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MEDICAL EXPERT TESTIMONY: METHODS OF IMPROVING THE PRACTICE.¹

WILLIAM SCHOFIELD.²

It is plain that medical expert testimony has fallen upon evil days. There is a widespread belief that it is entitled to little weight in courts of justice. The principal ground of complaint is that the medical expert, while nominally a witness, is in fact a partisan or advocate, who takes sides in the case and uses medical science merely as a means of supporting that side which he represents.

There is a general disposition to assume that this complaint is true. There are some reasons, however, for believing that it is not true to the extent that many persons assert.

In the first place, medicine is not an exact science. It is subject to growth and change. In some of its branches, especially those which treat of mental and nervous disorders, eminent members of the profession admit that there is much which is imperfectly understood or wholly unknown. This being so, it is manifest that there may be wide differences of opinion among medical experts in the same case, upon the same facts, without justifying a belief that they testified merely as advocates or partisans, still less an imputation that they testified with intentional dishonesty.

That there are members of the medical profession who have given or who habitually do give dishonest expert testimony may be true. This may happen under any system of regulation which can be devised. No profession or society of men can be protected completely against unworthy members. On the other hand, anyone who has had much experience in courts can call the names of gentlemen who as medical expert witnesses always were entitled to credit and respect. I will name one, Prof. Edward S. Wood. He testified as an expert witness in many important cases. Both in the honesty and accuracy of his statements and in the thoroughness of his preparation he was a model of what a medical expert witness should be. I doubt if any defendant in a capital case, whose condemnation after trial was due in whole or in part to

¹An address read at the semi-annual meeting of the Suffolk District Medical Society, October 30, 1909, and revised by the author for this JOURNAL.

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Dr. Wood's testimony, ever thought for a moment that he testified as a partisan or advocate, or otherwise than as a conscientious and honest witness. If the medical profession must suffer, as it does suffer, in its good name from the public exhibition of alleged insincerity or dishonesty given by some of its members in courts of justice, it is entitled to credit, on the other hand, for the modest, steadfast and powerful assistance rendered to the cause of truth in the courts by members like Professor Wood.

After making all deductions which fairly can be made, however, there remains cause for the belief that there is some unsoundness in medical expert testimony which renders it unworthy of full credit. The practical question is to discover the source of this unsoundness and find a remedy.

It is common to assume that the unsoundness is wholly in the law and that the remedy is in legislation. I venture to assert that the question presents a moral issue which ought to be fairly met, with a view to determine whether reform cannot come from the efforts of the medical profession.

What is the obligation of a medical expert upon the witness stand? He is summoned like an ordinary witness and sworn to tell the truth, the whole truth and nothing but the truth. His duty is so clearly defined by his oath that there would seem to be no room for mistake or misunderstanding. He is bound to state facts and opinions truly. When called upon to state reasons for his opinions it is his duty to give reasons which he honestly believes to be sound, in the exercise of his best judgment as a medical man.

There are many medical men who believe that a medical expert or any scientific expert is a witness of such special character that he ought not to be classified as a witness at all. The expert differs from an ordinary witness in this: that he is called by reason of special training and experience to give opinions as to the significance of facts testified to in the case, and also to testify to facts and principles which he has a knowledge of by his special study and experience in his science. A medical or scientific expert has been well described as an interpreter of science to the court. Suppose that in a case of homicide an ordinary witness testifies that he saw upon the clothing of the prisoner stains which resembled blood or rust. A medical or chemical expert examines the clothing, using the methods and instruments of science, and testifies that the stains were caused by blood, and

