1895

Expert Testimony

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EXPERT TESTIMONY

by

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EXPERT TESTIMONY

The practice of admitting the testimony of experts is of very ancient origin. The Roman law provided that persons "artisperiti" might be summoned by the judge in order that he might inform himself as to matters embraced by the various trades and professions in their several specialities.


Many of the nations of Continental Europe at an early date introduced into their laws provisions for admitting the testimony of the expert. It was a requirement of the Criminal Code of Charles V., which was drawn up at Ratisbon in 1532, that medical expert testimony should be taken wherever death was supposed to have occurred through violence. Francis I., after the publication of the Caroline Code, decreed that both physicians and surgeons should be legally required to act in a medico-legal capacity. Henry IV., (1606) provided that his Chief Physician should be empowered to appoint two surgeons in every city or important town, whose duty it should be to examine and report upon all wounded or murdered men, and Louis XIV. decreed that physicians must always be present with surgeons at the examination of dead bodies.

About the first book written upon the subject was a treatise by a German doctor, Johannes Bohn, published about 1698, and in 1704 the same author produced a more voluminous work, a book of rules for the guidance of medical experts in courts of law. A very early English record shows, in a case of mayhem, a demand that the court examine the wound to decide as to whether there had been a maiming or not, and, as the court was unable to reach a decision, a writ was issued to the Sheriff to cause "medicos, chirugicus de melioribus ad informandum dominum regum et curiam venire". The Year Books also show several cases into which expert testimony was, of necessity, introduced.

9 Hen. VII., 16; — 7 Hen. VI., 11.

Expert testimony may then be well said to have grown up with the common law, or, at least, to have become a recognized part of it at a very early date.

As to the wisdom of admitting the testimony of the expert there is a wide divergence of opinion. The mind looks with a natural suspicion upon the witness whose testimony is bought and paid for, added to this, but more particularly, within the domain of medicine, we have had, of late, all too frequently, the spectacle of two experts upon the witness stand, both
of equally exalted reputation, at a total variance of opinion as to the subject upon which they were called upon to testify.

Mr. Wharton (I. Wharton, Ev., Par. 454, note 2) quoting from the New York Evening Post, presents the following excellent example of this lamentable condition of affairs:

"A striking instance of an unexpected source of error in scientific investigation was witnessed in the last case tried by Mr. Justice Jones in the Superior Court in this City (New York), being the case in which the house of J. and J. Coleman established their right to a bull's head as their trade-mark on mustard. Professor X., one of the most celebrated analytical chemists of New York, a witness called by the defendant, had alleged, as the result of his experiments, that mustard contained over eleven percent of starch.

Two other analytical chemists, one of them Professor Chandler of Columbia College alleged that mustard contained no starch. The evidence was in this conflicting condition when both parties rested and the case was adjourned until the next morning for argument. In the meantime Professor X. applied to the counsel of the defendant to move to so far open the case as to allow him to vindicate by actual experiment in open court, the correctness of his statement as to the existence of
starch in mustard. The motion was made and granted and on the fifth of December last, the court room presented the appearance of a chemical laboratory. The professor, with his assistants prepared mustard for experiment in open court by pounding the seed in a mortar. He placed the crushed seed in distilled water and boiled the mixture over a spirit-lamp. He then threw some of the solution on sheets of filtering paper, and applied his test and exhibited the characteristic blue iodine of starch. The experiment was varied in many ways with the same result and at the end of the testimony many sheets of paper were thus colored. The demonstration seemed perfect. On Professor Chandler being called to the stand, he made experiments which, in his view demonstrated that starch did not exist in mustard and stated that he was not satisfied with the experiments that had been made by the defendant's witness.

"Why,— said the defendant's counsel,— are not you satisfied with the reaction for starch exhibited by Dr. X. on a dozen or more sheets of filtering paper?"

"I am not certain to begin with."— said Prof. Chandler —"that the paper would not have produced that reaction without the mustard."

Whereupon the counsel handed to the witness some of the clean
paper, and asked him to apply the test himself. He did so, and the result was a deep blue, thus showing the illusory nature of the prior tests and that the experiment was entirely worthless as a proof that starch was contained in mustard.

In the Guiteau trial occurs another example of the inaccuracy of this kind of testimony, on page 1648 of the trial report we find the following:

Q. (By Mr. Scoville for the defence) "But insanity does necessarily mean disease of the brain?"

Ans. (By Dr. Gray a medical expert), "Insanity necessarily means that there is a conjunction or combination of disease of the brain with mental disturbance."

On Page 1673 of the same report we find —

Q. (By Mr. Scoville) "The disease itself, I understand you to say, is never inherited?"

Ans. (By Dr. Gray) "Never. Insanity is never inherited as a disease."

And on pp. 1676, 1677 we find Mr. Scoville introducing five statistical reports of cases of hereditary transmission of mental diseases drawn up by Dr. Gray as medical superintendent of the New York Lunatic Asylum, for the years 1879, 80, 84, 85, 86. Such an instance of inaccuracy surely needs no further comment.
The somewhat recent trial of Dr. Buchanan in New York, for murder, presented another example of this kind of unexpected error in expert testimony. During the cross-examination of a medical expert, called by the state, one of the counsel for the defence tendered the witness a yellowish mass, apparently a wax brain, requesting him to illustrate upon it the matter he was testifying to. The expert looked at it for a moment, then returned it to the counsel, scornfully terming it a mere caricature of the brain. This "caricature" was subsequently proved, by the testimony of the gentleman who had prepared to be a "human" brain preserved by the Zinc-Chloride method.

