Published, by vote of the Society, in the Boston Medical and Surgical Journal for Feb. 17, 1870.

THE Committee of the Suffolk District Medical Society, appointed last winter, with instructions to consider and report on the subject of

MEDICAL TESTIMONY AND EXPERTS,

herewith present their final report upon the questions, as originally submitted to them, and as recently recommitted to them for a more detailed examination.

The Committee are fully aware of the importance of the questions, and at the same time are conscious of the many and great difficulties that surround the proper consideration of them. These difficulties have of late years exercised the thoughts of some of the best minds in the medical and legal professions. They have been discussed by individuals and by social science associations in Europe and America. It is very evident that some change must eventually be made in the present mode of investigating civil and criminal cases involving questions that require scientific or skilled witnesses to testify upon matters of science or art, and of which the court and jury may know little or nothing previous to the trial. The rapid advances made by science and art require that experts in these departments should be summoned in order to aid those who are finally to decide the cause. As at present conducted, this custom of summoning experts may actually lead to error rather than truth. This is especially liable to occur in civil actions, as we shall endeavor to show in a subsequent part of our report.

Under a vote of this Society, your Committee was directed to ask the American Academy to appoint a similar committee, with the idea of a joint appeal to the Legislature for the enactment of a law upon the subject. The Academy appointed the Hon. Emory Washburn, Hon. Joel Parker of the Dane Law School, Prof. Horsford, C. B. Bigelow, Esq., and Dr. H. R. Storer. After a long and ample discussion of the whole matter by this joint committee, and amid grave doubts whether *any law* would meet all the contingencies, it was unanimously voted that Hon. Emory Washburn should draw up a bill and present it to the Judiciary Committee of the last Legislature, and urge its passage. This was done, and a draft of the proposed bill is herewith appended. Judge Washburn appeared before the Committee and urged its adoption. It, however, never came to light afterwards. We know of no reasons for this, nor is it necessary for us to seek for any. But it is for the Society to decide whether it will again urge the passage of the law proposed by the Committee, or of some other of a similar character, or allow the whole to go by default. Your Committee would suggest that a copy of the law be entered in full upon our records for future reference.

The Committee ask permission to lay before the Society some of the arguments and facts, *pro* and *con*, in reference to the whole subject of experts in courts of law.

Let us suppose that in a civil case a question is to be brought before a court about which neither the judge, counsel nor the jury can know much. Moreover, it is so intimately associated with some peculiarity of science, or of art, or of fact, that it would be impossible for either of these parties to learn much, if they can learn anything, upon the subject during the short period of the trial of any cause. Still further, there are causes for the proper elucidation of which a long series of scientific study or of experiment is needed. To meet such a case the following course is usually pursued. Either party in the cause has the right to employ any one he may choose as expert. If the case involves large interests, the wiser and wealthier party generally engages a sharp-witted man of science, and tells him what it is desirable for science to prove in order that he may gain his point. Under such circumstances, however learned or honest the expert may be, his mind will be inevitably inclined to bring all his energies to bear upon the idea of success for his employer rather than to learn the exact truth in regard to the entire subject. By study and experiment he may thus be enabled to bring a great amount of learned evidence, and apparently quite overwhelming in behalf of his patron. But if the opponent in the cause has been equally wealthy and wise in the world's ways, and has also engaged for his side of the question some scientific rival, there may be an equally scientific display on the other side. Between these two witnesses the minds of the jury are clouded rather than enlightened. They have not been trained to such studies. They do not see the fallacies that perhaps lie under both displays, and they at times seem to forget that self-interest has perhaps marred the testimony of both witnesses. The discrepancy between the two may be easily seen, but no light comes from them. The result sometimes is, that the jury ignore altogether the scientific evidence, and decide according to what some person call the dictates of *common sense*; while others, adepts in the science involved in the question, style it the *veriest nonsense*. All the while that this battle of the gi

is going on, no one hints aloud that the strong element of self-interest is perhaps underlying science and really warping both witnesses. Both should therefore be treated as common witnesses, and be closely cross-examined. To have this performed effectually it should be done by their peers, viz., by experts trained in the same science or art, but speaking through the mouth of the judge or either of the advocates. Hence it would be most appropriate that the judge should have the right to summon men skilled in this special training, either thus to question others, or to give their own opinions upon the matter in dispute. Such men would come untainted with the breath of suspicion of favoritism, or of self-interest, leading them to favor one side or the other of the question in dispute. If this be true, should not the Legislature, *pro bono publico*, assume the right to require of any person learned in any branch of knowledge to give his opinion, either in open court or upon written testimony, and thus enable the judge and jury to act understandingly in the premises? This is what the law, suggested to the last Legislature by the Joint Committee of this Society and of the Academy, proposed to give to the judge.

