EDITORIAL

TO ABOLISH PARTISANSHIP OF EXPERT WITNESSES, AS ILLUSTRATED IN THE LOEB-LEOPOLD CASE

In the course of a colloquy between counsel, over the testimony of a psychiatrist called for the defense, this passage occurred: Mr. D. "Let me ask you, doctor, what was Dick's attitude toward that compact?" Mr. C. "By 'Dick,' do you mean the defendant, Richard Loeb?"

Mr. D. "If necessary, I am willing to stipulate that 'Dickie' or 'Dick' means Richard Loeb, and that 'Babe' means Nathan Leopold, Jr."

This passage was evoked by the frequent instances of the expert witnesses' use of the endearing, youthful, innocent epithets 'Dickie' and 'Babe,' both in direct and cross-examination: thus:

Q. "Is Loeb the leader in this crime?"

A. "I should say that Babe has the more constructive component, etc. Dickie on the other hand is rather essentially destructive, etc."

1. This voluntary adoption of the endearing, attenuating epithets 'Dickie' and 'Babe' to designate the defendants reflects seriously on the medical profession. The whole evil of expert partisanship is exemplified in this action of these eminent gentlemen.

Most of the criticism directed against distorted and manufactured expert testimony has hitherto been based on the supposed bias due to the fees—the money taint. But in this case the fee was exactly the same on both sides. And in this case, also, the personality of the gentlemen refutes the possibility of such an influence. Two of the six experts testifying for the defense are known to me personally, and all the world knows that in the case of all six no question could possibly arise of the taint of money. Their standing, their whole career, has placed them beyond any such suggestion. And yet the sad spectacle is presented of these eminent scientists committing themselves to the cause of one side rather than the other, by adopting epithets calculated subtly to emphasize the childlike ingenuousness and infantile naivity of the cruel, unscrupulous wretches in the dock. It was the cue of the defense to impress this character on the judge, and the experts' well-chosen language lent itself shrewdly to that partisan end.

2. What then is the ultimate cause of expert witnesses' partisanship, if it is found even where character and reputation exclude the cause commonly attributed?

It is this; *the vicious method of the Law*, which permits and requires each of the opposing parties to *summon the witnesses on the party's own account.*

This vicious method naturally makes the witness himself a partisan. He is spoken of habitually as "my" witness or "our" witness. In the Loeb-Leopold case, where the experts devoted long hours to the study of the defense's case, consulted only with the defense's counsel, made preliminary reports to those counsel, cut down those original reports in their testimony, and answered only the questions that were asked by counsel, it was natural and inevitable that their testimony should take on a partisan color. Partly this would be unconscious. Partly it would be conscious, in that they came to sympathize with the only side of the case known to them, and in that they committed themselves to conclusions which it was hard to modify when grilled by hostile counsel.

This method of the law is inherently bad. Its badness has long been known or suspected. The Loeb-Leopold case merely gave a clear demonstration of it to the eyes of all the world.

What is the remedy? Very simple. *Let the expert witness be summoned by the Court himself.* Let all subsequent proceedings be based on this theory,—payment by the state,—consultations with counsel on either side if desired,—direct interrogation by the Court, and cross-examination by both counsel if desired,—exchange of views beforehand with other experts, if any.

This is the only method that will remove the scandal and mistrust that now attaches so often to expert testimony, whether in the medical or other sciences.

3. The medical profession has long complained of the present method. Yet the two methods commonly proposed as substitutes are quite impracticable.

One of these is to compose the jury of experts. This is out of the question; first, because the constitutional principle of jury trial will not permit it; secondly, because no case turns solely on a scientific issue, and two juries, one of laymen and the other of experts, would be unmanageable.

The other proposal has been to compile a standing list of official experts, and to limit such testimony to this list. This proposal is impracticable; first, because local partisan politics would make such a

list untrustworthy; secondly, because the variety of scientific questions is too great to have a list for each; thirdly, because no one judicial area contains all the best experts on all subjects; and fourthly, because it is and ought to remain a constitutional right of a party to secure any testimony which he deems useful, regardless of an official list.

4. No,—there is only one remedy, but it is sufficient, viz., to issue the summons from the Court on behalf of the Court, and to *place the witness on the stand as the Court's witness.* This leaves each party free to secure any witness he deems useful, by notifying the Court of the person's name and address; the Court issues and serves the summons and notifies both parties that the witness will be called; and the witness informs both parties whether and when he will consult with either or both of them before trial. This ensures impartiality, both subjective and objective.

In the Loeb-Leopold case, one of the experts called for the state refused originally to come as a partisan; he told the state's attorney that he did not want to be a partisan witness, that he wished to be free to form and to state any conclusions that he might reach. The state's attorney told him that he would be put on the stand whatever conclusion he might reach. On that condition he consented to study the defendants' personality; and the state's attorney never saw him again until the morning of the hearing.

It is a pity that the eminent gentlemen who consented to be engaged for the defendants by the defendants' counsel did not refuse to come unless and until they were summoned by the Court and *for* the Court, with freedom to lay before the state's attorney before trial every scrap of their conclusions. That would have been a fine service to the cause of Science and Justice, and they would have been applauded as pathfinders by both professions.

JOHN H. WIGMORE.