MEDICAL EXPERT TESTIMONY.

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THE single aim of this paper is to give a faithful picture of the modern American type of medical expert testimony, and to enter a plea for its radical regeneration. This venture to revive a topic which for many years has had a periodical ebb and flow of interest will be justified if it initiates a full discussion out of which shall come practical results too long delayed. We are familiar with the manner in which Massachusetts, led by the zealous efforts of the medical profession, has taken first rank in promoting the best cultivation of public medicine, and in regulating those matters that pertain to the public health, the registration of vital statistics, and the investigation of violent deaths. One other department of state medicine, that relating to medical expert testimony, still remains, deserving earnest thought, and requiring judicious amendment by the lawgivers. The reforms successfully accomplished through medical interposition and coöperation in times past give encouragement that similar endeavors will not be vain here.

I am conscious of the fact that I can present in this brief paper scarcely anything possessing the quality of novelty or originality. An examination of the periodical literature, legal and medical, published during the last twenty years, gives evidence that the subject has not been neglected; there has been no lack of learned criticism or of sagacious suggestions. In introducing such a venerable topic in a new guise, I acknowledge a faith in the virtue of iteration; a hope that the profession may determine that the time is now fully ripe

[1] Read at the meeting of the Boston Society for Medical Improvement, October 25, 1880.

for action, for an earnest endeavor to correct long-standing abuses in the relation which medicine holds to the law. With this in mind, I shall try to keep strictly within the limits that I have set, avoiding any introduction of matters pertaining to the rights, obligations, and behavior of medical witnesses, and urging simply and concisely the reasons that seem most cogent for the practical improvement of their present sphere and function.

There are two important considerations which commend the office of the medical expert to the renewed attention of physicians, and which should stimulate their hearty effort for its amelioration. In the first place, the expert is in a peculiar sense the public exponent and representative of his profession. Standing in the open light of the court of law, his manner as a witness, his technical opinions, his mental breadth, his learning, become matters of study and criticism in a way and to a degree wholly different from anything possible while he pursues the more congenial course of purely clinical labor in the secluded chamber of the sick. Generally, it is true, his exhibition is confined to the mixed company of spectators who take pleasure in the unsavory atmosphere of the temple of justice; but the not infrequent occurrence of a celebrated case, a suit for heavy damages, or a capital trial enlarges his audience and exposes him to public gaze and comment. Whether he wishes and deserves it or not, he is regarded as a representative physician, and as having been chosen as such to fulfill his present functions.

It is quite time, therefore, that the implied or imputed superiority of the medical expert should be a real and not an assumed virtue; and it rests largely with physicians to show that they feel the importance of this as affecting intimately the professional *esprit de corps.*

But there is another reason, more personal in its character, which should lead physicians to take an active interest in this matter. Medical men, with rare

exceptions, are well acquainted with the demoralizing exhibitions possible under existing rules of evidence. I allude now not to the unhappy and generally unjust civil suits in which physicians and surgeons are compelled to defend themselves against charges of malpractice, nor to the occasions on which, as chemists, as alienists, or as surgeons, they serve as medical experts; but I refer to the still more numerous instances in which they appear as ordinary witnesses in civil and criminal causes, in consequence of their intimate professional relations with mankind in the common course of life. We all know the great readiness with which actions are brought to recover damages for alleged personal injuries, and that in these suits the attending surgeon is always an important witness. So, also, in criminal trials, where the Commonwealth prosecutes, physicians frequently find themselves summoned to testify concerning wounds, fatal or otherwise, the consequence of unlawful violence. No medical man is exempt from this chance; under circumstances which are not of his own choosing, he is obliged to practice forensic medicine whether he will or not; he cannot foretell the hour when he may be called to close the cut which the homicide's knife has made, or to resist the progress of the septicæmia which the abortionist has lighted. But the evil of which medical men have a right to complain is not that they must testify of what they actually know with regard to cases having a criminal element in them; as good citizens, they owe this duty in behalf of the common welfare. It is when the medical expert appears on the scene to interpret the facts of a scientific character thus presented that the medical witness often learns with dismay how poor an interpreter has been chosen, and how completely subservience rather than excellence has determined the choice.

