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The Trial

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THE TRIAL

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In the beginning, I wish to impress on the young practitioner, as well as the older members of the Bar, to be prompt in attendance upon the Court on the very opening day of the Court where you have cases for trial. Be prepared to go into your case when it is called. Never ask for a continuance of the case unless you have legal grounds upon which to base your motion for a continuance. The delaying of the procedure of Court works a hardship upon jurors who have been taken away from their business to serve their State and County as jurors. When jurors observe attorneys attempting to delay the trial of their cases, where they do not have sufficient grounds, a bad impression is made upon them.

Throughout the trial it is well to bear in mind that courteous conduct towards the court, the jury, and your adversary pays dividends. By that it is not meant that you should not conduct your case vigorously, for one may conduct his case with vigor and at the same time do it in a courteous manner. Jurors observe the conduct of attorneys throughout the trial and discourteous conduct on the part of an attorney weighs greatly with the jury when they take the case under consideration. At all times be openly frank and fair with the court and jury. Never, by remark or conduct, give the impression that you are endeavoring to win your case by misleading the judge or the jury.

NECESSITY OF FAMILIARITY WITH TRIAL ROUTINE

The young practitioner should thoroughly familiarize himself with all the well-settled customs of the court in which he is to appear. There will be many unexpected and disconcerting occurrences during the progress of the trial, and familiarity with the ordinary routine of a trial will make possible undivided attention to the solution or remedy of these unexpected things as they arise. Just as a locomotive engineer's familiarity with all the parts and functions of his engine enables him to exercise utmost alertness when an emergency arises, so does familiarity with the court procedure enable the lawyer to exercise his greatest efficiency in dealing with unexpected testimony.

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FAMILIARITY WITH RULES OF EVIDENCE

Familiarity with rules of evidence is often of great value to the lawyer. By the rules of evidence testimony may be regulated, but the courts will not ordinarily exclude testimony unless the adverse counsel objects to its introduction; and when an objection is made to the testimony offered you must state the ground of your objection and not rely upon merely saying, "I object". In order to object successfully, counsel must be so familiar with the rules of evidence as to recognize the instant a question is asked that it offends a given principle of the law of evidence. The objection then has weight, and will usually be sustained by the court as soon as the ground of objection is stated.

It often happens that the young lawyer loses a good case because his adversary outgenerals him in the introduction of evidence. The mental confusion that comes over the young lawyer through the tactics of an opponent, who is a master of the rules of evidence, gives the latter a tremendous advantage. Full familiarity with the rules of evidence cannot be obtained solely from the text books written on the subject, but like everything else "practice makes perfect".

TRIAL BRIEFS — MEMORANDUM OUTLINE OF CASE

A lawyer should never undertake the prosecution or defense of a case in which much evidence is to be introduced without previously drawing up a memorandum of the order in which the evidence should be presented and the important points expected from each witness. Unless this is done, there is danger of omitting important evidence in the confusion of the trial. Many cases are lost through failure to introduce evidence really possessed by the party; and other cases are so weakened by the absence of material evidence that a victory is of little consequence.

NATURE OF OUTLINE

The memorandum itself may be very simple, unless the case to be tried is complicated. It is often advisable to use ordinary notepaper, and to allow considerable space between each item of the memorandum, thus making a sort of skeleton outline to which other suggestions may be added, if necessary, during the trial. The convenience of notes added in this way lies in the fact that they are logically arranged, because of being inserted in their proper place in the outline.

VERIFYING PREPAREDNESS FOR TRIAL

Before entering upon the actual trial, the lawyer should see to it that his witnesses are at hand, that he has prepared his outline of evidence, as well as having his brief on the questions of law pertaining to his case, and is prepared to meet any argument in the case based upon the law involved in the case.