that the blood was human blood. By the aid of science the expert is enabled to see more than the ordinary witness can see with the naked eye. He explains to the court the meaning of an object which has no important meaning without his aid, just as a sworn interpreter translates to the court in English testimony spoken by a witness in a foreign tongue. In the illustration given, the medical expert does two things. He testifies both to fact and opinion. As a scientific man he can see more in the stains than an ordinary witness, and he testifies to what he sees as the result of his examination. He also testifies to his opinion as to the meaning of the facts which he observed. Fact and opinion are usually inextricably bound together in the testimony of an expert witness. To separate them by a clear line is well-nigh impossible; but even if it were possible and practicable, it is still true that in cases where the medical expert testifies to matters which are clearly matters of opinion based upon medical science, it is his duty to state opinions which he honestly believes as a medical man to be true. While he may well be described as an interpreter of science to the court, he is like an ordinary witness in this essential point: he furnishes to the court material to be used by it in deciding the issues of fact in the case. There is no system of law, so far as I know, which permits expert witnesses in a contested case to determine questions submitted to them conclusively and finally, thus taking the decision of scientific facts out of the hands of the court. The opinion of experts in France and Germany is merely advisory or evidential in character. There is no way known to our law, or practically possible, by which a trial can be divided into parts, and the decision of experts on medical or scientific matters treated as final, except by consent of the parties. There is no place in the common law scheme of a trial where the expert can be put except among the witnesses. He cannot be a judge or a juror. He cannot take part openly as counsel in the trial without causing confusion and delay. There are some who believe that medical experts have a useful and proper place as advisers to legal counsel, but so long as they are treated by the law as witnesses, they must accept the obligations of a witness.

Another reason why the medical expert may be led to assume that he is not strictly a witness is this fact: that before the trial he is in communication with counsel and parties on only one side of the case. This exclusive contact with one side is likely to

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create a feeling of sympathy and loyalty for that side and to make the medical expert a partisan.

This danger is increased by the fact that to the opposing parties the trial is a contest. Not infrequently most intense feelings are excited by a legal controversy. The parties regard it as a trial of strength, and are eager for victory. It is natural that medical experts should be affected by this feeling of rivalry, forgetting that while the object of each of the parties is victory, the object of the law is the truth. Acute and able medical men, unfamiliar with courts and the methods of trial, may hastily or thoughtlessly assume that it is permissible in law to advance opinions in a contest in court in behalf of one side which they would reject as untenable in a consultation of physicians dealing with the same facts for the purpose of treating a patient. The medical expert should understand that it is his duty as a witness to preserve a judicial and impartial attitude as an interpreter of science to the court. If this were the prevailing practice there would not long be any dissatisfaction in regard to medical expert testimony. Fundamentally the reform of medical expert testimony is a moral question. Good morals will avail more to settle it than good laws.

It is a question of great importance, not only to the medical profession, but to the public. There are three classes of cases in which medical expert testimony is frequently used, although it may be necessary at times in any kind of a case. The three classes referred to are actions for personal injuries, homicide cases and will cases. Will and homicide cases frequently involve the issue of insanity, and attract great public attention. Cases for personal injuries are far more numerous, embracing more than one-half of all the litigation in the courts. In Suffolk County during the year ending in June, 1909, out of 1,146 cases actually tried in the Superior Court, about 660 were for damages for personal injuries. One or more medical experts testify in almost every personal injury case. The quality of this expert testimony is a factor of great importance in the daily administration of justice in the courts.

The two principal ways by which legislation can control medical expert testimony are by changing the method of selecting experts and fixing their compensation.

In countries governed by the common law, medical experts are selected by the parties in every litigated case. This is merely

an application of the fundamental principle that the office of court and jury, in the common law, is to hear and decide the cause upon the evidence presented by the parties. The production of witnesses or evidence is not a duty of the court. "It is placed wholly upon the parties to the litigation." (Wigmore on Evidence, sec. 2483.) The trial judge may in special circumstances order a person to be called as a witness who is shown to have knowledge of material facts. This right of the judge is exceptional, and rarely exercised, and nowhere clearly defined. When the practice of calling expert or skilled witnesses was introduced, the rule applicable to ordinary witnesses was gradually applied to them. They were selected and called by the parties. This custom is now so firmly established that it cannot be changed except by legislation. Some lawyers affirm that even legislation cannot change it, on the ground that it is a fundamental constitutional right.

In marked contrast with the common law is the system in use on the continent in Europe. There all expert witnesses are appointed by the judge, usually from an official list of experts. Those appointed by the judge are obliged to serve and are paid a reasonable sum for their services. If the parties agree upon the names of the official experts to be appointed, the judge must appoint them. If they do not agree, the judge may appoint *ex officio*. The judge decides upon application of the parties or of his own motion whether there is occasion for expert evidence in a cause.

