A CODE OF EVIDENCE FOR WISCONSIN? †

PROPOSED "LEARNED TREATISES" RULE*

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The American Law Institute in its Model Code of Evidence proposed Rule 529, entitled "Learned Treatises," reading as follows:

> "A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject."

This proposed Rule is followed by the following comment:

> "a. Comparison with existing law. Only a few courts receive the evidence made admissible by this Rule. The extent to which and the conditions under which a learned treatise may be used upon cross-examination are the subject of much conflict. The restrictions upon its use are in the last analysis based upon the reason that to permit the expert to be tested by the statements in a treatise is indirectly to get the content of the statement before the jurors who will use it as evidence of the truth of the matter stated. This Rule will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose."

This proposed Rule is treated as an exception to the prohibition of hearsay. Professor Morgan in his foreword to the Model Code makes no comment on this Rule.

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† Marquette University Law School and the University of Wisconsin Law School are cooperating in the collection of papers being published under this general title. The purpose of collecting and publishing these papers is to stimulate a State-wide interest in and discussion of the Model Code of Evidence of the American Law Institute. It is not a purpose either to promote or to discourage the adoption of that Code. Any opinions expressed in the articles on the desirability of adopting the Code are those of the individual authors and not necessarily those of the sponsoring law schools or of the cooperating authors.

A fabricoid bound edition of the Model Code of Evidence with comments, essays, etc., can be obtained through book dealers for $3.—*Ed.*

* This article by Mr. Grubb was originally published in INSURANCE COUNSEL JOURNAL, Vol. XII, no. 3, July, 1945, and is reprinted here with the permission of the publisher of that Journal and of the author. See 1945 WIS. L. REV. 455 for another view of the same Rule by Warren M. Dana.

Dean Mason Ladd, in his article on the proposed Code, makes the following comment:

> " . . . A published writing on the subject of history, science, or art to be offered as attempting to prove the truth of the matters stated is admitted if the judge takes judicial notice of it or an expert testifies that the writer of the publication is recognized as an expert upon the subject. Under the present law of some states learned treatises may be used only to test the expert witness on cross-examination when he has stated that he relied upon the treatise as a source of his information. The new provision admits the treatise both as evidence and to test testimony given in court."

About six states have somewhat similar statutes or rules, most of them not going as far as the proposed Rule in that most of the statutes provide that such works "are presumptive evidence of facts of general notoriety or interest therein stated."

This Rule would be a startling innovation in the trial of personal injury cases in most states, particularly if it were to be widely used. Most good medical schools carry upward to 35,000 volumes of medical books, some of the more extensive libraries carrying many thousands more. In addition to the *Journal* of the American Medical Society, practically all specialties publish periodicals, as do many state and local societies. In fact, I am informed that there are between 400 and 500 medical periodicals published in the United States and Canada, and that there are thousands published in other parts of the world. It is a common saying among physicians that one can find some medical "authority" for almost any proposition, no matter how discredited or how little accepted by the more learned members of the profession, if one searches far enough.

At first blush it would seem that the adoption and general use of such a rule would result in trials of personal injury and compensation cases becoming a "battle of books." A personal injury lawyer, to be well prepared, would have to employ a medical scholar or librarian to discover the various treatises and procure them for introduction in evidence.

It is a common experience to find that well-qualified experts differ in the interpretation of many of these medical treatises. Most of them are written for the medical profession and without that degree of careful selection of language that should be required if the rights of people in litigation are to be determined by these books interpreted by laymen, either as jurors, judges or administrative officials. Such a proposal should be carefully examined and studied before being adopted.