SELECTING JURORS

You should be familiar with the age, occupation and station in life of the jurors on the panel from which the jury is to be selected. You should be familiar with the number of peremptory challenges to which you are entitled and do not challenge haphazardly, but have in mind your reason for such challenge. After you have exhausted your peremptory challenges, you have a right to challenge for cause and if you have a good cause for challenging any juror, you should make your challenge giving your grounds for such challenge.

The selection of a jury may vitally affect the issue of the case, because the prejudice or bias of one or two of the jurors may prove of great weight with the rest of the panel. Hence every attorney who expects to have a case tried in a given term of court should carefully investigate, so far as it is possible, the men composing the venire of jurors, and indicate by memorandum before trial what men on the list are likely to be friendly or unfriendly to his client. This must be done in advance of trial, if at all, for the selection of a jury is ordinarily accomplished in a very brief time, and no opportunity for investigation or conjecture is presented. Men of the same occupation as your client are ordinarily favorable and sympathetic jurors, but the cases are seldom where there are many such on the jury.

Look out that your opponent does not have friends on the jury, for they are dangerous judges of your client's rights, and the result of the trial may surprise you.

OUTLINING CASE

In a civil case plaintiff's counsel should read his complaint and then briefly outline to the court and jury the nature of the action. Likewise, when the defendant's counsel has read his answer to the jury, he should outline the nature of his defense. The object of outlining the plaintiff's case is to give the court and jury a better understanding of the significance of the evidence to be introduced.

Likewise, it is also for the same purpose that the defendant outlines his defense. This opening of the case should not be argumentative, but simply and solely explanatory of the salient points of the plaintiff's side of the case, and the defense upon which the defense relies. The clearer and simpler the explanation, the stronger will be the interest aroused in the minds of the jurors. Having seen the points which the plaintiff and defendant hope to make, their minds will be alert to observe the array of evidence to decide whether it matches up with the various claims concerning it. Under such conditions, portions of the evidence may assume a far greater significance to the jury than if no claim had been made concerning them.

The testimony to be introduced may be perfectly clear and logically conclusive to the attorney himself, but it must be so presented to the jury as to produce a similar impression upon them. The opening of the case gives the plaintiff and defendant an opportunity to start the jury right in their interpretation of the evidence.

DIRECT EXAMINATION

In calling a witness to the stand for examination, it should be borne in mind that the position of a witness is an embarrassing one. The eyes of everyone in the courtroom are turned upon the occupant of the witness stand, especially during the first few minutes of the examination, and any person who has not had frequent experience as a witness in court must feel this scrutiny keenly. It is an ordeal that has doubtless been dreaded for days and everything conspires to render the witness nervous and easily flustered.

RESTORING COMPOSURE TO WITNESS

The first attention of the examiner should therefore be directed to restoring the composure and self-possession of the witness. Very ordinary questions should be resorted to, and the best of these are the perfunctory questions relating to the witness' identity. The name, residence, age, and occupation of the witness are necessarily first in order. The foundation for the testimony expected of the witness must first be laid and his relation to the case definitely ascertained. The details of this relation may be established by a series of simple questions which serve the double purpose of restoring the composure of the witness and of supplying a necessary basis for his testimony.

LAYING THE FOUNDATION FOR TESTIMONY

There is no presumption that a particular witness had requisite opportunities to observe or otherwise obtain correct information as to the subject matter of his examination. Questions should therefore be put to him at the beginning of his testimony for the express purpose of showing that he did have the requisite opportunities to acquire the knowledge sought to be obtained from him as a witness. This knowledge must have been obtained directly by personal observation or research and not from hearsay.

QUALIFYING AN EXPERT

If for any reason it becomes necessary to introduce a witness for the purpose of expert testimony, he should be qualified as an expert by a series of questions before the desired testimony is sought to be introduced. In order to give his testimony weight with the jury, if objected to, it must first be shown that the witness has, by study or experience, become a specialist in his particular field. He may be an expert in land values, a handwriting expert, an expert on human anatomy, or in any of the numerous fields of study or experience. But it must appear in evidence as a matter of record and by the testimony of the witness himself.