The continental method of dealing with expert evidence seems to be a consistent part of the continental theory of judicial procedure and trial, just as our method is a consistent part of the common law theory. There the procedure is more in the nature of an inquisition conducted by the court, and less under the control of the parties. The judge leads the trial.

"The examination of witnesses is in theory conducted by or through the judge, by repetition of questions, and in practice cross-examination is so casual or so feeble as to be a negligible quantity." (Wigmore, sec. 1367, note 1.)

The law there provides for the procedure of the experts and the form of their report and its use as evidence. The fundamental point in the continental system is that the selection of expert witnesses is taken out of the hands of the parties by the state. This system has many admirers in the United States. It is more favored by medical and scientific men than by lawyers, although I

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have heard it called by a lawyer the ideal system. In the recent efforts for reform of medical expert testimony the continental system has a strong support.

Considered from the point of view of abstract principle, it must be admitted that the continental system has one great advantage: it keeps the medical expert outside the atmosphere of conflict which surrounds the parties, in a position favorable to a judicial attitude of mind. In the opinion of many, the practical exemption of the continental expert from the excitement of cross-examination tends still further to preserve candor and increase the value of his testimony. On the other hand, from the point of view of principle, if the object of a trial is the ascertainment of the truth on the issue between the parties, there is much to be said in favor of the common law system. Professor Wigmore says (sec. 1286):

"The whole spirit of the Anglo-American system of trials is to leave the search for evidence in the hands of the parties themselves. Their interested zeal is regarded as sufficient to insure a full and exhaustive marshaling of all the evidential data on either side; and this attitude of the law, whether abstractly wise or not, has so thrown the parties upon their own efforts that in practice parties do exert themselves as effectively as could be desired. In fact, our system of partisan responsibility for the purveying of evidence, while it is marked by the natural defects of partisanship, is at least more successful in the thorough canvassing of all sources of evidence than any system of judicial responsibility could be in this country or (perhaps) than in any other country such a system actually appears to be to-day."

He is speaking here of the production of ordinary witnesses and evidence. If the zeal and intelligence of the parties can be relied upon in regard to such evidence, why may they not safely be relied upon for the production of the best attainable expert evidence for the discovery of truth?

The common law system, it is true, exposes the medical expert witness to the process of cross-examination, which is sometimes exceedingly severe. But in the hands of an able advocate, familiar with the subject under inquiry, cross-examination is an instrument so destructive to false testimony that it can never be given up. It is particularly effective when skilfully used in exposing the unsoundness of expert opinions based upon false theories or erroneous reasoning. Expert witnesses, more than any others, should be subject to it, because they are exposed to the danger of bias in favor of one or the other of several conflicting scientific theories, a danger from which ordinary witnesses

are free. Upon this point I set great value upon the testimony of Sir James Stephen, an authority of the first rank upon any question in the Criminal Law or the Law of Evidence. In 1856 he attended the trial of Queen vs. Palmer, in which the defendant was accused of murder by the use of antimony or strychnine. In his "History of the Criminal Law" Sir James Stephen says:

"I was present throughout the greater part of this celebrated trial, and it made an impression on my mind which the experience of 26 subsequent years, during which I have witnessed, studied and taken part in many important cases, has strengthened rather than weakened." (3 History Criminal Law, 422.) "No case could set in a clearer light the advantage of two characteristic features of English criminal law, namely, its essentially litigious character, and the way in which it deals with scientific evidence. A study of the case will show, first, that evidence could not be more condensed, more complete, more closely directed to the very point at issue; secondly, that the subjection of all witnesses, and especially of all skilled witnesses, to the most vigorous cross-examination is absolutely essential to the trustworthiness of their evidence. The closeness and the skill with which the various witnesses, especially those for the defence, were cross-examined and compelled to admit that they could not really distinguish the symptoms of Cook from those of poisoning by strychnine was such an illustration of the efficiency of cross-examination as is rarely, indeed, afforded." (P. 424.)

While this powerful agency is sometimes abused, and is usually too long, it never can be abandoned in favor of medical or other expert witnesses.

