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Sherwin Willens

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of alcoholic intoxication.⁸ This privilege is properly extended only to testimonial compulsion, for its purpose was to put an end to an early practice of extracting incriminating statements from accused persons.⁹

Another available theory is that the search became improper because of the subsequent tort on the defendant by the officers. The idea is the same as where officers legally searching a home unnecessarily destroy property, thus committing a trespass, and the trespass is urged to make the whole search invalid. This *ab initio* doctrine, however, is not approved by modern courts, as the trespass itself is a sufficient basis for remedial action.¹⁰

A more reasonable basis for excluding evidence of the type under consideration would assume that torture of a man can be regarded as something prohibited by the constitutional guarantees of due process of law, and that since it is illegal to deprive a person of his right to due process of law, evidence secured in such a manner is classifiable as illegally obtained evidence. Most states have by now decided how to handle such evidence, a substantial minority of them choosing to exclude it from the trial.¹¹ For these latter courts, calling the use of the stomach pump a violation of due process will accomplish the same result as calling it an unreasonable search. Moreover, a consideration of the problem as a due process question will focus attention upon the reasons for disapproving of such practices: the elements of pain or danger to the accused person.

CROSS-EXAMINING THE EXPERT WITNESS WITH THE AID OF BOOKS

Sherwin Willens

“. . . [I]n matters of science the reasonings of men of science can only be answered by men of science.”
Lord Mansfield in *Folkes v. Chadd*.¹

With increasing frequency, as knowledge becomes channelized into specialties, counsel must cope with the problem of cross-examining the expert witness.² Often it is advisable to forego cross-examining the competent and honest expert,³ but, unfortunately, not all experts are competent

8. See particularly Mamet, *Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication*, 36 J. Crim. L. & Criminology 132 (1945); 8 WIGMORE, EVIDENCE §2263 (1940).

9. See INBAU, SELF-INCRIMINATION: WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? (1950).

10. *McGuire v. United States*, 273 U.S. 95 (1927), strictly limited this theory to tort cases, disapproving its use as a basis for release of an accused. Its use as a means of adding penalty damages to a tort recovery against the offending police officers is discussed in Bohlen and Shulman, *Effect of Subsequent Misconduct upon a Lawful Arrest*, 28 Col. L. Rev. 841 (1928).

11. 19 states follow federal rule of excluding illegally seized evidence: Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming. 26 states reject it: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, South Carolina, Utah, Vermont, and Virginia.

1. 3 Doug. 157 (1782).

2. Wellman, *The Art of Cross-Examination* 75 (4th ed. 1932) (estimated that in over 60% of the more important litigation, experts were called upon to testify).

3. *Id.* at 77.

and honest; so, the crux of the examiner's problem is to neutralize the expert's testimony by showing the jury that he is not qualified or that he has misapplied his knowledge. One effective way of doing this is to cross-examine him from standard books, pamphlets and articles (all hereafter referred to as books) in his field, thus pointing up the fact that his purported expertness is not substantiated.

Although most state courts will not permit such cross-examination unless the expert refers to a specific book or books,⁴ a substantial minority rejects the requirement of reference and allows the examiner to use books subject to the trial judge's discretion.⁵ It is the purpose of this comment to attempt an answer to the following questions: When may books be used as an aid in cross-examining the expert? How may they be used when their use is allowed? Why have many courts restricted their use? Finally, is there a sound basis for restricting their use?

When Books May Be Used

At the outset, it should be noted that the courts do not draw a distinction between civil and criminal cases in regard to the use of books on cross-examination. The majority of jurisdictions qualify the use of books on cross-examination by a rather stringent rule of evidence known as the rule of reference—that is, the expert must first have referred to the book before the examiner may use it upon cross-examination. Actually, the rule of reference is not one rule, but two.

The stricter version of this rule demands that the expert must have made a *specific* reference to the book as corroborating his opinion or as a book upon which he relied as a basis for the opinion he expressed. Under this stricter version, only the book referred to may be used on cross-examination.⁶ Then, too, some of the courts which follow this version draw a distinction between corroboration and reliance, a distinction which seems to depend upon which phase of the examination, direct or cross, it is first established that the expert is familiar with the literature in his field. If in his direct testimony the expert states that his opinion is corroborated by a specific book, he may be cross-examined from that book. But if the factor of corroboration is established upon cross-examination, the trial-wise expert