An inquiry directed to the American Law Institute as to the discussions in connection with the adoption of this Rule elicited a reply from William Draper Lewis, its director, as follows:

> " . . . There was practically no discussion of the Rule before the Institute. It was first considered in 1941 in Tentative Draft No. 2. In that draft it was Rule No. 629, but the language has not been changed. When it came before the Institute for consideration, Mr. Morgan, the Reporter, stated that the Rule had long been advocated by Mr. Wigmore, 'But the danger that has been suggested to us is that there will be a battle of the books if you do adopt this Rule. The answer to that is, of course, the answer Judge Hand made—the control of the trial judge.' I do not remember any general discussion. I do, of course, remember the discussion of the Rule in the preliminary drafts. All of the members of the Committee were in favor of it, and though the objection which Mr. Morgan pointed out to the meeting was mentioned, it was disregarded. We all thought it would not result in a 'battle of the books,' or if it did that the trial judge would decide the admissibility of the particular book offered."

Apparently the idea springs in the main from Dean Wigmore. In his work on evidence he discussed learned treatises as an exception to the hearsay rule and also some early cases relating to the admissibility of such evidence. He referred to the statutes of California, Idaho, Iowa, Montana, Nebraska, Oregon and Utah, quoting the California statute as typical:

> "Historical works, books of science or art, and published maps or charts when made by persons indifferent between the parties are 'prima facie' evidence of facts of general notoriety and interest."

Professor Wigmore believed that learned treatises should be received as an exception to the hearsay rule upon the ground of necessity, because it is impossible to obtain the evidence of the leaders in scientific fields under ordinary circumstances unless published works are admitted. Dean Wigmore stated as another ground the "trustworthiness" of the usual published learned article and the circumstances under which it is published. He points out that the writer is ordinarily writing for his profession and therefore must expect that his work will be closely checked by people who know the subject; that he therefore will be careful to preserve his reputation. He points out that the writer has no interest one way or another in the lawsuit in which the writing may be offered. Wigmore admits that there are certain writings which would be open to objection because

of interest on the part of the author. His example in that respect is that of a representative of an electric company producing alternating current equipment supporting the thesis that alternating current would be desired over and above other types. The Dean also mentions the fact that legal treatises and publications are used by courts to "refresh" memory. He regards this as a brazen effort to cover up judicial ignorance.

The Hon. John D. Wickhem, a Justice of the Wisconsin Supreme Court and formerly a Professor of Law at the University of Wisconsin, in a series of talks on the law of evidence before the Dane County Bar Association in the winter of 1939 and 1940, pointed out that medical witnesses acquire their knowledge from textbooks, laboratory and other experience, that such witnesses do not segregate in their minds the source of their information, that when they give their opinions, such cannot be barred as hearsay unless it can be demonstrated on cross-examination that the evidence is wholly based on hearsay. He refers to Professor Wigmore's view, that it is nonsense that the treatises themselves may not be admitted, and that the doctor may be disqualified because much of his information comes from treatises on, and studies of, the subject. Justice Wickhem is on the Council of the American Law Institute.

Members of the Association in states having somewhat similar statutes of whom I made inquiry have responded most generously. These responses show the following:

California:

"Books of Standard Authority – To Prove Public Facts. The term 'facts of general notoriety and interest' stands for facts of public nature, either at home or abroad, not existing in memory of men as co-distinguished from facts of private nature, existing within knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of exact sciences and of literature or art, when relevant to cause, that, under provisions of code, proof may be made by production of books of standard authority.[1]

"Medical Books—Are Not Admissible in Evience.[2]

Joe Sweet adds:

"I am doubtful that controversial matters of science can be established by books."

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[1] Gallagher v. Market St. R. Co., 67 Cal. 13, 15, 6 Pac. 869 (1885).

[2] People v. Wheeler, 60 Cal. 581, 584 (1882); Gallagher v. Market St. R. Co., 67 Cal. 13, 6 Pac. 869 (1885).

Iowa:

I am informed that there are rulings that medical books as such are not admissible. They are used to a certain extent by agreement between the parties and extensively in cross-examination. This is true in states not having such statute.

