A DIGEST OF THE

CASE LAW

ON THE

STATUTORY REGULATION

OF THE

PRACTICE *of* MEDICINE

COMPILED BY THE

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CHAPTER I

THE CONSTITUTIONALITY OF MEDICAL PRACTICE ACTS

PART I. UNDER THE FEDERAL CONSTITUTION

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Part I.—Under the Federal Constitution

§ I.—Introduction

The case law under this head may be conveniently divided into two main topics, the constitutionality of the medical practice acts, and the definition and enforcement of these statutes. As to the constitutionality thereof, the question should be considered, first, as under the federal constitution, and second, as under the several state constitutions.

An analysis of the cases under the general topic shows that the basic principle of restricting legislation is the maxim: *"Salus populi est suprema lex."*

Construed in this light, the statutory regulation of the practice of medicine is not an attempt to set up any one theory, or system, on the science of health. Rather, such enactments are indicative of two ideas: To prevent any imposition upon the ignorant and credulous and to eliminate disease and suffering.[1]

Medical practice acts, therefore, generally provide, that an applicant for a license to practice medicine must prove his fitness to pursue this profession; that he must comply with certain regulations after licensure; that he must be prohibited from practicing when in any way improperly prepared; and that he may be punished by fines and the like for any violation of the law. These several penalties, so provided, are attachable, under "the law of the land," either on a hearing before the Board of Medical Examiners, or after a trial had by a court of judicature as established in some organic act.[2]

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1. Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.
   Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573.
   Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644.
   People v. Allcutt, 102 N. Y. S. 678, 117 App. Div. 546; (aff'd in 189 N. Y. 517, 81 N. E. 1171).
   People v. Mulford, 125 N. Y. S. 680, 140 App. Div. 716; (aff'd in 202 N. Y. ——).
   Bragg v. State, 134 Ala. 165, 58 L. R. A. 925, 32 S. 767.
   Smith v. State (Ala.), 63 So., 28; s. c. aff. ex parte Smith, 63 So. 70.
   State v. Buswell, 40 Neb. 158, 24 L. R. A. 68, 58 N. W. 728.
   State v. Oredson, 96 Minn. 509, 105 N. W. 188.
   O'Neil v. State, 115 Tenn. 427, 3 L. R. A. (N. S.) 762, 90 S. W. 627.
   Parks v. State, 159 Ind. 211, 59 L. R. A. 190, 64 N. E. 862.
   People v. Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923.
   State v. Bair, 112 Iowa 466, 51 L. R. A. 776, 84 N. W. 532.
   Commonwealth v. Jewelle, 199 Mass. 558, 85 N. E. 858.
   People v. Phippin, 70 Mich. 6, 37 N. W. 888.
   Richardson v. State, 47 Ark. 562, 2 S. W. 187.
   1 Kents' Commentaries, 462.
   2 Sutherland's Statutes and Statutory Construction. (2nd ed. by Lewis), secs. 370, 374, 376, 456.
2. Ch. 39, Art. I, Ala. Code, sec. 1626, et sequi.
   Sec. 1435, Wis. Code, et sequi.

§ 2.—The Powers of Government in Relation to the Medical Practice Acts

The power vested in Congress to enact legislation of this nature is very limited, while each of the several state legislatures has the right in nearly the broadest sense of that term. A reason for this may be found in the fact that under the federal constitution governmental powers are to be classed as political and social. The first are vested chiefly in Congress, while the latter remain in large part either in the states or in the people.[3]

Thus Congress may regulate the practice of medicine, but it may do so only in such territory as is immediately subject to its jurisdiction, while the several states are free to legislate for themselves in such matters, subject to the federal and the local constitution alone.

§ 3.—Police Power Defined

Laws regulating the practice of medicine are enacted under what is broadly termed the police power, a phrase which it seems rather impossible to limit in any abstract definition.[4]

In its broadest sense, however, the term "police power" may be considered as that general power in government which, when exercised, tends to promote and preserve the public welfare. This may be attempted either by prohibiting all things hurtful to the comfort, safety and well-being of society, or, by establishing such rules and regulations for the conduct of all persons, and the use and management of all property, as may be conducive to the public interest.[5]

The "police power" is an attribute of sovereignty which exists, without any reservation thereof, in the constitution. It is founded on the duty of a state to protect its citizens, and to provide for the safety and good order of society. It may be compared to the right of self-preservation in the individual, and is an essential element in all orderly governments. Upon it depend the security of the social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. It has been said to be the very founda-

3. Stimpson. Book I, Ch. 10; Book II, Ch. 3. The American Constitutions, Pp. 60, 106.
United States Constitution, 10th Amendment.
Freund, Police Power, ¶ 64, 65.
4. Slaughter House Cases, 16 Wall. (U. S.) 36.
People v. Ewer, 141 N. Y. 129.
Commonwealth v. Vrooman, 164 Pa. St. 306.
5. License Cases, 5 How. (U. S.) 504.
Munn v. Illinois, 94 U. S. 113.
Eastman v. State, 109 Ind. 278; 10 N. E. 97.

tion upon which our social system rests. And it has been sometimes termed, and not inaptly, "the law of overruling necessity." It is founded largely on two old civil law maxims, *"Sic utere tuo ut alienum non laedas,"* which may perhaps be co-terminous with *"Love thy neighbor as thyself,"* and *"Salus populi est suprema lex,"* that is, *"the welfare of the state is of first importance."*[6]

The "police" is the most extensive and pervading "power" of all those which exist in a state by virtue of general sovereignty. Under it many rights of a purely personal and private character give way to the common good; the individual, in becoming a member of organized society, must concede a certain measure of authority over his actions in return for his many privileges. Thus in the process of development from a rude state of society to a complex civilization the zone of personal and private rights that are beyond legislative control must constantly diminish.[7]

A detailed examination of the "police power" would not reveal it as by any means a fixed quantity. Rather it would seem to be an expression of the social, economic, and political conditions of any given era. Hence, as long as these conditions vary, this power must continue to be elastic, i. e., capable of development. The essence of this power would seem to be, that every individual must submit to such restraints in the exercise of his liberty, or of his rights of property, as may be required to remove, or reduce, the danger of the abuse of these rights on the part of those who are unskilled, careless, or unscrupulous.[8]

A state in exercising its police power is but acting in the nature of *"parens patriae"* for the people within its domain. For persons supposedly adults are frequently but children quite incapable of protecting themselves. And nowhere is this incapacity for self-protection more patent than in the relationship existing between patient and physician. Consequently it is in regard to such occupations that

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6. 22 A. & E. Encyc. L. 915, and cases.
   Blackstone IV, pp. 162-175.
   Cooley, Const. Lim., Ch. XVI, et sequi.
   Freund, Police Power, Para. 3 et sequi.
7. Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190.
   Commonwealth v. Alger, 7 Cush. (Mass.) 84.
   Thorpe v. Rutland & Burlington Ry., 27 Vt. 149.
   Gibbons v. Ogden, 9 Wh. (U. S.) 1, 204.
   License Cases, 5 How. (U. S.) 504.
   New York v. Milne, 11 Pet. (U. S.) 102, 139.
   Passenger Cases, 7 How. (U. S.) 283, 424.
8. Freund, Police Power, Para. 1, et sequi.

a state intervenes with its powers of police to protect both itself and the persons who are most likely to suffer.[9]

§ 4.—The Practice of Medicine and the Police Power

It is to be conceded that the police power extends to the regulation of certain trades and callings and most particularly those which closely concern the public health.[10] Still, in exercising this power a legislature must take into consideration the fact that each citizen has the undoubted right to follow any lawful calling, business or profession he may select.[11] With this limitation then in mind there is perhaps no profession more properly open to such regulation by a state than that which embraces the practitioners of medicine.[12] Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only qualified persons shall undertake its responsible and difficult duties.[13]

Thus it is that states have interested themselves in the conservation of public health as a leading matter of police control for hundreds of years.[14] At a very early date statutes were enacted regulating the admission to practice and licensing the members of the profession of medicine.[15] Such statutes were and are to-day primarily enacted for the benefit of the people of a state at large. For, in enacting these laws, a legislature has in mind the protection of the

9. State v. Cray (Vt.), 81 Atl. 450.
State v. Heath, 125 Iowa 585; 101 N. W. 429.
State v. Blumenthal (Mo.), 125 S. W. 1188.
10. Watson v. Maryland, 30 Sup. Ct. Rep. 644.
Chenoweth v. State (Colo.), 135 Pac. 771.
11. State v. Bair, 112 Iowa 466, 84 N. W. 532.
Allopathic Board, etc., v. Fowler, 50 La. Ann. 1358, 24 So. 809.
Smith v. State (Ala.), 63 So. 28.
12. Watson v. Maryland, 30 Sup. Ct. Rep. 644.
Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190.
People v. Phippin, 70 Mich. 6, 37 N. W. 888.
State v. Bair, 112 Iowa 466, 84 N. W. 532.
13. Watson v. Maryland, 30 Sup. Ct. Rep. 644.
State v. Bair, 112 Iowa 466, 84 N. W. 532.
Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190.
People v. Phippin, 70 Mich. 6, 37 N. W. 888.
Chenoweth v. State (Colo.), 135 Pac. 771.
Smith v. State (Ala.), 63 So. 28.
14. Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190.
15. Bonham's Case, 8 Coke 107.
College of Physicians v. Levett, 1 Ld. Raym. 472.
See Statutes, 3 Henry VIII, Ch. 11; 14 & 15, Henry VIII, Ch. 5; 5 Car. 1; Virginia 1639; Massachusetts 1649; New Jersey 1665; New York 1760.
Freund, Police Power, Para. 133.

people of the state against those not qualified for such service, and not the creation of a medical monopoly.[16]

As has been said, every citizen has the right to earn a living. But, when a person holds himself out to the community as a person skilled in the science of healing, and on that ground seeks the opportunity to exercise the skill he claims to possess, his business then becomes impressed with a public character. He is, therefore, subject to a reasonable regulation in its prosecution. Such a regulation is not an attempt to determine a question of science. Nor is it an attempt to control the personal conduct of the citizen without regard to his opinion. Nor yet is it a matter in which the public is in no wise concerned. It is a matter of very great public concern. The legislature of a state can appropriately determine under its "police power," the degree of learning that should be possessed by those who gain a livelihood by seeking to relieve the bodily ailments of others.[17]

Thus the medical profession upon whose skill is so much dependent the lives and health of others is very properly made a matter of legislative control. There is no more natural, absolute right in a person to practice medicine or surgery than there is to practice law. What is claimed to be a natural or absolute right is nothing more than a privilege or a right upon condition.[18] It would, therefore, seem that the freedom of engaging in a business, or vocation, is not inconsistent with its regulation as to the method of its conduction, that is, when the regulations imposed are upon one of the recognized grounds of the police power.[19] But this freedom is impaired, not merely when the right to engage in a business is absolutely denied, but also when it is made to depend upon conditions precedent of a burdensome or discriminating character. As regards the practice of medicine, however, the restrictions thus far imposed have been uniformly sustained by the courts, excepting, perhaps, as to technical points touching a state constitution alone and not really going to the root of the matter.[20]

On analysis, there are certain dominant features which seem to be included in any law enacted to control and regulate the practice of

16. Barton v. Schmershall et al. (Ida.), 222 Pac. 385.
State v. Bair, 112 Iowa 466, 84 N. W. 532.
Singh v. State (Tex.), 146 S. W. 891.
17. Parks v. State, 159 Ind. 211, 59 L. R. A. 190.
Allopathic Board v. Fowler, 50 La. Ann. 1358.
18. Allopathic Board v. Fowler, 50 La. Ann. 1358.
People v. Phippin, 70 Mich. 6, 37 N. W. 888.
19. Freund, Police Power, Para. 492.
20. Freund, Police Power, Para. 133, 152-154, 479, 542, 647, 673.

medicine. Nearly all these measures create a board of medical examiners in one form or another, and, naturally enough, with varying powers. Generally, it seems to be the duty of these boards to examine into the moral and mental fitness of the applicants desiring to practice medicine. To test the applicants thoroughly, it is prescribed usually that each must submit to an examination in the subjects fundamental to a knowledge of the human body and its diseases. The boards are frequently allowed great discretion in refusing licenses but the forms are specifically determined. After licensure, the boards must supervise the conduct of all practitioners and, for unprofessional conduct and the like, may suspend or revoke a practitioner's license. A mode of procedure for the trial of such a charge is sometimes provided. The terms "practice of medicine" and "unprofessional conduct" are in most statutes defined to some extent. Practicing contrary to the statute, as well as other violations, are constituted misdemeanors and fines are provided. These laws make exceptions of various kinds to their general terms. Finally, certain persons are often precluded from the practice of medicine; some by reason of their failure to qualify *ab initio;* others, from their inherent nature, as corporations, may not qualify for licensure.[21]

The provisions here cited are the ones which most frequently come into question as to their constitutionality, and these, as has been noted, have been uniformly upheld. Possibly North Carolina and Kentucky are the only jurisdictions where there would seem to be any doubt as to the validity of such acts. However, in view of the vast preponderance of opinion favoring the validity of these laws such apparent anachronisms need not be seriously considered.

§ 5.—Medical Practice Acts Under the Federal Constitution

It has become a fixed principle that, under the police power inherent in the state, the legislature may enact such reasonable regulations for the examination and registration of physicians, and the practice

21. Youngstown Park v. Kessler (Ohio), 36 L. R. A. (N. S.) 50.
Nelson v. Dr. Cook and Co., Sup. Ct. Washington, February, 1913.
Ch. 39, Art. I, Ala. Code, Sec. 1626, et sequi.
Public Acts 174 (U. S. A.) for District of Columbia.
Acts 1897, Indiana, p. 255, amended 1901.
Ch. 17, Title 12, Iowa Code, Sec. 2576, et sequi.
Ch. 254 Kansas Laws 1901, amended Ch. 63, 1908.
Art. 43, Pub. Gen. L. Md., amended, 1892, 1894, 1896, 1902.
Ch. 344 New York Code.
Ch. 93 Utah Laws, 1911.
Ch. 192 Washington S. L. 1909 (H. R. 144).
Sec. 1435 et sequi, Wisconsin Code.

of medicine and surgery, as it may deem fit, nor do such laws violate the federal constitution.[22]

The authority of the legislature does not end with declaring what qualifications a person entering upon the practice of the profession must possess. Since the legislature has plenary power over the whole subject, it alone can be the judge of what is expedient, both as to the qualifications required and as to the method of ascertaining those qualifications. The only limit to the legislative power in prescribing conditions to the right to practice is that they shall be reasonable. Whether or no they are reasonable the courts must judge. As a guide to the court in determining as to their reasonableness it is required that the conditions be adopted in good faith; that they operate equally upon all who desire to practice and who possess the required qualifications; that they be appropriate to the end in view, to-wit, the protection of the public; and that they be attainable by reasonable study or application. If these be complied with, then the fact that the conditions may be rigorous will not render the legislation invalid. In the enactment of legislation of this character, the legislature may take account of the advance of learning and impose new conditions and qualifications as increased knowledge may suggest. And to make such legislation effective one having an established practice and one contemplating practicing may be required to conform to the same standard of qualification.[23]

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22. State v. McCrary (1906 Ark.), 92 S. W. 775.
Thompson v. Van Lear, 77 Ark. 506, 92 S. W. 773, 5 L. R. A. (N. S.) 588.
Richardson v. State, 47 Ark. 562, 2 S. W. 187.
Czarra v. Board of Medical Supervisors, 25 App. D. C. 443, 33 Wash. Law Rep. 470.
State v. Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.
People v. Reetz, 127 Mich. 87, 86 N. W. 396.
State v. State Board of Medical Examiners, 32 Minn. 324.
State v. First Judicial District Court, Department No. 2, 26 Mont. 121, 66 Pac. 754.
Smith v. State (Ala.), 63 So. 28.
In re Roe Cheng, 9 New Mex. 130, 49 Pac. 952.
People v. Fulda, 52 Hun. 65, 4 N. Y. Supp. 945.
State v. Marble, 72 Ohio St. 21, 73 N. E. 1063.
Comm. v. Wilson, 6 Pa. Dist. 628, 19 Pa. Co. Ct. 521.
Comm. v. Densten, 30 Pa. Super. Ct. 631.
Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. Rep. 231, 32 L. ed. 623.
Contra.
Chenoweth v. State (Colo.), 135 Pac. 771.

23. Ex parte Gerino, 143 Cal. 412.
Ex parte Frazer, 54 Cal. 94.
People v. Boo Doo Hong, 122 Cal. 606.
Ex parte McNulty, 77 Cal. 164.
In re Bulger, In re Merrill, 45 Cal. 553.
Ex parte Whitley, 144 Cal. 167.
Arwine v. Board of Medical Examiners (Cal.), 91 Pac. 319.
De Yoe v. Superior Court, 140 Cal. 476.

The police power of a state is very broad and comprehensive. Consequently all kinds of restraints and burdens may be placed on persons and property thereunder, and these will be held valid if their object is to secure the general comfort, health and prosperity of the state.[24] Thus with the practice of medicine and surgery, it being a function which concerns the comfort, health, and life of every person, it is well-nigh an imperative necessity that only persons possessing the highest possible degree of skill and knowledge should be permitted to enter the pursuit thereof. In passing on the validity of a law regulating this practice, the argument that it is bestowing a favor upon a particular profession will not be considered by the courts. For they seem to hold such laws to be the exercise of one of the highest duties of a state, that of protecting its citizens from injury and harm.[24] Still there can be no doubt the legislature of every state should permit the utmost freedom of action, consistent with the public welfare as regards the pursuit of the practice of medicine. The legislature should not, therefore, impose any restraint which the paramount interest of the community does not demand.[25] It may, however, legitimately restrain the action or conduct of any individual citizen by a general law, if this be applicable alike to all. Such a law must also be imposed for the purpose of promoting the comfort, health or prosperity of the community at large.[25] Any state has a right, under its general police power, to pass laws placing individuals under restraint in the exercise of any business, calling or profession. This power has been universally recognized and has been held by the courts .

23.—*Continued.*
Iowa Ec. Med. Assn. v. Schrader, 20 L. R. A. 259.
Dent v. West Virginia, 129 U. S. 114.
State Board v. Fowler, 50 La. Ann. 1358.
Scholle v. The State, 90 Md. 729, 50 L. R. A. 411.
People v. Fulda, 52 Hun. 65, 4 N. Y. Supp. 945.
State v. Davis, 92 S. W. 407.
Antle v. State, 6 Tex. Crim. App. 302.
Ex parte Grenall, 153 Cal. 769.
Ex parte Bohannon (Cal.), 111 Pac. 1039.
Driscoll v. Commonwealth, 93 Ky. 393, 20 S. W. 431.
Eastman v. State, 109 Ind. 282.
State v. Johnson (Kan.), 114 Pac. 390.
Brooks v. State, 88 Ala. 122, 6 So. 902.
Richardson v. State, 47 Ark. 562, 2 S. W. 187.
Bragg v. State, 134 Ala. 165, 33 So. 767, 59 L. R. A. 925.
Smith v. State (Ala.), 63 So. 28.
Spurgeon et al. v. Rhodes, 167 Ind. 1, 78 N. E. 228.
State v. Dent, 25 W. Va. 1.
State v. Chapman, 69 N. J. Law 464, 55 Atl. 94.
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

24. Eastman v. State, 109 Ind. 282.

25. State v. Dent, 25 W. Va. 1.

to be constitutional and valid.[25] While all men have a right to acquire property, and of the means thereto, still the methods employed toward obtaining this end must be lawful means. One cannot acquire property by stealth or robbery, for in so doing he infringes on the rights of others. Therefore, a person cannot have a right to acquire property by the practice of medicine if he has no qualifications to practice medicine, since in attempting to do so he destroys the health of others in violation of the law.[25] Hence it is that a legislature has the right to declare that one shall not acquire property by the practice of medicine unless he possess the requisite qualifications and can thus assure the community that he will not destroy the health of others.[25] Any restrictions or qualifications placed on applicants to the practice of medicine and surgery must be appropriate to the profession, and attainable by reasonable study or application. They must also be imposed equally upon all persons of like sex, age, and condition.[26]

As has been said, in construing these laws, courts have as a guide the rule that they must be reasonable, necessary, and not unduly oppressive. But it is said that, in addition, a court in deciding cases involving the exercise of the police power reflects the state of public opinion, and that therefore measures looking to the public welfare are no longer tested by the strict letter of the Constitution, but rather by public opinion, which, keeping pace with an advancing civilization, is a progressive factor that calls for an enlarged invasion of private rights for the public good. And thus it is that courts are prompted to give greater elasticity to constitutional limitations, as well as because it is thought that in flexibility of construction lies the possibility of progress and the vitality of the Constitution.[27]

While all this may be true, still a court ought not to be bound by an alleged expression of public opinion as evidenced by a hastily considered legislative enactment. A court should be vouchsafed the opportunity of scrutinizing carefully each law that comes before it for the purpose of determining whether or no means provided in a given statute will effectuate the desired end.

For example, a Minnesota statute regulating barbers required that all persons before entering the trade should take a preparatory course extending over three years. Before licensure, each applicant was to

26. Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.
27. Dade v. United States, Court of Appeals of the District of Columbia, No. 2466, decided Feb. 25, 1913.
Smith v. State (Ala.), 63 So. 28.
But see
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

be examined, among other things in his knowledge of face and of skin diseases. It was admitted that the chief danger to customers lay in unclean tools and yet nothing was done to enforce sanitary precautions in this regard. The Minnesota Supreme Court held the law valid.[28]

From such a situation it would apparently follow that to prevent an abuse of the police power for the alleged protection of health, or safety, or the alleged prevention of fraud, the courts must be allowed to judge whether restrictive measures have really these ends in view. A remote and slight danger should not be recognized as a sufficient ground of restriction. A legislature should not be permitted to run riot, enacting into laws the ideals of a theorist no matter how wise and beneficent they may seem to be. For, what is termed the voice of the people is not always the will of God. Idealistic legislation of this nature is nearly always uneconomical and unjust. It would therefore seem that such laws should be held unconstitutional.[29]

§ 6.—The Constitutionality of Boards of Medical Examiners; The Power to Create Such Boards

It being well recognized that a state may enact laws requiring practitioners of medicine and the like to conform to certain conditions for the protection of the health of its citizens it follows that the state may also devise a means of securing conformity to these conditions.[30] To this end a legislature may create and establish a state board of medical examiners.[31] Courts cannot control the selection of these agencies by a legislature. It is impossible for a state to supervise this professsion to the best advantage otherwise than by such a delegation of authority. It is essential that such authority be granted to men well qualified to pass on the various requisites that may be made conditions precedent to issuance of a license to practice medicine.

28. State v. Zeno, 79 Minn. 80, 48 L. R. A. 88.
See State v. Sharpless (Wash.), 71 Pac. 737.
29. Freund, Police Power, Para. 494.
Smith v. State (Ala.), 63 So. 28.
Chenoweth v. State (Colo.), 135 Pac. 771.
30. Allopathic State Board v. Fowler, 50 La. Ann. 1358, 24 So. 809.
State ex rel Powell v. State Board, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238.
State v. Bair, 112 Ia. 466, 84 N. W. 532.
State Board of Health v. Roy, 22 R. I. 538, 48 Atl. 802.
Meffert v. Packert et al., 195 U. S. 625, affirming Meffert v. State Board, 66 Kan. 710, 72 Pac. 247.
Green v. Hodges (Kan.), 138 Pac. 605.
Freund, Police Power, Para. 546.
31. Allopathic State Board v. Fowler, 50 La. Ann. 1358, 24 So. 809.
State v. Bair, 112 Ia. 466, 84 N. W. 532.

Hence, medical men usually make up the personnel of a board. These may be chosen in a number of ways. Power may be given the Governor to appoint a certain number of efficient men, by and with the advice of the senate. Or the several state societies may select certain of their number and recommend them to the Governor for appointment to the board. However it be done, no question can be raised as to its constitutionality, generally speaking.[32] Thus, it would not be objectionable if the numbers be chosen from but two of the state societies and other be ignored,[33] or if a Governor, having but the nominating power, appoints the members of a board and fails to gain the confirmation of the Senate.[34] This is because a state is bound only to provide a means whereby all applicants may receive like treatment. A court may not condemn any such system, when used, simply because it may work out unfairly and because the board might not be entirely free from prejudices. A law is not discriminatory which authorizes the creation of a board and which does not make mandatory the recognition of all schools and sects. For such a law is not recognizing any particular school as contradistinguished from another; nor is it bestowing special privileges on a few to the detriment of the many. Rather it is casting a burden upon those so chosen to act in the interests of the state and for the general welfare of the people. It is simply a means whereby there may be evolved the greatest possible degree of efficiency.[35]

§ 7.—Medical Examining Boards and the Separation of Powers

The several constitutions, state and federal, provide for a *"separation of power"* into three governmental departments — Legislative, Executive and Judicial. Now because of this arrangement of Government it has been urged that a legislature, in vesting a medical board with power to revoke licenses, is creating an administrative body with judicial powers, and this contrary to the constitution.[36]

A license to practice medicine when granted is said to constitute a vested right. And it is urged that such a right should not be interfered with, except on a proper hearing. Hence the proposition

32. See cases Note 30, ut supra.
Driscoll v. Comm., 93 Ky. 393, 20 S. W. 431.
33. Allopathic Board v. Fowler, 50 La. Ann. 1358.
34. Brown v. People, 11 Colo. 109, 17 Pac. 104.
35. See cases cited Note 30, ut supra.
Brown v. People, 11 Colo. 109, 17 Pac. 104.
Driscoll v. Commonwealth, 93 Ky. 393, 20 S. W. 431.
State v. Call, 121 N. C. 646, 28 S. E. 517.
36. Freund, Police Power, Para. 546 (note).
Stimson, Constitutions, Book II, 1, Book III, 1, U. S. Const., I, 1.

is advanced that a power of revocation should not be conclusively vested in an "administrative body," at least not without a right of appeal to the courts being specifically provided for.

It is further argued that a license to practice medicine is a valuable personal right and is property and that to deprive a citizen of such a right—as by a revocation of his license—is an exercise of judicial power. Now this power, it is claimed, cannot be vested in any administrative body, for a legislature cannot itself exercise the power, hence it cannot be delegated to a board.

But under the view of the majority it would seem entirely competent for a legislature to confer on a board this power to revoke licenses in its discretion.[37]

And it would seem that the majority base their opinion, in part, on the fact that under the police power a question of qualification may be raised continually *de novo*. That is, a person once qualified to practice medicine does not necessarily always remain so, and hence may be subjected to a "continuing regulation." Medical boards also find a parallel in the boards of equalization which for purposes of taxation determine the value of property. Here is a taking of property without judicial process, yet such an exercise of power has been uniformly upheld. The powers given the medical boards, being comparable, may be similarly held valid. Furthermore, such boards are neither administrative nor judicial, but partake of each and are therefore termed quasi-judicial.[38] Moreover, such an exercise of power as the revocation of a license does not properly belong to the judicial department of government, but the determination of such questions as the fitness of a person to practice or to continue in the practice of medicine may constitutionally be and is very properly devolved upon boards composed of experts in that particular occupation.[39]

Nor need a statute in creating these medical boards and in conferring certain powers upon them necessarily provide for a rehearing before a judicial tribunal to be constitutional. It is sufficient if provision be made for a hearing of some nature before the board; but a statute must not preclude an appeal to a court when desired.

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37. State ex rel Chapman v. Board, 34 Minn. 387, 26 N. W. 123.
Traer v. Board, 106 Iowa 559.
Meffert v. Board (Kan.) 72 Pac. 247, and cases cited therein.
People v. McCoy, 125 Ill. 289.
38. People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.
Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 228.
39. People v. Hasbrouck, 11 Utah, 291, 39 Pac. 918.
State ex rel Powell v. State Board, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238.
Mathews v. Hedland (Neb.), 119 N. W. 17.

With this system applied any person deeming himself injured may always apply to the nearest court of competent jurisdiction. For it is a function of all such courts to hear and right all grievances which may be properly laid before them.[40]

§ 8.—Medical Boards and the Validity of their Powers

A legislature may within its limitations vest in a board of medical examiners the power to determine as to the mental and moral fitness of an applicant.[41]

Thus, a board may require an applicant to present a diploma from a medical school and that he submit himself to an examination, and the like. Such an exercise of power cannot be criticised.[42] For this is an application of the powers of police which a state cannot, as such, exercise. An agent is essential and so long as there is no discrimination or undue partiality shown such a delegation of authority cannot be attacked on the grounds of constitutionality.[43]

Again, the legislature has the same power to require as a condition of the right to practice the profession that the petitioner shall be possessed of the qualifications of honor and a good moral character as it has to require that he shall be learned in the profession.[44] Hence a board may refuse to issue a license to an applicant who lacks the requisite moral qualifications as well as to those who fail to pass the necessary test as to their knowledge of their profession. Such applicants must be given an opportunity, however, to be heard in their own defense.[45] And any statute granting a power to pass on such matters should at least indicate to the board that notice of the charge made and a hearing must be given the accused. These points having been given due consideration, there can be no doubt but the

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40. United States v. Custis et al. (D. C.), 33 Wash. Law Rep. 396.
Dent v. West Virginia, 129 U. S. 114.
Reetz v. Michigan, 188 U. S. 505.
Jacobson v. Massachusetts, 197 U. S. 11.
Lieberman v. Van De Carr, 199 U. S. 552.
Yick Wo v. Hopkins, 118 U. S. 356.
State Board v. People, 20 Ill. App. 457.
Spelling, Injunctions, 2d ed., Sec. 1433.
41. State ex rel Powell v. State Board, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238.
State v. Bair, 112 Iowa 466, 84 N. W. 532.
42. State v. Call, 121 N. C. 646.
Driscoll v. Commonwealth, 93 Ky. 393.
43. State v. Bair, 112 Ia. 466, 84 N. W. 532.
44. State ex rel Powell v. State, 32 Minn. 324.
State v. State, 34 Minn. 387.
45. Smith v. Board (Iowa), 117 N. W. 1116.

right to so regulate the practice of medicine falls within the police power and would therefore be valid.[46]

As the board may refuse to issue a license to a citizen of its own state, so it may likewise refuse to license citizens from any other states. This is true, even though such a person be a licensed practitioner under the laws of the foreign state, nor is this discriminating against the citizens of the several states.[47]

Finally these boards may be given power to supervise the practice of medicine and to suspend or revoke licenses for improper conduct. The exercise of this authority has sometimes been termed the power of continuing regulation.[48] Such an exercise of power has been quite uniformly held not to contravene those constitutional guarantees "that no one shall be deprived of life, liberty or property, unless by the judgment of his peers," or "by the law of the land," or "be denied the equal protection of the laws."[49]

§ 9.—The Power of a Board to Revoke a License for Cause

As has often been said, the right to practice medicine is a valuable right which cannot be taken away without due process of law. It has also been said that two of the essential elements of due process are notice and the opportunity to defend. Now statutes regulating the practice of medicine clearly fall within the police power of a state, nevertheless even such statutes cannot be permitted to override the constitution. Consequently, when a valuable property right, such as a license to practice medicine, is to be disturbed thereunder, those provisions of the constitution prohibiting the taking of property without due process and the like are paramount. The law must, therefore, provide to give the accused notice of the charge brought against him and an opportunity to defend himself.[50] Although a statute may not expressly provide for notice, it will not be held uncon-

46. See cases cited Note 1, ut supra.
Barton v. Schmershall et al. (Ida.), 222 Pac. 385.
Smith v. Board (Iowa), 117 N. W. 1116.

47. People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.

48. Hawker v. New York, 170 U. S. 189.
Reetz v. Michigan, 188 U. S. 505.
Meffert v. Packer et al., 195 U. S. 625.
Chenoweth v. State (Colo.), 135 Pac. 771.

49. Mathews v. Hedland (Neb.), 119 N. W. 17.
State Board of Health v. Roy, 22 R. I. 538, 48 Atl. 802.
Smith v. State Board of Medical Examiners (Iowa), 117 N. W. 1116.
Spurgeon et al. v. Rhodes, 167 Ind. 1, 78 N. E. 228.
Chenoweth v. State (Colo.), 135 Pac. 771.

50. Smith v. State Board of Medical Examiners (Iowa), 117 N. W. 1116.
Chenoweth v. State (Colo.), 135 Pac. 771.

stitutional or invalid if the requirement of notice may be fairly implied therefrom. In some cases, it is said that notice is to be implied from the very fact that it is a constitutional requirement irrespective of particular provisions in the statutes apparently contemplating that notice is to be given.[51] A suspension or revocation of a license is generally had for what is termed unprofessional conduct. In nearly all the states, this term includes any act in the nature of a felony or that is grossly immoral or such as would deceive or tend to deceive the ignorant and the like. The revocation of a license on such grounds does not violate any provision in the federal constitution.[52]

The provisions of these acts would seem to indicate that such investigations were never intended to be carried on in observation of the technical rules of evidence. On the contrary it would seem that the legislative intent in such cases is to adopt a summary proceeding by which the morals of the people and the dignity of the profession might be protected[53] against the flotsam and jetsam current in any walk in life and without being embarrassed by the technical rules of proceedings at law. It is generally deemed sufficient if the accused be notified and have a hearing. If this be done the findings of the board are conclusive on the court.[54]

Depriving a physician of his right to practice medicine otherwise than by a judgment or forfeiture by a judicial tribunal does not violate Amendment 14 of the federal constitution as to depriving a person of his property without due process of law. For due process of law is not necessarily judicial proceedings. The procedure to be found in these statutes is for the purpose of exercising the police powers of the state to the best advantage. And although such a power when exercised may interfere with or restrict a person's enjoyment of his property, yet it was never held that the exercise of the police power must be by judicial proceedings in court in order to constitute due process of law. No distinction can be taken between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power and their object is identical, viz., to exclude the

51. Smith. v. State Board of Medical Examiners (Iowa), 117 N. W. 1116.
52. Spurgeon et al. v. Rhodes, 167 Ind. 1, 78 N. E. 228.
Chenoweth v. State (Colo.), 135 Pac. 771.
53. California Senate Bill 813, Acts 1913.
Ch. 17, Title 12, Iowa Code, Sec. 2578.
Ch. 344 New York Code, Para. 11.
Art. 43 Maryland Laws, Sec. 65.
But see
Ch. 422 Wisconsin Code, Sec. 1436e, et sequi.
54. Meffert v. State Board, 66 Kan. 710, 72 Pac. 247.

incompetent and unworthy from this profession.[55] A state may confer on a board the power to revoke a license if it should be made to appear that the license should not have been issued or if for any reason the holder thereof since its issuance has become disqualified.

