

“CROSS-EXAMINATION”

BY

CUSHMAN KELLOGG DAVIS

FOREWORD

BY

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Joseph Wesley Donovan (1847- ?) served on the Third Circuit Court of Michigan from 1887 to 1911. He loved the law and he admired lawyers. As he wrote in *Tact in Court*:

The happy lawyers! The men who live so easily, flourish so long on the bounty of a grateful people, make laws and settle the titles, defend the weak and protect the wealthy, enjoy the rich fruit of the world’s praises and abuses, mingled and commingled in such rare harmony that no one can define where censure ends and approval commences! Who would not be a lawyer ?

There must have been something of a teacher in Judge Donovan because he wrote several trial manuals: *Modern Jury Trials* (1881), *Tact in Court* (1885), *Skill in Trials* (1891), and *Art of Advocates and Public Speaking* (1905). Each went through several editions.

Judge Donovan is listed as the author of *Tact in Court*, but its contents are largely the work of others. He is up front about this. His “Preface” begins:

Addison says : The safest way to give advice is in the form of fables, and cites the case of Nathan to David as his authority. In this he shows that where instruction comes through story, incident or illustration, it is better understood and more convincing. The writer aims to follow this line of advice where it is given. The advice given is mainly from others.

Accordingly, *Tact* contains anecdotes, maxims, lists of rules, arm chair psychology, and all around good advice about how to try a case. To a modern reader, it is surprisingly fresh. It was a popular book in its time, and it is easy to see why. Physically it is small, 5" X 7.75", and easy to hold. The sixth edition is 188 pages long and is divided into over six dozen short chapters. It is repetitious—a lesson in one chapter may reappear later, told in a different manner by another famous advocate. The one conclusion every reader can draw from *Tact* is that Judge Donovan loved courtroom jousting.

It appears that when compiling *Tact*, Judge Donovan wrote to several famous lawyers for their advice on trial practice. One of these was Cushman Kellogg Davis, then serving his first term as United States Senator from Minnesota. Senator Davis provided Judge Donovan with three rules on trial practice—or, more accurately, on what a lawyer should not do during a trial. One of the peculiarities of books on trial practice is that they abound with words of caution, of warnings, of what to avoid, of what not to do. Judge Donovan gave the title "Cross-Examination" to the chapter containing Senator Davis's advice, but he would have been more accurate if he had called it "Three Don'ts."

The chapter that follows appeared on page 107 of the sixth "enlarged" edition of *Tact in Court*, published in 1907. Though reformatted, it is complete. ■

TACT IN COURT

SIXTH ENLARGED EDITION

CONTAINING

SKETCHES OF CASES WON BY ART,
SKILL, COURAGE AND ELOQUENCE.

WITH

*EXAMPLES OF TRIAL WORK BY THE BEST
ADVOCATES, AND HINTS ON LAW SPEECHES.*

By JUDGE J. W. DONOVAN,

AUTHOR OF

*“Skill in Trials,” “Modern Jury Trials,” “Speeches
and Speechmaking,” etc.*

ROCHESTER, N. Y.
WILLIAMSON LAW BOOK CO., LAW PUBLISHERS,
1907.

TACT IN COURT.

CROSS-EXAMINATION.

EX-GOV. DAVIS, of St. Paul sends the following excellent rules:

1. Discount by at least twenty-five per cent what your client says he himself will swear to.

2. Do as little cross-examining as possible. Never, on cross-examination, ask a question when you do not know what the answer must be if the witness is honest; and, if he is a liar, don't ask the question unless you are ready to ruin him with a contradiction by facts in evidence or by other witnesses. I have seen more good cases ruined by cross-examination, by the lawyer, who ought to have suppressed his curiosity or vanity, than by any other cause.

3. Never misstate or overstate testimony to a jury, in summing up. You will always be detected by some juror and he will resent your attempt to "play him for a fool."



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