For we know well what manner of man we may find in the typical American medical expert of modern times. He has been evolved out of the necessities of

advocates and clients; he is the creature of his environment. Medical memory need not be severely taxed to recall conspicuous examples of that which is worst as the fruit of prevailing methods. But it is not with exceptional or distinguished exponents of a bad system that we have to do; the average specimen offers ample material for reflection on the conditions which have nurtured him. Let me mention two or three of the qualities which characterize the veteran medical expert.

In the first place, it goes without saying that he is partial; his partisanship is deliberate and inevitable. Without this controlling bias, he would be of little use in fulfilling the purposes for which he is employed. He is in court to help the counsel who has retained him; his business there is to render assistance in securing a verdict. This is his mission, — his *raison d'être*. The novice may initiate his experience as a witness with some old-fashioned ideas as to the sphere and obligation of medical experts touching the truth and impartiality of their testimony; but he soon survives that. The lawyers quickly enlighten him concerning his relations to the party for whom he testifies. Nor is his partisanship a wholly voluntary matter; it is unavoidable and comes as a matter of course. Sympathy, not less than selfish interest and professional pride, leads him to color his statements on the witness-stand according to the needs of his client; the points of evidence which are useful to his side are put prominently forward; other matters are faithfully omitted, misrepresented, or obscured. The nature of the evidence itself permits this: it is comparatively difficult to distort a matter of fact without detection; but it is easy to mould so elastic a material as one's opinion, however scientific it may be, in such a way as shall suit present exigencies. The physician most skilled in this adaptability is most in demand as a medical expert; he is well known for skill in partisanship, and if he has a reputation for adroitness in "making the worse appear the better reason," it does not operate to his disadvantage.

It naturally follows from the biased state of mind thus developed in the medical expert that he becomes dogmatic, positive, and opinionated. Consciously or unconsciously, he yields to the temptation to state his views with emphasis and full confidence. It is not with him a difficult task to adjust probabilities and possibilities. Where others, more cautious than himself, are ready to acknowledge the instability of many of the so-called demonstrated principles of medical science, he affects to feel the ground beneath his feet entirely solid. Controverted questions do not perplex him. Is it a question of the source of certain blood globules found upon a weapon, his micrometric measurements and microscopic observations thereupon are infallible. Is the defense "insanity," there is no peradventure in the expert's mind concerning the subject. Is there a theory of spinal irritation or of spinal concussion to be elaborated, the witness is inflexible in his opinions and decided in his expression of them. It does not occur to him that in thus misrepresenting current medical knowledge he is injuring his profession; he is not in court to uphold the dignity of medical science. He has, in fact, been employed mainly because of his reputed self-reliance and dogmatism. If he went, in his testimony, to the point only to which the fixed principles of medicine would justify him in going, his usefulness to the party for whom he appears would often be greatly curtailed, and his occupation as a professional expert would soon be gone.

Finally, in this brief review of the aspects under which the modern medical expert presents himself, I place that which, for want of a better term, I call his mercenary side. Under prevailing methods, the physician in court as an expert witness is a hired servant; he has not been the recipient of an honorable appointment on account of recognized extraordinary attainments fitting him to fulfill a dignified medico-legal function, for which he merits, of course, a just remuneration; he appears on the witness-stand by virtue of a voluntary

pledge or contract to use his medical knowledge to impress a jury and to win a verdict. He is bound in honor to discharge this obligation toward his employer and to earn the money which that employer has agreed to pay him. It is not surprising that, in view of this relation between employer and employed, medical expert testimony is not in high repute among lawyers; and that, while using it as one of their legal weapons, they entertain scant respect for it. Not long ago, a well-known member of the bar expressed the prevailing opinion thus: "Medical testimony to almost any effect can be purchased in the market as readily as one may purchase a horse, and, to extend the simile, with as little assurance of soundness." This disposition finds an illustration in the recent conduct of a medical man who, it is reported, on learning that one of his creditors was a defendant in an action for damages on account of alleged personal injuries, proposed to cancel his pecuniary obligations by services in court, and threatened, if this proposition were not accepted, to appear as an expert on the opposing side.

