Marquette Law Review

Volume 48
Issue 3 *Winter 1964-1965*

Article 4

The Intricacies of Hypothetical Questions

Arnold J. Cane
Third Judicial Circuit, State of Wisconsin

THE INTRICACIES OF HYPOTHETICAL QUESTIONS*

ARNOLD J. CANE**

I. THE LAW

In a case going back to the territorial days of Wisconsin, about 115 years ago, Pinney reports that of *Luning v. State*,[1] decided at the January 1849 term of the territorial supreme court.

Luning was tried in the Circuit Court of Washington County for erecting a mill-dam near the village of Cedarburg on a stream passing through the town. It was charged that the health of the citizens was injured because of the unpleasant and unwholesome vapors arising therefrom. (There was testimony to the effect that before the erection of the dam there was general good health, but afterwards universal sickness, "there not being enough in health to administer to the necessities of the sick,"[2] and the stench from the dam being so intolerable that the inhabitants were compelled to close their doors and windows and resort to other expedients to remove its influence.) A Dr. Whitney was present all during the trial. The defense called him to the stand and propounded the following question to him: "You state you heard all the evidence given on this trial; now, from that evidence, did *Luning's* mill-pond, in your opinion, cause the sickness spoken of by the witnesses?"[3] The trial judge sustained an objection to this question. The territorial supreme court ruled that in this the trial judge was correct:

> The answer to this question would have been an opinion as to the general merits of the cause, the weighing of conflicting testimony, and swearing to a legal conclusion; in fact, usurping the province of the jury. The facts, as given in evidence, might have been stated to the witness, and then his opinion upon them would have been competent; or he might have given his opinion upon a similar case, hypothetically stated.[4]

Less than fifty years later, in a case appealed to the Supreme Court of Wisconsin from the Third Circuit, one of the author's predecessors, Judge Burnell, was reversed in *Maitland v. Gilbert Paper Co.*[5] Mait-

---

* This article is based on a paper presented at the summer meeting of the Board of Circuit Judges of Wisconsin in August 1964.

** Ph.B., Marquette University (1935); LL.B., Marquette University (1937); judge, Third Judicial Circuit, State of Wisconsin (1962-1964); judge, criminal and juvenile courts, County Court of Winnebago County (1960-1962); member, Wisconsin Assembly (1950-1960); member, American Bar Association and American Judicature Society; formerly president, Winnebago County Bar Association, and governor, State Bar of Wisconsin.

[1] 2 Pin. 215 (Wis. 1849).

[2] *Id.* at 219.

[3] *Id.* at 220.

[4] *Ibid.*

[5] 97 Wis. 476, 72 N.W. 1124 (1897).

land, an engineer at the paper company in Menasha, had his left eye destroyed when a water glass which had been installed for the purpose of indicating the water height in the steam boiler exploded in his face. Judge Burnell had allowed the plaintiff, under objection, to answer the question: "What, in your opinion, was the cause of the explosion of the glass?"[6]

In an opinion written by Justice Marshall, our supreme court held that "where evidentiary facts, upon which the fact in issue depends, are in dispute, opinion evidence as to the ultimate fact must be given upon a hypothetical case."[7] Justice Marshall also wrote: "The rule is that experts are not to decide issues of fact, hence all questions calling for opinion evidence must be so framed as not to pass upon the credibility of any other evidence in the case, else it will usurp the province of the jury or the court."[8]

These two cases, dating back 115 years and sixty-seven years, respectively, are recalled by way of introduction chiefly to point out that the law of Wisconsin on the subject of hypothetical questions is of long standing. It has been little changed in succeeding years.

In *Hamann v. Milw. Bridge Co.*[9] and *Schwantes v. State,*[10] the court held that "the scope of expert evidence is not [restricted to matters of science, art or skill]. It extends to every subject in respect to which one may derive, by experience, special and peculiar knowledge."[11]

On October 30, 1962, the supreme court handed down its decision in the case of *Kreyer v. Farmers' Co-operative Lumber Co.*[12] in which Justice Wilkie reviewed the law as to hypothetical questions. An appeal from Judge Varnum's circuit, Buffalo County, the case involved a claim for fire damages to barns and equipment by the plaintiff, Kreyer, who charged that the fire was the result of faulty electrical work done by the defendant, Farmers' Co-operative, on the day of the fire.

