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Expert Witnesses Appointed by the Court

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NOTES

EXPERT WITNESSES APPOINTED BY THE COURT

American Law Institute Code of Evidence Rule 403[1] provides for the appointment of expert witnesses by the court, whenever the court determines that such expert evidence will be of substantial assistance in a particular action, civil or criminal.

Caprice has no place in law. A change of methods, to be justified must meet and favorably pass the test of "better justice." An unbiased appraisal of our present methods of presenting expert testimony forcibly illustrates its shortcomings. Parties choose their experts for what they can contribute to their cause, consequently we end up with the inevitable battle of experts, which unnecessarily prolongs the litigation and precludes a fair determination of the issues, by the triers of fact.

In *Kramer* v. *Chicago & Milwaukee Electric Railway Co.,* 179 Wis. 453 (1923), a personal injury action involving chest and back injuries, Judge Doerfler in commenting on the radical differences of medical opinion presented said:

> "Such differences of opinion are not an unusual occurrence in the trial of a lawsuit, but rather constitute the rule . . . What is here said is not intended as a criticism or slur upon the medical profession. Its object is to bring home a realization that court proceedings are designed for the general welfare in order that justice may be done to, between man and man. A mutual cooperation on the part of the profession to obviate as far as possible a situation which appears to the mind of a layman as irreconsilable, is highly to be desired."

In *Jessner* v. *State,* 202 Wis. 184, 231 N.W. 634 (1930), Judge Owen, in ruling on the constitutionality of the Wisconsin Statute 357.12 (1925), said:

> "By the statute under the consideration the legislature has deliberately attempted to regulate the subject of expert evidence in criminal trials, to the end that there may be some evidence in the case, not bought and paid for, coming from impartial witnesses who owe no duty or allegiance to either side of the controversy, and that the fact of their impartiality shall be made known to the jury. . . . We find no constitutional provision relating to jury trials which prohibits the practice thus prescribed by the legislature."

The rules, on expert witnesses, as set out in the ALI Code of Evidence, do not aim at perfection. A proper question raised by the proposed changes which these rules will effect, is whether or not these changes will provide the needed remedies for the existing evils under

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[1] Rules 402 to 410 (inclusive) are found in MORGAN AND MACQUIRE, CASES ON EVIDENCE (2d ed. 1942) 1146-1148.

our present procedure without violating any substantial rights of the parties.

Naturally such a proposal has been vigorously opposed by many members of the bar. Their position is that such a change, if effected, will emasculate our adversary system of trial. Their objection would be tenable if this proposal limited expert testimony to only experts appointed by the court, for this would be granting arbitrary powers to the court and permit an inescapable interference with the traditional right of the parties to advance such evidence as they think helpful to their cause.

However, Rule 403 of the ALI preserves for the parties the right to call in their own experts, upon proof to the court, of reasonable notice to the adverse party and with the condition that the fees of such experts are not to be taxable as costs. This is a wise and necessary safeguard against arbitarary or mistaken opinions of the court's appointed witnesses,[2] and a potent incentive to have the judiciary exercise this power within the spirit and intent of the new procedure.

Many states have enacted legislation giving to the courts the power to appoint expert witnesses in criminal actions,[3] and a few states have extended this power of appointment to civil actions as well.[4] The Federal Rules of Criminal Procedure provide for the selection and appointment of expert witnesses, by the court, in criminal actions.[5] The Federal Rules of Civil Procedure provide for court appointed experts in personal injury cases:[6] and furthermore these Rules of Civil Procedure provide for the appointment of masters to make findings of fact to be used as prima facie evidence in jury cases,[7] thus impliedly recognizing the need for impartial scientific knowledge and information in the disposition of litigation. Courts of equity have, on their own initiative, called in experts to aid in the administration of justice. The court's power to order an investigation and report thereon, without the aid of statute, is well illustrated in *Georgia* v. *Tennessee*.[8] There is also the Kentucky case of *Edwards* v. *Sims*[9] where the court dissatisfied with the conflicting testimony of partisan experts, appointed two county sur-

