LECTURES ON TOPICS CONNECTED WITH MEDICAL JURISPRUDENCE DELIVERED BEFORE THE MEDICAL DEPARTMENT OF THE UNIVERSITY OF VERMONT. APRIL, 1881

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LECTURE I.

MEDICAL EVIDENCE.

Medical jurisprudence, gentlemen, is that combination of legal and medical science sometimes found necessary to the administration of justice. Its learning is principally medical, its application altogether judicial. When taught by the physician to the lawyer, it treats of medicine: when the lawyer instructs the physician, it treats of law. It is wholly from the legal side that I shall attempt to deal with the subject, in the few lectures I shall be able to offer you. I could not supplement your medical instruction; certainly I shall not try. And even of the law that belongs to the subject, much is only useful to the lawyer, and but a part is ever actually serviceable to the physician. I shall therefore confine myself to some of those practical considerations and suggestions, which, as it seems to me, may be valuable to you in your coming professional life; troubling you with no theories, with no speculation, with none of the theoretical philosophy, if it may be dignified by that title, which attaches to this subject as to so many others, endless in its extent, and very rarely useful in its results.

The sole connection, with a single exception, you will ever be likely to have professionally—as physicians—with the department of medical jurisprudence, is in the capacity of medical witnesses. The one exception, if strictly it may be called so, is the liability of a physician, civilly and criminally,

for his own professional conduct. On that point I shall have something to say before the course is completed. But with that exception, the whole subject, from the legal standpoint, so far as you are practically concerned, narrows itself down to a consideration of the rights, the privileges, the duties, the responsibilities, and the requirements of the medical witness. What I have to say might therefore have been more properly entitled, observations upon medical evidence, rather than upon medical jurisprudence.

Now in the first place what is "expert testimony?" And what, especially, is meant by the term "medical expert?" Ordinary testimony in a court of law, is confined to the statement of those facts which a man learns by the use of his physical senses. He may state what he has seen, what he has heard (from the proper quarter), what he has tasted, or smelt, or physically felt; and that is all. The operations of his mental consciousness are entirely excluded. His opinions, inferences, conclusions, expectations, theories, hopes, fears, and thoughts, are all shut out. When he has stated the facts he personally knows, the inference, the conclusion, the opinion to be formed upon them, must be formed by the court or jury, that has the case to decide. So that an ordinary witness, no matter how humble his capacity, requires no previous preparation. The very idea of preparation usually suggests that he is expected to tell something besides the truth. He has but one rule to observe, and that is to tell the truth, as far as he knows it, in the simplest way. But the administration of the law further demands, and therefore allows, the class of testimony I have mentioned, called "expert testimony;" that is to say, the testimony of men who by their familiarity through study or special experience, or both, with a science, an art, or sometimes an industry, are permitted to state not merely facts, but opinions, scientific truth in the abstract, theories, conclusions, and their application to particular cases. Who is a competent expert in any given case, is a question that is de-

cided by the court. Upon a preliminary inquiry to the witness selected and called by a party to the cause, as to his experience and acquaintance with the subject, the court determines whether or not he is a competent witness for that purpose, whose testimony may be heard for what it may be worth.

Experts are of two kinds, practical and scientific. Practical experts are those who have acquired a peculiar skill in some unscientific specialty, by actual experience in it,—as the mechanic, or sometimes the farmer, in respect to certain branches of their callings. That is an humble class of expert testimony, not usually of great importance. It is not commonly dignified with the name of expert testimony, although strictly speaking it is such. The more important class, and that to which your attention is required, is that of scientific experts: those who have become sufficiently acquainted with the principles of some established science like medicine, surgery, chemistry, engineering, or mechanics. On such subjects, those accomplished or learned in them are received as expert witnesses, and are called scientific experts, or, within your own profession, medical experts, or medical witnesses.

