ADMISSION OF LEARNED TREATISES IN EVIDENCE

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One phase of the problem of the admission of hearsay evidence is treated in Rule 529 of the American Law Institute's Model Code of Evidence. This rule deals with the admission in evidence of learned treatises and reads 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 rule would be applied most frequently to the admission of medical writings, for out of the eleven cases found on the subject in Wisconsin, ten dealt with medical writings,[1] and only one with other scientific writings.[2] But the rule is not limited to medical works and includes writings on history, science, and art.

It is to be noted that the rule would have its greatest effect on writings on the so-called inexact sciences. Writings on an exact science like mathematics have generally been admitted in evidence without question.[3]

Rule 529 would reverse the existing rule in Wisconsin and the rule almost universally followed elsewhere on the admission of such writings as independent evidence on behalf of any party.[4] The gen-

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[1] Luning v. The State, 2 Pinn. 215 (1849); City of Ripon v. Bittel, 30 Wis. 614 (1872); Stilling v. The Town of Thorp, 54 Wis. 528, 11 N.W. 906 (1882); Knoll v. The State, 55 Wis. 249, 12 N.W. 369 (1882); Boyle v. The State, 57 Wis. 472, 15 N.W. 827 (1883); Soquet v. The State, 72 Wis. 659, 40 N.W. 391 (1888); Kreuziger v. The Chicago & Northwestern Railway Company, 73 Wis. 158, 40 N.W. 657 (1888); Zoldoske v. The State, 82 Wis. 580, 52 N.W. 778 (1892); Waterman v. The Chicago & Alton Railroad Company, 82 Wis. 613, 52 N.W. 247 (1892); Bell v. Milwaukee Electric Railway & Light Company, 169 Wis. 408, 171 N.W. 669 (1919).

[2] Marsh Wood Products Company v. Babcock & Wilcox Company, 207 Wis. 209, 240 N.W. 392 (1932).

[3] Tucker v. Donald, 60 Miss. 460, 45 Am. Rep. 416 (1882); Annotation, *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1106; Annotation, *Admissibility in Evidence of Safety Codes Issued by Governmental Department or Commission, or Promulgated by Voluntary Associations*, 122 A.L.R. 644.

[4] Luning v. The State, 2 Pinn. 215 (1849); Stilling v. The Town of Thorp, 54 Wis. 528, 11 N.W. 906 (1882); Boyle v. The State, 57 Wis. 472, 15 N.W. 827

eral rule is that medical and scientific books or treatises are not admissible to prove the truth of the statements therein contained.[5]

The proposed rule would not work such a sweeping reversal of the Wisconsin law as to the admission of such evidence on cross-examination. Under the existing Wisconsin law such treatises are admissible for the purpose of impeaching an expert who has based his opinion on such treatises or has stated what such treatises contain. The treatises can be introduced in evidence to show that the expert was in error.[6] This is also the generally recognized rule outside of Wisconsin.[7]

However, where an expert testifies entirely from his own knowledge and experience, Wisconsin does not permit him to be impeached by reading into the record contradicting written authorities.[8] Elsewhere, the rule is in conflict on this phase of the problem.[9]

The leading case outside of Wisconsin on the admissibility of learned treatises on cross-examination is *Laird v. Boston & Maine Railroad*.[9a] Here the court permitted the use of standard medical authorities to discredit an expert witness, even though such witness had not apparently referred to such authorities in his direct testimony. The court pointed out that experts are qualified as such because of their study of the assertions of others respecting a given fields of learning; that is, their opinions as experts are based largely on hearsay, and their qualifications as experts depend largely on their familiarity with the available hearsay on the particular subject. Hence, their qualifications are open to investigation, and the qualifications of an expert can be tested by interrogating him to see whether he is versed in the recognized hearsay of his field.

In Wisconsin[10] and in other jurisdictions,[11] under the guise of

(1883); Soquet v. The State, 72 Wis. 659, 40 N.W. 391 (1888); Kreuziger v. The Chicago & Northwestern Railway Company, 73 Wis. 158, 40 N.W. 657 (1888); Zoldoske v. The State, 82 Wis. 580, 52 N.W. 778 (1892); Marsh Wood Products Company v. Babcock & Wilcox Company, 207 Wis. 209, 240 N.W. 392 (1932).

[5] Annotation, *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1102.

[6] City of Ripon v. Bittel, 30 Wis. 614 (1872).

