Legal Notes.

The Art of Cross-Examination.*—If the practising lawyer expects to find Mr. Wellman's book a manual of the cross-examiner's art, he is likely to be disappointed. If the man unversed in law expects to find in this book some account of the methods that trial lawyers adopt in worming out of resistant witnesses the truth which they have sworn to tell, and very often refuse to tell, he will be more than gratified. In a word, whatever may have been Mr. Wellman's intention in preparing this book, it will be read with most interest by men who are not lawyers.

Mr. Wellman's long experience as a resourceful cross-examiner has singularly fitted him for the task of presenting a clear analysis of the methods which every good trial lawyer consciously or unconsciously adopts. Contrary to many cross-questioners, Mr. Wellman does not believe, as a general rule of procedure, in bullying every witness into telling the truth. Sometimes it is necessary; and even then it may not attain the desired end. Mr. Wellman states that the late Benjamin F. Butler was one of the few men who employed the method of roaring at a witness successfully. One example of what is politely termed his "vigorous" method of cross-questioning was afforded when, on one occasion, he began savagely to examine a distinguished Harvard professor. The presiding judge, struck by the indignities to which the witness was being subjected, reminded Butler that the man in the box was a Harvard professor. "I know it, your Honor," replied Butler; "we hanged one of them the other day." In striking contrast to Butler was Rufus Choate, of whom it was said that "he never aroused opposition on the part of the witness by attacking him, but disarmed him by the quiet and courteous manner in which he pursued his examination." In Mr. Wellman's opinion the good advocate should be a good actor. The play of the facial muscles, a look in the eyes, perhaps a smile, may often do more to convince a jury than actual words. Perfect self-possession is one secret of a skillful advocate's success in court. Damaging admissions by his own witness should never disconcert him. An excellent example of the effect of manner rather than of words upon a jury is quoted by Mr. Wellman from O'Brien's "Life of Lord Russell." Once when cross-examining a witness of the name of Sampson, who was sued for libel as editor of the Referee, Russell asked the witness a question which he did not answer. "Did you hear my question?" said Russell in a low voice. "I did," said Sampson. "Did you understand it?" asked Russell in a still lower voice. "I did," answered Sampson. "Then," said Russell, raising his voice to its highest pitch, and looking as if he would spring from his place and grip the witness by the throat, "why have you not answered it? Tell the jury why you have not answered it." A thrill of excitement ran through the courtroom. Sampson was overwhelmed; and he never pulled himself together again.

As to the matter of cross-examination, which forms the topic of an entire chapter, all that can be said is summed up in David Graham's jesting remark: "A lawyer should never ask the witness on cross-examination a question unless in the first place he knows what the answer would be, or in the second place, he doesn't care."

The task of exposing a witness who is not telling the truth, by the wiles of cross-examination, to make him convict himself out of his own mouth, requires more than ordinary adroitness. The difficulty lies in the fact that it is so hard to sift the true from the untrue. Even the habitual liar sometimes tells the truth. It is in his exposition of the method of detecting perjury that Mr. Wellman has given us one of the most valuable discussions of his book. The man who is able to repeat his story over and over again, using almost the identical words in each narration, says Mr. Wellman, is always open to suspicion. If he is suddenly stopped in the middle of his story, and made to start again at the very beginning, he is almost sure to betray the fact that he is reciting a carefully-prepared tale. Having no facts to associate with the wording of the story, he can recall it to mind only as a whole, and not in detachments. By distracting his thoughts to incidents not forming a part of his narrative, and then by returning to those considerations about which he has been first questioned, he is sure to be trapped. He cannot invent answers as fast as a lawyer can invent questions. It is the "instinct for the weak point" that here assists the questioner. Sometimes the lawyer confines himself to one or two salient points, on which he feels confident that he can make the witness contradict himself. An excellent example of this method may be found in the oft-repeated story of Abraham Lincoln's convincing a jury that the witness could not have seen his client commit the murder for which he was charged, by the light of the moon, for the reason that there was no moon at the time the murder was said to have been committed.

The sharpest battle of wits in the courtroom is to be found when the cross-questioner meets the expert. It has become a matter of common observation that not only can honest opinions of different experts be obtained upon opposite sides of the same question, but also that dishonest opinions may be obtained upon different sides of the same question. It is dangerous for a cross-examiner to attempt to cope with a specialist in his own field of inquiry. And yet it is often done with some success. During the famous Carlyle Harris case, in which Mr. Wellman himself played no small part, the prosecution won its case largely upon the information which it had gathered in a thorough examination of six thousand reported cases of morphine poisoning. The distinguishing symptom of the case was symmetrical contraction of the pupils of the eyes. There was no doubt that Mrs. Harris, for whose murder Carlyle Harris was on trial, had taken capsules containing harmless doses of quinine and morphia. The theory of the prosecution was that Harris, who had reasons for wishing his wife out of the way, had emptied one of the capsules and filled it with morphine, thus causing her death. On the trial an expert testified that symmetrical contraction of the pupils was not a certain symptom of morphine poisoning, and that his belief was grounded on a case recorded by a Prof. Taylor. When this point was reached, the cross-examining counsel asked: "Well, sir, did you investigate that case far enough to discover that Prof. Taylor's patient had one glass eye?"

By far the most interesting chapter in Mr. Wellman's book is that which he entitles "Some Famous Cross-Examiners and Their Methods." It is filled with many a striking example of the methods of Russell, Choate, Butler, and Mason. Undoubtedly the most dramatic piece of cross-examination that Mr. Wellman has recorded is that of Piggott by Sir Charles Russell before the Parnell Commission. So overwhelming was it, that two days later Piggott fled to Paris. He later admitted that he had perjured himself, and committed suicide.