Generally speaking, statutes authorizing boards of medical examiners to refuse and revoke licenses under the circumstances set forth in these statutes, confer on these boards a discretionary power. This is at least true in passing on questions of fact presented to the board for their determination. That is, the board must exercise its judgment in determining whether or not the facts presented are sufficient to warrant a refusal of a license or a revocation thereof and the like.[56] If any person be wronged in any such exercise of discretionary power, such wrong may be corrected in the courts of the state; but the courts will not interfere with nor disturb the discretionary power conferred on a board.[57]

§ 10.—The Term "Unprofessional Conduct" Is Not Void for Uncertainty

It is maintained by some authorities that a statute permitting a revocation of a license for "unprofessional conduct" is void for uncertainty in that the defendant is not sufficiently advised as to the nature of his offense when indicted under such language.[58] This point is raised under the Sixth Amendment to the federal constitution and under similar language in several state constitutions. It has been held that the sixth amendment to the federal constitution does not apply to the states but only to the enactments of Congress.[59]

The terms "unprofessional conduct" or "gross unprofessional conduct" and the like are said to have no exact nature as an offense and only to constitute matter for mere speculation. Thus the underlying question involved in all cases that may arise under such language

55. State ex rel Chapman v. State, 34 Minn. 387, 26 N. W. 123.
Chenoweth v. State (Colo.), 135 Pac. 771.
56. Barton v. Schmershall et al. (Ida.), 222 Pac. 385.
57. Barton v. Schmershall (Ida.), 222 Pac. 385.
Spelling on Injunctions, 2d ed., Sec. 1433.
Dent v. West Virginia, 129 U. S. 114.
Chenoweth v. State (Colo.), 135 Pac. 771.
Reetz v. Michigan, 188 U. S. 505.
58. Czarra v. Board, 25 App. D. C. 443, 33 Wash. Law Rep. 471.
Matthews v. Murphy, 23 Ky. 750, 63 S. W. 785, 54 L. R. A. 415.
See also
State ex rel Powell v. State Medical Examining Board, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 38.
Kennedy v. State Board of Registration in Medicine, 145 Mich. 241, 108 N. W. 730.
59. Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 228.

would seem to be whether the courts can uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion but equally to others about which there might be radical differences. Because in upholding such an act there might devolve upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts. Also a board authorized to enforce an act in which such broad language is used would, it is claimed, enable it to accuse a physician of almost any act as unprofessional. And the defendant would from this term be unable to formulate a proper defense not knowing with what offense he was charged. And all this it is claimed, is contrary to the fundamental principles underlying our organic acts.[60]

It would seem, however, that this construction takes the words too broadly. For it is clearly against public policy to place any such arbitrary power anywhere much less in a mere medical board.[61] "Grossly immoral and unprofessional conduct" excludes the idea that a license may be revoked for trivial reasons or for a violation of what might be regarded as mere professional ethics. Hence such language is not too general under which to lay an indictment. And while a great many statutes may define, with great nicety, the meaning of this term, yet it would seem almost unnecessary, for it may be urged that the words "unprofessional conduct" carry with them a sufficient meaning to inform anyone of the charge brought against him.[62]

In the face of these authorities it would seem that the position taken by the courts of California and Kentucky were untenable. And further, the affirmation of Meffert v. Packert by the United States Supreme Court would, in effect, negative the opinion of the Court of Appeals of the District of Columbia, although the Meffert case did not turn on quite the same point. Then again, in nearly all these cases, it might seem that the court was given to a great deal of speculation in trying to put a strained construction on the language in question. It would have been a great deal simpler to hold the

60. Czarra v. Board, 25 App. D. C. 443, 33 Wash. Law Rep. 470.
61. United States v. Custis et al., 38 Wash. Law Rep. 396.
62. Aiton v. Board of Medical Examiners of Arizona, 114 Pac. 962.
Meffert v. Packert et al., 66 Kan. 710.
Same case (aff.), 195 U. S. 625.
State v. Board, 34 Minn. 391.

language sufficient and to allow a review in cases in which there might be a palpable miscarriage of justice.[63]

§ 11. (a) Medical Practice Acts and the Privilege and Immunity Clauses

Section 2, Article 4 of the Federal Constitution provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Generally speaking, this does not apply to Medical Practice Acts which apparently make exceptions favoring the citizens of a given state.[64]

A statute requiring a diploma from a reputable college and an examination of all candidates from a foreign state but excepting students matriculated at any college in the state is not violative of this provision.[65] For such a restriction does not constitute class legislation, the test being whether or no the exercise of the medical profession is made any less perilous by such a provision. Now it would seem incontrovertible that one state may protect its citizens more thoroughly than other states. Hence to admit candidates from these states on an equal footing with its own students would be to imperil the health and safety of its own citizens, and this any state may decline to do. It would therefore be a proper classification and valid under Section 2, Article 4 of the Federal Constitution.[66]

Nor is differentiating between established practitioners within the state and those who may come in from another state invalid.[67] For such a provision is not directed against the citizens of another state as such. No privileges are being withheld which are not being withheld from all who are similarly situated. And hence such a classification cannot be in contravention of that provision in the Federal Constitution which provides that "the citizens of each state are entitled to the privileges and immunities of the citizens of the several states.[68]

§ 11 (b).—Similar to this "privilege and immunity" clause is that part of Section 1 of the Fourteenth Amendment stipulating that "no state shall make or enforce any law which shall abridge the

63. Kennedy v. State Board of Registration, 145 Mich. 241, 108 N. W. 730.
64. Harding v. People, 10 Colo. 387, 15 Pac. 727.
State ex rel Kellogg v. Currans et al., 111 Wis. 431, 87 N. W. 561.
People v. Phippen, 70 Mich. 6, 37 N. W. 888.
Wolf v. State Board (Minn.), 123 N. W. 1074.
People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.
65. State ex rel Kellogg v. Currans et al., 111 Wis. 431, 87 N. W. 561.
66. State ex rel. Kellogg v. Currans et al., 111 Wis. 431, 87 N. W. 561.
67. People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.
68. Federal Constitution, Article IV, Sec. 2.

privileges or immunities of citizens of the United States." The difference being that the one is to protect the citizens of the various states while the second is[69] for the protection of the citizens of the United States. And it is well settled that the right to practice medicine without regulation is not one of the privileges and immunities incident to citizenship of the United States.[70]

The fact that a statute apparently discriminates and allows certain seeming exemptions is no constitutional ground for objection as being discriminatory: as, for example, exempting those who have practiced in a given state for five years prior to the taking effect of the statute in question.[71]

There can be no doubt that it is within the proper power of the legislature to provide that some people may and some may not practice medicine; provided that the characteristics and conditions distinguishing the former class from the latter are of a kind tending to make their exercise of that profession more beneficial or less perilous to the community than the class excluded.[72]

§ 12 (a).—The "Due Process of Law" Clause in Amendment Fourteen

Generally speaking, medical practice acts have been held not to fall within that part of Section 1 of the Fourteenth Amendment which declares that no state shall "deprive any person of life, liberty or property without due process of law." For such laws properly drafted come under the police power of a state and as such are a proper exercise of that power in scope and purpose.[73]

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69. Slaughter House Cases, 16 Wall. (83 U. S.) 36, 74, 21 L. ed. 394.
Bartemeyer v. Iowa, 18 Wall. (85 U. S.) 129, 21 L. ed. 929.
Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 876.

70. Slaughter House Cases, et sequi, ut supra. (Note 69.)
Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.
Harding v. People, 10 Colo. 387, 15 Pac. 727.
People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.
People v. Phippin, 70 Mich. 6, 37 N. W. 888.
State ex rel. Kellogg v. Currans et al., 111 Wis. 431.

71. People v. Phippin, 70 Mich. 6, 37 N. W. 888.

72. State ex rel. Kellogg v. Currans et al., 111 Wis. 431, 87 N. W. 561.
Harding v. People, 10 Colo. 387, 15 Pac. 727.
People v. Phippin, 70 Mich. 6, 37 N. W. 888.
People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.

73. Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644.
Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.
Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.
Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573.
Meffert v. Packer, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790.
Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493.
People v. Apfelbaum, 251 Ill. 18.
State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179.

If the statute be so drafted as not to result in any arbitrary deprivation of any person's liberty or property or the right to engage in a lawful calling, then it cannot contravene this clause of Amendment 14. The qualifications of learning, skill and character required by such acts depend primarily upon the judgment of the state as to their necessity. If appropriate to the profession of healing and attainable by reasonable study and application, no objection can be made to them merely on account of their stringency or difficulty.[74]

Such laws must be general in their operation upon the subjects to which they relate. The classifications made therein as to who may practice and the like must be reasonable and not arbitrary and capricious. And there must be a logical relation to the ends sought to be attained by the statute which must apply equally to all persons similarly situated.[75]

The provisions and regulations of such a statute should be enforceable in the usual mode established in the administration of government with respect to kindred matters—that is, by proceedings adapted to the nature of the case. Due process is not necessarily judicial process. And hence power reposed by a statute in a Board of Medical Examiners is proper. Such power cannot be questioned unless it be exercised in an arbitrary, capricious or unfair manner by the board.[76]

73.—*Continued.*
Parks v. State, 159 Ind. 211, 59 L. R. A. 190, 64 N. E. 862.
State ex rel. Burroughs v. Webster, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750.
Bragg v. State, 134 Ala. 165, 58 L. R. A. 925, 58 So. 728.
Little v. State, 60 Neb. 749, 51 L. R. A. 717, 84 N. W. 248.
State v. Gravett, 65 Ohio St. 289, 55 L. R. A. 791, 87 A. S. R. 605, 62 N. E. 325.
State v. Marble, 72 Ohio St. 21, 70 L. R. A. 835, 73 N. E. 1063.
People v. Allcutt, 102 N. Y. S. 678, 117 App. Div. 546 (aff'd in 189 N. Y. 517, 81 N. E. 1171).
People v. Mulford, 125 N. Y. S. 680, 140 App. Div. 716 (aff'd in 202 N. Y.—).
People v. Phippin, 70 Mich. 6, 37 N. W. 888.
State v. Miller, 146 Iowa 521, 124 N. W. 167.
State v. Adkins, 145 Iowa 671, 124 N. W. 627.
State v. Wilhite, 132 Iowa 226, 109 N. W. 730, 11 A. & E. Ann. Case. 180.
State v. Edmunds, 127 Iowa 333, 101 N. W. 431.
State v. Heath, 125 Iowa 585, 101 N. W. 429.
State v. Bair, 112 Iowa 466, 84 N. W. 532, 51 L. R. A. 776.
Scholle v. State, 90 Md. 729, 50 L. R. A. 411, 46 Atl. 326.
State v. Yegge, 19 S. D. 234, 103 N. W. 17.
Collins v. Texas (U. S.), 32 Sup. Ct. Rep. 286.
Chenoweth v. State (Colo.), 135 Pac. 771.

74. Commonwealth v. Porn, 196 Mass. 326, 17 L. R. A. (N. S.) 94, 82 N. E. 31. See also cases in Note 73, ut supra.

75. Dent v. West Virginia, 129 U. S. 114.

76. State v. Buswell, 40 Neb. 158, 24 L. R. A. 68, 58 N. W. 728.
Bandel v. Dept. of Health, 193 N. Y. 133, 85 N. E. 1067, 21 L. R. A. (N. S.) 49. McGehee, Due Process of Law, 56.
See also Note 73, ut supra.

The fact that a law may be improperly administered and thus work ill is not to be considered. Nor are the motives or policy which induces such an enactment. But in such a law the qualifications as to learning, character, etc., must be appropriate and sufficient to guard the public against any real danger. And also such a measure must fairly secure or tend to secure the objects sought to be attained by it and must not be patently unreasonable.[77]

It has been insisted that the requirement of a diploma from a reputable medical school as a condition precedent to licensure is unreasonable and in contravention of the Fourteenth Amendment. But clearly this is not the case. For if a board should, in passing on the reputability of a school and the like, through malice or prejudice or dishonesty arbitrarily refuse or revoke a license, the injured party would have his remedy by appropriate proceedings in the courts and the board would be restrained from doing, or compelled to undo the wrong.[78]

If the action of the board is in good faith, its final determination of qualification is not obnoxious to any constituted provision. Due process of law is not necessarily judicial process. A uniform rule and a uniform process for ascertaining and determining qualifications, as prescribed by this act, operate equally on all persons, affording to all persons the right to establish their qualifications before a board. This is due process of law.[79] A statute which gives a physician an opportunity for a rehearing before a tribunal authorized to protect his rights and an appeal to a superior court on both the law and the fact answers every requirement of due process of law.[80]

Again[81] a provision that certain classes should be excepted from the application of the law was argued to be discriminatory as forbidden by the Fourteenth Amendment. It was held,[82] however, that if the conditions surrounding all persons who desired to practice were alike there could be no differences made as to the terms upon which a certificate could be obtained. But often there are differences as to conditions and situations by which it becomes reasonable that greater precautions are required in some cases than in others. In

77. Otis v. Parker, 187 U. S. 606, 608, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168. And see cases generally, Note 73, ut supra.
78. Fox v. Territory, 2 Wash. T. 297, 5 Pac. 603.
79. Fox v. Territory, 2 Wash. T. 297, 5 Pac. 603.
80. Wolf v. The State Board, etc. (Minn.), 123 N. W. 1074.
Craig v. Board of Medical Examiners, etc., 12 Mont. 203, 29 Pac. 532.
81. Pub. Gen. L. Md., Art. 43, Title Health, Subtitle Practitioners of Medicine, Sec. 61.
82. Scholle v. State, 90 Md. 729, 46 Atl. 326.

such cases, classes may be formed and certificates may be granted to some without examination while others may be altogether exempted from the burdens of being registered. But these classes must be created upon considerations that are promotive only of the public interest. If they are so created they do not constitute an unlawful discrimination and do not impair the equal rights which all can claim in the enforcement of the law.

It is undoubtedly true, as stated by Judge Cooley, that a proper exercise of the police power cannot come in conflict with the national jurisdiction. Still, the ultimate test of propriety must be found in the limitations of the Fourteenth Amendment, since it operates to hedge in the field of the police power to the extent of preventing the enforcement of statutes in denial of the rights that the amendment protects. This is especially true of statutes tending to deny to persons the right to follow their accustomed vocations in life while the same right is granted to others. The courts are insistent under these circumstances that there must be some substantial basis in reason and justice for the discrimination. In cases where there is room for the presumption that a substantial and just reason furnished the basis for the legislation enacted in the carrying out of a public purpose, then the exercise of the legislative discretion in the establishing of a classification is to be respected.[83]

In the exercise of the police power there must be a considerable discretion vested in the legislature, whereby some people have rights or suffer burdens that others do not. If an objection has any real basis the statute must be condemned by the courts. The statute of a state that deprives any person of his "life, liberty or property without due process of law" cannot be upheld on the theory that it is an exercise of the power of classification.[84]

A statute which prescribes a residence of three years in a given locality as a prerequisite to the practice of medicine is valid hereunder.[85] For it may be conceded that it is often necessary to divide into classes the subjects upon which a law operates. The distinction made in such a case must be reasonable and not arbitrary. It will then justify the application of different rules to the subject thus separated. Now this section makes a distinction recognized in all the affairs of life. The distinction is neither arbitrary nor unreason-

83. Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190.
84. Parks v. State, 159 Ind. 211.
But see
Chenoweth v. State (Colo.), 135 Pac. 771.
85. Iowa Code, Sec. 2579, Public Health.

able. It is in harmony with the common knowledge of the differences existing between physicians having a definite residence and those who have not.[86]

Refusing or revoking a certificate on account of advertising under a false name[87] is not in contravention of the Fourteenth Amendment of the federal constitution. For it is a legitimate exercise of the police power in protecting the public against the deception and fraud practiced by irresponsible and quack doctors to require every physician to have the license of the State Board of Health granted in his own name and to practice or advertise under no other. Due process of law does not necessarily imply judicial proceedings. Orderly proceedings according to established rules which do not violate fundamental right must be observed, but there is no vested right in any particular remedy or form of proceeding. A general law administered in its regular course according to the form of procedure suitable and proper to the nature of the case conformable to the fundamental rules of right and affecting all persons alike is due process of law.[88]

Licensed medical practitioners may be divided into two classes,[89] the basis of the classification being the mode in which the business is carried on, e. g., those who practice in the mode defined by the statute as itinerants and those who follow other methods. And one of these classes may be taxed while the other is not. For it is well settled that the state may prescribe qualifications which persons must possess lawfully to practice medicine and surgery. And further the state may require persons desiring to enter such practice to obtain a license or certificate of proficiency. The method or means by which those qualifications are to be evidenced is very largely if not wholly within the exercise of legislative discretion. A state may also lay an occupation tax on physicians and surgeons or on a fixed class of that profession. Such a tax would be neither arbitrary nor unreasonable and is not objectionable so long as the classification itself is proper.[90]

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86. State v. Bair, 112 Ia. 466, 84 N. W. 532.
87. Medical Practice Act of Ill., Act of 1899, amended in 1901, Sec. 6.
88. People v. Apfelbaum (Ill.), 95 N. E. 995.
    But see
    Chenoweth v. State (Colo.), 135 Pac. 771.
    Graeb v. State (Colo.), 135 Pac. 776.
89. Ch. 176, Laws of South Dakota 1903, Sec. 19.
90. State v. Doran (S. Dak.), 134 N. W. 53.
91. Otis v. Parker, 187 U. S. 606, 609, 47 L. ed. 323, 327.
    But see
    Chenoweth v. State (Colo.), 135 Pac. 771.

As regards the attitude the courts should take in construing these laws generally, Mr. Justice Holmes has said:[91] "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem, to the judges who pass upon it, excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly if at all. Otherwise, a constitution, instead of embodying only relatively fundamental rules of right as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions which by no means are held *semper ubique et ab omnibus*. . . . No court would declare a usury law unconstitutional even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good."

§ 12 (b).—"The Equal Protection of the Law:"—The various Medical Practice Acts have been held generally not to contravene that part of Section 1 of the Fourteenth Amendment of the federal constitutions which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. For the state legislatures have the power to enact laws of this character and the details of such legislation rests primarily within the discretion of the state legislature.[92]

The classifications made in these various medical practice acts is generally considered reasonable. They have been almost uniformly held as not arbitrary or oppressive.[93] Classification is deemed within the legislative power of the state as having a fair relation to the object of such statutes. As usually drawn up these laws within the sphere of their operation affect alike all persons similarly situated.[94]

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92. Dent. v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.
Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644.
Reetz v. Michigan, 188 U. S. 505, 507, 47 L. ed. 563, 565, 23 Sup. Ct. Rep. 390.
Hawker v. New York, 170 U. S. 189, 192, 42 L. ed. 1002, 1004, 18 Sup. Ct. Rep. 573.
Meffert v. Packer, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790.
Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493.
Collins v. Texas, (U. S.) Sup. Ct. Rep. 286.
But see
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

93 Parks v. State, 159 Ind. 211, 59 L. R. A. 190.

94. Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.
Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644.
Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.
Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573.

A person will not be heard to complain of unfair or unjust action on the part of a Board of Examiners when such a contention is based solely on a fancied inequality of a statute. Or which arises only on his individual theory of how the law would be construed by the board if he were to apply for an examination.[95]

There may be excepted from a statute all who were practicing at the passage of the act and the like. Such exceptions are not deemed arbitrary nor as denying the equal protection of the laws. For the object sought to be accomplished by such laws is the protection of the public against incompetent and ignorant practitioners of medicine. Such classifications to be deemed invalid must be obviously arbitrary and must be shown not to rest on some difference which bears a reasonable and just relation to the act—the thing—in respect to which the classification is proposed.[96]

It is fair to assume that those already in the practice, many of whom have grown gray in the service of humanity and the alleviation of suffering have already received that public approbation which is a sufficient guarantee of competency. These practitioners should not be needlessly subjected to the humiliation of an examination while those already in practice who have proven themselves incompetent have been equally stamped with public disapproval. The statute bearing alike upon all individuals of each class is not a discrimination forbidden by the Fourteenth Amendment. It has been frequently adjudged by the Supreme Court of the United States that the Fourteenth Amendment does not restrict the powers of the state when the statute applies equally to all persons in the same class. The state is the judge of the classification.[97]

The regulation of a particular trade or business essential to the public health and safety are within the legislative capacity of the

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94.—*Continued.*
State ex rel. Burroughs v. Webster, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750.
Parks v. State, 159 Ind. 211, 59 L. R. A. 190.
Little v. State, 60 Neb. 749, 51 L. R. A. 717, 84 N. W. 248.
Commonwealth v. Jewell, 199 Mass. 558, 85 N. E. 858.
Scholle v. State, 90 Md. 729, 50 L. R. A. 411, 46 Atl. 326.
Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493.
Collins v. Texas, 32 Sup. Ct. Rep. (U. S.) 286.
But see
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.
95. Dent v. West Virginia, 129 U. S. 114.
Collins v. Texas, 32 Sup. Ct. Rep. (U. S.) 286.
And cases in Note 94, ut supra.
96. Watson v. State, 105 Md. 650, 66 Atl. 635.
97. State v. Call, 121 N. C. 646, 28 S. E. 517.

state in the exercise of its police power. And unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens unnecessarily and arbitrarily they are within the power of the state. The classification of the subjects of such legislation so long as such a classification has a reasonable basis and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law does not deny to the citizen "equal protection of the law." Before a law of this kind can be declared relative of the Fourteenth Amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes the court must be able to say that there is "no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." The selection of these exempted classes is within the legislative power subject only to the restriction that it be not arbitrary or oppressive and apply equally to all persons similarly situated.[98]

The Fourteenth Amendment does prohibit arbitrary discrimination between persons or fixed classes of persons such as that based on color or race or nationality or state citizenship. It does not prohibit reasonable discrimination based on the requirements of the public health or morals. Medical Practice Acts are purely for police purposes designed solely for the promotion of the health of all the people within the state. The distinctions made in such acts by the legislatures are clearly required by circumstances and by the purpose of the act, viz., the health of the people. Such a measure does not break against the Fourteenth Amendment.[99] Moreover there is no precise application of the rule of reasonableness of classification and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things.[100]

The fact for instance, that a statute may require examination in some subject that is not directly useful to a man intending to specialize does not constitute an objectionable inequality. It cannot be seriously urged that an act is arbitrarily discriminatory and oppressive merely because such a person cannot obtain a license to practice this one branch of the science without taking an examination or

98. Watson v. State of Maryland (U.S.), 30 Sup. Ct. Rep. 644.
99. State v. Bohemier, 92 Me. 257, 52 Atl. 643.
City of Fairfield v. Shallenberger, 135 Ia. 615, 113 N. W. 459.
Williams v. Arkansas, 217 U. S. 79.
Parks v. State, 159 Ind. 211, 59 L. R. A. 190, 64 N. E. 862, and cases cited therein.
100. Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283.

otherwise evidencing his qualifications in other subjects for which he has no direct use.

An Iowa statute required all practitioners to be examined in certain given subjects regardless of his particular school. It was held not to be unreasonable to exact from every one who undertook to prevent, to cure or alleviate disease and suffering some knowledge of the nature of disease, its origin, its anatomical and physiological features, its causes and even of the action of drugs.[101]

These laws are not class legislation discriminating against some and favoring others, but within the sphere of their operation they affect alike all persons similarly situated.[102]

§ 13.—Medical Practice Acts and the Ex Post Facto Clause

An *ex post facto* law is said to be one which in its operation makes that criminal which was not so at the time the action was performed. Or, which increases the punishment or in short which in relation to the offense or its consequences alters the situation of any person to his disadvantage.[103]

The federal constitution forbids any state to pass *any bill of attainder, ex post facto law, etc.*[104] This would seem to preclude a state from amending a medical practice act in order to make it conform more nearly to the most advanced standards of civilization. Thus a man admitted to the practice of medicine could not be subjected to what may be termed disciplinary measures for a past offense of such a nature as to negative any trust that may have been reposed in him as far as the public at large are concerned. And this would be the case were it not for the continuing power of regulation which is vested in the state. While a man may have expiated his offense still his having committed such an act may render him unworthy to practice medicine. Now under this continuing power a state may forbid his further practicing, and this is not in the nature of further

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101. State v. Heath, 125 Ia. 585, 101 N. W. 429.
State v. Marble, 72 Ohio St. 21, 70 L. R. A. 835.
O'Neil v. State, 115 Tenn. 427, 3 L. R. A. (N. S.), 762.
Dent v. West Virginia, 129 U. S. 114.

102. Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923.
Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673.
Collins v. Texas, 32 Sup. Ct. Rep. (U. S.) 286.
Contra
Chenoweth v. State (Colo.), 135 Pac. 771.

103. Mr. Justice Lawrence in United States v. Hall, 2 Wash. C. C. 366
Semble
Kring v. Missouri, 107 U. S. 221-8.
Medley Petitioner, 134 U. S. 160-71.

104. Art. 1, Sec. 9 (3), United States Constitution.

punishment but the conviction for the past offense is made evidence of character, and a man thus proven to be of improper morals is forbidden to practice medicine[105] for the purpose of protecting the public against those of ill repute.

But this doctrine is severely criticised by Freund, and his arguments bear no little weight. Mr. Freund admits that the claim to protection grows with the study and preparation required for the successful practice of a profession. So with regard to professional qualifications the same reasons which control in imposing conditions in the first instance may call for further conditions as new modes of treating disease are discovered. But he thinks a statute should if possible be interpreted as not applying to existing practitioners.[106]

A statute of New York in 1893 provided that no person should after conviction of felony attempt to practice medicine on penalty of fine and imprisonment. In the case in question[107] the defendant at the time of the law's enactment was engaged in the practice of medicine. He had been convicted in 1878 of committing an abortion, which constituted a felony, and had been punished therefore by imprisonment. In 1896 he was indicted and convicted of practicing illegally under the statute of 1893 which precluded from the practice of medicine all who might be convicted of a felony. This conviction was sustained in the highest state court.[108] The case was carried to the Federal Supreme Court on the ground that the act thus retroactively construed was an *ex post facto* law. The conviction was again sustained.[109]

The Supreme Court said in Hawker v. New York, that whatever is ordinarily connected with bad character or indicative of it may be prescribed by the legislature as conclusive evidence thereof. Freund thinks that this is open to serious question. He is, however, willing to concede that a state may pass a law under which licenses to practice medicine may be refused to those who have been convicted of

105. Hawker v. The People of New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573.
Reetz v. The People of Michigan, 188 U. S. 505, 23 Sup. Ct. Rep. 390, 47 L. ed. 563.
France v. The State, 57 Ohio 1, 47 N. E. 1041.
Fox v. Territory, 2 Wash. T. 297, 5 Pac. 603.
Per Justice Harlan, Hawker v. People, ut supra, and Freund, Police Power, Para. 545, et sequi, contra.
106. Freund, Police Power, Para. 545.
In re Applications to Admission to Practice, 14 S. D. 429, 85 N. W. 992.
Dent v. West Virginia, 129 U. S. 114.
107. Hawker v. New York, cited Note 105.
108. People v. Hawker, 152 N. Y. 234.
109. Hawker v. New York, 170 U. S. 189.

felony before the enactment of the law. Though how the time of a law's enactment can affect a man's morals one way or the other is a question which he leaves unanswered. The Supreme Court maintains that a previous conviction makes a presumption of bad character and as there can be no conclusive evidence of bad character a strong presumption may be sufficient to exclude from entrance upon a pursuit to which the applicant has no vested right and as to which the burden of proving qualifications may be thrown upon him. "But," says Freund, "it may be argued that conditions are altered after he has become established in his profession. It may be conceded that the acquired right is still subject to regulation, still subject to proof of qualification but the proof must not be made impossible. He may perhaps after previous conviction be required to overthrow the presumption of bad character by proof of unblemished life and good reputation." Now under this statute, Freund claims, he is absolutely debarred from showing what may be the fact that he has reformed. He therefore asserts that the statute is not a proper police regulation since it establishes a conclusive presumption of fact, the necessary effect of which is to take away an acquired right. The statute does not establish the fact. It is submitted as is said in Hawker v. New York, that this is simply applying the doctrine of *res adjudicata*. That is Hawker had been convicted of a criminal abortion. He had been duly adjudged guilty thereof by a jury of his peers. Now this statute is not determining his character. Far from it. His conviction and above all his own act had characterized him. The statute simply says the conviction may be used as evidence—and as conclusive evidence, for the purpose of protecting the public and not in any way as a punishment. Says Freund, further, "It cannot be maintained as establishing a cause of forfeiture since in making the conviction of a felony conclusive evidence of bad character where it was not so before it adds to the punishment after the offense has been expiated and is therefore an *ex post facto* law." True, forbidding a man to practice his profession after becoming more or less proficient therein would seem quite a hardship. And also it would seem that the revocation of a license, apparently because of a crime already expiated, was but additional punishment therefore, and *ex post facto*. But such is not the case. The revocation is not had for the crime heretofore committed, nor is it in any sense a punishment. But the revocation is had for the character of which the crime is evidentiary. That is, a conviction for a crime is made the autoptic proference of character. And thus it may be said that the license is revoked not

to punish the offender but to protect the public. This would seem to be on the theory that justice consists in the removal of all temptation from the individual who has shown himself unable to cope therewith, and thus subserve both moral and economic ends. Proceedings had under such a law are not criminal. The state is simply seeking to ascertain who ought to be permitted to practice medicine or surgery. Criminality arises only when one assumes to practice without having his rights to do so fully established. There is no attempt to punish for a past offense. The law in the most extreme view can only be considered as requiring continuing evidence of one's qualification as a physician. Such a law is not *ex post facto*.[110] Doubtless one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has the power in such cases to make a rule of universal application and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist.[111]

§ 14.—Medical Practice Acts and "The Impairment of the Obligation of Contract"

In some states the local medical societies have been incorporated by law and have been given considerable supervisory power and the like over the profession. But membership in these societies would be insufficient grounds to exempt the members from the application of a law passed under the police power of a state. That is, a charter granted such a society would not constitute a bar to the power of the legislature to further regulate the practice of medicine and the licensing of physicians in the state.[112] Nor would such a statute be an impairment of the obligation of contract in that it might conflict with a grant of corporate power.[1] For if there were such a grant in a charter the state reserves the right to revoke such a grant by subsequent legislation. As no state can alienate its right under the police power to legislate for the public health and general welfare.[1] Hence no one legislature can find the right of subsequent legislatures to guard the safety and morals of the people by appropriate measures, and any measure that would tend in this direction must be null and void and cannot constitute a valid contract.[113]

110. Reetz v. People of Michigan, 188 U. S. 505, 23 Sup. Ct. Rep. 390, 47 L. ed. 563.
111. Hawker v. New York, 170 U. S. 189.
112. State v. Bohemier, 92 Me. 257, 52 Atl. 643.
113. Freund, Police Power, Para. 24, 361, 506, 561, 564, 580.
Thorpe v. Rutland Ry. Co., 27 Vt. 140.
Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659.
Boston Beer Co. v. Massachusetts, 97 U. S. 25.
Stone v. Mississippi, 101 U. S. 814.

§ 15.—Medical Practice Acts and "Autrefois Acquit or Convict"

The federal constitution[114] provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." But such a plea would not act in bar to an indictment, for practicing medicine without a license, which was so drawn as to differ materially, on its face, from the former indictment. That is, the test laid down in such cases is, would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction on the first.[115]

Supposing an indictment be so drawn as to amount to an allegation of a separate offense. And this would be the case when under the statute a physician is charged with practicing medicine without a license. For each treatment given constitutes a violation of the statute and a separate offense.[116] In such a case, therefore, the second indictment would charge the treatment of another person and on a different date. Now the proof necessary for a legal conviction under the first indictment would vary materially from that for the second, that is, the evidence in the one case would not substantiate the charge in the second case. Consequently the plea of being put twice in jeopardy or of *autrefois acquit* would not constitute a bar. And a conviction of practicing medicine in violation of the statute as charged would be sustained.[117]

Again, under "An act to regulate the practice of midwifery," a state board revoked the license of a midwife for improper conduct. But the order of revocation was rescinded owing to numerous "errata" appearing on the face of the proceedings. Subsequently the license was again revoked on the same charge after proper proceedings were had. It was contended that the board was without jurisdiction to entertain the second charge because a person cannot be tried, convicted and punished twice for the same offense. To support this it was argued that the board by rescinding its first order merely restored the license but did not negative the penalty of suspension. And hence by the subsequent revocation the defendant was being penalized twice for the same offense and in violation of the federal constitution. This position, however, the court refused to sustain.

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114. United States Constitution, Amend. V.; S. C. 1, 17; N. J. 1, 10; Cal. 1, 13; Ill. 2, 10; N. Y. 1, 6.

115. State v. Van Buren (S. C.), 68 S. E. 568.
Frascella v. Board of Medical Examiners (N. J.), 79 Atl. 1063.

116. State v. Van Buren (S. C.), 68 S. E. 568.

117. State v. Van Buren (S. C.), 68 S. E. 568.

The fact that the license was revoked a second time, but strengthened the case against the midwife. Moreover the provision for licensing these practitioners and for the taking away of such licenses for a violation of the law are police measures for the public safety. And therefore it would be objectionable to apply thereto the highly technical common law rules which should be deemed relative only to the criminal code. If the first proceedings had been set aside on certiorari, or a like action, such procedure being judicial would have precluded the charge from being preferred a second time.[118]

Thus it may be said that plea of former acquittal will not be sustained when substantially a different offense is charged, nor in proceedings by a state board under a statute to enforce a police measure for the public safety.

