SUCCESSFUL TRIAL TACTICS, by A. S. Cutler.* New York: Prentice Hall, Inc., 1949. Pp. 307. $5.35.

I have read with interest Mr. Cutler's book on "Successful Trial Tactics." "Here is a book," says Judge Jerome Frank in his foreword, "by a highly intelligent lawyer who, for some thirty years, has successfully practiced in our trial courts. Equipped with this rich experience, he has told, in delightfully homespun language, how trials are actually conducted." I agree.

In sixty-one compact and well written chapters, Mr. Cutler seems to have run the whole gamut of a trial. He has endeavored to give us, to use his own words, "A practical book—homely, concisely written, dealing with all phases of trial practice. . . ." And then he adds: "Every general practitioner in this country needs real assistance in the trial of his cases."[1] With studious conscientiousness, Mr. Cutler has endeavored to give us such a book, but after reading it, the question which stands uppermost in my mind is whether a general practitioner can greatly profit by this or any other similar treatise. The law student or the lawyer who spends most of his tune in office work would read this book, I am sure, with deep interest for he would find here good practical advice and many, many useful hints and suggestions.

The mistake, however, which he might make could well be that by mastering all that Mr. Cutler has so carefully written, he would thereby feel himself to be a master of the subject and competent to try a case in court. Yet the more slavishly he followed Mr. Cutler's teachings, the more likely he would be to do the wrong thing because there are and can be no set rules which an able advocate will invariably follow. The law student or the office lawyer also might come to the conclusion that the trial of a case can be taught from a book, and that all that is involved is a familiarity with the rules—even such excellent rules as Mr. Cutler has laid down; for the trial of a case is as far as anything can be from the mastery of a bag of tricks.

What Mr. Cutler is talking about in his sixty-one chapters is the art of advocacy, and until and unless the persuasion of twelve men or of one judge or of a bench of appellate

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1. P. 7.

judges is recognized as an art rather than a set of rules and smart devices, this difficult, fascinating and most interesting subject never will be understood. For advocacy is as much an art as playing a violin or painting a portrait—indeed, it much resembles the work of painting. The portrait painter is given a canvas and the colors of the spectrum. How he mixes these and finally applies them is the test of his capacity. The men and women immortalized by Rembrandt or Sir Joshua Reynolds were only men and women after all, and their likenesses, had they been produced by an inferior hand, would never have endured the test of time. These works are treasured in our galleries because a master hand created them. A reasonable likeness might have been produced by an inferior brush, but such a likeness never would have caught the heart, the spirit or the soul of the subject.

That advocacy is an art for which some men are peculiarly qualified and others not, has been given practical recognition in Great Britain for centuries. "There," says Mr. Cutler, "the bar is sensibly divided. The office lawyers are all solicitors. They do try cases in certain inferior courts, but generally the majority confine their work to office work. Trial lawyers, a small, compact group, well-known to each other and to the judges, do nothing but try cases. Naturally, the barristers are highly expert. In any case of importance the solicitor retains, and indeed is required to brief, a barrister. Miscarriages of justice are infrequent and almost unknown."[2] But in the United States, he continues, "because every lawyer admitted to practice has the absolute right to try a lawsuit, without reference to his competence to do so, the ascertainment of the truth and the certainty of decision is upon a hit-and-miss basis."[3] This certainly is a profound truth and one which Mr. Wellman recognized when, in his work on cross-examination, he wrote: "In our local courts there is already an ever increasing coterie of trial lawyers, who are devoting the principal part of their time to court practice. . . . We are thus beginning to appreciate in this country what the English courts have so long recognized: that the only way to insure speedy and intelligently conducted litigations is to inaugurate a custom of confining court prac-

2. P. 2.
3. P. 2.

tice to a comparatively limited number of trained trial lawyers."[4]

But how does one attain proficiency in this field, assuming a sincere desire to work in it? "There is no short cut," says Mr. Wellman, "no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. . . . When the public realizes that a good trial lawyer is the outcome, one might say, of generations of witnesses, when clients fully appreciate the dangers they run in intrusting their litigations to so-called 'office lawyers' with little or no experience in court, they will insist upon their briefs being intrusted to those who make a specialty of court practice, advised and assisted, if you will, by their own private attorneys."

What made Martin Littleton, John B. Stanchfield, Burke Cochrane, Max D. Steuer, Emory R. Buckner, William Travers Jerome and so many others, great trial lawyers? One answer, of course, is experience. By the trial of innumerable cases beginning as young men they had learned how to do it. They had been resolute in the recognition of their own mistakes and strong in their purpose to correct them. They had watched the mistakes of their adversaries, determined not to make them, and had looked with approval at the able work of opposing counsel and resolved to imitate it. But that was not all. They had found that they possessed the God given gift of persuasion.