Even if the continental system were to be preferred in theory, there are obstacles of the most serious character to its adoption in the United States. The sixth amendment to the Federal Constitution and the constitutions of many of the states provide that in all criminal prosecutions the accused shall enjoy the right to be confronted by the witnesses against him. This secures the right of cross-examination in all criminal cases, and renders it impossible without an amendment to those constitutions to make the report of a medical expert or board of experts competent evidence in a criminal case, in a federal court, or in the court of any state where the constitution contains that provision, unless the defendant has an opportunity of cross-examining the expert. The effect is to make one part of the continental system of expert testimony by which a report is evidence without cross-examination impossible of adoption in criminal cases.

It is commonly assumed, however, that constitutional provisions in the United States have a much larger effect in restricting the power of the legislatures over expert testimony than is

above stated. In 1905 a committee of the State Bar Association of Michigan, in reporting a draft of a bill which has been enacted by the Michigan legislature, said:

"The radical reformers say that the courts should select and fix the compensation of all expert witnesses. Your committee believes that there are constitutional objections to the court making such selection. Parties have a right, under the law, to select their own witnesses."

In January of this year a committee of the Bar Association of the State of New York reported:

"That every party to an action, civil or criminal, has the constitutional right to call such witnesses as he may deem important to the maintenance of his cause, and the right to cross-examine those who may be called against him."

I do not assent to those opinions. There is no provision of the Federal Constitution or of any state constitution, so far as my knowledge extends, which secures to a party the right to select his witnesses. The Federal Constitution protects the right of trial by jury, of confrontation in criminal cases, and grants to the accused the right to compulsory process to summon witnesses in his defense, and secures in all cases due process of law. The constitutions of many of the states contain similar provisions. Neither the federal nor any state constitution, so far as I have examined the state constitutions, expressly provides that a party may select his witnesses. On the contrary, the rules of evidence and the qualifications of witnesses are wholly under the control of the legislature. I believe that the legislature has full control over the subject of expert testimony, saving only to the defendant the right of confrontation in criminal cases. So firmly established, however, is the belief that a party cannot be deprived of the supposed right of selecting his own witnesses, including expert witnesses, that every bill enacted or proposed which I have seen, providing for a list of officially designated medical experts, contains the express provision that nothing in the act shall preclude either party from summoning and using other expert witnesses at the trial.

The prevalent feeling in favor of this right of a party to select his witnesses, including expert witnesses, is so strong that probably no American legislature could be persuaded to pass a statute which did not reserve it. The probable result will be that statutes providing for officially designated experts to be appointed by the court will not be used by the parties. Parties will use the

right to select experts for themselves unless some advantage will come to them from accepting the official experts. We are not without experience to guide us on this point. In Massachusetts the statutes provide that in a capital case the court may approve bills for expenses incurred by counsel for the defendant and order them paid from the county treasury. By a standing order of the court the employment of experts for the defense in such cases must be approved in advance by the court, in order that compensation to them may be allowed. Under this statute and order, counsel for defendants are not content to accept the experts employed by the commonwealth, no matter how eminent or trusted they may be. They apply for leave to employ experts on their own side, and capital trials in Massachusetts held under the operation of this law furnish striking examples of contradictory medical expert testimony. In Rhode Island there is a statute which has been in force since 1896, now included in the Court and Practice Act of 1905, which provides for the appointment of medical experts by the court in both civil and criminal cases. One section (sec. 372) provides that in actions for personal injuries wherein an expert shall be appointed, the justice making the appointment shall require the person injured to submit to a reasonable examination of his body and health. By this provision defendants in such actions acquire a right which as a rule they did not have at common law, viz., a right to a physical examination of the plaintiff. Appointments of experts by the court under this statute can be made only on application of the parties. The result is that a party does not apply except when some advantage is to be gained by his side. The only section of this act which is much used in practice, as I have been informed, is the one relating to actions for personal injuries. That is exactly what a lawyer reading the act would expect. Until public opinion or legislative opinion shall be so changed as to make it possible to prohibit the selection of medical expert witnesses by the parties, there is no practical advantage in enacting statutes which provide for the appointment of experts by the court. The parties will go on selecting their own experts, and medical expert testimony will go on as it was before. If authority should be given to the court, as is given in the Michigan statute of 1905, and in proposed statutes in other states, to appoint experts on its own motion, and to call them as witnesses subject to cross-examination, the result will be merely to add a third class of experts to those selected by the parties,

and to increase the number and possibly also the variety of medical expert opinions. The fact that the official board or list of medical experts cannot be made exclusive is a strong and practical reason against adopting the system of official medical expert witnesses in the United States.³