Montana:

In *Lynes v. Northern Pacific Ry. Co.*[3] the court received in evidence a table showing the effects of experiments made by a manufacturer of air brakes. I am informed that the Montana court has not passed upon the question as to whether medical books as such are admissible. Here also they are used on cross-examination.

Nebraska:

I am informed that medical books as such are not received as independent evidence of matters therein stated. The reason for such rule is set forth in the case of *Van Skike v. Poter*,[4] as follows:

> "The authorities, both English and American, are practically unanimous in holding that medical books, even if they are regarded as authority, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third, and perhaps a more important, reason for rejecting such testimony, is that the science of medicine is not an exact science. There are different schools of medicine, the members of which entertain widely different views, and it frequently happens that medical practitioners belonging to the same school will disagree as to the cause of a particular disease, or as to the nature of an ailment with which a patient is afflicted, even if they do not differ as to the mode of treatment. Besides, medical theories, unlike the truth of exact science, are subject to frequent modification and change, even if they are not altogether abandoned. For these reasons, it is very generally held that when, in a judicial proceeding, it becomes necessary to invoke the aid of medical experts, it is safer to rely on the testimony of competent witnesses, who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury."

I am informed that these books are used mostly in rebuttal and in cross-examination, but that occasionally the medical witness will support his opinion by reference to textbooks.

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[3] 43 Mont. 317, 117 Pac. 81 (1911).

Oregon:

In *Scott v. Astoria Railroad Co.*,[5] the court held that books on civil engineering were not competent evidence of the degree of slope that might safely be given to an earth embankment. The court quoted the statute and stated that an expert might substantiate his views by books. It commented upon the fact that standard works of civil engineering are treatises that relate more nearly to matters of exact science than do medical books. The Oregon court has approved the use of medical books in cross-examination. I am informed that the statute is not used extensively but that medical works are used in cross-examination as in other states.

Utah:

I am informed that the statute is used oceasionally so far as medical articles are concerned, but that they are still primarily used for the purpose of check on cross-examination of an adverse witness.

Those in the profession who have been actively engaged in the trial of personal injury cases of various kinds have learned that the generally accepted ideas and beliefs of the medical profession change rapidly from time to time. Concepts which have been accepted for years are suddenly disproved or new theories are adopted. Doctors are as prolific with writings as rabbits are with young. Some of their treatises seem to be as hastily conceived. Some of their magazines and pamphlets set forth reports on one medical case and sometimes on but a few. Reports on other occasions cover an extensive study of a large number of cases. Obviously, conclusions arrived at by observation of a very few cases should not be accepted at face value, until they are more thoroughly proven. None should be until various factors bearing upon what happened in a given case, such as resistance of the patient, environment, background, nutrition, efficiency of function of the various organs, glandular efficiency and the like, can be known and evaluated.

There are other obviously difficult problems in applying such a proposed rule. Who is an expert on a medical subject? How may a judge in Florida properly pass upon the expertness of a physician in the state of Washington who writes an article for some medical publication? With the exception of a very few men of outstanding national reputation, what basis does a physician in Maine have to pass upon the qualifications and scientific ability of the author of

[4] 53 Nebr. 28, 73 N.W. 294 (1897).
[5] 43 Ore. 26, 72 Pac. 594 (1903).

some article in a remote community? There are thousands of doctors in this country alone who are constantly studying a myriad of problems, and are turning out, often without due consideration, conclusions which the extent of their study and background do not justify.

Another great problem about the application of this rule is the fact that these articles, generally written only for the medical profession, are often confusing even to this profession. The average medical authority in writing this article does not use that degree of exactness that the attorney employs in drawing a will, contract, trust agreement or statute. Certainly the American Law Institute gathered together a group of outstanding jurists, legal scholars and lawyers in preparing its Restatement of the Law. It is my understanding that these sections were considered and discussed very carefully and with the idea of having the language exact and not subject to ambiguity. This was done by men whose background was such that if anyone could avoid the pitfalls of inexact language, this group in its collaboration should have done so. Yet I have known of very able appellate court judges who in some instances could not decide what was meant by some of the statements in this work or how to apply them to an unusual state of facts. It is a monumental work, but how many laymen could take that work and tell you what the Law is?

