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Expert Testimony

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EXPERT TESTIMONY[1]

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The last meeting of this Board directed your committee "to consider and report some recommendation to the legislature upon the question of empowering the trial court to appoint, in cases involving the consideration of questions and issues requiring expert testimony, a certain number of witnesses expert on the subject to be considered, whose compensation would be provided by the public." This action assumes the generally conceded fact that there are abuses connected with the present methods of securing and presenting expert testimony which should be remedied by legislative action. Your committee therefore will not attempt to present the reasons which warrant this Board in urging legislative action to remedy these abuses, but will confine itself to a presentation of the legislation which it believes should be enacted. Such legislative remedies may be placed in two general classes:

First: Such legislation as that embodied in Bill No. 320 S, which failed to receive the approval of the Wisconsin legislature at the session of 1911, and which provided for the appointment by the governor of a body of accredited alienists from which expert witnesses as to insanity should be selected by the presiding judge.

Second: Bills which place the selection of expert witnesses in the hands of the court, permitting it to select such witnesses for each case as it believes to be best qualified to aid in determining the question at issue.

We recommend the enactment of a law that will place the selection of experts in the hands of the court. Under this plan the court will be free to select the experts best qualified to testify in each case, unhampered by the necessity of selecting such witnesses from a body of accredited experts chosen by the governor or some other appointing power. The very fact that there is a limited number from which selection must be made will result at times in the exclusion of the men best qualified to testify. Those who advocate the creation of an accredited list of expert witnesses usually confine the selection of witnesses from such accredited lists to cases involving the single issue of

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mental responsibility. This board has directed your committee to make recommendations covering all "questions and issues requiring expert testimony." It would obviously be well nigh impossible to select a list of accredited witnesses who would be qualified to testify upon all the manifold questions upon which expert testimony may be offered. But even if it were practicable to provide such an accredited list, your committee believes that the remedy lies in placing the power to select expert witnesses in the hands of the court, unhampered by any limitation except that of securing the witnesses who will render the court and the jury the greatest aid in deciding the questions at issue.

Many bills to remedy the abuses in connection with the use of expert testimony have been drafted and presented to the legislatures of the several states, but so far as the investigations of your committee have gone only three states have passed such acts: Rhode Island, New York and Michigan. The Rhode Island act (General Laws, 1896, chapter 244, sections 16-19; General Laws, 1909, chapter 292, sections 18-21), which has been in force over twenty years, provides that on application of either party to a civil or criminal action the trial judge shall appoint one or more disinterested skilled persons to serve as expert witnesses, whose fees are fixed by the judge and paid into court by the party making the application, at the time the application is made. These fees form a part of the costs of the case. No fees of expert witnesses not appointed by the court are allowed as costs at any sum in excess of the fees paid ordinary witnesses. Before proceeding with their examination they are sworn by the judge appointing them "to make a faithful and impartial examination . . . and a true report according to the best of their knowledge, belief and understanding." Thereafter they proceed to view and examine the persons, matters or things about which they are to testify, and report their findings, views and opinions, jointly or severally, orally or in writing, as the judge appointing them shall prescribe. If the report is in writing, it shall be filed as a part of the record of the case and produced in evidence at the trial. The experts may be called and examined by any party at the trial and are subject to cross-examination by the adverse party. In actions brought to recover damages for personal injuries, whenever experts have been appointed by the court, the plaintiff is required to submit to examination by such experts at such times and places as the experts may require or the appointing judge prescribe and the action is continued until such examination is had.

The New York act (Chapter 295, Laws of 1915) provides that

in all criminal actions or proceedings and in habeas corpus and certiorari to inquire into the cause of detention, in which the soundness of mind of a person is in issue, the court or presiding judge may appoint not more than three physicians to examine such person for the purpose of determining the soundness of his mind at the time of examination. Such physicians are paid by the public and may be called as a witness by any party to the action or proceeding.

Your committee has not been able to find that either the New York or the Rhode Island statute has been passed upon by the appellate courts of those states.