There are other minor objections to the system. (1) It is not probable that the most eminent physicians could be induced to accept appointment on a board or list of official medical experts. It would be as unreasonable to expect the leading physicians to serve for the compensation which the court could award as to expect the leaders of the bar to sit as auditors or masters for the usual legal compensation of \$15 per day. The result of establishing an official list of experts probably would be that they would not be equal in quality, on the whole, to those selected by the parties. (2) If a permanent board or list of medical experts should be established, the power of appointment ought not to be vested in the courts. The number of experts required would be considerable, the appointments would be valuable to some physicians, and the system would expose the judges to a kind of solicitation which would bode no good to the courts. (3) Neither the judges nor the officers of any branch of the government can be assumed to have special knowledge of the qualifications of physicians to serve as medical experts.

Finally, to my mind, the grand reason why we should not adopt the continental system is that it would be giving up, in an important matter, the time-honored principle of individual freedom which pervades and animates the old common law, and the Anglo-American law as well. If an eminent physician should be sued for malpractice, he would surely deem it a great hardship if he could not select and present to the court in his defense the best medical experts whom he could obtain who would give testimony in his behalf. What an eminent physician would feel in such a case, every citizen would feel, though perhaps in less degree, who should have a case in the courts in which expert testimony was necessary. Conceding freely that the legislature may restrict individual freedom in this matter for the public good, and should do so, it is also true that the individual should be left free until it is reasonably probable that some public benefit will result from imposing a restraint upon him. There is no substantial ground for believing that under present conditions in the United

³See note A, at end of article.

States the quality of medical expert testimony will be raised, or that the cause of truth will be advanced in the courts by taking the selection of medical expert witnesses out of the hands of the parties and putting the power of selection in public officials or in the judges.

The compensation of medical expert witnesses is probably of more importance than the method of their selection. Large fees, and especially large contingent fees, depending upon the result of the litigation, cannot fail to have an influence upon the testimony of medical experts. Such fees are likely to cause them to forget their obligations as witnesses, and to feel that they are employed and paid as advocates. This is a subject which legislation can regulate, and, as it seems to me, ought to regulate.

At the present time in Massachusetts, and generally in other states, medical expert witnesses, if summoned, are required to attend court upon payment of the fees of an ordinary witness. In practice they often attend upon request of the party by whom they are called, without legal summons. An expert could not be required, upon summons and the payment of ordinary witness fees, to perform any services in order to prepare and qualify himself as an expert witness. He would be required to testify only to such material matters, whether of fact or opinion, as he was qualified to give testimony upon when served with summons, without further preparation. Usually, indeed almost always, a medical expert witness is obliged to perform service before the trial in order to qualify himself to testify as an expert. Unlike an ordinary witness who becomes connected with a case casually, in the ordinary course of events, the expert is brought into a case by selection and employment. The law permits the party calling him to make a contract in reference to his compensation. (*Barrus vs. Phaneuf*, 166 Mass. 123.) In the case of attorneys at law, the courts, influenced, no doubt, by a desire to enable every person to prosecute any claim which he honestly believes to be just, and to obtain the services of a competent legal adviser, have permitted the client to make a contract with the attorney as to his services which may be contingent upon success in the cause. This does not sanction champerty or maintenance, which would require a mere sharing in the proceeds of a suit by the attorney, with no personal liability of the client to his attorney for services. In order that the contract may be valid it is essential that the client shall assume a per-

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sonal liability for the services, but the amount to be paid may be contingent upon circumstances, including, among other circumstances, the amount recovered. The contingent contract of attorneys, subject to various distinctions in different states, has become widely prevalent in American law. It was introduced in New York in 1848 in the celebrated Field Code of Civil Procedure, and has spread to other states. Wherever it goes it carries evils of a grave character in its train. In New York, after half a century of experience, a movement has been started to make such contracts subject to approval by the courts.