Now, as a medical witness, you are permitted and will often be required to state, in the first place, abstract scientific truth in your own department; such as the anatomy of man; the structure of the body: the various organs, and their functions: the pathology of disease, its source, its progress, its diagnosis, its prognosis, its treatment, its consequences, the origin of life, the cause of death. Then you will be called on further, to give opinions in respect to particular cases of injury, disease, or death. "What is the matter with this man? What was the cause of it? What should be the treatment? Is he likely to recover?" In short, the whole range of material inquiries, that may arise in respect to any given case. And those questions may be put under three different conditions. 1. You may be asked to testify in respect to some case that you have personally examined, either because you have at-

tended it in a medical capacity, or have been called to examine it for the purpose of forming an opinion as a witness, to be stated in court. 2. You may be required to answer the same questions, upon conditions and symptoms detailed by some other physician, in respect to a case you have never seen; and where the inquiry assumes such statement to be true. 3. And finally, you may be subjected to the same questions, upon supposed or theoretical cases. These latter inquiries may be put, not only where the case supposed is taken to be or claimed to be the real case in dispute, but also for the purpose of testing the capacity of the witness, his knowledge, his intelligence, his fairness. Of course there is a limit to that sort of inquiry, which rests largely in the discretion of the court, and depends somewhat upon the witness to whom such questions are addressed. In these three ways, therefore, you may be called upon to give opinions, conclusions and theories, sometimes in the abstract, and sometimes in respect to individual cases. That constitutes the testimony of the medical expert.

While every man in the community can be compelled to attend court as a witness in any case in which either party thinks proper to summon him, whether he knows anything about the case or not; and although a physician or a surgeon like any other man may be brought into court as a witness, and compelled to attend there in response to a subpœna, and to state all material facts within his personal knowledge, he is not obliged to testify to opinions, or to give what I have attempted to define to you as expert testimony. A physician has a right, if he pleases, in response to inquiries of that sort, to decline to express opinions. He must judge for himself whether he has sufficient acquaintance with the subject—whether he possesses an opinion that he is willing to swear to. And one of the values of that privilege to the medical profession is, that it enables them to command a compensation for attending as expert witnesses, beyond the small fee that the law pro-

vides for ordinary witnesses. It is customary, and it is proper, that physicians who are called into court to testify to scientific truths or opinions, and perhaps to examine cases to qualify themselves to testify in regard to them, should receive an adequate compensation for their services. Of course cases arise in courts of justice as in private practice, where charity or humanity call for the gratuitous services of the physician as an expert witness, as they call for his services at the bed-side. But there is no legal obligation on the part of the medical witness, to give his opinion as an expert.

Communications made to physicians by the parties on whom they are attending, are not protected by law from disclosure in courts, if the physician should happen to be called as a witness, except in a few states where special statutes on the subject exist. In my judgment they ought everywhere to be protected, and the confidential communications between a patient and his physician should be placed on the same footing with similar communications between a client and his counsel or attorney, which cannot be disclosed. I hope, ultimately, such will everywhere be the law. But as the general law now stands, you may be in most states compelled in courts of justice to disclose communications and statements of your patients that were confidential in their character, and which perhaps it may be very important to the patient should remain confidential. And that being the case, only two suggestions can be made on the subject. One is that physicians should be careful, where they perceive that what is said to them may be the topic of judicial inquiry, or may expose the patient to some legal consequences, neither to invite nor receive confidence beyond what their professional duty makes necessary. The other suggestion is, that it is comparatively rare that witnesses are called upon in courts to testify upon a point, on which their knowledge has not been previously ascertained. You will not be very likely, therefore, to be asked for such a disclosure, unless it has in some way trans-

pired that you are able to make it. And I need not say that in respect to communications of that sort from patients, very great care should be taken by the physician, that no one becomes aware that the enterprise of interrogating him on the stand concerning them, would be likely to be successful. In short, they never should be disclosed at all, so long as it can be avoided without perjury, or a direct violation of the order of the court.

Let me say one thing further on the general topic of medical and surgical evidence. Your profession has an exclusive monopoly of it. There is no other witness who under any circumstances will be heard in a court of justice on that subject. The whole matter is absolutely in your hands. And though you are not called upon as judges to decide the cause, you furnish all the materials on which the questions turn which do decide the cause, where it depends upon medical evidence. It is the only monopoly you have;—not the only monopoly, in my judgment, you ought to have; but in most of the states of our country a man may be doctored by a quack or an impostor if he pleases, and it is the pernicious right of the quack or the impostor to doctor him. The medical profession have generally no legal monopoly of the practice of medicine or surgery. But the equally important function of supplying the courts in all cases where it becomes necessary, with all the medical truth, and all the opinions in respect to individual cases, on which they must proceed, belongs exclusively to the physician.

Now, I ask you, young men, with your professional life before you, to pause on the threshold of the subject, and try to appreciate adequately the importance of this great duty. And you will see upon a very little reflection, that there is no duty you are likely to be confronted with in your professional capacity, more important than that of supplying to the tribunals of your country, the evidence upon which questions of this sort are to be determined. If I were to venture to pass