

Victorian jury court advocacy and signs of fundamental change

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Victorian jury court advocacy and signs of fundamental change.

Abstract.

Over the last three centuries advocacy in the courts of England and Wales, and other common law countries, has been far from static. In the second half of the 19th century, roughly until the beginning years of the 1880's, the foremost style of advocacy before juries in English criminal and civil cases was melodramatic, declamatory and lachrymose. Aggressive and intimidating cross-examination of witnesses took place, sometimes, unless restrained by judges, descending into bullying. Questions asked often had more to do with a blunderbuss than with a precise forensic weapon. Closing speeches were frequently long and repetitious. Appeals to emotion, and prejudice, usually reaching their peak in the peroration, were often greater than those to reason. The Diety and the Bible were regularly invoked. Vivid and floral language was employed and poetry liberally put to use to awaken generous sympathies. Examples of this style of advocacy, parodied amongst others by Gilbert and Sullivan's in their *Trial by jury* - a short comic operetta, first staged in 1875, about a trial of an action in the Court of Exchequer for breach of promise to marry, are presented.

However signs of change began to appear. Men like Hardinge Giffard, who became Lord Halsbury and Lord Chancellor for a total of eighteen years, John Holker, later to be appointed Attorney General, Charles Russell, a future Lord Chief Justice, and Edward Clarke began to significantly change the style of advocacy. Their approach was quieter, more learned and less inclined towards violent appeals to emotions, use of florid language and quoting widely from popular verse and literature. Less concerned with relying on the tricks of the Victorian stage, they also were developing a more dignified and controlled manner in their conduct towards each other and to witnesses. These barristers tended to select the best arguments from their client's case and to drive them home forcefully to jurors, rather than saturate them with rhetorical elaboration of all conceivable points. They also avoided tiring juries with needless repetition. In the bar's tradition of copying what appeared to succeed, they began to be emulated by its junior members. Their success may well have been because they recognised that jurors, for a

variety of reasons, were becoming better informed and educated and expected more than empty rhetoric, artful bombast, verbal chicanery, dramatic gestures and aggression. At the end of the 19th Century and during the first quarter of the 20th Century the jury advocacy of Rufus Isaacs, Edward Carson, F. E. Smith and Edward Marshall Hall, who frequently opposed each other in greatly publicized cases, was an important influence on other barristers of the period and beyond. In very broad terms, and aware of the limitations of this approach, it might be said that the first three were the descendants in advocacy of Hardinge Giffard, John Holker, Charles Russell and Edward Clarke, but who took the art further - especially in employing conversational language and in carefully planning precise cross-examination rather than making long and emotive closing speeches; the small quiet sniper's rifle with accurate sights was replacing the loud blunderbuss, often unpredictable in results and dangerous to its user. Marshall Hall's advocacy, on the other hand, with its blatant appeal to emotion, sometimes sprinkled in tears, fell within the tradition of 19th Century histrionic advocacy.

Introduction.

Courtroom advocacy has not developed according to an over-riding logical plan, but has grown piecemeal and at an uneven pace, the result of a complex interplay of many influences. A non exhaustive list of principal factors , the relative importance of each has varied over time, includes: the effect on juniors of successful styles and approaches used by senior advocates; judicial tastes for the advocacy of lawyers, especially in the absence of jurors, when it is usually for the practical and the unadorned; changes in court procedure made by judges; reforms in the law of evidence concerning who and what may be put before courts and informing the content of submissions made; alterations in civil and criminal procedure and in the substantive law; the amount of media reporting of court cases; public and press opinion about the acceptable limits of advocates' tactics and oratory; the forming, by advocates, of professional rules of conduct and how much they are followed; levels of respect and civility between the bench and the bar; the standing of the judiciary and its power to control proceedings in court; the extent to which juries are used in trials and the social origins of those serving on them; greater education of jurors and less susceptibility by them to

melodramatic appeals to emotion; awareness by advocates that in addressing juries they have to take into account contemporary use of language and , when making allusions, draw on popular culture, itself far from still, formed by newspapers, novels, radio, films, television and increasingly the computer internet; the school educational curriculum, which has substantially evolved, usually received by lawyers and judges; general styles of public speaking and discourse in society; the formal teaching of advocacy, only introduced comparatively recently; and a relationship, although not a simplistic one , between quality of advocacy and the amount parties and the state are prepared to pay for it. New technology will, very probably, exert a strong influence on future forensic oratory. Recent widening of the pool of advocates may also be important.

This article concentrates on the mid -19th Century until the 1880s, a period in which the style of advocacy before jurors established earlier during the century continued to be dominant, but signs of major change, which later developed further, began to appear.

Advocates of their time.

In the second half of the 19th century, roughly until the beginning years of the 1880's, the foremost style of advocacy before juries in criminal and civil cases remained melodramatic, declamatory and lachrymose ¹. Aggressive and intimidating cross-examination of witnesses took place, sometimes, unless restrained by judges, descending into bullying² . Questions asked often had more to do with a blunderbuss

¹ J. R. Lewis, *The Victorian Bar*, Robert Hale, London,1982, pp.119-120, describes how prospective barristers would sometimes attend a course on declamation with John Cooper, who had given up the stage himself to teach young hopefuls. His classes on declamation were attended by a mixture of aspiring barristers and actors. Recollecting the criminal bar in the 1870's and early 1880' s, Edward Purcell, *Forty Years at the Criminal Bar*, page 27, wrote of "many advocates who deliberately took a dramatic approach to advocacy and were prepared to adopt mannerisms, tricks of speech and gestures to heighten the effect of their pleas and of the prevailing fondness for noise".

² Lord Chief Justice Cockburn's comments in 1874 on the treatment of witnesses indicate this was particularly bad in England:

"I have watched closely the administration of justice in France, Germany, Holland, Belgium, Italy, and a little in Spain, as well as the United States, in Canada, and in Ireland, and in no place have I seen witnesses so badgered, brow beaten, and in every way so brutally maltreated as in England. The way in which we treat our witnesses is a national disgrace, and a serious obstacle, instead of aiding the ends of justice. In England the most honourable and conscientious men loathe the witness- box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-examination in our English courts. Watch the tremor that passes the frames of many persons as

than with a precise forensic weapon. Closing speeches were frequently long and repetitious. Appeals to emotion, and prejudice, usually reaching their peak in the peroration, were often greater than those to reason. The Diety and the Bible were regularly invoked. Vivid and floral language was employed and poetry liberally put to use to awaken generous sympathies. Special juries, in particular, because of the usually greater education of their members, would be treated to quotations from, and allusions, to English literature, history and the classics. This style of advocacy was parodied in Gilbert and Sullivan's *Trial by jury* - a short comic operetta, first staged in 1875, about a trial of an action in the Court of Exchequer for breach of promise to marry³.

