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The Finished Trial Lawyer

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THE PRACTICE of law in the United States has gradually, and within the last fifty years much more rapidly, developed along lines that recognize and need types quite different from those of the days of the "old school" lawyer.

This does not mean that the profession is developing greater legal minds. Quite to the contrary, proportionately, great legal minds are fewer today than in the days of the old-school type—not because the foundations for such minds are fewer, but because the "law business," and it has grown to be a business, is more commercialized, which is in consonance with need for more of the so-called "Notary Public" type; a lawyer who is a calculating machine, who is capable of accurately and intelligently marshalling and applying the rules and regulatory laws governing a mass of big business enterprises, as to which each year these rules and regulations are changing.

As a result of this development, we have with us today the administrative type of lawyer, who knows little and cares less about the rules of evidence and pleading, so necessary to the successful practitioner of the old-school type; he has little need for such knowledge.

In his commercialized era of the legal profession, the new type of lawyer in practice reasons from rule or case to principle, whereas, the old-school type reasoned from principle to case. The days of Blackstone and Kent's Commentaries are gone. The day of case law is here. Of course, the law schools undertake to teach the principles as laid down in Blackstone and Kent's Commentaries and to show through certain cases the relation of the case to principle. But, when this student of the law gets into the field of practical activity, he is confronted with an experienced lawyer with appropriate cases to sustain his contentions, and the young lawyer is put to it to find a case that differentiates or contradicts or overrules the case relied upon by the opposing counsel. The old-school lawyer with one book under his arm is superseded by the lawyer with a stack of books, seeking by persuasive language pieced together through many volumes, gradatim, to sustain his proposition.

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The old-school lawyer, and there are some left, is just as powerful as ever, and probably more so, and in the Courtroom is always a dangerous antagonist. His approach to the problem goes like this: What should the law be? And he reasons from principle. When he thinks he has reached a sound conclusion, he goes to the law books to get sound cases to support his conclusion, and the lawyer who has come into Court with a flock of cases, and who does not reason from principle to case, is at a great disadvantage against the lawyer who knows and relies upon an underlying principle, when it comes to applying the decisions at hand to the case under consideration.

There is still great need for the real trial lawyer. This field is not crowded. Many who would make good in this field get into a line of work in this commercialized age that makes them more money quickly. The advocate—the trial lawyer—the one whose pleadings are not haphazard, the one who knows the rules of evidence and how to apply them, is still in great demand.

To a certain extent, this type must have it born in him. But no matter how well he is born to it, of course, work is all that will bring it out.

So, this article is intended to deal with the trial lawyer, his qualifications, his potentials, and his rewards.

I have no preconceived notions about the value of this article. What is said is already known in a general way to experienced lawyers. It is my desire that this humble expression may be of some assistance to the student of law who is preparing to enter the practice of the legal profession. It is my hope that it may be an aid to such a student in subjecting himself to an analysis, to determine in just what field he is best qualified to function and where he would be most contented. It is not intended to enable the student to determine in what branch of the practice he can make the most money. The lawyer who is the most credit to the profession is the one who does not make money the primary purpose of the practice of law.

The teacher of law stands out as an example of one whose primary purpose is not making money. Some are peculiarly qualified for this mission in life, and they love the work. This is where they are needed, where they can render the most service, and where thy are happiest. These teachers of law are the nobility of the profession, often unheralded, but who lay the foundations upon which the careers of those who receive great acclaim are built.

The trial of a law suit is a serious matter to the litigants. It involves property rights, human liberties and sometimes human life. The Courts are created to adjust matters that cannot be adjusted out of Court, and to protect both individuals and society.

Wise-cracks are out of place in the trial of a law suit, with rare exceptions. Sometimes something funny might be said or done to break the monotony of a long trial. But the fact is that the real test of a trial lawyer comes in a long trial that carries on day after day. Wise-cracks do not carry much weight.