Contingent contracts by medical expert witnesses, depending upon the success of the party calling them, and upon the amount recovered, are more objectionable than those of attorneys at law, and have not the same practical necessity for their recognition by the law. If contingent contracts were not sustained under carefully defined conditions in the case of attorneys, a practical denial of justice might result to many deserving persons. In the case of medical expert witnesses this hardship does not exist. The law, as it seems to me, ought to put medical experts thoroughly and unmistakably in the class of witnesses by fixing their compensation for attendance at court at a reasonable sum, and taxing the amount in the costs, as in the case of ordinary witnesses, and also by providing that the compensation to be paid to them for services in preparing to give expert evidence shall be such reasonable sum as may be approved by the court in each case, and that any contract for a larger sum or a contingent fee shall be invalid. A provision of this kind was enacted into law in Michigan in 1905. Any expert witness receiving, or any person paying, a larger sum than the amount awarded by the court is made guilty of a misdemeanor and subject to fine, or imprisonment, or both. This statute seems to me to strike a vulnerable part of our system of medical expert testimony, and to be well calculated to do good.

There is no single remedy, however, that will cure all existing evils. A number of causes have contributed to bring medical expert testimony into its present state of disrepute, and the coöperation of a number of different forces will be required for its restoration. Legislation is not the sole, nor even the principal, remedy. A committee of the Bar Association of the State of New York, in its report, submitted this year, summarized the

evils of medical expert testimony in six propositions, three of which were as follows, viz.:

"First. Want of satisfactory standards of expertness, with its result of inviting the testimony of charlatans.

"Second. The prolongation of trials and the consequent increase of expense on account of the number of witnesses.

"Sixth. An unfortunate tendency upon the part of some trial judges to permit incompetent so-called medical experts to testify to opinions predicated upon widely unrelated fact, and under oath to express views which are but the speculative vagaries of ill-informed minds."

Of course this report was made with reference to conditions existing in New York. It is manifest that the evils above stated are all within the common law powers of the trial courts, without the aid of statutes. The trial judge determines the competency and qualification of all expert witnesses, subject to very slight control by appellate courts. At common law he can limit the number of medical expert witnesses, prevent the abuse of the right of cross-examination and the abuse of the right to put hypothetical questions to experts. If these powers were fully exerted, much good would result. Judge Garrison, of the Supreme Court of New Jersey, in a published address, has said that it is useless to look to the courts for a remedy because these evils have grown up in the courts. The blame does not rest wholly upon the trial judges, for in many states they have been deprived by the legislatures of much of the power which they had by the common law. President Taft, in a speech last month at Chicago (Sept. 16), which attracted wide attention, said: "In this country there seems to have been on the part of all state legislatures a fear of the judge and not of the jury, and the power which he exercises in an English court has by legislation been reduced from time to time until now, and this is especially true in western states, he has hardly more power than a moderator in a religious assembly."

The efforts of bar associations and medical societies for the improvement of medical expert testimony are mainly directed, so far as I have observed, to obtaining new legislation. The power of the courts may also be made to help the reform effectively in all states where the trial judges retain their common law powers. In states where those powers have been restricted or taken away, the most effective legislation that could be devised to improve the quality of medical expert testimony would consist of statutes restoring those powers. All legislation de-

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pende for its efficiency upon the manner in which it is construed and enforced by the courts. In order to administer any new statutory authority in relation to medical expert testimony the courts should first have and should be encouraged to exercise the powers which they had by the common law. Situations frequently arise in the trial of causes both in regard to medical expert testimony and other details where a trial judge, clothed with the powers which he exercised by the common law, can deal effectively with evils which legislation cannot reach. Legislation should provide general rules, based upon principles. The courts apply those rules to individual cases. The legislatures and the courts should work together in a spirit of harmony and mutual confidence, not of distrust. Both should have all the power needed to discharge in the most effective manner the duties with which they are intrusted by the Constitution.

