Ordronaux, (J.)

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BY JOHN ORDRONAUX, M. D., LL. D.,

STATE COMMISSIONER IN LUNACY.

[From the *American Journal of Insanity*, for January, 1874.]

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There is a growing tendency to look with distrust upon every form of skilled testimony, and to abandon it to the risks of polemical detraction and obloquy. Nor is this strange. Such fatal exhibitions of scientific inaccuracy and self-contradiction as have been presented to us in the cases of Huntington, Cole and McFarland, and later and less excusably still in those of Schoeppe, Mrs. Wharton and Geo. Francis Train, can not but weaken public confidence in the value of all such evidence. If science, for a consideration, can be induced to prove anything which a party litigant needs, in order to sustain his side of the issue, then science is fairly open to the charge of venality and perjury, rendered the more base by the disguise of natural truth in which she robes herself. In fact, the calling of experts has now come to be regarded as the signal for a display of forensic pyrotechnics, beneath whose smoke and lurid glare, law, common sense and unalloyed justice, are swept away in a whirlwind of muddy metaphysics.

It is needless to say that all honest men, laymen and lawyers alike, look upon this as a judicial farce and a degradation of the ethics of jurisprudence, even though technically defensible on the basis of orthodoxy in procedure. But, when anything in law, government or conventional usage has become inherently bad in its essence, as well as in its operation; when by common consent and impulse, good men unite

in its condemnation, then, it is not only absurd, but unjust, to plead prescription in its behalf, or ask the cowardly question of how can we do better without disjointing old rules, and dethroning old idols of professional worship. There is a law of demon-worship—an enslavement to *cultus* everywhere inherent in the human mind, and the conservatism of law tends, unfortunately, but too strongly to confirm the right of the *eidolon specus* to occupy its old throne, simply because no one can remember when it was not king. Its only right is, but too often founded upon the antiquity and passage out of memory of its day of original usurpation.

That these facts, in relation more particularly to expert testimony, are attracting public attention everywhere, and silently preparing the way for some speedy demand upon the law-making power to cast out the old fetich of procedure by which courts are still fettered, is becoming matter of daily observation. And the sign is so good and augurs so well for the redemption of the law from the embarrassing clogs of tradition, that we feel it a duty to hasten the time of this enfranchisement, by bringing the matter forward with all the power of presentation of which we are capable.

In their last annual report to the Legislature, the Managers of the New York State Lunatic Asylum feel themselves called upon to allude to the subject in the following very pertinent observations:

> It may not be amiss to observe that this matter of the testimony of experts, especially in cases of alleged insanity, has gone to such an extravagance that it has really become of late years a profitable profession to be an expert witness, at the command of any party and ready for any party, for a sufficient and often an exorbitant fee; thus destroying the real value of the testimony of unbiased experts. Vaunted and venal expertness is usually worthless for evidence; and yet such testimony is getting to be in great demand. One expert, whether real or assumptive, is set up against another;

and finally it will result that, by competition, pretending inexpertness will prevail, by numbers, against the real expertness of those few thoroughly qualified men whose judgment is the mature experience collected from years of daily study and practical observation. Obviously it does not become States, or great tribunals, or public justice, that the testimony which settles matters of weight should be trifled with as it is for an emolument; and experts should only be called, as formerly they were, by the court itself, on its own judgment of the necessity requiring them; and when called at all, they should be the sworn advisers of the *court and jury*, and not witnesses summoned in the particular behalf of any party; nor should they be permitted to receive either fee or reward from any party, but only from the court or the public. Capable judges are competent to say, in any case, whether the court requires the evidence of experts for its information in matters of technical knowledge or science, and also to say who shall be particularly summoned for his acknowledged expertness; and should, therefore, have the control of that sort of testimony, which is only allowable to enlighten the court and jury, and not to be the ordinary captious weapon of attorneys and counselors, nor to be the theoretical, one-sided opinions of sciolists, founded on some hypothetical case which deflects more or less from the actual truth of the real case in question.

That some remedy is called for in the interests of both humanity and justice all are ready to admit, and that the remedy should be as far reaching in its effects, as the disorder it is intended to alleviate, is equally apparent. The difficulty of making any change, however, has been generally over-estimated, from the assumption that it would necessarily derange well-established principles of jurisprudence. But this is a danger more imaginary than real, and like many other figments of the imagination grows smaller the nearer we approach to it. Inasmuch, too, as methods of existing procedure are, and have ever been, in fact, in opposition to established principles in the law of evidence, it is only necessary to return to them, and in the very opposite language of Lord Coke *petere fontes quam sectari rivulos*, in order to solve what has generally seemed a

legal enigma. For all writers upon Evidence are forced to call expert testimony an *exception* to the ordinary forms which it assumes before courts, although offering no suggestions towards altering the rules of procedure governing its introduction and rendition. These rules having been originally designed to meet the requirements of ordinary testimony alone, the attempt to adapt this *exceptional* form to the existing practice of Nisi Prius courts has resulted in producing judicial ambiguities and contradictions, such as are to be found in no other department of jurisprudence. It is impossible, in fact, to reconcile the duties of experts, with the position they are constrained to occupy in courts, nor to accommodate the present rules of evidence to the ambiguous phases which theirs assumes.