No doubt many attorneys have wrestled with the problem of "traumatic cancer." If there is anyone who had made a study of cancer and who was regarded by the professors as an expert on that subject, it was James Ewing. Nevertheless, his article in the May, 1935, issue of the *Archives of Pathology*, entitled "Traumatic Cancer," is subject to different interpretations by physicians. I cannot believe that a lay jury would be as apt to arrive at a correct decision on this question by the use of this article, as it would if the matter were explained to it by medical witnesses. Ewing, for example, states five postulates after an introductory paragraph. This, when carefully read, might well justify the conclusion that he does not mean that the cancer is traumatic if these postulates are present, but means only that if they are not all present, trauma cannot even be considered as a cause. A layman might well obtain the impression that Ewing believed that if those five postulates are present, the cancer would be traumatic. Similarly, publications on trauma and heart trouble, trauma and diabetes, the direct effect of such industrial diseases as silicosis, lead intoxication and the various industrial poisons and their effect on the various human organs are myriad. In many instances publications of "experts" are not in accord as to

these questions. Most of these authorities are not too careful in their choice of language. Many treatises are based on a far too limited observation or experience to be of value. Yet, under the proposed Rule, if a witness, "expert" on the subject, testified that the writer is recognized in a profession as "an expert in the subject," these various publications, pamphlets and articles become admissible and go to the jury as tending to prove the truth of the matter stated therein. They go to a lay jury to evaluate, to apply, to ponder on and to determine what is meant and what is intended in the article. For a jury then to evaluate the various extraneous factors, which even the author might not have attempted to evaluate, is asking no little of lay persons.

An occurrence in Wisconsin a few months back serves as an extreme illustration of what could happen under the proposed Rule. A well-known doctor testified that a moderate degree of silicosis was the cause of a fatal lung abscess. On cross-examination he admitted that he had never seen such a case previously. He frankly admitted that he had been unable to find anything in American literature or statistics to justify his opinion of a causal connection. When pressed further, he produced a photostatic copy of an article published in Berlin, Germany, in 1942. If this proposed Rule had been in effect, that article, on the doctor's testimony that the author was recognized in his profession as an expert, would have been admissible as tending to prove the truth of the matter therein stated.

The possibility of manipulation under such a rule is shown in *U. S. v. Hartford Empire Co.*[6] It appears in that opinion that persons interested in a patent wrote an article, paid $8,000 in cash to have the president of a union sign it. It was then published under the title "Introduction of Automatic Glass Machinery; How Received by Organized Labor." The article was then called to the attention of the patent office without disclosing its real authorship or the circumstances surrounding its publication.

Unsatisfactory as is the present occasional "battle of experts," it has advantages over this proposed Rule. Under the present practice the jury can hear what the witness says. The witness chooses his language for a layman rather than for a technical person. It is still important that there be an opportunity by cross-examination to show bias, lack of logic or consistency, lack of adequate ground for the basing of an opinion, or other material things which could not be

[6] 46 Fed. Supp. 541 at 612.

brought out where the author of the article is not before the court. The right of cross-examination, the right to be faced by and to question your accuser—whether the proceedings be criminal or civil —still constitutes a cornerstone of justice and a fair trial as we know it.

In spite of the fact that the proposal emanates from sucb distinguished men, I believe it should be carefully considered by those engaged in the actual trial of this type of case. Would this proposed Rule improve the understanding of jurors, the accuracy of the layman's verdict on medical-legal problems? Would it not be subject to abuse?

I have grave doubts as to whether this proposed Rule, if used extensively and literally, would be a real improvement on the present practice.