, and Franco, with their power by oratory and theatre to move audiences in terrible directions, may also have contributed to jurors' suspicions of obvious rhetoric <sup>69</sup>. The advent of radio broadcasting led to widespread abandoning of grand declamatory forms of public oratory in favour of a more personal "fireside" approach. It may be reasonable to suggest that this further helped the cause of conversational, rather than declamatory, advocacy before juries.

In the first capital defence case he conducted on his own, that of Marie Herman in 1894, an Austrian prostitute charged with killing a client, Marshall-Hall, with tears streaming down his face, told the jury in his peroration: "Remember that these women are what men made them; even this woman was at one time *a beautiful and innocent child*". Flinging an arm in the defendant's direction in the dock he continued: "Look at her, gentlemen of the jury. Look at her. God never gave her a chance - won't you?" . Just a few decades later, because of jurors' different expectations, this approach would have been received with embarrassment rather than anything else: no longer dazzlingly effective oratorical pyrotechnics; at best a damp

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<sup>66</sup> On the Origin of Species by Means of Natural Selection (1859), The Descent of Man and Selection in relation to Sex and The Expressions of the Emotions in Man and Animals (1872) were read by a large section of the public. Many more people would have absorbed Darwin's key ideas from reports in the press.

<sup>67</sup> . See J. F. Von Arx, Progress and Pessimism: Religion, Politics and History in late 19<sup>th</sup> Century Britain. Harvard University Press, 1985.

<sup>68</sup> Touching on this subject, George Elliot K.C., in his Forward to Illustrations in Advocacy by Richard Harris K.C. Fifth Edition, 1915, a work intended mainly as a guide to effective court advocacy for newly qualified barristers, wrote: Further it may also be remembered that the development of education amongst all classes of the people has rendered juries much less susceptible to mere tricks of advocacy and less easily diverted from the real issues before them.

<sup>69</sup> See Andrew Watson, Changing Advocacy, Part Two, Justice of the Peace, Vol.165, 13<sup>th</sup> October, 2001, page 808.

squib<sup>70</sup>. Along similar lines, J Alderson Foote recounted how Montagu Williams defending a prisoner charged with fraud in 1877 (Chapter Four), said of two witnesses against his client: “Excellent in vice and exquisite in fraud – the cunning of a cat teeming from the eyes of one; the oily soft serpent-like treachery of deceit trickling *from the mouth of the other*”. Foote, speculating on how jurors would react in 1910, said:

“Few indeed are the advocates nowadays who could venture upon such flights without exciting *derision*”<sup>71</sup>. In 1921, Bernard Kelly explained how juries now seemed to have a higher appreciation of facts, usually little regard for mere graces of language and almost none for sentimental appeals: “..... cynical yawns, and not higher emotions, more often than not greet the most pathetic efforts of counsel to create a sentimental leaning towards their clients *at the expense of actual fact*”<sup>72</sup>.

Amusingly, drawing on recollections from his career, A W Cockburn QC described a case when “grandiloquence” and “idle histrionics” did not commend itself to a jury; the implicit message being that a more conversational style might have done so:

“I cannot forget hearing an extraordinary peroration in a very ordinary case some years ago which finished up with, ‘Members of the Jury, the moving finger writes, and having writ moves on.....’ Then came a slight misquotation, and with a flourish of his coloured handkerchief, the exhausted orator sat down. It had all been very moving; and after a short breath-taking pause, came the summing up, in which the empyrean level was not even aimed at; and in a few seconds an earth-bound jury were in their own simple way recording what they thought about coloured handkerchiefs and moving *fingers*”<sup>73</sup>.

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<sup>70</sup> Very much to the surprise of counsel for the co-defendants in the much publicised Mary – Ann Leneghan case, which took place in 2005 and involved the murder by a gang of a teenage girl and an attempt to kill her friend, Gilbert Gray QC used the words God never gave him a chance – *won't you?* in his closing speech for a defendant. He was convicted. Interview with Anthony Arlidge QC, who represented another defendant, held on 30<sup>th</sup> October, 2007.

<sup>71</sup> Piepowder, J. Murray, 1911, page 176.

<sup>72</sup> Famous Advocates And Their Speeches, London, Sweet and Maxwell, London, Sweet and Maxwell, 1921, page 27. Thirty eight years before, certainly not followed then by all barristers in criminal trials, more a call for it to be so, Sir James FitzJames Stephen, wrote of advocacy: “It is impossible to be eloquent in the sense of appealing to the feelings without more or less falsehood, and an unsuccessful attempt at passionate eloquence is of all things the most contemptible and ludicrous, besides being usually vulgar. The critical temper of the age has exercised an excellent influence on speaking in the courts. Most barristers are justly afraid of being laughed at and looking silly if they aim at eloquence, and generally avoid it by keeping quiet”. Sir James FitzJames Stephen, A History of the Criminal Law of England, MacMillan and Co, London, 1883, page 454.

<sup>73</sup> In Limine, An Address on advocacy to the Christ Church, Oxford, Law Club, May 15<sup>th</sup>, 1952, Published by the Faculty of Law, University of Southampton.