§ 16.—Medical Practice Acts and the So-Called "Schools of Medicine"

Some medical practitioners attempt to divide themselves into different groups or schools of medicine. And these artificial groups are variously dealt with in the several states. In some by definition or judicial interpretation of the term "Practice of Medicine" the statute is construed to apply to all or nearly all of these schools. Again in other states only a few or none are deemed to come within the meaning of the law. But wherever they have been dealt with so as to restrain them to any considerable degree a question has arisen as to the constitutionality of such laws.

(a) *Eclectics.*—In animadverting against these laws it is generally asserted that the legislature is without authority to constitute as a misdemeanor the pursuit of any legitimate and proper calling. But in regulating the practice of medicine it is not the pursuit of the calling which is prohibited and made criminal but it is the pursuit of the same by unauthorized persons.[119] In so legislating no attempt is made to deal with any school of medicine such as the eclectics and to discriminate against it. The fact that in some particular instance a board should have improperly rejected an application made it for the issuing of a certificate to practice might possibly give rise in case of abuse to a right of action for the correction thereof. But the possibility of such misconduct would certainly not go to the extent of rendering unconstitutional the law under which the board was created. There is no constitutional right given to any particular persons, who,

118. Frascella v. Board of Medical Examiners (N. J.), 79 Atl. 1063.
119. Allopathic State Board v. Fowler, 50 La. Ann. 1358, 24 So. 809.

entertaining peculiar theories of medicine, group themselves together and call themselves a special school of medicine under a selected name, to be recognized and dealt with as such. Whenever the pursuit of any particular occupation or profession requires for the protection of the lives or health of the general public, skill, knowledge and other personal attributes, or characteristics in the person pursuing it, the General Assembly has the power and authority to have recourse to proper measures to ensure that none but persons possessing these qualifications should pursue it. A statute to that effect is not open to attack as depriving citizens of their right to earn a living. The right to practice medicine is not an absolute right but a right or privilege to be exercised under conditions and limitations regulated by legislative authority.[120]

(b) *Osteopaths.*—A Texas statute declares that "any person shall be regarded as practicing medicine within the meaning of this act . . . who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof, and charge therefore, directly or indirectly, money or other compensation."[121] And by a subsequent section of the same act it is provided that nothing is to be construed to discriminate against any particular system, and it is not to apply to nurses, masseurs, etc. It was insisted that to construe this law so as to apply to osteopaths would render the same unconstitutional.[122] But the court held that such a construction inflicted no wrong on this school of medicine contrary to the Fourteenth Amendment of the Constitution of the United States. Nor was the definition of the practice of medicine in Section 13 arbitrary or irrational. Whatever may be the osteopathic dislike of medicines, neither the school nor any member of it would suffer any constitutional wrong by calling their colleges medical schools in such acts for the purpose of showing that it satisfies the statutory requirements. And generally speaking it is plain that such practitioners may be made amenable to these laws. For a state may constitutionally prescribe conditions to such practice as may be considered necessary or useful to secure competence in those who follow it. An osteopath undertakes to be something more than a nurse or a masseur, consequently the considerations which justify including him likewise justify the exclusion of the lower grades.[123]

120. Allopathic State Board, etc. v. Fowler, 50 La. Ann. 1358.
121. Statutes of 1907, Texas, Ch. 123, Sec. 13.
122. Collins v. Texas, 32 Sup. Ct. Rep. 286 (U. S.).
123. Collins v. Texas, 32 Sup. Ct. Rep. (U. S.) 286.

(c) *Chiropractors.*—Any similar language to that found in the Iowa Medical Practice Act[124] may generally be construed to include those practitioners termed chiropractors and may be taken as constitutional.[125] If the theory of this school is as valuable and of as much consequence to the world as is contended it would seem that the study such as medical practice acts often require of anatomy, physiology, general chemistry, pathology, surgery, and obstetrics would not be objectionable. Surely the requirement that every one who proposes to devote himself to the prevention, cure or alleviation of disease and pain shall possess some knowledge of the nature of disease, its origin, its anatomical and physiological features, its causative relation and of the preparation and action of drugs ought not to be denounced as exacting or unreasonable. Indeed without such preparation one might entertain a suspicion that the proposed healer was acting selfishly and not from an intelligent conviction that his method was preferable to others. All a state insists on in such cases is qualification, and when possessed of this and armed with a certificate so evidencing and deeply recorded the practitioner may follow any system of healing he may choose. A law simply going this length and which is construed to apply to chiropractors cannot be taken to contravene any of those principles which underlie the organic acts of the several states or the United States.[126]

(d) *Suggestive Therapeutics.*—Chapter 344, Laws of 1907, New York, required the licensing and registration of all persons prior to the commencement of the practice of medicine. This language was held to apply to a practitioner of "suggestive therapeutics." That is practicing "suggestive therapeutics" was said to be the practice of medicine and consequently a member of that school would be amenable to the law. This was said to deprive a person of the legal right to carry on a proper business and hence would be unconstitutional.[127] It would seem that no discussion is needed to show that a legislature has the right to enact such provisions and that these are not violative of any constitutional provision even when made to apply to the school of "suggestive therapeutics." A patient may often suffer as well from a failure to prescribe proper remedies or afford surgical relief promptly as from making improper prescriptions or performing unskillful opera-

124. Ch. 17, Title 12, Iowa Code, Secs. 2579, 2580.
125. State v. Corwin (Ia.), 131 N. W. 659.
State v. Miller (Ia.), 124 N. W. 167.
Green v. Hodges (Kan.), 138 Pac. 605.
126. State v. Corwin (Ia.), 131 N. W. 659.
127. People v. Mulford, 125 N. Y. Supp. 680.
Smith v. People (Ala.), 63 So. 28.

tions. A physician who holds himself out to treat patients for physical ills should know whether to do anything and what to do to relieve his patients. Otherwise he should not be permitted to practice, and impose upon the unfortunate poor. Many of these need the protection of the state against quacks both in and out of the profession of medicine. It would seem that no sympathy should be expended on this class of practitioners who seek to remain outside of the control of the state for the welfare of the people. Such measures are undoubtedly constitutional.[128]

(e) *Magnetic Healing.*—In construing and passing on the constitutionality of the Indiana Medical Practice Act as applied to the school of magnetic healing[129] the court did not think that any question as to the authority of the legislature to discriminate against a particular school of practitioners was involved. The court was not judicially advised that magnetic healing so-called, is so far based on such a degree of co-ordinated arranged and systematized knowledge that it can be termed a science. Nor does it seem that any considerable degree of instruction is a prerequisite to its prosecution as it is actually practiced by those whose knowledge does not go beyond the manifestation of the phenomena of magnetism. It may have been the judgment of the legislature, in its implied exclusion of any member of this school, that both the limitations of value that the treatment possessed and the dangers attending it, made it wise to confine its use to a body of men in whose hands it would be safer to intrust it, because of their education in subjects relevant to its administration.

A legislature in judging of matters of this kind is authorized to give heed to the opinions of scientific men and presuming that this be done, sufficient reason may doubtless be found for the exclusion of any member of a sect or the sect itself. While magnetic healing may be based on some elements of ascertained knowledge yet there is a sufficient element of danger attendant thereon so as to justify a legislature in taking it out of the hands of empirics. It may be said that a statute which goes no further than to establish a standard which may be attained by reasonable application and in which the means has an appropriate relation to the end, is neither an arbitrary nor unreasonable deprivation of a right. Nor is a classification which excludes empirics and the like from the practice of medicine unreasonable or arbitrary.[130]

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128. Dent v. West Virginia, 129 U. S. 114.
People v. Mulford, 125 N. Y. Supp. 680.
129. Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190.
130. Parks v. State, 159 Ind. 211.

(f) *Healers.*—In nearly all the state constitutions and in the federal constitution there is a provision of some sort separating church and state and amounting to a guarantee of religious freedom. As a further protection and since many schools of medicine are inseparably associated with religion in one guise or another many medical practice acts exempt the adherents of a religious tenet or belief from the general application of the law. The Colorado Act[131] defines the practice of medicine as exercising the healing art commercially. Thus any one who professes to cure the sick under any system and charges therefore is practicing medicine within the meaning of the law. A healer was indicted and convicted under this law. The point was made that this law interfered with the free exercise of a religious belief. But in such cases it is not the religious tenets that are in controversy but the manner in which the business is conducted. The statute lays hands on commercial healing as a money-making occupation, business or profession, regardless of the method of treatment or the curative agency employed. As a protection to the public health the statute requires those engaged in the business of curing the sick to possess certain qualifications. It is not concerned with the school, sect or system of healing or the method of treatment. One form of examination is required of all sorts of healers. All applicants must show themselves to be firmly grounded in the fundamentals before they can be licensed to follow the business of curing the sick. In this there is no discrimination, partiality or monopoly as prohibited by the constitution. There is discrimination but it goes to the degree of learning and not to the school, sect, system or creed. Such laws do not interfere with the free exercise of religion or worship. Now this interpretation of the law does not justify healing commercially for hire under the cover of a religious exercise. Religion cannot be used as a shield to cover a business undertaking. Again it is not essential that the practice of medicine be considered from the commercial point of view alone. A legislature under the police powers of a state may fix on any thing that will reasonably tend to preserve and promote the health, safety and morals of the people, and make it the criterion for determining whether or not a person is practicing medicine. Thus a statute may declare that professing to heal or the use of certain titles constitutes practicing medicine. And it is submitted that such a law would not be interfering with the free exercise of a religion. For so long as the law be complied with as far as the preventable

131. Ch. 144 Mills Ann. Stat. Colo., Sec. 6856.

infectious and contagious diseases are concerned it matters not what system of healing may otherwise be employed. The idea in these laws would seem to be twofold: To prevent the spread of contagious diseases, and the like: and to prevent impositions on the credulous by empirics and frauds. Any law tending in this direction is not an interference with a religious belief but is an agent for the gradual uplift of the whole social fabric and therefore constitutional.[132]

(g) *Christian Science.*—It has come to be the practice of the followers of this faith or school to wage war against any attempt to enact a law that might in any way impinge upon their religious beliefs. As a consequence it has been necessary to so amend any proposed practice act as to exempt such practitioners from their application. This would seem essential if a state should desire to pursue such a policy. For under the broad language of most statutes such sects may well be included within the language "practice of medicine," and without any violation of any constitutional provision for the purpose of guaranteeing religious freedom and the like.[133]

The right of freedom of religious beliefs and worship is purely personal and individual. No one shall be affected in the exercise of his beliefs and faith in the Divine being so long as the beliefs of the church and the exercise thereof do not jeopardize others and non-believers. The field of personal opinion is inviolable. The church and state must be independent. The inviolability of the freedom of religious profession and worship must, however, in no wise impair or menace the safety of the state or the security of its people in their health. And this is the criterion in all such matters[134]

The fact remains that there are people who believe that the divine power may be invoked to heal the sick and that faith is all that is required. There are others who believe that the Creator has supplied the earth, nature's storehouse, with everything that man may want for his support and maintenance, including the restoration and preservation of his health, and that he is left to work out his own salvation under fixed natural laws. There are still others who believe that Christianity and science go hand in hand, both proceeding from the

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132. Smith v. People (Colo.), 117 Pac. 612.

133. Davis v. Beason, 133 U. S. 333.
Dent v. West Virginia, 129 U. S. 114.
People v. Mulford, 125 N. Y. Supp. 680.
In re First Church of Christ Scientist, 6 Pa. Dist. Rep. 745.
People v. Pierson, 176 N. Y. 201.

134. Opinion of Freschi, C. M., New York v. Cole, City Magistrate's Court of the City of New York, First Division, Second District, Feb. 11, 1911; aff'd People v. Cole (N. Y.) 148 N. Y. Supp. 708.

Creator, and that science is but the agent of the Almighty through which He accomplishes results, and that both science and divine power may be invoked together to restore diseased and suffering humanity.[135] In all this no limitation is placed upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. Be all this as it may, it is submitted that a person can no more endanger the health and safety of a state in carrying out his peculiar ideas as to sickness and diseases than another can corrupt the morals of a community by polygamous practices under the guise of a religious belief. Both such individuals are amenable to the laws of the state. In all matters of health and morals the state is supreme. The maxim *"Sic utere tuo ut alienum non laedas,"* is the level by which all such affairs may best be adjusted. And it is precisely here that it would seem the Supreme Court of Rhode Island fell into error.[136]

The "Great Physician" in advocating the efficacy of prayer and faith did not deny the existence of disease and death as we understand such things. The Supreme Court of Rhode Island should have borne this in mind.[137]

Religious belief is no excuse for an unlawful act. No person under the guise of the practice of the principles and tenets of any church may violate the law of the land.[138]

Suppose one believed that human sacrifices were a necessary part of religious worship. Would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying out her belief merely because of the sacred rights of individual liberty? To permit this would be to make the professed doctrines of religious belief superior to the law of the land and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[139]

Moreover to permit this would be contrary to the federal constitution itself which provides that the constitution, the treaties made pursuant thereto, and the laws of Congress shall be the supreme law of

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135. People v. Pierson, 176 N. Y. 201.
136. People v. Mylod, 20 R. I. 632.
137. Ex parte Bohannon (Cal.), 111 Pac. 1039.
138. United States v. Reynolds, 98 U. S. 145.
Dent v. West Virginia, 129 U. S. 114.
139. United States v. Reynolds, 98 U. S. 145-166.

the land.[140] And each state constitution together with the laws of the several legislatures established thereunder are paramount within each of those jurisdiction. It has been proven unwise to exempt corporations and the like from taxation.

In 1279, under Edward III, the statute of mortmain was enacted to restrain the powerful religious corporations and to compel them to bear their just share of the taxes. Our nation was founded on the principle of "equal rights to all and special privilege to none." These points should be given due consideration in those states in which either the courts or the legislatures are granting exemptions and privileges to one of the greatest money making corporations of the day. The Christian Scientist has the right to believe that he can heal by prayers. But in soliciting patients by advertisements and in practicing for hire he is exceeding any prerogative which may be reserved him under a constitution. He must subordinate his beliefs to the rights of the community and of the state as an entity. No law is in contravention of any constitutional guaranty which inhibits such sects from jeopardizing the health and well-being of the community at large. *"Salus populi est suprema lex."*

Part II.—Under State Constitutions

§ 17.—Medical Practice Acts Under State Constitutions

The legislatures under some state constitutions are expressly empowered to enact laws, prescribing qualifications affecting practitioners of medicine, or in some way to benefit the public health.[141]

But irrespective of these express constitutional provisions the general police power vested in a legislature is sufficient for the enactment of these medical practice acts.[142] And these laws have generally been upheld under the several state constitutions as they have under the federal constitution.

However, there are one or two jurisdictions which would seem to deny the validity of these laws. Among these are Kentucky and North Carolina.

1. Medical Practice Acts Invalid. Minority View

The charter of the North Carolina State Medical Society was amended[143] by defining the practice of medicine and surgery to be the management "for a fee or reward of any case of disease physical

140. Art. 6, Ch. 2, United States Constitution.
141. La. 178; Tex. 16, 21; Wash. 20, 2; S. C. 8, 10; Del. 12, 1.
142. Logan v. State (Texas) 5 Tex. App. 306.
143. Acts of North Carolina for 1903.

or mental, real or imaginary, with or without drugs, surgical operations, surgical or mechanical appliances, or by any other method whatsoever." The Supreme Court of North Carolina held this act to be unconstitutional[144] on the ground that it was class legislation. The court construed the section, cited "ut supra," in accordance with whether or no a fee was charged, as having two meanings, and then asked where was the protection to the public if such a treatment is valid when done without a fee or reward. It was argued further that in forbidding all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method for a fee or reward except by a regularly licensed physician under the law the legislature attempted to confer a monopoly on those so licensed. And this the court said was forbidden by the constitution. Nor would an examination of the character of those using methods of treatment not requiring much skill and learning be warranted by any legitimate exercise of the police power. The court did recognize that the medical profession is one requiring the highest skill and learning and that the public are entitled to know that those holding themselves out as members of the profession are competent and duly licensed as such, but went no further. In taking this position it evidently escaped the court's attention that the "practice of medicine" as defined by this law was to create and maintain a uniform standard. For by it any who desired to practice for a fee must be licensed after having complied with identical requirements. Thus the incompetents and the mass of the unscrupulous and fraudulent would be precluded from practicing, at least openly. Not only because of their failure to qualify but because they could not charge a fee legally. To this extent, then, the public would be benefited. The point as to the fee was inserted simply to facilitate prosecutions for violations of the law. It did not create two classes because those who had not qualified would not practice gratuitously.[145]

2. Medical Practice Acts Are Valid Under the Several State Constitutions

This case with one or two others are to all practical purposes pariahs since they run directly counter to the mass of well-considered opinions which uphold apparently analogous laws.[146]

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144. State v. Biggs, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139.
145. Smith v. State (Ala.), 63 So. 28.
146. State v. Vandersluis, 42 Minn. 129, 43 N. W. 789.
State v. Carey, 4 Wash. 424, 30 Pac. 729.
People v. Reetz, 127 Mich. 87, 86 N. W. 396.
Webster v. State Board of Health, 130 Ky. 191, 113 S. W. 415.

That the legislature may prescribe such reasonable conditions on the right to practice medicine as will exclude those who are unfitted is so well settled by decisions of the courts as to be no longer an open question.[147] In such an exercise of power the legislature may require as a condition of the right to practice that each applicant shall procure a license. It may designate some officer or board to issue the license and to determine whether an applicant possesses the qualifications required to entitle him to it. The requisite qualifications may be prescribed and a means of ascertaining whether or no an applicant possesses them may be designated. It is for the legislature and not for the courts to determine these things.[148]

3. Legislatures Are Limited by the Rule of Reason

It would seem that the only limit to the legislative power in prescribing these conditions to the right to practice a given profession is that they shall be reasonable. And as to this the courts must judge. Reasonable does not mean expedient. Nor does the term connote such as a court might impose were it called on to prescribe the conditions. Nor yet need they be the wisest and best that might be adopted. But reasonable when applied to these conditions would seem to mean that these must be fit and appropriate to the end in view, to wit: the protection of the public. And they must be manifestly adopted in good faith for that purpose. For, if a condition should be clearly arbitrary and capricious, and especially if it appeared that it must have been adopted for some other purpose; such for instance as to benefit or favor some person or class of persons—then it would most certainly not be reasonable. Such would be beyond the power of the legislature to impose and would therefore be unconstitutional.[149] It is submitted that a great deal of the so-called sect legislation, that is, the legislation favoring the alleged different schools of medicine, might very well be held unconstitutional on this same principle. For it would seem unfair to enact a law requiring the so-called "regular" to comply with the highest educational tests in order to practice medicine and yet have other laws under which others, seemingly less fitted from a scientific point of view, may reap identical benefits and at less cost to themselves in every way.

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147. State v. Vandersluis, 42 Minn. 129.
Chenoweth v. State (Colo.), 135 Pac. 771.
148. State v. Vandersluis, 42 Minn. 129.
State v. Carey, 4 Wash. 424.
People v. Reetz, 127 Mich. 87.
149. State v. Vanderlius, 42 Minn. 129.
Smith v. State (Ala.), 63 So. 28.

§ 18.—The Titles of Medical Practice Acts Under Various State Constitutions

1. Nearly all the states have in one form or another some provision in their constitutions respecting the titles of the various laws.[150] The general purport of such limitations is that only one subject may be expressed in a title, and that the subject matter must be clearly set forth plainly showing the contents of the Act.

The courts have been fairly liberal in construing medical practice acts and have usually held their titles sufficient. The practice of medicine being a broad field, a court has considerable room for interpretation and may thus reconcile subjects apparently not germane to the supposed purport of a law. For such a law a title need not be complex, simple language is quite sufficient, and will usually be held to carry with it the general subject matter of a medical practice act.[151]

2. *Itinerant Vendors.*—Many statutes require itinerant physicians and vendors of drugs to secure a license prior to carrying on their trade, or some regulation of this nature.[152]

Such a provision falls clearly within the police power of a state. If the subject of the act be expressed in the title in general terms it is sufficient. The right to prescribe medicines for the cure of diseases and to administer them falls clearly within the practice of medicine. And the regulation of the sale of drugs and nostrums by itinerant vendors as clearly falls within the purpose of such an act as expressed in its title.[153]

It can hardly be denied that if the general purpose of an act is to protect the public from unskilled and incompetent practitioners a provision relating to itinerant vendors of drugs would not be germane thereto. These vendors who undertake to prescribe and effect cures with the nostrums which they sell are in the same category with persons who without having had their qualifications tested undertake to treat disease by the use of compounds sold by others. Most titles are sufficiently broad to include both.[154]

3. *Penalties.*—Generally these need not be expressed in a title. And this is particularly true in regard to an act regulating the practice of medicine. For the very fact that the legislation as expressed in the

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150. Ala. 45; Cal. 4, 24; Colo. 5, 21; Del. 2, 16; Fla. 3, 16; Ga. 3, 7, 8; Ida. 3, 16; Ill. 4, 13; Ind. 4, 19; Iowa 3, 29; Kan. 2, 16; Ky. 51; La. 31; Mich. 4, 20; N. J. 4, 7, 4; Ore. 4, 20; Wyo. 3, 24.
151. Harding v. People, 10 Colo. 387, 15 Pac. 727.
152. Sec. 11, Illinois Medical Practice Act, 1887.
Act No. 49, Louisiana Medical Practice Act, 1894.
153. People v. Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923.
154. State v. Lee, 106 La. 400, 31 So. 14.

title is the examination and licensing of physicians and surgeons would be sufficient to carry with it the idea that the consequences of practicing without complying with the act were also provided therein.[155]

A title containing sixty-three words is not open to criticism for brevity or vagueness. The purpose of an act may very well be indicated in the phrase "to regulate the practice of medicine and surgery." Nothing further is required.[156]

§ 19.—Medical Boards Are Generally Upheld in the States

1. *The Method of Appointing Thereto.*—(a) State Boards of Medical Examiners vested with power to regulate and supervise the practice of medicine are valid alike under both federal and state constitutions. And it matters not as to the method of appointment thereto or as to the personnel of which its membership is composed. It is only necessary that the legislature use reasonable means and that the board act fairly in enforcing the law.

A legislature has the undoubted right to attach as a condition precedent to the privilege or right of any one to practice medicine that he should be subjected before doing so to a prior examination as to his qualifications. It therefore has as a consequence the right to select the particular agencies to which may be delegated the right and duty of testing those qualifications. And a court cannot control the selection of those agencies by the general assembly.[157]

(b) *When Appointed by a Governor.*—Such acts are generally not in contravention of a provision of a state constitution because the governor has been vested with the appointing power as regards the State Board of Medical Examiners. For a legislature may create a new office to be filled by the governor and only limiting him by designating a certain class from which to select the incumbent. And in thus selecting certain schools of medicine from which to choose the members of a board of examiners the legislature is not bestowing a special privilege upon any given class. It is simply using a convenient method to obtain competent examiners. And should it be a special privilege it would not be unconstitutional for the legislature is simply exercising the police powers of a state. And a state may choose its own agents in its own way.[158]

155. Comm. v. Clymer, 217 Pa. 302, 66 Atl. 560.
Act of May 18, Pennsylvania Medical Practice Act, 1893.
156. In re Campbell, 197 Pa. 581, 47 Atl. 860.
Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358.
157. Allopathic Board, etc. v. Fowler, 50 La. Ann. 1358, 24 So. 809.
158. In re Campbell, 197 Pa. 581, 47 Atl. 860.
Green v. Hodges (Kan.), 138 Pac. 605.

(c) *Governor to Nominate Only.*—Nor would a provision similar in its purport render an act unconstitutional or be in itself invalid because apparently in conflict with a particular section of a state constitution. As for instance that the "governor shall nominate and by and with the consent of the senate appoint."[159] For such constitutional provisions do not apply to officers created by statute to be filled as therein otherwise provided.[160]

(d) *Appointed by State Medical Societies.*—It is entirely competent that a state in the exercise of its police power should confer the exclusive power to appoint boards of examiners on certain medical societies. Such a procedure does not exceed the constitution in that corporations may be created by general laws but not by special act.[161]

A provision granting to a certain society the privilege of selecting three members of an examining board is not vesting in such a society a special privilege in a constitutional sense.[162] For such a power to appoint is in the nature of a duty rather than a privilege. It may not be said to constitute a special privilege any more than in the many instances when non-judicial functions are imposed on judicial officers or non-executive functions are cast on the executive or when men by reason of their learning are designated to perform a service to the public. Such measures therefore are not unconstitutional.[163]

And that a given society may choose members of its own society, for the board does not in itself render the law unconstitutional.[164] For a constitution does not require that each school of medicine be represented equally on an examining board. It is not attempted to establish a government that will be administered absolutely free from prejudice. In such cases the restraint of an official oath is the chief safeguard against the exercise of an undue prejudice.[165]

These laws are enacted in the interest of the public health. And as a consequence the mode of creating a board and the like to enforce such laws cannot be too closely defined. A legislature must be allowed some liberty in order that the best men for such a position may be selected.

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159. Art. 4, Sec. 6, Colorado Constitution.
160. Brown v. People, 11 Colo. 109, 17 Pac. 104.
State v. Carey, 4 Wash. 424, 30 Pac. 729.
People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.
161. Ex parte Frazer, 54 Cal. 94.
162. Sec. 5596, Indiana Code, Medical Practice Act.
Art. I, Sec. 23, Indiana Constitution.
163. Ferner v. State, 151 Ind. 249, 51 N. E. 360.
164. Ex parte Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249.
165. Brown v. People, 11 Colo. 109, 17 Pac. 104.

2. *"Unprofessional Conduct." Term Construed.*—Among the several duties devolving upon a board of examiners there is one or perhaps it should be said there are three, which involve the exercise of a peculiar degree of discretion. These are in the refusal to license, and in the suspension or revocation of a license for *unprofessional conduct.*

(a) *In some states this term has been deemed insufficient to support a revocation.* Again in others the words have been defined either by the legislature or by judicial interpretation as sufficient. Now while it may be true that this language has no common law signification yet it would seem that no court is so restricted but what it may in some way place an interpretation on the words that would uphold the provision. As we have said, this some states have done. Others however, have flatly refused to attempt a definition and have held the provision void as being too indefinite.[166]

(b) *It is said such language does not sufficiently advise a physician in advance of what act or acts may be in violation of its provisions.* He is not told what is lawful or unlawful. He might do an act which he regarded as entirely proper which neither violated moral law or involved turpitude. Still such acts might in the opinion of the state board amount to unprofessional conduct, or be calculated as such as would deceive or defraud the public. The board is to have the right after a physician has done some act to determine what its effect is to be. And if in its judgment he should be deprived of the right to practice his profession it can inflict such a punishment upon him. The statute does not advise the physician as to what is unprofessional conduct and yet he is considered as being knowingly or intentionally guilty of it. For these reasons certain jurisdictions have declared the exercise of this power to be invalid.[167]

(c) *But the majority would seem to uphold this and apparently similar language which might likewise be termed indefinite.* Certain expressions have been handed down through the law for centuries and have received such a standard of interpretation and understanding that they no longer are subject to the charge of being indefinite. "Gross immorality" is a term which has been used and has received adjudication at the hands of a great many courts. "Gross" has been taken to mean wilful, flagrant, shameful with respect to the office

166. Matthews v. Murphy, 23 Ky. 750, 63 S. W. 785, 54 L. R. A. 415.
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

167. Matthews v. Murphy, 23 Ky. 750, 63 S. W. 785, 54 L. R. A. 415.

involved. Or as would render a person unfit to hold a license and the authority to act. These expressions "gross immorality," "gross misbehavior," "moral turpitude" and the like, have received a great many interpretations. But they have nearly always been sustained by the court. In but few cases have they been held so indefinite as to preclude action against the person guilty thereof.[168]

(d) *Act Must Be Dishonorable.*—Similar language has been construed as referring to offenses similar in nature to a felony or an abortion. The act must be of such a nature as would deceive or defraud the ignorant and it must be dishonorable.[169]

(e) *Act Should Involve Moral Turpitude or the Like.*—"Grossly immoral and unprofessional conduct" excludes the idea that a license may be revoked for trivial reasons or for a violation of what might be regarded as mere professional ethics. Such language would seem to be co-terminous with "immoral conduct." All such language would seem to import therein an element of moral turpitude or a disregard of the settled ideas or principles of morality. And *unprofessional conduct* should be taken to mean that which is by general opinion considered grossly unprofessional because immoral or dishonorable. It would seem too well settled to admit of discussion that a state may in the exercise of its police power vest in a board the right to revoke the license of a physician who has become disqualified either morally or intellectually.[170]

3. Revocation of a License Not a Judicial Act

(a) *Judicial Powers.*—It is frequently contended that a given medical practice act is repugnant to a state constitution in that judicial powers are conferred on the medical board. Such powers it is maintained belong to the courts alone. It may be conceded that the authority vested in medical boards by these acts includes the power to examine into and decide questions requiring the exercise of judgment. But it does not follow that the exercise of such authority is necessarily the exercise of judicial power. This power to pass upon

168. Rose v. Baxter, reported without comment in 81 Ohio St. 522, 91 N. E. 1138; reported in 7 Nisi Prius (N. S.) 132.

169. Sec. 11, Texas Medical Practice Act, April 17, 1907.
Morse v. State Board, etc. (Tex.), 122 S. W. 446.

170. Aiton v. Board, etc. (Ariz.), 114 Pac. 962.
Meffert v. Board, etc., 66 Kan. 710.
State v. Board, 34 Minn. 391.
People v. Apfelbaum (Ill.), 95 N. E. 995.
But see
Chenoweth v. State (Colo.), 135 Pac. 771.

the qualifications of physicians and applicants who in pursuance with the law come before the board for their several purposes must necessarily be committed to some board or body other than the legislature. It may be characterized as administrative rather than judicial.[171]

(b) *Quasi-Judicial Powers.*—In considering the objection that these acts invest a board with judicial powers there would seem to be a clear misapprehension of the law. The legislature has the right to regulate the practice of those trades and professions requiring particular skill and learning and this would seem incontrovertible. And therefore a statute tending to the preservation of the health of a community is an exercise of this prerogative by the legislature. It is an acknowledged part of that undefined power inherent in a state denominated the police power. Thus a legislature will in the interests of society pass a law to prevent the imposition of quacks, adventurers and charlatans upon the ignorant and credulous. To provide for a proper enforcement thereof the legislature creates a board vesting in it these several powers and duties which partake of both a judicial and administrative nature and may therefore be termed *quasi-judicial.* Such a vesting of power is entirely constitutional.[172]

(c) *"Notice."*—But the right to practice medicine is a valuable right which cannot be taken away without due process of law. This would seem to require notice of the charge and an opportunity to defend. This does not mean procedure must be provided as in a court at law. It simply is an assertion of the principle that no man may be disturbed in the possession of a valuable right no matter how acquired without an opportunity to prove his right to remain in possession and the exercise of such right.[173]

(d) *Revocation by a Court.*—The power to revoke the license or certificate of a physician need not necessarily be vested in the board of examiners. This same power may be vested in any other body as for example a court of proper jurisdiction and regularly established under a constitution of any state.[174]

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171. France v. State, 57 Ohio St. 1, 47 N. E. 1041.

172. State v. Hathaway, 115 Mo. 36, 215 S. W. 1081.
Matthews v. Hedlund (Neb.), 119 N. W. 17.
Smith v. State, etc. (Ia.), 117 N. W. 1116.
State v. Board, 34 Minn. 387.
Meffert v. Packert, 66 Kan. 710, 1 L. R. A. (N. S.) 811.
Kennedy v. Board, 145 Mich. 241, 108 N. W. 730.
State v. McCrary (Ark.), 130 S. W. 544.

173. Smith v. Board (Ia.), 117 N. W. 1116.

174. Ch. 422, Laws of Wisconsin for 1905.
State v. Schaeffer, 113 Wis. 595, 89 N. W. 481.

(e) *Jury Trial.*—A party on trial on a charge of unprofessional conduct is not entitled to a jury as of right. It would seem that trial by jury is guaranteed only on those classes of cases when that right existed at common law. This would apparently preclude the right to such a demand. Moreover in the revocation of a license as for fraud the action is in its nature equitable. Such actions would not seem to require the aid of a jury and would negative the demand therefore as a matter of right.[175]

§ 20.—The Validity of Different Statutory Provisions Under the Several State Constitutions

1. No "School of Medicine" to be Preferred on a Medical Board

In certain states there are constitutional provisions inhibiting any preference being shown by law to any "school of medicine" in the creation of a medical board.[176]

But the creation of medical boards representing certain only of these so-called schools would not controvert such a provision. And the fact that all practitioners must be licensed by some one of these boards irrespective of his own views would not be subversive of this principle. That is, a law which created two or more partisan boards thereby failing to recognize one or more "schools" would not be invalid because the members of the unrecognized "schools" would be forced to apply to a possibly hostile board for licensure.[177]

2. The Power to Pass on the Qualifications of Applicants and Colleges

A statute which vests in a medical board the power to pass alike on the qualifications of applicants and colleges is not extending special privileges and immunities in that it may refuse certificates to graduates of schools not in good standing and grant them to graduates from schools which it has determined to be in good standing.[178]

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175. Gulley v. Territory (Okla.), 91 Pac. 1037.
But see
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

176. Texas Constitution, Sec. 31, Art. 16.
Louisiana Constitution, Sec. 178.
Washington Constitution, Sec. 20, 2.

177. Stone v. State, 48 Tex. Cr. Rep. 114, 86 S. W. 1029.
Smith v. State (Ala.), 63 So. 28.

178. Ch. 17, Title 12, Sec. 2582, Iowa Code; Art. I, Secs. 6, 8, Iowa Const.

A law of this nature is general and uniform in its application. Not that it operates upon every person within a state, but because every person who is brought within the relation and circumstances provided under the law is equally affected thereby. Thus it is general and uniform in its operation upon all persons in like situations. Nor would the law be affected as to its uniformity by the number of persons within the scope of its operations. To this extent then such a law grants no privileges and immunities that do not equally belong to all citizens. It is therefore incorrect to say that a board wherein this power is vested may determine whether or no a medical school is in good standing arbitrarily and without restraint. No law can authorize such an action and to do so would clearly be illegal. All boards must act under the restraints of the law and are required to make a proper inquiry into any matter which may be before them for determination. It is not to be presumed that a board will act arbitrarily and without investigation and then upon that presumption hold the statute conferring the power in question unconstitutional.[179]

3. The Granting of Licenses by a Majority Vote of the Board

In a provision that a medical board of nine members can grant licenses only on the consent of not less than seven members the use of the noun "consent" does not give the board arbitrary and unreasonable power. Such a construction would be highly improper. The spirit and object of the act is to maintain a high standard in the medical profession, thereby protecting the people of the state from quackery. It is within the legislative discretion to require that all or more or less than a majority of its members should participate in the examination and before issuing a certificate affirmatively pass upon the merits of each applicant. The requirement that at least seven of the nine members must concur and approve is a mere declaration of the mode in which a determination must be reached.[180]

4. Time Limit for Registration

The fixing of a time limit for registration is not unwise and unreasonable in that it deprives a citizen of the right to follow a lawful occupation. Such provisions have been repeatedly upheld on

179. Iowa v. Schrader, 87 Iowa 659, 55 N. W. 24.
Ex parte Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249.
State v. Wilcox, 64 Kan. 789, 68 Pac. 634.
State v. Schmidt, 138 Wis. 53, 119 N. W. 647.

