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Manis Elbert Ketchum II
West Virginia University College of Law

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Thus, the use of the injunction for the suppression of evidence has become limited by recent constitutional developments. Its future in some areas remains uncertain. The success of the remedy will rest ultimately on the interpretation given the scope of Rule 41(e). Similarly, the granting of equitable relief in situations like that in *Bolger v. Cleary, supra*, may depend upon the interpretation of state statutes providing no preindictment method for suppressing evidence.

Ellen Fairfax Warder

Evidence—Use of Learned Treatises in Cross-Examination of Expert Witnesses

An action was brought on behalf of a minor, by his father and next friend, to recover damages for allegedly negligent medical and hospital treatment which necessitated the amputation of the minor's right leg below the knee. At the trial, the court permitted cross-examination of the defendant's expert witnesses concerning the views expressed in recognized treatises in their fields, although the experts had not relied on these treatises as bases for their views on direct examination. The trial court rendered a verdict for the plaintiff. *Held*, affirmed. The rule that an expert can be cross-examined only about those texts upon which he expressly bases his opinion is not supported by sound reasoning. Expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities expressed in treatises or periodicals written for professional colleagues. *Darling v. Charleston Community Memorial Hosp.*, 211 N.E.2d 253 (Ill. 1965).

It is the general rule that treatises are not admissible for substantive evidence purposes. This is due primarily to the fact that they are composed of opinions and views of persons not under oath and not subject to cross-examination and thus in violation of the hearsay rule. 6 WIGMORE, EVIDENCE §§ 1690-92 (3d ed. 1940).

The same reasons for excluding books on direct evidence have been carried over into the area of cross-examination of expert witnesses. It is maintained that this would enable the cross-examiner to present the contents of the treatise to the jury as

substantive evidence in addition to using it for the proper purpose of contradicting or discrediting the testimony of the expert witness. Willens, *Cross-Examining the Expert Witness With the Aid of Books*, 41 J. CRIM. L. & CRIM. 192, 197 (1950).

However, many courts feel that the hearsay objection is not applicable to the cross-examination of expert witnesses because the testimony of the expert on direct examination is based largely on hearsay; consequently, it is only fair to allow the cross-examiner to use similar sources in testing his familiarity with hearsay. *Laird v. Boston R.R.*, 80 N.H. 377, 177 Alt. 591 (1922). Furthermore, the trial judge has broad discretionary powers as to how extensively treatises may be used. It is urged that, where the cross-examiner is trying to get the contents of the treatise before the jury as substantive evidence, the court will not allow the treatise to be used for this purpose. *Commonwealth v. Phelps*, 210 Mass. 109, 96 N.E. 69 (1911). "We must assume as the result of centuries of practice that a judge and jury can receive evidence for limited purposes without applying it improperly." *Laird v. Boston R.R.*, *supra*.

Most courts which do allow treatises to be used on cross-examination restrict this use. Four views have emerged concerning these restrictions. 60 A.L.R.2d 77 (1958). (1) Some cases allow cross-examination by use of treatises on which the expert has relied specifically in his direct examination. *Hope v. Arrowhead & Puritas Waters, Inc.*, 174 Cal. App. 2d 222, 344 P.2d 428 (1959); *Clark v. Commonwealth*, 111 Ky. 433, 63 S.W. 740 (1901). (2) Some courts hold that, when the expert relies generally and specifically on treatises, he may be cross-examined on authorities which were not employed by him in forming his direct testimony. *Farmers Union Federated Co-op. Shipping Ass'n v. McChesney*, 251 F.2d 441 (8th Cir. 1958); *Travelers Ins. Co. v. Davies*, 152 Ky. 600, 153 S.W. 956 (1913). (3) Other courts hold that the expert may be examined upon the basis of treatises which he personally has recognized as having authoritative status, whether or not he has relied upon them in his testimony. *Stottlemire v. Cawood*, 215 F. Supp. 266 (D.D.C. 1963); *McComish v. DeSoi*, 42 N.J. 274, 200 A.2d 116 (1964). (4) Still other courts endorse a liberal view that an expert witness may be cross-examined with any treatise established as authoritative by any acceptable method, even though the expert has not relied upon or not recognized the treatise. *Superior Ice & Coal Co. v. Belger Cartage Serv., Inc.*,