The jury, the Court, the lawyers, actually get tired, sitting hour after hour, day after day, listening and watching. After several days the jury becomes critical of the lawyers. Running through the minds of the jurors are questions like these, "Why is he wasting so much time?" The lawyer might not be wasting time, and, too, he could be; but this question will arise in the minds of his jurors. "Why is he objecting and arguing so much?" He might be right in what he is objecting to, and in his arguments, and he might not be, too. The jury wants to get through.

When the trial lawyer, after several days of a trial, has convinced the jury he is not intentionally wasting time but is fighting for the rights of his client as he deems it to be his duty to do, he is making big headway. And, on the other hand, if his conduct and utterances are such as to leave the jury with the impression that he is four-flushing, he is contributing greatly to the defeat of his client.

Now keep in mind, I am directing attention to the finished trial lawyer. When I say finished, I do not mean to convey the idea that the finished trial lawyer is the only one that is successful in the trial of lawsuits. There are many good lawyers who are reasonably successful, who cannot qualify as finished products. There also is the lawyer, especially in our congested centers, who by sharp practices —jury-fixing, prejured testimony—either wins lawsuits or hangs juries. To the discredit of the profession let it be said, there is too much of this going on. But, in any case where there is a legitimate two-sided lawsuit, tried legitimately, the finished trial lawyer is the one who can get the most out of the case.

NATURAL QUALIFICATIONS

We hear it said that trial lawyers are born, not made. While there is some truth to this statement, it isn't wholly ture. Some men who are smart, well-educated, with pleasing personalities, honest and

energetic, can never be what is known as a "finished trial lawyer." This "something" is that with which he is born, and that which might be missing in the otherwise qualified person. One might be born with that essential something and yet require great application on his part to make him a finished product.

Now just what is this essential that we are talking about? Just how can it be defined? It can't be. Successful trial lawyers are so different in their physique, appearances, methods, and manners that it is difficult to find a starting point in seeking a definition for this all-important essential. But there is a common denominator that runs through them all, the small and the big, the handsome and the ugly. "Fairness." Fairness with the Court, the jury, the witnesses, and opposing counsel.

If we are to accept recorded history for what it is worth, we must classify Abraham Lincoln a finished advocate, a trial lawyer. He was of the old-school type, and traveled about in the course of his practice like an old-time Methodist Circuit Rider, from county to county, and Court to Court, trying a civil case here, and a criminal case there. He was far from being handsome, either in features or physique. Many lawyers who never did and never could qualify as a finished trial lawyer had, and have, better and more complete educational backgrounds than Lincoln. Yet, Lincoln had that something that we are trying to find that is so essential. He had a keen sense of humor. Many have this. He was able to talk to and to understand the feelings and thinking of the ordinary as well as the extraordinary types; he was naturally and sincerely sympathetic. There it is, a word that stands out in our search for this essential. "Sincerity," and the ability to show this sincerity without appearing to do so. So we will say, for the sake of the record, that sincerity and the ability to show it must be there. What else?

Clarence Darrow, if we accept the record for what it is worth, was a finished trial lawyer. He was an able and successful corporation lawyer and, as such, had a very lucrative practice in Chicago. He was another of the old-school type. The humdrum business of the corporation lawyer got on Darrow's nerves; he wanted to be out in the field of human emotions, and there he went; Darrow wasn't a handsome man; his physique was unattractive; his voice was nothing to attract attention. One thing he did have that stood out--his earnest, sincere belief in the cause for which he worked; it was an obsession with him that finally ran away with his better

judgment, as all lawyers know. But Darrow had that something. What was it? Belief in the cause of his client.

Court records carry many names of finished trial lawyers whose fame has never been heralded widely. Also, it might here be said many lawyers have obtained recognition as great trial lawyers on account of some case which attracts national notice and has been widely publicized. Most of such lawyers, if subjected to the acid test, could not qualify as finished products and every good Court lawyer will see what I am getting at in this statement.

Some of our greatest finished trial lawyers are unknown nationally. So, now, I shall for a while draw on my experience of forty-six years of active general practice, that have taken me into Courts high and low, from Arkansas to North Dakota.