An objection to a hypothetical question asked of one Sherman, an expert called by the plaintiff, to the effect "was the barn fire caused by faulty wiring?"[13] was sustained by Judge Varnum on the ground that it invaded the province of the jury. In this the supreme court held that Judge Varnum erred, citing the cases hereinbefore mentioned and others. On the other hand, the court approved of Judge Varnum's ruling on the objection of the defendant that there was not the proper foundation for the question. After reciting in some detail what the

---

[6] *Id.* at 483, 72 N.W. at 1127.
[7] *Id.* at 484, 72 N.W. at 1127.
[8] *Ibid.*
[9] 127 Wis. 550, 106 N.W. 1081 (1906).
[10] 127 Wis. 160, 106 N.W. 237 (1906).
[11] 127 Wis. at 565, 106 N.W. at 1086.
[12] 18 Wis. 2d 67, 117 N.W. 2d 646 (1962).
[13] *Id.* at 75, 117 N.W. 2d at 651.

testimony had been prior to the putting of the question to Sherman, the plaintiff's expert witness, Justice Wilkie wrote:

> In ruling on a hypothetical question or on any other expert testimony, the trial court must be in a position to insist upon a proper foundation being laid before it allows the question to be answered. The entire premise here as stated by plaintiff's counsel was devoid of any assumption as to evidence pointing to the electrical system as the cause of the fire so that the conclusion called for would be pure speculation and conjecture. There was lack of foundation. . . .[14] (Footnote omitted.)

In addition to summarizing the law relating to hypothetical questions on the two points mentioned, Justice Wilkie, writing for the entire court, discussed the law as to objections required to be specific, not general. During the trial, Judge Varnum and all counsel retired to chambers to discuss the objection and the question. The record, however, disclosed that at no time was the objection detailed. The objection was general, to the effect that the question "assumed facts not in evidence." Justice Wilkie declared that the "objection to the question on the general ground that it 'assumes facts not in evidence' was not specific enough to be sustained."[15]

A quick reference is here made to some other general rules relating to hypothetical questions, as set forth in Wisconsin cases:

(1) *Moore v. Ellis*:[16] The witnesses' testimony is not conclusive upon a court sitting without a jury; it is merely advisory.

(2) *Plainse v. Engle*:[17] The testimony of a medical expert upon the question of mental competency may not be disregarded unless it is impeached.

(3) *Foster v. Fidelity & Cas. Co.*:[18] The question must show the facts upon which the opinion is based and must exclude hearsay.

(4) *Sundquist v. Madison Ry. Co.*:[19] A doctor may base his opinion, in part, on reports of a hospital technician.

(5) *Leora v. Minneapolis, St. P. & S. Ste. M. Ry.*:[20] Medical history obtained, in part, from someone other than the patient may, in particular situations, be admissible.[21]

(6) *Estate of Scherrer*:[22] The question must include undisputed

[14] *Id.* at 81, 117 N.W. 2d at 654. Reference was made to McGaw v. Wassmann, 263 Wis. 486, 57 N.W. 2d 920 (1953); McCORMICK, EVIDENCE § 14, at 29-32 (1954); JONES, EVIDENCE § 371, at 694 (4th ed. 1932); 32 C. J. S. EVIDENCE § 522, at 220-21 (1958).

[15] *Id.* at 79, 117 N.W. 2d at 653. The case of Cornell v. State, 104 Wis. 527, 80 N.W. 745 (1899), was cited as directly in point, and page 534 of that case was quoted. Reference was also made to 6 AM. JUR. EVIDENCE § 788 (1939).

[16] 89 Wis. 108, 61 N.W. 291 (1894).