God Almighty has not made all men equal in ability. All men may have been created equal but they have not been created alike. He has fitted some for one class of work; others for another. Happiness in life consists in finding at an early age what it is that a man by his natural talents is most adapted for—what work he can best perform. The young man may decide to embark upon the medical profession. He may have great gifts as a diagnostician or an internist, and yet be utterly unfitted for the performance of a major operation. So, too, with lawyers. Some find themselves adept in drawing trust agreements or intricate plans of reorganization, yet with no inclination for and no talents in the field of advocacy. Now, how does one find out what he is best fitted for? Surely, not in any law school. "Our

4. Francis L. Wellman, THE ART OF CROSS EXAMINATION (1925).

law schools," says Mr. Cutler, "do virtually nothing to help a man try a case. They teach a student the theory of the law. They forget that principles of law, no matter how well conned, apply only to the facts invoking the rule. The proof of those facts, to which legal principles may be applied, is the daily grist of our courts. Very few of our millers know anything about the running of the mill which eventually grinds out a decision depriving a person of life, liberty, or his money and property."[5]

Some of the law schools have sought to give their students an experience in the trial of cases through the organization of moot courts. On a few occasions I have acted as a judge in these courts where young men and women have been trained on the points of actual testimony in some reported trial and have then as "witnesses" reproduced this before the moot court, but I agree with Mr. Cutler's quotation from a writer in the *Harvard Law Review* that such " 'experiments have been more successful in affording amusement than in substantial benefit to the participants. A fact trial now and then is well worth while, but only as a relief to the tedium of serious work.' "[6]

How does a medical student learn how to be a surgeon? By watching some gifted surgeon in the actual work of surgery and then finally, first in a small way, then in a more important manner, by participating in some actual operation. How, too, does a young member of the bar become an effectual trial lawyer? In the same way, namely, by watching an experienced advocate at work in an actual courtroom. Both of these methods, that for the young doctor and the young lawyer, hark back to the apprentice system. It was a great system in its day and the apprentice, if he were fortunate enough to be articled to a master craftsman, learned more from him than any book could teach.

If our neophyte were to supplement his study of the law by reading the lives of some of the great lawyers, he would greatly add to his store of knowledge. Campbell's *Lives of the Chief Justices and the Chancellors* is hard reading, but they are a treasure house of information for anyone aspiring to persuade a court or jury.

There are other great masterpieces in this field. Among

5. Pp. 2-3.
6. P. 6.

them I might mention Quintillian's *Institutes of Oratory*; Aristotle's *Book on Rhetoric*—a most revealing and most modern book, though it was written many, many centuries ago. Filled with deep, philosophical understanding of the very essence of the art of advocacy, I have often been surprised that more lawyers are not familiar with it.

These and similar reflections suggest the reason why, I believe, that the difficulty of teaching anyone "successful trial tactics" by the reading of a book on the subject is insuperable. The experienced trial lawyer will read Mr. Cutler's book with interest and with approbation, recognizing the many truths which he has there so attractively presented. He will read, for example, Mr. Cutler's Chapter Forty-one on "Taking Notes," in which he suggests, except for taking a few, very few notes, on very important aspects of the trial or the evidence, that the lawyer might be better engaged in watching the witnesses, studying them and noting the reactions of the jury.

How impossible of complete performance, however, was the task which Mr. Cutler set himself, is revealed in his Chapter Twenty-three, entitled "Conducting the Cross-Examination" and the following chapter which deals with "Some Don'ts In Cross-Examination." There is vast truth is his opening sentence of Chapter Twenty-three: "Cross-Examination is not only an art. It requires a great artist to sense when to refrain from cross-examination. No rules can guide the beginner. Only when his skill is such that he knows all the values, can the true trial artist possess the instinct that assures him that certain witnesses are safer left alone than prodded into reiteration by cross-questioning."[7]

He then in seven pages proceeds to set forth "certain guideposts which help to mark the uncertain trial."[8] The experienced trial lawyer will recognize them as good guideposts, and yet I hesitate to think how far short of even the beginnings of a mastery of this subject a reader must needs find himself who knew no more about the subject than is contained in these clear and well written pages. I have read a good many books on this subject, many of them helpful, the most helpful, I think, being Wigmore's chapter on cross-examination. It is one of the greatest chapters in that in-

7. P. 115.
8. P. 115.

comparable book. The study of great cross-examinations is helpful even from the printed page, but here again no one can learn how to cross-examine except by cross-examining. His education should be two-fold: practical experience supplemented by sound reading.

The substantive rules of law, as handed down by our appellate courts—though the last advance sheet had better be consulted to find out what the law of the moment is—can, no doubt, be well taught from the case books in vogue in the great law schools, but the law of the forum, the law in action, what to do and what not to do in the conduct of a case, in my opinion, can be learned nowhere else than in the courts themselves.

All this is not to disparage Mr. Cutler's excellent book. I shall keep it on my shelf and frequently examine it. I think it serves a useful purpose. It is a practical book; it is concisely written and it does deal with all phases of trial practice—the goal which Mr. Cutler set himself. What I am saying is not in dispraise of this able effort, but merely as a word of caution to the neophyte and to the uninitiated. Do not read this book or any other with the idea that by so doing a mastery of the art of advocacy will be achieved.

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