METHODS OF PRESENTING EVIDENCE

The effort of the examiner should be to present the evidence as briefly and clearly as possible. Protracted examination should be avoided. Nothing can be gained by causing the witness to repeat his evidence, unless the first recital was incomplete. One clear statement of the facts should accomplish all that is desired.

The witness should be turned over to the adverse counsel for cross-examination as soon as all desired testimony has been given. Care should be taken, however, that no important element of his testimony be omitted. A previously prepared memorandum of the witness' testimony, if consulted before leaving the witness, should safeguard one against this danger.

Do not ask questions just merely to be asking them. Have definitely in mind what point you wish to develop from each question asked of the witness. Questions asked haphazardly are most dangerous to the examiner for he will often thereby develop evidence for his adversary. Many a case has been lost by the asking of one question too many.

Questions propounded to a witness, especially to one's own witness, should be short and couched in simple language. If the witness can tell his story without omitting details that should be properly be given, it is usually considered wise to allow him to do so without interrupting his recital with questions. It is well to avoid the appearance of prompting a witness, for the effect of the testimony is greatly weakened by unnecessary reminders from counsel. Do not allow the recital to drag; keep the witness alert and animated if you desire to hold the attention of the judge and jury. Be as watchful to avoid weak cases as you are to present the strong points of your client's case.

LEADING QUESTIONS IN DIRECT EXAMINATION

Leading questions are not permitted in direct examination and upon objection will be excluded by the court. If a question is worded in such a way as to directly suggest to the witness the answer expected or desired, it is a leading question. By framing your question, using the phrase "whether or not", does not always prevent the question from being a leading one.

If the witness has omitted a material part of his testimony some way must be devised of reminding him of the omitted portion without asking a question that can successfully be objected to as leading. The nature of the testimony and the witness himself are controlling factors in any given case, so no rule of practical benefit can be laid down. Each examiner must solve the problem in his own way.

But a word of caution should be added. Do not be a stickler for technicalities in the introduction of evidence. If your opponent puts a leading question in direct examination, do not object to it merely because it is leading. Many attorneys of long experience choose to ignore leading questions, unless concerning a material matter in dispute. They regard them as an expeditious method of reaching the issue.

HOSTILE WITNESS

Leading questions are always allowable in the direct examination of a hostile witness. But it should appear that the witness is really hostile, otherwise objection to such questions will be sustained by the court. Another reason why the hostility of a witness should be made to appear at an early stage of the examination is that the jury will be apt to attach more weight to evidence favorable to your side if they know that the witness is hostile.

It is often said by lawyers of mature experience that one should hesitate about calling a hostile witness, because of the unfavorable evidence he may be able to include in his answers. If, however, it is necessary to call a hostile witness, prudence would dictate that you frame your questions carefully, giving the witness the least possible opportunity for explanations or evasions.

I feel that I should give you just what our Supreme Court has said regarding the examination of a hostile witness (*White v. Southern Oil Stores, Inc.,* 198 S. C. 173, 17 S. E. (2d) 150 (1941)):

> We can well appreciate the dilemma in which appellant (defendant in the lower court) found itself, when on account of certain allegations in the pleadings not necessary to be set out herein, it was announced that respondent (plaintiff in the lower court) was closing his case without going upon the witness stand; and with no previous decision of this Court directly on the issue as raised, so far as we have been able to learn, appelant used due caution in refusing to call the adverse party (respondent) as a witness, especially in view of the opinion of the Court in *Benbow v. Harvin,* 92 S. C. 180, 186, 187, 75 S. E. 414, 417, wherein it is stated: 'While the party who calls his adversary as a witness makes him his witness to the same extent that he makes any other person whom he calls as a witness, still he is no more concluded by the testimony of his adversary than he would be by the testimony of any other witness whom he might call. But just as in the case of any other witness, having called him, he may not impeach him or contradict him; but he may prove the facts to be otherwise than he testifies them to be'. Of course the general rule is that a party who offers a witness cannot impeach or discredit him, but there are some exceptions, as for instance, where the witness is not of the party's own selection, but is one whom the law obliges him to call, such as a subscribing witness to a deed or a will or the like. See *Jerkowski v. Marco,* 57 S. C. 402, 35 S. E. 750.