4. Cases cited notes 6 and 8 *infra*.

5. Cases cited note 13 *infra*.

6. Fed.: *Western Union v. Ammann*, 296 Fed. 453 (3rd Cir. 1924); Cal.: *Griffith v. Los Angeles Pac. Co.*, 14 Cal. App. 145, 111 Pac. 107 (1910); *Gluckstein v. Lipsett*, 209 P. 2d 98 (Cal. App. 1948); Colo.: *Baker v. People*, 72 Colo. 68, 209 Pac. 791 (1922); *Denver City Tramway Co. v. Gawley*, 23 Colo. App. 332, 129 Pac. 258 (1912); Del.: *Drucker v. Philadelphia Dairy Products Co.*, 35 Del. 437, 166 Atl. 796 (1933); Fla.: *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1899); Ill.: *Wilcox v. Internat. Harvester Co.*, 278 Ill. 465, 116 N.E. 151 (1917); *Ullrich v. Chicago City R. Co.*, 265 Ill. 338, 106 N.E. 828 (1914); *City of Bloomington v. Shrock*, 110 Ill. 219 (1884); *Contra*: *Conn. Mut. Life Ins. Co. v. Ellis*, 89 Ill. 516 (1878) (this case has never been overruled and has been cited in jurisdictions allowing complete use of books. Thus, Illinois has the dubious distinction of being authority for opposite views); Ind.: *Louisville, New Albany & Chicago R. Co. v. Howell*, 147 Ind. 266, 45 N.E. 584 (1896); *Hess v. Lowrey*, 122 Ind. 225, 23 N.E. 156 (1889); Mass.: *Percoco's Case*, 273 Mass. 429, 173 N.E. 515 (1930); *Commonwealth v. Phelps*, 210 Mass. 109, 96 N.E. 69 (1911); Mich.: *People v. McKernan*, 236 Mich. 226, 210 N.W. 219 (1926) (court plays a cat and mouse game between examiner and expert; following appears: "In stating the stain was human blood in his opinion and 'I think by the best authorities is so considered,' the witness unlocked the door of exclusion, but counsel failed to lift the latch by naming the authorities he had in mind"); *People v. Vanderhoof*, 71 Mich. 158, 39 N.W. 28 (1888); N.J.: *State v. MacRorie*, 86 N.J.L. 401, 92 Atl. 578 (1914); N.C.: *State v. Summers*, 173 N.C. 775, 92 S.E. 328 (1917); *Butler v. South Car. & G. Ext. R. Co.*, 130 N.C. 15, 40 S.E. 770 (1902); S.D.: *State v. Sexton*, 10 S.D. 127, 72 N.W. 84 (1897).

may escape cross-examination from the book by stating that he did not rely upon it in forming his opinion. In other words, when the expert corroborates his opinion as part of his direct testimony, reliance is taken for granted; the same is not necessarily true when he corroborates his opinion while being cross-examined.⁷

The less strict version of the rule of reference is that books may be used if the expert refers to books generally as sustaining his opinion and the book used need not be a book referred to by the expert.⁸

In both versions it makes no difference whether the expert relies wholly or partially upon a book. The important factor is some reliance. However, the expert can avoid cross-examination from books by making an emphatic statement that although he is familiar with the books in the field, he based his opinion solely upon personal experience and observation.⁹ If he does refer to a book, he may be cross-examined only on sections of the book relevant to his testimony upon direct.¹⁰ For example, a doctor who testifies as to the proper method for setting a broken leg, citing a book as corroboration, may be cross-examined from that book only to contradict his conclusion or to test his knowledge of bone setting, but not to test his capabilities in the whole field of medicine. Another restriction upon the cross-examiner in a few of the states following the rules of reference is the requirement that the book be used only to *contradict* the expert, and not to test his knowledge upon the subject matter of his testimony.¹¹ Taking the illustration given above, application of this restriction means that if the expert's opinion is substantiated as to the manner of setting a broken leg, the examiner cannot use the book even though the conclusion in the book is reached by a reasoning process differing from that employed by the expert.

The one important exception to the restrictive scope of the rules of reference is that a book written by the expert himself may be used by the examiner during cross-examination. This exception is based upon the rule of evidence which allows the impeachment of a witness by his own prior inconsistent statements.¹²

7. *Compare*, *Percoco's Case*, 273 Mass. 429, 431, 173 N.E. 515 (1930) and *DeHaan v. Winter*, 262 Mich. 192, 247 N.W. 151 (1933), *with* *People v. McKernan*, 236 Mich. 226, 210 N.W. 219 (1926) and *People v. Vanderhoof*, 71 Mich. 158, 39 N.W. 28 (1888).