These examples present very remarkable instances of the fallacy of expert testimony, but there is still another view of the case. Is not the legal profession demanding an infallibility of opinion, an accuracy of statement, from experts representing the trades and professions, which it does not possess itself? What a disagreement there seems to be among members of the legal profession on many points of law. Even in the totally unbiased opinions of our judges we find wide disagreement. Let us examine, as an example, the New York rule as to what constitutes the test of the requisite capacity to make a will. In the case of Delafield v. Parish (25 N.Y.9)
we find the rule laid down that if a man be "compos mentis" he can make any will, however complicated; if not, he can make no will however simple; and the main question seems to be what state of mind constitutes "compos mentis". Then, in Stewart v. Lispenard, (26 Wend. 255), we find it decided that the capacity to make the particular will in question, is the true test; and although this case is of earlier date than that in 25 N. Y. 9 we find in the case of VanGuysling v. Van Kuren (35 N. Y. 70), that the court completely ignored Delafield v. Parish to follow it. Since the case of Stewart v. Lispenard there have been various minor court decisions in New York, many of them at a total variance of opinion as to what was held in Delafield v. Parish. Surely this is as wide a divergence of opinion as ever existed between two medical experts.

It is clear that we cannot do without the testimony of the expert. In 7 Rep. p. 19, we find it laid down that "Omnes prudentes illa admitere solent quae probantur iis qui in arte sua bene versati sunt." The whole question hinges not upon the admission of the testimony of the expert but upon his capacity and capability. We cannot expect our judges and juries to be storehouses of scientific knowledge, abolish expert
testimony completely and the cases involving questions of a scientific or artistic nature, if ever rescued from the chaos into which they must of necessity sink, will all too frequently be decided in a manner which the testimony of the expert witness, if admitted, would have rendered impossible.

That the sciences, and more particularly that of medicine, are by no means thoroughly developed, will account for much of the contradictory testimony of experts, then, if we carry in mind the fact that such testimony is, after all, only "opinion" the testimony of experts may be received in suitable cases and will prove of no little value to both court and jury.

I dismiss, as utterly untenable, the opinion that expert testimony is given as paid for, or in other words, may be purchased. I do not believe that an expert can be found who will prostitute the science to which he has devoted himself, the reputation he may possess among men of his own genus, for the sum of money, necessarily small, which he may receive as remuneration for his services in a court of law.

I believe the blame for many of the apparent contradictions in the testimony of experts may be fastened upon the members of the legal profession with whom they are brought in contact during the progress of the trial. The incompetency of examining counsel all too frequently detracts from,
rather than enhances, the value of an expert's testimony. I quote, as an example, a question recently put to an electrical expert in an action in one of the lower courts of New York.

Q. "What would be the effect upon a man if he touched a wire through which a current of electricity, sufficient to drive a heavy car up a steep hill, was flowing?"

The exact point to be ascertained was — would such a current be sufficiently powerful to cause a man, mounted upon a telegraph-pole to lose his balance? But fearful, no doubt, lest the question, in such form as would render it intelligible to the witness, should prove a boomerang, the examiner carefully veiled it and it might as well have been omitted.

This one, of many instances, will illustrate the fact that if much of the testimony of an expert be ambiguous and apparently contradictory, he is not always the sole person to be blamed. If the expert be examined by one of his own profession, who, at the same time is a member of the legal profession, as was the case in the recent trial of Dr. Buchanan, for murder, in New York City, a decidedly better result will be obtained, though such a scheme is unfortunately not feasible in many instances. I am, however, of the opinion that the one side may, in cases where some doubt exists as to the sci-
entifically phenomena involved, obtained, by skillful questioning, from the testimony of an expert as the other. It is not then a question as to whether we shall admit expert testimony but what is the value of expert testimony in each particular case. This of course varies largely in different cases. It is of first importance that the facts upon which an expert's opinion is based, be satisfactorily established. It is next necessary that the integrity and skill of the witness be known. Then, where the expert states precise facts in science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts before him; his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated his opinion is of less importance. Where the opinion is speculative, theoretical, and states only the belief of the witness, while some other opinion is equally consistent with the facts in the case, it is entitled to but little weight.

Gay v. Union Mut Life Ins. Co. (9 Blatch. 143)

It is a fact, much to be regretted, that so many of the opinions rendered recently by experts, in courts of law, should have been of this latter nature.
WHO IS AN EXPERT?

Here again we face a multiplicity of definitions and a decided variance of opinion. Many of the definitions that have been attempted are of such a meager nature as to be practically worthless; I have in mind one rendered by a western court in these few words, "An expert is a skillful person", the worthlessness of which is self-evident.

In the consideration of the question it is obviously impossible to frame a definition that will be at once concise and clear and at the same time applicable to every situation that may arise. The rule for the admission of experts as witnesses places the question of qualification, to a great extent at the discretion of the presiding judge.

Howard v. City of Providence, (6 R. I. 516).

