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# Bill to Regulate Expert Testimony

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# A BILL TO REGULATE EXPERT TESTIMONY.[1]

EDWIN R. KEEDY, *Chairman.*[2]

The American Institute of Criminal Law and Criminology at its meeting in Washington, D. C., on October 22, 1914, unanimously approved the following bill, which was presented by the committee on insanity and criminal responsibility.[1]

SECTION 1.—*Summoning of Witnesses by Court.* Where the existence of mental disease or derangement on the part of any person becomes an issue in the trial of a case, the judge of the trial court may summon one or more disinterested qualified experts, not exceeding three, to testify at the trial. In case the judge shall issue the summons before the trial is begun, he shall notify counsel for both parties of the witnesses so summoned. Upon the trial of the case, the witnesses summoned by the court may be cross-examined by counsel for both parties in the case. Such summoning of witnesses by the court shall not preclude either party from using other expert witnesses at the trial.

SECTION 2.—*Examination of Accused by State's Witness.* In criminal cases, no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine the accused.

SECTION 3.—*Commitment to Hospital for Observation.* Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before which the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The

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[1]Fourth Report of Committee B of the Institute.

[2]The membership of the committee is as follows:
Edwin R. Keedy (professor of law in Northwestern University), *Chairman.*
Adolf Meyer (professor of psychiatry in Johns Hopkins University), Baltimore.
Harold N. Moyer (physician), Chicago.
W. A. White (superintendent Government Hospital for the Insane), Washington.
William E. Mikell (dean of the Law School of the University of Pennsylvania), Philadelphia.
Albert C. Barnes (judge of the Superior Court), Chicago.
Morton Prince (physician), Boston.

court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the acused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides.

SECTION 4.—*Written Report by Witness.* Each expert witness may prepare a written report upon the mental condition of the person in question, and such report may be read by the witness at the trial. If the witness presenting the report was called by one of the opposing parties, he may be cross-examined regarding his report by counsel for the other party. If the witness was summoned by the court, he may be cross-examined regarding his report by counsel for both parties.

SECTION 5.—*Consultation of Witnesses.* Where expert witnesses have examined the person whose mental condition is an element in the case, they may consult before testifying, with or without the direction of the court, and may prepare a joint report to be introduced at the trial.

Section 1 applies to civil and criminal cases.

The purpose of this section is to secure the testimony of disinterested witnesses which may go to the jury along with the testimony of the witnesses for the prosecution and defense. Under the present system, a criminal trial where expert testimony is employed generally resolves itself into a contest between the opposing witnesses, whose contradictory opinions often confuse, rather than enlighten, the jury. Such divergence of opinions must exist in the very nature of the case, for each party calls only those witnesses whose opinions are in accord with the theory of that side. The situation in this respect has been well described by Sir George Jessel, Master of the Rolls in *Thorn v. Worthing Skating Rink Co.*, L. R. 6. Ch. Div. note 415, 416: "Now in the present instance I have, as usual, the evidence of experts on the one side and on the other, and as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained, since I have had the honor of a seat on this bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert, also honestly obtained. But the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does sometimes, to half a dozen experts. He takes their honest opinion; he finds three in his favor and three against him; he says to the three in his favor, 'will you be kind enough to give evidence?' He pays the ones against him their fees and leaves them alone; the

other side does the same. It may not be three out of six, it may be three out of fifty. * * * I am sorry to say the result is that the court does not get the assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect." A similar statement was made by one of the medical members of this committee in the *New York Medical Journal,* in July, 1908. It is suggested that the proposal in section 1 will tend to counteract the evils of the system described above.

Section 2 applies to criminal cases only. This section will enable witnesses for the prosecution, who at present, in most cases, are limited to opinion evidence, to testify as to the actual condition of the defendant. In this way the necessity for the much-abused and much-criticized hypothetical question will be considerably lessened. It is submitted that section 2 does not violate the constitutional provision against self-incrimination. (See Wigmore on *Evidence,* §2265.) In *People vs. Kemmler,* 119 N. Y. 580, 584, the Court of Appeals of New York said: "It is urged that the court erred in permitting the physicians, called as witnesses for the people, to testify as to the mental condition of the prisoner. The argument is that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. These physicians were sent to the jail by the district attorney to make an examination of the prisoner's mental and physical condition. On the stand they were not inquired of as to the conversation had with him, or as to the transactions in the jail. Their testimony was simply their opinion of his mental condition, as they saw him in his cell and in the court room, but they gave no evidence of his statements of his physical condition. Such evidence is quite unobjectionable."