[17] 262 Wis. 506, 56 N.W. 2d 89 (1952).

[18] 99 Wis. 447, 75 N.W. 69 (1898).

[19] 197 Wis. 83, 221 N.W. 392 (1928).

[20] 156 Wis. 386, 146 N.W. 520 (1914).

[21] The subject, including this case, was discussed in 175 A.L.R. 282 (1948).

[22] 242 Wis. 211, 7 N.W. 2d 848 (1942).

facts, and must also include all facts necessary to be considered in arriving at a correct answer.

(7) *Sharp v. Milwaukee & Suburban Transp. Co.*:[23] The defendant's question need not include plaintiff's testimony that she had no trouble with her elbow prior to the accident.

(8) *Kiekhoefer v. Hildershide*:[24] The question may disregard the adversary's theory of the case.

(9) *Selleck v. City of Janesville*:[25] The mere fact that the question is, in part, based upon the personal examination and knowledge of the physician does not make it objectionable.

(10) *Feldstein v. Harrington*:[26] An expert is not precluded from giving his opinion in answer to hypothetical questions because he has personal knowledge of the case and might testify directly, but he may also give his opinion based on hypothetical facts, or upon such facts and facts within his knowledge; to sustain an objection on that ground is error.[27]

(11) *Kath v. Wisconsin Cent. Ry.*:[28] A doctor may not state what he learns entirely from medical works, unsupported by practical experience of his own.

(12) *Zoedoski v. State*:[29] On cross-examination, the medical expert cannot be questioned on a hypothesis having no foundation in the facts. He may be cross-examined on facts which the cross-examiner claims he has proved, provided such examination is confined within the possible or probable range of facts.

(13) *Marsh Woods Products Co. v. Babcock & Wilcox Co.*:[30] Medical textbooks are not admissible in evidence.

(14) *Bell v. Milwaukee Elec. Ry. & Light Co.*:[31] While the device of reading excerpts while cross-examining is not permissible, when the expert denies any authority a short extract can be used.

(15) *Kuroske v. Aetna Life Ins. Co.*:[32] Opinion evidence carries no weight when it in turn is based upon the opinions or conclusions of other witnesses.

(16) *Vogelsburg v. Mason & Hanger Co.*:[33] The opinion of an expert cannot be invoked to supply the substantive facts necessary to support his conclusion; the opinion of the expert does not constitute proof of the existence of the facts necessary to support the opinion.

---

[23] 18 Wis. 2d 467, 118 N.W. 2d 905 (1962).
[24] 113 Wis. 280, 89 N.W. 189 (1902).
[25] 100 Wis. 157, 75 N.W. 975 (1898).
[26] 4 Wis. 2d 380, 90 N.W. 2d 566 (1957).
[27] The subject is discussed in considerable detail in 82 A.L.R. 1338-39 (1938).
[28] 121 Wis. 503, 99 N.W. 217 (1904).
[29] 82 Wis. 580, 52 N.W. 778 (1892).
[30] 207 Wis. 209, 240 N.W. 392 (1932).
[31] 169 Wis. 407, 172 N.W. 791 (1919).
[32] 234 Wis. 394, 291 N.W. 384 (1940).
[33] 250 Wis. 242, 26 N.W. 2d 678 (1947).

(17) *Curran v. Stang Co.*:[34] The fact that the jury must find reasonable certainty from all the evidence does not make it necessary that every witness must testify to the fact or reasonable certainty.

(18) *Sundquist v. Madison Ry.*:[35] A jury's finding of reasonable certainty may be based on testimony that such a result may "probably" follow or is "likely," "liable," or "apt" to follow the accidental injury.

(19) Only a medical expert is qualified to express an opinion to a medical certainty or based on medical probabilities (not mere possibilities) as to whether or not the pain will continue in the future.[36]

(20) *Walraven v. Sprague, Warner & Co.*:[37] Mere possibilities leave the solution of an issue of fact in the field of conjecture and speculation to such an extent as to afford no basis for inferences to a reasonable certainty, and in the absence of at least such inferences there is no sufficient basis for a finding of fact.