He may even, if he regard it as necessary, make a preliminary examination of the witness seeking to qualify as an expert. This rule, which at first sight would seem to demand an almost universal knowledge on the part of the court, is fortified by the fact that the witness is subjected, while on the stand, to an examination by counsel that will generally
establish or negative his qualifications as an expert. The question as to who is an expert can perhaps be best answered by quoting freely from the case of Jones v. Tucker, (41 N. H. 546). Mr. Justice Doe, in that case, says — "When the witness is offered as an expert, three questions necessarily arise:— 1. Is the subject concerning which he is to testify, one upon which the opinion of an expert can be received? — 2. What are the qualifications necessary to entitle a witness to testify as an expert? — 3. Has the witness these qualifications. Experts may still give their opinions upon questions of science, skill, or trade, or others of the like kind, or when the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, or when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of the knowledge of it; and the opinions of experts are not admissible, when the inquiry is into a subject matter the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it.—

Rochester v. Chester, 3 N. H. 349.
Peterborough v. Jaffray, 6 N. H. 462.
Beard v. Kirk, 11 N. H. 397
upon subjects of general knowledge which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone, and the testimony of witnesses as experts merely is not admissible"


Experts have been described as "Men of science",

Folkes v. Chadd, 3 Doug. 157.

"Persons professionally acquainted with science or practice"

Strickland on Evidence, 408.

"Conversant with the subject matter"

Best's Prin. of Ev., Sec. 346.

"Persons of Skill"


"Possessed of some particular science or skill respecting the matter in question"


"An expert must have made the subject on which he gives his opinion a matter of particular study, practise or observation and he must have particular and special knowledge upon the subject."

The rules determining the subjects upon which experts may testify and the rules prescribing the qualifications of ex-
Experts, are matters of law; but whether a witness, offered as an expert, has those qualifications, is a question of fact to be decided by the court at the trial. The various disqualifications which render a person incompetent to be sworn and to give any testimony, are fixed by law, but whether the disabilities exist in a particular case is a question of fact. And whether a disability is such that a person cannot testify at all or only such that he cannot testify as an expert, the existence of the disability is equally a matter of fact, most conveniently and satisfactorily determined at the trial. That an expert must have special and peculiar knowledge or skill is as definite a rule as that the search for a subscribing witness must be diligent and thorough; and whether a witness has special and peculiar knowledge, is as much a question of fact as the question whether the search for the witness has been diligent and thorough.

Many are the definitions and explanations which have been attempted. Bell, in his work on expert testimony, says —

"The legal signification of 'expert' (ex pertus) corresponds strictly with the ordinary acceptation of the term, namely, 'one who has skill, experience, or peculiar knowledge on certain subjects of inquiry in science, art, trade and the like'."

Bell on Expert Testimony, p. 11.
In Best on Evidence (p. 499 Chamberl. Ed.) this definition is to be found — "On questions of science, skill, trade and the like, persons conversant with the subject matter — called by foreign jurists 'experts', an expression now naturalized among us — are permitted to give their opinions in evidence. This rests on the maxim 'cuilibet in sua arte perito est credendum'.

"Coke on Littleton" 125 a.

The application of these rules is of continual occurrence. Medical men are frequently called upon to explain the cause of death, or the condition of a person's mind. Scientific men, to explain natural phenomena. Lawyers, to explain laws and customs within the province of their profession. It is not necessary that the person offered as an expert should have combined study with practice, or vice versa, in order to be qualified to give testimony as an expert.

Taylor v. Railway, 48 N. H. 304.
Mason v. Fuller, 45 Vt. 29.

But observation without either study or practise will never be sufficient.

Clark v. Bruce, 12 Hun, 271.

Nor is it at all necessary that he should at present be engag-
ed in the practise of the art, trade or profession as to which he is called to testify. When the testimony of an expert becomes necessary, the only requirements are that the witness offered as such should be particularly skilled in the science, art, trade or profession involved in the subject upon which he is called to testify. This skill or knowledge may be acquired in any manner whatsoever provided the witness possess the requisite degree of skill, information or knowledge to entitle his opinion to the credence accorded to that of an expert.

Emerson v. Lowell Gas Light Co., 6 Allen 146.
Caleb v. State, 39 Miss. 721.

The rule is, or ought to be, perfectly clear — in the first place, the subject should be one requiring the services of an expert. Secondly, the expert should be qualified and particularly informed, either by practise or special study, as to the subject upon which he is to testify — it is no more the province of the practising physician, with an experience of one case, to state as an expert opinion that the result of a chemical test, to which certain portions of a dead body have been subjected, evidences the presence of a minute quantity of morphia rather than the existence of ptomaines and leuko-
that a person is afflicted with nystagmus. And lastly, when rendering his testimony, it is never the privilege of an expert to assume the functions of a jury; a method has grown up, which well nigh evades this rule — the hypothetical question — which will be referred to at more length later.

WHEN IS EXPERT TESTIMONY ADMISSIBLE?

The rule as to this may be stated as follows — When the controversy, from its nature, necessarily involves questions of a scientific nature which, without the opinions of witnesses, skilled in the science, profession, trade or art in question, can not be presented to a jury in such form as to enable them to decide the question involved with the requisite degree of knowledge or judgment the testimony of experts may be introduced.

Shelton v. State, 34 Tex. 663.