In Massachusetts the trial judge retains the powers which he had at common law, with one important exception, viz., the power or right to advise the jury on the facts. This was taken away in the revision of the laws enacted in 1860, under the name of the General Statutes. Attempts have been made recently to have this power restored with respect to expert evidence, but thus far without success. A bill for that purpose passed the Senate this year, but failed in the House. Opinions differ as to the practical value of this power and as to the effect upon jurors of advice by the trial judge in regard to the facts. It should be carefully noted that the common law power of the judge was merely to advise, leaving the responsibility of decision upon the jury. In the matter of medical expert testimony, cases may frequently occur where a trial judge of experience who had the power to comment directly upon the evidence could exhibit to the jury the relative strength and weakness of different medical experts in such a manner as to aid the jury materially in reaching a sound result. The judge would also be in a position to restrain more effectively any impropriety of conduct on the part of medical experts during the trial or in preparation for the trial. Conceding that this particular power of the trial judge may be overvalued, it is, nevertheless, an ancient common law power which exists in the federal courts and in some of the state courts, and should exist in them all.

If statutes were enacted regulating the fees and contracts of medical expert witnesses, and prohibiting the acceptance by

them of any different fees, either for attendance at court or for services, and restoring the common law powers of the trial judge, conditions would be established in the courts by which the evils of medical expert testimony could be greatly mitigated, if not wholly removed. Medical societies can aid the reform by bringing forward the moral issue involved and impressing it upon students and practitioners. They can establish rules of conduct to be observed by their members when called upon to act as medical expert witnesses. Sir James Stephen says:

"If medical men laid down for themselves a positive rule that they would not give evidence unless before doing so they met in consultation the medical men to be called on the other side and exchanged their views fully, so that the medical witnesses on the one side might know what was to be said by the medical witnesses on the other, they would be able to give a full and impartial account of the case that would not provoke cross-examination. For many years this course has been invariably pursued by all the most eminent physicians and surgeons in Leeds, and the result is that in trials at Leeds (where actions for injuries in railway accidents and the like are very common) the medical witnesses are hardly ever cross-examined at all, and it is by no means uncommon for them to be called on one side only. Such a practice, of course, implies a high standard of honor and professional knowledge on the part of medical witnesses, but this is a matter for medical men. If they steadily refuse to act as counsel and insist on knowing what is to be said on both sides before they testify, they need not fear cross-examination." (1 Gen. Hist. Criminal Law, 576.)

This was written in 1883. Dr. James J. Putnam, in an excellent article published in 1896, recommended a comparison of views among medical experts before trial similar to the method above described as practiced in Leeds.⁴ It is quite probable that such a course on the part of physicians would be resisted by the parties and their counsel at the start. It is the ancient and deep-seated habit of the common law not to require the parties to disclose their evidence in advance of trial. It would be very natural that parties and counsel should resist as an innovation which would lead to a disclosure of evidence to the

⁴Dr. Francis Wayland Anthony, in Boston *Medical and Surgical Journal*, January 16, 1908, writes that at a meeting in Boston recently, by delegates from several of the district societies, it was voted, "That this committee recommend to the various district societies of the state a plan by which physicians, when called to make examinations for the purpose of testifying in court, shall make that examination upon the basis of professional consultation. I have done this for several years, with the result that in a great majority of cases the medical testimony was absolutely in accord, and in many cases was omitted, either by the plaintiff or the defendant since there was to be no variation."

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opposing party a movement in favor of conference before trial between the experts on each side of the case. But expert witnesses are an exceptional class of witnesses, and the proposition is so manifestly fair and well-intentioned that it ought to have a trial. It would be a step toward the restoration of confidence in the sincerity of medical expert testimony, and would tend to reduce the divergence of medical expert opinions in courts to legitimate and reasonable limits. These are objects greatly to be desired. Medical expert testimony is likely to be needed more in the future than it has been in the past. The flood of litigation arising from personal injuries which is overwhelming the courts in all large cities throughout the country, will demand radical changes in legal procedure in order to keep it within manageable bounds. There are signs that serious attention must soon be given to this subject. The medical expert should have, and probably will have, a greater influence in the settlement of those cases in the future than he has under existing methods of trial. This, to my mind, is one of many reasons why the subject of medical expert testimony is of great importance to the public at the present time. The medical profession will do the State a service in bringing about any measure of reform.

NOTE A.