Mr. Wellman's book as a whole may be considered a most excellent presentation of both the merits and abuses of cross-examination as it is conducted in criminal trials. Without having written in any sense of the word a textbook, he has given us an admirable work on a subject with which only the trial lawyer is intimately familiar, and yet which is of interest to every man.

* The Art of Cross-Examination. By Francis L. Wellman, of the New York Bar. With the cross-examination of important witnesses in some celebrated cases. New York. The Macmillan Company. 1903. Small 8vo. Pp. 283.

Historical Sketch of Patent Practice.—Mr. F. T. Wentworth contributes an instructive article to the American Machinist in which he gives an historical outline of our law of patents. The granting of letters patent was not altogether the prerogative of the King, for the first legislation in England on this subject, in about the year 1623, was for the purpose of defining the right of royalty in the granting of monopolies and confining letters patent to inventions, thus settling a disputed point as to the King's right to grant such, and preventing the continuance of that flagrant abuse of the executive power which had led to the granting of business monopolies covering all forms of trade during the reign of Elizabeth. These grants were extremely obnoxious to those engaged in all branches of industry, inasmuch as they were generally to court favorites who had no facilities for utilizing the same except by trading in the franchises so acquired.

When the United States gained their independence, the mantle of sovereignty did not fall upon the President, but upon each of the several States, where in the major part it remains to the present day.

The several States were, therefore, each vested with the right under the law existing at the time of the adoption of the Constitution to grant patents for inventions, and there are several known instances where a State actually did grant patent rights. Whatever power the United States government has in patent, as in all other matters, is traceable directly to some Constitutional provision and was not the result of any precedent set by sovereignty abroad, but of patent laws passed by Congress in accordance with powers vested in it by the Constitution.

The first United States patent law was passed in 1790 and provided that the secretary of state, the secretary of war and the attorney-general, or any two of them, might grant letters patent for an invention if they deemed it sufficiently useful and important. The application papers were addressed to the three officials named above, but it was expressly provided that the letters patent themselves should be attested by the President, examined by the attorney-general, recorded by the secretary of state, and sealed with the seal of the United States.

This practice was changed by the patent act of 1793 by vesting in the secretary of state alone the power of passing upon applications for patents, the practice in other respects remaining unchanged.

Under both these laws the granting of the patent was not compulsory, the said laws merely vesting in the secretary of state the power to grant letters patent if he considered the subject matter of an application sufficiently useful and important. There was, probably, no examination made as to novelty under either of these laws, but as the filing of a model or specimen was compulsory, it is apparent that an examination as to utility or operativeness was always had. The examination of the attorney-general was, as in most countries to-day, merely as to the form of the papers. It was under this law of 1793 that the "old patent" of the article was granted, and, to be valid, that patent must have contained the attestation of the President and have been countersigned by the secretary of state and also by the attorney-general to evidence that it had been duly recorded and was in proper legal form.

The granting of patents was a function attached to the department of state and so continued until 1870, when by the statute of that year the patent office was attached to the department of the interior, which had been founded in the interim, to wit, in 1849. There has been at different times agitation tending toward the formation of a separate governmental department for carrying on this work, but it is probable that the patent office will continue to be under the supervision of some one of the other departments.

The practice of granting patents without compulsory examination as to novelty continued until 1836, which year saw not only the destruction of the patent office building and its entire contents by fire, but the destruction by legislation of the old practice and the entire reorganization of the patent office upon the existing lines. This patent act of 1836 was really the beginning of the present patent system. But 10,000 patents had been granted in the half century preceding its adoption, and since, the number has been nearly 750,000.

This act of 1836 not only provided for the examination of all applications in relation to the known art, but created the office of commissioner of patents. We find the patent office report of 1835 signed "Henry L. Ellsworth, Superintendent," and that of 1836, "Henry L. Ellsworth, Commissioner of Patents," the first report so signed. Patents from July 4, 1836, to July 8, 1870, were not signed by the President, but by the secretary of state and countersigned by the commissioner of patents. Thereafter and until within the past few months, each patent was signed by the secretary of the interior and countersigned by the commissioner of patents. At present, however, a patent is signed by the commissioner of patents only.

The first patent issued after the law of 1836 took effect was to John Ruggles, of Thomaston, Maine, on July 13, 1836, a patent which does not seem to have attained any prominence in patent lore beyond having been so issued. It is probable that this patent was granted under the old system, as patent No. 1 (the present numbering of patents dates from 1836 only) was granted to the same party under date of July 28, 1836. The invention of this patent was a "locomotive steam engine for inclines and declines," and seems to have been of no greater prominence in the history of patents than the earlier patent referred to.

The date of the advent of the patent attorney is not positively ascertainable. It is more than likely, however, that he was always present, if only in an advisory capacity. It is worthy of comment that it is generally recognized, both within and without the patent office, that the patent attorney of to-day who does his work conscientiously is the factor which enables the immense volume of business transacted in the patent office each year to be carried on expeditiously, and that the value of many patents is attributable largely to his knowledge of the requirements of patent office practice and of the manner of treating each application to meet such requirements, a knowledge attained only by experience and which embraces every stage of a patent application from its preparation to its final allowance. Although he acquires a considerable fund of theoretical knowledge pertaining to the arts, his business is more particularly to see that the application is filed and sent to issue couched in terms which clearly distinguish the invention for which the patent is sought.

The patent office each year receives from 35,000 to 40,000 patent applications and issues from 25,000 to 30,000 patents. Of the applications on which patents are not granted, some are found upon examination to be for well-known structures, others are duplicates of applications by other inventors, still others are abandoned and the remainder fail to issue because the device is not of sufficient merit over the known art to be patentable. The number of applications seems to increase each year, and the delay in disposing of them in the patent office is due to the failure to develop the capacity of the office in proportion to the increased volume of business.