180. Ch. 9, Laws of Minnesota, 1887, Sec. 3.
State v. Fleischer, 41 Minn. 69, 42 N. W. 696.

the basis that it is competent for a legislature to regulate the practice of medicine and of chemistry in such a way as will not deprive citizens of the right to follow a lawful avocation. And limiting the term for registration is not open to this objection.[181]

5. Requiring a Diploma or an Examination or Both Not Unreasonable

The requirement that an applicant for a license should either present a diploma or submit to an examination is not unconstitutional in that the provision as to the diploma is neither whimsical, arbitrary or unreasonable. Such a provision is quite germane to a practice act and clearly adaptable to the end in view, to wit, the welfare of society. There is no legal fault with the legislative theory that it is largely impracticable for an applicant to acquire in the first instance suitable skill and technic and adequate professional knowedge by himself or in an office. The line has to be drawn somewhere and so long as it is not chalked out whimsically and arbitrarily at an unreasonable place it is well enough—the legislature having plenary power in such matters.[182]

6. Determination of Requirements

The right to determine what requirements must be met by an applicant is within the exclusive province of the legislature.[183]

7. The Requirement of a License Fee, Etc.

An act is not discriminatory and class legislation which provides for an examination of all applicants on the payment of a fee. Nor is the further requirement of a diploma from some school in good standing, together with satisfactory evidence of the right of the holder to its possession objectionable. Requiring a certain degree of learning and skill as a condition of being allowed to practice is discrimination between those who have and those who have not that degree of learning and skill. Between those who are and those who are not able to acquire it. But the mere fact of discrimination in such a law is no objection to it. If, however, there were discrimination between persons or any matter not pertinent to the legitimate purpose of the law, to wit, to secure fitness and competency in those who shall be permitted to practice, it would be objectionable. Such for example, as discrimination as to birth, color or religious belief.

181. Gosnell v. State, 52 Ark. 228, 12 S. W. 392.
182. State ex rel. Crandall v. McIntosh, 205 Mo. 589, 103 S. W. 1078.
183. State ex rel. Thompson v. Board (Wash.), 93 Pac. 515.

The requirement of a diploma from some college or learned society in order to practice medicine has been inserted in the laws of many states and questioned in but few. The fact of having graduated at and received a diploma from a school or college devoted to teaching the science of medicine and surgery or dentistry bears directly upon the person's qualifications to practice. A legislature might make it the sole test. Such provisions are rigorous, and they should be, to protect the public. There is nothing in provisions of this nature which can be taken as otherwise than an attempt in good faith to benefit the people of any given state.[184]

8. Refusal to Grant Certificate — Its Effect

Neither the refusal to grant a certificate nor the revocation of a certificate to practice medicine has any retroactive operation. Nor do such penalties impose any new or additional punishment or disability for a past act. These statutes have prospective operation only and do not purport to have any retroactive effect.[185]

9. Limitation of Practice

The limiting of the practice of dentistry to dentists *per se* or of medicine and surgery to physicians is not objectionable. Nor is permitting enrolled students to practice under the supervision of a licensed practitioner discriminatory.[186]

10. Forbidding an Unlicensed Person to Advertise in Writing as a Physician

A statute forbidding an unlicensed person to hold himself out as a physician by printing, writing or the like, does not contravene the constitutional provision that, "No law shall be passed to restrain or abridge the liberty of speech or of the press." Such prohibitive features in an act do not go to the rights intended to be secured by the provisions in constitutions as to speaking, writing or publishing one's sentiments or as to abridging or restraining the liberty of the press.[187]

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184. State v. Vandersluis, 42 Minn. 129, 43 N. W. 789.
State ex rel. Thompson v. Board (Wash.), 93 Pac. 515.
State v. Van Doran, 109 N. C. 864, 14 S. E. 32.
Ewbank v. Turner, 134 N. C. 77, 46 S. E. 508.
Ex parte Whitley, 144 Cal. 167, 77 Pac. 879.
In re Roe Chung (N. Mex.), 49 Pac. 952.

185. France v. State, 57 Ohio St. 1, 47 N. E. 1041.

186. State v. Vandersluis, 42 Minn. 129.

187. State v. Blair, 92 Iowa 28, 60 N. W. 486.

11. An Unlicensed Person May Own and Manage a Dentist's Office

To own and run property is a natural right which may be restricted only by reasons of public policy clearly discernible. Nor may the police power of a state be invoked to restrain a business irrespective of its nature, especially when the "health, good order, morals, peace or safety of society" are not injuriously affected thereby. Thus a law requiring examination and licensure by a Dental or Medical Board before one could own or run or manage an office would be invalid and unconstitutional.[188]

This, however, would seem too broad a statement of the law. For it is submitted that it is an easily recognized fact that the moral and physical welfare of the public may be seriously endangered by a person who simply owns and manages a dental office—or a medical office. It is not sufficient that the employees therein be regularly qualified and licensed to do the actual work. Such employees would be too easily influenced by their employer to whom they must look for compensation, to be able to maintain the highest standard which the ethics of any profession demands. A man and particularly a professional man, must be free and untrammelled when it comes to the determination of a question in the course of his work. Such a law is but a step in the direction of the effective regulation of a phase of the medical profession, which is but too greatly given over to the spirit of commercialism. There is thus too much of a resultant "laissez-faire" policy in regard to any effective treatment of that part of society which is subjected to the ministrations of such men. The law it would seem is clearly constitutional.

12. Excepting Physicians Practicing at the Passage of a Given Act

A medical practice act does not create a monopoly or perpetuity in excepting from its requirements physicians who were practicing on or before a given date. Such a distinction is not unreasonable. It is always fair to assume that some of those engaged in the practice of medicine at the time a law is enacted have already received the public approbation. Again there are others who have proven themselves incompetent and have therefore been stamped with the public disapproval. It would be unfair to examine the first class and unnecessary to test the latter as to their mental fitness. Each have classified themselves. And surely the legislature may deem this to be suffi-

188. State v. Brown, 37 Wash. 106, 79 Pac. 638.

cient. At any rate a provision of this nature is but an exercise of the police power. It is in no sense the creation of a monopoly or special privilege. The door to the practice of medicine stands open to all who possess the requisite age and good character. And any applicant who can pass the prescribed examination may enter.[189]

13. Consulting Physicians May be Excepted

A proviso excepting a duly licensed physician of a neighboring state when called into any given state on consultation from the provisions of the law is not an attempt to grant an exclusive privilege to a fixed class.[190]

The comity thus extended to reputable physicians is widely different in its nature from the attempt to grant a monopoly or the like within the meaning of any state constitution to a restriction or prohibitory law inserted through courtesy to sister states upon the assumption that they have provided amply for the protection of the health of their citizens by legislation similar to that of any given state. There is the further safeguard that a locally registered physician alone has the power to extend this courtesy to a non-resident upon whose opinions he may place a high estimate.[191]

14. A "Locus in Quo" as a Determinant of Character

There is a conflict of opinion as to whether or no a provision is constitutional which excepts practitioners from the usual license fee who have pursued their profession for a certain length of time in a given locality. In one jurisdiction this is held to be unjust discrimination in favor of a special class[192] and hence invalid.

The weight of opinion though would seem to be in favor of its validity.[193] Moreover the argument in favor of the validity would seem to be supported by much the better reasoning.

The New Hampshire case asserts that the exemption is made to depend not on integrity, education, and medical skill, but upon a con-

189. State v. Call, 121 N. C. 147, 28 S. E. 517.
State v. Vandersluis, 42 Minn. 129, 43 N. E. 789.
State v. Hathaway, 115 Mo. 36, 215 S. W. 1081.
Ex parte Spinney, 10 Nev. 323.
Freund, Police Power, Para. 711 and note.
Ex parte Whitley, 144 Cal. 167, 77 Pac. 879.
Williams v. People, 121 Ill. 84, 11 N. E. 881.
State v. Doran (S. Dak.), 134 N. W. 53.
190. Art. 1, Sec. 7, North Carolina Constitution.
191. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.
192. State v. Pennoyer, 65 N. H. 113, 5 L. R. A. 709.
193. State v. Bair, 112 Iowa 466, 4 N. W. 532.
State v. Carey, 4 Wash. 424, 30 Pac. 729.

tinuous dwelling in one place for a certain time. This is taken to be an arbitrary discrimination which permits some and forbids others to carry on their business without regard to their competency or to any material difference in their situation. The test is not merit but unchanged residence. This is not the equality of the constitution. The magnitude of the unequal burden is not material. If any unequality is permitted the discrimination might be made prohibitory and a monopoly of the business given to the physicians who have resided in a town or city for a specified time.[194]

The fallacy of such reasoning is patent. In passing on the constitutionality of an act a court may not consider what might be the result of the act. They are concerned only with the actual facts. Again, in construing a statute a court is forced to give the language thereof a favorable interpretation to the end that it may be held valid. These are familiar rules which need no support. Moreover the court would seem to have overlooked a distinction which can be recognized in all the affairs of life. For will any one contend for a moment that, everything else being equal, the permanent resident of a locality is not likely to be superior in capacity and morals to him who has no fixed professional abiding place? That there may be and are exceptions is readily conceded, but the legislature was not forced to adopt an absolutely infallible rule. Again, if within the ordinary experience of men, and as a matter of common operation, physicians of learning, skill, and character, are generally permanently located, and seldom change the places where their profession is followed, as appears to be true, then there is no tenable reason why this circumstance might not be treated by the legislature as evidence of qualification under the statute. The distinction is neither arbitrary nor unreasonable. But it is in harmony with common knowledge of the differences which ordinarily exist between persons following the medical profession who have a permanent *locus in quo* and those who do not.[195]

15. Penalties

As a penalty for a failure on the part of a physician to register in pursuance with the law it is frequently provided therein that he

194. State v. Pennoyer, 65 N. H. 113, 5 L. R. A. 709.

195. Art. 1, Sec. 6, Iowa Constitution.
State v. Bair, 112 Iowa 466, 84 N. W. 532.
Ch. 17, Title 12, Sec. 2579, Iowa Code, Medical Practice Act.
Art. 1, Sec. 12, Washington Constitution.
State v. Carey, 4 Wash. 424, 30 Pac. 729.

may not recover for services rendered his patients. That is, contracts for compensation for such services are void *ab initio*. Nor will a subsequent registration allow a recovery to be had therefore. And such a penalty is not in contravention of any constitutional prohibition against the vesting of exclusive privileges and the like.[196] For such constitutional provisions are manifestly pointed to the prevention of hereditary rank and the privileges of birth. And when an act confers a privilege upon a class or group of men incidentally and indirectly but not as the leading purpose thereof the statute cannot be said to contravene such a constitutional prohibition. Moreover, the motive for such legislation is to guard the public against ignorance, negligence, and carelessness, in the members of a most useful profession. And the means selected in one of these laws are intended to be adapted to that object. The courts all seem of the opinion that the law in question is not repugnant to a Bill of Rights and the like. Nor may the validity of such a measure be impeached on the ground that it is violative of any principle of the constitution.[197]

The mere repeal of a statute containing such a penalty ("ut supra") cannot give a right of action for past services. It needs something more than to remove an impediment. There must be life infused and a course of action created which before did not exist. This is not done by the repeal of a statute and cannot legally and constitutionally be done by a positive enactment even. It is not competent for the legislature even to create an obligation out of a by-gone transaction which at the time of its concurrence all parties understood to be and was strictly gratuitous.[198]

16. Licensing Itinerant Physicians

(a) *By a State.*—A statute which in addition to the ordinary physician's license required itinerant physicians to procure an itinerant license also, for which they were required to pay $500 a year, was said to be laying an occupation tax. This was on the ground that the law did not involve an exercise of the police power. It did not contain anything in regard to special fitness or qualifications for practicing medicine as an itinerant physician. Nor did it pretend to be regulatory of such practice. It was therefore plainly an occupation tax involving only the taxing power of a state and as such would be subject to such provisions of a state constitution as that "all taxa-

196. 6 Art., Bill of Rights, Massachusetts Constitution.
197. Hewitt v. Charier (Mass.), 16 Pick. 350.
198. Warren v. Saxby, 12 Vt. 146.

tion shall be equal and uniform." The court in passing on this case admitted that an occupation tax could be laid on itinerant physicians. It was not asserted that there was anything unreasonable in taxing itinerants *per se* as a class. Such a division of practitioners would be entirely reasonable. But the section was unconstitutional, inasmuch as it did not apply to all itinerants. Only those from without the state were to be taxed. And since an occupation tax must be uniform, that is, apply equally to all those in the same class, the law was to this extent obviously invalid.[199]

It would seem that the learned court fell in error in holding this to be an occupation tax.[199]

For it is submitted that it is quite patent that the law was nothing but an exercise of the police power.[199] The fee of $500 was a prohibitory one. It was applied to those from a foreign state only, just as a state may refuse to permit any non-resident physician to practice within its jurisdiction if it so desire. It was simply by way of forbidding non-resident itinerants to enter the confines of the state. A direct prohibition may just as well have been used. Clearly a state can distinguish between resident and non-resident itinerants. For all itinerants are now recognized to be a class of undesirables. The legislature would seem to have been taking a step toward absolute prohibition of the occupation. Such laws are clearly an exercise of the police power. It is therefore submitted that the reasoning of the court is fallacious and that the law is constitutional.[199]

In Illinois a law regulating itinerants was declared unconstitutional on a different ground. It was because it created a monopoly.[200] Here too, there would seem to be error. And it is submitted that the court did not discover the true purport of the law. The Illinois statute required itinerant vendors of drugs to pay a fee of $100 a month. This, the majority held to be objectionable in that it gave the druggists of the state a monopoly in the business. Very true, but the object of the law was to prohibit itinerants from carrying on their trade and in some measure to control the patent medicine business. It would seem that the legislature considered pharmacists more fitting to conduct this business than itinerants. And it would seem that a legislature in making such a distinction would be quite within its power. Such a distinction would appear to be entirely reasonable. The law should be held constitutional.[201]

199. State v. Doran (S. Dak.), 134 N. W. 53.
Freund, Police Power, Para. 37, 288, 289, 732.
200. People v. Wilson, 249 Ill. 195.
201. Minority opinion People v. Wilson, 249 Ill. 195.
Sec. 8, Illinois Medical Practice Act of 1899.
Freund, Police Power, Para. 37 and note, 39, 133.

(b) *By a Municipality.*—A state may confer upon a city or town the power to ordain its local police regulations.[202] For clearly what the state may do in its sovereign capacity it may authorize its creatures to do. And a state is not prohibited therefrom by the fact that its power is granted to it from the people who have not also granted a power to delegate such authority. This right would seem inherent in a state. Thus there can be no doubt of a state's power to delegate to a municipal corporation the authority to regulate such matters as shall be deemed reasonably necessary for the protection of the public in the particular locality. And hence since a state may regulate the practice of medicine it may delegate the same power to municipalities to be exercised within their boundaries. Nor would a city ordinance necessarily conflict with a state law. There need be no inconsistency and both could be enforced at the same time. Therefore a city ordinance requiring traveling physicians to pay a license fee in addition to that required by the state would be valid and constitutional.[203]

17. Public Profession to Cure Evidence of a Statutory Violation

In defining the practice of medicine as the public profession of the ability to cure or heal, a statute is simply shifting the burden of proof. That is, the public profession is taken as sufficient evidence of the violation of the statute, thereby waiving the necessity of charging and proving an overt act. And such a change is valid and within the legislative power.[204]

18. Proof as to the Existence of a Physician's License

The contention that the taking of a record in a county clerk's office and making it "prima facie" evidence as to the existence of a physician's license is illogical and arbitrary would seem to be without foundation. For the difficulty of proving or disproving the existence of a license is frequently so great that an arbitrary rule of this nature is oftentimes of the greatest benefit. A state may under its police power declare the character of proof necessary to constitute "prima facie" evidence. This simply shifts the burden of proof and is subject to rebuttal.[205]

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202. Sec. 700, 2581, Iowa Code.
203. City of Fairfield v. Shallenberger, 135 Iowa 615, 113 N. W. 459.
But see, Noel v. State, 187 Ill. 587, and People v. Wilson, 249 Ill. 195, as to the creation of monopolies.
204. State v. Heath, 125 Iowa 585, 101 N. W. 429.
State v. Wilhite, 132 Iowa 226, 109 N. W. 730.
205. State v. Lawson, 40 Wash. 455, 82 Pac. 750.

19. Enforcing a Penalty in an Action for Debt

To have a civil action eventuate in a judgment in a criminal case is no objection. That is, a statutory provision requiring the recovery of a penalty in an action for debt which is converted into a fine in proceedings to enforce its collection would not render the law invalid. These laws fall within the police power of a state and its discretion in such matters is extremely broad.[206]

20. Medical Practice Act of a Territory on Its Admission Into the Union

Territorial laws in force at the time when such territory is admitted into the Union as a state are not necessarily continued in force. It would seem to require an especial provision either in the organic law of the state or in the statutory enactments thereunder to adopt the laws of the defunct territory as *per se* a part of the municipal laws of the state.[207]

21. Substituting a Bill in a Legislature

A bill introduced as a substitute for a medical practice act in a favorable report by the committee to whom the first measure had been referred need not be considered as an original bill. Consequently it would not be necessary that such substitute be read three times on different days and once in full as is required for an original bill.[208]

22. Amending a Medical Practice Act

In amending one of these laws it is frequently essential under a constitution to do so by either setting forth the entire act or simply the amended section. In such cases it would be clearly improper to refer to the amended act by the title of the act only.[209]

23. When to Plead the Constitutionality of a Medical Practice Act

In contesting the constitutional validity of one of these laws it is essential that parties concerned therein should tender that issue in the trial court. For such a point cannot be raised on appeal for the

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206. In re Roe Chung (N. Mex.), 49 Pac. 952.
207. State v. Harmon (Okla.), 104 Pac. 370.
Art. 5, Sec. 39, Oklahoma Constitution.
Ch. 70a, Art. 1, Okla. Sess. L. 1909, p. 701a.
208. Allopathic Board v. Fowler, 50 La. Ann. 1358.
209. Washington Medical Practice Act, 1890 and the amendatory Act of 1901. State v. Lawson, 40 Wash. 455, 82 Pac. 750.

first time as a matter of right. When properly raised below new special grounds cannot be urged for the first time on appeal, particularly when an examination of evidence would be needed in the decision thereof.[210]

24. When One Medical Practice Act Repeals Another

A statute passed subsequently to a prior one and either apparently in conflict therewith or by its express language a revision thereof, will be taken to repeal the earlier law and be held as evidentiary of the legislative intent therein. Such a law will not under such circumstances be held unconstitutional.[211]

25. Construing a Statute to Include Midwives Not Unconstitutional

The use of instruments for delivery and various prescriptions as "for vaginal douche, post-partum hemorrhage," and the like, by a midwife has been held to fall within the meaning of a statutory definition of the practice of medicine. But such a construction would not render the act invalid. The position is to be supported on the ground that the maintenance of a high standard of professional qualifications for physicians is of vital concern to the public health. And reasonable regulations to this end cannot contravene any provision of a state constitution. And thus holding a midwife to be practicing medicine is but a step in this same general direction and would clearly not invalidate a medical practice act.[212]

§ 21.—Statutory Constructions as to the Several So-Called Schools and the Validity Thereof

1. *Osteopathy.*—The positions taken by the courts of Ohio and Texas in construing their laws: In State v. Liffring[213] and State v. Gravett[214] is to be found the position of the Supreme Court of Ohio on osteopathy. In the first case osteopathy was held not to be the practice of medicine. But the statute in question was considered objectionable because of its phraseology. It seemed that the legislature was attempting to determine a question of science and thereby to control the personal conduct of the citizen without regard to his

210. Allopathic Board v. Fowler, 50 La. Ann. 1358.
211. Oregon Medical Practice Act, 1895.
In re Ferdon (Ore.), 57 Pac. 376.
212. Ch. 76, Mass. Stat., Sec. 3.
Comm. v. Porn, 196 Mass. 326, 8 N. E. 31.
213. 61 Ohio St. 39, 55 N. E. 168, 46 L. R. A. 344, 76 Am. St. Rep. 358.
214. 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791.

opinions. Such legislation was thought to be an astonishing denial of the commonly accepted views touching the right to personal opinion and conduct which does not invade the rights of others. The second case to a certain extent discredited State v. Liffring. It would seem at least to show an attempt on the part of the court to get away from the doctrine of the earlier decision. For it was held not to apply in the second case. Nevertheless, the proviso to the statute in question was held void because of unjust discrimination.[215]

The statute required an osteopath to take a four year course in a medical school in good standing before he would be permitted to take an examination in anatomy, physiology, chemistry, and physical diagnosis. And he was to be given but a limited certificate, while the applicant for an unlimited certificate was admitted to a much more extensive examination without being required to prove attendance at a regular medical school. It was said that the object of this proviso was not any consideration for the public health. It was nothing but an unreasonable distinction. Hence the section in question was invalid. The case might very well have been decided to the contrary. It would seem that too fine a distinction was drawn in taking the view the court did. An apparently better view is to be found in the opinion of the Texas court in a somewhat similar case.[216] Here a statutory definition of the practice of medicine was held not to militate against any "school" and that therefore no constitutional prohibition was contravened thereby.[217]

2. *Chiropractors.*—Section 2582 of the Iowa Code was construed to include chiropractors in its definition of the practice of medicine. And a chiropractor was indicted and convicted thereunder of practicing without a license. It was contended that such a construction forced these practitioners to comply with the law to their manifest disadvantage, as they would be discriminated against by the medical board created under the law. This it was contended would render the act unconstitutional. It would seem, however, that such a law does not discriminate against any class of citizens simply in providing a board for the regulation of the medical profession and in allowing a fairly wide discretion to this board. Nor would such powers confer on the board of examiners any arbitrary power or enable it to discriminate in favor of any particular school of medicine. Such boards are usually permitted to prescribe reasonable rules and regu-

215. State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791.
216. Ex parte Collins, 51 Tex. Cr. Rep. 2, 121 S. W. 501.
217. Sec. 13, Texas Medical Practice Act, 1907.

lations for the conduct of its work. But a statute does not warrant an unjust discrimination by a board in the exercise of the several powers that may be granted to it. Nor will a court presume that a board might exceed its power or do an unlawful act simply for the purpose of holding the law under which the board was created unconstitutional.[218]

3. *Suggestive Therapeutics.*—Construing an act so that it applies to these practitioners does not contravene any constitutional prohibition against depriving a person of the legal right to carry on a proper business. It has been maintained that these practitioners can do no harm. But it would seem that any person who holds himself out as a physician capable of treating patients and alleviating their sufferings, should know whether anything should be done and what to do. It would therefore appear that a legislature may enact a law for the purpose of regulating or even prohibiting this method of treatment as carried on by certain individuals.[219]

4. *Christian Science.*—(a) A statute making it a misdemeanor to give such treatment for a fee does not interfere with any rights of conscience and of worship as conserved by the several state constitutions,[220] and would not therefore on that ground be unconstitutional.

It would seem that legislation prohibiting any one from treating disease for a fee excepting those persons who have duly qualified under such law is a valid exercise of the police power of a state and hence constitutional. Medical practice acts are as a general rule reasonable in the qualifications required of a practitioner and exclude no one possessing them. A condition as is here considered would not seem void as discriminating against Christian Science or any other school. Nor would the fact that any one possessing certain qualifications may practice osteopathy under such an act discriminate against that sect in that no similar special provision was made for them. This may be placed on the grounds that the practice of medicine would seem to be nothing more than a privilege or franchise. Under such a view no one has an absolute right to practice but is subject more or less to the legislative discretion. But even assuming the practice of medicine to be an absolute right all persons engaged therein are subject to such reasonable regulations or conditions as a state in the exercise of its police power may prescribe. Now it

218. State v. Miller (Iowa), 124 N. W. 167.
Green v. Hodges (Kan.), 138 Pac. 605.
219. People v. Mulford, 125 N. Y. Supp. 680.
Smith v. State (Ala.), 63 So. 28.
220. Sec. 7, Bill of Rights, Ohio Constitution.

would seem that the word "treatment" does not mean only the application of remedies to the curing of disease. But it might very well be taken to include prayer for the recovery of the sick. For physicians frequently cure imaginary diseases by means that would as easily as Christian Science escape the above interpretation of "treatment." And again the followers of Christian Science call their method of healing "treatment." It would seem therefore that these people should not be heard to the contrary.

As has been said, such language does not interfere with any one's right to worship God according to the dictates of his conscience. For the language usually found in such laws does not prohibit prescribing, etc., excepting for a fee, or some similar restraint. Now it may be said that exacting a fee as well as praying can hardly be taken as a part of a religious rite. Laws of this nature are clearly in the interest of public welfare and so long as they are not obnoxious on other grounds, may be taken as constitutional. Nor can such a view be taken as interfering in any way with man's natural and indefeasible right to worship Almighty God according to the dictates of his own conscience.[221]

(b) *Christian Science the Practice of Medicine Although Excepted in a Statute.*—A statute defining the practice of medicine appended the clause that the article was not to be construed to affect the religious tenets of any church. But notwithstanding this, Christian Science was held to be practicing medicine under the act. This was because of a constitutional provision which decreed that liberty of conscience was not to be construed so as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.[222] The position taken was also based in no little degree on the fact that the practice of Christian Science was dangerous to the community when carried to an extreme. This neither the statute or the constitution permitted. Hence a reader of the church could be indicted thereunder for practicing medicine contrary to the law and without violating any constitutional provision.[223]

(c) *Saving Clause in Statute Not a Necessity.*—Usually it will be found unnecessary to insert a saving clause in a medical practice act for the purpose of excepting a bona fide religious sect from the

221. State v. Marble, 72 Ohio St. 21, 73 N. E. 1063.
222. Sec. 160 Public Health Law, New York.
Sec. 173 Public Health Law, New York.
Art. L, Sec. 3, New York Constitution.
223. People v. Cole, City Magistrate's Court, City of New York. First Division, Second District, Feb. 11, 1910; aff'd People v. Cole (N. Y.), 148 N. Y. Supp. 708.

application of the statute. For the guarantee of religious freedom is a basic principle in all our governments and may therefore be implied without mention in the law. A given system of treatment should not be excepted either under a statutory provision nor under this guarantee simply because there is an apparent association with a form of worship. Religion may not be used as a cloak to cover infringement of the law.[224]

(d) *Excepting Treatment by Prayer Not Unconstitutional.*—The fact that there is a proviso in any certain statute excepting treatment by prayer therefrom cannot be taken as rendering the statute unconstitutional because of an unjust discrimination. For such a provision is not to be taken as applying to a certain sect only, but as an immunity allowed to all who may desire such treatment.[225]

It may be argued however, that this contention as to the unconstitutionality of such a provision is not entirely without foundation. For there is created thereby two classes who may minister to those suffering from either physical or mental ills. The one class is compelled to undergo a rigorous and thorough scientific training prior to being permitted to "treat disease" for a compensation. While the other must simply subscribe to the tenets of a so-called religious faith in order to act as "healers." Now if it be essential that a physician who uses drugs and the like to cure his patients must submit to a careful preparation therefore in order to protect the health of the public, why is it any less desirable that these "healers" should have a similar knowledge? If ill may be worked through a physician having an improper amount of knowledge it would seem that the "healers" of these alleged religious sects would be equally dangerous. It is therefore submitted that it is manifestly unjust not only to the physicians who comply with the law, but to the public as well, to make such exceptions in the law. A law so drafted, is, it would seem, creating a monopoly in favor of a class. It is unreasonable in such a discrimination and therefore unconstitutional.

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224. State v. Wilcox, 64 Kan. 789, 68 Pac. 634.
225. Ex parte Bohannon (Cal.), 111 Pac. 1039.

CHAPTER II

THE PRACTICE OF MEDICINE DEFINED

§ 22.—The Construction of Medical Practice Acts

All laws enacted in the interest of the public welfare, or convenience, for the protection of human life, or in regard to the rights of citizenship, for the prevention of fraud, or providing a remedy against either public or private wrongs should be liberally construed with a view to promote the object in the mind of the legislature.[1]

1. 36 Cyc. 1172, Construction of Statutes.
1 Kent's Commentaries, 461.
Sutherland's Statutes and Statutory Construction (1st ed.), Secs. 234, 237, 238, 239.
Bragg v. State, 134 Ala. 165, 58 L. R. A. 925.
Dent v. Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.

Speaking broadly, medical practice acts are for the purpose of protecting the sick and afflicted from the pretentions of the ignorant. the unskilled and the unscrupulous. Such legislation is an endeavor to prohibit and to punish fraud, deception, charlatanry and quackery in the practice of healing, to prevent empiricism and to bring the practice under such control that as far as possible the ignorant, the unscientific, the unskilled and the unscrupulous practitioner may be excluded. They are designed to secure the public in whole and every part from the charlatans and empiricists who masquerade under the venerable and honorable titles of surgeons, physicians and doctors. And to protect the public in a just reliance upon the one using these titles as a man of proper education and sufficiently trained in the sciences involved to minister properly to their needs.[2]

These statutes do not attempt to discriminate between the different schools of medicine or systems for the cure of disease. No method of attempting to heal the sick, however occult, is prohibited. All that the law enacts is that whatever the system, the practitioner must be possessed of a valid certificate and that he must exercise such reasonable skill and care as are usually possessed by practitioners in good standing of that system in the vicinity where they practice. This excludes no one from the profession, but requires all to attain reasonable proficiency in certain subjects essential to the appreciation of physical conditions to be affected by treatment. The object is not to make any particular mode of effecting a cure unlawful, but simply to protect the community from the evils of empiricism.[3]

Then again, the public interests must be protected against fraud from an economical standpoint. For a just enforcement of these laws to this end would tend to prevent the most deplorable swindling of the ignorant poor who can least afford to pay for the luxury of deception. And it is in this class that the readiest dupes are found by ostensible practitioners whose competency has not always been determined by law, and whose moral deficiencies are evidenced by their

2. Dent v. West Virginia, 129 U. S. 114.
Hawker v. New York, 170 U. S. 189.
Watson v. Maryland, 218 U. S. 173.
Bragg v. State, 134 Ala. 165.
Collins v. Texas, 32 Sup. Ct. Rep. 286.
Witty v. State, 173 Ind. 404.
State v. Edmunds, 127 Iowa 333.
People v. Phippin, 70 Mich. 6.
State v. Oredson, 96 Minn. 509.
State v. Buswell, 40 Neb. 158.
People v. Allcutt, 102 N. Y. S. 678 (affirmed 189 N. Y. 517).
State v. Marble, 72 Ohio St. 21.

3. State v. Heath, 125 Iowa 585.

false pretenses. But small wonder it is, for in no profession, occupation or calling is it possible for the people to be more readily imposed upon.[4]

It would thus seem to be patent that the care of the public welfare or internal public policy has for its object the improvement of social and economic conditions. And that medical practice acts and the like are intended to affect the community at large and collectively with the direct view of bringing about "the greatest good of the greatest number." Any legislation of this nature may be said to be based on the primal idea that the collective communal action of the state more nearly subserves the best interest of the state. For in this method, the waste and sacrifice entailed by individual activity is curtailed and the, to a certain extent, "antisocial" tendencies of private effort prevented. With these points in mind, the application and meaning of the maxim "sic utere tuo ut alienum non laedas" will be the more readily understood.[5]

Medical practice acts, therefore, being in the interests of the general public and for the prevention of fraud should be liberally construed to accomplish the object of their enactment and to prevent the mischief intended to be guarded against.[6]

§ 23.—Construing Technical Words

Medical practice acts, as we have seen, have to do directly with the general public health. And, therefore, such laws deal very nearly with all those subtle and mysterious influences upon which health and life depend and which require not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts and their relation to each other as well as their influence upon the mind. The physician must accordingly be able not only to detect readily the presence of disease, but to prescribe the appropriate remedies for its removal as well.[7]

And whether the physician professes to attack the malady or the cause is immaterial. They are all treating the "ailment" as the word

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4. Freund, Police Power, Para. 12.
   Bragg v. State, 134 Ala. 165.
   State v. Heath, 125 Iowa 585.
5. Freund, Police Power, Para. 8, et sequi.
6. 1 Kent's Commentaries, 461.
   Sutherland, Statutes and Statutory Construction (1st ed.), Secs. 234, 237, 238, 239.
   Bragg v. State, 134 Ala. 165.
   Smith v. People (Colo.), 117 Pac. 612.
   Harding v. People, 10 Colo. 387.
   Little v. State, 60 Neb. 749.
7. Dent v. West Virginia, 129 U. S. 114.

is popularly understood. All wish to restore their patients to sound bodily and mental vigor. And that is the essence of the practice of medicine.[8]

It is this term "practice of medicine" and matters of a like nature which have given rise to much debate and which have developed diverse opinions in the several jurisdictions as to the proper construction and interpretation to be placed upon such technical words which are to be found in the various medical practice acts.

