

RECENT BOOKS

TRIAL TACTICS AND METHODS. By Robert E. Keeton.
New York: Prentice-Hall, Inc., 1954. Pp. 438. \$7.50.

An unprecedented number of books on trial technique were published this past year. Professor Keeton's *Trial Tactics and Methods* is the best of this mediocre lot, and ranks among the superior works in this general field, along with Busch, *Law and Tactics in Jury Trials* (1949), the *Trial Practice Series* of monographs published by the Practising Law Institute (1946), and Goldstein, *Trial Technique* (1935).¹

The coverage in *Trial Tactics and Methods* is broader and more detailed than that of most books on the subject, although there is the usual over-emphasis on automobile negligence problems and the usual neglect of problems peculiar to such important litigation areas as crimes, child custody, divorce, collection of small debts, foreclosures, and suits to quiet title. Keeton thoroughly discusses the ordinary steps in a trial from selection of a jury to closing argument, and then has lengthy chapters on Preparation for Trial, Pleadings, and Proceedings Before Trial. There are also separate chapters on *The Non-Jury Case* and *What Makes a Trial Lawyer Effective*. The book is not a digest or even a manual of formal legal doctrine. Only a few rules of court and appellate decisions are cited; and when authorities are given for statements about the law, they are usually sections of *Wigmore* or *American Jurisprudence*. The book is primarily concerned with practices for most effectively preparing and trying law suits within the framework of the law.

To a considerable extent the book involves the steps for lawyers to take or avoid in dealing with the key persons in judicial proceedings: judges, juries, and witnesses. It could properly be sub-titled "The Psychology of Proving Facts." Keeton proceeds on the realistic premise that no matter how favorable the law may be to a litigant, he will not prevail unless a judge or jury accepts his version of the facts. As is sufficient for a book written for practitioners, Keeton's conclusion on how judges, juries, and witnesses react is based on experience and hunch. No doubt, his conclusions are fairly accurate. But they raise the questions of why people respond in the trial situation as Keeton assumes they do, and whether there is any empirical method available to test the accuracy of his assumptions. A scientific study of the trial process might disclose data that not only would be helpful to the trial practitioner, but also might suggest changes in the law of trial procedure to achieve more accurate fact finding in litigation. One such study of the jury is now under way in Chicago, aided by a large Ford Foundation grant. Its findings may substantially change the recommendations made by future books on trial tactics.

Due to the increasing difficulty that young lawyers face in acquiring trial experience, competently written books such as *Trial Tactics and Methods* can fill a major educational need. Of course, more is necessary to create a skilled trial lawyer than the mere reading of books. But if the young lawyer carefully studies books on trial technique as he prepares for trial or as he observes the court work of older lawyers, his trial ability will increase much more rapidly. Similarly, the law schools can make use of these books as supplemental readings for their students in trial practice courses. More law schools should give attention to the development of trial competence by means of trial exercises that simulate actual litigation experience. Every student should actively participate in a series of such exercises, drawing on Professor Keeton's

¹Other recent books on trial technique are BISKIND, *HOW TO PREPARE A CASE FOR TRIAL* (1954); GAZAN, *TRIAL TACTICS AND EXPERIENCES* (1954); LAKE, *HOW TO WIN LAWSUITS BEFORE JURIES* (1954); STRYKER, *THE ART OF ADVOCACY* (1954); APPLEMAN, *SUCCESSFUL JURY TRIALS* (1952); FRICKE, *PLANNING AND TRYING CASES* (1952); CUTLER, *SUCCESSFUL TRIAL TACTICS* (1949); and SCHWEITZER, *TRIAL GUIDE* (1948).

book or some comparable written materials as background information. Until the legal teaching profession recognizes its obligation in this regard, the number of lawyers qualified to try contested law suits will continue to decline.

Because of its wealth of detail, *Trial Tactics and Methods* should be of value to the experienced trial lawyer as well as the novice. Any lawyer, no matter how many cases he has tried, could profit from reading this book. Some of Keeton's suggestions, of which these are samples, might prove new to many experienced trial men or lead them to reconsider the desirability of practices they have been following. Jury arguments are usually too long from the standpoint of jurors. An unfavorable witness should generally be asked some questions on cross-examination so that the jury will not get the impression that the cross-examiner acquiesces in such testimony. A federal court is the best forum in a diversity case, if the strongest authority in your favor is the opinion of an intermediate state appellate court, because federal courts are more likely to follow these intermediate appellate court decisions than are state courts. After initial discussions with the client, he should be asked to prepare at his leisure a memorandum of all material facts that occur to him during the next several days. A motion to exclude harmful and objectionable evidence should be made out of the presence of the jury and in advance of its offer if it seems probable that the opposite side plans to offer such evidence. Instructions on damages are generally more favorable to the plaintiff if each item of damage is treated separately. Ordinarily you should not take depositions of your own witnesses unless they are likely to be unavailable at the time of trial. Where pleadings are read to the jury, they should be drafted in a simple style that will appeal to jurors and be understood by them.

Some trial technique books have been criticized for recommending unethical practices and describing the effective trial lawyer as though he were the participant in a game in which success is measured by how extensively he misleads the court and jury and by how frequently he surprises his opponent. Professor Keeton avoids censure of this sort by frequent warnings concerning unethical conduct, supported by citations to the canons of ethics. But still there is the implication running through the book that surprise, concealment, and misrepresentation are advantageous trial techniques.

Although over-all, *Trial Tactics and Methods* is an excellent work, it has some shortcomings. As has been indicated, more consideration should have been given to trial problems peculiar to cases other than automobile negligence. The book also suffers from too few examples. Hypothetical cases appear at the beginning of many sections and receive fairly complete discussion, but they are insufficient to clarify many of the generalizations. In addition, the writing style is frequently so complex and verbose as to make it difficult to follow the ideas presented. But considering the unfortunate style of most statutes, regulations, and judicial opinions, lawyers should be accustomed to understanding difficult reading matter.

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