We are told, too, of physicians who deliberately go a step farther in the mercenary direction, and are "attracted to the cause they serve, like seamen in time of war, not so much by the assurance of wages as by the possibility of prize." An impecunious party brings a suit against a corporation or against a man known to have a generous bank account, the ground of the action being certain injuries of a physical nature, received in consequence of the defendant's neglect; he needs the help of a lawyer and a doctor to maintain his cause. The advocate is easily secured if the case has "anything in it;" and the doctor's services are retained with nearly equal facility. Both these prime ministers expect their fees from the damages awarded to their client; their compensation depends on the result of the trial. It is therefore for their interest to labor diligently, with energy, tact, and cunning, to obtain a verdict. Here there are exactly the conditions

favorable to the development of the very worst kind of medical expert, — a medical advocate inspired by selfish interest and a hope of pecuniary gain. And if, as frequently occurs, the cause is appealed, or is tried a second time in the same court, the temptations to vigorous partisanship are cumulative. Instead of being present in the case to aid without prejudice in determining truth, he comes really as a party to the suit, voluntarily taking a hand in the game, and trusting to luck and the jury to save him from loss for his venture.

Now, without proceeding farther to detail the characteristics of the prevailing type of medical expert testimony, I want to emphasize the fact that it is the legitimate fruit of the conditions under which the modern practice of the law is pursued. The physician in the sick-room does not exhibit the disposition here depicted; but place him under the novel and subtle influences of the court-room and he becomes another creature. In this new relation, he inevitably finds himself subject, in greater or less degree, to peculiar temptations. For nearly all that is objectionable in the exhibitions made by medical experts I blame the methods under which such experts are employed and utilized; the system, and not its exponent, is at fault. A case, for example, occurs which offers an opportunity for the use of medical testimony. Dr. A. receives a politely insinuating note from the eminent counsel, intimating that his services as an expert will be very acceptable. Dr. A. does not inquire very carefully into the grounds which have determined the selection; he feels complimented, at all events, and he consents to be retained. The lawyer, as a matter of course, has canvassed the availability of the candidate beforehand, and has decided to employ him because he will probably be a useful ally; his usefulness depending less on distinguished professional position or extraordinary knowledge than on his success in impressing favorably twelve ordinary men, on his pliability in forming scientific opinions, and on his perfectly imperturbable pertinacity

in maintaining them, once formed. Now, the retained expert having fully committed himself to the service of his employer, his independence is laid aside. He is expected, in preparing for the trial, to develop all the elements in the case favorable to his own side only. The advocate consults with him, coaches him, nourishes in him a controlling partiality, does all in his power to stimulate a cordial interest in his client's cause. The witness thus approaches the trial, expert chiefly as a partisan medical advocate. Against the insidious influences which promote this surrender of mental equipoise few physicians could successfully defend their judgment. One might intend and resolve at the outset to maintain an unprejudiced frame of mind, to be ready to observe, deliberate in drawing conclusions, cautious in stating them. He might reinforce his purpose by recalling the counsel of the eminent jurist, Lord Hatherly. "Every witness," he says, "should eschew altogether the notion of partisanship. He should be ready to give his opinion frankly and unreservedly, regardless how it may tell. He is there, not as an advocate, but in order to inform the court and jury to the best of his judgment." But, however fully such authority may commend itself to the medical witness, he must be a rare exception who invariably guides his demeanor by it in practice. Ordinarily, the exigencies of his service, his sympathy with his client's cause, his sense of obligation to fulfill an implied contract, all draw him away from a judicial independence of reasoning.

Then at the trial itself still more compulsory influences encompass him. He now finds himself in the arena, marshaled with others to defend the cause of his own side, to neutralize the strength of the opposing side. He is harassed by the technical limitations of the rules of evidence. Through the inability of lawyers to conduct an examination on medical subjects, he is made to state views which, under other circumstances, he would not think of maintaining. The leading questions with which the cross-examination bristles ensnare him

into unexpected and embarrassing corners, out of which the easiest way lies through extraordinary expositions of medical science. Professional pride compels him to defend stoutly his position, a retreat from the ground being deemed worse than the blunder which took him there. First, last, and always he is to shape his course with the single aim of helping to win a verdict favorable to his side, and of earning thereby the dollars which are his reward for faithful service.