The most cursory glance shows us that the Common Law procedure relating to the whole field of expert testimony, whether in the method of summoning, of examining, or of presenting such testimony to the jury is paradoxical in principle and self-contradictory in practice. The very term witness, when applied to an expert, is at the start a legal paradox. It owes its origin to the custom of allowing experts to be summoned by either party litigant, and in the exclusive interest of that side from which they either have received, or expect to receive a retainer. Consequently, and in that capacity, they come upon the stand with minds prepared to favor only that view of the case which they are retained to sustain. Being also generally, first consulted in private; hearing only the statements of one side, and thus forming a judgment before coming into court, it is inconsistent with the laws of mental action for them, willingly to recall that judgment, so as to place their public opinion in direct antagonism to their private, thereby demolishing the case and forfeiting the confidence of those who have given them by their patronage,

both a reputation and a fee. Thus fettered on the very threshold of his service by being reminded of what he is expected to do towards sustaining one side, the expert starts under a cloud of suspicion and distrust, which justifies that other and equally absurd though consistent proceeding of the cross-examination of an *expert* by a *layman*. The whole drama is, in fact, a tissue of legal inconsistencies, all springing from that one tap-root of error, viz., the habit of considering the expert as a strictly party witness and allowing him to be summoned as such.

Legally speaking, witnesses are limited to facts observed by them, and while opinions upon such facts may very properly be given in all matters of ordinary observation, *opinions* upon facts never personally observed, or opinions upon facts requiring *special* knowledge to interpret them, constitute, not testimony, but a *quasi*-judgment upon them. The Civil law, with an acumen pre-eminently distinguishing its philosophy, had established boundaries to testimony that have required no sensible change, except in enlargement, to meet the demands of modern society. Wherever, therefore, that majestic system of jurisprudence, which has been a convenient treasure house for even the common law of England to draw from, has been adopted, no contradictions and no ambiguities in the application of expert testimony before courts are known. Under its practice the expert was considered simply as an *amicus curiæ* whose opinion was *ex vi termini* a *quasi*-judgment in the premises. Nor could it be otherwise, for the separation of the *jus* from the *judicium* rendered it quite possible to unite the functions of expert and judge, without derogating, in the least degree, from the strictest operation of the *jus*, since this latter always furnished the principles by which the *judicium* was to be applied to a given case.*

**Maynz, Elemens de Droit Romain.* Vol. 1., p. 348.

Whatever may be said in fact of the duty of courts to prevent experts from encroaching upon the province of the jury by pronouncing judgments on issues before them, it should never be forgotten that the calling of an expert to pass upon the merits of an issue joined is an open confession of its incomprehensibility to a jury, and since they can not determine it themselves, do they not thereby ask of the expert, as they do of the court itself under other circumstances, for a ruling or judgment upon that issue? In the one case they ask the court for a ruling upon the *municipal* law applicable to some point; in the other they ask the expert for a ruling upon the *physical* law applicable to some equally dubious point. Is the answer or opinion less a *judgment* when uttered by the expert than when uttered by the judge? One is a minister and interpreter of municipal laws, the other of physical laws, but both are legally, because rationally judges, each in his own province.

In other fields of investigation courts recognize these principles. Thus courts of equity are in the habit of sending issues of fact to be tried before masters in chancery, and their reports are always accepted as preliminary judgments upon the issue tried before them, requiring only the subsequent confirmation of the court to give them plenary authority. A similar rule obtains in many European countries in relation to issues involving the necessity of expert opinions. And in fact this is the only proper solution of the problem; since it is plain that neither under the civil, nor even the common law is the expert regarded as a witness proper, being more nearly a referee and physical juris-consult specially called for this purpose. It is manifestly wrong, therefore, to define his opinion as testimony, when, in truth, it is rather an opinion upon testimony, a judgment upon the physical merits of a state of facts agreed upon.

The expert being in no proper sense of the word a

witness, should have his status definitely determined, should be free from alliances with either party, and give his opinions only upon an agreed statement of facts. In other words he should arbitrate and not testify. So long as he is introduced as a party witness, the opposite side have the right to confront and necessarily to cross-examine him, but how unphilosophical, not to say ridiculous even, is the idea of an expert being cross-examined for the purpose of testing his professional knowledge, by a layman. The entire effect and benefit of his participation in any trial is thus mutilated, deformed and nullified by the legal paradox which assumes him to be a witness. Witness to what? His own opinion only.