Mentioned is now made of some prominent advocates of the period, whose cases were greatly reported and whose style, because of their successes, influenced those of other barristers. In a small profession which lacked formal training in advocacy, watching and

they enter the witness box. I remember to have seen so distinguished a man as Sir Benjamin Brodie shiver as he entered the witness box. I dare say his apprehension amounted to exquisite torture” . Calling for judges to exercise more control over the way cross-examination was conducted, the Lord Chief Justice continued:

“Witnesses are just as necessary for the administration of justice as judges or jurymen, and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or the jurymen. I venture to think that it is the duty of the judge to allow no questions to be put to a witness, unless such are clearly pertinent to the issue before the court, unless such as are clearly pertinent to the issue before the court, except where the credibility of the witness is deliberately challenged by counsel and that the credibility of a witness should not be wantonly challenged on slight grounds”. Irish Law Times, 1874, quoted in Francis L. Wellman, *Wellman’s Art of Cross – Examination*, 4th Edition, 1936, pp.188-189.

Nearly a decade after Lord Justice Cockburn’s comments, and demonstrating continuing concern about cross-examination, Sir James FitzJames Stephen, who at the time had nearly thirty years experience in the courts firstly as a barrister and then a judge, wrote, in similar terms, that “ *it was the highest importance that judges and counsel bear in mind the abuse to which cross-examination is liable and should do their best not to ask questions conveying reproach on character, except in cases in which there is a reasonable ground to believe that they are necessary*”.

Like Cockburn, Stephen was not only exercised about the subject of questions put to witnesses but also the way in which they were asked. “ *Cross-examination is not infrequently converted into an occasion for the display of wit, and for obliquely insulting witnesses. It is not uncommon to put a question in a form which is in itself an insult, or to preface a question or receive an answer with an insulting observation. This naturally provokes retorts, and so cross-examination so conducted ceases to fulfil its legitimate purpose and becomes a trial of wit and presence of mind which may amuse the audience, but is inconsistent with the dignity of justice, and unfavourable to the object of ascertaining the truth*” . Stephen principally blamed judges for this state of affairs by not stopping examinations unnecessary for any proper purpose and for failing to prevent questions in improper forms. Sir James FitzJames Stephen, *A History of The Criminal Law of England*, MacMillan and Co, 1883, Chapter XII, pp. 435 – 436.

³ George Gilbert, when a practising barrister on the Northern Circuit, later as a magistrate for Middlesex and who also involved himself in much litigation about his work, would have been familiar with courtroom advocacy of his time. It is said he compiled his notes for *Trial by jury* in 1868. Still performed today, it is often produced in the Royal Courts of Justice, or Bow Street Magistrates Court, as part of the annual Covent Garden Festival.

emulating the style and techniques of leading advocates was central to the education of younger lawyers.

A writer of several books on Welsh literary history, and originally employed in the Printed Book Department of the British Museum, John Humphreys Parry (1816 – 1880) decided to qualify for the Bar. He was called at Middle Temple in 1843. With a pleasing heavy set appearance, a deep Welsh voice and clear talent, especially for cross-examination, he achieved rapid success and soon built up a large practice at the Old Bailey, the Middlesex Sessions and on the Home Circuit, of which he soon became an acknowledged leader⁴. In 1856, he was made a serjeant. Amongst the great cases in which he figured, were for the prosecution in the trial of the Mannings in 1849, charged with the brutal murder of their lodger, the excise man O' Connor, and for the defence of Franz Muller in 1864, indicted with the murder of Mr Briggs on the underground railway⁵. In 1873 -74 he appeared for the prosecution in *Regina V Castro*, the Tichborne claimant perjury trial. Parry was considered to have a great deal of Charles Dickens's Buzfuz about him⁶, but his theatrical performances won him considerable support and work from attorneys and were copied by others at the bar. His opponent in many cases, William Ballantine, described Parry's noise and thunder as “*passion passing for eloquence*”⁷. Despite this, J Alderson Foote , in his book of reminiscences of decades of practice as a barrister in Victorian England wrote⁸ :

“Parry was an oldish man when I remember him, but to my mind he was the most persuasive advocate that ever addresses a jury. He had not the overwhelming force of Russell, nor the incisive persistence in cross-examination of Hawkins, nor the silver tongue of Coleridge; who were all in their own peculiar style unapproachable. But he had persuasion, which after all, is the end to which other qualities are the means; and I doubt if any other advocate of his day could have shown a higher average of successes”.

⁴ B. Kelly, *Famous Advocates and their Speeches*, London:Sweet and Maxwell, 1921, page 109.

⁵ His closing speech for Franz Muller was widely praised as a memorable piece of advocacy (Kelly, *ibid*, Page 109.), especially those parts which dealt with: the influence of the press on public (the jury's) opinion; that counsel's personal opinion was to be ignored; and for circumstantial evidence to be complete.

⁶ J. R. Lewis, *The Victorian Bar*, Robert Hale, London, 1982, page 62

⁷ See . J. R. Lewis, *ibid*, page 63.

⁸ John Alderson Foote *Pie powder from the Law Courts: being dust from the law courts, collected, and recollected on the Western Circuit by a circuit tramp.*, first published by John Murray, London, 1911, re-published by EP Publishing, Yorkshire, Chapter IV page 81.