In the construction of a statute, the practical inquiry is what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition — construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered, while the general intent should be kept in view in determining the scope and meaning of any part. In this way, all parts of an act are to be brought into accord and if possible given a sensible and intelligible effect in furtherance of the general design. It is said to be the most natural exposition of a statute to construe one part by another, for that expresses the meaning of the makers. This exposition is "ex verceribus actus."[9]

When a word having a technical meaning, as well as a popular one, is used in a constitution or in a statute, the courts will accord to it its popular signification unless the very nature of the subject indicates, or the context suggests that it is used in a technical sense. The court is at liberty in its determination of the nature of the act to regard the state of the law at the time and the facts which the preamble or recitals of the act prove to have been the existing circumstances at the time of its passage. Such words will be used in a technical sense when the act treats of the subject in relation to which such words are technically employed. For example, in the case of a law intended for practical application to men engaged in avocations in which the words have acquired a special meaning by usage, as "practice of medicine."[10]

The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in their popular uses, as in the subject, or in the occasion, on which they are used, and the object to be attained. That is, in the construction of a statute, as in that of other instruments, words are to be understood, not according to their mere ordinary general mean-

8. Little v. State, 60 Neb. 749.
9. Sutherland, Statutory Construction (1st ed.), Para. 245.
10. Sutherland, Statutory Construction (1st ed.), Para. 247, 250, 254, et sequi.

ing, but in their ordinary meaning as applied to the subject matter with regard to which they are used. Unless, indeed, there be something requiring them to be read in a sense which is not their ordinary sense in the English language as so applied. An obvious result of this rule is that where technical words are used in reference to a technical subject, they are primarily interpreted in the sense in which they are understood in the science, art or business in which they have acquired it. But the rule, giving to a word its technical meaning, holds equally good in the construction of statutes dealing with other subjects, in which are to be found words and phrases that have been used in a prior statute, thereby acquiring a technical meaning, whether it be a legal technical meaning or not. That is, whether it be a technical meaning which the word or phrase has acquired in the law, or a technical meaning which it has acquired in any other science, art or business. If the enactment relates to any of these, the technical meaning the word has in the law in any other science, in any art or in any business is to be given to it accordingly as the one or the other is the subject of the enactment.[11]

§ 24.—"Medicine" is a Technical Word and Must be so Construed

It would seem that the term "medicine" especially when used in the phrase "practicing medicine" or the like could hardly have reference to any other subject than a science or an art. When so used, it would seem to be a technical word denoting the science or art of curing diseases — and one who engages in the "practice of medicine" is a scientist or an artist professionally known by the name "physician" or "doctor." It may be, and doubtless is true that it is not and has never been an exact science; but this is due to the fact that it has been, and is a progressive science. But it is, nevertheless, a science or an art. Nor does the fact that those who practice the science or art differ as to the administration of specific remedies for specific diseases render it any the less an art or science. These differences have always existed and will doubtless always continue to exist. As a science, the practitioners of medicine are not simply those who prescribe drugs or other medicinal substances as remedial agents. For the term "medicine" is broad enough to include and does include all persons who diagnose disease and prescribe or apply any therapeutic agent for its cure. Can it be seriously doubted that it is *not* the intent and purpose of the legislative mind in these laws to restrict the exam-

11. Endlich, Interpretation of Statutes, Pp. 94-96, Para. 73-75.
17 Am. & Eng. Ency. Law (2d ed.) 13.

ination of those desiring to practice medicine to that class of the profession who may prescribe drugs as therapeutic agents in the healing of diseases? It would seem not.[12]

THE NARROW CONSTRUCTION OF THE TERM "MEDICINE" IS BASED ON A "FALLACY"

In the construction of medical practice acts, courts have frequently based their opinions upon a fallacy in their interpretation of the words "medicine" and "medical." This has doubtless been due in great part to the *double entendre* in the word "medicine." It may mean, and as commonly used does mean either of two things: in one sense it means a substance or thing which has, or is believed to have, certain curative properties which are exercised upon the body by taking the substance into the system in some way, or by applying it to the body externally. When so used, it is frequently synonymous with "drug." But the word has another common and well-established meaning which is, nevertheless, frequently overlooked or entirely ignored in these discussions upon the construction and operation of statutes regulating the "practice of medicine." That meaning is the science or system of curing, healing, alleviating or preventing disease, physical disorders and injuries without reference to the means employed to accomplish that end. Similarly, in the arguments of those who are attempting to prove the unconstitutionality of medical practice acts, the word "medical" used in connection with school, college, practice, etc., is usually construed as having to do only with medicinal substances, drugs, and the art of administering them; whereas the word has, aside from any connotation of drugs and remedial substances, the well-settled meaning of "engaged in, or connected with the study or treatment of disease." "Medicine" in its generic sense as a science must not be confused with the term drug. And a physician is not necessarily one who treats disease through the instrumentality of drugs alone. Thus the "practice of medicine" is not a branch of the healing art confined to the use of drugs alone. Nor is a "medical" college confined to teaching only the application of drugs as a cure for disease.[13]

§ 25.—"Medicine" Defined

The word "medicine" (latin, *medicina*) is derived from *mederi* — to heal. It has been defined in various medical and standard dictionaries

12. Bragg v. State, 134 Ala. 165.
Richardson v. State, 47 Ark. 562.
State v. Schmidt, 138 Wis. 53.
13. Bragg v. State, 134 Ala., 165.
Collins v. Texas, 32 Sup. Ct. Rep. 286 (U. S.).

as well as by statute and the courts. An analysis and comparison of these several definitions evidenced a similarity in shades of meaning which would seem to admit of but a single conclusion, to-wit: this term is used only in its broadest sense in these acts.

> Medicine is the healing art; physic; a science the object of which is the cure of disease and the preservation of health.[14]
>
> Medicine is the science and art of preserving health and of preventing and curing disease; the healing art including also the science of obstetrics. In a more restricted sense of the word, surgery is excluded. . . . The term is applied also to a particular drug or therapeutic application.[15]
>
> Medicine is the science and art dealing with the prevention, cure or alleviation of disease; in a narrower sense, that part of the science and art of restoring and preserving health which is the province of the physician as distinguished from the surgeon and obstetrician. And again as: any substance or preparation used in treating diseases; a medicament; a remedial agent; a remedy; a physic. And the etymology of the word is given under "medical" as: L.L. "*medicalis*," L. "*medicus*" belonging to healing, from "*mederi*," to heal.[16]
>
> Medicine is a substance used as a remedy for disease; a substance having or supposed to have curative properties; hence, figuratively, anything that has a curative or remedial effect. The art of preventing, curing or alleviating disease and of remedying as far as possible the results of violence and accident.[17]
>
> Medicine is a substance possessing or reputed to possess curative or remedial properties; as a fever medicine; a medicine for a cold. The healing art; the science of the preservation of health and of treating disease for the purpose of cure.[18]
>
> Medicine, a subject of one of the learned professions, includes as it now stands a wide range of scientific knowledge and practical skill. The science of medicine is the theory of disease and its remedies.[19]

Thus it would seem that "medicine" is a technical word denoting a science and comprehending not only therapeutics, but the art of understanding the nature of diseases, the causes that produce them, as well as the art of knowing how to prevent them — hygiene, sanitation and the like. And these definitions are fully supported and their correctness is thoroughly established by the history of medicine and its practice as a science or art. Thus it has never been supposed that the disciples of any particular school of the healing art were physicians — practitioners of medicine — and that those of a different school or sect were not. They have all been regarded by eminent scholars as engaged in the "practice of medicine." Again, the history of medicine shows that there have always been many systems of healing

14. Dunglison, Medical Distionary.
15. Gould's Illustrated Dictionary of Medicine, Biology and Allied Sciences (1904).
16. Webster's New International Dictionary (1910).
17. Century Dictionary.
18. Standard Dictionary (1897).
19. Encyclopedia Britannica, title "Medicine," subtitle "Synoptical View of Medicine."

and further that there have been vital differences between the various schools. Yet all these systems are included within the healing art, or the practice of medicine. Finally, the history of legislation on the subject of medicine proves that it was always dealt with in its broad and comprehensive sense — as the science or art of preventing and healing bodily and mental infirmities. This, perhaps, has been rather emphasized than otherwise in the present day legislation on the subject.[20]

This broad view of the meaning of the term "medicine" and as to the legislative intent in its use has been recognized in numerous state courts which had to decide whether certain drugless systems and methods of healing, such as osteopathy, mechano-neural therapy, magnetic healing, chiropractic, etc., were included within the operation of statutes which undertook to regulate "the practice of medicine in any of its branches or departments," "the practice of medicine and surgery," "the practice of medicine," etc.[21]

§ 26.—"Medicine" as Defined by the Legislature and by the Courts

In New York, the practice of medicine was defined as:

> "holding one's self out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

This language was deemed capable of a very broad interpretation and as applying to the several methods of treatment.[22]

Under the Iowa code, the "practice of medicine" is defined as follows:

> "Any person shall be held as practicing medicine, surgery or obstetrics or to be a physician within the meaning of the chapter who shall publicly profess to be a physician, surgeon or obstetrician and assume the duties, or who shall make a practice of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal."

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20. Bragg v. State, 134 Ala. 165.
Collins v. Texas, 32 Sup. Ct. Rep. 286.
21. Witty v. State, 173 Ind. 404.
State v. Miller (Iowa), 124 N. W. 167.
People v. Phippen, 70 Mich. 6.
Little v. State, 60 Neb. 749.
People v. Allcutt, 102 N. Y. Supp. 678.
State v. Marble, 72 Ohio St. 21.
O'Neil v. State, 115 Tenn. 427.
Ex parte Collins, 57 Tex. Crim. Rep. 2.
27 Cyc. 466, and cases cited.
22. People v. Mulford, 125 N. Y. 680.
Ch. 344, New York Code, Sec. 1, Subd. 7.

This statute was also construed as covering all systems of healing.[23]

Judicially "medicine" has been held to mean the art of healing by whatever scientific, or supposedly scientific, method there may be. It means the art of preventing, curing or alleviating disease and remedying as far as possible the results of violence and accident. It further means something which is supposed to possess or some method which is supposed to possess curative powers.[24]

"Medicine" in its ordinary sense as applied to human ailments means something which is administered either internally or externally in the treatment of disease or the relief of sickness. It may be applied externally and it need not be a substance which may be seen or handled. It may consist of electricity conveyed by instruments or the human hand. And he whose profession it is to prescribe and administer this after diagnosing the complaint is a physician as commonly and ordinarily understood.[25]

§ 27.—A Broad Interpretation of the Word "Medicine" Does not Give It a New Meaning

It has been argued that to extend the meaning of this word "medicine" and the phrase "practice of medicine" as well, so as to include all systems of healing, is to give an unusual and false meaning to the word "medicine." And further, it has been said that a legislature cannot extend the meaning of these words so as to include methods of healing diametrically opposed to the so-called common understanding of the term "practice of medicine." It may very well be true that a better phrase than "practice of medicine" may be selected under which to group the several systems of healing. Still this phrase and the meaning given it in the various acts is by no means new. Rather it is a return to the original meaning of the word "medicine." Nor can it be said that this is an unwarranted use of the term. For a legislature clearly can define terms used in an act in order that a court may more readily give effect to the enactment.[26]

§ 28.—The Language Must Be Construed Liberally in Order to Give Full Effect to the Enactment

It would be too narrow a view of the "practice of medicine" to say that it could not be engaged in, in any case or class of cases, other-

23. Ch. 17, Iowa Code, Sec. 2579.
State v. Heath, 125 Iowa 585.
24. Ex parte Collins, 57 Tex. Crim. Rep. 2.
Texas Medical Practice Act, 1907, Secs. 13 and 31.
25. Kansas City v. Baird, 92 Mo. App. 208.
26. Territory v. Newman (N. Mex.), 72 Pac. 706.

wise than by prescribing or dealing out a substance to be used as a remedy. The science of medicine, that is the science which relates to the prevention, cure or alleviation of disease covers a broad field and is not limited to that department of knowledge which relates to the administration of medicinal substances. It includes a knowledge not only of the functions of the organs of the human body, but also of the diseases to which these organs are subject and of the laws of health and the modes of living which tend to avert or overcome disease as well as the specific methods of treatment that are most effective in promoting cures. It is conceivable that one may practice medicine to some extent in certain classes of cases without dealing out or prescribing drugs or other substances to be used as medicine. Clearly, any practice act to be effective must be construed to include all such practitioners.[27]

And such a law must be the more liberally construed to be made effective when the act exempts numerous classes from its application such as osteopaths, Christian Scientists and the like. For, even with such exceptions, by taking a broad view of any act of this nature, it may very well be that the "practice of medicine" is possible under its language without prescribing drugs to be used as medicine.

Moreover, to confine the definition of the words "practice of medicine" to the mere administration of drugs or the use of surgical instruments would be to eliminate the very cornerstone of successful medical practice. And that is the diagnosis. This is quite clearly an integral part of both the study and the practice of medicine and it is so recognized by law as by common sense. The correct determination of what the trouble is must be the first step for the cure thereof.[28]

Again, would it seem a proper construction to give to the words:

> "medicine, appliance, or other method"

to say that they import simply

> "a medicine or drug, or something to be administered as a medicine or drug would be"?

Indeed this would seem much too narrow. For an appliance can hardly be said to be a medicine or drug and a method may or may not involve the administration of any substance either internally or externally. True, when general terms follow specific words of a like nature, the general terms are presumed to embrace things and methods

27. Commonwealth v. Jewelle, 199 Mass. 558.
28. People v. Allcutt, 102 N. Y. Supp. 678.
Collins v. Texas, 32 Sup. Ct. Rep. 286.

of the kind designated by the specific words. But for the rule "noscitur a sociis" to apply, it must first appear that the general words are of a like nature. This is not true here. Such language evidently intends to prohibit the practice of the healing art by the use of medicine or any kind of appliances or methods except on certain named conditions. This is very broad and comprehensive language and would seem to cover any and every kind of public profession to cure and heal by the use of any method or device. When a legislature has defined the terms of a statute, the courts should accept such definition and not be too subtle in the use of refined distinctions.[29]

After the decision in State v. Liffring[30] was handed down, the Ohio practice act[31] was amended to read: "who shall prescribe or who shall recommend for a fee for like use any drug or medicine, application, operation or treatment of whatever nature for the cure or relief of any wound, fracture, bodily injury, infirmity or disease." This was to obviate the effect of the Liffring case as it had applied the doctrine of "noscitur a sociis" to the language "medicine, drug or other remedy." The two laws were distinguished on the ground that in the earlier statute the legislature had intended to prohibit the administration of drugs only by persons not informed as to their effect or potency. In the amended law, however, it was patent that a comprehensive regulation of the healing art was intended. Thus the Liffring case was in effect overruled and the broader interpretation was given to the new law.[32]

It was contended that the word "treatment" as used in this same Ohio statute was to be given the same meaning as when it was used in the phrase "practice of medicine" and, that so read, it means the application of remedies to the curing of disease; that a remedy is a medicine or application or process; that a process is an action or operation, and that prayer for the recovery of the sick is neither. But it would seem that the words "of whatever nature" following the word "treatment" are pregnant with meaning and that therein is evidenced the legislative intent to bring within the definition every person who for a fee prescribes or recommends a cure for disease. And further, this would seem but a recognition of the fact that the healing and curing of disease may be attempted by an invisible agency and by aid other than the art and science of man. For to assume that

29. State v. Edmunds, 127 Iowa 333.
Ch. 17 Iowa Code, sec. 2579-81.
30. 61 Ohio St. 39.
31. Medical Practice Act, 1900.
32. State v. Gravett, 65 Ohio St. 289.

legislation may be directed only against the administration of drugs or the use of the knife is to take too narrow a view of the laws regulating the practice of medicine. The subject of such enactments of the legislature is not medicine, i. e., drugs and surgery. It is the public health or the general welfare of the state. It is disease and not the treatment thereof with which the legislature deals.[33]

§ 29.—The Phrase "Practice of Medicine" as Judicially Considered

The "practice of medicine" may be said to consist of three things: first, in judging the nature, character and symptoms of disease; second in determining the proper remedy for disease; and third, in giving or prescribing the application of the remedy to disease. Thus, in making a diagnosis of a case and in giving medicine to the patient a person is clearly practicing medicine within the broadest meaning of the language. "The 'practice of medicine' as that term is more generally understood means the exercise or performance of any act by or through the use of anything or matter, or by things given or applied whether with or without the use of drugs or medicines by a person holding himself or herself out as able to cure diseases or the causes of diseases with a view to relieve, heal, cure, or having for its object the prevention, healing, curing or alleviation of disease."[34]

The term "practice of medicine" may be taken as embracing the art of preventing, curing and alleviating disease and of remedying as far as possible the results of violence and accident. Therapy is the treatment of disease and surgery is operative therapy. Thus, the practice of medicine necessarily includes surgery and any method of treatment.[35]

Holding one's self out as a physician together with diagnosing, prescribing and charging therefor constitute the "practice of medicine."[36]

Diagnosing disease, writing prescriptions or prescribing remedies are all embraced in the "practice of medicine" and cannot be limited to the term "optician" alone. Holding one's self out to the world as a practitioner of the healing arts and soliciting patients afflicted with disease for treatment are determinative factors as to whether or no a person is practicing medicine within the meaning of any given law.[37]

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33. State v. Marble, 72 Ohio St. 21.
34. Underwood v. Scott, 43 Kan. 714.
    Green v. Hodges (Kan.), 138 Pac. 605.
35. Stewart v. Raab, 55 Minn. 20.
36. State v. Van Doran, 109 N. C. 864.
37. O'Neil v. State, 115 Tenn. 427.

It may be true that a person does not administer drugs, but in practicing what purports to be the healing art, that person practices medicine. The attempt to help certain ailments by a scientific manipulation affecting the nerve-centers or the like must be preceded by a diagnosis. And all this requires a scientific training. In undertaking to be something more than a nurse or a mere masseur and in making a claim to greater science, the state may require proof thereof, and may forbid the general practice of any system for money except on certain conditions in the law.[38]

Under the Iowa medical practice act, it was deemed the manifest intention of the legislature to divide those who were to be considered as practicing medicine into three classes: first, all those who profess to be a physician, surgeon or obstetrician, and assume the duties thereof; second, those who make a practice of prescribing and furnishing medicine for the sick, and third, those who shall publicly profess to cure or heal. It is doubtless true that a mere public profession would not subject anyone to the penalties of this law. But to fall within the purport of the statute, a profession would have to be made under such circumstances as to indicate that it is made with a view to curing the afflicted. And one publicly professes to heal in the meaning of this act in announcing to the public generally his claim of skill in the art of healing with the purpose of treating the maladies of patients who may engage his attentions.[39]

A number of acts regulating the practice of medicine place considerable emphasis on three points which taken either separately or in conjunction evidence very strongly whether a given act is violative of the law. These criteria are: first, opening an office in which to practice medicine; second, announcing publicly that one is able or willing to practice medicine; third, prescribing a remedy for any bodily or mental ailment for a compensation. Under the first two points the essence of the act is the public announcement of a general readiness and willingness to treat the sick. This may be done in either of the two ways; either by the act of opening an office, or by an advertisement or other public statement. Under neither of these is any actual treatment of a patient necessary and, therefore, the question of compensation is immaterial to a prosecution thereunder. The third point, however, deals with the actual treatment of disease and prescribing for the sick or injured. It is, therefore, provided that such attention, if it be to one person only, and even without a previous opening of an office

38. Collins v. Texas, 32 Sup. Ct. Rep. (U. S.) 286.
39. Ch. 17, Iowa Code, Sec. 2579.
State v. Heath, 125 Iowa 585.

or any previous advertising, is to constitute the "practice of medicine." But such treatment must be furnished for pay either present or prospective. And further, it would seem quite immaterial from whom compensation was received or from whom it was intended it should be received. Laws embodying these features would seem to imply that a violation of any one or all of these would be practicing medicine contrary to law.

In a law of this nature, it would seem that any system or method of healing might very well be included and that therein would be obviated many of the difficulties in attempting such an inclusion in that an overt act is specified as designating a violation of the law.[40]

In the consideration of any act regulating the "practice of medicine," the essential point to be remembered is that the term "medicine" is not confined solely to the administration of drugs; nor is surgery limited to the knife. When a physician advises his patient to travel for his health, he is practicing medicine. Broadly speaking and within the spirit if not the letter, also, of all such laws one is practicing medicine when he visits his patient, examines him, determines the nature of the disease and prescribes the remedy he deems appropriate.[41]

Thus medicine and surgery, not only within the common but within the adjudged meaning as well, cover a wide portion of the domain of healing. In point of fact, the meaning and intent of these laws is so broad that it may and should be held to cover all those persons who deny that they "practice medicine," but claim only "to treat," "to heal," "to remove cause," "to pray for the intercession of Deity" and in fact any and all of the numerous systems in which either material or immaterial means may be employed in ministering to the wants of suffering humanity.[42]

And any regulation of the "practice of medicine" should be taken to be directed against any unauthorized person who attempts to treat any physical ailment by whatsoever system he may choose. And not only against one who practices medicine and surgery and obstetrics as those terms are usually and generally understood. For the object of such laws is to protect the afflicted from the pretensions of the ignorant and avaricious, no matter whether the person pretending to heal bodily or mental ailments does or does not follow the beaten paths and establish usages. In the construction of such laws, effect must be given to the intent of the legislature, and hence these measures

40. Territorial Acts of New Mexico, 1903.
Territory v. Lotspeich (N. Mex.), 94 Pac. 1025.
41. State v. Smith, 233 Mo. 242.
42. State v. Johnson (Kan.), 114 Pac. 390.

should be directed against all physicians whether they profess to attack a malady or a cause. It is really quite immaterial what such a person is pretending to do for all are treating an "ailment" as that word is commonly understood. All wish to restore their patients or whatsoever they may choose to call them to sound bodily and mental condition. And that is of the essence of the "practice of medicine."[43]

§ 30.—"Treat, Operate On"

The word "treat" may be construed as not necessarily implying the use of medicines or drugs of some sort. Many forms of disease are treated by attention to diet, habits and mode of life, without resorting to medical remedies. Medicine is the art of understanding diseases and curing or relieving them when possible. Medicine is that branch of physic which relates to the healing of diseases. Nor need the words "operate on" be taken as implying the use of instruments. Many minor operations are effected without the use of instruments by mere pressure, extension and flexion. This implies some knowledge of anatomy and some skill. Thus the act of healing is not restricted to any particular method or remedy. The various methods are innumerable considering what are used and what have been discarded. It would seem that all these various systems might be covered by the language "treat, operate on, etc.," which in turn is included within the phrase of larger meaninng "practice of medicine."[44]

§ 31.—"Prescribing Remedies"

A jury was instructed that to "prescribe remedies" is to write or to give medical direction to indicate remedies. But it is not necessary that the prescription be in writing. A remedy may be given or indicated verbally. Any direction given to a patient for drugs, medicines or other remedies for the cure of bodily diseases, directing how they are to be applied to or used by the patients is prescribing remedies within the meaning of most of these laws.[45]

The Iowa act was construed as evincing an intent on the part of the legislature to include not only the person who professes to be a physician, but also the person who simply undertakes "to prescribe and furnish remedies" for the sick. Under such an interpretation it would not be error to instruct a jury that the "practice of medicine" is somewhat analogous to "prescribing and furnishing remedies" for

43. Art. I, Ch. 55, Compiled Statutes Nebraska.
Little v. State, 60 Neb. 749.
44. Eastman v. People, 71 Ill. App. 236.
45. State v. Lawson (Del.), 65 Atl. 593.

the sick. And further, a jury could be instructed that if after diagnosing a case, a person undertook to determine for a patient the remedy best suited to his ailment, such an act would be prescribing medicine for the sick within the meaning of the statute. Any person who in catering to the patronage of the sick assures them of his ability to help them and supplies them with an alleged appropriate remedy, giving instructions for its application, would seem to come within the meaning of such a law. The fact that the substance so employed as a remedial agent may have value as a food will not deprive it of its character as a medicine if it be so employed. "Medicine" as defined by Webster is any substance administered in the treatment of disease; a remedial agent; a remedy.[46]

The seal placed on the lips of the physician in many statutes relates only to information necessary to enable him "to prescribe" for a given patient as a physician. The word "prescribe" is not here to be used in its most limited sense of writing an order upon an apothecary for specific drugs, but should be given as liberal and as enlarged an effect as the word itself will bear in the connection found. The word "prescribe" when used as applicable to physicians embodies the purpose of cure, remedy or alleviation. The word means to advise, appoint or designate as a remedy for a disease. The purpose of curing or alleviating is an essential element in the meaning of the words "to prescribe as a physician" as used in these laws. And the prohibition against disclosing information only applies when such a purpose is present.[47]

§ 32.—The Practice of Medicine a Business

The word "practicing" in respect of the subject in connection with which it is used may be taken as indicating the pursuit of a business; as, for example, practicing medicine.[48]

When we say that any one is practicing medicine or surgery or osteopathy, we mean that he is engaged in that line of work as a business. That he is holding himself out as being so engaged or that for a consideration he is treating those who will accept his professional services. This concept would not, as a matter of course, be applied to one who incidentally and gratuitously suggests or puts into operation some method of treatment in the case of one who is sick. But he who has chosen the practice of medicine as a calling and who advertises to that end is practicing medicine as a business.[49]

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46. Ch. 17, Iowa Code, Sec. 2579.
State v. Bresee, 137 Iowa 114.
47. In re Bruendl's Will, 102 Wis. 45.
48. Payne v. State, 112 Tenn. 587.
49. Ex parte Greenall, 153 Cal. 767.

The use of the title "healer" by a person to indicate that he is engaged in the business of healing the sick for hire and who has an office or place of business where he can be seen by his patients is "practicing medicine." And if a statute lays hands on commercial healing as a money-making occupation, business or profession regardless of the method employed, then any system of "healing" in which such a course is pursued would be within the intent of the law.[50]

Professing to cure for pay is the practice of medicine. The system or method used is immaterial, the fact alone which is of importance is whether or no a charge was made for the services rendered. If that be done, then there is a violation of the law for which there may be a prosecution.[51]

§ 33.—Advertising as Evidence of the Practice of Medicine

It has been contended that the operation of these statutes should be limited to those professing or undertaking to practice medicine and surgery. But surely a state may determine what acts constitute the practice of medicine and may impose conditions on the exercise of that privilege. Hence it is manifest that the publication of a series of articles in a newspaper advertising a "physician" and his system of healing could be made the overt act which evidences the violation of the law or the attempt to heal any person by this system and all of which would be "the practice of medicine."[52]

Again the securing or attempt to secure patients through advertising "marvelous cures" and that the patients will "reap rich rewards" under certain new methods of treatment and then operating on or treating any persons so secured is practicing medicine within the meaning of the statute which defines the "practice of medicine" as "treating, operating on or prescribing for any physical ailment of another." Under such language rubbing the affected parts of a person for any physical ailment is practicing medicine and if a "physician" is unlicensed he is practicing illegally.[53]

Advertising one's business or calling to be that of a doctor or a physician would bring such a person under the language of the statute and if he be unlicensed he could likewise be penalized thereunder.[54]

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50. Smith v. People (Colo.), 177 Pac. 612.
51. Newman v. State (Tex.), 124 S. W. 956.
52. State v. Corwin (Iowa), 131 N. W. 659.
53. W. D. Jones v. People, 84 Ill. App. 453.
Illinois Medical Practice Act 1887, Sec. 10.
54. Illinois Medical Practice Act 1899, Sec. 7.
People v. Gordon, 194 Ill. 560.

Thus a practitioner of suggestive therapeutics should he advertise in a local paper as a "doctor" would be asserting to the public that he was engaged in the practice of medicine. The mere fact that in his practice he did not use drugs in any form whatever as a medicine to cure or heal the many diseases which he professed to successfully treat would not place him in the eyes of these statutes in the position of one not engaged in the "practice of medicine." Consequently, when such a person holds himself out to the public and advises it that he is a "doctor" located in a definite place with fixed office hours, all persons are given to understand and be informed that he is at least engaged in the practice of healing or curing suffering humanity of diseases by some method or means adapted to that purpose, notwithstanding the fact that he disclaims the use of all medicines of the nature of drugs in his treatment of the diseases mentioned. Such advertisements do not profess that the "doctor" is a mere masseur engaged in giving massage treatment to all persons who might desire such, or who had been advised by their physicians to take such treatment. The advertisement generally goes further and undertakes to assert that the "doctor" is learned in his profession and competent to diagnose diseases and prescribe the treatment necessary for a cure. If such a person is exempt under the law, then any unlicensed person may hold himself out as a doctor and treat all classes of diseases without administering drugs and not offend against the law. Such a construction would be inconsistent with the letter and the spirit of these measures. Their very object or purpose is to protect the public at large against the ignorant and unlearned. Such laws are to prohibit these classes of "practitioners" from holding themselves out to the world as doctors or physicians without having acquired any knowledge whatever of the human system or of the diseases and ailments with which it may be afflicted.[55]

In not a few acts regulating the practice of medicine the use of any letters or titles indicating that the user is a physician is made evidentiary of a violation of the law by being constituted advertising in a medical sense. As an example of this, one act reads that "the use of the letters M.B. or M.D. or the title Dr. or Doctor, or any like sign or appellation shall be constituted the practice of medicine." By such a provision, it is evidently intended to prevent persons not properly educated in the science from assuming to act as physicians. The use of such letters and titles is palpably a fraud on the public and one capable of working great evil. To protect the public, therefore, it has

55. Witty v. State (Ind.), 90 N. E. 627.
Parks v. State, 159 Ind. 211.

been deemed advisable to restrain their use and to compel all those entitled to prefix or append such letters and titles to be properly registered under the law. Such laws should not be construed so as to deprive the people of the benefits intended by the act, but such a construction should be given them as to carry into effect the evident intent of the legislature.[56]

Titles and letters of this nature are usually associated with practitioners of the regular schools who treat disease by the administration of remedies in the nature of drugs and their compounds rather than with practitioners who treat solely by appeals to Deity, the occult, or by manually manipulating the limbs, muscles or nerves and by flexing and manually manipulating the joints of the body. And it is practitioners of the regular schools rather than the others that the ill and infirm seeking relief usually expect to find when entering a room whose door has lettered on it the name of a person preceded by the title "Dr." or followed by the letters "M.D." or the words "Physician and Surgeon."[57]

§ 34.—"Practicing" Under the Direction of a "Licensed Physician"

A person not coming within the exception of a statute is within its condemnation even though he acted under the direction of a registered physician. And hence, it would be a misdirection to instruct a jury that a person not a physician who administers drugs or remedies of any nature or performs surgical operations is not practicing medicine simply because he does only as directed by the licensed physician in whose immediate charge any patient might appear to be. Such a construction would protect an unregistered surgeon in any operation he might choose to perform if care were taken that he be guided in the operation by a registered surgeon. Such an interpretation would nullify and defeat the beneficent object of the laws.[58]

In the same way, professing to be an expert in the treatment of a given disease and furnishing remedies therefor is practicing medicine although the treatment and care of the patient be under the immediate direction of a licensed practitioner. As an example of this, a person might profess to be able to cure alcoholism by the use of a remedy which he had discovered. Such a person might examine and diagnose the complaint of the various people coming to him for treat-

56. Ch. 176, Laws North Dakota 1903, Sec. 21.
State v. Yegge, 19 S. Dak. 234.
Hale v. State, 58 Ohio St. 576.
57. State v. Pollmann, 51 Wash. 110.
58. State v. Paul, 56 Neb. 369.

ment and he could then place them under the care of a licensed physician simply with the advice that his remedy be administered. Clearly, selling a compound under such statements is practicing medicine even though the actual administration thereof together with the hours for taking and the quantum be subject to the direction of a legal practitioner. Such acts are but evasions of the law and it is not by any means the sphere of the courts to protect ignorant or unscrupulous individuals in their endeavor to defraud persons worn down mentally and physically by disease to such an extent that they are incompetent to judge for their own welfare.[59]

And again, a student of dentistry is charging a patient for work, although he is under the immediate direction of a licensed dentist, is nevertheless practicing illegally. Provided, of course, the student actually be paid for said work. In such a case, if it can be proven that the student receives the money as a mere agent of the licensed dentist, such proof would constitute a rebuttal. But on the other hand, proof that the student did the work and personally received the money with a fair presumption that it was for his personal use would constitute a prima facie case and the burden would rest with the accused to rebut the presumption. The mere working in a dentist's office is insufficient to rebut a charge of guilt under such circumstances, especially when the law makes the receipt of money the gravamen of the charge. Consequently, instructing a jury to acquit an accused if they believed him to be working under the direction of a licensed dentist would be improper in any case in which said accused had not overcome the presumption that he personally had been paid for his work.[60]

§ 35.—Remedies Sent from an Adjoining State

Oftentimes the practice of medicine as contemplated by any given statute consists in the examination of a patient, diagnosing his case, seeing the patient at stated intervals, prescribing any necessary remedies and charging and accepting pay for such services. Under such a law, the mere fact that the remedies indicated and prescribed were sent from an adjoining state would not negative the fact that such person was practicing or attempting to practice medicine within the jurisdiction of the state where either he or his patient or both resided. In such a case, the receipt and use of the remedy *per se* is by no means germane to the gravamen of the charge. It would really seem immaterial as to whether or no the remedy be used or as to whence

59. Springer v. District of Columbia, 23 App. D. C. 59.
60. State v. Reed, 68 Ark. 381.

it comes. The law makes the diagnosis together with prescribing for the patient and the recipt of pay the illegal act. It would, therefore, seem totally irrelevant to this intent in the law as to what pharmacist the patient apply for his drug.[61]

§ 36.—Ophthalmology

The practice of medicine in its broad sense includes diagnosing eye troubles, prescribing salves and washes, and fitting glasses. The ophthalmologist as a practitioner performs these functions. Hence, as a specialist in this particular field, he would be practicing medicine within the meaning of the law and as a further consequence would be amenable thereto. The field of the ophthalmologist though in some measure a limited one is nevertheless an extremely vital one and one in which the health and welfare of the state is as dependent as on any other, and in which the functions of the practitioner must be properly performed. For these reasons, therefore, it behooves a state under the exercise of its police power to regulate and control such practitioners in addition to those who work in the broad field of general practice.[62]

§ 37.—Dentistry

Within the scope of the term "practice of medicine" it may be said that the practice of dentistry is included. For insofar as dentistry is a direction of medical science to the prevention or elimination by medicinal and hygienic remedies of the causes and effects of disase, it forms a part of the physician's practice; and as it is an application of surgical skill, involving the use of technical and delicate instruments and the like, it is to that extent a division of the surgeon's field. Thus, generally speaking, dentistry is the practice of medicine. Of course, on grounds of policy and expediency, dentistry may be differentiated from the broader field and separate measures may be enacted for the regulation thereof. Under such laws it may very well be that a dentist is not practicing medicine and *"au contraire."* Aside from this, it would seem to be a sound conclusion that the practice of medicine includes the practice of dentistry.[63]

§ 38.—"Material Remedy"

A "material" remedy is a "physical" remedy and hence any treatment which consists in rubbing and manipulating the parts affected, and in flexing and moving the limbs or the like is a "material" remedy

61. State v. Davis, 194 Mo. 485.
62. State v. Blumenthal (Mo.), 125 S. W. 1188.
63. State v. Taylor, 106 Minn. 218.

and the practice of medicine. The term "material" as used in these acts clearly cannot be taken as having reference simply to drugs *per se*. "Material" means something tangible or physical and a "material" remedy would seem to have place within the broader meaning of the word "medicine" and the phrase "practice of medicine." Any tangible or physical system or method of healing is to be taken as included within such language. The history of legislation in the medical field shows that these words were added to nullify judicial decisions, narrowing the term "practice of medicine" to those physicians and surgeons who use drugs and the knife only. Clearly then, any like narrow construction of "material remedy" would be contra to the obvious legislative intent, a proposition to which no court could very well subscribe.[64]

§ 39.—"Mental Treatment"

Diagnosing a person's trouble and then treating such person by manipulating the muscles and flexing the limbs is not a "mental treatment." But such treatment, while not practicing within what we would term the common acceptation of that phrase, is treating patients and human ailments without the use of medicine or instruments and consequently within the terms of a statute so defining the practice of medicine.[65]

"Mental treatment" has reference more nearly to the systems employed by those practitioners who rely entirely or in great part upon certain psychic conditions or phenomena, such as the effect produced by hypnotism, mental suggestion, the occult, and the benefit derived, as some believe, by prayer to Deity. That is, in "mental treatment" the practitioner would be more likely to use an immaterial or intangible remedy than a material or tangible one. In the construction of such an exception to a practice act, great care should be exercised not to unduly broaden the scope of this and similar language and thus permit an influx of charlatans and the like, which would be directly contrary to the terms of the law.