The preceding remarks on the clashing of the testimony of experts in any civil case may not apply exactly to the processes usually pursued in a criminal cause. In this latter case the expert called by the State is supposed to be, and really ought to be, above the suspicion of favoritism; for the theory of such a trial is, on the part of the State at least, to get exact truth and to administer exact justice. Hence, when a learned man is called upon by the State Attorney to investigate the facts, he has no reason for wishing to arrive at one conclusion rather than another. But even in criminal cases very discordant opinions are sometimes advanced. The immediate cause of the raising of the present committee was the remarks made by the presiding judge in a criminal trial. It is undoubtedly true that under the present initial processes of the law, matters for examination may be placed in the hands of an ignorant or unreliable so-called expert by some distant country magistrate, policeman, or coroner, entirely unfitted to make such selection, before the affair in question comes to the knowledge even of the Attorney-general or any competent law officer. This necessarily brings to the case at trial a person who should have no connection with it, or may even prevent its investigation by other and proper persons. In other countries, only those authorized officially by the courts or high authorities can be employed in the investigation of criminal cases.

Among the objections to giving this power to any judge may be cited the following:—

It is contrary to the usual custom in our community to compel a man to testify to the *opinion* he may hold on any subject. That opinion is considered as something sacred, and which the State has no right to demand of any one. It is his property, and as such no one, not even the State, has a right to take it from him. But is this assertion really tenable, when considered in the light of the rights usually claimed by the State? The sovereign has always asserted, and has now gained the right to demand of a man, the free confession of all of his knowledge about certain facts bearing upon matters important to the public welfare, and about which the witness is supposed to know what others do not. The State can take the property of any one for the public good. During the late rebellion even life itself was often taken for the safety of the Republic. Your Committee cannot see how any rights are invaded more in the case of a learned man, who is required to give his opinion merely in a certain cause, than in another case where life itself is taken without scruple. It is true that the necessities of the attending circumstances may be undoubtedly greater in one case than in the other. Nevertheless, human life may be at stake in both cases, and if the argument hold good for one it ought to hold for others where perhaps human interests alone are at stake, inasmuch as they become at times quite as important as life itself.

The payment of such scientific or learned experts, when summoned by the judge to give their opinions and render essential service to the State in its courts of justice should be proportioned to their high skill and to the time and trouble involved, and subject to the approval of the Court that should summon them.

If such an aid should be granted to the Court in any case where hired opposing athletes in science present their opposite opinions and reasoning, or in criminal cases, where such high advice is needed, it is evident that such are and will be still more necessary in those grave cases where no expert has been called, or in those in which individuals claiming to be experts but without a single qualification justifying their assumption of that title, may give evidence and may state opinions wholly er-

neous, whereby the property and possibly life of a citizen may be endangered. In one or all of these contingencies it would seem most important for the sake of justice that the Court should have the power to summon any one it may choose to aid in the determination of a case.

Your Committee, therefore, cannot but regret that no provision has been made by the Legislature for this purpose.

The Committee deem this a fitting occasion for them to bring before the members of the Profession certain facts connected with the present mode of conducting trials, and at the same time they will take the liberty of suggesting some evident rules of conduct, which, as it seems to your Committee, might well be followed by any professional man when called upon the stand.

A medical witness would do well to remember, 1st, that no one has a *right*, as the law now stands, to ask an *opinion* of him. 2d, that, if asked for an opinion, he may refuse to give it; and 3d, that in order to throw doubt on his testimony the opposing counsel will, at times, endeavor to entrap him into the expression of an opinion, and afterwards, by subsequent questions, to lead him to absurd conclusions, whereby his testimony, although strictly accurate, may be made to appear wrong in the eyes of the jury.

4th. In the statement of facts your Committee believe that it would be well to be as brief as is consistent with clearness. Moreover, the witness should, as far as possible, avoid all technical language. For example, a witness when about to instruct a jury will lose credit for clearness of statement, and may darken the minds of the whole court, by telling of the *scapula* instead of the shoulder-blade, or using *clavicle* for collar-bone, *sternum* for breast-bone, &c.

5th. If he be not sure that he is really an expert in the matter in hand, he should beware of going upon the stand at all. If he do so, he deserves and probably will get a severe castigation from opposite counsel, and he has no right to ask sympathy from his professional associates. He cannot blame lawyers for even apparent rudeness in their attempts to prove him before the jury to be the ignoramus he really is.

6th. A medical man should beware of allowing himself to be called into court save as an independent witness, to give evidence upon "the truth, the whole truth, and nothing but the truth." Your Committee know of no act of villainy greater than that which a scientific man commits when he voluntarily takes the witness-stand, and then fails to act upon this noble rule. Yet this has been done in Massachusetts, and may be done hereafter. If on cross-examination the perjured scientist have sufficient coolness and the opposing lawyer little wit, he may escape detection, as he has escaped before. Under the present law the Court cannot summon any one of his peers to catch him in his wordy windings, and he may thus escape the righteous indignation that would arise were his fraud discovered by the community he thus outrages. Such men actually at times may pervert justice. As pertinent to these remarks the Committee would cite the following remarks made by the present Lord Chancellor of England, in reply to questions put to him by the Committee on State Medicine of the General Medical Council of England.*

"Every witness should eschew altogether the notion of partizanship. He should be ready frankly and unreservedly to give his opinion, regardless of how it may tell. He is there not as an advocate, but in order to inform the court and jury according to his best judgment."