The admissibility of the testimony of the expert may be said to be provided for in almost every civilized country, though the method of receiving it may vary somewhat.
In Scotland the report of the medical man engaged in a case forms a part of the preliminary investigation, or "precognition," as it is called, before the Procurator-Fiscal. In England, as in the United States, the testimony is all received at the trial. On the Continent, and more especially in France and Germany, experts, when medical men, are chosen from a special class and act singly or in conjunction with each other. In these cases, instead of being subjected to a viva voce examination at either the Precognition or the trial, the expert is presented, at the preliminary investigation, with a series of written questions together with the written depositions of the witnesses and of the accused, and from the study of these he is required to render, in writing, his opinion in the case, adding at length the reason upon which such opinion is based. This system, as I have before stated, applies more particularly to the medical expert and is not without its advantages. Were it possible to secure a staff of recognized experts in each state, it would greatly enhance the value of expert testimony; as it stands today, in this country, the testimony of the expert, the "paid witness," is looked upon with pronounced disfavor by the public, while the general sentiment of the legal profession may be gathered from the following ex-
"Few specialties are so small as not to be torn by factions; and often, the smaller the specialty, the more inflaming and bitter and distorting are the animosities by which these factions are possessed. Peculiarly is this the case in matters physicological, in which there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand and defend it with vehemence when off the stand. 'Nihil tam absurdum dice potest, quod non dicatur ab alioquò philosophorum.'

To return, however, to this question as to when expert testimony is admissible. There is but little to be added, by way of explanation, to the definition before given. It is a fixed and certain rule that an expert may not give an opinion as to common every day facts that lie within the knowledge of every man.

I. Phillips Ev. 780.
II. Taylor's Evidence, 1230.

Nor may he give an opinion of law.

Carrington et al v. Burden, 15 How. 270
The Stearine Kaarsen Fabrick Gonda Co. v. Heintzman, 17 C. E. N. S. 56.
Illustrated by an Examination of the "Whittaker Case".

This field is one in which the testimony of the expert has proved of particular value. In questions as to a testator's signature, in the discoveries of the authors of anonymous letters, in cases of forgeries, in every case where there has been a dispute as to the authenticity of hand-writing, the testimony of the expert has always been of particular service.

The rule as to the admission of this kind of testimony is extremely clear and simple. Where the authenticity of hand-writing is in question, the testimony of an expert upon the subject is admissible. The following may be stated to be the rules as to the value of testimony with regard to manuscripts, signatures, etc.

I. The best evidence, as to the writer of the manuscript, is the evidence of one who has seen him write.

II. Second in value is the evidence of one who has carried on a correspondence with the person whose writing is in dispute.
III. The third in value is that obtained by the comparison of hand-writings, the testimony of the caligraphic expert.

Let me, before proceeding farther in the discussion of this field of expert evidence, quote somewhat at length, from an anonymous article, that appeared in 2 Crim. Law Mag. 139.

"That a man's hand-writing is anything but the product of his will is a proposition familiar enough. Thus, a man may will or wish to write a round copper-plate hand, or an angular foreign hand, without being able to do it. If a man could regulate his penmanship by his will, of course there would be the end of caligraphic experts. The forgery — which now and then is once successful — would travel on indefinitely, deceiving the very elect, instead, as the rule is, of depending for its success — if success it have at all — upon a single slip of the paying teller. But that he cannot, imitate as skillfully as he will, divest himself of his own natural characteristic, has now come to be demonstrated. The accomplished expert has only to study his man. The hand of a writer is beyond the power of that writer's will or that writer's eye. The will is absorbed by the subject matter. The eye watches the paper, keeps the hand running in lines, prevents the line gliding over the edge etc. etc. But once in motion the hand will ac-
quire the nervous motion, which, as surely as it moves at all writes down itself, its very self and no other. An effort to make a single letter would be an unusual movement, perhaps, for any but a writing master, but when rapidly advancing from letter to letter and from word to word, lifting itself slightly every instant to skip the place between the words, the hand will measure off from parts of letters to the next succeeding part and from one word to another until it is taken up, a sort of gauge, running like a machine, and, whether regular or uniformly irregular, this gauge will be not the least reliable feature of the characteristic.

Having shown by this excerpt that the work of caligraphic experts rests upon a scientific basis and not upon mere acquired skill of the eye and has, moreover, achieved two pronounced eminence to be slightly assailed; let us next consider one of the leading cases upon the subject.

THE WHITTLER CASE.

Probably no better case could be selected to illustrate the field of the caligraphic expert's testimony than this much disputed Cause Célèbre.

In the class that entered the United States Military
Academy at West Point, in 1876, was one, Johnson C. Whittaker, a colored boy from Charleston, South Carolina. The boy was extremely light in color and it seemed as though the "color prejudice" if it must exist at all, might in his case have been exhibited in its mildest form. He enjoyed exactly the same rights and privileges as his fellow cadets, and indeed more, for in 1880, having failed in his examinations, instead of being dropped from the academy, as is the usual rule, he was merely placed in a lower class and permitted to remain.

At six o'clock on the morning of April 6, 1880, as Whittaker did not appear the Officer of the Day sent one of the guard after him. His room was found to be in a state of chaos. Whittaker lay on the floor in his night-clothing, his head upon a pillow, his feet bound loosely to his bed and his hands tied, but not sufficiently tightly to preclude his freeing himself, an Indian club stained with blood lay near the bed. Whittaker, when released, appeared to be severely frightened, he talked incoherently and seemed to be suffering intense pain.