337 S.W.2d 897 (Mo. 1960); *Faught v. Washam*, 365 Mo. 1021, 291 S.W.2d 78 (1956).

The first group of cases, which holds that the expert must rely specifically on the particular treatises before they may be used in cross-examination, recently has been subject to much criticism. In rejecting this rule, the Supreme Court of the United States in *Reilly v. Pinkus*, 338 U.S. 269, 275 (1949), observed that, "It is certainly illogical, if not actually unfair to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books." Furthermore, this view favors the ignorant and unprincipled expert over the honest and well trained expert. MCCORMICK, EVIDENCE § 296 n.3 (1954).

The second group of cases, holding that where the expert has relied generally or specifically upon authorities, he may be attacked upon authorities on which he did not rely, has been gaining wide acceptance. This is the view recently accepted by the Supreme Court in *Reilly v. Pinkus*, *supra*. The most recent adoption of this rule was by the legislature of California. CAL. EVID. CODE § 721 (Effective January 1, 1967). However, this view has been criticized because its application will not let the cross-examiner use treatises when the expert testifies solely on the basis of his own observation and experience. It may be that these critics forget that the testimony of all experts, save possibly a few well known scientists, is based on their learning as well as their experience. *Hastings v. Chrysler Corp.*, 273 App. Div. 292, 296, 77 N.Y.S.2d 524, 528 (1948); 3 WIGMORE, EVIDENCE § 687 (3d ed. 1940); APPLEMAN, CROSS-EXAMINATION pp. 183-186 (1963).

The third view, which permits the cross-examiner to interrogate the expert from treatises which the witness has recognized as authoritative is conducive to the unprincipled expert. It gives the ignorant and misinformed expert the opportunity to keep from being contradicted and discredited by refusing to recognize the book as an authoritative source in his field. *Zubrypki v. Minneapolis St. Ry.*, 243 Minn. 450, 68 N.W.2d 489 (1955). Nevertheless, many jurisdictions adhere to this view. In a relatively recent Virginia case, *Hopkins v. Gromovsky*, 198 Va. 389, 94 S.E.2d 190 (1956), the court held it was proper to cross-examine an expert witness on whether or not he agreed with extracts read to him from

scientific authorities which he recognized as standard on the subject matter involved in order to test his knowledge and accuracy.

A few courts have adopted the liberal view which permits authoritative treatises to be used on the cross-examination of expert witnesses even though the expert does not recognize the authoritative status of the work and has not relied on treatises in his testimony. The modern tendency veers toward freedom of cross-examination of expert witnesses, but it is doubtful if many courts will become this liberal. However, in *Bluebird Baking Co. v. McCarthy*, 19 Ohio L. Abs. 466, 3 Ohio Op. 490, 36 N.E.2d 801 (Ct. App. 1935), there is a dictum that Ohio would permit the cross-examination of experts with publications of writers of recognized skill and ability. The leading exponent of this liberal rule is the Uniform Rules of Evidence. These rules would eliminate all prohibitions upon the use of a treatise for purposes of cross-examination except those that would apply to the use of testimony by another expert witness for the same purpose. UNIFORM RULES OF EVIDENCE rule 61(31), comment (1953).

A diligent research has revealed no West Virginia cases on this subject. One may ponder whether West Virginia will move to a liberal view on the use of treatises in the cross-examination of expert witnesses or adhere to the more conservative view requiring the reliance of the expert upon or recognition by the expert of learned treatises used in the cross-examination.

Menis Elbert Ketchum, II

Federal Courts—Another Chapter To Erie

P averred that he was injured in the state of New York on August 18, 1961, while using road building equipment manufactured by *D-1* and bought from *D-2*. He filed complaints in federal court against *D-1* on August 20, 1962, and against *D-2* on February 13, 1964. Proper service of process on *D-2* was not made until October 22, 1964. The basis of federal jurisdiction was diversity of citizenship. In a motion for judgment on the pleadings, *D-2* contended that the action was barred by the New York statute of limitations in that such actions must be commenced within three years. The law of New York is that such actions are commenced by service of process, but an action is commenced in federal courts merely by