By changing their style of advocacy before juries towards the conversational and matter of fact, barristers consciously, or sub-consciously, followed Cicero's cautionary advice given centuries ago and avoided the "very cardinal sin in oratory; that is to depart from the language of everyday life and usage approved of by the sense of the community" <sup>74</sup>.

A possible further explanation for the transformation to a more conversational and matter of fact advocacy may have been the reduction of court reporting in newspapers, removing much of the gallery from the stage. Attempting to catch the eye of the press for words spoken in court, aiding a barrister's reputation, (sometimes also very useful to fulfill political ambitions) was an important contributory factor behind the emotive, theatrical, florid, and aggressive advocacy of the early Victorian period and after <sup>75</sup>. As late as the 1930's proceedings in court were still much reported, making barristers household names<sup>76</sup>. For instance in a popularity poll organized in 1935 by William Hickey, the Daily Express columnist, who invited readers to write to the newspaper naming the public personalities they most liked reading about, Norman Birkett got into the first twenty<sup>77</sup>.

After the War there were fewer reports from the courts, partly because of a shortage of paper and newsprint which led to cuts in the size of papers generally (For a time newspapers were restricted to only eight pages.). Sir Patrick Hastings, in 1949, compared the situation with "not very long ago when every trial of the slightest importance was reported in the public press". He continued: "Morning papers had a page devoted to Law reports; evening papers displayed posters announcing every detail of so-called important trials and possibly even of the persons mainly concerned; there were murder cases, libel cases, cases about old ladies disputing over garden walls, even breach of promise cases. Every tribulation known to human life was brought before us and its appropriate remedy

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<sup>74</sup> De Oratore (translated by E W Sutton and H Rockman, Loeb edition, 1942) 1.iii.12.page 11.

<sup>75</sup> J R Lewis, The Victorian Bar, Robert Hale, London, Chapter 1. A tradition of courting the press appears to have survived until the late Twentieth Century. A senior judge, interviewed on 11<sup>th</sup> July, 2007 (Lord Justice Sedley), spoke of how some barristers, at least up until the end of the 1970's, would try to cultivate interest amongst journalists in their achievements by drinking and dining with them in public houses in Fleet Street, then the centre of the newspaper industry, or sending their clerks to do so.

<sup>76</sup> In the one man show he performed in the years before his death in 2009, John Mortimer would reminisce about how his father, Clifford Mortimer, a blind divorce barrister who freely quoted poetry in court, drawing on a vast store, would demand that his wife read out detailed news reports of current divorce trials when they were traveling together in crowded railway carriages, often to the embarrassment of other passengers.

<sup>77</sup> Daily Express, February 1<sup>st</sup>, 1935. Lloyd George headed the list closely followed by Winston Churchill and Lord Beaverbrook. The other popular favourites included Gracie Fields, Bernard Shaw, Franklin Roosevelt, Mussolini, Rudyard Kipling, Greta Garbo and the Aga Khan, with whom Birkett tied for the final place amongst the first twenty.

displayed. When the Courts were closed , the papers were half empty, and people knew that the silly season had arrived; something was missing from their daily lives ” <sup>78</sup>.

The decline in volume of reports from court, and hence attention given to the efforts of advocates, appears to have continued throughout the 1950's. Reduced press interest in the courts was noted by Lord Birkett at the start of the 1960's <sup>79</sup> .

The thesis continues by considering alterations in advocacy before juries in the second half of the 20<sup>th</sup> Century and what has accounted for them (Chapter Ten). Changes scrutinized include: the falling away in the use of Aristotle's ancient order of closing speeches, which usually ended with an emotive peroration ; the enormous expansion of eligibility to serve on juries, a democratisation , brought about by the Juries Act 1974, leading to great adjustments in the way jurors were addressed and to different allusions and references made by advocates; the reduction, and eventual abolition, by the Criminal Justice Act, 1988, of peremptory challenge of jurors; the removal of certain offences from Crown Court jury trial; prosecutions conducted in more measured tones and more methodical and less aggressive defences, although the latter was not always being seen in sexual offences cases; decline in weight attached by juries to police evidence; less heavy drinking by some barristers and the positive effects of this on their performance in court; the rise of plea bargaining and the need to mitigate effectively after guilty pleas; the introduction of Social Enquiry Reports and their effect on pleas in mitigation; the need to make, and respond to, submissions arising out of key changes in evidence and procedure concerning exclusion of confessions, when adverse inferences can be drawn from silence to questions put to the accused and from admission of a defendant's bad character; increased employment of expert witnesses in trials; the use of special measures for vulnerable and intimidated witnesses and of witness protection orders in trials of serious and violent offences; submission of written skeleton arguments on complex questions of law; and victim impact statements. The prospect of trials without juries in complex frauds and where there is a danger of jury tampering is also looked at.

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<sup>78</sup> P. Hastings, *Cases in Court*, Heinemann page 12.

<sup>79</sup> *Six Great Advocates*, Penguin, 1961, page 9.