I began practice in a small town of four thousand people—Covington, Tennessee. I rented one room for $7.50 per month, in a building in which were located the offices of Baptist & Baptist. "Colonel N. W.," as he was known, was the senior member, a big, fine specimen of manhood, with a heart as big as he; with eyes that could twinkle with merriment and almost in the same moment flash with purpose that impressed one with his honesty and sincerity. He was one of Tennessee's great jury lawyers, and his special field was criminal law. He has long since passed on, but his son, R. B. Baptist, is today one of Tennessee's leading jurists. But I am wondering somewhat afield.

With one room, one table, one book, an old Tennessee Code which a friendly Justice of the Peace had given me, two chairs, an old typewriter, a short order of stationery, no telephone, and no stenographer, I began practice just across the hall from the offices of Baptist & Baptist, which offices consisted of some eight rooms, with a magnificent library.

Shortly after embarking upon my legal career, into my office came Mr. Cox of the Lawyers' Co-operative Company, a law book salesman, who proceeded both to embarrass and anger me by looking my office over and saying, in substance, "Young man, how do you expect to practice law with no tools, no books?" My answer was the natural one, "I have just begun and am not financially able to buy books." Mr. Cox sat down on the one chair that was available to him and filled out an order for Tennessee Reports and Digest and asked me to sign it and to pay for them as fast as I could. I did not have the slightest idea where the money was to come from, but I

needed the books. They were paid for finally, but the reason Mr. Cox let me have the books, I did not know for many months after, was that Col. N. W. told Mr. Cox to see that I had some books, and that if the young man didn't pay for them, he would. This is an example of a good man. Another thing, then, we may add in the search for this essential. Natural goodness.

Then, in Memphis, Tennessee, where I practiced for twelve years, there was Mr Albert Biggs, a great trial lawyer, whose goodness and strict integrity made him such. To illustrate, when many states were adopting state-wide prohibition, before national prohibition, Tennessee's Legislature passed state-wide prohibition. The liquor and brewery interests sent a committee to employ Albert Biggs to attack the constitutionality of this legislation. That this was done, I know to be a fact; and that he did not accept such employment, I know to be a fact also. But here is the story I heard as to just what did happen. The committee told Mr. Biggs that they wanted his services and that money was no object insofar as they were concerned. They would even pay him as much as $100,000.00. Thereupon, Mr. Biggs replied, "Gentlemen, my legal services were available to you for what they were worth, until you mentioned $100,000.00. I cannot represent you. You do not want my legal ability primarily, but you want my professional standing and reputation before the Courts of this state, and they are not for sale in this kind of case." When Albert Biggs died, he was not a wealthy man. This may be going to the extreme. Suffice it to say, few lawyers would have responded in this way to the opportunity to get a $100,000.00 fee. Biggs was a fighter who was fair with the Court, with the juries, witnesses, and opposing counsel. He was fearless, and his reputation was established on this basis. He was a power for whatever he advocated. He was a good man, and he was a fearless man. This leads us another step further in seeking this essential. "Fearlessness."

In Memphis, Tennessee, I ran into one of the ablest lawyers I have ever known, but in view of the fact that I expect to use him in a way that will not reflect credit upon him, I shall use a ficticious name, Mr. "Jones."

Mr. Jones was a corporation lawyer who had a general practice. In his college days he was a great debater and won many oratorical contests. He really was an orator. As a lawyer he was a success. But among lawyers, the most complimentary expression with reference to him that was heard was that "you had better be ready when

you go against Jones, because he will be ready." He always was. He was ethical in a miserly way. But no matter how hard he tried, he could not be fair. He knew the importance of being fair, too, but when he had a chance to get away with something, he would. He would hit below the belt if he thought the referee wasn't watching. Mr. Jones appeared in a number of big trials that were widely publicized. His score was nothing to scream about. His wins and losses were such as to leave him in the class of a successful lawyer. His tactics, however, were such that he could not qualify under Grantland Rice's idea of a sportsman: "For when the One Great Scorer comes to mark against your name, He writes—not that you won or lost—but how you played the game." In passing, I might say among the lawyers I have known, many have not been heard of beyond their stamping grounds who might well be qualified with this natural something that is essential in a finished trial lawyer.