Whittaker's story was as follows — "Last night, immediately after tattoo I went to bed and I think I had been asleep sometime, when I was awakened by the moving of the latch on
the door. I listened for a moment and then fell into a doze, when I was suddenly awakened by somebody jumping on me. I looked sharp and there were three men in all. Two of them wore dark clothes and the third had on a light gray suit and all wore black masks. I drew back my arm to strike the man who had jumped on me and I partly arose in the bed. Then I was seized by the throat and choked until I was almost suffocated. I was also struck a heavy blow on the left temple and also on the nose, with something hard, the man who dealt the blow shouting to me 'If you don't be still you will be a dead man. Don't you holler!'. I was overpowered. One of the men then said 'Let's mark him like they do the hogs down south;' and then, with what I think was a knife, they cut off the lower end of my left ear and slit the lobe of my right ear once or twice. Next they began to tie my feet and I kicked as hard as I could, when one exclaimed; 'Don't you kick or I'll cut you!' and he did stick my feet twice. At this time the small man in gray said to one of the others; 'Look out! don't hurt him; see how he bleeds; take my handkerchief and put it around his wounds' and they did but afterwards took it away. They then tied my feet and my hands with strips of white cross belts and laid me on the floor with my feet towards the bed and my head towards the wall.
Next they tied my feet to the iron bedstead. I asked them if they would 'nt put a pillow under my head and they did. Again they told me not to holler, and one said, 'Now let's leave'. After they left I tried to gnaw the straps from my hands. I cried, but not very loud, and got no answer. I did not dare to shout loud for fear of more harm. I think I must have laid there three or four hours before reveille, and was in a stupor from blows received. I don't know who could have done this thing. I didn't know I had an enemy. I think I could recognize at least one of the men by his clothing. I tried to pull his mask off but he jumped back. About a year ago I got a note on which was written 'look out'. I don't know where it came from. Last Sunday I found a sealed envelope in my room and on opening it found this note inside."

Sunday — April 4th.

Mr. Whittaker. You will be 'fixed'. Better keep awake.

A friend."

The slits in Whittaker's ears which are referred to(ante) were very slight and it was the opinion of those who examined him when first found, that he was not as unconscious as he seemed, added to this examinations were near at hand and it was, in all probability, Whittaker's last chance of remaining
at the Academy. From these and other facts it was undeniably the general opinion among the West Point authorities that Whittaker had committed the assault upon himself.

Now let us consider the testimony of the experts when the case came before a military court for investigation. It will be clear, from the statement of facts, that the field of investigation was narrow and that the case hinged upon the discovery of the author of the anonymous note of warning. The perpetrators of the outrage — if we believe Whittaker's story — must have been cadets at the Military Academy, once discover the author of the note and the mystery will be solved. But if, on the other hand, Whittaker had committed the assault upon himself, then he certainly penned the note of warning, and the latter fact once established would prove the former.

The case, from the scientific standpoint, was full of surprises. In the first place there was practical unanimity of opinion among the experts called, a fact, which in the scientific examination of writing, is, unfortunately, very rarely the case.

The following method of examination was practised by the experts called into the case. A specimen of writing contain-
ing the words of the note of warning was obtained from every cadet at the academy. These were submitted to the experts without the names of the various authors being attached, In addition was submitted —

1. An unfinished letter, written by Whittaker to his mother, found in a drawer in his table, when his room was taken possession of by the authorities.

2. A requisition for postage stamps signed by Whittaker and written upon a piece of paper shaped like the letter L.

3. A portion of an incompleted story, written by Whittaker, and found in the drawer of the table before mentioned.

4. A piece of paper containing a few lines written by Whittaker and identified by the Recorder of the court, Lieutenant Sears, having written upon them "C. B. S. West Point, N. Y., April 12, 1880."

Before proceeding it would be well to note, that in this case the experts were submitted to detailed preliminary examination before being permitted to testify. These examinations were as varied, searching and conclusive as possible.

On the first test of the papers submitted to the experts it was agreed by four of them that every paper written by Whittaker displayed the same caligraphic characteristics as the
"note of warning". One expert, Mr. Paine, agreed with the other experts except as to the paper marked "C. B. S. West Point, New York, April 12, 1880," and as he did not believe that the author of the anonymous note could write as easily and as gracefully as the writer of this fragment, he disagreed as to this paper with the other experts.

A more searching test was insisted upon by Whittaker's friends and the following papers were submitted to three of the experts.

Set 1.— was made up of papers written by Whittaker himself and included — the portion of the story — the unfinished letter to his mother — the requisition for postage, and other papers, none of which had previously been examined by these experts.

Set 2.— included a miscellaneous collection of letters and writings by officers, cadets and others collected at random.

The question submitted to the experts were —

1. Whether the two sets of papers were written by the same person?

2. If not, which bore the most resemblance to the note of warning.
3. If any similarities were found, were they sufficient to warrant the statement that their author was also the author of the note of warning.

The experts, in the answers submitted, agreed that the author of set I wrote the note of warning. Unusual as was this exact agreement of the experts, there was still a greater surprise to be presented to the court. A supplemental report was received from one of the experts, Mr. Southworth, on the last days of the trial stating that the paper used for the note of warning, for the requisition, and upon which the unfinished letter was written, had originally been one whole sheet. The accompanying diagram will explain the matter in which the division was made.