William Ballantine(1812 – 1887) became a barrister of Inner Temple in 1834 Long before he was appointed a serjeant in 1856, he established himself as one of the leading criminal advocates of his day at the Old Bailey, where he remained for his working life, surpassing others in cross- examination and retention of essential facts ⁹. For many years he dabbled in the theatre and journalism. Ballantine’s clients were numerous and ranged from Prince Louis Napoleon (Napoleon III of France) to the Gaekwar (Prince) of Baroda, tried in 1875 with attempting to poison the British Resident. For this case he received £10,000, then an enormous sum. He appeared for the claimant in *Tichborne v. Lushington* which straddled 1871 and 1872 . Attracting crowds and huge press interest, the case hinged on whether the claimant, Arthur Orton, was or was not the missing aristocratic heir, Roger Tichborne. Its outcome led to Orton’s later trial for perjury. His manner in court tended to be less passionate than some of his more florid rivals such as Parry. Ballantine’s voice, however, was notable for its hesitancy and drawling tone, said to be “*half infirmity, half affectation*” ¹⁰. It has been claimed that he was the inspiration for Anthony Trollope’s Chaffenbrass in *Orley Farm* ¹¹.

Another prominently successful barrister of the time was Montagu Williams (1835 – 1892). Prior to being admitted to the bar, Williams, who at Eton had been a fine classics scholar with a particular enthusiasm (later to be heard in the courts) for Horace, had pursued a number of occupations including acting ¹². Before and after becoming a barrister he wrote for the stage, including two farces, *A fair exchange* and *Easy Shaving*. Williams had a ready address and was skilled in marshalling circumstances favourable to his client ¹³. He mainly appeared in the criminal courts. His style , perhaps unsurprisingly, was artificial, theatrical and prone to purple passages¹⁴ . In the Turf frauds case of 1877 three Scotland Yard detectives and a solicitor were tried

⁹ B. Kelly,*Famous Advocates and their Speeches* London: Sweet and Maxwell,1921, page 124.

¹⁰ J. R. Lewis, *The Victorian Bar* Robert Hale, London,1982, page 63. Bernard Kelly, *ibid*, page 124, also noted a certain hesitation but also wrote of his great charm of manner.

¹¹ Law Times 82 (1886-8) pp. 198-199.

¹² Details of these and of his very early years are presented in Montagu Williams’s memoirs, *Leaves of a Life being the Reminiscences of Montagu Williams QC*, MacMillan and Co, 1893, Chapters I – VI.

¹³ B. Kelly, *Famous Advocates and their Speeches*, London:Sweet and Maxwell, 1921, page 127.

¹⁴ Two good examples of his style are given in the Appendix to Williams’s *Leaves of a Life*. The first (Pp. 335-348.) is his address to the jury on behalf of Percy Lefroy, tried in 1881 for the murder of Frederick Gold on the London to Brighton Railway. According to Williams, this was “*the most sensational trial*” of his career. Lefroy was convicted and hanged. The second (Pp. 348-363.) is Williams’s jury speech, which he delivered over two days, for George Lamson, a surgeon tried, convicted and executed in 1881 for the murder by poison of his young brother in law. The case was very widely reported in the press.

for complicity in the frauds of two notorious criminals, Kurr and Benson, who had already been sentenced for defrauding an old French lady¹⁵. The two were produced from prison to give evidence against the detectives. Montagu Williams, defending one detective, said this of the criminals:

“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 down from the mouth of the other”.

A few years earlier, in similar vein, Sergeant Vaughan had poured scorn on a witness by saying:

“And then we come to Brown. Ah, there the impudent and deceitful fellow stands, just like a crocodile, with tears in his eyes and his hands in his breaches pockets”¹⁶.

Montagu Williams prided himself on being able to assess how receptive jurors were to his advocacy and accordingly what more, if anything, was required. On this subject, in his *Reminiscences*, he wrote¹⁷:

“An advocate who has had large experience (especially if that experience has been in criminal cases), can pretty well, when he has finished speaking , tell which way the jury incline. It was the custom of mine to try and make sure of two or three of the most likely men first, and then to devote my attention to the others. Sometimes one man in particular would present special difficulties. It would be easy to see that he had formed an opinion adverse to my client, and was resolved not to be influenced by what I was saying. There was nothing for it but to patiently hammer away. I found it was half the battle to rouse him from his indifference, and to thoroughly arrest his attention ; while , of course , if he once opened his mouth to make an inquiry, and thus gave me an opportunity of addressing myself directly to him , I could usually count upon his allegiance. It was sometimes my experience , too , that , when it came to considering the

¹⁵ For an account of this case, in which Williams had defended another prisoner, one Murray, see Montagu Williams, *Leaves of a Life*, MacMillan and Co, Chapter XXXIII, pp. 217-222.

¹⁶ Robert Walter, *Random Recollections of the Midland Circuit* (1869), Chiswick Press, page 13.

¹⁷ Montagu Williams, *Leaves of a Life*, MacMillan and Co, 1893, page 87.

verdict, one or two strong men would easily carry their fellow – jurors along with them".

In *Reminiscences*, Williams approvingly described Serjeant Ballantine's ability to delight jurors by *firing off a number of small jokes* in his speeches, something he had observed early in his career as a junior to Ballantine in a case on a bill of exchange. Montagu Williams was noted for using humour in court to aid his persuasiveness. He recorded, "*I have noticed, indeed that jurors in a court of law, as also the ushers, are always convulsed with laughter on the smallest possible provocation*"¹⁸.

The ill-fated Edwin James (1812-1882) QC, upon whose rather florid countenance it was said Charles Dickens based his description of the barrister Stryver in a Tale of Two Cities, and for a time Radical MP, was another with words. After his call at Inner Temple in 1835, he gradually built up a considerable practice in the criminal courts. He excelled in forcible address especially in cases where passion or prejudice might be relied on to sway the verdict of a common jury¹⁹. His most famous defence was that of the refugee Dr Simon Bernard, tried, in 1858, for conspiring to assassinate Emperor Louis Napoleon III of France ("The "Orsini Conspiracy"). Edwin James's speech on behalf of his rather sinister client was a masterpiece of florid and rhetorical advocacy. It was laced with "glittering steel" and "mounted lancers" – the words had little to do with the issue in hand but, jurors passions aroused with fears of a French invasion, were rewarded by Bernard's acquittal which led to frantic scenes of rejoicing at the Old Bailey and outside. Passionate advocacy by James, on another occasion, led to the judge suggesting, in view of comments made by counsel, that the Archangel Gabriel should be called to the witness box²⁰. Three years after defending Dr Bernard, the popular advocate was disbarred by the Benchers of Inner Temple for dishonourable conduct in financial transactions and was later declared bankrupt. Just before these events occurred it was said the government was contemplating appointing him as

¹⁸ Montague Williams, *Leaves of a Life* MacMillan and Co, 1893, pp.50-51.

