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## Expert Testimony

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# Marquette Law Review

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## EXPERT TESTIMONY

Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount. There is no hypothesis, however novel, but what for a substantial fee per diem some one expert will be found to defend it under oath. As a result expert testimony often is entitled to such weight only as a sound and cautious criterion would award to the testimony of one retained on a particular side, not speaking to facts as other witnesses do, but to uphold a theory favorable to his employer. It is patent therefore, that much time is wasted in cross-examination to discredit the witness as well as his opinion, this evil varying in degree as the lack of integrity of the expert or the novelty of the theory sought to be upheld draws forth the challenge of opposing counsel.

In this issue we present an appeal by a high-minded physician who keenly feels the stigma of disrepute into which medical testimony apparently has fallen along with that of other kinds of expert testimony. In his article the writer points out the characteristic difficulties to be overcome by the medical expert. Many members

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of the bar quite agree with him that under the present system medical testimony, important as it is, can be practically nullified. Wharton, in his magnificent work on the law of evidence says, that originally expert testimony was called in to supply to the court and jury information about scientific facts, not within their knowledge, to aid them in arriving at conclusions of fact. The modern theory of expert testimony, as opinion based upon a hypothetical case propounded by a litigant, seems to be an outgrowth of practice. In view of the increasing importance of medical testimony as a necessary aid in the administration of justice; a change in the present methods of introducing medical evidence would seem imperative.

## WHY STUDY THE CIVIL LAW

The territorial legislature of Michigan abrogated the "Customs of Paris" in force in that territory while under French Dominion. The Constitution of our state declares the common law in force in the Territory of Wisconsin, and not repugnant thereto, to remain in force until superseded by legislative enactment. The Supreme Court of Wisconsin has declared the term "common law" to mean the common law of England as it existed in the original thirteen American Colonies at the time of the Revolution. It would seem then that the study of the civil law is a matter of utter indifference to a lawyer in Wisconsin. Yet such is not true.

The cardinal principles of justice are unchangeable. The Justinian Code which survived the Roman Empire as the foundation of the modern civilization in Europe has furnished the fundamental principles of American private law. The maxims of Ulpian, "According to the law of nature all men are equal" and "By nature all men are free" sound the keynote of our institutions. Frequent references to the civil law are made in the reports of American and English courts, either to seek the reason for a rule or to support their decisions. Unable to keep abreast of the growing needs of new conditions the common law courts have long ago reached over into the civil law for basic principles.

The civil law as a system of Jurisprudence is grounded essentially on the experience of ages. The Justinian Code is composed of a body of principles which were found in the law of all

nations from time immemorial. The strict *jus civile*, the positive law of the Twelve Tables, was applicable only to the citizens of Rome. It grew more and more inadequate as the Roman eagle spread over farther lands. Recurrent suits between citizens and foreigners, and between foreigners of diverse nationalities, necessitated a special tribunal to adjudicate these controversies. The Praetors, untrammelled by positive law, administered justice according to their own notions of natural equity. They observed that certain laws were common to all nations. These laws were summarized by the jurists under the name of *jus gentium*. The Stoic philosophy of Greece had developed the idea of a natural law, and with the enthusiastic reception of that philosophy in Rome, the idea of a *jus naturale* entirely transfused the theory of the old positive law of early Rome. Laws of ancient civilizations, perished long before, were thus enriched and expanded into a magnificent system of law based on natural equity. The civil law has ever since and in every age furnished principles which, modified to meet new circumstances, have greatly contributed to the real interests and welfare of modern society.

The methods by which justice is administered are subject to constant fluctuations. By momentous reforms, England during the past century ironed out many of the salient characteristics of the common law. It was not pretended, however, to adopt the tenets of the civil law. To be accurate, the common law was brought closer to that common basis of justice that ought to inhere in all systems of jurisprudence whether of Germanic or Roman origin. It must be conceded that the civil law more nearly approaches an ideal system, to attain which is the purpose underlying modern reforms in procedure.

The crowning achievement of codifying the correlated principles of the civil law is a monument to the Roman genius for organization. Codification admittedly tends to secure uniformity. The conflict of the decisions throughout common law jurisdictions is severely criticised. In the day of Bacon and Coke there was a strong controversy whether decisions should furnish precedents to govern later cases or whether decisions should merely illustrate a system of "Rules" as proposed by Bacon. Coke's system of Reports prevailed; and although the maxims of Equity supplied the deficiencies of the common law, yet the innate vice of that system remained. Under the doctrine of *stare decisis* one wrong decision entails a continuation in error until that decision

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has been overruled, while under the civil law one court is nowise bound by decisions of another. The civil law provides a norm and the decisions thereunder must necessarily tend to conform thereto, but the common law must strive for uniformity from a maze of conflicting decisions.

The admirable uniformity created by the Justinian Code is a universal need today. An international code of laws, compatible with sovereignty, is an aspiration of the idealist. Codification has taken firm root in England. The project of codifying existing law is a distinctly American problem. The feasibility of codification, without effacing the limits of state jurisdiction in a federal republic, is being demonstrated. The uniformity of law in European countries today, where formerly a great diversity of law existed, bears eloquent testimony to past achievements.

The civil law as a fountain of basic principles has not been exhausted. The characteristic stability and uniformity of the civil law is still a desirable end. The splendid example of codification of the Justinian Code has not been surpassed to this day. When the Justinian Code has ceased to be a source of inspiration, then only can it be said that the study of the civil law may be safely ignored by the analytical student of the law.

JOSEPH WITMER, *Editor.*