This fact has been very much assailed by various writers who claim, as a rule, that it is not always possible to fit paper together that has been torn, this statement is too deeply within the realm of scientific uncertainty for discussion here, suffice it that even were Mr. Southworth's discovery fallacious, the testimony of the experts in this case was sufficiently convincing without it.

It would not be fitting to close the discussion of this Cause Célèbre without some mention of the remarkable piece of testimony in this case for which Mr. Southworth is also rest and of book.
responsible. According to this gentleman the "note of warning" when magnified, proved to be faintly covered with, what appeared to be specimens of half erased attempts at the style of writing embodied finally in the note itself. This bit of evidence(?) which has been to many an incontrovertible proof of Whittaker's having been the author of the note, seems to be a statement well nigh incredible. In the first place, an attempt at erasing would also remove the line from the paper, this was not the case in the note of warning, and in the second place the discovery of the paper bearing an attempt at this microscopic kind of practising would seem to be absolutely worthless as a subject of comparison with the disguised handwriting in the note. It would seem to be almost impossible to make an exact enlargement of a microscopic disguised handwriting.

It may be that Whittaker did not write himself this famous note of warning, but it seems to be certain that the paper upon which it was written was some which was exclusively in his possession, according to the testimony of five experts, if corresponded in more particulars to the specimens of Whittaker's handwriting submitted to them, than to those of any other cadet in the Academy, some one of whom, must clearly have been its author.
THE MEDICAL EXPERT.

There is probably no branch of expert testimony so common as that represented by the medical expert. In point of time one of the first witnesses that was permitted to give testimony that was mere opinion and not based upon actual facts, its appearance has been growing more and more frequent until today scarcely a criminal trial of any importance is conducted without the presence of one or more experts skilled in the various branches of Medical science. It is useless to regard this species of testimony with contempt, to impress upon juries that, because of the divergence of opinions evidenced by the experts called, the entire system is worthless, or, at its best, of little value.

The practise of admitting medical expert testimony has practically grown up with the common law and like the latter has varied with the time and customs of the country. As to the admission of the testimony of medical experts, Mr. Wharton (I. Wharton's Ev. Sec. 441) says, "So jurisprudence does not say to a surgeon or physician called to testify whether a wound or a poison was fatal, 'you must have a particular diploma or belong to a particular professional school'; but it says
'If you have become familiar with such laws of your profession as bear upon this issue, then you can testify how the issue is affected by such laws'.

Livingston's Case, 14 Grat. 592.
New Orleans Code v. Allbritton, 38 Miss. 242

This familiarity may be gained from study rather than from practise.

Fordyce v. Moore, 22 S. W. 235.

Though it is clear that the knowledge is equally valuable if acquired from practise merely or from both practise and particular study.

It must depend upon the particular state of facts as to whether the testimony of a physician is admissible.

Graves v. City of Battle Creek, 54 N. W. 77.

Among the many cases where the testimony of the medical expert is admissible are — the nature and effects of a disease.

In re Vananken, 10 N. J. Eq. 186.

The likelihood that a certain disease would produce death.

State v. Smith, 32 Me. 329.
A surgeon may be permitted to prove the nature of a wound and its probable causes and effects.

Rumsey v. People, 19 N. Y. 41.
and in many other cases too numerous to mention. It is to be noted that in no case is a witness permitted to usurp the functions of the jury.


though a witness may be asked his opinion upon a similar state of facts, hypothetically stated.


an arrangement that in many cases amounts to practically the same thing.

THE HYPOTHETICAL QUESTION.

It is the usual rule that where an expert witness has no actual knowledge of the facts in the case, that the statement of facts already proved should be summed up in the form of hypothetical case and the witness asked what would be his professional opinion on the subject matter of his testimony, if such a statement of facts were actually true.


but if the facts upon which the hypothesis is based fall, than the answer falls also.

Hovey v. Chase, 52 Me. 304.
Nor can an expert be asked a hypothetical question upon facts not proven in the case.

Muldowney v. Ry. Code, 39 Iowa, 615.

This, however, is not the rule in New York and in several other states. In those states the hypothetical question may be based upon any possible probable range of the evidence in the case.

Harnett v. Garvey, 66 N. Y. 641.

But, as a rule, it is nowhere necessary that the hypothetical question should be based upon the exact reproduction of the evidence, or an accurate presentation of what has been proved; it will be sufficient if it be in accordance with any reasonable theory of the effect of the evidence.

Hall v. Rankin, 54 N. W. 217.

Where there is, however, absolutely no foundation in the case for the facts assumed, the hypothetical question based upon such facts is properly excluded.

People v. Harris, 136 N. Y. 423.

This hypothetical question, like almost every other element that constitutes a part of expert testimony has been subjected, at times, to the most severe criticism and perhaps with some degree of justice. The wider the latitude permit-
ted in propounding the question the result. That the admission of this species of question is not without having certain undeniable merits will be readily admitted, it must be acknowledged that it has, in addition, certain disadvantages.

Among the many minor questions involved in the discussion of the testimony of experts and, more particularly, of medical experts, is that of the right to demand compensation for testifying. It is clearly inequitable to class such men with the ordinary witness, the skill and labor which an expert is expected to employ involves an expenditure, of time, labor and preparation not expected of the witness who testifies to facts alone. There can be no doubt that, if the case be one of public nature a witness might be compelled to give an opinion as an expert without compensation. But as to the ordinary class of cases the rule as laid down by Greenleaf on Evidence (Sec. 310 n.) prevails, that author says, and his statement is supported by the weight of authority, — there is a distinction between a witness to facts, and a witness selected by a party to give his opinion on a subject with which he is peculiarly conversant from his employment in life. The former is bound as a matter of public duty to testify as to facts with-
in his knowledge, the latter is under no such obligation; and the party who selects him must pay him for his time before he will be compelled to testify".