¹⁹ Bernard Kelly, *Famous Advocates and Their Speeches*, Sweet and Maxwell, 1921, page 119.

²⁰ J R Lewis, *The Victorian Bar*, Robert Hale, London, 1982, page 120.

Solicitor General. James left London for New York where he put himself to work at the New York Bar, as well as appearing on the stage at the Winter Gardens Theatre.

Digby Seymour (1822-1895) QC, an Irishman, also stands out for the use of flamboyant language which was successful before juries even in technical cases. As a member of the Historical and Literary Institution of Dublin he had produced an essay on the genius and study of rhetoric. Public speaking was regarded by him as a subject for careful cultivation and constant improvement. He was briefed in a compensation claim concerning some grass-fields near Neasden , where a large number of carriage –horses had been allowed to graze. Digby Seymour made a colourful speech, not entirely empty of patriotic sentiment, about:

“Arab steeds with flowing manes and panting flanks, careering over these fields as though they had been in the desert” .

His opponent , however, was a great expert in compensation cases like this and reminded the jury that they had to consider:

- (a) the value of the land
- (b) the number of years' purchase that should be given on it
- (c) special principles of discount which applied, and so forth.

Out of his depth, a horrified Digby Seymour asked a junior counsel, who he was leading, what to say. His junior answered “*Don't worry about that rot.....just give them some more of those Arab steeds with their panting flanks*”. This he did and won the highest compensation that had ever been awarded for land in the locality ²¹ .

Digby-Seymour's capacity for emotive denunciation was shown in his address to the jury in the Fenian Trial in Manchester, November 1st 1867. Although he was instructed as one of the counsel for three Fenians, Irish nationalists, charged with murder, following bombings in the city, Digby-Seymour was at great pains to disassociate himself with the Fenian cause:

²¹ Arab Steeds. Viscount Alverstone's *Recollections of Bar and Bench* (1914),cited by Richard Hamilton, All Jangle and Riot, page 270.

“Of all the curses that ever fell on my unhappy country, Fenianism is the blackest and the worst. Famine may desolate and destroy; a pestilence may mow down its hundreds or its thousands, returning spring will renew the crops of the earth, and a refreshing atmosphere will subdue the pestilence. But Fenianism is a blighting curse, a cancer, fastening itself to the fairest spots of an otherwise fair island, and looking for its mischief and exerting its influence upon the most vital parts of my native country”.

A little later he continued:

*“There is not a politician in my native land who has not denounced it; not a capitalist who is not afraid of it, nor an alter throughout the country which has not cursed it! The clergy have spoken of it as, in times of old, the Levitical priesthood and the priesthood of the East spoke: ‘ Go forth into the wilderness thou leprosy. Unclean! Unclean!..... ”*²².

Another highly considered member of the bar was Henry Hawkins who, like Edwin James, had made his name as a criminal advocate in securing acquittals in the Orsini Conspiracy (1858) and also in the prosecutions that followed the collapse, in 1866, of the Overand Gurney discount house ²³. Like Montagu Williams, he had an interest in the stage. This assisted him to develop a graphic power of characterization which was frequently employed before juries in richly dramatic speeches. Lacking a classical education, and thus unable to make allusions to antiquity and the great oratory and literature of the past, he compensated by treating jurors with confidences , assuming them to be worldly men like himself, convincing them he was no different from them and making many references to horse-racing, then the leading gambling sport. Jokes were told by him to good effect. He had an extraordinary ability, by a wink or a gesture, to plunge courts, judge, jury, counsel and audience, into uproarious laughter, putting the

²² Reproduced by Kelly, *Famous Advocates and their Speeches*, London: Sweet and Maxwell, London, 1921, pp.132-133.

²³ J. R. Lewis, *The Victorian Bar*, Robert Hale, London,1982,, pp. 70-71.

jury into good humour and distracting them from damaging pieces of evidence ²⁴. Unlike some others, who relied on a mixture of vanity, flair and memory, he was thorough in his preparation and worked hard, although on those occasions when he did not know his brief he appeared to manage competently ²⁵. Hawkins had a reputation as a rough cross-examiner. This was borne out in the case of *Tichborne v. Lushington* in 1871-72 where he behaved with such aggression towards the Claimant's witnesses that some of them refused to attend the later criminal trial for fear of facing him again. Repeatedly in *Tichborne v. Lushington* Hawkins used the weapon of selecting one small item from a witness's evidence and on which to concentrate his energies, examining it in minute, and often embarrassing detail. One of the issues in the case was whether the real Roger Tichborne had tattoo marks on his arm like those of the claimant. A man called Boyle claimed to have seen such marks when Tichborne pulled up his sleeve to rub his arm. Hawkins put these questions:

Hawkins: "Do you know why he rubbed his arm?"

Boyle: "I suppose it itched. I do not know".

Hawkins: "But what you think when you saw him rubbing his arm?"

Boyle: "I thought he had got a flea".

Hawkins: "A flea! Did you see it?"

Boyle: "No, of course not".

Hawkins: "Whereabouts was it? Just show me (*The witness pointed to his upper arm*)."

What time was this?"

Boyle: "Ten past eleven".

Hawkins: "On the second occasion did you think it was a flea again?"

Boyle: "I suppose so...."

Hawkins: "What time was it? About the same time?"

Boyle: "Yes".

Hawkins: "Ten past eleven?"

Boyle: "YES".

Hawkins: "Then all I can say is, he must have been a very punctual old flea" ²⁶.

²⁴ J. R. Lewis, *ibid*, page 15

²⁵ An aspect of Hawkins's abilities marvelled upon by Sir Edward Clarke in his unfinished short treatise on advocacy, published some years after his death as an Appendix to E. W. Fordham, *Notable Cross-examinations*, 1951.

²⁶ Reproduced by Richard Du Cann, *The Art of the Advocate*, Pelican Books, 1980, page 126.

It was said that Hawkins often rose to his feet with no firm ideas of the way his cross-examination should proceed; he had to rely on experience and instinct which was sometimes spectacularly correct ²⁷.

