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For my part, I feel firmly that under existing conditions, the jury system is basically sound, and on the whole reasonably successful. By this I mean, that even now, few juries fail to reach fairly correct verdicts. Jurors, however, are essentially human. They have their prejudices, preconceptions and antipathies—racial, religious and political. While not always controlling in a particular lawsuit, these considerations do sometimes affect a verdict, and this should, of course, be reduced to a minimum. We hope by the procedure that has been suggested these may, in part, be accomplished.

We shall, of course, never have perfect juries. But any plan that will improve the quality of our juries, is worth a try, and if we are permitted to call upon a greater percentage of the population that is fitted by education, intelligence and appreciation of our way of life, we may, perhaps, bring about a better brand of justice than that which we now know.

A Lawyer In Court†

BY KENNETH W. ROBINSON*

The nicest part about giving a talk so far as the speaker is concerned, is the pleasure of listening to his introduction, and hoping that the introducer will say tremendously flattering things about him. Of course, any speaker knows that they aren't true, and down in his heart he knows that the audience knows they aren't true, but still, the sensation must be somewhat comparable to that of a corpse if he could listen to the nice things said about him in the funeral sermon.

Undoubtedly most lawyers approach the trial of a case, particularly to a jury, with the same sensations—a sinking feeling in the pit of the stomach, and an assertion, which we really don't mean, that God deliver us from ever trying another case; yet, once the trial is started we undoubtedly feel that of all the phases of the practice of the law, it is one of the most stimulating, exciting and interesting.

There is no need in saying to a group of lawyers that which they all know, that behind the trial of every case there must be painstaking preparation—the interviewing of witnesses; their careful selection; the preparation of an adequate trial brief; the taking of depositions of your opponent's client in advance so as to know the full story he will tell in the courtroom. These things, I submit, we all realize are tremendously important. Furthermore, so far as our office is concerned, were it not for the work done in this connection by my partners, Philip Van Cise and my father, and by Albert Frantz and Robert Swanson, I

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would find myself in a worse fix, if possible, when I entered a courtroom. For as is often true, the real preparation for a trial is done by others who may not even participate in the actual trial itself.

Now what can be said as to the selection of a jury? After over twenty years I profess I know no more about it than at the start. One thing I can tell you gentlemen: If you go into the federal court and the United States Attorney suddenly arises and asks for a thirteenth juror, it is well to bear in mind something that I learned, to my horror, last summer—that a thirteenth juror in the federal court is selected differently than in the state courts. I say to my horror, for through sheer ignorance as to how a thirteenth juror was obtained in the federal court, I ran out of challenges and ended up with a chief of police and a past commander of the American Legion as the thirteenth juror in a treason trial! Perhaps a smattering of law would be of assistance to all of us.

The importance of a clear and convincing opening statement in the trial of any case, civil or criminal, cannot be overestimated. For it is there that you are first enabled to let the trier of the facts know that you do have a case and that your cause is just. It has always seemed to me a bad mistake to reserve an opening statement in a criminal trial on the theory that you are going to conceal your real position, for by the time you make the opening statement the government's case oftentimes has become so persuasive to the jury that little you can say then will affect the result. Whereas, if you make your opening statement at the start and emphasize clearly your position in the trial, each juror, I submit, will have at least something of what you said in mind as he listens to the witnesses produced against your client.

Much has been written on the subject of cross examination. Doubtless you gentlemen have read various works on this subject, but I submit to you, there is little that can be gained from such reading. It must be learned through trial and error, principally error. Instinctively we must know that on cross examination we are always on very thin ice. Ridiculous it is to have the witness repeat again his damaging story against us, nor should we assume that the witness is lying merely because he opposes our position. Perhaps he is biased, consciously or otherwise, and oftentimes he is mistaken. Naturally, where possible, we endeavor to show the bias or the mistaken fact, and in doing so, how many times have we wished we never had tangled with the witness! I still know of no rule by which we should approach this most delicate operation, except, perhaps, a determination by the forms of our questions that we will never permit that witness to get his head and run away with us. Leading questions being permitted, leading questions they should be, and in a form where the answer