People v. Montgomery, 13 Abb. Pr. 207.  
LeMere v. McHale, 30 Minn. 410.

This rule also prevails in England,  
Parkinson v. Atkinson, 31 L.J. C. P. N. 199  

But the rule is by no means universal in the United States. In some states, as for example Rhode Island (Stat. 1882, p. 733, Sec. 15) and Iowa (40 Iowa, 646) the compensation of experts is provided for by statute, while in Indiana (Rev. Stats 1894, p. 175, Sec. 512) an expert may be compelled to testify without extra compensation.

Another question that is of no small importance arises as to the admission of scientific treatises and writings as evidence. It will be at once clear that books upon scientific subjects that yearly expand and become developed should not be admitted to prove the facts they set forth.

Washburn v. Cuddihy, 8 Gray, 430.  
Huffman v. Click, 77 N. C. 55.

This is otherwise in Iowa by statute (35 Iowa, 429) And the contrary practise prevails in several other states.  
Bowman v. Wood, 1 Ind. 441.  
Boyle v. State, 57 Wis. 472.  
Tucker v. McDonald, 60 Miss. 460.
It is true that an expert witness may cite authorities to show that the general consensus of opinion in his profession agrees with his testimony and may even refresh his memory by turning to standard authors in the domain of his specialty.

Harvey v. State, 40 Ind. 516.

But witnesses may never read extracts from such works as primary proof in their departments.

Washburn v. Cuddihy, 8 Gray, 236.

Where a scientific witness has cited authorities to sustain his position it is generally permitted to put such works in evidence to discredit and contradict him.

Punny v. Cahill, 48 Mich. 584.

This is permitted in California under the Code


THE LEGAL EXPERT

The court at the place of trial will not, of itself, take cognizance of foreign laws. These must be offered and proved in evidence, and, though this may, as a rule, be accomplished by offering statutes under the seal of the foreign sovereign, or,
as is customary in the United States, by presenting the statute laws of such foreign state in such a form as they are officially issued by that state;

Stewart v. Swanzy, 23 Miss. 502.
Pac. Gas Co. v. Wheelock, 85 N. Y. 278.
The Matter in these two last states, being provided for by statutes; nevertheless, it is the more general custom to prove foreign laws, whenever possible, by the testimony of experts.

Church v. Hubbart, 2 Cranch. 187.
Ernis v. Smith, 14 How. (U.S) 400.
Ely v. James, 123 Mass. 36.
Pierce v. Insedth, 106 U. S. 546.
People v. Lambert, 5 Mich. 349.

But a certificate of a foreign expert will never suffice. The witness himself must be examined under oath.

Ernis v. Smith, 14 How. (U.S.) 400.

In all other relations of their profession the testimony of lawyers, not necessarily experts, is admissible, as, for example, as to the practise of the courts.

Mowry v. Chase, 100 Mass. 79.

But in order to render a witness competent to testify as to foreign law he must be either a professional man, or, at least hold some official situation which presupposes the knowledge of the laws of the country, as to which he is called upon to
give an expert's testimony.

Sussex Peer; 11 Cl. & Fin. 134.

This rule has been broadened in the United States, to include such persons, who, from the nature of their business, are likely to be acquainted with the laws of the foreign country in question.


But the rule does not extend so as to include such persons as have derived their knowledge of the law in question from a mere course of study.

Bristow v. Sequeville, 9 Exch. 275.

A very broad rule prevails in New Hampshire and one not without a great deal of merit. In that state the court has laid it down as a rule that any person who appears to the court to be well informed as to foreign laws may give expert evidence thereon whether he be a professional lawyer or not.

Hall v. Costello, 48 N. H. 176.

It is, however, better to increase the qualifications necessary to admit a witness as an expert in the many broad fields of the law of foreign states and countries, rather than to decrease them. Since the court is presumed to be unacquainted with the subject in discussion it might prove rather
a difficult task to discover whether the witness offered as an expert upon such an important topic were possessed of any higher legal attainments than an ability to convince the court that he was well informed. Where it becomes necessary to admit such testimony, it will be readily seen that its accuracy is all important, it were better then, by increasing the necessary qualifications, to reduce the number of those fitted to present this kind of testimony and so insure a greater accuracy.

EXPERTS IN THE MECHANICAL SCIENCES, TRADES ETC.

It is never necessary, to constitute a man an expert, that he should necessarily follow the trade, art, or profession relative to which his testimony is adduced, his competency or incompetency hinges alone upon the extent of his knowledge of such particular topic. So any person, familiar with a trade may testify as to the meaning of particular words or phrases used in such trade.


There are no rules particular to these minor branches of expert testimony. The main questions being, in such cases —
"Is this case one in which expert testimony may properly be introduced?", or, that being answered,"Is the witness an expert within the meaning of the term?" That being decided it then becomes necessary to examine several of the more important heads under which these questions or either of them have been raised.

Architect. — After a witness has testified to facts showing that he has some knowledge of the cost or value of buildings, acquired as a dealer, builder or architect, his testimony as to the value of a building is competent.