Hawkins, along with many other of his contemporaries, acknowledged that little children in court could rend the hearts of jurors in criminal and civil cases and indeed encouraged their presence ²⁸. In his *Reminiscences* ²⁹ Hawkins describes how he defended a man who had suddenly, and without any apparent reason, killed his wife. Securing his acquittal was helped by the evidence of a Vicar, who explained he had regularly attended church for thirty five years. In his view even greater assistance had been rendered by the presence in court of the prisoner's intensely sobbing children . Henry Hawkins conceded that their excessive grief might not have been all it appeared to be after hearing that just a few days before the trial they were playing on an ash-heap in the village where they lived, swinging around a dead cat with a string about its neck, and singing:

*"This is the way poor Daddy will go!
This is the way poor Daddy will go!"*

Away from juries, Hawkins had little reputation in arguing law before the appellate courts. After seventeen years as a QC, Hawkins was elevated to the Bench in 1876.

Willie Mathews was another barrister with a sense of drama. He had been the pupil of Montagu Williams. A child of the stage, the son of the playwright Charles Williams, he had a flow of language and a passionate earnestness that juries found irresistible, despite an unusual habit, which was possibly cultivated to hold the attention of listeners, of beginning a sentence with an accusative case and ending on a preposition. J.A Foote, KC., who knew Mathews on the Western Circuit, in his book *"Pie Powder"* speaks of Mathews's "*fervid eloquence which became the admiration*

²⁷ See Henry Hawkins, *Reminiscences of Henry Hawkins, Baron Brompton*, Edited by Richard Harris, K C, E. Arnold, 1904, republished by Kessinger Publishing, USA 2004, especially Chapter XIV: 'The case of Mr Faker and the Welsh Will', in which, through testing his evidence in cross examination, Hawkins exposed a well-known dissenting clergyman, thus destroying the plaintiff's case, called as a witness by his opponent Edwin James.

²⁸ This was, of course, appreciated at least since the days of ancient Rome, see Appendix 1, Excursus: Classical Rhetoric.

²⁹ Chapter 5. J.Murray, 1911.

and despair of his rivals and contemporaries" and adds, "He was the only advocate I have ever known who could make a juryman shed tears, and on one occasion at least I have seen him perform the same operation in cold blood upon a reluctant judge" ³⁰. In his memoirs, Travers Humphreys, an eminent QC and later High Court judge, recounts how he had also seen a judge and jury being reduced to tears by Mathews ³¹.

Signs of Change.

Even though histrionics continued to thrive amongst these leaders of the bar and were copied by some juniors, signs of change began to appear. Men like Hardinge Giffard, who became Lord Halsbury and Lord Chancellor for a total of eighteen years ³², John Holker, later to be appointed Attorney General, Charles Russell, a future Lord Chief Justice, and Edward Clarke began to significantly change the style of advocacy. Their approach, which was increasingly emulated by others at the Bar, was "*quieter, more learned and less inclined towards violent appeals to emotions and florid language and quoting widely from popular verse and literature*" ³³. Less concerned with relying on the tricks of the Victorian stage, they also were developing a more dignified and controlled manner in their conduct towards each other and to witnesses. These barristers tended to select the best arguments from their client's case and to drive them home forcefully to jurors, rather than saturate them with rhetorical elaboration of all conceivable points. They also avoided tiring juries with needless repetition.

Hardinge Giffard (1823-1921), who narrowly escaped a pistol bullet fired by a deranged clergyman in the Old Bailey in 1854, was recognized for his judgement, power of expression, freedom from speaking nonsense, not talking for talking's sake and for his ability to grasp all the facts of complicated cases ³⁴. He accepted a wide

³⁰ *Pie Powder*, J. Murray, 1911, Page 32. On the following page, Foote wrote about hearing Mathews addressing a common jury in a "*torrent of burning eloquence, probably incomprehensible to most of them, but nonetheless impressive*".

³¹ Travers Humphreys, *Criminal Days*, Hodder and Stoughton, 1946 pp. 68-69.

³² See John Hostettler, *Lord Halsbury*, Barry Rose, 1998.

³³ J. R. Lewis, *The Victorian Bar*, Robert Hale, London, page 120.

³⁴ Such qualities were praised by the eminent solicitor William Freshfield in a letter he wrote to Giffard in 1883, and cited in Lewis J. R. *The Victorian Bar*, page 163. He was said to be blessed with great powers of memory to such an extent that he could read a brief without making a single note and conducted one heavy case without taking the ribbon off the papers in court; they were later found to have only one thing written on the outside: a list of the trains back to London. Richard Hamilton, *All Jangle and Riot*, Professional Books, 1986, page 177. Another, although somewhat later, advocate, who was also renown for a phenomenal memory was Sergeant A. M. Sullivan, the last Sergeant at the Irish

variety of briefs and in London divided his time between the Chancery bar and the Old Bailey. His courtroom demeanour was often understated, even stilted³⁵.

Recalling his association with Hardinge Giffard, Sir Edward Clarke, in 1916, wrote:

"It is now fifty years since I made his acquaintance at the Old Bailey where he had a most lucrative practice. It was then a rough place and some of the older men had habits of cruel and offensive cross - examination and violent and unscrupulous advocacy, which Giffard's influence and example did much to banish from our criminal courts. He was not a great defender of prisoners: Ballantine and Parry.....had the most important defences but.....Giffard was constantly appearing in important prosecutions . To listen carefully to the whole of a case when Giffard prosecuted with Poland for his junior and Russel Gurney was the presiding judge, was the best lesson a young barrister intending to practice in the criminal courts could possibly have³⁶".

John Holker (1828-1882) did not attend university and was articled to a Westmoreland solicitor before being called to the Bar at Gray's Inn, at the then comparatively late age of 26, in 1854. He began to specialize in patent cases and then commercial law more generally. The Tichborne cases, in which he was not involved, did much to promote his career: As they occupied many of the leaders of the bar, solicitors had to look elsewhere for forensic ability. This resulted in Holker being thrust to the fore. There he thrived, with a great knowledge of business and of how businessmen thought, suppressing all oratory, claiming little or no knowledge of law and always putting the most common place view of a case to a jury. "*A great getter of verdicts, the impression he made on a jury was that his client had a first – rate case and*

Bar who died in 1959. It was said of him that he never needed to refer to papers in court. Brian Gibbens, *Elements of Modern Advocacy*, New Law Cassettes, Butterworths, London, 1979. Minimising the need to read papers, enabling barristers to maximize time looking at witnesses, judges and juries, was often seen as a valuable persuasive technique in advocacy, projecting confidence and sincerity of belief in a client's case. Indeed in his short treatise on advocacy Sir Edward Clarke, *infra*, remembers being told by Harry Hawkins, *earlier*, to *never examine or cross-examine from your brief. Know your brief and examine from your head.* He recalled this as *one of the most useful pieces of advice I ever received* .