[7] Annotation, *Use of Medical or Other Scientific Books or Treatises in Cross-Examination of Expert Witness*, 82 A.L.R. 442.

[8] Knoll v. The State, 55 Wis. 249, 12 N.W. 369 (1882).

[9a] 80 N.H. 377, 117 Atl. 591.

[9] Annotation, *Use of Medical or Other Scientific Books or Treatises in Cross-Examination of Expert Witness*, 82 A.L.R. 448 ff. and 453 ff.; Kern v. Pullen, 138 Oregon 222, 6 Pac. (2d) 224, 82 A.L.R. 434 (1931).

[10] Bell v. Milwaukee Electric Railway & Light Company, 169 Wis. 408, 171 N.W. 669 (1919); Waterman v. The Chicago & Alton Railroad Company, 82 Wis. 613, 52 N.W. 247 (1892).

[11] Laird v. Boston & M. R. R., 80 N.H. 377, 117 Atl. 591 (1922). Annotation, *Use of Medical or Other Scientific Books or Treatises in Cross-Examination of Expert Witness*, 82 A.L.R. 459 ff.

cross-examination, a party will not be permitted to get statements from learned authorities before the court and jury when such statements are not for the purpose of impeachment or testing the expert's knowledge, but are solely for the purpose of getting such statements in evidence in the record. This is frequently accomplished by having an expert acknowledge that a certain author is a recognized authority on a subject and then asking if the witness has read the particular passage which counsel desires to get in evidence, and then proceeding to reach such passage.[12]

Rule 529 would put no restriction on the admissibility of learned treatises for the purpose of independent evidence or for the purpose of cross-examination, provided, "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."

Under the proposed rule, learned treatises could be used for cross-examination to the same extent as the testimony of another expert.

There is need for a rule such as Rule 529 of the Model Code of Evidence. Material such as that contained in learned writings by recognized experts in the fields of history, science, and art, and especially in the field of medical science, is generally regarded as of considerable probative value, as witnessed by the subterfuges and guises under which counsel now attempt to get such writings before the court and jury. Many and devious are the ways under which learned writings are now attempted to be brought before the court and jury; for example: counsel reads from the authority in the argument to the jury, or seeks to have the authority's statement incorporated in the instruction to the jury.[13] Counsel, after having a witness identify an author as standard in the profession, reads from that author into the record before the jury.[14] A witness testifies to the standing of authors in the profession, then tells what each particular author says.[15] A witness gives an opinion as an expert, basing such opinion solely on the study of authorities.[16] A witness who has had some personal experience bolsters his opinion by statements of standard authori-

[12] Bell v. Milwaukee Electric Railway & Light Company, 169 Wis. 408, 171 N.W. 669 (1919); Waterman v. The Chicago & Alton Railroad Company, 82 Wis. 613, 52 N.W. 247 (1892).

[13] Luning v. The State, 2 Pinn. 215 (1849).

[14] Stilling v. The Town of Thorp, 54 Wis. 528, 11 N.W. 906 (1882).

[15] Boyle v. The State, 57 Wis. 472, 15 N.W. 827 (1883).

[16] Soquet v. The State, 72 Wis. 659, 40 N.W. 391 (1888); Kreuziger v. The Chicago & Northwestern Railway Company, 73 Wis. 158, 40 N.W. 657 (1888).

ties.[17] A witness admits a certain textbook as standard in the profession; then pictures from the text are attempted to be admitted in evidence.[18] Counsel attempts to impeach a witness on cross-examination by reading from medical or other works, or offers the books in evidence.[19] Counsel asks the witness if a certain author is considered an authority in the profession, and then reads from that author and asks the witness if he has ever read that quotation.[20]

It would seem that the law should acknowledge the probative value of learned writings by proven authorities. If such authorities are sufficient for the purpose of passing on knowledge to students and practitioners in such fields, they should be sufficient in the courtroom. If an authority on medicine is recognized so that his writings are used to instruct future doctors who will one day use the knowledge so gleaned to diagnose and treat a given condition of the body, the knowledge contained in that writing should be made available to the court in its attempts to find the facts of a given case. No good reason is seen for excluding from the courtroom the knowledge that is generally used outside of the courtroom under the best scientific and educational processes of today to instruct and enlighten mankind. Rule 529 presents the opportunity to have such knowledge and information made available for the decision of disputes in courts of law under fair and straightforward rules instead of under the guises and subterfuges under which such information is now gotten before the courts.