Another type I have seen is the capable corporation lawyer, who could have been a finished trial lawyer, but never was. Probably there are many such.

I recall one, not in North Dakota, who was a natural, but who early in his career became associated with corporation practice; he liked the Courtroom work; he stood out in his performances in jury trials; a big murder case developed, and he was employed to defend, and almost simultaneously with his employment, something happened, and almost as quickly as he had been employed, he resigned. His corporation clients objected to his participating in a murder trial. This is one of the examples that illustrates the truth of the saying that the big corporations expect more of their attorneys than just legal services, and it might truthfully be said in many instances, they are paid for more than just legal services. So, this leads me to another essential of the natural trial lawyer. Independence. Independence of corporations or individuals, politics or politicians, when it comes to saying what cases he will take or not take. This does not mean that he must take any case that is offered; it simply means he is free to take any case in which he feels he can render service, and a service to which his client is entitled.

In North Dakota, during my thirty-two years' residence and practice, I have seen many lawyers come and go, and some of these could well be mentioned as filling the bill as to natural qualifications. But one I desire to mention still lives and is active in his profession. This man is one that I have had more to do with than any

other lawyer in all my acquaintance. Yet, I have never been on the same side with him. We have always been antagonists from Trial Courts to Courts of Last Resort, and often back again for a new start in the Trial Court; he never hits below the belt, but how hard he hits sometimes above the belt, I well know. I learned in dealing with Mr. Francis Murphy that an agreement in writing was not necessary. I have heard Mr. Murphy over the phone, and in person, say, "Now just what are we agreeing to?" Then again over the matter we would go, we both knew what the agreement was. That was that, and that was what it was. Rigid honesty. So, in pursuit of the essentials of the naturally qualified, we arrive at "Rigid Honesty."

I have served as United States District Attorney under eight Attorneys General, beginning in 1933—Cummings, Biddle, Murphy, Jackson, Clark, McGrath, McGranery, and Brownell. Of these, one I definitely classify as having the natural qualifications for that essential that we are looking for: Homer Cummings. Here is an attorney of the old school who never let the commercilization of the law business take away its romance and its real place on the Stage of the Theater of Life.

In my humble way, I have tried to point out a method of measurement by which one might arrive at ascertainment of just what the natural qualifications are that go to make up a finished trial lawyer. In so doing, I have, in the main, used illustrations rather than definitions. And among these illustrations we find, Simplicity, Rigid Honesty, Fairness, Courtesy, Courage, Energy, Goodness, Ability, and I must add as important, Resourcefulness.

ACQUIRED QUALIFICATIONS

Let's see what must be acquired. It is necessary to learn about the ordinary people and the ordinary things of life. In other words, learn people and their relations to every-day endeavors and happenings. Of course, it is impossible to know all about everything, but learn as much as possible about an many businesses as possible and all that affects the people and the way it affects them, and be able to move with understanding of the little things that so often mean so much to the average person. Learn that in a crowded Court room a lawyer is under scrutiny from the time he enters until the time he leaves; sometimes by the apparently trivial things he does or says he is judged.

It goes without saying, he should understand pleading. This,

even though the old common law pleadings with their technical requirements are things of the past; clean-cut pleadings, neat and understandable, are essential.

Evidence—Knowledge of and ability to apply the rules of evidence is a must with the finished trial lawyer. This comes about only through study and actual experience. One may, by application, learn the rules of evidence, but unless he has been frequently in the Court room, confronted with how to use them, his knowledge is ineffective. When one has become a master of evidence and its use, he has traveled a long way on the road to success as a finished trial lawyer.