³⁵ R. F. Heuston, *Lives of the Lord Chancellors 1885-1940*, Oxford, 1964, 12. Hardinge Giffard, although generally eschewing it, did vividly employ theatrical emotion and drama, presumably for entirely tactical reasons, in his six hour speech before lay magistrates at Market Drayton in 1867. He was instructed to halt the prosecution of Edward Eyre, the former governor of Jamaica, for murder, arising from his bloody suppression of the Morant Bay uprising in 1865. At one stage, Giffard broke down in tears and called on God before resuming his appeal to the biases of rural magistrates. Eyre was not committed. (See Korstal, R. W. *A Jurisprudence of Power; Victorian Empire and the Rule of Law*. Oxford University Press, 2005, pp. 302-310.)

³⁶ Reproduced by J R Lewis, *The Victorian Bar*, Robert Hale, London, 1982, pp.163-164.

*was to be pitied for having such a second rate advocate*³⁷*". A contemporary wrote of him; "this tall plain Lancashire man never seemed to labour a case nor to distinguish himself by ingenuity or eloquence, but through whom the justice of his case appeared to shine through a somewhat dull but altogether honest medium". He had the art of never seeming to be cleverer than the people he was addressing*³⁸*. J. A. Foote , who had also encountered him, wrote, he was massive and deliberate, with a hesitating delivery that amounted at times to a stammer, but he could address a jury as if he was one of themselves, and won their confidence by his apparent sincerity rather than by a parade of oratorical power*³⁹*. The appearance of great candour was his most valuable asset in advocacy . In court it was said he would accept suggestions from juniors and solicitors clerks*⁴⁰*, marking him out from many barristers of the old school, who had much of the prima donna about them . Sir John Holker became Solicitor- General under Disraeli's administration in 1874 and was briefly Attorney General. After the fall of the Conservative government, he was appointed a Lord Justice of Appeal.*

Charles Russell (1832-1900), born at Newry in Ireland, became a solicitor in 1854 and soon became noted for vigorous advocacy in the county courts. He was called to the English Bar at Lincoln's Inn in 1859 and soon became established in the North of England. His chief rival on the Northern Circuit was John Holker. In his early days, perhaps keeping with the spirit of the times, flashes of temper were seen and many angry exchanges with opposing counsel, judges and jurors occurred. This was to change and as the years passed he won great admiration for his advocacy. Russell's powers of cross- examination were acclaimed as those of genius⁴¹, whilst in the art of forcibly stating a case to a jury he was extraordinary, said to be beyond every advocate in living

³⁷ AW Cockburn QC. An Address on Advocacy to the Christ Church Law Club, May 15th 1952. Published by the University of Southampton

³⁸ Mr Balfour Browne K.C. Quoted by Francis Cowper, *Holker of Gray's Inn*, Graya 14, Easter 1934, page 71 .

³⁹ J. A. Foote, *Pie powder from the Law courts*, John Murray, 1911, page 177.

⁴⁰ Francis Cowper, *Holker of Gray's Inn*, Graya 14, Easter 1934, page 72.

⁴¹ Charles Russell's biographer, R. Barry O' Brien wrote: *It was a fine sight to see him rise to cross-examine . His very appearance must have been a shock to the witness, - the manly, defiant bearing, the noble brow, the haughty look, the remorseless mouth, those deep set eyes, widely opened, and that searching glance which pierces the very soul. "Russell", said a member of the Northern Circuit, "produced the same effect on a witness that a cobra produced on a rabbit". R. Barry O'Brien, O'Brien's Life of Lord Russell, Smith, Elder, 1901, page 101. John Singer Sargent's large portrait of Charles Arthur Russell, Baron Russell of Killowen, painted in 1899, hangs in Lincoln's Inn.*

memory⁴². In the opinion of J Foote, who heard him conduct cases, Russell was an *elemental force*. In similar vein Travers Humphreys, who had also observed him, wrote:

*"What one remembered after witnessing one of his great performances was not the admission extorted from a witness, the astuteness of the questions put in cross-examination , or even the eloquence of speech to the jury , but the atmosphere which the man created. Whoever was the judge, from the moment Russell got going he dominated the court "*⁴³.

Unlike many of his contemporaries, he did not attach much importance to what he jokingly called "*rhetorical fireworks*", believing that juries were becoming increasingly suspicious of florid oratory and theatricality and preferred to base their decisions on what they believed to be solid facts⁴⁴ . Again, distinguishing himself from many others, Russell always meticulously prepared his cases so that when he was in court he could watch the jury and the judge in everything they did, however trivial it might seem. He was always ready and alert and would not hesitate to stand up to any judge if he thought the rights of the advocate were being invaded⁴⁵. Russell was made a Queen's Counsel in 1872. Such leaders of the Bar as Serjeants Ballantine and Parry and Henry Hawkins QC found in him a very formidable rival. Russell was engaged in many well known cases, but his most famous were the successful defence of the Irish Nationalist leader Charles Stewart Parnell, before the Parnell Commission in 1888, and the defence of Florence Maybrick at the Liverpool Assizes in 1889 who was convicted of murdering her husband by poisoning him with arsenic⁴⁶. Sir John Russell was Attorney General in the Liberal Governments of 1885 and 1892 and was appointed Lord Chief Justice in 1894, the first Catholic to hold that office for centuries.

The late Victorian period saw a number of contests in court between Sir Charles Russell and Sir Edward Clarke. Edward Clarke (1841-1933) was not from a privileged background, beginning his working life as a shop assistant in a silversmiths run by his

⁴² B. Kelly, *Famous Advocates and their Speeches*, London: Sweet and Maxwell, 1921, page 135.

⁴³ *Criminal days*, Hodder and Stoughton, London, 1945, page 91.

