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Matt Excell - Trial Lawyer Extraordinary

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ONE DAY, IN THE CIVIL ASSIGNMENT ROOM, Matt Excell said to me: "When the Lord made that lawyer (pointing to one) he hand-carved him, and when He was making him (pointing to another) He was called to the telephone."

If his own definition were to be applied to Matthew B. Excell, *he* was a lawyer "hand-carved by God." This story pertains to the period in which I knew, worked and lived with him in court and in the preparation of cases for court.

Matt Excell was born in Jackson, Michigan and reared in Cleveland, Ohio. He went to school in Cleveland and, being the grandson of a Methodist minister, finished up at a Methodist college, Mount Union, in Alliance, Ohio. He was a reporter on an Alliance newspaper, earning money to help educate himself.

At the age of twenty-three, he was elected the "boy Mayor of Alliance." He studied ("read") law and took the Bar examination before one of the Ohio Supreme Court Judges who journeyed to various parts of the State and who also gave an oral examination. As Matt put it, "he was examined and admitted to the Bar in the bar of the Tod House in Youngstown, Ohio."

He returned to Cleveland and became an Assistant City Solicitor, trying the lawsuits for the city under the administration of "Honest John" Farley, a Democratic mayor of Cleveland.

Tom L. Johnson became four times mayor of Cleveland, and Matt Excell was appointed Director of the Board of Public Safety, serving out eight years in that assignment. He, together with Newton D. Baker and Peter Witt, were the ace orators of Tom L. Johnson in his campaigns for election and re-election as Mayor of Cleveland.

Matt Excell returned to private practice and, like an elevator, had his ups and downs for a while. Any lawyer taking root in politics for a long time loses out when he returns to private practice. He also taught the Law of Torts, Partnership, Criminal Law and Pleading at the Cleveland Law School (now Cleveland-Marshall Law School).

I first met him there when I became a student back in 1914.

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The law was a dry subject for a beginner who worked all day and studied at night, and seemed mysterious and contradictory; but under the Excell touch it became interesting. He made it simple and easy to understand, by illustrating points of law, often using the vernacular of the street. To illustrate: One evening he was about to describe what was meant by the term "a phrase susceptible of two meanings," when there came a knock on the door and an old lady named Mrs. Barnes, a secretary to the then Dean, Judge Vickery, stuck her head in the door. She was worried about the lateness of the hour, and said "Mr. Excell, will I turn out the lights or will I wait for you until you are through." He snapped, "That's a phrase susceptible of two meanings."

Another time in class he was not so helpful to a lady student who said that she was confused and didn't know the difference between adultery and fornication. Mr. Excell answered "It is confusing, but I tried both and didn't find any difference."

He described a corporation as "a creature never created by God, having no soul to damn nor body to kick—an invisible and intangible thing."

At the end of 1918 I was employed by Payer, Winch, Minshall & Karch, one of the greatest and most thorough personal injury law firms of its day. It was chock full of great trial lawyers. Its method of preparation of lawsuits was "out of this world." As early as 1912 a motorcycle was owned by the law firm, to speed the investigation of lawsuits, and fine cameras were abundant for taking pictures of scenes of accidents and of injured plaintiffs. After six months working there, I was called into Harry Payer's office and was informed that he and Bill Minshall had hired another trial lawyer, the wit of the Bar, Matt Excell. I would be assigned to prepare his lawsuits for court, and it would be the greatest thing that could happen to me as a lawyer—to be with him. Certainly I was delighted, because I had had contact with him, and knew him slightly, but admired him greatly.

I was reintroduced to him the next day. We were in court two days later. For five years thereafter I labored hard for him. It was not work, but the labor of love, and the years seemed like months.

In his early years he had been run over by a horse-drawn street car owned by the old Cleveland Railway Company, and seriously injured either in his foot or leg. Anyone familiar with his gait could observe it. He had a difficult time fighting for a

settlement, and it seemed he never forgave the Railway Company for the hard time they gave him. His fights against the defendant were endless, and he fought like a man possessed of some supernatural power.

His first case for Payer, however, was representing the defendant in a malpractice case. It developed that the plaintiff claimed that the defendant had administered ergot to her, which would produce a miscarriage. That, the plaintiff had not wanted, and it was the reason for the claim of malpractice.

Mr. Excell asked a doctor of what ergot was made, and was told that it was made from rye (the country being dry at the time). Matt said "So they have found another purpose for rye other than making booze." The defendant won the case.