§ 40.—"Treatment in an Emergency"

An emergency is a case in which a regularly licensed physician is not readily obtainable. Many statutes except in the definition of the practice of medicine any gratuitous treatment which is rendered in an emergency. But in this connection the term "emergency" is taken as having reference to only an exigency of so pressing a character

64. Illinois Medical Practice Act 1899, Sec. 7.
People v. B. E. Jones, 92 Ill. App. 447.
65. People v. Gordon, 194 Ill. 560.

that some kind of action must be taken *"eo instante"* and this prior to even an attempt at obtaining a licensed physician. As for instance, a person who is in a remote and isolated region sustains an injury and calls in a person not a licensed practitioner to render immediate service. The aid therein rendered would be in an "emergency" which would clearly justify any services of a medical nature that might have been afforded. And further, under such circumstances, humanity and decency would require that such a physician be not liable in a criminal prosecution for so doing.

But, however, if under ordinary circumstances a person calls in a member of a school of physicians or a given individual who is not a legally licensed practitioner simply through a preference for or leaning toward the said school or individual, such a case would not be an emergency within the contemplation of the statute. Therefore, any physician who treats a patient under such circumstances is, if he be not licensed, violating the law, for which he should be held liable in a criminal prosecution.[66]

§ 41.—Itinerant Physicians

An itinerant physician has been defined as any person who travels from place to place professing to treat diseases, injuries and the like in any way and by any system.[67]

But a physician who maintains an office in several cities with headquarters in one of them where he may receive his mail is not a traveling or itinerant physician simply because he goes from one town to another in order to see his patients and that they may call on him at one of his several offices, as the case may require.[68]

Thus it would seem that there should be added to the definition of this class of practitioners some such language as this —"and who has no office or definite permanent place of business wherein to pursue his profession and receive calls from his patients." It may very well be contrary to the policy of some states to allow physicians to so pass from city to city and be not deemed itinerant physicians. Iowa, for example, differentiates between physicians having an office in one locality for three years or more and those who have moved from one place to another frequently. It need not follow though that all physicians who move from place to place are objectionable. Yet, on the whole, the permanent resident is to be preferred to the practitioner

66. People v. Lee Wah, 71 Cal. 80.
67. Ch. 150, West Virginia Code, Sec. 14.
State v. Ragland, 31 W. Va. 453.
68. Adams v. State, 45 Tex. Cr. Rep. 566.

who is likely to have a tendency toward the treatment of "chronic diseases and sensational advertising." That is, he would yield the more readily to fraudulent methods of practice. On this ground then, it might be well to consider any physician who moves about from town to town as an "itinerant practitioner" and to hold him amenable to the law that may have been enacted for their regulation, whether or no he has offices in each one of the several cities which he may visit. It would, therefore, seem that there should be added to the definition of the term "itinerant physician" the further words "in any one town," so as to read, "who has no office nor definite permanent place of business in any one town."

§ 42.—Medical Practice Acts as Construed by the "Minority"

It has been noted from time to time that there are jurisdictions in which the courts have come to contrary conclusions and have discovered other intents in a given law than those set forth ut supra. These courts have based their opinions in the main, perhaps, on a more narrow view of the several laws, that is, have construed such laws more strictly. In the light, however, of a minute analysis of such legislation and its purport, it would seem that the rules of strict construction were inapplicable thereto. Thus, these courts would seem to have been in error *in limine*. Again, these opinions have been based on a fallacious definition of the word "medicine" and this too would seem to be an untenable position to be taken. Hence, if a court is indeed to give effect to the intention of the law-making body as evidenced in the various statutes, that end would never obtain through a strict construction or a fallacious interpretation of a word as the several jurisdictions would seem to argue.[69]

These several courts in an apparently honest endeavor to construe the law at bar recognize that the intention of the legislature must be carried out. But as these laws are promptly designated as "penal" or as "derogatory of common law rights" and the like, it will be seen that

69. State v. Mylod, 20 R. I. 643.
State v. Beck, 21 R. I. 288.
Smith v. Lane, 24 Hun. 632 (N. Y.).
Bennett v. Ware, 4 Ga. App. 293.
State v. Liffring, 6 Ohio St. 39.
State v. Herring, 70 N. J. L. 34.
Hayden v. State, 81 Miss. 291.
Foo Lun v. State, 84 Ark. 475.
State v. McKnight, 131 N. C. 717.
State v. Biggs, 133 N. C. 729.
State v. Heffernan, 28 R. I. 20.
Nelson v. State, 108 Ky. 769.

the rule of giving effect to the legislative intent can have but little if any beneficial effect. In both the cases of State v. Mylod[69] and State v. Beck[69] the courts recognize the rule as to the legislative intent. And again, in State v. Biggs[69] the opinion of the court is based on somewhat analogous reasoning. In this latter case, the court argues that "the act of 1903 of the North Carolina legislature must be construed most strongly against the corporation in whose supposed interests it was evidently drafted and not solely in the interests of the public." As numerous jurisdictions have pointed out, it would be almost impossible to enact restrictive legislation that did not confer a benefit on someone other than the public. But it would be most illogical to conclude therefrom that consequently there is no public benefit attaching to such a law and, ipso facto, to apply thereto the rules of strict construction. Now it can be seen beyond a reasonable doubt that acts regulatory of physicians and the like while benefiting in a considerable degree a given class of physicians are above all else clearly remedial measures having for their chief purpose the protection of the people from imposition by charlatans and quacks who, under the claim of being doctors and able to cure the sick, jeopardize the life or at the very least the health of their victims.[70]

It is submitted that it may well be doubted that the statutes at bar in the cases cited had a contrary purpose to that of protecting the people. To construe them as penal or as derogatory of common-law rights is subversive of the principle established in the quotation, *"Sic utere tuo ut alienum non laedas."* Moreover, the practice of medicine is not a right, but a mere privilege of which the physician may be divested in the common interest.[71]

No state can stand on a doctrine of unlimited individualism nor, it is submitted, was our government founded on any such principle. And further, the adoption of the Bill of Rights or any other such instrument does not in a considerable degree prove to the contrary. It is safe to conclude that State v. Mylod[69] and cases based on similar reasoning cannot possibly be considered authorities to-day. Nor can they in any way have place under the principle of *"steri decisis."* It is submitted that a case based on a wrong principle should at least

70. Collins v. Texas, 32 Sup. Ct. Rep. 286 (U. S.).
Dent v. West Virginia, 129 U. S. 114.
Bragg v. State, 134 Ala. 165.
People v. Allcutt, 102 N. Y. Supp. 678.

71. Hawker v. New York, 170 U. S. 189.
Watson v. Maryland, 218 U. S. 173.
Collins v. Texas, 32 Sup. Ct. Rep. 286.

be distinguished if it be impossible to overrule it. The application of such a principle is not a question of judge-made law. For to disaffirm or to distinguish a case in which a wrong principle is asserted is not making law. On the contrary, it is asserting the true law and applying it.

Again, in State v. Biggs[69] the court advances the argument that a legislature cannot enact "the practice of medicine and surgery shall mean practice without medicine and surgery." Again in State v. McKnight[69] it is said that one cannot practice medicine and surgery without the use of "drugs, medicine or surgery." The same idea is to be noticed in Smith v. Lane, State v. Liffring, Hayden v. State, State v. Herring, Bennett v. Ware, State v. Heffernan, Foo Lun v. State and Nelson v. State.[69] Most of these cases in the utter absurdity of their conclusions speak for themselves, witness the Biggs and Nelson cases. But lest there be some lingering doubt as to the definition of the word "medicine" let it be at once said that all these cases are in some measure based on the fallacious conception of that term. Furthermore, "medicine" is by no means always synonymous with "drug." And that any legislature could have so used it to the subversion of the public safety, it is submitted would be most difficult to prove.[72]

People v. Allcutt[72] has disaffirmed Smith v. Lane[69] and has disapproved State v. Mylod.[69] And State v. Liffring[69] has been explained and distinguished in State v. Gravett and State v. Marble.[73]

Again the effect of Nelson v. State is rendered null by the subsequent enactment of the Kentucky legislature making osteopathy the practice of medicine in the Act of 1904. These cases, therefore, would seem to be but anomalies in the law and as such can be given but scant if any consideration. In the doctrine of *"noscitur a sociis"* the courts for some time put an effective quietus to unlimited prosecutions under the then law. This was because the language "medicine, drug or any other agency" was limited to have reference to treatment by drugs alone. Of course, when it is seen that medicine and drug are not synonymous, the rule can have no application.[74]

Moreover, it is evident by a mere perusal of such a clause that a legislature intends to include under the language "practice of medicine" the use of every curative agency for the relief of any infirmity, injury or disease. In contending that the words "other agency" must be

72. People v. Allcutt, 102 N. Y. Supp. 678.
73. 65 Ohio St. 289, 72 Ohio St. 21.
74. State v. Edmunds, 127 Iowa 333.
State v. Gravett, 65 Ohio St. 289.
State v. Marble, 72 Ohio St. 21.

construed as meaning "drug or medicine" would be to make a statute read as follows:

> "Prescribe or direct any drug or medicine or other drug or medicine for the treatment, etc., of any bodily injury, infirmity or disease."

It is submitted that a proposition so absurd cannot be attributed to any legislative mind. The rule *"noscitur a sociis"* does not have application except where there is doubt. Can it be asserted that by such language as is here being discussed, a legislature could have any other intent than that the regulation of the art of healing should include any and every system imaginable?

Again, translating "other agency" as meaning "drug or medicine" would be to permit the treatment, cure and relief of bodily injury to anyone, however incompetent. That is to say, to any person pretending to practice surgery or obstetrics provided he does not prescribe a drug or medicine. Amputation or other vital surgical operations are to be left in the hands of the ignorant or the uneducated while a repeated prescribing of some well-known remedy for an insignificant ailment is to be forbidden unless the prescriber has proven his competency under the statute! It has been repeatedly said that these laws are to protect the life and health of the people by requiring that all persons pursuing callings that involve such protection should have the skill, integrity, knowledge and other personal attributes or characteristics that a given statute may set forth. These laws then must be construed to the end that the legislative intent may be carried out.[75]

When a legislature says that not only the prescribing of drugs and medicine, but of any other agency as well in the treatment of disease is to constitute the practice of medicine, then plainly something is meant by the use of the words "other agency." A legislature does not insert such language as mere useless verbiage. And in the construction of a statute, all the language must be considered and rendered effective. No language should be construed so as to render it null and void. Clearly then, a court cannot so construe "other agency" as to exclude from the definition of the "practice of medicine" any and every curative agent of whatsoever kind; whether it be solid, liquid or volatile; whether mineral, vegetable or organic; whether taken internally or externally; whether it be material or immaterial; or whether the cure be attempted through man alone, or through the interposition of divine Providence. All are the practice of medicine and must be so construed.

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75. Fowler v. Board, 50 La. Ann. 1373.
Dent v. West Virginia, 129 U. S. 114.
Bragg v. State, 134 Ala. 165.
People v. Allcutt, 182 N. Y. Supp. 678.

In State v. Mylod[69] it was objected that the language of the act could not be so construed as to include Christian Science treatment. It was asserted further that one who "healed" by this system did not attempt to practice medicine and in fact always denied that he practiced medicine, assuring those who came for "treatments" that it is God alone who "heals," acting through the human mind and that all the "healer" does is to engage in silent prayer for the person desiring to be "healed." However, the mere fact that a person does not call himself a physician and does not claim to practice medicine should certainly not be taken as conclusively rebutting a presumption of guilt under statutory charge of practicing medicine without a license. The fact that one claims to "heal" and that people regard such "healer" as one able to help them remains. It is the effect which this claim produces that is of importance and which must be negatived.[76]

It is not necessary that one should administer internal remedies to practice medicine within the meaning of the law, nor even that one be dependent alone on the arts of man in the system of healing he may profess to follow.[77]

Again, it is argued that the offering of prayer to God for the recovery of the sick is not against the public health or the public morals or public safety or public welfare. Nor is it from this point of view that prayer is made the practice of medicine. The point is that there are ills, so-called contagious diseases, which all people do not believe can be cured by divine aid. But the "healers" who practice this system claim to cure them or claim that a person so afflicted can be relieved by prayer. And there are people willing to give credence to this assertion. Now, it is in this belief of this assertion that the evil lies. For although it is often the individual alone who suffers from a want of proper attention, yet in cases of so-called contagious and infectious diseases, an entire community may be endangered. Now, our government is founded largely on the principle that no individual or group of individuals are to be interfered with or endangered because of the beliefs, whether or no they be religious beliefs of any other individual or group of individuals. But when the Christian Scientists advance their theories of healing and demand that they be unrestrained in their administration, this sect is running counter to one of our fundamental theories of government and to that extent is interfering with the beliefs and endangering the safety of by far the larger majority in any given community. Granting exception in their favor is but

76. Bibber v. Simpson, 59 Me. 181.
State v. Blumenthal (Mo.), 125 S. W. 1188.
77. Davidson v. Bohlman, 37 Mo. App. 576.

placing the legislative stamp of approval on an inequitable and unjust demand. It is submitted that such statutory exceptions are unconstitutional. Therefore, to assume that legislation may be directed only against the administration of drugs or the use of the knife is to take, to say the least, too narrow a view. The subject of legislation of this nature is not any given system of healing. It is the public health and general welfare of the entire community.[78]

§ 43.—Summary

As a consequence of an analysis of the various cases bearing upon the construction and interpretation of medical practice acts, it would seem that the rules and principles of liberal construction should be applied thereto. When it is remembered that such legislation is for the purpose of maintaining and promoting the public health and general welfare, it becomes at once apparent that any exceptions created by either legislative enactment or by judicial interpretation will be most decidedly derogatory and subversive of those ends. Thus, a law on this subject should in the first place be enacted to include all systems of healing and in the second place, it should be so construed as to give effect to that express intent. Such a law would permit any and all systems of "healing" on conditions that would apply equally to any one. There could be no exceptions under a law based on the principle of being all inclusive and no exceptions could be created by judicial interpretation. All that would be essential would be that the language should plainly assert that the terms of the statute were applicable to every system of healing and that no exceptions were to be permitted thereunder, saving of course gratuitous treatment in an emergency, the administration of family remedies, and of the like.

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78. State v. Marble, 72 Ohio St., 21.
State v. Heath, 125 Ia. 585.

CHAPTER III

WHO ARE PRACTICING MEDICINE

§ 44.—In General

In attempting to determine "who are practicing medicine" it is well to remember that a variety of differently worded laws are being considered by the courts of approximately fifty separate and distinct jurisdictions. Having taken this important factor into account, it is then the more simple to explain some of the distinctions which are drawn in the seemingly analogous situations. That is to say the difference made may be attributed in part to the dissimilarity in language in two or more given laws; and in part to an almost natural conflict

of opinions that is bound to result in the adjudication of similar issues by several different courts, each of which are paramount within the confines of its jurisdiction.

Notwithstanding these facts, however, it is permissible, it would seem, to assume the generality that the laws regulating the practice of medicine apply equally to all who assume the duty of practicing the art and science of healing by whatsoever method the practitioner may adopt. For apparently it is quite patent that the courts cannot divide professional persons into classes and assert that one class is liable under the law for a violation, while another is not. These laws are framed not to bestow favor upon a particular profession, but to discharge one of the highest duties of a state, that of protecting its citizens from injury and harm, which might devolve upon them through persons possessed of insufficient learning and skill attempting to discharge the duties incumbent upon the profession of healing the sick and afflicted.[1]

Then again the "practice of medicine" at least in its popular sense is generic in its character,[2] and this too notwithstanding the fact that not a few jurisdictions place a much more limited construction on those words.[3]

In this generic sense the words "practice of medicine" have reference to the art of healing by whatsoever scientific or supposedly scientific method may be used. It means the art of preventing, curing or alleviating diseases and remedying as far as possible results of violence and accident. It further means something which is supposed to possess or some method which is supposed to possess curative power. Many jurisdictions will, of course, be inclined to question such a definition as is here given. But if such should be the case, there is no limitation upon the power of a legislature which would inhibit it from adopting such a definition or a similar one should it see fit. The legislature may prohibit any one or any class from practicing any system for pay or because such a system is fraudulent, or because such a system has or tends to have a deleterious effect on the public at large.[4]

Some statutes seem to permit the practice of medicine by certain drugless systems and the like. But even in such jurisdictions it has been held that a person may practice medicine within the meaning of

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1. State v. Eastman, 199 Ind. 282.
   People v. Phippen, 70 Mich. 6.
   State v. Bair, 112 Iowa 466.
2. Parks v. State, 159 Ind. 211.
3. Ut supra, Ch. 2.
4. Bragg v. State, 134 Ala. 165.
   Ex parte Collins, 57 Tex. Cr. Rep. 2.
   Collins v. Texas, 32 Sup. Ct. Rep. 286.
   Underwood v. Scott, 43 Kan. 714.

the law without the use of drugs or the like. That is, a person may practice the healing art or the art or science which relates to the prevention, cure or alleviation of disease without necessarily prescribing or dealing out a substance to be used as a medicine.[5]

§ 45.—Eclecticism

These practitioners have probably never denied that they "practiced medicine." Technically they might have done so under some laws. This sect has, however, objected to recognizing the authority of an examining board on which their school was not represented. But clearly it is not essential that the legislature recognize their school. The law may specify that all who treat the sick are practicing medicine and hold all amenable to the same law. This may at least be done in the interests of uniformity, to say nothing of the evil effect which the creation of sectarian boards might have on any community, and which is hereby prevented.[6]

§ 46.—Osteopathy

This system of healing has been frequently described as consisting wholly in rubbing and manipulating the affected parts with the hands and fingers and by flexing and moving the limbs of the patient in various ways. The practitioners of osteopathy have at times asserted that in their treatment they do not profess to cure any physical or mental ailment because as they claim the system used is one merely removing the cause.

Illinois, 1896. OSTEOPATHY THE PRACTICE OF MEDICINE

Under the then law in Illinois it was quite apparent that any person who had an office where he received patients; who visited such patients at their homes; who advertised his system and skill therein by publication in newspapers, and who professed an ability to understand and treat human ailments intelligently and successfully, was "practicing medicine." As those terms were defined by legislative enactment, it was unnecessary for such a person to use drugs or instruments. It is common knowledge that many minor operations are performed without the use of instruments, and that many diseases are treated by diet and the like. The practitioner of osteopathy differs from a masseur who gives Turkish baths and other such treatment. The difference lies in that the osteopath professes an ability to diagnose and prescribe for

5. Comm. v. Jewelle, 199 Mass. 558.
6. Board v. Fowler, 50 La. Ann. 1358.

any diseases, and to have the skill and judgment to effect cures by the use of his system. The masseur does not lay claim to any such ability. It is, therefore, incumbent on the legislature to compel the osteopath to demonstrate his ability by any suitable means and to hold him amenable to the law.[7]

Nebraska, 1900.

Osteopathy falls within the language "who shall operate on or profess to heal or prescribe for or otherwise treat any physical or mental ailment of another" just as clearly as those who practice Christian Science. Medical practice acts are as much directed against any unauthorized person who shall operate on or profess to heal or prescribe for or otherwise treat any physical or mental ailment of another as against one who practices "medicine, surgery and obstetrics," as those terms are usually and generally understood. Such a doctrine carries out the legislative intent and effects the object of the statute which is "to protect the afflicted from the pretensions of the ignorant and avaricious" no matter whether the person pretending to heal bodily or mental ailments does or does not profess to follow the beaten paths and established usages. To the argument that osteopaths do not profess to heal any mental or physical ailment, but that they merely seek to remove the cause of such ailment or disease, and therefore do not come within the law, it may be said that all physicians have the same object in view, to-wit: the restoration of any patient to sound bodily and mental condition. Whether a physician professes to treat the malady *per se* or simply to remove its cause is really immaterial. All are treating the ailment as the word is properly understood. Wherefore, one who practices osteopathy falls within the provision of the statute as clearly as would an ordinary practitioner or Christian Scientist, and is liable under such statute if he be not duly licensed as by law prescribed.[8]

Illinois, 1900.

The maintenance of an office where persons may be treated for physical and mental ailments, and where persons are so treated for pay, was by statute evidentiary of practicing medicine. Thereunder, an osteopath who treated people for disease by rubbing the affected parts would clearly fall as a practitioner of medicine.[9]

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7. Eastman v. People, 71 Ill. App. 236.
8. Little v. State, 60 Neb. 749.
   Art. 1, Ch. 55, Nebraska Com. Stat.
9. People v. B. E. Jones, 92 Ill. App. 447.
   People v. W. D. Jones, 92 Ill. App. 445.

Ohio, 1901.

An osteopath is practicing medicine within the meaning of his statute which defines the act as prescribing "drugs, medicine or appliances of whatever nature." The court declined to apply the maxim used in construing the law in the Liffring case. The addition of the words of "whatever nature" was taken as expressing a legislative intent to apply the law to all practitioners of any system.[10]

Alabama, 1902.

The fact that in the practice of osteopathy drugs and other medicinal substances are not used is immaterial. Nor does the fact that drugs and the like are administered neither internally nor externally, or that surgery as it is generally known is not resorted to in any treatments, differentiate it from the practice of medicine. It is admitted that the osteopath must know anatomy, physiology, hygiene, histology and pathology, just as the regular practitioner must know them. For a knowledge of these and other subjects aids both the osteopath and the physician to determine the nature of a disease and to apply the proper treatment thereto. Taking all of this into consideration, therefore, it is highly proper to hold osteopathy to be the practice of medicine, and the practitioners thereof to be responsible under the law.[11]

Illinois, 1902.

Under the Illinois Medical Practice Act of 1899 medical practitioners could be divided into two classes. First, those who desired to practice medicine and surgery in all its branches, and, second, those who desired to use merely a drugless system of healing. Hence, a person who diagnosed cases and removed or attempted to remove the cause of any ailment by massage and flexing would fall under the two classes. Treatment of this sort is somewhat similar to osteopathy, and that system is really something more than what a trained nurse might administer. It is not perhaps the practice of medicine in that drugs and surgical instruments are not used, but it is practicing medicine under the statute, because the osteopath professes and attempts to cure and heal without the use of drugs and is thus a drugless practitioner under the law. Advertising one's business or calling to be that of a doctor and the administration of osteopathic treatment to patients, differentiates osteopathy from the mere use of massage and the like. It is for this reason that the osteopath can be held liable under the law.[12]

10. State v. Gravett, 65 Ohio St. 289.
11. Bragg v. State, 134 Ala. 165.
12. People v. Gordon, 194 Ill. 560.

Alabama, 1906.

The doctrine as laid down in Bragg v. State was based on sound reasoning and public policy. Consequently it is deemed inadvisable to change the opinion as therein found. For the only real difference between the osteopath and the regular practitioner of medicine is one of therapeutics — that branch of medical science which consists of the application of remedies as a means of cure. The result sought by each is the same — the relief of illness. Hence, both practice the art of healing or curing human disease.[13]

Washington, 1909.

A person who professes to be an osteopath, magnetic or drugless healer is practicing medicine in violation of the law if he prefixes or affixes the title "doctor" or some word or the like of similar import to his name, thus advertising to practice medicine by the use of such words, titles or the like, which may be used only by those who are legally entitled thereto. The purpose of this law being to prevent deception and fraud, the interpretation given thereto should be such as would be most conducive to that end. Therefore, it makes no difference if these titles and abbreviations are used in conjunction with osteopaths or any other such work in an attempt to confine or limit the meaning of the word doctor and the like.[14]

Iowa, 1910.

A person who claims to heal and to cure the sick who apply to him for treatment by rubbing and massaging the parts affected, and who talked of treating people, saying that he "rubbed and cured them," and who charged and received pay for such treatments would be practicing medicine under the Iowa laws. Such evidence would be sufficient to sustain a conviction of practicing medicine without a license.[15]

Texas, 1910.

A masseur doctor who advertised himself as able and willing to cure various ills, and who treated the patient who came to him, was practicing medicine, although he did not use any drugs or the like, for he came within the meaning of the language "any system or method."[16]

Osteopathy is the practice of medicine, though no drugs or anything of that nature are used.[17]

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13. Ligon v. State (Ala.), 39 So. 662.
14. State v. Pollman, 51 Wash. 110.
15. State v. Yates (Iowa), 124 N. W. 174.
16. Newman v. State (Tex.), 124 S. W. 956.
17. Ex parte Collins, 57 Tex. Cr. Rep. 2.
Texas Medical Practice Act, 1907.

Texas, 1913.

A masseur who holds himself out as a doctor or person able or willing to treat disease and undertakes to do so and receives pay therefor, either directly or indirectly, is practicing medicine contrary to the law if unlicensed.[18]

OSTEOPATHY NOT THE PRACTICE OF MEDICINE

New York, 1881.

Manipulation is not the practice of medicine. The object of the legislature was simply to regulate the practice of medicine and surgery as those terms are generally or usually understood. The practice of medicine includes the application and use of medicines and drugs for the purpose of curing disease. By the use of manual manipulation or osteopathy neither drugs nor instruments are employed. There is danger attached to the use of drugs or medicines, but none from the practice of osteopathy. Hence there is no necessity to interfere with its pursuit. The system more nearly resembles nursing than the practice of medicine.[19]

Ohio, 1899.

Osteopathy is not the practice of medicine under a statute which defines practice "as prescribing a drug, medicine or other agency to effect the cure." By the maxim *noscitur a sociis* osteopathy is not an agency. The term agency refers to a drug or the like.[20]

Kentucky, 1900.

An osteopath so long as he does not administer drugs or perform surgery is not practicing medicine. This conclusionn is based on the fact that the Kentucky statute was construed as being designed to regulate those practitioners who employ drugs or the knife. This an osteopath does not do in following strictly the methods of his school. Osteopaths come more nearly being nurses than practitioners of medicine.[21]

North Carolina, 1902.

Osteopaths do not use drugs or operative surgery while practitioners of medicine do. The law requires the regular practitioner to be examined in "materia medica" and the like. It can hardly be conceived that an osteopath must also be examined in such subjects.

18. Milling v. State (Tex.), 150 S. W. 434.
19. Smith v. Lane, 24 Hun 632 (N. Y.).
20. State v. Liffring, 61 Ohio St. 39.
21. Nelson v. State Board, 108 Ky. 769.

The fact that an osteopath uses the title doctor is immaterial. Osteopathy resembles nursing more than the practice of medicine.[22]

Mississippi, 1903.

The practice of medicine suggests the use of drugs and surgical appliances, while the osteopath uses none of these. Nor do the words "appliance or agency" cover osteopathy. The osteopath does not speak of his method as an appliance or agency—there would be an incongruity in doing so, and in any strict and proper sense osteopathy cannot be denominated as an agency or appliance. Then, too, the statutory requirement of chemistry and materia medica cannot be of much assistance to an osteopath. From all this it would seem that the legislature did not intend to set up a universal standard from which no one might depart. Hence, osteopathy is not the practice of medicine.[23]

New Jersey, 1904.

The phrase "other agency or application" is undoubtedly very broad and would usually be taken as covering manual manipulation. But this phrase is conjoined to the terms "drug and medicine" which are more special and under the maxim *noscitur a sociis,* its interpretation should be such as will confine it to the class in which its special associates stand. In forbidding an unlicensed person to apply any drug or medicine for remedial purposes, the legislature plainly contemplated the use of something other than the natural facilities—some extraneous substance. A similar restriction must therefore attach to the words "agency and application." Hence osteopathy is not the practice of medicine.[24]

North Carolina, 1904.

The administration of massage, baths and physical culture is nothing which calls for an examination by a learned board in obstetrics, therapeutics, materia medica and other like things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine.[25]

Delaware, 1908.

Treatment of patients simply by the use of hypnotism and massage is not practicing medicine under a statute which defines that term as "prescribing remedies or performing surgical operations," the term

22. State v. McKnight, 131 N. C. 717.
23. Hayden v. State, 81 Miss. 291.
24. State v. Herring, 70 N. J. L. 34.
25. State v. Biggs, 133 N. C. 739.

"remedy" having reference to drugs. So that if a person advises the use of powders, plasters and baths he is practicing medicine.[26]

Colorado, 1912.

The Colorado statute provides that an osteopath was not included thereunder if he did not administer drugs. Hence, an osteopath could use the title "doctor" and the like, especially in conjunction with the word "osteopath," provided he did not prescribe or administer drugs. It would seem too that he must have received the degree of doctor of osteopathy from a legally created college of osteopathy and have a certificate from the osteopathic association.[27]

SUMMARY

It will be seen that the states are about equally divided in their opinions as to the appropriate definition of osteopathy. However, much greater weight is to be attached to the opinions holding osteopathy to be the practice of medicine than to those opinions which have held osteopathy not to be the practice of medicine. As we have seen in Chapter 2, these latter opinions are based in great part upon a fallacy which is a misconception of the meaning of the words "medicine, drug," and the like. By giving these terms their broadest interpretation such opinions as Smith v. Lane, State v. Liffring, Nelson v. Board, State v. McKnight and the others are entirely negatived. Then, too, the New York case was discredited in the later opinion as given in People v. Allcutt.[28]

While State v. Liffring was explained in State v. Gravett, and the case Nelson v. Board is no longer of weight in Kentucky since their law was amended in 1904 to include osteopaths. In other jurisdictions this case may be given such weight as would seem to attach thereto, taking its logic and reasoning into due consideration. The North Carolina cases are negatived from the fact that they are based on the narrow conception of the word medicine. And too an analysis of those opinions would seem to show a failure to have grasped the true purport of the facts so that the reasoning is to be given less consideration than that of such cases as Collins v. State, and People v. Little. Again, in the cases in which osteopathy is said to more nearly resemble nursing than the practice of medicine it would seem that the courts have missed the point. For as was said in People v. Gordon and in Collins v. Texas, the osteopath in professing the greater skill must for that very reason be differentiated and distinguished

26. State v. Lawson (Del.), 65 Atl. 593.
27. Jones v. People (Colo.), 127 Pac. 125.
28. 117 App. Div. 546, 102 N. Y. Supp. 678.

from a mere nurse or masseur. And further, it is apprehended that the osteopath would not care to have his profession reduced to the level of those callings. As a consequence, the cases in which osteopathy is considered negatively may be disregarded and it may be taken as the law that osteopathy is the practice of medicine, excepting, of course, those states in which by specific definition the practice of osteopathy may be excepted.

§ 47.—Christian Science

CHRISTIAN SCIENCE IS THE PRACTICE OF MEDICINE

Nebraska, 1896.