In *State v. Nelson,* 192 S. C. 422, 426, 7 S. E. (2d) 72, 74, the general rule is stated as follows:

> It is a well established rule of evidence that a party is not concluded by the unfavorable testimony of his own witness, but may prove his case by other evidence. He is not precluded from proving any facts relevant to the issue, by any competent evidence, though it be a direct contradiction of the testimony of

a former witness called by him. And, generally, when a witness is an unwilling one, or hostile to the party calling him, or stands in a situation which makes him necessarily adverse to such party, his examination in chief may be allowed to assume something of the form and character of cross-examination, at least to the extent of permitting leading questions to be put to him. Justly limited and rightfully applied, the rule is a wise and salutary one; but if not properly limited and employed it may be very unjust and mischievous. * * *

While this Court should and does adhere to the general rule, yet under unusual circumstances such as existed in this case, had appellant called the respondent as a witness, we would feel inclined to hold that it would have been permissible for the appellant to have contradicted and impeached such adverse party. We think the reasoning in a 'Note', the subject of which reads 'Right of a Party Who Calls Adverse Party as Witness to Impeach or Discredit His Testimony,' found at pages 711 and 712, 6 A. & E. Ann. Cas., is sound. We quote therefrom:

'There are manifestly stronger reasons for permitting the contradiction and impeachment of a party who is called as a witness than of an ordinary witness. Thus it has been said: 'A party who produces a witness thereby vouches for his respectability of character and for his veracity, and therefore he should not be allowed to show that he is unworthy of credit after he has been disappointed in his testimony. This rule can scarcely be said to be applicable to the parties themselves, because the very litigation between them and the points in issue are in dispute, and each denies to be true what the other says. The pleadings in almost every case brought down to trial prove the truth of this; and it would be hard indeed to believe that the party would go into the witness box when called by the opposite side and there state what he himself had before asserted was all untrue; and it would be harder still to hold a party should be conclusively bound by the statements made in his own favor, and that he should not be allowed to impeach the party so examined'. *Hair v. Culy,* 10 U. C. Q. B., 325. The testimony admitted in this case was merely contradictory and would not have been competent as against any witness. In *Carny v. Kats,* 89 Wis., 230, 61 N. W. Rep., 762, it was held that the rule as to the holding out of the witness as one worthy of credit does not apply in its full rigor where the adversary

party is the witness called. In *Webber v. Jackson,* 79 Mich., 175, 44 N. W. Rep., 591 (19 Am. St. Rep., 165), wherein the defendant, charged with having made a fraudulent conveyance, was made a witness by the plaintiff, it was said: 'It seems a little incongruous to claim that a party who puts a defendant on the stand for the express purpose of showing his fraud thereby gives him credit for honesty.

HANDLING A DULL WITNESS

In handling a dull witness the examiner is often obliged to exert all his ingenuity to obtain the desired information without exposing himself to objection for leading his witness. The witness must be made to understand the exact meaning of the question, so that his answer may be to the point. Simple, direct questions should be put with a patient persistence until the information sought has been obtained as a matter of record, or a sufficient basis has been laid to make the inference so obvious that the jury must perceive the precise point involved.

UNCERTAINTY OF MEMORY OF WITNESS

There is no field more baffling in its aspects than that of credibility of witnesses. Because two witnesses differ in their versions of the same occurrence which both have witnessed it is not thereby established that one or the other is guilty of perjury. They may both be perfectly honest in their beliefs. No two people see a thing in the same way, and if their impressions are not the same it follows that the memory of one as to the occurrence will differ from that of the other. It often happens that one person will remember a thing with a fair degree of definiteness and certainty, while another person, equally well-informed originally as to the event, may have forgotten it entirely or confused it with some other similar event. If the incident is one involving excitement or emotion the memory of the witness is especially likely to prove treacherous.