A trial lawyer learns early, if he has the natural qualifications, the dangers of cantankerousness and cross-examination. I have seen lawyers with good cases lose by eternally objecting and arguing over matters as to which they were many times technically correct, but which meant little if anything to the merits of the case. This practice in a long trial wearies the Court and jury and impresses a jury with the idea that he is trying to cover up or get something by that is improper. This leaves the impression on the jury that he is not fair. This is disastrous.

I have seen many good cases lost by cross-examination. Unless in desperation, one should never ask a queston on cross-examination without a definite purpose, and better still, unless he has good reason to know what the answer will be. Of course, there arise times when so-called "fishing expeditions" become necessary. When the real trial lawyer does this, it means he is acting in desperation.

And keep in mind that the lawyer who makes a note of every topic covered by direct examination and then starts down his list to cross-examine on all is very likely to merely emphasize testimony already given and, perhaps, to make such testimony fuller and plainer than could ever have been done on direct. And, too, he lays himself open to having made admissible evidence on redirect that otherwise would not have been admissable.

The young lawyer naturally feels, and especially so if he has a quick mind, that his business is to out-do the witness on cross-examination. This is a great mistake—no one knows this better than I. As a young lawyer I had occasion to cross-examine a witness who was a carpenter, and it went like this: (This got into *Case and Comment.*)

"Mr. Witness, you say you are a carpenter?" "Yes, sir." "Now,

just what kind of carpenter are you?" "Oh, a 'jack leg' carpenter." "What kind is that?" "Just about the same kind of carpenter as you are a lawyer."

This illustrates the htings that can happen, and this really happened. Too much cross-examination often times elicits unexpected answers.

MAKING A RECORD

Most important—making a record. What happens in the Trial Court should be recorded so as to be presented to and understood by the Appellate Court. A finished trial lawyer must be adept at this.

This, of course, brings into play the rules of pleading and evidence—(1) Is the evidence material under issues made up under the pleadings? (2) Is the foundation for admission adequately laid? When once the lawyer can quickly know the answers to these questions, the rules will come into place like parts in a puzzle.

When objection to admission on any ground is sustained, and the proponent of such evidence believes the adverse ruling is wrong, he should make an offer of proof so as to definitely and clearly place such evidence in the record to the end that an Appellate Court may pass on not only the admissibility of such evidence, but may also take it into consideration when passing on the appeal, not necessarily as substantive proof, but something that may be well considered, together with all of the evidence before the Court.

Objections are of three types as heard in the Courtroom. (1) The "shot-gun" type, that which embodies every ground known to the rules of evidence, and many times those unknown. (2) The specific, definite type that points out the ground or grounds relied upon, and which is recognized by the rules of evidence. (3) Then, sometimes, "I object," no ground assigned, and if the Court acts as some I have seen, he may rule for an against the objector without a ground being assigned. Much evidence has been stopped with no record being made of the ground upon which it was stopped and oftentimes with no record of what the evidence offered was.

Number three of the grounds above will not develop if there is an experienced, learned judge presiding, which, unfortunately, is not always the case.

So, we readily see the importance of knowing how and of making a record; a record that will give protection to a client against ad-

verse rulings that prevent valuable evidence, or admit damaging evidence that has no place in the case. MAKE THAT RECORD. This is the right that a lawyer has, and one that a finished trial lawyer will invoke.

The development of facts from which an inference may readily be drawn, without drawing the inference specifically, is often effective. Jurors are just human and sometimes like to be able to draw their own inferences. They may even get the idea, "this is something the lawyer overlooked." This makes the fact to be inferred much more effective. Little things sometimes are of great importance. The finished trial lawyer senses these situations.

Selecting a jury is very important. It contemplates that the jury when sworn in is a fair jury; one that has no preconceived ideas about the case; one that has no prejudice for or against the plaintiff or the defendant; one that has no prejudice against the kind of case that is to be tried; and it contemplates that no one on the jury is interested in the outcome of same.