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[2] TEXAS L. REV. (1945) Vol 23, No. 2, p. 109.
[3] Vermont Gen. Laws (1917) § 2620; Rhode Island Gen. Laws (1923) §§5002-5005; Colorado Laws (1927) c. 90, § 2; Indiana Ann. Stat. (Burns Supp. 1929) § 2291; N.Y. Const. Laws (Cahill's 1930) c. 31, § 31; Ohio Gen. Code (1931) §§ 13441-13444; Calif. Penal Code (Deering 1931) § 1027; WIS. STAT. (1928) § 357.12(1).
[4] Rhode Island Gen. Laws (1923) §§ 5002-5005; Calif. Code of Civil Procedure (Deering 1931) § 1871. WIS. STAT. (1939) 269.57.
[5] Rule 30 in Federal Rules of Criminal Procedure (2d Prelim. Draft—Feb. 1944).
[6] Rule 35 in Federal Rules of Civil Procedure (1944) Rev. ed.).
[7] Rule 53 in Federal Rules of Civil Procedure (1944 Rev. ed.).
[8] Georgia v. Tennessee, 237 U.S. 474, 35 S.Ct. 631, 59 L.Ed. 1054 (1914).
[9] Edwards v. Sims, 232 Ky. 791, 24 S.W. (2d) 619 (1929).

veyors to go on the defendant's land and survey the cave in question and report their findings back to the court. In *Ex parte* Peterson,[10] the United States Supreme Court held that courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.

In testing the constitutionality of these state statutes one of the frequent questions raised was whether or not the exercising of the power of appointment of these expert witnesses, is the performance of a judicial function. In *State* v. *Horne*[11] it was held that it has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side, whenever he sees fit to do so, and the calling of a witness on his own motion differs from this practice in degree and not in kind. In *Jessner* v. *State*[12] it was held that the function of these experts is to aid in the administration of justice, by furnishing reliable and unprejudiced opinions upon a technical subject. The whole purpose of their creation and appointment is to promote the accomplishment of the very purpose for which courts are established. The Wisconsin Supreme Court has held that the appointment of jury commissioners,[13] revisors of statutes,[14] and commissioners of equalization,[15] are all within the performance of the court's judicial function. It was further held that the trial courts may avail themselves of the expert testimony of members of the tax commission[16] and the industrial commission[17] when the issues involved are of such nature that the better interests of justice will be served by presentation of such expert testimony. The leading case contrary to these holdings is the Michigan case of *People* v. *Dickerson*[18] which holds that the court's power of selecting and appointing expert witnesses, is in no sense a judicial act but the court fails to state reasons for so holding. Edmund Burke[19] said:

> "It is the duty of the judge to receive every offer of evidence apparently material, suggested to him, though the parties themselves through negligence, ignorance or corrupt collusion should not bring it forward. A judge is not placed in that situation

[10] Ex parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1919).
[11] State v. Horne, 171 N.C. 787, 88 S.E. 433 (1916).
[12] Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930).
[13] State ex rel Gubbins v. Anson, 132 Wis. 461, 112 N.W. 475 (1907).
[14] "In the Matter of the Appointment of a Revisor of the Statutes," 141 Wis. 592, 124 N.W. 670 (1910).
[15] Foster v. Rowe, 128 Wis. 326, 107 N.W. 635 (1906).
[16] Wisconsin Ornamental I. & B. Co. v. Wis Tax Comm., 202 Wis. 355, 233 N.W. 72 (1930).
[17] Zurich Gen. Acc. L. Ins. Co. v. Industrial Comm., 203 Wis. 135, 233 N.W. 772 (1930).
[18] People v. Dickerson, 164 Mich. 148, 129 N.W. 199 (1910). In this case the constitutionality of Pub. Acts 1905, No. 175, Sec. 3 was tested—the court holding such Section as unconstitutional.
[19] Report on Committee on Warren Hastings' Trial, 31 Parl. Hist. 348 (1794).

merely as a passive instrument of the parties. He has a duty of his own, independent of them, and that duty is to investigate the truth."

Rule 407 of the ALI provides that the fact of appointment of experts by the judge shall be made known to the trier of fact. Around this one point much of the arguments against this proposed change of procedure, take form. It is contended that such a practice by the court, is prejudicial to and violative of the rights of the parties to an impartial jury trial. *People* v. *Dickerson*[20] held that such a practice is unconstitutional as changing the character of criminal procedure and endangering the constitutional safeguards, by giving undue weight to the testimony of the experts appointed by the court. The effects of such a practice are said to be the same as if the court itself had expressed its opinions directly. It is argued that to allow such methods is prejudicial to the substantial rights of the parties because it puts evidence of the court appointed witnesses on a higher plane than that of other witnesses,[21] while justice demands that expert witnesses should be judged by the same standards as any other witnesses.[22]

In *Jessner* v. *State*[23] the court takes cognizance of the principles expounded in the various Michigan cases, especially *People* v. *Dickerson*,[24] but it refers to them, "as principles of recent development, in accordance with modern views of justice and in response to the growing notion that our system of jurisprudence commits to the jury determination of the facts unbiased and uninfluenced by the views or opinions of the trial judge." The court further states that these principles find their source not in common law, but in a great majority of cases by the present trend of judicial opinion.