It is cause for regret that the English and American methods of employing medical experts have fallen away so greatly from the primitive practice. Under the Roman law, the physician in court as an expert witness held a relation of exceptional honor and responsibility; he was *amicus curiæ*, an independent, unprejudiced interpreter of medical facts.[1] He was summoned to instruct the court and jury in matters of which they had, presumably, a general and imperfect knowledge only. His duty was to aid in establishing the whole truth. In such a position, a physician occupied a most honorable office. He was chosen because of his acknowledged superiority; he truly represented his profession.

And in still more recent times, even down to the present period, the system in vogue in France and Germany is far in advance of our own in securing the end which the theory of medical expert testimony designs. Either under the German plan which provides for official experts, or under the French method which leaves the employment and choice of the expert at the discretion of the court, the medico-legal results are admirable and in striking contrast with the procedures with which we are familiar, and which permit a suitor to come into court with a company of medical Hessians enlisted to defeat his opponent.

Now, what can be done — and this is the one important question for consideration — to modify, or, if need be, to revolutionize these unworthy methods? It is plain that the only way out of the difficulty is through

[1] Ordronaux, Jurisprudence of Medicine, page 125.

legislation. Statutory law must prescribe the *modus operandi* and forbid practices contrary thereto, establishing legal provisions which shall be clear and just for the guidance of all concerned.

Without pausing to review the various propositions that have been made from time to time for compassing this end, I remark at the outset that, as may readily be inferred from what has been presented, the first thing to be desired is the complete removal of the medical witness from the influences and temptations of partiality; he must be lifted far above the plane of bias. This is the corner-stone on which the entire new structure must be built, if the evils of which we complain at present are to be avoided. Other provisions are mainly correlative and subordinate details growing out of this.

To secure this end, the best way, because it is the most practical and the most in accord with American notions of fairness, is that which would provide that the medical expert in any action at law, civil or criminal, should be the choice of the two parties contending. Grant this primary principle, and all other secondary questions and exigencies will find comparatively easy adjustment. The advantages of such an innovation, both theoretical and practical, are too plain to be mistaken. Theoretically, a statute covering such a plan would secure experts in fact as well as in name, since it would obviously be for the interest of all concerned that *the best* medical judgment should be obtained upon technical questions involved in the issue on trial. Instead of the present deplorable exhibitions, so amusing to lawyers, so discreditable to the medical profession, so subversive of justice, we should see a true representative of medical science, selected because he is recognized as such, appearing in court as the honorable interpreter of medical data, the instructor of the court and jury in matters of which they are presumed to be ignorant. We should see him the calm and dispassionate exponent of the most recent authoritative advances in science as well as of the settled principles

which are the fruit of long experience. We should see him, with the same judicial impartiality which the presiding justice himself must display, passing judgment, without fear or favor, on matters which legitimately fall to his office as an expert. There would be little danger that this altogether honorable function would fall into unworthy hands under such a system; the man chosen would, from the necessities of the case, be well known as the possessor of extraordinary knowledge fitting him to comprehend and to elucidate the points presented in the testimony. The man of pronounced and peculiar views, the man of hobbies, would not be sought; his judgment is already discounted.

In practice, the expert thus selected, because of his eminent fitness, his experience, his judicial fairness, his independence, would make such investigations as the case demanded, would listen to all the testimony, and at the proper time would report his conclusions either as oral testimony, or, preferably, in the form of a written statement. Here would occur an opportunity for professional distinction. The name of medical expert, instead of conveying with it a questionable flavor, would become a term of good repute, attracting rather than repelling the master minds in the profession; while the many-sided questions presented in legal suits and actions would offer occasions for medico-legal reports such as have made Germany and France confessedly the leaders in forensic medicine.

An innovation like this will meet with opposition and unfriendly criticism. Objections will arise in part from legal considerations touching the rights of citizens, and in part from a conservatism which sets itself against all changes, and especially against such as concern institutions that serve selfish ends.

For example, it will be urged that the selection of one or more medical witnesses to be clothed with something like judicial powers will be prejudicial to the traditional and constitutional right of the individual citizen to defend his person, property, or character by

producing "all proofs that may be favorable to him." As a matter of fact, however, the proposed plan would much more fully protect the interests of honest suitors, and secure them against injurious and unjust results, than is possible under prevailing methods. At present, the issue, so far as the medical elements are concerned, often depends more on the number and eminence of the hired experts than on the intrinsic strength of the case; so that a poor man, no matter how just his cause, is at great disadvantage in the presence of an adversary able by his wealth to command any amount or kind of medical testimony. The medical expert under the plan proposed would have no inducement to present anything other or less than the whole truth, and this would have effect precisely where it ought.