RIGHTS AND DUTIES OF ADVERSE COUNSEL DURING DIRECT EXAMINATION

The duty of adverse counsel during the direct examination is twofold. He must be continually on the alert to object to improper evidence if it should be offered, and he should also take notes of the testimony as a basis of cross-examination. Few lawyers have so

retentive a memory as to remember accurately rapid-fire testimony and carry that recollection with them through all the confusion of cross-examination. A written memorandum, however, is available at any moment of cross-examination and also during argument to the jury. If there be associate counsel, one of them should take notes of both direct and cross-examination, and be in a position to prompt the other if he omits a material point or insufficiently covers an important proposition.

You should not object to questions asked by your opponent unless you have sufficient grounds for such objection. You should state fully your ground of objection, for our Court has held that merely objecting to the testimony will not avail, but in order to have the benefit of the objection you must state the grounds therefor. Many practitioners, not only the young, but also the old, seem to have the idea that to constantly object to his opponent's questions strengthens his case; but to the contrary, unfounded objections serve only to irritate the jury and to weaken one's case.

CROSS-EXAMINATION — MANNER IN QUESTIONING WITNESS

There are lawyers who apparently consider an aggressive, domineering manner toward the witness as the first requisite of success in cross-examination. But the majority of lawyers prefer to treat the witness courteously, and to accomplish results in a less spectacular manner. An apparently friendly and good-natured beginning should put the witness in a better mood for accomplishing results than if he were antagonized at the outset. The jury will ordinarily take sides instinctively with the witness if the lawyer plays the part of a bully. The position of the witness is an embarrassing one at best, and he is at a great disadvantage if badgered and "stormed at" by the questioner. A damaging admission is of less weight with a sympathetic jury under such circumstances. The jurors are apt to consider the contradiction due to excitement or pardonable confusion. I have seen many a case lost because of the attitude of the cross-examiner towards a witness gaining the sympathy of the jury.

So it is better policy to begin quietly, and to put important questions in an unconcerned manner, so that the witness may not be on his guard. After you have trapped him in an important particular, the sympathy of the jury will be with you, and then you can follow up your advantage by harsher methods, being careful only not to overdo the matter by too great severity.

DISCREDITING PERJURED WITNESS

In order to make sure of discrediting a perjured witness do not take up his testimony in the order of the direct examination, but reverse the order, or jump from one topic to another in an unexpected sequence. A "made-up" story must inevitably break down under such tactics.

Witnesses differ greatly, and the examiner must decide upon the spur of the moment what method to adopt in cross-examining a particular witness. It is often of great importance to give the witness a "bad fall" and before he can recover from his confusion and vexation to follow him up relentlessly. Other matters that seem to need explanation should be brought out, and questions put to him so swiftly that by no feat of mental gymnastics can he tell anything but the truth.

BRINGING OUT WHOLE TRUTH

A very important feature of cross-examination is the possibility of bringing out the whole truth where only a part of the truth has been stated in direct examination.

FISHING CROSS-EXAMINATION

It is often said by lawyers of long experience in court that one should never cross-examine a witness without a direct object in view. Other lawyers qualify the statement to the effect that if the case is desperate there is everything to gain and nothing to lose by cross-examination.

With an honest witness who is trying to tell nothing but the truth the field of successful cross-examination is limited. He may be able to enlarge upon something only partially disclosed or explain matters more fully. But the lawyer must decide for himself in any given case and general suggestions are at such times of little value. He must size up the witness and the probabilities, and then take his chances one way or the other. The honest witness will usually make his story more definite and convincing under cross-examination, while the dishonest witness speedily falls before the efforts of a skilled examiner.