But it is never allowable to admit the testimony of an expert no matter how well qualified, to prove the existence of a custom or usage merely.


Since a custom to be recognized in the law, must be sufficiently well known as to require no such proof.

Mechanics.— A machinist is always competent to give an opinion as an expert in relation to the construction of machinery.

Sheldon v. Booth, 50 Iowa, 209.

And he may even give evidence that a machine was not constructed in a workmanlike manner without specifying the particulars.
particulars in which the machine was defective.


Insurance Experts.— If we leave out of consideration the Professions, there are few branches of the subject of expert testimony that are of more importance than that represented by the Insurance expert. Probably one of the most familiar, as well as one of the most important cases under this head is that of the Milwaukee & St. Paul Ry. Co. v. Kellog (94 U. S. 469). In this case an exception was taken because of the refusal of the lower court to permit the defendant to show by witnesses who were experts in the business of fire insurance, that, owing to the distance between a mill and a pile of lumber, the mill would not, in case of fire insurance, be considered in measuring the hazard of the lumber, or vice versa. Mr Justice Strong, delivering the opinion of the court, said—"This exception is quite unsustainable. The subject of the proposed inquiry was a matter of common observation, upon which the lay or an educated mind is capable of forming a judgment. In regard to such matters experts are not permitted to speak their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike". But, in
an action upon a policy of fire insurance providing against any increase of risk, the testimony of experts is competent upon the question as to the materiality of circumstances affecting the risk, especially where its determination calls for a degree of knowledge not likely to be possessed by an ordinary jury.


In order, however, to make the testimony of an expert competent, it must be based upon facts and not upon mere conjecture, he is not, however, necessarily confined to his own observation but may give testimony upon a hypothetical statement of facts presented to him while upon the witness stand.

Higbie v. Guardian etc. Life Ins. Co. 53 N. Y. 603.

Railroad Experts — Another class of cases in which the testimony of the expert is frequently a necessity, are those arising from railroad accidents, and in such cases, where the question involved is one requiring some peculiar knowledge of mechanics beyond that acquired by the average layman, the expert skilled in such lines is alone qualified to speak.

Penna. Co. v. Conlan, 101 Ill. 93.

Thus it is competent to show by an experienced engineer the rate of speed that is usually considered safe when an engine
is running backward.

Cooper v. Central Ry. of Iowa, 44 Iowa, 135.

And a person who has acted continuously for more than seven years as a railroad conductor has been permitted to give expert evidence as to the means of stopping railroad trains.


Patent Experts.— Here, too, we find displayed the animosity that all too frequently marks the admission of the testimony of the expert. In re Taggart, (Comm. Dec. 1869, p. 103) it is said "Good experts are especially valuable for the skill with which they assist their client and badger, befog, and bewild the enemy. No wise judge would dare to put his trust implicitly in such witnesses; and, very frequently, the care which is necessary to unravel their sophistries, and avoid the influence of their obvious bias, would be much more profitably employed in an examination of the case without their aid."

The rule as to "who is an expert" is, in this class of cases, very clearly defined. The Patent Act contemplates two classes of persons as peculiarly appropriate witnesses.

1. The practical mechanic to determine the sufficiency of the specifications as to the mode of constructing, compounding and using the patent.
2. Scientific and theoretic mechanics to determine whether the patented article is substantially new in its structure and mode of operation, or simply a mere change of equivalents, and this class Mr. Justice Story considers "The most important and most useful to guide the judgment, and to enable the jur. to draw a safe conclusion, whether the modes of operation were new or old, were identical or the reverse."

Allen v. Blunt, 3 Story, 742.

It must, however, be noted, and this fact is common to all classes of cases where it is sought to introduce the testimony of an expert, that the court cannot be compelled to receive an expert's testimony.


As to the weight an expert's testimony is entitled to, the rule here is the same as in every other class of this kind of evidence. The knowledge of the witness; his fairness, the ability he evinces, his peculiar advantages for observation, study and research must all be weighed and considered, and upon them the value of his testimony in a court of law must rest

Johnson v. Root, 1 Fisher, 351.

The necessity for the admission of the testimony of an expert is one to be decided by the court in each particular instance.

Howard v. City of Providence, 6 R. I. 516.
No rule can be authoratively laid down to cover every case.

The questions concerning expert testimony are of growing importance, little by little the necessity for its introduction has increased, step by step it has grown and developed, until, today, when scarcely a murder trial of note comes before our tribunals without bringing in its train a small army of experts, representing the one side or the other, it has become impossible to listen, for the weeks that this kind of testimony frequently and to pass it all by as "Of little value", or "entitled to but little weight".

It is much to be regretted that this kind of testimony should prove, in many cases, so entirely contradictory, and yet the matter is not irremediable. In his monograph upon experts and expert testimony — Mr. Moak says — "As to a remedy in a case where expert testimony is admissible, I can see none, except for counsel, and for the court to inform themselves as fully as possible upon the subject so as to be able to detect and to expose, a false or a fallacious statement or conclusion;" and this is indeed the best, and the only remedy. Such preparation would sift down the number of supposed experts who, fearful of an exposure in open court, would hesitate to take the stand; whereas the true expert, confident in
his own knowledge and skill, would take the severe test of the
witness stand as a mere increase of his own reputation and thereby
doubly enhance his value as an expert witness.
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