It may be conceded that perfect toleration of religious sentiment and the enjoyment of liberty in all religious matters is of paramount importance. The exercise of the art of healing for a compensation, whether exacted as a fee or extended as a gratuity, cannot be classed as an act of worship. Neither is it the performance of a religious duty. The object of a medical practice act is to protect the afflicted from the pretensions of the ignorant and avaricious, and its provisions are not limited to those who follow the beaten paths and established usages. If such a person has treated any physical or mental ailment of another, then neither the pretense of religious worship nor the performance of any other duty should have excepted him from the punishment which an infraction of the statute would seem to involve. Hence, instructions that for a conviction such a person must be found guilty of "practicing medicine, surgery and obstetrics" as generally or usually understood, are erroneous.[29]

Ohio, 1905.

Christian Science is the practice of medicine in that treating persons for a fee for the purpose of curing or healing their physical and mental ailments is so defined under the statute. The language of the statute would seem to imply that the legislature intended to bring within its meaning every person, who, for a fee, prescribed or recommended a cure for disease, even though the cure was to come not from such person himself but through his intercedence from God. In praying for the recovery of a patient a Christian Scientist is giving a treatment to cure patients of disease, and the patient pays therefor. He is thus practicing healing or curing disease.[30]

New York, 1911.

The Christian Scientist brings himself within the meaning of the statute, which says, "a person practices medicine within the meaning

29. State v. Buswell, 40 Neb. 158.
30. State v. Marble, 72 Ohio St. 21.

of this article, except as hereinafter stated, in holding himself out as being able to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition." Nor would a Christian Scientist be protected by the constitutional provision which permits the free exercise and enjoyment of religious profession and worship without discrimination or preference. For the constitution further provides that liberty of conscience should not be so construed as to excuse acts of licentiousness or justify practice inconsistent with the peace or safety of the state.[31]

For the Christian Scientist although claiming to derive his power of healing from the Supreme Being, is clearly within the meaning of the New York statute, professing to heal and cure physical and mental ailments. And when the law says that this cannot be done without a license, a religious belief is no excuse for the unlawful act, for no person under the guise of the principles and tenets of any church may violate the law of the land. The Christian Scientist has the right to believe that he can heal by prayers, but if he carries that belief into practice for hire and solicits patients by advertisements, then he exceeds his rights as an individual under the law and comes directly within the prohibition contained in Article 3 of the Constitution of the State of New York. He must subordinate his belief to the rights of the community and of the state as an entity, where the free exercise of such belief either impairs or endangers the health of the people, or tends to place their health in jeopardy so that the safety of the state will be affected.[32]

Colorado, 1912.

A person claiming to be a member of a corporation entitled "The Divine Scientific Healing Mission" is practicing medicine, inasmuch as he attempts to treat and heal the sick for pay. The statute lays hands on commercial healing as a money-making occupation, business or profession, regardless of the method of treatment or curative agency employed. As a protection to the public health, the statute requires those engaged in the business of curing the sick to possess certain qualifications. One form of examination is required of all sorts of

31. New York Public Health Law, Sec. 173.
New York Constitution, Art. 1, Sec. 3.

32. People v. Cole, City Magistrate's Court of the City of New York, First Division, Second District, Feb. 11, 1911; aff'd People v. Cole (N. Y.), 148 N. Y. Supp. 708.
People v. Pierson (N. Y.), 68 N. E. 243.

healers. All must be examined in the fundamentals before they can be licensed to follow the business of curing the sick. In the eye of the statute, methods of treatment meet on a level as curative agencies in healing human ills. There is no discrimination, partiality or monopoly. As a protection to the public health the state fixes the standard of competency and makes the right to engage in the business dependent on the possession of certain knowledge. Nor is this any interference with a free exercise of religious worship. Herein the defendant was engaged in a business venture, not a religious exercise. The commercial practice of healing by prayer followed as a money-making venture or occupation is the practice of medicine within the plain meaning of the statute, and such occupations must be so held for the preservation and promotion of the health, safety and morals of the people.[33]

CHRISTIAN SCIENCE NOT THE PRACTICE OF MEDICINE

Rhode Island, 1898.

Christian Science is not the practice of medicine under the general laws of Rhode Island, Ch. 165, in that prayer alone is used by these persons and no attempt is made to cure by physical means. The healer is simply desirous of turning the patient's thoughts to God and toward the attainment of physical perfection. In this, there is no attempt to practice medicine or surgery, or to diagnose cases or prescribe any drug or medicine. And further, such a healer makes no claim to know anything about disease. The fact that such a person hands out a card, advertising himself as a doctor, and giving office hours, is to be disregarded. Prayer, for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer, cannot be taken as in any sense constituting the practice of medicine. The object of such a statute is to protect the public from incompetent persons and not from theories. The statute is not to compel persons suffering from disease to resort to remedies, but is designed to secure for those desiring remedies, competent physicians to prepare and administer such remedies.[34]

SUMMARY

The clear preponderance of authority is here to the effect that Christian Science is the practice of medicine, on the basis that medical practice acts are to be construed to maintain the public health, which the unrestrained practice of Christian Science would seem to

33. Smith v. People (Colo.), 117 Pac. 612.
34. State v. Mylod, 20 R. I. 643.

tend to endanger. This point the court in State v. Mylod failed to consider. For although the Christian Scientist may be entitled to religious freedom, nevertheless allowing him too much liberty in the exercise of his beliefs is to endanger the public health which medical practice acts are primarily designed to promote and maintain. Again the court is too much given to the narrow construction of the law from the point of view that such an act is a penal statute. As has been seen, a statute designed to promote the general welfare and the like can in no sense be considered penal. Nor can the fact that the statute is creating an offense, not known to common law, be taken into consideration as against the plain fact that medical practice acts in general are to protect the people from ignorant and designing persons, who claim to be able to cure them of their ills, and also to protect the people against themselves, who, when ill, are ready to give ear to any one who claims to help them. State v. Mylod, *supra*, has in effect been much modified, it would seem, by Swarts v. Siveny, (R. I.) 85 Atl. 33 (*infra* 40).

§ 48.—Chiropractic

Chiropractic the practice of medicine

Iowa, 1910.

An indictment charged a defendant with wrongfully, unlawfully and publicly professing to be a doctor, and assuming the duties of that profession, and then wrongfully, falsely, unlawfully and publicly professing to cure and heal diseases by means of a certain system known as chiropractic. The evidence showed that the defendant treated for a consideration and professed to cure and heal diverse diseases, that he neither gave nor prescribed medicine, and that his system consisted in hand manipulation and electric vibrations. These acts were taken as showing that he was engaged in the practice of medicine. The system by which one professes to heal is immaterial. The point is that under these laws no one can undertake to treat and heal human ailments without first giving evidence of one's ability to follow such a profession.[35]

Iowa, 1911.

It has been contended that the operation of medical practice acts should be limited to those professing, or undertaking, to practice medicine or surgery. But a state may determine what acts constitute the practice of medicine as a physician and may impose conditions on

35. State v. Miller (Iowa), 124 N. W. 167.

the exercise of that privilege. Thus the Iowa law may be taken as including those who without medicine or the practice of surgery publicly profess to cure and heal, and plainly such language would cover chiropractors. A person who published a series of articles in a newspaper denominated "talks with a chiropractor," in which he directed public attention to the so-called chiropractic system of healing to the shortcomings of the medical profession and especially to himself as a member of that school, and also who undertook to heal a number of persons, and who in doing so first required them to strip the back to the skin and lie on the table in order that he might examine the spinal column with his hands and by sudden pressure restore the vertebrae out of place to their normal position, is manifestly not only publicly professing to cure and heal, but is undertaking so to do.[36]

Kansas, 1911.

Chiropractic is the practice of medicine under a law simply professing to regulate the practice of medicine, surgery and osteopathy. One who without registration, examination or attempting to procure a license, endeavors for pay to practice chiropractic by pretending to adjust the spine of one afflicted with bodily infirmities, and who advertises to treat for pay, by chiropractic spinal adjustment, persons thus afflicted, would be guilty and liable under the law. Webster's New International Dictionary defines this system as "chiropractic is a system of work that treats disease by manipulation of the spinal column." The chiropractor claims that the only treatment, so-called, which he uses is not a treatment, but merely an adjustment of the vertebrae which restores the vertebrae and the nerves to their normal position and thus removes the cause of the disease. In this he is not practicing surgery or medicine, and does not use any manipulations whatever other than the adjustment of vertebrae. But under such language as is used in the Kansas law of 1908 it may well be said that one whose vertebrae are partially displaced, causing impairment of nerve function, is one afflicted with bodily infirmities, and that one who restores the functions of the nerve on which maladjusted vertebrae had formerly pressed is treating or attempting to treat such afflicted person. Manifestly, it is the object of the legislature to protect the ignorant from imposition in the healing art. It may very well be that a close construction of the language in this law would not bring a chiropractic within the meaning thereof as a physician or surgeon, but that his system would more nearly resemble osteopathy. However, medicine and surgery with which the defendant was charged as attempting to practice

36. State v. Corwin (Iowa), 131 N. W. 659.

is by common use and adjudged meaning taken as covering a wide portion of the domain of healing, and should be held to cover the case of one who not claiming to be a physician and surgeon really practices osteopathy under another guise, without having even the qualifications of the osteopath.[37]

Missouri, 1911.

The practice of medicine is not confined to the administration of drugs, nor is surgery limited to the knife. When a physician advises his patient to travel for his health he is practicing medicine. Broadly speaking, one is practicing medicine when he visits his patient, examines him, determines the nature of the disease and prescribes the remedy he deems appropriate. When a practitioner makes such an examination of his patients as he regards sufficient to indicate to him the cause of the trouble, and to indicate its proper treatment, he has diagnosed the case. Hence a practitioner although he does not claim to treat his patients, but merely to adjust them, is practicing medicine. It makes no difference that the practice may be harmless, or that cure may be seemingly effected thereby if such practitioner is unlicensed. Hence one who practices what he calls the science of chiropractic is practicing medicine within the meaning of the law.[38]

Iowa, 1913.

Persons professing to be chiropractors, who maintain offices, and who hold themselves out to treat and do actually treat patients for disease for the purpose of healing them are practicing medicine within the meaning of the law.[39]

Rhode Island, 1913.

A chiropractor who professes to adjust the spinal column for the purpose of removing the cause of a person's physical disability is guilty under the ordinary acceptation and the popular meaning of the term "practice of medicine." The practice of medicine does not wholly depend on the administration of drugs. It is a matter of common knowledge that the use of drugs by physicians of medicine has materially decreased, especially during the last twenty or more years, and that not infrequently a medical practitioner limits his efforts to effect a cure by simply regulating the diet, advising exercise or prescribing a change of scene or climate. Hence a practitioner in undertaking

37. State v. Johnson (Kan.), 114 Pac. 390.
See also: State v. Peters, 87 Kan. 265, 123 Pac. 751; State v. Cotner, 87 Kan. 864, 127 Pac. 1; Green v. Hodges (Kan.), 138 Pac. 605.
38. State v. Smith, 233 Mo. 242.
39. State v. Zechman (Iowa), 138 N. W. 387.

by his system or method of treatment to cure or alleviate disease or pain, and who advertised his ability to so treat human disease, and who has been compensated for giving such treatment, was practicing medicine within the meaning of the law.[40]

CHIROPRACTIC NOT THE PRACTICE OF MEDICINE

Arkansas, 1912.

Under a statute which defines the practice of medicine as "prescribing or directing for the use of any person or persons any drug or medicine or other agency for the treatment of disease" a chiropractor is not practicing medicine in that he is not using drugs or medicine within the meaning of the act, nor does his system come under "other agencies" because the formal rule of *noscitur a sociis* compels the meaning of the general term "other agency" to be limited to the meaning of the specific terms "drug or medicine" preceding it, and can only include agencies of the like nature as those designated by said words. This rule of construction does not deprive the term "other agency" so used of all meaning, but only limits its meaning to agencies of the like nature and quality as those designated by the particular words. This statute was not intended to include the practice of osteopathy, which chiropractors more nearly resemble than it does the practice of medicine, for the legislature passed an act regulating that practice, which expressly declared that it is not included within the practice of medicine. Hence the chiropractor is not amenable to the law, and he may pursue his profession without complying therewith to the extent of obtaining a license.[41]

SUMMARY

It would seem almost unnecessary to comment on the somewhat anomalous case of State v. Gallagher. The court therein was constrained to follow the doctrine of *nocitur a sociis,* which has been explained in Chapter 2. Obviously, the chiropractor is as much within the meaning of medical practice acts in general as is the osteopath or the Christian Scientist. A fallacious conception of the words drug or medicine cannot be invoked to except him from the intent of the legislature. The general welfare of the people compels such interpretation of these laws as will effectually control the exercise of the medical profession and limit it to those who are and who have shown themselves to be competent to treat mental and physical ailments.

40. Swarts v. Siveny (R. I.), 85 Atl. 33.
41. State v. Gallagher (Ark.), 143 S. W. 98.
Ex parte Greenall, 153 Cal., 767, 96 Pac. 804.

Chiropractors, as evidence adduced in court would seem to show, do not as a general rule sufficiently prepare themselves to pose as persons able and fitted to practice the art and science of healing. Members of this school should, therefore, be held amenable to the laws and if possessed of the proper qualificationns should be licensed and permitted to use their system. Doubtless such a scheme would soon develop the limitations of chiropractic and bring about its gradual elimination. Chiropractic must be taken as the practice of medicine to conserve the public health, and can be so held under any law without express language to the contrary.

§ 49.—Magnetic Healing

Michigan, 1888.

A person who advertises himself as a doctor and magnetic healer; who attempts to treat the sick and does do so, and who signs death certificates and the like is practicing medicine within the meaning of the law. Evidence tending to prove these facts, if submitted to the jury under proper instructions, would be sufficient whereon to find a defendant guilty. Nor would there be any error in letting such a case go to the jury.[42]

Indiana, 1902.

A person held himself out as a magnetic healer, advertised himself as such and styled himself "Professor." He was not a graduate of any school of medicine and had no license to practice the profession. He diagnosed his cases entirely by the nerves, and in the treatment thereof used no drugs or surgery. His system of working, in so far as there was anything manual about it, consisted in holding the affected parts and in rubbing them. He received as a fee $1.00 for each of such treatments. A court would not be called upon to determine whether all of these acts might properly be denominated the practice of medicine. Given a fairly relevant use of the term "practice of medicine" as is found in the Indiana law, it would only be necessary to determine whether such a practitioner has brought himself within such statutory definition. Hence under the Indiana law it may be concluded that a person so practicing was engaged in the practice of medicine, since he held himself out as a magnetic healer, and his method was at least in part a method that medical practitioners sometimes employ.[43]

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42. People v. Phippen, 70 Mich. 6.
43. Parks v. State, 159 Ind. 211.
Indiana Medical Practice Act, Sess. L. 1897 as amended 1905.

Iowa, 1905.

Magnetic treatment is the practice of medicine under a law which makes the public profession of an ability to heal evidentiary of a violation of a law. Hence a person who uses that system, and who advertises his ability to cure a variety of ailments, all without a certificate from the State Board of Health, is practicing medicine in violation of the law.[44]

Iowa, 1908.

A person who advertises himself as a magnetic healer, giving treatments by rubbing and kneading the body, and using other osteopathic manipulations, is practicing medicine and is liable under the penalty if he has failed to secure a certificate by law prescribed.[45]

§ 50.—Suggestive Therapeutics

Indiana, 1910.

A defendant claimed to be a graduate of an institute of suggestive therapeutics. In his advertisements he appended the letters "D.S.T." to his name. The evidence showed that he held himself out and advertised to the public by signs in his office, and by insertions in local newspapers, that he was a doctor and that he was capable and competent of successfully treating all forms of chronic diseases. He notified all persons that he was not only a doctor but that as such he was a specialist in the treatment of chronic diseases. He further advised people that he was capable of curing many diseases mentioned in his advertisements without administering drugs or using surgery, and that there were but few of the many diseases which did not yield to his drugless treatment. Acts of this nature constitute the practice of medicine whether or no drugs are administered or surgery employed.[46]

New York, 1911.

A defendant had an office where he received his patients and gave them treatments for their physical ailments. He received compensation for such treatments, but neither prescribed nor administered drugs, nor did he use any surgical operation. His treatment consisted only of the laying on of hands and of mental suggestion. He advertised himself as a Doctor of Suggestive Therapeutics. Such facts were deemed sufficient whereon to base a charge of practicing medicine

44. State v. Heath, 195 Iowa 585.
45. People v. Trenner, 144 Iowa 275.
State v. Miller, 138 Iowa 28, 115 N. W. 493.
46. Witty v. State (Ind.), 90 N. E. 627.

without a license, in that in claiming the ability to treat patients for physical ills a person asserts himself to be one with special training and skill, thereby securing his patronage. Inasmuch, therefore, as the defendant held himself out to the public as one capable of treating and curing human diseases, together with the facts that he did usually treat patients and receive pay for such treatment, he was guilty of practicing medicine under the law without a license.[47]

§ 51.—Midwives and Obstetricians

Massachusetts, 1878.

In a suit sounding in tort and brought by plaintiff's next friend against defendant, a midwife, for negligently delivering said plaintiff, thereby causing a loss of sight, it was held that defendant was not liable in the premises. This was on the ground that it was not defendant's duty as a midwife to treat diseases of infants' eyes at birth because defendant practiced only as a midwife. Such practice does not constitute the practice of medicine under the law. Defendant had asserted an ability to effect a cure. But such assertion would not make her chargeable for a failure to use that special degree of skill and care for which only the medical profession *per se* may properly be held liable. A physician must apply the skill and learning which belong to his profession; but a midwife who without special qualifications volunteers to attend the sick and if such offer is accepted, can at most be required only to exercise that skill and diligence which is usually bestowed by persons of like qualifications under like circumstances. The defendant was not practicing medicine nor was she assuming to do so, and hence was not liable for the alleged negligence.[48]

Illinois, 1895.

From the evidence adduced it appeared that defendant held herself out as a midwife and practiced in that capacity. Under the law, which enacts that "no person shall practice medicine and surgery in any of its departments in this state without the qualifications required by this act," it would seem that the practice of midwifery was made an important department of medicine and surgery. Argument is apparently quite unnecessary to show the relative value of obstetrics as compared with other branches of medicine and surgery. Nor yet would it seem necessary to show that obstetricians should possess a knowledge and skill commensurate with the importance of their profession and sufficient to cope with the dangers and accidents frequently

47. People v. Mulford, 125 N. Y. Supp. 680.
48. Higgins v. McCabe, 126 Mass. 13.

confronting such practitioners. Patently, the welfare of their patients is within the purview of a medical practice act.[49]

North Carolina, 1901.

The practice of obstetrics is the practice of medicine and surgery, and practitioners thereof must be licenssed. Obstetricians do not fall within the exception of the law which permits women to practice as midwives without taking out a license, since as a rule those practitioners are not women and have assumed the broader responsibility of the profession than that of the midwife.[50]

Massachusetts, 1908.

Both medical and popular lexicographers defined "midwife" as a "female obstetrician," and "midwifery" as the practice of obstetrics. Many of the medical practice acts mention obstetrics as one of the subjects of examination for the purpose of testing an applicant's fitness to practice medicine. This would seem to go far toward showing that obstetrics is a branch of medicine. Nor would it seem to require discussion to demonstrate that when in addition to the ordinary assistance in the normal cases of childbirth a midwife who makes use of obstetrical instruments, and who under certain conditions gives her patients printed formulae, which are in fact prescriptions for use in the following circumstances: vaginal douche, postpartum hemorrhage, afterpains, uterine inertia, painful hemorrhoids, and to prevent purulent ophthalmia neonatorum, is practicing medicine in one of its branches. This conclusion may be reached notwithstanding the fact that childbirth is not a disease, but is in reality a normal function of woman. For the practice of medicine does not exclusively appertain to disease, but is inclusive of obstetrics, which as a matter of common knowledge has long been treated as a highly important branch of the science of medicine.[51]

SUMMARY

It would seem that the difficulty of the courts in their several opinions lies in their failure to recognize the surrounding conditions to the practice of midwifery, which, as a result, prevents a proper application of the law. This may readily be seen in the McCabe and Welch cases cited *ut supra*. In these and similar cases the courts apparently labor at what is to them the Augean task of recognizing the facts which were so lucidly explained in the Porn case and still take into consideration the numerous difficulties attendant on the prac-

49. People v. Arendt, 60 Ill. App. 89.
50. State v. Welch, 129 N. C. 579, 40 S. E. 120.
51. Comm. v. Porn, 196 Mass. 326, 82 N. E. 31.

tice of obstetrics. In many states the laws at one time, and not a few so enact to-day, that women acting as midwives were exempt thereunder. Such laws had existence in great part because of a lack of knowledge. To-day with the advance of medical science has come a consequent enactment of special midwifery laws and statutes regulating ophthalmia neonatorum. Thus surrounding conditions are being given greater consideration and are now being recognized as highly important factors. It may, therefore, be concluded that midwifery and obstetrics are included in the term "practice of medicine," excepting, of course, under those special and highly technical laws which may be found in any given jurisdiction.

§ 52.—Cancer Cures

Ohio, 1871.

A farmer pretended to have a prescription for cancer and that he had special skill which enabled him to treat and cure that disease. He was employed by various persons so afflicted to exercise his skill and was paid therefor. He was held to be practicing medicine contrary to the law.[52]

Kansas, 1907.

A farmer manufactured what he asserted to be a cancer cure from vegetables, grown on his own farm. He had used the remedy on a number of patients, he himself making the application. These people were treated under a contract which called for a payment of $50 down and a like amount upon the cure being effected. He was held to be practicing medicine under a law which made the prescribing of drugs for a fee prima facie evidence of a violation of the law. It is not necessary that a patient himself apply the drug — a physician may also apply it. If the fee is paid for imparting a knowledge of the curative powers of a drug and not simply for material furnished or as compensation for the application thereof, then the transaction amounts to recommending medicine for a fee within the letter and spirit of the law. Nor would a defendant in such a case be exempted from the penalty of the law as "administering domestic medicines" for he received pay for his services and the remedy was not one which is well known or the effect of which is a matter of common knowledge. The theory is that one who proposed to advise as to the use of drugs thereby holds himself out as possessed of special and peculiar information on the subject. It is, therefore, the duty of the state to see that he possesses it or in default of proof thereof to prevent

52. Musser's Executrix v. Chase, 29 Ohio St. 577.

his making the unfounded claim a source of revenue. Thus a person who prescribed a remedy for a cancer for a fee would be practicing medicine whether or no the drug prescribed was a domestic remedy.[53]

§ 53.—Ophthalmology

South Dakota, 1903.

A person who proposes to be an opthalmologist and who claims to cure eye troubles, hysteria, female diseases and various nervous diseases is practicing medicine under a statute which forbids the use of medical titles or the like in advertising by any one other than a person with the legal right thereto, and who is duly registered under the law. Claiming to be a doctor and an ophthalmologist when one is a graduate of no medical school whatsoever and is unlicensed, is practicing medicine contrary to the law.[54]

Illinois, 1904.

From the evidence defendant seemed simply to fit spectacles to the eyes of persons of defective vision, and to sell them to such persons. In his advertisements he stated simply that glasses fitted and ground by his method benefited and had cured headaches, blurring and itching of the eyes. The court held that acts of this nature are not practicing medicine under the Illinois act of 1899. It was further urged that it would be a strained construction of the law to hold that the mere fitting of spectacles is a selling of "appliances intended for the treatment of diseases or injuries of another." It was recognized that it is a well-known fact that headaches and the like are a result of defective vision, and that such ills may be relieved by the use of glasses. But it was said that it could not be contended that a person who sells spectacles or who fits glasses is practicing medicine or surgery or is professing to cure or treat diseases or infirmities thereby.[55]

Tennessee, 1906.

Defendant claimed he was an optician and used what he called "a functional ray treatment." In order to diagnose patients' trouble he made microscopic tests of their blood and then prescribed his method. The patient was denuded of clothing and placed in a closed cabinet, wherein the body was subjected to the rays of two large electric arc lights — this was continued for about thirty minutes or until the patient was in a profuse perspiration — the patient was then taken

53. State v. Huff, 75 Kan. 585, 90 Pac. 279.
54. State v. Yegge, 19 S. Dak. 234.
55. People v. Smith, 208 Ill. 31.

to another room and rubbed off. Local applications of the rays were made to any part affected. Besides the ray treatment the defendant prescribed medicines of various kinds, mostly patent or proprietary remedies, and kept an account at a drug store. He made a uniform charge of $100, which was claimed to be for the light treatment alone. Neither defendant's peculiar definition of optician nor his system of treatment relieved him from liability under the law. The determinative factors against him were his claim to be a physician by holding himself out as a practitioner of medicine and by soliciting patients who were afflicted with diseases for treatment by his system.[56]

Iowa, 1908.

The publication of a card bearing the inscription "Doctor of Neurology and Ophthalmology" together with the insertion of advertisements in a daily paper dilating on one's ability and on the value of a practical system is making a public profession that one is a physician and a practitioner of medicine. Such a profession together with the assumption of the duties of a medical practitioner by advising patients how to care for themselves so that Nature might effect a cure is practicing medicine within the meaning of the law. Merely claiming to discover the cause and letting Nature effect the cure is immaterial; if the practitioner has no certificate his acts are unlawful. A preparation to follow the medical profession by a mere attendance at so-called medical colleges during the summer months only, is entirely insufficient and should constitute no authority to practice medicine under any law. Practitioners of this nature savor of the charlatan and impostor, and can form no bona fide basis on which to establish a right to practice medicine.[57]

Missouri, 1910.

A person who treats diseases of the eyes is practicing medicine. It may be that simply fitting and selling eye glasses is not practicing medicine, but where there is added thereto a prescribing of ointments, salves and the like, together with the facts that the practitioner charges and received pay for his services, has an office and advertises himself as a doctor, it can hardly be denied that this is the practice of medicine. It is the act committed and not the designation thereof which constitutes the offense. Hence calling one's self an ophthalmologist is no defense because that term has reference simply to a branch of medicine.[58]

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56. O'Neil v. State, 115 Tenn. 427, 90 S. W. 627.
57. State v. Wilhite, 132 Iowa 226.
58. State v. Blumenthal (Mo.), 125 S. W. 1188.

SUMMARY

The courts in dealing with those who fit and sell spectacles — opticians, ophthalmologists and the like — seem to have the same difficulties as when dealing with other so-called or alleged specialists. In an apparent endeavor to differentiate these callings from the profession of medicine in its broadest sense, these courts have "digged for themselves a pit" into which they and their logic have forthwith fallen. For example, in the Illinois case of People v. Smith, *ut supra,* the court at one place says that a mere "fitter of spectacles" is not to be considered under the language "appliances intended for the treatment of diseases or injuries of another,"[59] and then the court continues "it is a well-known fact that headaches . . . may be relieved by the use of glasses. But it cannot be contended that one who sells or fits glasses is practicing medicine . . . " Glasses relieve headaches, to say nothing of defective vision, blurring, which may be indigestion, and the like, and yet glasses are not appliances intended for the treatment of diseases, and one who fits and sells spectacles is not practicing medicine. Doubtless the learned court, which evolved this *chef d'oeuvre* of legal lore and acumen, can defend it with logic equally marvelous. That is not to be controverted, nor is it necessary. We need simply apply the maxim: "the facts speak for themselves." It can therefore safely be concluded that a "fitter of spectacles" is handling "appliances intended for the treatment of disease" and is to that extent practicing medicine. So-called optometrists should not be permitted to sell glasses indiscriminately when the true *casus belli* is mayhap a tumor or a paralysis of a nerve or the like. Those who append the terms "optometrist, optician, oculist, ophthalmologist" and the like are practicing medicine and it should be so held.

§ 54.—Itinerant Physicians and Vendors of Drugs and Proprietary Remedies

Illinois, 1884.

The record showed that defendant was engaged in the selling of medicines by means of a show and the like, and that the board had offered evidence tending to prove that defendant had professed at these gatherings that he could cure rheumatism, kidney diseases and the like. It was shown in evidence that defendant circulated certain advertisements and the board offered to read said circulars into evidence, but permission was denied. From these facts and others it

59. People v. Smith, 208 Ill. 31.
Illinois Medical Practice Act, Sess. Law 1899, Secs. 7 and 8.

would seem that there was a clear case for the jury and sufficient grounds on which to hold defendant as an itinerant doctor and vendor of drugs, and therein as a violator of the medical practice act, or rather that portion thereof having reference more particularly to itinerant physicians and vendors of drugs.[60]

North Carolina, 1891.

A person who is a vendor of patent medicines and who in addition thereto diagnoses diseases, prescribing various proprietary remedies therefor in accordance with what the trouble may seem to be, is practicing medicine. The avocation of vendor of patent medicines cannot be used to shelter one who is in reality practicing medicine. If such were permitted a pretender might take advantage of it and evade a law which is enacted for the express purpose of preventing quacks from masquerading as medical men, thereby endangering the general health and safety of the people.[61]

Iowa, 1894.

Any person being an itinerant vendor of drugs, who travels from county to county, and without selling or offering to sell any drugs, makes the profession of being able to cure or treat diseases in any way, and by any means, is guilty as contemplated by the act of the defense of "professing to treat diseases while an itinerant vendor of drugs and without a license."[62]

Illinois, 1900.

A medical company entered into a written contract with one "W" to sell and distribute its remedies by itinerant vending. The law required all itinerant vendors of drugs to pay a fixed fee monthly. The contract thus entered into made the medical company the seller of the drugs and "W" its mere agent. The company under the law should therefore have taken out the license and paid the fee as all sales otherwise were violations of the law. The obvious purpose of such a law is to prevent the public being harmed and defrauded by the itinerant sales of injurious drugs and nostrums.[63]

Illinois, 1902.

A person who travels about the country, prescribing a certain medical device, claiming it could cure rheumatism and the like, and making sales of said device, cannot be regarded as practicing medicine.

60. People v. Blue Mountain Joe, 129 Ill. 370.
61. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.
62. State v. Blair, 92 Iowa 28.
63. Watkins Medical Co. v. Paul, 87 Ill. App. 278.

For this is no attempt "to treat physical ailments." It is simply offering and recommending a device for sale. It is no more the practice of medicine than a sale of an atomizer by a druggist or any gratuitous advice given by one neighbor to another, in case of illness, would be.[64]

Iowa, 1905.

Defendant, a non-resident and unlicensed, assumed the duties of and publicly professed to heal and to cure diseases by dieting his patients and by causing them to take certain exercises and to wear glasses furnished by him. In pursuing his profession he traveled from place to place and was thereby guilty of practicing medicine as an itinerant physician without the required license.[65]

Arkansas, 1912.

A law provided that it would be illegal for "any itinerant vendor of any drug, nostrum, ointment, or application of any kind intended for the treatment of diseases or injury, or who may by writing, print or other methods profess to cure or treat diseases or infirmities by any drug, nostrum, manipulation or other expedient to practice medicine without a certificate, or to pursue his profession without said certificate." The obvious intention of this act it would seem is to create two offenses. First, the selling of any drug for the treatment of any disease without a license, and second, advertising the willingness to cure or treat any disease by means of any such drug without a license. But in construing the section the act as a whole was taken into consideration and it was ruled that in order to constitute a violation of the act the vendor had to "practice medicine," and in order to do that, the section must read "sell drugs and profess to cure diseases by advertising." Under this construction the mere sale of drugs without a license would not be unlawful because that would not be practicing medicine within the meaning of the statute. For there was required in addition to the "sale" a professing to cure diseases by advertising.[66]

SUMMARY

In the construction of these laws the courts would seem to miss the true object of their enactment, which is to protect the public from fraud and charlatanry. If this be kept clearly in mind there would be no difficulty as was found in the Lehr and Williams cases cited

64. People v. Lehr, 196 Ill. 361.
65. State v. Edmunds, 127 Ia. 333.
66. Williams v. State (Ark.), 137 S. W. 927.
Kirk v. State (Tenn.), 150 S. W. 83.

ut supra. In the Lehr case the selling of a device for rheumatism could well be construed the practice of medicine. However, in an opinion to the contrary no little blame may be placed on the wording of the statute. Yet the courts must bear their share in failing to interpret even a poorly worded statute with a liberal mind and for the best interests of the public. It is well recognized that itinerant physicians and vendors of drugs are objectionable, and that they are actuated entirely from selfish motives, not hesitating to sacrifice any one or anything for their own ends. For these reasons an itinerant is not comparable to a druggist selling an atomizer or to a neighbor advising a domestic remedy in case of a cold. And again a statute may very well constitute two acts as offenses; selling drugs and professing to cure diseases with the said drugs by advertising. On grounds of public policy these laws must be met with a fair and open mind and not construed so as by means of verbal quibbling to create technical defenses to the ultimate sacrifice of the public welfare. All states do not constitute the itinerant vending of drugs the practice of medicine, nor is it necessary. This business, however, should be regulated and can be controlled just as well from this point of view as any other. Generally, the vendor of drugs pretends to have an ability to diagnose, and of course claims his remedy for a specific. What more sensible course could there be than to constitute this practicing medicine, and even to require these vendors to submit to an examination as to their qualifications. At least if this were done courts could not miss the obvious point that the legislature was attempting to eliminate certain undesirables who cannot possibly qualify as able to treat physical and mental ailments.

§ 55.—Treatment Given Under the Direction of a Legally Registered Physician

Nebraska, 1898.

The defendant, an unregistered physician, and another assisted a duly registered physician in his operations and divided the remuneration equally. The defendant further administered remedies under the direction of the registered physician and also in his absence. In performing the services usually rendered by a physician and in accepting remuneration therefor defendant was practicing medicine under the law. It was immaterial that he was seemingly acting as assistant to the registered physician inasmuch as in reality he was acting independently in that all fees were divided equally.[67]

67. State v. Paul, 56 Neb. 369, 76 N. W. 861.

Illinois, 1899.

A defendant who advertised his system of healing, and who treated patients by rubbing the parts affected, claimed to be acting under the direction of a licensed physician, defendant himself being unlicensed. The trial court instructed the jury that although the treatment may have been requested and directed by the regular attending physician of the person treated, still defendant is actually administering the treatment and in being unlicensed would be practicing medicine illegally. Such an instruction as a general principle of law is wrong and vicious. But since no competent evidence was adduced to substantiate the allegation of practicing under the direction of a physician the instruction could do no harm and the verdict of guilty should be allowed to stand.[68]

Arkansas, 1900.