ASTUTENESS OF EXAMINER

In cross-examination much depends upon the astuteness of the examiner. The expression of the witness and the very inflection of the voice may sometimes indicate a possible opening for the examiner.

Discrediting Witness

The cross-examiner is frequently obliged to resort to putting up other witnesses to establish facts tending to discredit the witness whom he has cross-examined. It sometimes happens however, that a witness under cross-examination can be forced to discredit himself by his own testimony.

Another effective method of discrediting a witness is by showing a conflict between his testimony in the present instance and other testimony or statements relative to the same matter which he has made at some previous time. In order to accomplish this successfully, the lawyer must be so familiar with the alleged statements that he can instantly detect a variation from previous statements. If these statements were made in the court or at a formal hearing the stenographic minutes of the proceedings should be at hand in order that the witness may be confronted with the facts if he denies having made the contradictory statements. He may still insist that he never made the statements alleged, but if the record shows to the contrary, the jury will ordinarily prefer the record to the uncertain memory of the witness. However, before you attempt to contradict a witness by a previous statement made in court, or out of court, be sure that he did make the contradictory statements. If by a reference to a record, or otherwise, it is shown that you have been misinformed as to the previous statements made by a witness, your efforts to discredit the witness in this manner will be a "boomerang" and greatly weaken your case.

It may be, and it frequently so occurs, that the variation is only apparent and can be readily explained by the witness, but the value of the actual discrepancy when established is so valuable in discrediting the witness that most lawyers will make the attempt, unless the variation is in their favor.

Statements made in a previous trial of a similar nature that conflict with the witness' present testimony are frequently of weight with the jury.

A Woman Witness

You will note that I have not attempted to discuss the examination of a woman witness. I could not tell you how a woman witness should be handled, nor have I ever experienced any lawyer who knows how to handle such a witness. She will always say what she has to say regardless of objection by counsel, or the efforts of the court to stop her. A woman will always have the last word on

the witness stand, or anywhere else. I therefore leave the woman witness with you, labelled *"Handle With Care — Explosive — Dangerous"*, and pass on to my next topic.

BE PREPARED WHEN QUESTIONS OF LAW ARISE AS TO ADMISSIBILITY OF EVIDENCE

When a question of law arises as to the admissibility of certain evidence, be prepared to back your objection up by references to authorities, or certainly to the extent of what the authorities hold.

VIEWING THE LOCUS

If either party to the suit considers it necessary for the jury to personally view the premises or place in question, or any property, matter or thing relating to the case, he may secure a view by the jury by making a motion to that effect. Under our practice and procedure, the request for a viewing of the locus comes at end of the introduction of testimony by witnesses, unless a different time be agreed upon.

MAKE APPROPRIATE MOTIONS TO PRESERVE RIGHTS IN EVENT OF APPEAL

In order to preserve your rights in the event of an appeal, you should make proper motions, such as a motion for a non-suit, and a motion for a directed verdict at the appropriate time.

IMPORTANCE OF WRITTEN REQUESTS TO CHARGE THE LAW INVOLVED

When the evidence has been concluded, you should hand up to the trial Judge a written request to charge. In a very simple case the request to charge may be unnecessary. If you have a well-prepared set of requests to charge, covering the points of law involved (and you should have prepared this before trial), supplemented by authorities, you will impress the court with the fact that you consider your case an important one and that you have faith in the merits of your case. When a Judge asks of the attorney if they have any special requests to charge, and he receives the reply, as I often have, — "Your Honor is more familiar with the principles of law involved than I am and I leave it to your judgment," the Judge is impressed with the idea that the attorney was too lazy to prepare his case, or that he does not think it of great enough importance to prepare writ-

ten requests. But bear in mind that "whatever is worth doing at all, is worth doing well". You do not flatter a judge and curry favor with him by stating that you leave the question of law entirely to him. He is seeking enlightenment and it may be that without the request to charge he may inadvertently overlook charging some very important principle of law. The very reading by you of your request to charge may impress upon the jury a very important principle of law, and, if the Judge charges your request, it puts you in a more enviable position before the jury. But be sure that your requests are sound propositions of law. Bear in mind that if they be not sound and the Judge refuses to charge them, you are not at all helped with the jury.