(21) *Will of McGovern*:[38] Any infirmity in the hypothesis attaches to the answer predicated upon it.

(22) *Fehrman v. Smirl*:[39] Grounded upon the rule in Wisconsin that the use of *res ipsa loquitur* is one involving a permissable inference (as contrasted to a rebuttable presumption), an instruction embodying the principle of *res ipsa loquitur* may be based on expert medical testimony in a malpractice action, but the case must, of course, first qualify for the *res ipsa loquitur* instruction.

II. The Question

While hypothetical questions are by no means limited to medical experts, in practice the majority of them will be of such nature. Therefore, it is appropriate to use examples from this field in a consideration of the framing of questions.

After the medical witness has qualified as an expert, the question itself ought to include the following:

(1) Informative description of the person involved (sex, age, weight, height, and prior condition of health).

(2) Date and scene of the accident.

(3) Description of the accident itself (judges know all too well

---

[34] 98 Wis. 598, 74 N.W. 377 (1898).
[35] 197 Wis. 83, 221 N.W. 392 (1928).
[36] For further consideration of the subject of "possibilities" vs. "probabilities," see Creamery Package Mfg. Co. v. Industrial Comm'n, 211 Wis. 326, 248 N.W. 140 (1933); Miller Rasmussen Ice & Coal Co. v. Industrial Comm'n, 263 Wis. 538, 57 N.W. 2d 736 (1953); Molinaro v. Industrial Comm'n, 273 Wis. 129, 76 N.W. 2d 547 (1956); Michalski v. Wagner, 9 Wis. 2d 22, 100 N.W. 2d 354 (1960); *In re* Kitz Estate, 13 Wis. 2d 49, 108 N.W. 2d 116 (1961); Rogers v. Adams, 19 Wis. 2d 141, 119 N.W. 2d 349 (1963); and Bleyer v. Gross, 19 Wis. 2d 305, 120 N.W. 2d 130 (1963).
[37] 235 Wis. 259, 292 N.W. 883 (1940).
[38] 241 Wis. 99, 3 N.W. 2d 717 (1942).
[39] 20 Wis. 2d 1, 121 N.W. 2d 255 (1963).

that the framer of the question will include the most favorable version possible of disputed facts).

(4) Description of tests, investigations, and examinations (including both objective and subjective symptoms).

(5) Description of recent developments (including the latest examination and present condition and complaints).

(6) Conclude by inquiring to a reasonable medical probability or certainty both as to causal connection between the accident and injury, and permanent nature, if any.

(7) Form of conclusion: "Now, Doctor, assuming all these factors to be true, have you an opinion, based upon a reasonable medical certainty, and from a medical and surgical point of view, as to whether or not there is a causal connection between the accident described and the injuries sustained as set forth in this question?"

(8) Continuing: "Doctor, assuming the same hypothetical person, and the same hypothesis, have you an opinion, based upon reasonable medical certainty, and from a medical and surgical standpoint, as to whether the condition, as described, is permanent or temporary?"

(9) If the hypothetical question is dispensed with, then the connecting and causal question can be put to the expert witness as follows: "Now, Doctor, in your opinion, based upon a reasonable medical certainty, was the accident described to you by the plaintiff in the history you have mentioned, a competent and producing cause of the injuries you found?"

All of us have been aware, both in our trial court practice as lawyers and in our judicial experience, that the question of whether or not a hypothetical question ought to be used at the trial involves the consideration of many factors. Often a hypothetical question is not needed, but the opportunity of rehashing the testimony, done artfully, is difficult to reject. Surely if the question is not too long, put simply, with facts accurately stated, it can be both interesting and persuasive. Not only should the question be prepared before trial (subject to be modified to include the facts as given at the trial), but a trial brief should be addressed to the proposition for the benefit of the judge in ruling on the objections which are sure to come.