In whatever direction we look, we see how inevitably these conflicting principles arise from the first departure in recognizing the true position of the expert. Having once been summoned as an ordinary witness by one party, he is fore-doomed to that position throughout his entire service in court; is cross-examined as such—and his opinions before the jury lose proportionally the weight which, but for this, would attach itself to them. No jury can be expected to place absolute confidence in the statement of a witness called exclusively in the interest of one party. They will balance probabilities even in the matter of his *professional* accuracy, whenever his opinions conflict with their own pre-conceived ideas upon the subject. To that extent, therefore, they will sit in judgment upon his opinion, rather than accept it as a specific adjudication in a matter admitted to be beyond their knowledge and comprehension. Nor is it laying too much emphasis upon the results of such repudiation of skilled testimony to affirm, that it begets an overweening self-confidence in jurors, which is not slow to extend from the opinions of experts to those of the court. Every verdict against evidence, or every analogous omission to

apply the principles laid down in a judge's charge, to the case at bar by a jury, are but confirmations of these assertions.

It is from an unwillingness to accord any distinct legal status to experts, after summoning them *eo nomine* before courts, that has resulted the chaotic state of our jurisprudence upon this subject. No chapter in the law of evidence presents more conflicting decisions than this. In fact every court seems to have had some distinct, and the same court at times diverse views upon the character of this form of testimony. Nor is it to be wondered at, since every common law court has persistently insisted in treating the expert as a party witness while seeking his opinion as an impartial judge. The next error has been that of allowing any one to be introduced before a jury as an expert without first putting him upon his *voir dire* to ascertain whether his competency agreed with his pretensions. If anyone, as is now the practice, may be admitted to testify as an expert, then the term is one of multitude and not of exception.

Some idea of the diametrical difference between courts in their opinion of the basis of qualifications in experts, may be had from the citation of two cases only, where in the first one, (Tullis v. Kidd, 12 Alab., 648) it was held sufficient that a party had studied medicine, although he had never practiced it, while in the second (Emerson v. Lowell Gas Light Co., 6 Allen, 146) it was held that a physician who had been in practice for several years, but who has had no experience as to the effects of illuminating gas upon the health when breathed, can not be allowed to testify thereto as an expert; and *experience* in attending upon other persons who, it is alleged suffered by breathing gas from the same leak, is insufficient. This case presents us with a complete illustration of self-contradic-

tion in the form of that logical fallacy known as a negative pregnant. It first lays down the principle that a physician who has had no experience in a certain direction is not an expert *quoad hoc*, and then asserts that one who has had experience in this very direction is equally incompetent *quoad hoc*.

In order to obviate the effects of such contradictions in the law of evidence, it would be well, for it is entirely possible, to remove all experts from the field of testimony and place them in that of arbitration, so far as any particular scientific question is to be decided. For this purpose, whenever such an one arises whose solution is material to the determination of the matters in dispute, let a feigned issue be made upon the point, and referred for judgment, upon evidence agreed upon, to three experts, one to be selected by each party litigant, and the third by the court, such experts to sit and determine at once the question in dispute, and their opinion to be received by the jury as conclusive of the issue tried by them. In this way each party would be represented, just the same as if the expert had been called into court by him, and the evidence on which an opinion is sought being agreed upon, time and arguments would be saved. Nor would there be any necessity either for a direct or cross-examination, since there would be no *witness* to require such, and the opinion of experts being given upon deliberation, and while they are themselves freed from the vexation of a personal discussion with counsel, would be of a more satisfactory character to all parties concerned by expressing the best possible efforts of an unprejudiced mind.

And with the further view to secure economy in time from the application of these views to practice, counsel desiring to invoke the assistance of experts should be required to give notice to the court and opposite party

of such intention, so that the scientific issue upon which their services will be required could be tried in advance, and the ordinary course of judicial proceedings at Nisi Prius not be interrupted by the interpolation of new and exceptional matter. We need not point out how much this would tend to simplify and abridge trials for homicide when the plea of insanity is suddenly sprung upon the court, and an entire shifting of the scenes in the drama of evidence becomes necessary.

We have said nothing about *qualifications* in experts, because that is a matter which it may be assumed every court would see to with more jealousy and vigilance, than if, as at present, each party were allowed to select those experts only who would best subserve their interests. For, whenever expertism shall be known to represent in fact what its name implies in theory, those offering themselves as practitioners in that field, will be careful to formulate only such opinions as will stand the test of future criticism. At present it is the victory of the hour that alone engages the efforts of *party*-experts, many of whom having no reputation to lose, throw themselves recklessly and to that extent wickedly, into the high seats of oracular authority regardless of the consequences to the professions which they so often *mis*-represent.

It can not be necessary to enlarge further upon a state of facts like these, which, both in this country as well as in England, casts a periodical shadow upon the wisdom of judicial procedure as the exponent of perfected law. And having traced the evil to its parent source in the erroneous classification of experts among witnesses, no large or disturbing change is required to secure the needed remedy. Let us but remove the cause, and its consequences will die with it. *Cessante causâ cessat effectus.*

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