These written requests will serve as effectual reminders to the Judge of your claims as to the law. If the trial Judge refuses to give any of the requested instructions, and you feel that your client's interests have been prejudiced by the refusal, you have opportunity for appeal to a higher court to have the matter definitely determined. If the Supreme Court decides that the requested instructions should have been given, a new trial will be granted.

THE ARGUMENT TO THE JURY

We often hear it said that the day of eloquence has passed and that modern jurors, like other men of today, frown upon the lawyer who attempts to overwhelm them with too much oratory. There is little necessity of cautioning the young lawyer to avoid grandiloquence, for in ordinary cases he is too nervous and self-conscious to launch upon flights of speech. The jurors of the present day are too enlightened to be swayed by grandiloquence. They can be appealed to by sound reasoning. Do not strive to be eloquent or to affect the jury to tears. Make your client's side of the case as attractive as it can possibly be made. Make it clear that the evidence in favor of your contention is so reasonable and so logical that it must be accepted as the true version. This does not require eloquence, but it does require putting things in a clear and definite way. You must be, and appear, interested in the matter yourself if you desire to interest the jury. You must also be, and appear, convinced of your contention if you wish to convince the jury.

In opening your argument, you should bear in mind the fact that the jury and everyone in the courtroom give you their attention at first. A new speaker or a new witness is always an object of interest at the outset. Take advantage of this fact by using your most in-

teresting or most important argument at first, and thus hold the interest of the jurors until you have attained your object.

Do not prolong the argument after your points have been clearly made. To do so would be to weaken the effect of your plea. The jurors, even as other men, prefer a short pithy address to a long and rambling discourse. Your argument should, of course, aim to prove some claim or claims upon which your suit is based. There may be several allegations in your complaint, or in your answer, and the evidence may not support all of them. It would, therefore, be prudent to ignore the unsupported allegations and devote all your energies to maintaining the others. I have experienced in the trial of cases where a short but to the point argument would have won the case, but it was lost by the counselor's verbosity exhausting and irritating the jury.

To illustrate to you where a short, but to the point, argument paid dividends, there comes to my mind a criminal case in Lexington County, over which I presided, where the defendant was not represented by counsel but conducted his own defense. This defendant, an illiterate negro, had never had the opportunity of studying the theory of law, but he had much practical experience in Criminal Law Procedure, for he was constantly a defendant. He was charged with assault and battery with intent to kill, it being alleged that he had wounded his wife with a pistol. After the State had concluded its evidence, the defendant turned to me and said, "Mr. Judge, tell dese gemmens dat dey cain't do nothing with me on what dem witnesses just say 'bout me." While not couched in legal phraseology, the defendant had made a motion for a directed verdict. Because of the nature of the evidence introduced by the State, I had to refuse this motion, but had it duly placed in the record. When the defendant took the stand in his own behalf, he testified that, when he went to his home one night, he looked through the window before attempting to enter, and saw his wife in the embraces of another man. The defendant said he heard the report of a pistol coming from within the house and saw the man in his home run therefrom. The defendant swore that he had not fired a shot, and that he did not have a pistol. The defendant's entire argument to the jury was, "Gemmens, I ain't done what dey say I done, but if any of you gemmens would go home and find yo' wife in another man's arms, and you didn't do what dey say I done, den you won't be no gemmens." The jury retired, and was out just long enough to write a verdict of not

guilty. This defendant's argument was short and to the point, and paid dividends.

You should confine your argument to the material issues in the case for it is upon them you must expect to win. Do not discuss other matters, however attractive for argument, for you will be devoting time to useless matters unless they can in some way be brought to bear upon the issue.