⁴⁴ R. Barry O' Brien, his biographer, said to Russell, "Your methods are altogether different, you do not as a rule manoeuvre, you go straight at the witness. Russell replied: With an English jury it is different. They are busy and they want to go away quickly. Mere finesse they do not appreciate; go straight at the witness and at the point; throw your cards on the table. It is a simple method and I think it is a good method". *O'Brien's Life of Russell*, Smith, Elder, 1901, pp.100-101.

⁴⁵ Lord Norman Birkett, *Six Great Advocates*, Penguin,1961, page 71.

⁴⁶ See Lord Norman Birkett, *ibid*, pp. 71-80. Also, for a highly readable account of the trial, F. E. Smith, *Famous Trials*, Hutchinson and Co, Ltd, 1930, *Mrs Maybrick*, pp. 399- 412.

father. Although lacking money, influential friends, connexions with the law and social standing, he had a driving ambition to excel first by becoming a barrister and then by entering politics. After periods as a writer at East India House and a law reporter, he raised sufficient funds to enter Lincoln's Inn as a student and to be called to the bar in 1864, aged 23. Small criminal cases came his way. In time they were followed by weightier matters. Solicitors noticed his skill in persuasively presenting medical evidence and cross-examining doctors - both the result of vast preparation before trials⁴⁷. The case which established him was that of Harriet Staunton in 1877, when Clarke was 36. He was briefed to defend Patrick Staunton on a charge of murder. The kernel of the Crown's case was that a woman of limited mental powers had been neglected and starved to death over months by her callous husband, Patrick, and his relatives, to obtain her small inheritance. Public outrage and interest in the trial was intense. Despite much undermining by Clarke of medical evidence on behalf of the Crown, all four defendants were convicted and sentenced to death after a summing up by Mr Justice Hawkins (Henry Hawkins, *earlier*) pointedly against the defendants⁴⁸. Clarke's closing speech had a very great effect on the country and propelled him up to advocacy's top rank. His early desire for political fame was abandoned. During his remaining thirty seven years at the bar he appeared in many famous and sensational cases. Against Sir Charles Russell in 1886, he obtained a verdict of not guilty for Adelaide Bartlett who was charged with murdering her husband with chloroform. In 1890 he appeared in the Parnell Divorce suit. The following year Sir Charles Clarke represented the plaintiff in the Baccarat case in which the Prince of Wales gave evidence. He fought for Oscar Wilde in his three trials at the Old Bailey in 1895. And in 1896 he appeared for Dr Jameson, who was prosecuted in London after the Jamieson Raid in South Africa.

Clarke was a fine speaker and had taken lessons in voice production and public speaking. He knew the value of pause and of a change in tempo⁴⁹. Unlike others of the period, "*he had inherited few of the declamatory, lachrymose, resonant talents of the early Victorian Bar*"⁵⁰. Clarke relied on persuasion in his speechmaking, an appeal to logic that sprang from a deep sincerity, rather than almost wild appeals to emotion.

⁴⁷ Edgar Lustgarten, *R v The Stauntons*, part of the Old Bailey Series, broadcast in 1970 on Radio 4.

⁴⁸ Following a public outcry, and a petition signed by over seven hundred doctors that the cause of Harriet Staunton's death was not starvation but tuberculosis, they were reprieved.

⁴⁹ Travers Humphreys, *Criminal Days*, Hodder and Stoughton, page 92.

⁵⁰ J. R. Lewis, *The Victorian Bar*, Robert Hale, London, page 141.

Unlike many barristers, he seldom employed ridicule ⁵¹. Juries found for him because they believed he believed.

Edward Clarke's unfinished short treatise on advocacy, only published some years after his death ⁵², shows he employed in both cross-examination and speeches, the two forming what he called "*a combined address to the jury*", subtle psychology and close attention to those details his preparation and management of the case in court led him to believe would concern jurors:

"The cross-examination of the chief witness for the plaintiff is always of great importance. It is the first opportunity which counsel for the defence has of indicating , instead of presenting, because the most skillful and effective cross-examination is that which interests the jury and sets them thinking what the answer to the plaintiff's case , or the case for the prosecution, can possibly be , and by the selection of and arrangement of the facts referred to, suggests the defendant's case instead of stating it.

Presently comes the speech in which the defence is formulated; and if, listening to that speech, a juryman says to himself, "Why that is just what occurred to me when the witness was in the Box," the verdict, so far as he is concerned , is safe. The conclusion which his own intelligence has suggested must be right" ⁵³.

In the assessment of Lord Birkett:

"In an age when advocacy was held in great esteem, nobody ever equalled Clarke in marvellous persuasive power. Some of his learned brethren excelled him in some spheres. He lacked, for example, the overwhelming elemental force of Charles Russell and could not rival his incisive, persistent, penetrating power of cross – examination.

⁵¹ DuCann, Edward, *The Art of the Advocate*, Penguin Books, 1993, page 144.

⁵² In the form of an Appendix to E.W. Fordham, *Notable Cross-examinations*, Constable and Company, 1951.

⁵³ Elsewhere in his treatise, Clarke criticizes Sergeant Parry, *earlier*, for often spoiling shrewd and powerful cross-examinations by *violence and harshness* to witnesses. John Duke Coleridge (1820-1894), eventually Lord Chief Justice of England, was praised for his ingenious and painstaking cross-examination, in which the more closely a witness was entangled the more suave and gentle Coleridge's manner became. Clarke, however, described, as "*studiously unfair*", Coleridge's *habit* of repeating a witness's answer or quoting it in a subsequent question but not exactly as it had been said, though insufficiently altered to attract comment from opposing counsel or judges, as a means of quietly getting the witness to give his or her case away.

*Others perhaps had a greater sense of the dramatic or were more truly versatile; but Edward Clarke had the supreme gift – the advocate’s pearl of great price – the gift of persuasion. This, when all is said and done, is the gift to which all other qualities of the advocate are subordinate: and it was by this gift that Clarke won his enduring fame”*⁵⁴.

Norman Birkett (1883 – 1962), was called to bar in 1913. He never saw Edward Clarke in action, but recalls that older barristers, whenever conversation turned at the Inns of Court or in the Bar Messes on circuit to great advocates, spoke of him with admiration and wonder. It is, therefore, very likely that his highly successful advocacy was an influence on them in the later Victorian period and after.⁵⁵.