The reasons put forth by the courts in refusing to admit in evidence learned writings by recognized authorities are five-fold:

(1) Such evidence lacks the sanction of an oath.[21]

(2) There is no opportunity to cross-examine the authority.[22]

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[17] Zoldoske v. The State, 82 Wis. 580, 52 N.W. 778 (1892).

[18] Marsh Wood Products Company v. Babcock & Wilcox Company, 207 Wis. 209, 240 N.W. 392 (1932).

[19] City of Ripon v. Bittel, 30 Wis. 614 (1872).

[20] Bell v. Milwaukee Electric Railway & Light Company, 169 Wis. 408, 171 N.W. 669 (1919); Waterman v. The Chicago & Alton Railroad Company, 82 Wis. 613, 52 N.W. 247 (1892).

[21] Stilling v. The Town of Thorp, 54 Wis. 528, 11 N.W. 906 (1882); Annotation, *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1104; Annotation, *Admissibility in Evidence of Safety Codes Issued by Governmental Department or Commission, or Promulgated by Voluntary Associations*, 122 A.L.R. 644.

[22] Stilling v. The Town of Thorp, 54 Wis. 528, 11 N.W. 906 (1882); Annotation, *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1104; Annotation, *Admissibility in Evidence of Safety Codes Issued by Governmental Department or Commission, or Promulgated by Voluntary Associations*, 122 A.L.R. 644.

(3) Isolated passages from a writing may not give a fair statement of the writer's views.[23]

(4) Changes in scientific knowledge may make the authority outmoded.[24]

(5) Technical and scientific writings may not be understood by the laymen who comprise the jury.[25]

The first objection, that such evidence lacks the sanction of an oath, is not a real objection in this day and age, and is a holdover of a form of the law intended as a guaranty of truthfulness, but which today has little guaranty to that effect. Furthermore, the treatises used would not have been written with an eye to their use in any particular case. Such writings are done by men of science and learning for the sole purpose of passing on their knowledge and theories to others. These writings are largely by men whose lives are dedicated to the search for truth and whose sole purpose in writing is to make such truths as they have found available to others. The nature of the writings is sufficient guaranty of the truthfulness of the authors, and an oath would add nothing to the quaranty of honesty in such evidence.

The second objection, that there is no opportunity for cross-examination of the author of the learned writing, is perhaps of some validity. Yet, as pointed out above, the writers whose findings and opinions would come in evidence under the proposed rule, can be considered as having presented their findings free from any partisan considerations, which cannot be said of the testimony of all experts who are called and paid by a particular party. There can not help but be some bias, even unconscious, in the testimony of the most honest of a partisan expert, so that the need for cross-examination is present in his case. The need appears less urgent in the case of the writings of a disinterested authority who makes nothing from the lawsuit in question. It is true that learned writers may present conflicting theories and opinions which might be explained or reconciled on cross-examination, but the primary purpose of cross-examination

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[23] Boyle v. The State, 57 Wis. 472, 15 N.W. 827 (1883); Annotation, *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1104.

[24] Boyle v. The State, 57 Wis. 472, 15 N.W. 827 (1883); Annotation, *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1104; Annotation, *Admissibility in Evidence of Safety Codes Issued by Governmental Department or Commission, or Promulgated by Voluntary Associations*, 122 A.L.R. 644.

[25] Boyle v. The State, 57 Wis. 472, 15 N.W. 827 (1883); Annotation, *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1104.

of experts under the adversary system is to test the qualifications of the expert, the truth of the testimony, and to bring out facts and information which may be withheld or not fully presented by the witness. The qualification of the learned author is taken care of by the proposed rule in requiring that he be recognized as an expert before his writing comes in evidence. It seems a reasonable assumption that a learned writer is not attempting to withhold information, nor is he falsifying when he writes works that gain him recognition as an authority in his field. The purpose of scholarly works,—namely, to disseminate knowledge,—and the disinterested situation of the authors should be sufficient guaranty of truthfulness of the statements contained in such works without cross-examination. It is also to be remembered that both sides have the opportunity to present their authorities, and the proposed rule does not supplant the personal testimony of the expert witness who no doubt will still be relied on to a considerable extent.

The third objection, that isolated passages from the writing may not present a fair view, should be overcome by the adversary system of lawsuits. It would be up to opposing counsel to see that the learned writer's full statement is made available to the court and jury if a misleading portion has been put in evidence.