Section 3, which is applicable to criminal cases only, does not present a new idea. Maine,[2] New Hampshire,[3] Massachusetts[4] and Vermont[5] have statutes providing for the commitment of a defendant, who is relying upon mental disease as a defense, to a hospital for purposes of observation. According to the language of the Maine and Vermont statutes, the report of the superintendent is final on the question of the defendant's condition, for they provide that the accused shall be detained and observed "that the truth or falsity of the plea (of insanity) may be ascertained." The Virginia legislature at

[2]Rev. Stat., 1903, ch. 138, sec. 1.
[3]Laws of 1911, ch. 13, sec. 1.
[4]Acts of 1909, ch. 504, sec. 103.
[5]Pub. Stat., 1906, sec. 2307.

its last session (1914), enacted a statute[6] providing that the trial judge may commit an accused person to a hospital for purposes of observation. The statute also empowers the judge to appoint qualified experts to examine the accused before this commitment and to report the results of their examination to the judge. The establishment in large cities of psychopathic institutes, such as the one recently started in Chicago in connection with the Municipal Court, would facilitate greatly the examination and study of persons mentally diseased or deficient.

Section 4, which covers both civil and criminal cases, will enable the expert witness to present a much more accurate and connected description of the defendant's mental condition, particularly with reference to the symptoms of his disease. Under the present system, by which the opinion of the witness must be drawn out by a series of questions put up by counsel, witnesses often feel that they are unable to present an adequate diagnosis of defendant's condition, and to express a full and convincing opinion regarding his powers of judgment and decision. Such a plan as is proposed in section 4 has worked successfully in Scotland. The medical witness in a Scottish criminal trial, after an examination of the defendant, prepares a written report which he files with the clerk of the court. At the trial, after the witness has been sworn and has qualified as an expert, he reads his report to the jury. The counsel for the party which has called the witness may ask any explanatory questions, and the witness is then cross-examined by the counsel for the other side.

Section 5, which is applicable to both kinds of cases, is simply for the purpose of saving time and eliminating any possibility for misunderstanding, where the experts are able to agree in their opinions.

[6]Acts of 1914, ch. 313.

*(Remarks[1] by Hon. Orrin N. Carter, Justice of Illinois Supreme Court, relative to bill to regulate expert testimony.)*

## A BILL TO REGULATE EXPERT TESTIMONY.

Mr. Chairman: Ordinarily I am reluctant to have the Institute pass a resolution in favor of special or particular legislation, because generally we do not have time here to give full consideration to the subject. This matter we are now discussing, however, I consider an exception. Few subjects have been given the exhaustive investigation before reporting that has been given by the committee to this. From my own personal experience and observation there is another reason I think why we should make an exception in this matter; the great majority of people who have given it any study fully agree that there should be a change in regard to the calling and examination of expert witnesses. Many people believe that experts testify for the side which will pay them the most, and that they ought not to be called by the litigants. Lawyers, as well as laymen, think our system of calling and examining experts should be changed.

I have given the subject of this report considerable thought, but a judge of a court of last resort does not wish to express an opinion on constitutional questions before they come to him in due course, and hence I would not wish to express publicly whether I thought this recommendation in all respects would be constitutional. I deem it entirely proper to say, however, that judges of courts are reasonable men, and that most members of courts of last resort are very anxious to uphold the constitutionality of a statute that is based on reason and good sense. Indeed, many good lawyers think that the courts of many of the states are too ready to yield to public opinion and stretch the constitution in order to hold constitutional certain laws along new lines embodying the ideas of the time. I am not here to discuss whether that be true or not.

I think the chairman of this committee is right in saying, if you do not allow the defendant in a criminal case to call experts, if he desires to do so, that there is grave danger of the law being held unconstitutional in some, if not all, of the states. Not only that, but such a law would not strike the ordinary person as being fair. Judges, as well as laymen, are desirous of having the laws treat everyone

[1]Made at the meeting of the American Institute of Criminal Law and Criminology, in Washington, D. C., on October 22, 1914.

fairly; a defendant accused of crime should have a right to be heard and—so far as reasonably consistent with the due course of law—to present his evidence in the way that he wishes. The present method of calling and examining expert witnesses is not only unfair, but often brings most disastrous results.