Now began his long litany of cases against the Railway Company. Every case filed in court was fought. No cases were ever settled by the Railway Company with the Payer office, except without Matt's knowing. In one case it was contended by the defendant that the plaintiff was drunk—and six witnesses were produced to prove it. The plaintiff, standing alone, denied drunkenness. It was in this case that I heard for the first time the poem recited by Mr. Excell, which convinced the jury that the plaintiff was not drunk. It was as follows:

"He is not drunk who from the floor can rise
and drink and call for more,
But he is drunk who prostrate lies
and has not the power to drink or rise."

In another case a motion was made by defense counsel to withdraw a juror and continue the case, because of some statements Matt had made. Quick as a flash he said, "Which one do you want to withdraw?" The flustered defense counsel pointed to a juror sitting in the box, who happened to be crippled. Matt immediately rejoined: "Picking on a cripple." The juror stood up, squared off and said: "Never mind, I can defend myself." A mistrial was declared in the pandemonium that ensued. In another case, a similar defense motion was made and Matt asked the defense lawyer what he had against the jury. The motion was also granted, but the same jurors sat in other cases, and the jurors had the impression that Matt was their champion.

A case was tried in which both sides argued to the jury that they had the weight of evidence. Matt began his final argument by asking the jurors to imagine two scales, and on the scales he put the witnesses as they appeared for the respective parties.

He finally came to a witness for the defense who weighed 350 pounds—a man who testified standing up, there being no chair in the Court Room that could fit his bottom. He was terribly discredited on cross-examination, but was put on the defendant's scale as the only physical-weight of evidence they had. A verdict for the plaintiff followed.

Another verdict for the plaintiff was found in the amount of $25,000.00 against the Cleveland Railway Company. This case was tried and motion for a new trial argued before a visiting judge. The motion was taken under advisement, and a motion for a new trial was granted and the verdict was set aside. A month later the same judge returned and the same lawyers and the same defendant were in the case. A view of the premises was taken, and on the return to the Court House, Matt Excell and the late Clan Crawford returned in an auto, passing by the mansions of Bratenahl. The judge was impressed by the beauty of the homes and said: "Matt, I suppose you live out here." Matt said: "No, every time I figured I'll have enough money to make a down payment, some country judge grants a motion for a new trial."

A rape case was tried in the Old Court House on the Public Square, and the same country judge who granted the new trial presided in that case. The Court was strongly convinced that the defendant was guilty, and showed his feelings all through the trial. The jury disagreed, four for acquittal and eight for conviction. Three months later the same judge met Matt in the corridors of the New Court House and inquired about the rape case. Matt said: "That's peculiar, the jury just returned a verdict today." The judge asked: "Who tried the case this time?" Matt said: "Henry Williams." The judge: "Was he as good as Eva Jaffe?" She had been the prosecutor in the first trial. Matt replied: "He wasn't as good as you and she put together."

In personal injury cases, certain doctors appeared repeatedly for the opposite sides. In the days of Matt Excell one doctor appeared consistently for the defendant, and as Matt said, "He was careless with the truth." He was so bitterly cross-examined that he became wary of appearing in Excell cases, and finally altogether refused to do so.

In a death case against the Pennsylvania Railroad Company in Federal Court, Judge Westenhaver asked if there had been a discussion of settlement in the case. He was informed that there had not been, so he gave a half hour for discussion. Matt said,

to the defendant's counsel and chief claim man of the Pennsylvania Railroad Company, that he could inform them how they could win the case. The defense counsel, having had much experience with Matt, laughed. But the claims man was more serious, and bit at the bait. He asked, "How?" Matt said: "Hire Dr. . . . and he will swear the decedent is living." That remark put the "kiss of death" on that doctor as a witness in court.

Matt lived next door to a prominent lawyer, and both had almost daily litigation against each other. The other lawyer never drank anything stronger than tea. One night a terrific crash occurred outside their home, and Mrs. Excell shouted: "Matt, get up, something terrible has happened." Matt said, in a flash, "Oh, I suppose . . . came home drunk again."

His favorite pastime, when interrogating a jury in regard to one certain law firm, was to inquire if the jury knew any of the living members of a law firm that operated under a nom-de-plume. In drawing attention to the living members he would describe them—one, the affable one—another, the tactful one—another, the howling one—and last, but not least, another member of the firm, my distinguished opponent with the platinum chain on his glasses—the man with the spats. This lawyer was getting old but didn't want to admit it, so Matt said, "He is distinguished and all of that, but to me he is Weary Willie." That lawyer didn't speak to Matt for three months after that episode.