8. Iowa: *Wilcox v. Crumpton*, 219 Iowa 389, 258 N.W. 704 (1935); *State v. Blackburn*, 136 Iowa 743, 114 N.W. 531 (1908); *Cronk v. Railroad Co.*, 123 Iowa 349, 98 N.W. 884 (1904); Kan.: *Stout v. Bowers*, 97 Kan. 33, 154 Pac. 259 (1916); Minn.: *Ruud v. Hendrickson*, 176 Minn. 138, 222 N.W. 904 (1929); *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N.W. 14 (1899); N.Y.: *Hastings v. Chrysler Corp.*, 273 App. Div. 292, 77 N.Y. Supp. 2d 524 (1948). *But cf.* *People v. Riccardi*, 285 N.Y. 21, 32 N.E. 2d 776 (1914); N.D.: *State v. Burnette*, 28 N.D. 539, 150 N.W. 271, rehearing granted, 28 N.D. 554, 150 N.W. 276 (1914) (excellent attempt at reconciliation of conflict in cases); Vt.: *Baldwin v. Gaines*, 92 Vt. 61, 102 Atl. 338 (1917); Wis.: *Bruins v. Brandon Canning Co.*, 216 Wis. 387, 257 N.W. 35 (1934).

9. *Griffith v. Los Angeles Pac. Co.*, 14 Cal. App. 145, 111 Pac. 107 (1910); *Baldwin v. Gaines*, 92 Vt. 61, 102 Atl. 338 (1917).

10. *State v. Thompson*, 127 Iowa 440; 103 N.W. 377 (1905) (murder: defense, insanity. Medical expert could not be cross-examined from a book because statement in book merely showed that author did not believe in defense of insanity); *Hill v. Ross*, 198 Minn. 199, 269 N.W. 396 (1936) (expert did not testify on subject matter of book).

11. *Gluckstein v. Lipssett*, 209 P. 2d 98 (Cal. App. 1948); *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1899) (cross-examination allowed to contradict a witness who testified to having derived teachings from a specified book, said book not containing such teachings, or containing matter substantially different from testimony); *Ullrich v. Chicago City Ry. Co.*, 265 Ill. 338, 106 N.E. 828 (1914).

12. *LaCount v. General Asbestos & Rubber Co.*, 184 S.C. 232, 192 S.E. 262 (1937); *Goldstein and Shabat, Medical Trial Technique* 44 (1942).

Although, as has been shown, the majority rule is that books may be used upon cross-examination only when the expert refers to them, a substantial minority of states allow their use even though he does not say that they corroborate his opinion and he does not rely upon them.¹³ There are, however, three qualifications placed upon this liberal rule. (1) The expert must authenticate the book as a standard authority by acknowledging it as such.¹⁴ Generally, this is not a stumbling block for the expert usually acknowledges the book, and several cases intimate that if he does not do so, the examiner may call his own expert to do it.¹⁵ (This qualification is also required in the states following the less stringent rule of reference previously discussed.) (2) As in the states restricting the use of books, the use must be relevant to the opinion given by the expert upon direct.¹⁶ For example, the examiner will not be permitted to ask the witness if he agrees with Sir William Osler's famous observation in one of his medical treatises that it was remarkable how soon after a lawsuit patients suffering from injuries caused by shock recovered their health.¹⁷ (3) The use is discretionary with the trial judge.¹⁸ However, permission seems to be readily granted.

How the Books Are Used

Before a book may be used in any court a foundation for its use must be laid. The extent of the foundation depends upon the jurisdiction in which the book is used, but generally consists of establishing reliance upon a specific book or books and establishing that the book sought to be used is a standard authority in the expert's field.¹⁹ A sample line of questioning, assuming the expert is a civil engineer and that he did not refer to a book upon direct, would go: *Examiner*: "Mr. Expert, upon your direct examination you stated that in your opinion the railroad was negligent in the construction of its roadbed where the accident occurred because the angle of the slope of the bed was off 20 degrees. Are you sustained in your opinion by any au-