We naturally draw on our personal experiences in discussing changes in the law. For nearly twelve years I presided over a court in Chicago, in which all persons whose sanity was questioned were tried. The question of expert witnesses was often called to my attention, as it has been frequently in a striking way in the court of which I am now a member. In a recent murder trial that came before the Supreme Court of Illinois for review, the question of the sanity of the defendant was raised. Expert testimony had not been put in, at least in a proper way, in the trial below. The members of the Supreme Court of Illinois would have been much better satisfied in passing on that case if the testimony as to the sanity of the defendant had been properly presented. From the record we could not satisfactorily reach a conclusion as to whether the man was insane, or was what is commonly known as a degenerate. On an appeal to the Governor to commute or reprieve the defendant, he called in experts to make an examination. The court would very gladly have considered the testimony of those experts, if they had been called on the trial.

This report recommends that pending the investigation before the criminal trial, the defendant be taken to the asylum for the insane and kept. I have talked with Prof. Keedy about some of the difficulties in the way of enforcing that provision, unless the law is carefully drawn. In Illinois we have five state institutions, as I recall the number, where the insane are cared for. The law should be so drawn that the defendant would be taken to the nearest state asylum. I suggested, among other things, to Prof. Keedy that I had some doubt as to the practicability of such a law, as the expense and delay in the trial would be too great, but he stated in reply that the plan had been tried in other jurisdictions and found to be practical. That is the real and true test of such a plan as this. If it works successfully in some states it ought to work successfully in all the states, if the law is carefully drawn. Of course I cannot guarantee that this draft of the law is drawn in the right way. If it is, it is the first time that I have ever known the first draft of a new law to be so drawn. I have never seen any statute where lawyers would not disagree as to its meaning. Indeed, Mr. Chairman, I have written opinions, now

in the books, as to the meaning of parts of which lawyers have taken diametrically opposite views, when in writing the opinion I did not intend to have it construed as either of the lawyers contended. I have sometimes thought that the great Frenchman, Talleyrand, was right when he said that language was meant to conceal rather than to express thought.

I am very much in favor of this law, so drafted in each state as to meet the conditions in that state. Of course this will not do away entirely with such foolishness as Prof. Keedy has called attention to in this report, where a hypothetical question was presented which took half a day to read to the witness. I have no doubt, though, that such a law as this will prove of great use in remedying many of the evils that now exist in reference to the calling and examination of expert witnesses. Lawyers and courts are probably much to blame for the condition that now exists, especially as to allowing such unreasonable questions as just referred to. Agitation and education should force courts and lawyers to put a stop to that sort of an examination. We can bring about that result by concerted action. I cannot emphasize too strongly, Mr. Chairman, my desire to see enacted in every state, a statute modelled along the line of the suggestions offered in this report.

*(Editorial by John H. Wigmore in Illinois Law Review for December, 1914.)*

## THE BILL TO REGULATE EXPERT TESTIMONY.

At last it would seem that the lamentable conditions of expert testimony, under the present law and practice, have some prospect of improvement.

More than fifty years ago, Lord Chancellor Campbell, speaking of experts' testimony (*Tracy Peerage Case,* 10 Cl. & F. 154) said pessimistically, "Hardly any weight should be given to their evidence"; and since that time, still harsher sayings have been uttered by judges. In spite of much study of the problem, no solution has commanded acceptance.

The reasons for this lamentable condition of things lie partly in the inherent nature of such testimony and partly in the law. But the law's part of the fault has been that it has not sought to adjust itself explicitly to the special conditions. The ordinary rules did not suffice, and some adjustment was needed, before things could improve. But for this purpose some understanding by both parties—lawyers and scientists—of each other's limitations was indispensable, and some concessions on each side. This understanding and these concessions lacking, no progress was possible.