In a case before the late Judge Thomas M. Kennedy—a wit in his own right—it developed, on cross-examination of the plaintiff's witness, that 25 years before he had had some trouble with the Cleveland Railway Company. He forgot the trouble for a time, but when his memory was refreshed, remembered it. He said, "Oh, that's the night the conductor took a bottle of whiskey out of my topcoat pocket." Matt asked: "What kind of whiskey was that?" The witness replied: "Green River." Matt said to Judge Kennedy: "I suppose Your Honor will take judicial notice my witness drank good whiskey." "No," said Judge Kennedy, "when you and I go out it is always Hennessy that we drink." The Railway Company lawyer continued his cross-examination, insisting that the witness was drunk and disorderly on that long-ago night, and that he demanded his whiskey back. Matt interrupted that in 1898 he too had had a bottle of whiskey on him. Asked by the defendant's counsel if he ever had it taken from his pocket, he replied, pointing to his stomach: "I had mine in here where they couldn't take it." The jury

was so entertained by all of this that they brought in a verdict of $20,000.00 for the plaintiff, the full amount of the prayer of the petition.

In a criminal case before the Federal Court in Toledo, Ohio, a defendant was charged during World War I with violating the Espionage Act. The defendant was a member of the Cleveland School Board and was politically a Socialist. He was supposed to have made derogatory remarks about the Elihu Root Mission to Russia. Feeling ran high against the defendants in such cases, during that period. Matt, who represented the defendant, developed that he had started his life as a carpenter. In his argument to the jury, which he said was "hand-picked" (but we didn't pick them), he said, "1900 years ago there was another carpenter on trial in the Holy City. He was tried and convicted by the clamor of the mob and He was innocent." The Court interrupted to inquire: "Mr. Excell, are you attempting to compare your client to Jesus Christ?" Matt replied: "No more than I'd compare Your Honor's Court to that of Pontius Pilate's."

At the beginning of and during Prohibition there were a lot of new wrinkles in the kind of evidence that was brought into court. In a case against a railroad company, Matt appeared for a decedent's administrator, whose decedent was killed at a crossing. It was contended by the plaintiff's lawyer that the defendant was negligent in several ways. The defendant claimed that the decedent himself was negligent. When plaintiff rested, the defendant produced seven witnesses who swore that the decedent was eating an ice cream cone as he went to his death at the crossing, and that he was careless and shouldn't recover. Matt began his argument by saying: "B. V. (before Volstead), the company's claim department would line up seven witnesses who would have in some way have come in close contact with the decedent and smelled liquor on his breath. Now, A. V. (after Volstead) they have people approaching crossings eating ice cream cones." Indeed, the jury didn't believe the defense, and the plaintiff-administrator won a $25,000.00 verdict. It can be stated with certainty that Matt was the greatest enemy prohibition had. In one comical moment he said: "One thing prohibition has done—it certainly put the prostitutes on their merits." At another such moment he told of a sign that was put up in a saloon, which said: "Many lawyers have pleaded in vain at this bar"—meaning that their credit was no good.

In a case against the Cleveland Railway Company, a client had lost an eye in an accident. Three reputable lawyers turned down the case. Matt took it and had a verdict of $50,000.00 for the plaintiff. A motion for a new trial was granted on the ground that the verdict was excessive. One of the saddest moments occurred when the plaintiff and Matt met to discuss the bad news. The plaintiff pleaded his own case to Matt, and both men cried. The defendant offered $15,000.00 and the court recommended that it be taken. Other members of the law firm were called in to talk to the plaintiff and to review the case, and they concurred with the judge that the plaintiff should accept the amount offered. Matt never was satisfied with what happened in that case. His motto was to forget the past, as nothing could be done about it. But he would bring up this case until the day of his death and say: "I wonder what that judge would think if he lost *his* eye."

In 1923 Matt Excell walked into St. Vincent's Hospital, a very sick man. I carried the bag which contained the few toilet articles he needed while there. He was told by Dr. (King) Hamman that there was no hope for him. He had a cancer of the spleen and his death was a matter of days. He sent for me and told me of his talk with the doctor and asked me to be one of his pall bearers. I tried to console him and tell him that sometimes even a great doctor can make a wrong prognosis. He said: "No, I have lived 106 years, I'm ready to go." I thought he was getting delirious and told him he was only 53. But he said: "No, I lived two years for every one—my years were crowded." Matt Excell died and members of his law firm were his pall bearers. We carried his body to Lakeview Cemetery, Cleveland, Ohio, but his soul surely entered the Valhalla of the Trial Immortals.

I have been in court frequently since Matt Excell's death 33 years ago, and I have never seen nor heard anyone who could come close to him as an advocate. In repartee he was unexcelled, especially when it was accompanied by sarcasm. He lived before the coming of radio and television, and good shows were scarce and expensive to attend. But in his time the big question around the Court House would be, "Where is Matt Excell trying a case?" He always had a big audience. They were with him, and their reaction to his wit and cunning seemed to find its way into the jury box. Women followed him about in courts and were what we would call today "court sitters" (fans). His memory is as fresh and green with me today as on the day he died.