13. Fed.: *Reilly v. Pinkus*, —U.S.—, 70 S. Ct. 110 (1949) (Prior to this decision there was a split of authority within the federal courts. This case, although dealing with an administrative agency, may go a long way in unifying federal court practice); *Victor American Fuel Co. v. Tomljanovich*, 232 Fed. 662 (1st Cir. 1916); *Mutual Benefit Health & Accid. Ass'n. v. Francis*, 148 F. 2d 590 (8th Cir. 1945); *Woelfe v. Conn. Mut. Life Ins. Co.*, 103 F. 2d 417 (8th Cir. 1939); Ala.: *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 So. 30 (1915); Ark.: *Scullin v. Vining*, 127 Ark. 124, 191 S.W. 924 (1917); Idaho: *Osborn v. Cary*, 28 Idaho 89, 152 Pac. 473 (1915); Ky.: *Ky. Public Service Co. v. Topmiller*, 204 Ky. 196, 263 S.W. 706 (1924); Mo.: *Hemminghaus v. Ferguson*, —Mo.—, 215 S.W. 2d 481 (1948); *Wurst v. American Car & Foundry Co.*, 103 S.W. 2d 6 (Mo. App. 1937); Mont.: *State v. Bess*, 60 Mont. 558, 199 Pac. 426 (1921); Nebr.: *Fonda v. Northwestern Public Service Co.*, 138 Nebr. 262, 292 N.W. 712 (1940); N.H.: *Laird v. Boston & M.R. Co.*, 80 N.H. 377, 117 Atl. 591 (1922); Ore.: *Kern v. Pullen*, 138 Ore. 222, 6 P. 2d 224 (1922); Tenn.: *Byers v. Railroad*, 94 Tenn. 345, 29 S.W. 128 (1895); Tex.: *Bowles v. Bourbon*, 219 S.W. 2d 779 (Tex. Civ. App. 1949); *Hicks v. Brown*, 128 S.W. 2d 884 (Tex. Civ. App. 1939); Wash.: *Cameron v. Benefit Assoc. of Railway Employees*, 6 Wash. 2d 440, 107 P. 2d 1096 (1940).

14. *State v. Blackburn*, 110 N.W. 275 (Iowa, 1907); *Wurst v. American Car & Foundry Co.*, 103 S.W. 2d 6 (Mo. App. 1937); *Texas & P. Ry. Co. v. Hancock*, 59 S.W. 2d 313 (Tex. Civ. App. 1933).

15. *Oliverus v. Wicks*, 107 Nebr. 821, 187 N.W. 73 (1922); *Cameron Co. v. Downing*, 147 S.W. 2d 963 (Tex. Civ. App. 1941).

16. *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 So. 30 (1915); *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808 (1903).

17. *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808 (1903).

18. *Woelfe v. Conn. Mut. Life Ins. Co.*, 103 F. 2d 417 (8th Cir. 1939); *Winters v. Rance*, 125 Nebr. 577, 251 N.W. 167 (1933); *Laird v. Boston & M.R. Co.*, 80 N.H. 377, 117 Atl. 591 (1922).

19. Cases cited notes 6 and 8 *supra*.

thority?" If the witness answers that he is not sustained by any authority with which he is familiar, the examiner has made a telling effect toward neutralizing the expert's direct testimony. Further attempts to question from books will not be allowed because the admission forecloses the possibility of invoking the rules of reference in order to make use of books.²⁰ But if the expert sustains his opinion by referring to a specific book or books generally, the examiner must continue to lay a foundation. In a jurisdiction following the strict version of the rule of reference—*Examiner*: "Mr. Expert, would you please be more specific and state which book sustains your opinion." Then in order to distinguish between reliance and corroboration, the expert should be asked: "Did you rely upon that book in any way in reaching your opinion?"

The above questions need not be asked in those states which freely allow the use of books on cross-examination. In those states, the examiner need only establish that the book is a standard authority and that may be done by: *Examiner*: "Mr. Expert, I have in my hand a copy of Ohms on *Embankments and Slopes*. Is it considered a standard book in your field?" After the foundation has been laid, the examiner may use the book in several ways. (1) He may read from it himself, asking the witness if he agrees or disagrees with the extract read.²¹ (2) He may hand the book to the expert, asking him to find wherein the book sustains his opinion and to read the sustaining portion aloud.²² (3) Even more effective would be to hand the book to the expert, point out wherein the book contradicts him, and ask him to read the contradiction aloud.²³ (4) A few jurisdictions allow the examiner to read the contradictory extract directly to the jury,²⁴ and one jurisdiction allows calling one's own expert to read the book in rebuttal.²⁵ However, the examiner is on safer ground if he addresses his reading to the witness because of the rule that the books may not be used for their substantive value, and any indication that the examiner was trying to use the books for such a purpose may be grounds for a reversal.²⁶

Why the Restriction on the Use of Books on Cross-Examination

If books were received as direct evidence for their substantive value there would be no problem about using them during cross-examination.²⁷

20. *Woelfe v. Conn. Mut. Life Ins. Co.*, 103 F. 2d 417 (8th Cir. 1939).