But at last the attempt has been made to confer and agree, and the result promises to be a solution of this long standing problem—so far at least as its solution depends upon legal practice, and not on the ethical behavior of the two professions. A committee of the American Institute of Criminal Law and Criminology, with Professor Edwin R. Keedy as chairman, has been working on the subject for the past three years. The four medical members of the committee represent the widest experience and a national fame: Adolph Meyer, director of the psychiatric hospital of Johns Hopkins University; Morton Prince, professor of psychiatry in Boston University; William A. White, superintendent of the Federal Hospital for the Insane at Washington; and Harold N. Moyer, of the Chicago Medical Society. The lawyers' names are equally a guarantee of experience and sound judgment: Albert C. Barnes, judge of the Superior Court of Cook County; William E. Mikell, dean and professor of criminal law in the law school of the University of Pennsylvania; and the chairman, who made a study of the subject in two foreign

countries. If this weighty body of opinion, after the fullest discussion, can be brought into agreement, and proposes something as an adequate measure of reform, the rest of us may well be satisfied to accept it. We mean this literally; our profession can afford to give full faith and credit to the proposal of such a body.

And what is this measure? It consists of five sections; each one of them aims to remedy one aspect of the complex problem; and the combined effect of the five is to remedy all of the most serious shortcomings of the present practice, and thus to do in one enactment all that the law itself can do under present conditions.

Section 1 empowers the judge to summon expert witnesses (selected by himself or by parties' agreement), in addition to those summoned by the parties. This is the first needed step to eliminating the extreme evil of hired partisanship, but it wisely does so by trusting to the greater moral weight of a judge-selected expert, instead of attempting to create an exclusive and permanent body of official experts; for the latter measure (often proposed by medical men) is both impracticable and un-American.

Section 2 provides that in criminal cases (on the sanity issue) the expert medical witnesses offered by the prosecution shall have equal opportunity with those of the defence to examine the accused. This removes one important source of unfair use of expert testimony to becloud a case. It will also much lessen the need for the much-abused hypothetical question.

Section 3 empowers the judge, on a sanity issue in a criminal case to place the accused in a hospital for observation by all the expert witnesses. This, again, removes one of the present means of juggling with testimony, and furnishes the condition on which scientific and impartial alienists depend for forming a safe and useful judgment.

Section 4 permits the expert witness to read, as his direct testimony, his report in writing, subject then to cross-examination. Here, once more, the legal limitation is removed which leads to so much of the artificial partisanship now obtaining, and is so irksome to the true and impartial scientist. The condition is furnished which will make the witness-box seem more natural to the medical practitioner, without abandoning any of the traditional safeguards of the law.

Section 5 permits the experts to consult before trial, and to prepare a joint report if desired. Here, too, legal practice is allowed to conform to the normal practice of all reputable medical practitioners in dealing with a serious case. The false and futile forcing

of medical men to disagree, and the foolish bear-baiting so absurd in a quest for truth, is made needless under the law, if the practitioners are disposed to take the opportunity.

Now the notable thing about these measures is that the last four of them are merely measures which bring the law into conformity with all reputable medical and other scientific practice. They are measures which the medical profession has long demanded. The perverse thing about our law has been that it flew in the face of facts. It has complacently expected to get at the truth without methods which are always used in getting at the truth in ordinary scientific practice. The law does not mean to be foolish, and lawyers as a class are not chargeable with stupidity. But it is simply preverse childishness to ignore in legal trials of truth, when expert aid is invoked, the indispensable methods which the experts themselves use and must use in their own work outside of court. If the law will give up this perversity, and will look facts in the face, it may expect to obtain results worthy of its mission; but not otherwise.

There is nothing in this bill to frighten the lawyer. There is nothing in it to discourage the expert witness. There is everything in it that can satisfy the needs of both classes.

The significant fact is that it has commanded the support of seasoned representatives of both professions. At the October meeting of the American Institute of Criminal Law and Criminology, in Washington, the report was adopted. The proposal has been adopted by the Committee on Expert Testimony of the Council on Health and Public Instruction of the American Medical Association, and will be presented to the next Conference on Medical Legislation. The same bill will this winter be laid before committees of the American Bar Association and of the National Conference of Commissioners of Uniform State Laws, as also of the American Neurological Association. If it receives the approval of these bodies, the prospect is that it will be favorably accepted in the state legislatures soon thereafter.

And so a light is dawning on a problem which has long vexed two great professions.