Chapter 23 of the book *Anatomy of a Murder* by Robert Traver[40] contains what to me is the best hypothetical question, even though the law of Michigan on the subject of insanity as a defense to charge of murder is different than that of Wisconsin.

After slowly and carefully qualifying the thirty-five year old psy-

[40] This was the author's pseudonym; his real name is John D. Voelker, born in northern Michigan in 1903, admitted to the Michigan bar in 1928, prosecuting attorney of Marquette County, Michigan, from 1935 to 1950, and member of the Michigan Supreme Court from 1957 to 1960, retiring in 1960 to write more books, including *Small Town D.A.*

chiatrist, Dr. Matthew Smith, the defense attorney, Paul Biegler, by whom the entire book was written in the first person, related:

> I paused. We were coming to the crucial hypothetical question over which Parnell (not Andy!) and I had worked so long and given so much thought. The hypothetical question was one of the law's more urbane fictions, a convenient sort of legal make-believe by which counsel, when examining an expert witness called by it, wrapped up all the facts and issues and pet theories of his case in a sort of neat legal grab bag and pelted it at the expert witness for his opinion and conclusion. It at least mercifully possessed the highly desirable quality of saving time.
>
> 'Doctor,' I said, 'I ask you whether you and I have heretofore reviewed together a hypothetical question based upon the issue of possible insanity in this case?'
>
> 'We have.'
>
> I advanced to the Judge's bench. 'Your Honor,' I said, 'I hand you a copy of our hypothetical question.' I walked over to Mitch's table. 'I also hand counsel a copy.' I returned to my table. 'With the Court's permission I should now like to read into the record our hypothetical question.'
>
> The Judge nodded. 'Read away,' he said, and the court reporter rolled up his eyes and seemed to brace himself for the expected flood of words, in which he was not disappointed.
>
> 'Thank you, Your Honor,' I said, and began reading. 'Doctor, assume that a man of 36 is a First Lieutenant in the United States Army; that he was a combat veteran of World War II and the Korean War; that he returned to his country from Korea in 1953 and for a time was assigned to special military duty in various places. That in July of this year he was assigned to duty in a remote logging and resort village in the Upper Peninsula of Michigan. That he was married to an attractive and vivacious woman 5 years his senior. That these two were and are much in love with each other. That they lived in a trailer in a public park in said village. That the social and recreational facilities of said village were limited. That one of the few public recreational places they could conveniently go to was a neighboring hotel bar. That because of his long overseas service and the further fact that he was on loan from his own outfit the Lieutenant had few acquaintances among local Army personnel. That he occasionally went to the hotel bar when off duty and that his social relations with the civilian proprietor were cordial though in no sense intimate. Assume further, Doctor, that at approximately 9:00 P.M. on Friday, August 15th, the wife of the Lieutenant went to this tavern to get some beer and play pinball and that the Lieutenant went to bed and slept and that at approximately 11:45 P.M. he was suddenly wakened. That he hurriedly got up and thereupon heard a series of screams. That he then met his wife at the door of his trailer. That she was sobbing and breathless and hysterical. That she finally told him that the proprietor of the hotel had threatened her life and assaulted and raped her; that he had again just assaulted her and beaten and kicked her. That she was badly bruised and beaten.