Too often, in their overzealousness, counsel will constantly interrupt their adversaries during the arguments to the jury by making objections to the statements made in his argument. Certainly, if opposing counsel has made a mis-statement concerning a material matter, objection is proper, but do not make objection to some immaterial matter, for when you do so the jury is caused to believe that your adversary is getting the best of you and that you feel that your cause is lost and that you are acting in desperation.

Inference from evidence is an important element of jury pleading. Testimony has been introduced tending to show a given state of facts. Counsel then have a right to reason from inference that other facts exist. If the common experience of mankind would support this inference, it then becomes an element of strength in favor of the party invoking it. Circumstantial evidence owes its value to what inferences may be drawn from it. Stick closely to the facts in your case, but be sure that the facts, or the inference therefrom, warrants the position that you have taken in argument. You should be sure that when you attempt to say what a witness testified to, that you are giving the correct version of that witness' testimony.

It may be in some cases that the inference is so obvious that the jurors must assuredly perceive it, but it is dangerous to take things for granted, and in all ordinary cases the inference sought to be established should be clearly and convincingly set forth in the plea to the jury.

Reviewing Evidence in Argument

The importance of a bit of evidence is always enhanced by judicious review in the argument. The time for making clear any doubtful phase of the case should be improved to the utmost. Remember that your opponent in presenting his side of the case will treat your evidence in a hostile manner, and that every possible element of strength in your client's case should be arrayed before the jury.

Attacking the evidence of your opponent or explaining away its

importance are both important means of attaining a victory. Hence, after you have shown up the strength of your side, a judicious showing up of your opponent's case is advisable. This does not mean charging his witnesses with perjury or bad faith, unless such is fairly evidenced, but showing how unimportant their testimony may be, or how it may have resulted from an honest misapprehension of the real facts.

Always stick to the facts in the case. You should check your notes thoroughly to see that when you assert a fact that it comes from the testimony. Never go out of the facts produced in the case. If you are quoting testimony, or any part of the testimony of a witness, be sure that you are giving an accurate statement as to what that witness has testified. If you make a mis-statement as to any fact, or if you misquote the testimony of any witness, someone on the jury will remember this and he will use it against you in the jury room when the jurors are arguing the case among themselves.

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

If the jury has brought in a verdict adverse to you, make the motion *non obstante veredicto,* joined with a motion for a new trial. Bear in mind, however, that you are not entitled to make your motion for an order of judgment to be entered notwithstanding the verdict, unless at the close of the evidence you have made a motion for a directed verdict, and this must be made after the reception of the verdict and before the adjournment of the Court in which the case was tried. You may make the motion *non obstante veredicto,* or you may pray in the alternative for a new trial.

CONCLUSION

Sometimes an attorney, who has lost a case, is prone to charge the judge with having caused him to have lost. Bear in mind that the trial judge endeavors as far as it is humanly possible never to be a partisan. He does not take sides, but views the case from both sides. He is there for the purpose of seeing one thing only, and that is that the trial be conducted in such a manner that justice will be done. I do not mean by this that a judge is immune from proper criticism by the lawyers after the case has ended. I believe it was the late lamented Mr. Chief Justice Watts, who said that when an attorney has lost his case he has the right to cuss the

judge, not in his presence, however, for twenty-four hours thereafter, but when that time has passed the lawyer should forget any of the unpleasantness that may have come about during the trial and dismiss the loss of his case from his mind.

Likewise, it often happens that during the heat of a trial, because of the tenseness of the situation, lawyers may make remarks of each other of which at the time they do not realize the import, and thereby engendering illfeeling towards each other, which could be of lasting effect. You should never carry in your heart, after the case has been finished, any personal animosity toward your adversary. In closing I leave you with these lines from "The Taming of the Shrew";

> "And do as adversaries do in law;
> Strive mightly, but eat and drink like friends."