The Michigan act provided that in homicide cases where the issues involve expert knowledge or opinion, the court shall appoint from one to three experts to investigate such issues and testify at the trial; that the fact that such witnesses had been appointed by the court should be made known at the trial. The act also provided that both the prosecution and the defense might call other expert witnesses. These provisions of the Michigan law were declared to be unconstitutional by the Supreme Court of that state in *People* v. *Dickerson,* 64 Mich. 148, 129 N. W. 199, on the ground that they deprived the accused of due process of law. The Michigan court seems to proceed on the assumption that the court in selecting expert witnesses is representing the state and endeavoring to secure the conviction of the accused. Its reasoning is that it is the duty of the prosecuting attorney "to prepare the case for the people" and to "determine what witnesses shall be sworn. . . . The preparation for and conduct of the trial on behalf of the people are acts executive and administrative in character. . . . The power of selecting and appointing witnesses . . . is in no sense a judicial act." This construction of the act seems to wholly overlook its purpose of securing witnesses who shall be wholly impartial and unbiased, who will present questions of expert evidence without the bias which too often comes with the private retainer of our present procedure. If the purpose of the act was to make the presiding judge a sort of assistant prosecuting attorney, it would undoubtedly be subject to the condemnation given to it by the Michigan court. But such was not its purpose.

The Michigan court declares that the guarantee of due process of law "preserves to the people rights which had existed for centuries, and which had been enjoyed according to the course of the common law. In reaching the conclusion that due process of law is confined to rights that have existed for centuries, the court entirely overlooks the well established rule stated by Mr. Justice Matthews in *Hurtado* v.

California, 110 U. S. 516, that any legal proceeding "newly devised in the discretion of the legislative power, in furtherance of general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." 28 L. Ed. 239. "To hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." 28 L. Ed. 236. If the law were otherwise, every conviction in this state under information instead of indictment would be without due process of law. Mr. Justice Cole, in discussing this question, said that "the words due process of law . . . mean law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights. Administrative and remedial proceedings must change from time to time with the advancement of legal science and the progress of society." *Rowan* v. *State,* 30 Wis. 129, 149. Mr. Justice Cole quotes with approval the words of Chancellor Kent: "The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice." 30 Wis. 146.

Three further objections to the Michigan act, presented in the decision in *People* v. *Dickerson,* are that (1) the court selects the experts without notice to the parties; (2) that the names of the witnesses are not endorsed on the indictment as required by Michigan law, and (3) that it gives to the experts chosen by the court a "certificate of character, fitness and ability" which subverts "the foundations of justice." This latter objection would be of much weight if the presiding judge were in fact acting as a sort of assisting prosecuting officer, instead of an impartial judicial officer whose function is was to select such witnesses as would present their opinion evidence without bias or favor. If witnesses so selected present their evidence without bias for or against either party, there ought to be no objection raised if the jury give greater weight to their testimony. The objection that such witnesses are selected without notice is obviated in the draft of an act submitted by your committee. The objection that the names of these experts cannot be endorsed on the indictment would have no force in this state, where such endorsement is not required.

Maine (Rev. St. 1903, chap. 138, sec. 1), Vermont (Pub. St. 1906, sec. 2327), Massachusetts (Acts of 1909, chap. 504, sec. 103), New Hampshire (Laws of 1911, chap. 13, sec. 1), and Virginia (chap. 313,

Acts of Assembly of 1914, sec. 1682) have laws permitting the court to commit any defendant in a criminal action to a state hospital for the insane when the plea of insanity is made or the judge is satisfied that it will be made. The defendant may be confined in such hospitals pending a determination as to his mental condition.

The New York court decided in *People* v. *Kemmler,* 119 N. Y. 580; 24 N. E. 9, 10, that the testimony of experts who observed a defendant while in confinement in order to determine his mental condition did not violate the rule as to privileged communications between physician and patient or compel the defendant to be a witness against himself.

Under the guarantee of the Wisconsin constitution that the accused "shall have compulsory process to compel the attendance of witnesses in his behalf" (Wis. Const., Art. I, Sec. VII) we believe that no act would be constitutional that did not give the defendant in a criminal action the right to summon such expert witnesses as he may desire to call, in addition to those selected by the court. But the constitution does not take from the trial court its well established right to call such witness as it thinks will throw light upon the questions at issue (4 Wigmore Ev., sec. 2484, and cases cited). Nor does it prevent the court from exercising its power to limit the number of witnesses that can be called to testify upon any single issue not a controlling fact in the case (3 Wigmore Ev., sec. 1908; 16 C. J. 859 and cases cited). Cooley J., in *Fraser* v. *Jennison,* 42 Mich. 206, 224; 3 N. W. 882, limiting the number of expert witnesses; *State* v. *Beabout,* 100 Iowa 155; 69 N. W. 429; 430, where in a rape case the court said: "The power of the court to limit the number of witnesses upon a given point is not an open question in this state."