It is common knowledge that at the present time in all our federal courts, though the rule is different in most state courts, the trial judge is permitted to freely discuss the evidence, pointing out the weaknesses and the strength thereof, without committing error, provided the jury is given to understand that they are not bound by such judicial opinions and the final decision is left exclusively for them. These are precisely the common law requirements for an impartial jury trial.[25] In *Carver* v. *Jackson et al*,[26] it was held that charges of the court to the jury on mere matters of fact and expressed opinions upon the weight

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[20] People v. Dickerson, *supra.*
[21] People v. Vanderhoof, 71 Mich. 158, 39 N.W. 28 (1888).
[22] People v. Seaman, 107 Mich. 348, 65 N.W. 203 (1895).
[23] Jessner v. State, *supra.*
[24] People v. Dickerson, *supra.*
[25] Jessner v. State, *supra.*
[26] Carver v. Jackson, et al, 4 Peters 1 (80) (1830).

of evidence, are not sufficient grounds for reversal. In *Mitchell* v. *Harmony*,[27] it was held that charges meant not to control the jury but merely meant for their consideration, in order to assist them in forming their judgment, are regular and proper. Other United States Supreme Court decisions have held the Federal judges may comment on facts if ultimately submitted to the jury,[28] even when the judge's language shows bias[29] and no matter how strongly the judge's opinion be expressed.[30]

It is not only essential to reduce the partisan element in the selection of experts, but it is equally important that the presentation of the results of the experts investigation and findings be governed by simple rules of evidence. In *People* v. *Black*,[31] a physician who was in charge of an institution attempted to offer testimony based on institutional reports made by his subordinates and testimony based on his own observations of the patient. Such testimony was excluded for failure to recite their contents as hypotheses. To simplify matters for jury consideration expert's opinions should be given, "positively and directly rather than in a muffled, abstract form of an answer based on hypothesis."[32] Rule 409 of ALI provides for an expert witness, appointed by the court, to state his inferences from relevant matters observed by him or from evidence introduced at the trial and seen or heard by him or from his special knowledge, skill, experience or training; regardless whether such inference embraces an ultimate issue to be decided by the jury, or not. The expert need not give his reasons for such inference unless the trial judge orders that he specify as a hypothesis or otherwise, that data from which he draws them; but he may be required to specify such data during examination or cross examination by the parties. This rule provides the necessary relaxation to insure a simpler, yet still precise presentation of expert testimony, more readily comprehended by triers of fact.

Rule 410 of ALI provides for the compensation of the experts appointed by the court in criminal actions, by proper public authorities and in civil cases as the judge shall order. Experts accepting compensation other than that fixed by the court, or persons paying or promising to pay such experts other compensation shall be guilty of contempt of court. Expert witnesses called by the parties shall be paid by the party calling and shall not be assessable as costs. It is very clear that the provisions of this rule will tend to discourage the promiscuous ex-

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[27] Mitchell v. Harmony, 13 Howard 115 (1851).
[28] Vicksburg Etc. R.R. Co. v. Putnam, 118 U.S. 545, 30 L.Ed. 257, 7 Sup. Ct. 1 (1886).
[29] Lincoln v. Power, 151 U.S. 442, 38 L.Ed. 227, 14 Sup. Ct. 390 (1893).
[30] Doyle v. Boston Etc. R.R. Co., 82 Fed. 873, 21 C.C.A. 264 (1897).
[31] People v. Black, 367 Ill. 209, 10 N.E. (2d) 801 (1937).
[32] TEXAS L. REV., *supra*.

ercise of the privilege of calling in their own witnesses, by the parties, thus preserving the intended effects this change of procedure is to have.

There is, today, a grave danger facing our judicial system. Many administrative agencies are firmly establishing themselves in what was previously sacred judicial soil. One reason for this is obvious—the public is demanding expeditious disposition of pending litigation. Unless many of the complex and cumbersome legal procedures are replaced by simpler and more practical methods, the usurpation will continue to grow. Former Chief Justice Charles E. Hughes, in an address to the American Law Institute in 1938,[33] said:

> "The law . . . has maintained an unnecessarily complex procedure and has permitted obstacles to be interposed to the prompt disposition of controversies."

Long, drawn out, battles between expert witnesses, with radical differences of opinion, have unnecessarily consumed much of the court's invaluable time and while contributing materially to the congested dockets of many of our courts, have contributed little to increase the confidence of the layman in the administration of justice.

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[33] "Successful Justice"—Ewing Cockrell (p. 609).