That her skirt was ripped and her underpants were missing. That the Lieutenant spent upwards of an hour attempting to calm and comfort and minister to his wife. That during this time she told him the details of the threats and assaults and beatings. That during this time he wiped a fluid from his wife's leg which he believed to be seminal fluid. Assume further, Doctor, that this Lieutenant reasonably believed that the man whom he believed had just assaulted and threatened and raped his wife was an expert pistol shot and that he kept pistols about his premises and possibly on his person. That he himself kept a loaded Luger automatic pistol in his trailer for protection. That his mind was in a turmoil over what he believed had just happened to his wife, and over her present condition. That he finally determined to seek out said hotel bar proprietor and grab him and hold him for the police. That while he felt considerable anger and loathing and contempt for the proprietor he had at no time any intention of killing or harming him but felt that if the man made one bad move he would have killed him. That he went and got his pistol without his wife's knowledge and left his wife in the trailer and proceeded toward this tavern. That he does not remember what time it was or precisely how he got to the tavern. That he finally got to the tavern and entered it. That he saw the proprietor standing alone behind the bar watching him. That he then advanced in the bar and proprietor whirled around and the Lieutenant produced his pistol and pointed it at the proprietor and emptied its contents into his body, leaning over the bar to do so. That he had and has no conscious recollection of his act. That he then turned and left the tavern and proceeded toward his trailer. That he does not remember anything after he entered the tavern other than as indicated until he got home to the trailer. That he then first observed that the pistol was empty; that he then told his wife that he had shot the tavern proprietor. That he then notified the deputized caretaker of the trailer camp of what he had done. That he waited in his trailer for the police and was subsequently arrested and charged with murder. Assume further, Doctor, that this man had never before in his lifetime been arrested for or convicted of any criminal offense, including any civilian act of violence toward another human being.' I paused and caught my breath. 'Now, Doctor, assuming all the facts herein stated to be true, have you an opinion based upon a reasonable psychiatric certainty as to whether or not it is probable that the hypothetical man was in a condition of emotional disorganization so as to be temporarily insane?'

'I have.'

'What is that opinion?'

'That he was temporarily insane at the time of the shooting.'

Then, of course, followed a lengthy discussion in which the defense attorney questioned the doctor for further elaboration on the mental condition of the hypothetical man, including the psychiatric bases for opinions expressed.

Chapter 23, surrounding the hypothetical question, and chapter 24,

the cross examination of the psychiatrist, are, from the standpoint of a judge and lawyer, the most interesting and informative of the book.

III. COMMENT

The dignity afforded to hypothetical questions in Wisconsin, as seen from the cases dating back to the territorial days of our state, is not universal.

For example, the Model Code of Evidence, as well as the uniform acts, would eliminate the device of hypothetical questions and allow precisely what was attempted in the *Luning* mill-dam case of 115 years ago. Both rule 58 of the Uniform Rules of Evidence and section 9 of the Uniform Act on Expert Testimony provide substantially as follows:

> Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis, or otherwise; but upon cross examination he may be required to specify such data.

The text book used in the law schools of Wisconsin and frequently cited with approval by our Wisconsin Supreme Court, *McCormick on Evidence,* asks this question: "Should the Hypothetical Question Be Retained?"[41] To back up his contention that the legal writers who have studied the problem condemn the use of hypothetical questions, McCormick gives two examples:

(1) Wigmore declares that "it is a strange irony that the hypothetical question, which is one of the truly scientific features of the rules of Evidence, should have become that feature which does most to disgust men of science with the law of Evidence."[42]

(2) Judge Learned Hand described the hypothetical question as the "most horrific and grotesque wen on the fair face of justice."[43]

While admitting that the hypothetical question is an "ingenious and logical device"[44] for assisting a jury to have the benefit of the views of experts in a case, McCormick charges that it is a "failure in practice and an obstruction to the administration of justice."[45] He charges that by permitting counsel to pick out those material facts he wants in stating the question, the courts permit a one-sided hypothesis. On the other hand, if counsel is required to include all relevant facts, then an "intolerably wordy" question results. He quotes from two expert witnesses to show what he considers the principal weakness of the practice; namely, the slanting of the hypothesis:

(1) Dr. William A. White declared: "In a large experience, I have

[41] MCCORMICK, EVIDENCE § 16, at 33-34 (1954).
[42] 2 WIGMORE, EVIDENCE § 686 (3d ed. 1940).
[43] NEW YORK BAR ASS'N, LECTURES ON LEGAL TOPICS (1921-1922).
[44] MCCORMICK, *op. cit. supra* note 41, at 33.
[45] *Ibid*

never known a hypothetical question, in a trial involving the mental condition of the defendant, which, in my opinion, offered a fair presentation of the case."[46]