This is undoubtedly true doctrine. Your Committee believes that a really truthful expert will be fully alive to the honorable and important position that he will hold. He will come prepared not merely to tell the whole truth, but to see that none of it is hidden through his evidence. He will be careful to prevent if possible any question being put to him which by answering categorically may hide a part of the truth, and if he perceives that counsel have that aim in view he will answer with sufficient detail to reveal the truth in its wholeness. He will endeavor that no false interpretation shall be put by counsel on the facts presented by himself or others. And if opportunity be afforded him he will explain all facts in such a way as to make the truth appear in the fullest light.

7th. The conceit and desire for self-glorification of some experts produce evil results. They deliver themselves more like professors from their chairs of instruction, and sometimes talk with less precision than is required in a court of law. Such exhibitions are apt to afford ample opportur for subsequent criticism on the par counsel.

8th. Some while on the stand seem forget the great difference there is betwee the statement of a fact or of a series of facts, and the inferences that may be made

* Med. Times and Gazette, Nov. 13, 1869.

from these facts. The facts should be given, the inferences may be left to the wisdom of the court or jury to make. If the witness makes them he does so at the risk of severe criticism.

8th. Some really scientific men are so prejudiced that the simple fact that another with whom they may have had some previous antagonism has expressed an opinion, will induce in their minds a tendency to a belief precisely the reverse of that given by the opponent. Nothing can more effectually prevent one from arriving at exact truth than this mental quality, if brought to the witness stand.

There is one other topic on which your Committee feel called to make some remarks—viz., the relations of the lawyer to the expert. While human nature exists as at present, it may be feared that we shall never arrive at perfectly satisfactory results, even if we get these wisest of men for experts. However wise and truthful the witness may be, he cannot be sure while on the stand of not meeting *unwise* or *unprincipled* lawyers. One of the sovereign ideas of the law is that there are always two sides to every question, and another is that it is the bounden duty of each advocate to present his side of the question in the best light, and if possible in a better light than that of his antagonist. If, therefore, in conducting an important trial, it appear obvious to an able but *unprincipled* lawyer that he can gain any advantage by browbeating a witness, he will be very likely to try that method. If by any trickery of words he can make his opponent's witness stumble, he will be likely to try to make him do so even at the expense of truth. Nay, more; we fear that it must be admitted that some lawyers who rank high as gentlemen and men of honor in the community, and who, in their dealings with men in common society, would not dare to use words of *insult* to others when off the stand for fear of personal violence from those thus attacked, will within the sacred precincts of a court of justice indulge at times in remarks worthy of Billingsgate. By *insult* and sharp and repeated questioning, or by inuendo they will endeavor so to confuse or irritate a witness that perhaps some ...cky admission will be made by him. ... is all that is wanted, and the expert ... be made to appear ridiculous, and his ...stimony may thus become of little or of no avail in the minds of the jury. On such an occasion, therefore, it is of paramount importance for the witness never to lose his self-possession, and if he can give the retort courteous to the advocate it will be fortunate. And above all else he must be sure of not going in his evidence beyond the bounds of strict truth. Preserving that as his basis whereon to stand, he may defy all such attempts to upset his testimony. If he find himself pressed by repeated and what he perhaps may think *absurd* questions, for the obvious purpose of confusing and degrading him, he may appeal to the Court, or decline further speech, ever remembering that it is better for truth's sake for him to avow ignorance enough to be unable to reply to unwise questions, and decision of character and self respect sufficient to enable him to refuse to answer one that is put for the purpose of confusing him. Such a witness will command the respect and close attention of all the court. The ungentlemanly lawyer will not dare to attack him for fear of equally sharp replies to any questions offered. The honorable advocate will not wish to attack him. The judge will greet him as a co-worker and as a most efficient aid to himself in the careful and thorough unravelling of all the intricacies of the case in hand, and upon the proper and just investigation of which, perhaps, depend all the solemn destinies of life or death of a human being.

To establish a system whereby such an expert could be summoned by a court to aid it in its high duties is an object devoutly to be wished for by every one. Whether we shall ever get a law establishing such a system remains yet in doubt. Wiser men in the eyes of the community than the Joint Committee of the two Societies, viz., the Judiciary Committee of the last Legislature have apparently decided that nothing c... be done towards obtaining it. Your Co... mittee do not believe that all wisdom ... centred in the Legislatures of the pa... They hope much from the future. Wh... ever a great evil exists, then and th... close beside it, though invisible for a tim... lies undoubtedly its antidote. We mu... look for it, however, or it will not be foun...

Meanwhile, we have only to discuss ... questions having relations thereto in t... full conviction that under the light of h... man reason we shall eventually obtain ... and more than we now ask for.

With these remarks the Committee a... to be discharged from further considerati... of the subject.

HENRY I. BOWDITCH,
HENRY W. WILLIAMS,
F. MINOT,
GEORGE DERBY,
R. M. HODGES,
JAMES C. WHITE,

Com. of Suffolk Dist. Me... Society