To arrive at such a jury is oftentimes difficult; most Courts permit examinations of the jury on their "voir dire" by the attorneys; in the Federal Courts, as a rule, and, I believe, in a few state Courts, the examination is by the Court with leave to the attorneys to suggest questions to the Court. The examination by the Court is growing in its use, upon the idea that it saves time, and no doubt it does because a lawyer can use many hours in examination of a prospective juror while the Court would use much less time. Generally speaking, this rule is good, but sometimes I think it works a hardship, especially in a criminal case where so many things might enter into the search for a fair juror.

The finished trial lawyer will, before Court convenes, where he has access to the jury panel, know a great deal about the prospective juror; in fact, so much that often he does not need any "voir dire" examination; but even if he does, he is better able to conduct his examination or suggest questions to the Court to be asked.

I know what lawyers are thinking when I say the objective is a fair jury. "Fair to whom?" Every lawyer naturally wants jurors as favorable as possible to his client, and it is in this contest between the lawyers that facts both ways are brought out and give a fair picture so that when the jury is finally selected, it has been screened by the opposing sides so as to come as near the objective, all things considered, as possible.

In the course of selecting a jury, the lawyer, while endeavoring to obtain, legitimately, jurors who would be as favorable as possible to his case as it would likely develop on the trial, should bear in mind that the jurors who are selected have observed and listened to all that has occurred in the course of the selection of the jury. Conduct and words may create impressions. A wrong impression created during an examination of the jury may be hard to overcome during the trial.

While good looks and voice are real assets in a trial lawyer, they are not classed as essentials.

One of the niftiest little steamboats I ever saw—I was brought up on the Mississippi River—was the steamboat "Whisper." It was built and put in operation on the Mississippi River to be used as a pleasure boat between Memphis, Tennessee, and Vicksburg, Mississippi. Captain Wolf was the owner and operator. This was back in those "old days" that I have already mentioned when, before national prohibition, the states were going dry by state legislative enactment. This little steamboat was a stern wheeler, with dancing space and a big bar. It would traverse the Mississippi in the channel along the shoreline of the states that were dry, and at certain intervals, in certain places, it would blow a wonderful whistle, three long blasts, musical and sonorous, and the last blast would be much weaker than the first because it was exhausting its supply of steam; its whistle was too big for its boiler. The sound that emanated was anything but a "whisper"—the populace along the shore would congregate as the "Whisper" would drift out in the channel, where and when the bar would proceed to do a land-office business, in violation of no law. During this drifting period, the "Whisper" would proceed to get up another head of steam for its next run and next blast for more customers. This whistle was so big that when it blew, it would exhaust its power. The point I make is that when the whistle blew, no matter how pretty the boat, nor how melodious the whistle, the engine had to stop. Good looks and good voice in a long trial may leave in their wake no power, unless the boiler is able to maintain the steam.

Having gone through a long trial during which he has created the impression that he is unfair, and he comes to argue his case, even though he speaks with the tongue of men, he is lacking in love, and becomes as sounding brass, or clanging cymbal. In other words, beautiful language, perfect rhetoric, and superb delivery will fall short of being convincing.

REWARDS

The finished trial lawyer will be independent and a good liver, wherever he is; he will be known, and favorably known, in the territory which he serves, and oftentimes will be called upon to go far beyond his natural territory; he will be called upon by brother lawyers to try or assist in the trial of certain cases; he will be highly regarded by the fellow members of the bar; and this should be the acme of all lawyers' desires.

The finished trial lawyer in congested centers, when once his reputation is established as such, will come in contact with litigation in which large fees are paid, both civil and criminal; he will be, as we might say, in the "big money." The same type of lawyer in sparsely settled communities will naturally not earn large fees for the cases are fewer and of less magnitude, and the criminal practice pays so little that it would not be worthwhile, monetarily speaking.

One reward, however, that is common to all finished trial lawyers, whether in congested or sparsely settled territory, is the self-satisfaction that comes from being from day to day in a contest with respect for the rules of the game, and who is willing to be scored by that Great Scorer of whom Grantland Rice said: "For when the One Great Scorer comes to mark against your name, He writes—not that you won or lost—but how you played the game."