The fourth objection, that scientific writings become outmoded, is of no consequence. Under the proposed rule the author must be shown to be a recognized author. An author whose writings and theories have been superseded is not going to be able to pass the test of being a recognized author under the proposed rule.

The fifth objection to the admission of learned writings in evidence has considerable validity; namely, that such writings may not be adequately comprehended by the laymen who comprise the court and jury. Admittedly, works on science, especially medical works which come in question most frequently, are written for students or practitioners in the field and suppose a certain amount of knowledge or background on the subject already in the reader. Medicine, and all sciences for that matter, have a nomenclature of their own which is often unintelligible to the layman. Since, under the proposed rule, if the author is properly vouched for, his writings cannot be barred from evidence by the hearsay rule, it appears that evidence may come in the record which is of little help to the court and jury in finding the facts. However, to counteract this, it will be supposed that the wise practitioner will see that the learned writings he wants to use in evidence will be clear and reasonably understandable to the layman,

and that any parts not comprehendible by the layman are adequately interpreted by a qualified expert. It is apparent that the unscrupulous practitioner could probably offer more or less unintelligible learned writings, and then seek to interpret such writings as he saw fit in his argument to the jury. This danger should be adequately met by the adversary system whereby opposing counsel would see that a proper interpretation of such writings was placed before the court. However, if unintelligible writings were the only evidence on a particular subject, so that their meaning could be twisted by counsel, the whole benefit supposed to flow from the statement of a disinterested man of learning would be lost. It seems that the court should have some discretion in barring from evidence writings which are obviously over the heads of laymen, unless properly interpreted by a qualified expert.

The final consideration is: Will the proposed rule work? For the answer we must look to the state of Alabama where such evidence has been received as independent evidence over a long period of years. The rule in Alabama dates back to the case of *Stoudenmeier v. Williamson*.[26] The rule of the *Stoudenmeier Case* has been followed to the present date in Alabama in cases principally involving

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[26] 29 Ala. 558 (1857). The reasoning of the court in adopting such rule is stated as follows:

"We think that medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence. Should such works be obscure to the uninitiated, or should they contain technicalities, or phrases not understood by the common public, proper explanation should be offered, lest the jury be thereby misled. That was done in this case. The opinions of physicians, as experts, touching disease and the science of medicine, are, under all the authorities, admissible in evidence. If we lay down a rule which will exclude from the jury all evidence on questions of science and art, except to the extent that the witness has himself discovered or demonstrated the correctness of what he testifies to we certainly restrict the inquiry to very narrow limits. The brief period of human life will not allow one man, from actual observation and experience, to acquire a complete knowledge of the human system, and its diseases. Professional knowledge is, in a great degree, derived from the books of the particular profession. In every step the practitioner takes, he is, perhaps, somewhat guided by the opinions of his predecessors. His own scientific knowledge is, from the necessities of the case, materially formed and moulded by the experience and learning of others. Indeed, much of the knowledge we have upon all subjects, except objects of sense, is derived from books and our associations with men.

"It is the boast of this age of advancing civilization, that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the courtroom? We think not. Evidence drawn from this source being admissible, the question arises, in what form is it to be laid before the jury? Are opinions, derived from the perusal of books, and deposed to by witnesses, safer guides for that body than the books themselves are?"

medical works. However, the Supreme Court of Alabama in *City of Dothan v. Hardy*,[27] decided in 1939, reaffirmed the Alabama rule relative to the admission of learned treatises, and held that safety rules for the installation or maintenance of electrical lines issued by the Bureau of Standards of the Department of Commerce were admissible on the question of negligence under this rule. The court observed that on the decision of questions of law which is exclusively the court's function, the court is guided by hearsay; namely, reported cases and the writings of authorities on legal subjects. Yet, on the decision of a question of fact which is the peculiar function of the jury, the court assiduously bars the jury from access to authorities comparable to those on which the court rests its decisions of law in jurisdictions where learned treatises are barred under the hearsay rule. The court also notes that the Alabama rule has now been incorporated in a statute of the state and concludes, "We have not found the ends of justice damaged by our rule, nor the difficulties of its applications very great."

It seems that Rule 529 of the Model Code of Evidence is a desirable step forward in the progress of the law of evidence to bring that law out of the shades of medievalism with its reliance on the efficacy of oaths as a guaranty of trustworthiness, into the day of the scientific process in the search for truth.

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[27] 237 Ala. 603, 188 So. 264, 122 A.L.R. 637 (1939).