Statutes providing for the appointment of a board or fixed number of medical experts by the court, reserving, at the same time, to the parties the right to call medical experts of their own selection as before, seem to me open to grave objections. They rest, I suppose, upon a spirit of compromise, seeking to introduce in a qualified manner the continental method of appointment, without provoking the strong sentiment of opposition which probably would be aroused if the right of selection by the parties were taken away. How will such statutes work?

1st. Taking as the type of such a statute the bill which was introduced in the New York legislature last year, and which has been introduced again this year in substantially the same form, suppose that in each county or judicial district the court has appointed the prescribed number of physicians, "any of whom may be called as medical or surgical expert witnesses by the trial court or by any party to a civil or criminal action in any of the courts of the state." All of the physicians so appointed must either be of the same opinion upon given facts or divided in

opinion. In an indictment for murder, for example, where the defense of insanity is set up, it is conceivable that all the physicians named by the court might be against the defendant. In such a case, if the defendant had means he would use every effort to employ and call as witnesses experts of his own selection. In view of the wide differences of opinion which exist upon medical questions, he might succeed in obtaining such expert witnesses, and the court and jury would then have the same problem with which they are now daily confronted, namely, among conflicting medical expert witnesses to decide which tell the truth. The fact that some of those witnesses were designated by the court, and might be paid by the county, would not solve the problem. The jury might say, with reason, that an honest physician will tell the truth, whether selected by a party or appointed by the court and called by a party or the judge, and decide that the witnesses called by the defendant were honest.

2d. The case above supposed, where all the physicians appointed by the court are of one opinion, is probably an extreme and exceptional case. As a general rule, especially where there were a large number of physicians appointed by the court, there would be a difference of opinion among them upon the facts of a given case. In personal injury cases, which outnumber all other cases combined, there are lawyers familiar with such cases who believe that physicians, by reason of individual peculiarities of temperament or of training, or for other reasons, may be divided, without any imputation upon their sincerity or honesty, into plaintiff's experts and defendant's experts. I have been informed of a case where a physician declined to examine a plaintiff in a personal injury suit, upon the ground that he looked at those cases from a definite or fixed point of view, and recommended to counsel another physician, who was believed by him to look at them from a point of view different from his. The strong probability is that, under a system of a board of court-appointed physicians, if they should be called by the parties at all, they would soon become known and classified individually by the bar as plaintiff's experts or defendant's experts, at least in personal injury suits, and would be called as witnesses accordingly. In a short time the well-known question, "How often have you testified for a plaintiff?" or "How often have you testified for a defendant?" addressed to physicians appointed by the court, probably would be heard with the same frequency that it now is addressed to physicians selected wholly by the parties, if those gentlemen appointed by the court should be called by the parties to the witness stand at all.

MEDICAL EXPERT TESTIMONY.

3d. Why should the parties call physicians appointed by the court as witnesses, under a statute like that above mentioned, proposed in New York? In states where a physician's privilege exists, could the parties consult court experts under the protection of the privilege, in order to ascertain their opinions, in preparing their cases? I should say not. See Wigmore, sec. 2383. If they could not, would they be likely to consult such court-appointed experts at all? If a statute provides that court-appointed experts are to be paid by the county, by whomsoever they are called, that would furnish a strong inducement to the parties to make use of court-appointed experts whenever possible. Plaintiffs and defendants in personal injury suits and in all other suits would certainly have reason to welcome statutes which would enable them to transfer to the county treasury the expense of medical expert witnesses. In cases where such witnesses were called by the judge, in the exercise of a discretionary power conferred by statute or by the common law, there is much to be said in favor of charging the expense on the public. But what is to be said in favor of such action where such medical experts are called to the witness stand by the parties as their own witnesses? If medical expert witnesses named by the court and called by the parties are to be paid by the county, why should not all other expert witnesses—chemists, engineers, real estate experts and others—be paid by the county? The only difference among them is that the physicians are designated by the court. What does the public gain, or what does the cause of truth gain by such designation, where there is a conflict of medical expert testimony? Indeed, why does the subject of medical expert testimony cry aloud for legislative aid any more than the other forms of expert testimony? The real evil, so far as an evil exists, is a moral evil. To uproot or circumvent it by legislation is a difficult task. The best hope of improvement lies in the aroused public spirit of the medical profession and in the action of courts and the intelligence of juries in dealing soundly with such evidence in actual trials.