The act which your committee presents for your consideration and criticism gives every court of record or its presiding judge the discretionary power to appoint experts in all cases calling for the use of expert testimony, after notice and hearing all parties in interest. Such experts are paid by the public; their compensation being fixed by the court. They may prepare joint or separate reports, which may be read in evidence. They may be called by either party or by the court and are subject to cross examination. When the mental condition of any defendant in a criminal action is in issue the court may commit him to a state hospital for the insane for treatment and observation, where all experts interested in the case may have opportunity to observe him. In all civil or criminal cases where the mental condition of a party is in issue, no experts shall be allowed to testify as to

such mental condition until experts chosen by the opposing party shall have had an opportunity to examine the person whose mental condition is in issue. Either party to any action may call and pay experts of their own choosing, but the court may limit the number called by either party and no compensation other than that fixed by the court shall be paid to such experts.

The bill drafted by your committee is as follows:

Section 1: When in a case pending in any court of record it appears that an issue has arisen or may arise requiring expert opinion evidence, the court or presiding judge thereof, after reasonable notice to the parties and a hearing, may, on its own motion or on the motion of any party, appoint not to exceed three disinterested qualified experts to investigate the questions involved and be prepared to testify therein, if required. Before entering upon such investigation such experts shall take and file an oath in writing that they will make faithful and impartial examination of the persons, matters or things to be investigated by them, and that they will make a true report thereon to the best of their knowledge, belief and understanding.

Section 2: The court shall regulate the examination by the appointed experts, of any person, place, or thing which may be the subject of the opinion evidence, and shall give opportunity for the parties interested to be present or to be represented, when the interest of justice could be best served thereby.

Section 3: This act does not abridge the right of any party to call witnesses not appointed by the court, who shall give expert opinion evidence, but the court may limit the witnesses who shall give opinion evidence to such number as it shall determine to be sufficient for an understanding of the contentions of the parties on the questions involving expert opinion evidence. The compensation of all expert witnesses, other than those appointed by the court, shall be paid by the party summoning such witnesses, but no party shall pay and no such witness shall receive any sum in excess of the fees paid to ordinary witnesses, unless the court or presiding judge shall approve a larger sum. Any party paying and any witness receiving any sum in excess of that so fixed for any service rendered or testimony given in connection with such action shall be guilty of a misdemeanor and be punished by the imposition of a fine of not to exceed $1,000 or by imprisonment in the county jail not exceeding six months or by both such fine and imprisonment.

Section 4: Such experts so appointed by the court or presiding judge may be called as witnesses by either party or by the court, and

when so called shall be subject to full examination and cross examination. Expert witnesses summoned by the parties or appointed by the court may prepare written reports upon the questions upon which they are called to testify, either individually or jointly in consultation with other experts. When directed by the court or presiding judge appointing them, experts appointed by the court shall prepare such reports. Such reports may be read in evidence by the witness under oath at the trial. For their services and expenses and for their attendance as witnesses experts appointed by the court or presiding judge shall be paid from the treasury of the county in the same manner as witnesses for the state are paid, such reasonable sums as the court may allow.

Section 5: Whenever in any criminal case the existence at any time of mental disease on the part of the accused becomes a material issue the court, or the presiding judge, may require the accused to submit to examination and observation by the experts appointed by the court at any convenient public hospital for the insane, or elsewhere, for a reasonable period, and for that purpose the hospital designated by the court shall receive and maintain the accused at the expense of the county. If the parties to any civil or criminal action summon expert witnesses, other than those appointed by the court, to testify as to the mental condition of any party to the action, no such witnesses shall be allowed to give opinion evidence as to the mental condition of such party until the expert witness selected by the adverse party shall have had an opportunity to examine such party.