21. *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 So. 30 (1915) (expert may be asked if he concurs); *Scullin v. Vining*, 127 Ark. 124, 191 S.W. 924 (1917) (or if he agrees or disagrees); *Osborn v. Cary*, 28 Idaho 89, 152 Pac. 473 (1915); *Hess v. Lowrey*, 122 Ind. 225, 23 N.E. 156 (1889); *Ky. Public Service Co. v. Topmiller*, 204 Ky. 196, 263 S.W. 706 (1924) (or asked whether "this is the true rule"); *Bowles v. Bourbon*, 219 S.W. 2d 779 (Tex. Civ. App. 1949) (and the excerpts read are not substantive evidence, but are merely to impeach the expert).

22. *Osborn v. Cary*, 28 Idaho 89, 152 Pac. 473 (1915) ("it is competent to test his knowledge and accuracy upon cross-examination by . . . having him read extracts from standard authorities"); *Kersten v. Great Northern R. Co.*, 28 N.D. 3, 147 N.W. 787 (1914) (for "great latitude should be allowed in the cross-examination of experts to test their credibility and knowledge"). *Contra*: *Hoffschlaeger Co. v. Fraga*, 290 Fed. 146 (9th Cir. 1923).

23. See note 22 *supra*.

24. *Scullin v. Vining*, 127 Ark. 124, 191 S.W. 924 (1917); *Piney v. Cahill*, 48 Mich. 584, 12 N.W. 862 (1882); *Madsen v. Obermann*, 237 Iowa 461, 22 N.W. 2d 350 (1946).

25. *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1899).

26. *DeHaan v. Winter*, 262 Mich. 192, 247 N.W. 151 (1933) (jury given wrong impression by questions framed from book held by counsel).

27. 6 Wigmore, *Evidence* §1690 (3rd ed. 1940). There is at the present time much agitation for the use of standard books as direct evidence. See *Model Code of Evidence*, Rule 529 (1942); *Dana, Admission of Learned Treatises in Evidence* (1945) Wis. L. Rev. 455.

However, only one state receives books for their substantive value pursuant to common law; several states admit certain books for limited purposes pursuant to statute; and all of the states recognize a limited use of books, confining the use to facts of "notoriety," that is, life expectancy tables, annuity tables, maps and history.²⁸ The main reason for not admitting books for testimonial purposes is that they constitute hearsay evidence—that is, the testimony of persons not under oath and subject to cross-examination.²⁹ Another stated reason is that books themselves are not dependable evidence since knowledge in the field of the sciences changes rapidly and may have actually changed between the publication of the books and their use in court.³⁰ However, if this latter reason were carried to its logical conclusion it would also operate to cut off the testimony of the experts since they to are testifying to changing facts.

The same reasons for excluding books as direct evidence have been carried over into the field of cross-examination. It is thought that in cross-examination the examiner would be doing indirectly what he could not do directly; that is, place books in evidence for their substantive value.³¹ Inroads upon this rule are made, of course, when it is established in some manner that the expert relied upon books in reaching his opinion.³²

The courts which allow the use of books during cross-examination do so upon the premise that the expert's original opinion is based largely upon hearsay, and, therefore, it is only fair to use the same source of hearsay in cross-examining him. The leading case expounding this view is *Laird v. Boston Railroad*,³³ wherein the New Hampshire court said that since the expert really testifies from his recollection of hearsay he may be cross-examined to test his familiarity with that hearsay. Such testing is admissible for it is a factor which may qualify or discredit the expert's opinion. The court came close to saying that the use of books on cross-examination was not hearsay at all because the issue was "not whether the book states the true opinion of the author," but was whether the expert "honestly and intelligently read and applied" his knowledge in reaching an opinion. However, the plunge was not taken, for the court concluded that "the whole field of hearsay knowledge is open to such investigation because of the nature of the opinion" given by the expert.

A Suggested Solution

Actually, the use of books on cross-examination is not hearsay for the hearsay rule operates to exclude statements made out of court at a time when the maker of the statement was not under oath and was not subject to cross-examination *only when the statement is offered for the truth contained there-*

Contra: Grubb, *Proposed "Learned Treatises" Rule* (1946) Wis. L. Rev. 81. The comment to Rule 529 takes the position that the use of books as direct evidence "will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose." For an example of a statutory provision allowing books as evidence, see Sarkar's, *Evidence* (India and Burma) 587 (7th ed. 1946).

28. 6 Wigmore, *Evidence* §1693 (3rd ed. 1940). Dean Wigmore says that two jurisdictions allow use pursuant to common law. However, the cases of one of the jurisdictions, Iowa, do not sustain that position. See *Cronk v. Railroad*, 123 Iowa 349, 98 N.W. 884 (1904).

29. 6 *id.* at §1690.

30. *Ibid.*

31. Cases cited notes 6 and 8 *supra*.

32. *Ibid.*

33. 80 N.H. 377, 117 Atl. 591 (1922).