must be narrow. In other words, if possible, keep a firm hold on the interrogation and don't, gentlemen, do as I once did when Foster Cline called a character witness for the defendant in a notorious murder case I was prosecuting. Believe it or not, I asked that witness why he investigated to determine the good character of the defendant. What an answer I received, and justly so. The witness was a deputy sheriff from Cripple Creek. He made a speech from the witness stand. I couldn't stop him. I had thrown open the door. He told me why, and ended by saying that his investigation was made to determine whether or not the defendant was justified in the killing, and then the witness whirled toward the jury box, brought his fist down upon the reporter's desk, and shouted "I say to you gentlemen, by God he was justified." When the hats came down from the ceiling and the uproar of approval ended, and I could find no mousehole in which to creep, I discovered that the witness' observation simply made the views of all in the court room unanimous except your speaker.

I don't believe a team of horses could drag out of me the question "why" of any witness on cross examination.

All of which brings me down to this. I know of no formula by which a case should be tried. Surely there can be no fixed pattern when you enter that room. You must not say that come hell or high water you will start with A and end with D as witnesses. For when A finishes his testimony you sense the reactions of those in the jury box, or the gentleman on the bench, and so sensing, it may well be that witness E is thrown into the fray and B and C are dropped entirely, or perhaps, indeed, F, whom you had never intended to call at all, must be brought forward.

I say you sense it, and I mean just what I say, for unless you have a definite feeling of what is happening in that court room as the case progresses, then indeed you are seriously handicapped. And there is no rule that I know of by which you can sense what is happening. You feel it or you don't, and to the degree that you feel it your powers of persuasion are strengthened.

For it must be evident to all of us that in that arena of the court room neither the court nor the jury is any longer interested in mere abstract rules of law dug from musty books. Here at last is an attempt to resolve a definite conflict in human relationships between man and man. Whatever the standard of human conduct laid down by rules of law may be, I submit to you gentlemen that the jury, or indeed the court itself, is conscientiously trying to do what it conceives to be substantial justice in that particular controversy. In the majority of cases, perhaps the applicable rule of law may do justice between Tom Brown and Bill Smith. But oftentimes the enforcement of that

rule of law in that particular controversy between those very litigants will do injustice.

Whether the case be criminal or whether the case be civil, the court and the jury are both interested in trying to produce an end result which will allow that man or woman to leave the court room with a decision which in that case seems right, in common justice.

Hence it is that any lawyer who engages in that most fascinating work, the trial of cases, must always bear in mind that he enters that room faced with a definite problem of convincing a court or a jury, or both, that his cause is just, and just in the sense as the man on the street sees it. He must realize that if he approaches the trial with the thought that he will hang the case upon some technicality he is most apt to be woefully mistaken.

This, I submit, calls for a profound sympathy with and understanding of human problems: the rights and the wrongs of human conduct, irrespective of law; an understanding of why people do the things they do; the motives and forces back of them, some of which they cannot control; their economic needs. These are the things as we grow older in the profession we recognize not only are often the decisive factors in the court room, but, I submit to you gentlemen, justly so, for I cannot believe that we as lawyers should fall down and worship abstract rules of law and ignore the situations which life itself presents for solution in the immediate cause at hand.

Perhaps I am mistaken. Perhaps there is a formula by which cases shall be tried. Well, if such there be, the only rule that occurs to me is that of the Lord High Chancellor in the opera Ioloanthe.

How does the song run?

"When I went to the Bar as a very young man
(Said I to myself said I)
I'll work on a new and original plan
(Said I to myself said I)
I'll never assume that a rogue or a thief
Is a gentleman worthy of implicit belief
Because his attorney has sent me a brief
(Said I to myself said I)
Ere I go into court I'll read my brief through
(Said I to myself said I)
And I'll never take work I'm unable to do
(Said I to myself said I)
My learned profession I'll never disgrace
By taking a fee with a grin on my face
When I haven't been there to attend to the case
(Said I to myself said I)."