It is perhaps not too fanciful to suggest that the more restrained advocacy before juries that was emerging may have been influenced by the style of an earlier barrister James Scarlett (1769- 1844), Lord Abinger (1835), who was appointed Lord Chief Baron of the Exchequer in 1834. Invariably mastering each brief sent to him, not taking more than he could really attend to⁵⁶, having a deep knowledge of the law and consummate advocacy soon made him one of the leaders of the bar. A particular talent was getting witnesses to tell their stories as if for the first time. In marked contrast to many of his contemporaries, Scarlett’s highly winning method of addressing juries did not involve rhetorical expedients but choosing the very best argument on his client’s behalf and putting it with all his ability in a well modulated musical voice, paying strict attention to facts and good diction. His manner was relaxed and his tone conversational. Of Scarlett’s achievements with juries a number of stories are told, some of which contrast him with Henry Brougham. One has it that at the end of a Yorkshire Assizes a

⁵⁴ *Six Great Advocates*, Penguin, 1961, page 38.

⁵⁵ Sir Malcolm Hilbery ,born in the same year as Lord Birkett, in a speech, entitled *Duty and Art in Advocacy*, at Gray’s Inn, delivered in 1938 when he was a High Court judge, (Graya No XX, Easter), recounted how, as a young boy, he had seen, Sir Edward Clarke in the Kings Bench: “*It has remained a vivid memory and a model to this day*”. Travelling back in generations, and showing how young advocates may to some extent be influenced by older and outstandingly successful ones, Edward Clarke himself professed, in his short treatise on advocacy, Fordham, *ibid*, admiration for William Ballantine, Henry Hawkins and John Duke Coleridge.

⁵⁶ It was said of James Scarlett, in contrast to many of his colleagues, that “*One of his great merits was that when he was engaged in a cause his services might always be relied on. He disdained to adopt the vicious practice of some barristers, then far too common, of wandering from court to court and taking contemporaneous briefs in all, to the damage of those whose briefs they had accepted*”. Unattributed quote in Richard DuCann, *The Art of the Advocate*, Penguin Books, 1993, pp.40-42. The habit, to the detriment of the quality of their advocacy, of leading silks to accept, when they were in court, as many small briefs as their clerks could collect is also mentioned by Sir Edward Clarke in his short unfinished treatise on advocacy, *ibid*.

lawyer found himself in the company of a juryman. The lawyer asked the juror what he had thought of leading counsel . “ ‘ Well ’ said the juryman ‘ that Lawyer Brougham be a wonderful man ; he can talk , he can: but I don ’ t think nowt of Lawyer Scarlett. Indeed replied the lawyer, but you have given him all the verdicts Oh, there ’ s nothing in that said the juror, he be so lucky, you see, he be always on the right side ” ⁵⁷.

In later Victorian and in Edwardian times Sir James Scarlett’s accomplished advocacy was seen as instructive in a number of practical books for barristers beginning their careers.

It may well be that the success of men such as Hardinge Giffard, John Holker, Charles Russell, and Edward Clarke was partly because they recognised a change in public mood away from artful bombast, verbal chicanery, gestures, aggression and sometimes insults and altered their advocacy accordingly in the later 19th Century. In the bar’s tradition of copying what appeared to succeed, they began to be emulated by junior members.

Jurors became far better informed than before, capable of seeing through it and resentful when empty rhetoric was tried on them. As a consequence of 19th Century reforms, education was available to more people ⁵⁸. 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 ⁵⁹.

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 standards⁶⁰.

⁵⁷ A. W. B. Sampson, *Biographical Dictionary of the Common Law*, Butterworths, 1984. For Scarlett’s own assessment of his advocacy, in a biography written by his son, see Peter Campbell Scarlett, *A Memoir of the Right Honourable James, First Lord Abinger*, J. Murray, 1877, Chapter 18.

⁵⁸ 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 19th and 20th Centuries.

⁵⁹ In assessing factors which led to a general improvement in educational standards in the 19th Century 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.

⁶⁰ 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 19th and 20th 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

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. By the 1880's Darwin's theory of evolution had entered popular culture⁶¹. 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 after⁶². 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 faith⁶³.

Opportunities for passionate appeals to emotion, flowery passages and histrionic gestures by barristers considerably reduced as trial by jury in civil actions diminished with the establishment of County Courts, where the overwhelming majority of cases were heard by judges alone, and the Common Law Procedure Act 1854 which, provided both parties consented, permitted issues of fact in the higher courts to be tried by judges without juries. Judges had little taste for sensational appeals, floridity, and theatricality but did have a high regard for fact, law and logically structured argument. Accordingly advocacy before them adjusted and shortened in length. Some barristers mourned what they saw as the decay of forensic oratory, due to the reduction of trials by jury; others accepted the altered style

mutual improvement societies and establishing the Workers Educational Association in 1903. In an interview, held at the Royal Society, London, on 2nd 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.

⁶¹ *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.

⁶² . See J. F. Von Arx, *Progress and Pessimism: Religion, Politics and History in late 19th Century Britain*. Harvard University Press, 1985.

⁶³ 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.*

required as a necessary adaptation to changed circumstances. Specialist statutory tribunals, conceived to implement new regulatory legislation and to resolve disputes between the state and the subject, or between subjects, did not employ juries. Indeed the majority of them had little or no need for advocates.

At the end of the 19th Century and during the first quarter of the 20th Century the jury advocacy of Rufus Isaacs, Edward Carson, F. E. Smith and Edward Marshall Hall, who frequently opposed each other in court in greatly publicized cases, was an important influence on other barristers of the period and beyond. In very broad terms, and aware of the limitations of this approach, it might be said that the first three were the descendants in advocacy of Hardinge Giffard, John Holker, Charles Russell and Edward Clarke, but who took the art further - especially in employing conversational language and in carefully planning precise cross-examination rather than making long and emotive closing speeches; the small quiet sniper's rifle with accurate sights was replacing the loud blunderbuss, often unpredictable in results and dangerous to its user. Marshall Hall's advocacy, on the other hand, with its blatant appeal to emotion, sometimes sprinkled in tears, fell within the tradition of 19th Century histrionic advocacy.

Conclusion.

It has been the intention of this article not only to exhibit jury advocacy that predominated until the 1880s in Victorian England but also to show the beginning of what was to transform it in succeeding decades.