(2) Dr. Harold S. Hulbert wrote: "But the present practice of misusing a hypothetical question as restatement of the case to re-impress the jury is bad strategy, though good tactics; bad strategy because it is so unfair, confusing and degrading that it does not clarify the issue nor help achieve justice."[47]

Addressing himself to the remedy, McCormick, after remarking that it would be impractical to insist that the trial judge make the required study of the case in order to choose what facts should be included in the question, writes that in Michigan the courts follow the practice of framing the question by all counsel in conference with the judge, either at the pre-trial or during the trial in the absence of the jury (some of us here have frequently done this). He says, however, that these devices are

> wasteful of time and effort. The only remaining expedient is the one generally advocated, namely, that of dispensing with the requirement that the question be accompanied by a recital of an hypothesis, unless the proponent elects to use the hypothetical form, or unless the trial judge in his discretion shall require it. It will be for the cross-examiner to bring out if he so desires, the bases for the expert's opinion. Manifestly, this does not lessen the partisanship of the question or the answer, but it does greatly simplify the examination, and removes the occasion for imperiling the judgment by mistakes in the form of hypothetical questions.[48] (Footnotes omitted.)

McCormick also addresses himself to the broader subject of "Proposals for Improvement of the Practice Relating to Expert Testimony."[49] Summarizing what he said about this, it appears that while he recognizes the distinct advantages of the adversary system, including the initiative of opposing parties in gathering and presenting proofs, McCormick contends that there are two weaknesses of the system insofar as expert evidence is concerned. The first he considers to be the growing tendency in choosing experts not on the basis of who is the best expert but who is the best witness; the second, the method of presenting expert testimony at the trial, too often resulting not in a dispassionate presentation but instead an overemphasis on conflicts in the opinions of experts which juries cannot really intelligently resolve. McCormick deplores the "battle of experts" type of trial.

To reduce the partisan element in selecting experts to testify (or

---

[46] WHITE, INSANITY AND THE CRIMINAL LAW 56 (1923).
[47] Hulbert, *Psychiatric Testimony in Probate Proceedings,* 2 LAW & CONTEMP. PROB. 448, 455 (1935).
[48] MCCORMICK, *op. cit. supra* note 41, at 34.
[49] *Id.* at 34-38.

to make reports), McCormick recommends that trial judges make greater use of their inherent powers to call experts. This idea has been embodied in statutes and rules of courts in many states, including, of course, our own state as far as criminal cases are concerned. The Model Expert Testimony Act approved in 1937 by the Commissioners on Uniform Laws (adopted in very few jurisdictions) provides that the trial judge may, either upon request or upon his own motion, appoint experts on notice to make report or to testify at the trial. If the parties agree upon an expert, the judge shall appoint him. The parties may call additional experts on notice, but the jury is made aware of which experts were appointed by the judge (obviously for the purpose of suggesting that such experts' testimony be given more weight) and costs taxed only for the experts named by the judge. Both parties, of course, have the right to cross examine the experts called by the judge.[50]

Finally, after considerable discussion of the matter of the better utilization by courts of the services and knowledge of experts,[51] McCormick concludes: "It may be predicted that all of these opportunities of the courts for using expert knowledge less clumsily than in a duel before the jury will be more widely employed in the future. They will not merely be useful as aids to a more intelligent final trial of the issue, but they will more and more often render such trial unnecessary."[52]

---

[50] See UNIFORM RULE OF EVIDENCE 59; MODEL CODE OF EVIDENCE §§ 402-10.

[51] He quotes from many sources, including *Ex parte* Peterson, 253 U.S. 300 (1919) (Brandeis, J.); Beuscher, *The Use of Experts by the Courts*, 54 HARV. L. REV. 1101 (1941); Koerner, *Diagnosis and Treatment of Legal Congestion*, 22 J. AM. JUD. SOC'Y 168 (1939); Stephens, *What Courts Can Learn from Commissions*, 21 A.B.A.J. 141 (1933).

[52] MCCORMICK, *op. cit. supra* note 41, at 38.