Moreover, this testimony would be subject, of course, to such a review at the hands of counsel (analogous in its conduct to that of a cross-examination) that its value and the firmness of the witness's belief in it would be properly tested. The witness himself, meanwhile, would not have to fear the abusive treatment now so commonly offered in court and so justly dreaded by physicians.

But if either party to the suit or action felt disappointment in the result of the expert's investigations and in the effect of his conclusions, still other measures beside a rigid scrutiny of the testimony would be available. Either side, or both plaintiff and defendant, indeed, might be permitted to summon and pay experts of their own choice, just as at present, and might use them as supplemental witnesses either to confirm or to refute the position taken by the expert in chief. The latter, however, would always have great advantage over any partisan assistance thus secured, for his independent position would always place him in the eyes of the court and jury far above any partial testimony that might be offered; while, at the same time, the knowledge that his investigations and deductions would possibly undergo medical examination would compel him

to avoid the expression of questionable opinions, and stimulate him to elaborate his conclusions with the greatest care and accuracy.

I have thus described that which I regard as the pivotal point of an effective plan for improving the relations of physicians to the administration of justice. Other matters in the same connection will arrange and adjust themselves in harmony with this main idea. The remuneration of experts, the method of selecting them when the two parties in interest fail to agree, — these and other kindred questions are chiefly points of detail not difficult to meet.

The views here presented have met with favor from a committee of the Massachusetts Medico-Legal Society appointed to consider the subject of medical expert testimony. That committee, of which the honorable Attorney-General of the State was chairman, has formulated its conclusions in the draught of a bill for legislative action. This bill, of which a copy is appended, seems admirably comprehensive and feasible in its provisions. Will the medical profession favor such a measure and aid in its enactment?

AN ACT IN RELATION TO MEDICAL EXPERT TESTIMONY.

Be it enacted, etc.

SECTION 1. In any action, suit, or proceeding, civil or criminal, in which the testimony of a medical expert witness is desired by the parties, they may at any time before the trial file in the clerk's office a written agreement that such witness shall be summoned, designating him by name if agreed upon. The clerk shall thereupon issue a subpœna to the person designated, to be served in the manner provided by law. As soon as may be after service thereof the witness shall make such examination of the case as may in his judgment be necessary and practicable, and he shall attend as commanded in the subpœna, and answer such questions as may be put in relation to the case.

SECTION 2. If no person is designated by the agreement of the parties, the court, or any judge thereof in chambers, or in vacation, in any county, upon the filing thereof, shall designate a proper person, learned in the science of medicine, to be summoned as such expert witness, and the clerk shall thereupon issue a subpœna as hereinbefore provided. If the parties do not agree that a medical expert witness shall be summoned in the

case, the court or judge, upon motion of either party and upon hearing, may determine the question, and may designate the person to be summoned, if any, as hereinbefore provided.

SECTION 3. Such witness shall be paid for his attendance, travel, and services a reasonable compensation, to be allowed by the court and paid out of the treasury of the county. In all civil actions and proceedings the defeated party shall be liable to refund the amount so disbursed; and after final judgment an execution may issue against him therefor in favor of the county commissioners, or, in the county of Suffolk, the city of Boston.

SECTION 4. In any case the court, upon its own motion or for cause shown, may order more than one, and not exceeding three persons, to be summoned as medical expert witnesses; and such additional witnesses shall be designated and summoned, and shall perform the same services and receive the same compensation as hereinbefore provided.

[SECTION 5. In any criminal proceeding the defendant may call and examine other medical expert witnesses in addition to those hereinbefore provided for, but at his own cost; and in such case other medical expert witnesses may be called and examined in behalf of the commonwealth.] [1]

SECTION 6. No medical expert witness shall be admitted to testify before any court or magistrate except as hereinbefore provided.

[1] Section 5 is inserted only to meet the possible objection of the unconstitutionality of the bill in its application to criminal cases.