Defendant, a student in a licensed dentist's office performed dental operations for various patients for which he charged and received pay personally. Being but a student defendant was unlicensed. The law forbade any one to practice dentistry without first being licensed. From which provision persons doing work gratuitously were excepted. Hence defendant although he was ostensibly but a student working under a licensed dentist was nevertheless by his acts practicing dentistry in violation of the law.[69]

District of Columbia, 1904.

Defendant proclaimed himself an expert in the treatment of alcoholism, therein professing a knowledge of the science of medicine for the purpose of obtaining patients to take his treatment. Defendant would diagnose the case of any patient coming to him and prescribe his remedy. All patients would be placed under the immediate supervision of licensed physicians who were employed by defendant to administer his remedy, and prescribed for their general welfare. Defendant in selling his compound to patients whom he decided to be in need thereof, was practicing medicine just as much as if he had given them an actual prescription that could be filled at any ordinary drug store. Employing regular physicians to administer the remedy — to determine the amounts and hours of dosage — would not relieve defendant of liability.[70]

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68. W. D. Jones v. People, 84 Ill. App. 453.
Illinois Medical Practice Act, Sess. Law 1887, Sec. 10.
69. State v. Reed, 68 Ark. 331, 58 S. W. 40.
70. Springer v. D. C., 23 App. D. C. 59.

Oklahoma, 1913.

A person who does not possess a valid unrevoked certificate from the State Board of Medical Examiners is not entitled to practice medicine under the law of Oklahoma, excepting in emergencies and such other cases as are specifically exempted by the statute. This is the truth even though a person works with or under the direction of a duly authorized practitioner, and it is immaterial whether he works for a fee, a percentage or on a salary. The Oklahoma act does not any more contemplate or authorize a registered physician going out and employing all the unauthorized quacks in the country to aid and assist him for a compensation or otherwise, except in emergencies, in the practice of medicine, than it does the employment for the same purpose of the section hands on a railroad. The law is not only intended to protect legitimate practitioners, but also to protect the public against being imposed on by an incompetent person holding himself out as a physician. A person so practicing under a licensed physician, if unlicensed, would be guilty of a violation of the medical practice act, and the physician employing him, if cognizant of the facts, would be guilty under the criminal law as an aider and abetter.[71]

SUMMARY

It would seem the consensus of opinion that practicing or attempting to practice when unlicensed, even though it be under the direction of a licensed physician, is objectionable under the law. The Jones case, which apparently dissents from this view, in that the appellate court objected to the broad instruction of the trial judge, may even, it is submitted, be reconciled. The instruction made the administration of the remedy the objectionable point under the statute, but patently, this would not be so, for if defendant gave his massage treatment at the direction of a licensed physician, it would be directly comparable to a druggist filling the prescription of some physician and charging therefor. If this were all defendant had done he would not be violating the law, because he would not be assuming to treat as a physician, but simply and only at the direction of a registered physician. In the other case the defendants had not only held themselves out as physicians while assuming simply to act as duly licensed physicians, but they had actually treated cases and charged therefor as if they too were duly licensed under the law. As has been repeatedly said, it is this deception which the law attempts to prevent, together with the charlatanry which is bound to result therefrom.

71. Gobin v. State (Okla.), 131 Pac. 546.

§ 56.—Prescribing and Administering Remedies for a Compensation and the Like

New Mexico, 1905.

A drugless healer in opening an office for business and in advertising as a person able and willing to treat and cure disease and the like, and in accepting pay for his treatments and prescriptions, would be practicing medicine under a statute forbidding such act, unless the practitioner be licensed in due form under the law.[72]

Missouri, 1906.

A person holding himself out as a physician, receiving and examining patients, advising and prescribing for them, and accepting pay for such services is practicing medicine.[73]

New Mexico, 1908.

Defendant opened an office and announced to the public his willingness to treat consumptives with a patent medicine purporting to be a specific for that disease. He was to that extent practicing medicine under the law. When a law provides that a treatment must be for pay, or that a receipt of compensation constitutes the practice of medicine, then it is necessary that there be some person actually treated, but under the provisions as to advertising and opening an office no treatment is necessary. The mere acts of advertising and opening an office constitute the overt act, while under the other section it is the treatment of a patient for pay, which is forbidden if the practitioner be unlicensed.[74]

§ 57.—Corporations

Nebraska, 1905.

A corporation, while in some sense a person and for many purposes so considered, is not however such a person as can be licensed to practice medicine. It is impossible to conceive of an impersonal entity judging the nature, character and symptoms of a disease or determining the proper remedy or giving or prescribing the application of the remedy to the disease. Members of, or persons employed by a corporation might do these things, but a corporation itself is incapable of doing them. The law contemplates that one who undertakes to judge the nature of a disease or to determine the proper remedy therefor, or to apply the remedy, must have certain professional qualifications. But a corporation which merely advertises to and does prac-

72. Territory v. Newman, 79 Pac. 706.
73. State v. Davis, 194 Mo. 485, 92 S. W. 484, 4 L. R. A. (N. S.) 1023.
74. Territory v. Lotspeich (N. Mex.), 94 Pac. 1095.

tice medicine through its officers and agents who are legally licensed physicians does not in itself need these qualifications, and of course cannot have them. Hence the making of contracts to cure disease and the collecting of compensation therefor is not practicing medicine within the meaning of the law, nor is there therein any attempt so to do.[75]

Ohio, 1906.

A corporation issued and sold contracts to physicians whereunder it was bound to retain counsel and defend said physician in any malpractice suit that might be brought against him. The corporation did not agree to pay for any judgment rendered against any physician, and hence was not in an insurance business but was engaged in a professional business contrary to the law. In undertaking to act as agent of the obligee in retaining legal counsel and in managing and maintaining the defense of the suit, the corporation was engaged in a professional business. And this even though the corporation is an impersonal entity which as such cannot engage in the practice of law and the defense of suits *per se*.[76]

New York, 1908.

A corporation which advertises to practice medicine is undertaking to practice medicine just as much as an ordinary person would be. That the corporation would have to practice through its officers and agents is immaterial. Any corporation in the consummation of any act as a corporation must act through officers and agents. Nor is the fact that a corporation is physically incapable of taking out a license any objection. For notwithstanding that fact it can advertise, and advertising is forbidden to any but a licensed physician. Hence in so doing a corporation is practicing medicine contrary to the law.[77]

A contract to perform medical or surgical services by a corporation organized for the purpose of constructing, owning and operating a street railway is not only *ultra vires,* but is in direct conflict with the medical practice act, and therefore void.[78]

SUMMARY

On grounds of public policy, if not under the statutory laws, corporations can be held to be acting illegally in attempting to practice medicine or in advertising to practice medicine through agents. The

75. Institute v. State, 74 Neb. 40, 103 N. W. 1078.
76. State v. Laylin, 73 Ohio St. 90.
77. People v. Institute, 192 N. Y. 454, 85 N. E. 697.
78. R. R. v. Kessler (Ohio), 36 L. R. A. (N. S.) 50.
In re Cooperative Law Co. (N. Y.), 92 N. E. 15.

Nebraska case is to be distinguished from the New York and Ohio cases in that the law in the former case did not forbid advertising in itself and in that the practice of medicine as defined by statute differed as a consequence. It would seem that the Nebraska court would have held the same view as the New York court did had the case before the court arisen under a similar law. Undoubtedly, on grounds of public policy, it would have been a common sense decision to have held the corporation to have been acting illegally. The medical profession is a thing too vital to be emmeshed in the legal fictions of the so-called corporate entity. Hence it is that a corporation should at least be held guilty of the attempt to practice medicine even if it be a physical impossibility for the corporate entity as such to actually practice medicine.

§ 58.—Clairvoyant, Magic Healers

Maine, 1871.

A person who pretends to be a clairvoyant and who visits her patients for the purpose of treating them by her system, and who after a fashion diagnoses a disease and prescribes therefor, is practicing medicine. It is immaterial that such a person denies that she is practicing medicine and disclaims any use of drugs and the like. Such disclaimers and denials cannot controvert the charge of practicing medicine as evidenced by attempting diagnoses, prescribing for and treating patients.[79]

Delaware, 1904.

A defendant pretended that certain people were possessed of evil spirits and that their sickness was caused by the presence of this spirit and that defendant alone was possessed of the power to remove such spirits, and thus to heal the disease or cure the sickness. Defendant was indicted and convicted under a statute enacted against pretending to exercise the art of witchcraft and the like.[80]

Georgia, 1908.

Plaintiff had been charged with practicing medicine without a license, and after a preliminary hearing the case had been dismissed. He then brought this suit for malicious prosecution and false imprisonment. The pleadings therein raised the issue as to whether or no following the profession of a magic healer is practicing medicine. Under this system no drugs were administered, nor were surgical instruments employed. The method consisted simply in laying hands

79. Bibber v. Simpson, 59 Me. 181.
80. State v. Durham (Del.), 5 Penn. 105, 58 Atl. 1024.

on the sick at the point or place of pain or disease, and the healing which followed was by direct divine agency only. The plaintiff received no pay for his treatment but did accept gratuities. Plaintiff was held to be not practicing medicine by the application of the doctrine *noscitur a sociis* to the term "other agency," and by disregarding the words "material or not material." Magic healing is a branch of mental therapeutics or psychic phenomena, and receiving pay cannot make it the practice of medicine.[81]

SUMMARY

Possibly attempting to hold some of these healers as practitioners of medicine does test the tenuosity of the law in no little degree. However, it may be said to be simply a question of policy. Such practitioners are, with scarcely an exception, nothing but impostors and charlatans. Hence the issue is whether to indict them for some one of the usual misdemeanors or felonies, or to bring them under a medical practice act. The Delaware case is an example of the former, and the court in the Georgia case expressed themselves *obiter* as being favorable to such a policy. Conceding this issue as a matter of policy does not answer, however, such expressions as that a legislature cannot make the receipt of money for a treatment evidence of a violation of the law, and thus render those who treat sickness for pay practitioners of medicine under the law. There is no question but that this can be done.[82]

It is not to be apprehended that courts, so questioning the power of a legislature, would have any difficulty in recognizing the legal fiction, a corporation, as a personal entity. Why then should these courts "unravel the knitted sleeve of care" in their endeavor to pronounce "treating the sick for pay not the practice of medicine?"[83]

It is submitted that a court in so holding would seem to lay its opinion open to one of two charges. Either ignorance or undue partiality. Hence while these violators of law and good morals may as a matter of policy be indicted and punished for the ordinary criminal offenses of fraud and deceit, yet they too may very well be brought under a medical practice act, for this also is "the law of the land" and is intended for the general welfare of the people, just as much as the criminal law which has been created out of the old common law.

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81. Bennett v. Ware, 4 Ga. App. 293.
82. Ut supra, Ch. 1, Secs. 4, 5.
    Ut supra, Ch. 2, Secs. 25, 32.
83. Bennett v. Ware, 4 Ga. App. 293.
    State v. Biggs, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139, 98 Am. State Rep. 731.

§ 59.—Miscellaneous

MECHANO NEURAL THERAPY

New York, 1907.

Defendant advertised as a doctor and maintained an office where he received his patients. He also visited patients at their homes. He diagnosed their troubles and would advise various diets therefor. He also professed to treat their nerves by pressing and kneading different portions of the body. He had a regular charge for all such services. He claimed the ability to cure all diseases and denied the use of any drugs therein. He asserted himself to be a mechano neural therapist and hence was practicing medicine. The opinion as herein expressed may be said to have the support of the general current of authorities throughout the country and further an examination of the history and growth of statutory enactments along this line but serves to strengthen the view. It would seem that the rule as claimed to have been laid down in Smith v. Lane should not here apply.[84]

VITAL HEALING

Iowa, 1910.

Defendant attended a school of psychic-sarcology for three years. He then advertised his system in the daily papers and claimed that he treated and cured people. He had an office where he received visits from his patients and gave treatment. This consisted in a manipulation of the nerves, on the theory that the affected parts would thereby be made normal. These acts constituted an attempt to heal and cure the afflicted and hence defendant by his system of vital healing was practicing medicine.[85]

PRESCRIBING "TISSUE FOODS"

Iowa, 1908.

The evidence showed that defendant maintained an office where she kept and sold to her patients a preparation known as "tissue foods." It was further shown that defendant pretended to diagnose and thereon to prescribe the proper remedy. There was a conflict of testimony as to whether a food was sold as a medicine or as an article of diet. The only question here was, did defendant during the time covered by the indictment make a practice of prescribing and furnishing medicine for the sick, which under the law would constitute the practice of medicine. The acts as set forth were taken as sufficient to bring defendant within the terms of the statute and hence whether or no

84. People v. Allcutt, 117 App. Div. 546.
85. State v. Adkins (Iowa), 124 N. W. 627.

the food was an article of diet or a remedy in the nature of a drug or the like defendant was practicing medicine in diagnosing cases and prescribing said food for her patients.[86]

DERMATOLOGY

Rhode Island, 1907.

Defendant testified that he was not "a medical doctor" and that he had never attended a school or took any course of study in medicine. He claimed, however, to be "a doctor of dermatology and physical education" by virtue of a degree from an institute formed by himself and others, to which he added the title of "nerve specialist" by some authority not disclosed. Defendant advertised as a doctor and claimed the ability to cure all diseases. He sold a "nerve food" which he had concocted and his charge was, he claimed, for this food and other services rendered. The sale of this remedial substance, together with the various claims advanced by defendant would constitute him a practitioner of medicine under the law.[87]

BONE-SETTING SURGERY

Massachusetts, 1835.

A person who professes and practices bone-setting and reducing sprains, swellings and contractions of the sinews by friction and fomentation is practicing medicine. It is not necessary for one to profess to practice generally either as a physician or surgeon to bring one within the operation of the statute, for the law extends to any one engaging in practicing a distinct department such as surgery.[88]

The term "practice of medicine" embraces the art of preventing and curing or alleviating disease and remedying as far as possible the results of violence and accidents. A surgeon, therefore, is a practitioner of medicine in the broad sense of that term.[89]

MEDICAL TITLES

New York, 1907.

Under any act forbidding the use of such titles as "D.R.," "M.D." and the like in such a manner as to convey the impression that the person appending such a title to his name is legally entitled thereto, the persons so using the titles if other acts such as diagnosing and treating disease were likewise adduced in evidence, would be considered as practicing medicine.[90]

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86. State v. Bresee, 137 Iowa 673.
87. State v. Heffernan, 28 R. I. 20, 65 Atl. 284.
88. Hewitt v. Charier, 16 Pick. 353 (Mass.).
89. Stewart v. Raab, 55 Minn. 20.
90. People v. Somme, 120 App. Div. 20, 104 N. Y. Supp. 946.

ADVERTISING

New York, 1911.

The fact that a person sent out letters from a "department of glanderine" offering to cure persons of glanders, together with the fact that the person visited the patients, leaving his remedy, with directions for its use, and that he termed himself to be called "doctor" may be taken as sufficient facts on which to base a charge of the practice of medicine.[91]

FURNISHING MEDICINE

Kansas, 1890.

A physician who was unlicensed brought an action to recover for medicine furnished, claiming that he was making no charges for services. It was held that the physician could not recover inasmuch as furnishing medicine was the practice thereof. As plaintiff was unlicensed this would be permitting a violation of the law and would render the statute nugatory. Consequently no recovery could be allowed, for even the mere furnishing of remedies in such a case has to so hold or defeat the plain object of the law.[92]

NURSING

Illinois, 1908.

Plaintiff contracted to personally care for and nurse one "N" for and during the term of his natural life. An agreement to nurse an adult gives the idea that the adult is sick and that care and comfort will be required to hasten a recovery. This, however, would not constitute the practice of medicine, as a physician in having his services contracted for agrees to bring much more than the mere nurse under a similar contract, for the physician besides ordinary care must employ such skill and scientific knowledge in his treatment of disease as is commensurate with the given case in hand.[93]

ACTING IN AN EMERGENCY

California, 1886.

A person who renders gratutitious service in an emergency is not practicing medicine but performing an act of charity and common decency, and is therefore excepted under all medical practice acts. But a person who, claiming to be a physician, is called simply because a patient prefers him, or his school of medicine, does not fall within the exception and is practicing medicine as that term is ordinarily understood.[94]

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91. Schmidt v. Medical Society, 127 N. Y. Supp. 365.
92. Underwood v. Scott, 43 Kan. 714, 23 Pac. 942.
93. Oswald v. Nehls, 233 Ill. 438.
94. People v. Lee Wah, 71 Cal. 80, 11 Pac. 857.

§ 60.—General Summary

In determining whether or no the practitioners of a given sect or school of medicine are practicing medicine within the meaning of the law it would seem that those courts which hold in the negative are actuated most strongly by three factors. First, by the fact that they believe the religious and mental freedom of man is being unnecessarily interfered with; second, that no school of medicine has reached scientific perfection; and third, that to decide against the various schools is to create a monopoly for the so-called regulars. In answer to these objections, and taking them in order, it may be replied simply that the religious freedom of no man or group of men can be weighed in the balance over and against the health and safety of the state; nor can the opinions of a mere man or group of men be deemed as of paramount importance in the face of the needs of the masses. That medicine as a science is still imperfect is well recognized, and for that very reason no law attempts to prevent the use of any system. The most that is attempted is to require all physicians to have the same preparation and to undergo the same tests. Then all having started alike it is left to each school to prove its own worth. To hold that the practice of some particular sect is practicing medicine does not create a monopoly. It is simply pointing out to such practitioner that he must qualify himself under the law, having qualified himself he will then be permitted to make use of his system. If he work any injury therein he will be liable in an action sounding in tort, if it be a private wrong, and he will render himself liable in a criminal prosecution for a public wrong.

The courts would seem to lose sight of the great sociological and economical factors which actuate legislation of this nature. These laws, as has been so frequently stated, are in the interests of the masses. It is to protect them from injury that such laws are passed. It may be said the people need no such protection, that they have a right of action which the common law gives for any tort by a physician. But it is submitted this is not so. Economic conditions have entered in, which preclude the enforcement of this right. The great mass are entirely incapable financially to fight a case through our law courts. Then again, it is detrimental to the welfare of the state as a whole, to say nothing of the several individuals involved, to have its citizens engaging in continual litigation in protection of their rights. And yet, again, it is an economic waste to have men engaged in or attempting to engage in the practice of a profession for which they are but illy fitted. How much wiser it is to have a preliminary weeding

out process in order that each may find what has been termed "his proper angle of repose." Statutes regulating the medical profession may, therefore, be said to be a recognition on the part of government that the state must interpose itself in order to obviate these difficulties as much as possible, and thus assist the individual.

Finally, there is the criminal element with which to contend. It is this class which of itself, with its modern-day skill and science, constitutes this profession a most potential factor in aiding and abetting that problem of all time the "social evil." And then there are those practitioners who make a living out of performing abortions. Were the profession of medicine not thus prostituted, an effectual check would be found for which sociologists and legislators have searched time out of mind. With these points in view, it is not so difficult to answer affirmatively the question as to whether or no an attempt should be made to regulate the practice of medicine. Wherein can it be shown that it is unfair or unreasonable for all men to be subjected alike to an identical condition prior to their engaging in the practice of medicine? If this were done it is submitted that all who were able to qualify and to be licensed would soon reach their level through the law of the survival of the fittest. To be sure there would yet be those who are *imprimis persona non grata* in any walk of life. But it is submitted that these could the more readily be discerned and consequently obliterated through the uniform operation of identical laws enacted throughout the United States.

CHAPTER IV

CONDITIONS PRECEDENT AND SUBSEQUENT TO THE RIGHT TO PRACTICE MEDICINE

§ 61.—The Right to Practice Medicine

As regards the profession of medicine there seems to be no little doubt in the several jurisdictions as to whether or no the right to enter and to pursue it is absolute or entirely dependent upon governmental license. Now this right to practice medicine, which is most assuredly a valuable right, whether it be classed as an absolute property right, strictly speaking, or as a mere privilege, is one subject to governmental supervision. Therefore a determination of its precise status would seem quite important.[1]

Not a few authorities have boldly declared that the right to enter the profession is a right inherent in all citizens and consequently that

1. Smith v. Board (Ia.), 117 N. W. 1116.
Chenoweth v. State (Colo.), 135 Pac. 771.

the right to continue in the practice of medicine is all the more a valuable property right. Hence it is argued that neither of these rights with more reason perhaps for the latter, are subject to any unwarranted governmental interference.[2]

But it is submitted that this statement seems hardly logical. Especially since it is recognized that each of these alleged rights are subject to governmental supervision and regulation. Hence it would seem more competent to hold that there is no vested right either to enter or to continue in the practice of medicine, and that what is claimed as a natural or absolute right is nothing more than a privilege or a right upon condition, in this respect being similar to the practice of law.[3]

In the regulation of the practice of medicine the government is acting as a guardian of the public good and general welfare. Any action taken in the premises being similar to the regulation of certain specified pursuits which have from time to time been declared dangerous to the community, and which are as a consequence either entirely suppressed or subjected to more or less stringent regulations. Whenever the pursuit of any particular occupation or profession requires, for the protection of the lives or health of the general public, skill, integrity, knowledge or other personal attributes or characteristics in its followers and government takes steps to insure the possession of these attributes and characteristics, then the right to enter upon such a calling ceases to be an absolute right, if it ever was one, and becomes a mere privilege which vests in possession only upon a compliance with the several conditions precedent of government. And further it is submitted that there never is a vesting in interest, that is to say, a right to continue in the calling or profession, but that there is a mere user in the licensee. For it would seem that the title so to speak, remains in the state together with a right to dispossess the user for failure to comply with certain specified conditions subsequent.[4] These two so-called rights, as respects the medical

2. Hewitt v. Board, 148 Cal. 590, 84 Pac. 31.
State v. Chapman, 69 N. J. L. 454, 55 Atl. 94.
Matthews v. Murphy, 23 Ky. 750, 63 S. W. 785, 54 L. R. A. 415.
3. Board v. Fowler, 50 La. Ann. 1358.
State v. Davis, 194 Mo. 485.
People v. Phippen, 70 Mich. 6.
State v. Edmunds (Iowa), 101 N. W. 431.
State v. Board, 32 Minn. 324.
State v. State, 34 Minn. 387.
Lewis v. State (Tex.), 155 S. W. 523.
4. Board v. Fowler, 50 La. Ann. 1358.
Hewitt v. Charier, 16 Pick (Mass.) 353.
People v. Phippen, 70 Mich. 6.

profession, may be merged into one, viz., the right to pursue the practice of medicine. And this right is entirely subject to a compliance with said conditions precedent and subsequent of government.

With these points in mind it may be generally stated that any person has the right to pursue any lawful calling, business or profession he may choose, subject only to the restrictions of government for the welfare and safety of society. Thus, certain occupations, not in themselves unlawful, are so restricted from motives of the general public health and welfare. And among such callings so restricted falls the profession of medicine.[5]

The vocation of the physician is undoubtedly a lawful one and all that is exacted of this profession is that every one who assumes to pursue it must be possessed of the requisite knowledge and skill, and that this be evidenced by a license or a certificate granted by the proper governmental authorities.[6]

Thus, while a person who fails to possess a proper license or who is unable to proffer sufficient proof of its possession will be prosecuted should he attempt so to practice medicine unlawfully, yet the field is open to every one possessing the necessary qualifications duly attested by the public agencies provided by government.[7]

Under such regulations there is no discrimination as to persons or methods. The law simply requires that all undergo the same examination and then each and every person licensed may treat disease in the way by him deemed best. There is no attempt to say how disease shall be treated by any one. It is required simply that all persons who shall treat or offer to treat disease must have a proper knowledge of their subject. Herein no one is excluded from the profession, and no method of attempting to heal the sick, however occult, is prohibited. The object of such regulation is not to make any particular method unlawful but rather to protect any given community from the evils of empiricism.[8]

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5. State v. Board, 32 Minn. 324.
   State v. Bair, 112 Iowa 466.
6. State v. Bair, 112 Iowa 466.
   State v. Board, 32 Minn. 324.
   In re Campbell, 197 Pa. 581.
   State v. Carey, 4 Wash. 424.
   Fox v. Territory, 2 Wash. T. 297.
   State v. Davis, 194 Mo. 485.
7. Board v. Fowler, 50 La. Ann. 1358.
   State v. Hathaway, 115 Mo. 36.
   State v. Edmunds, 127 Iowa 333.
8. Singh v. State (Tex.), 146 S. W. 891.
   Eastman v. State, 109 Ind. 282.
   State v. Heath, 125 Iowa 585.
   State v. Wilhite, 132 Iowa 226.

Laws regulating the practice of medicine are in most jurisdictions generally one of a series, devoted to the conservation of the public health. Other regulations of the same nature are acts creating boards of health, state and local, pure food laws, vital statistics, quarantine, water-supply, sewage, pharmacy and the like. A medical practice act may make burdensome requirements of the members of the profession not simply in the interest of patients for the time being, but of the public welfare generally. For it is a matter of general concern that persons who are to be responsible for the discharge of these obligations should be known and that their qualifications to render the public service demanded of them should be ascertained. Beyond this the state is specially interested in protecting sick people from empiricism and from charlatanry; from the quack who is ignorant of healing, and the fake who is an adept at swindling.

Consequently it is recognized as entirely competent in government to submit a fairly relevant definition of the practice of medicine and to require the registration of certificates and licenses in the same manner that an attorney is enrolled in a court of record. But in fixing on a test of a person's right to practice medicine, the basis must be merit and not some criterion arbitrarily selected, irrespective of its relation to the medical profession.[9]

With the practice of medicine thus subjected to government it will readily be seen that the physician has no vested property right, but that his right to pursue the profession is in fact but a qualified right or a privilege.[10]

It is in this light then that the right to practice medicine will be regarded in giving consideration to the several conditions precedent and subsequent thereto.

§ 62.—General Requirements—Conditions Precedent

While it is said that all persons may practice medicine it should be added that it is only all persons who can qualify under the law who may practice. And in the several jurisdictions various methods

9. State v. Cotner (Kan.), 127 Pac. 1.
People v. Phippen, 70 Mich. 6.
Parks v. State, 159 Ind. 211.
Richardson v. State, 47 Ark. 562.
State v. Pennoyer, 65 N. H. 113.
State v. Bair, 112 Iowa 466.
But see
State v. Chenoweth (Colo.), 135 Pac. 771.
State v. Graeb (Colo.), 135 Pac. 776.
10. State v. Board, 32 Minn. 324.

and means are employed to prove such qualifications under the law.

Whatever other conditions there may be, it would seem that the primary and fundamental requisite is with hardly an exception in all jurisdictions the obtaining of a certificate or license to practice medicine. And it is around this evidence of qualification that the struggle centers, for a certificate or license may be refused or revoked for cause, or a person may be prosecuted as a criminal for attempting to practice medicine without it. Hence many statutes, especially the more recent ones, go into great detail as to the way in which a license may be obtained, and to whom it may be granted.

If in determining in a given case whether or no to grant a license the question were simply — Has the applicant complied with the law and performed the conditions precedent? Then the adjudication of the issue so submitted would not present any seemingly unsurmountable difficulty. But the various medical practice acts do not stop with requiring only that an applicant must present proof of moral character and of his skill and ability in his profession. One and all have apparently included in their language exceptions and exemptions that more than anything else give grounds for the complaint of monopoly and special privilege. It is in such addenda that cause is found for an unnecessary mass of litigation. It is submitted that it is not essential to except various so-called cults from the requirements of the law. For therein the law protects charlatanry and empiricism. The law should compel all to perform the same identical conditions and then allow each individual to practice whatsoever system he may choose. It is further submitted that permitting the several so-called schools of medicine to become divergent is entirely unnecessary. There is no hardship placed on any one in requiring that he know something of the human body before being allowed to practice medicine or to treat for real or imaginary ills. Possibly certain practitioners would not feel quite so certain that illness and disease does not exist and would be somewhat more willing to place an abiding faith in the efficacy of the regular methods of treatment. And too there would be more hesitancy in adopting new systems and in condemning the old. To be sure, this would be an absolute bar to many of the now practitioners. But who would hesitate to adopt a rigid and uniform educational test if such a step were to rid society of these enumerable cure-alls, who so brazenly assert that they only have the universal panacea for all human ills?

As the law now stands, then, a license is required of all who desire to practice medicine.[11]

And the law requires that a board of examiners shall be instituted who shall pass upon the credentials of all applicants therefor.[12]

Having established the *deus ex machina* the law next provides what credentials applicants must submit in order to become a duly accredited practitioner of medicine. It is usually required that proof of moral character must be submitted and that each applicant must prove his ability to pursue his profession. This latter may be by filing a diploma from a recognized medical college or by an examination, or by both. In many states the law even sets forth the number of hours which must be spent in preparation and the subjects in which applicants must be examined. And in not a few states the greatest detail as to these requirements is even to be found.[13]

§ 63.—Proof of Moral Character

In many states it is provided that the state board of examiners may refuse to grant a certificate to a person who is unable to submit proof of proper moral character or to a person who is actually guilty of what may be broadly termed "unprofessional and dishonorable conduct."[14]

(a) A person licensed to practice under the prior law is not "ipso facto" entitled to practice under a subsequent law

An old license issued under a prior law does not necessarily entitle the holder thereof to practice under a new law, unless the board of examiners is satisfied, on an examination, that such a

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11. State v. Fliescher, 41 Minn. 69.
State v. Vandersluis, 42 Minn. 129.
Harding v. People, 10 Colo. 387.
People v. Langdon, 219 Ill. 189.
Smith v. State (Ala.), 63 So. 28.
But see
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

12. State v. Vandersluis, 42 Minn. 129.
Harding v. People, 10 Colo. 387.
Chenoweth v. State (Colo.), 135 Pac. 771.

13. State v. Vandersluis, 42 Mo. 129.
Harding v. People, 10 Colo. 387.

14. Meffert v. Board, 66 Kan. 710.
Williams v. People, 121 Ill. 84.
State v. Webster, 150 Ind. 607.
State v. Board, 32 Minn. 324.
People v. McCoy, 125 Ill. 289.
State v. Roy, 22 R. I. 538.

license was obtained without fraud or misrepresentation, and besides that the applicant is morally a fit person to engage in the practice of medicine. The old license is revoked by the new law, and remains in force only until the board has acted on the application for the new license. If the license is refused on the application made, such person has no right to practice medicine, unless on appeal of the court from the action of the board, the board is required to issue a license. The subsequent statute is in itself notice that the legislature has set aside the old licenses and given a reasonable time in which to apply for new ones. Hence, when an applicant presents himself to the board for a new license he must be held to have notice of whatever disposition the board may make of his application. A board may at such times refuse to grant a license even though the applicant has been previously licensed on proof of improper character and the like.[15]

(b) USING NOTES AND MEMORANDA IN ANSWERING EXAMINATION QUESTIONS

The use of notes and memoranda in answering examination questions may be taken as constituting "unprofessional and dishonorable conduct." An applicant for a certificate to practice medicine if detected in their use may be denied the privilege of continuing the examination. After a written notice and an examination into the facts by the board, if found guilty, the applicant may be refused a certificate to practice medicine.[16]

(c) CHANGING A LIMITED LICENSE BY AN ERASURE TO A VALID UNLIMITED LICENSE IS SUFFICIENT GROUNDS FOR A REFUSAL

If a board has no power to issue a temporary permit then one of that nature is void and of none effect and the holder thereof has no right to practice medicine. Nor will the fact that the holder has passed a successful examination render such license valid. The license being void the board may vacate the record thereof when the holder of such a license by erasure removes the limitation as to time, thereby making said license to appear on its face to be a valid unlimited license so as to secure its registration and the recordation of his name as a licensed practitioner. When a record is admittedly fraudulent, a court of justice will not intercede to reinstate it, even though it was vacated without notice to the party affected by the order. A party

15. State v. Webster, 150 Ind. 607.
16. State v. District Court, 26 Mont. 121.
Curryer v. Oliver, 27 Ind. App. 424.

insisting on a privilege vouchsafed to him by a license or record which he conceded to have been adopted through his own willful and fraudulent act cannot insist on the aid of a court to allow him to enjoy the fruits of his own wrong.[17]

(d) ADVERTISING AS GROUNDS FOR REFUSING A LICENSE

An application for a license may be refused on the ground that the applicant has been conducting himself in an unprofessional and dishonorable manner. Advertising in the newspapers and by circulars to be a medicine man of an Indian tribe and claiming in such publications the proprietorship of a certain specific which he claimed would cure cholera and other such diseases when taken internally, and rheumatism when applied externally, would constitute unprofessional conduct since such claims would seem to be impossible and untrue. Clearly a refusal to issue a license on any such grounds should have the entire support of the courts.[18]

(e) FELONY OR GROSS IMMORALITY

A state board may refuse to grant a certificate to any person who may be guilty of a felony or gross immorality. It is not necessary that the applicant should be grossly immoral with his patients to give the board jurisdiction, for gross immorality in his general habits would be quite sufficient. The object sought is to protect the houses of the sick and distressed from any intrusion in a professional character of vicious and unprincipled men. It is not the purpose of the law makers to clothe such a man with a certificate of moral character and then send him out to prey upon the weak and unsuspecting, or those who would be entirely at his mercy and then quietly await the accomplishment of that which observation and experience has taught is certain to follow before depriving such person of the endorsement which gave him the opportunity to commit the wrong. The law disqualifies one who is guilty of a felony. It is not necessary that the felony be committed on a patient or against the property of the patient or while the physician was attending the patient in order to have grounds on which to base a charge of unprofessional or immoral conduct.[19]

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17. Vulk v. Saylor, 42 Ore. 546.
18. State v. Board, 32 Minn. 324.
    Kennedy v. State, 145 Mich. 241.
    But see
    State v. Chenoweth (Colo.), 135 Pac. 771.
    State v. Graeb (Colo.), 135 Pac. 776.
19. Meffert v. Packert, 66 Kan. 710 (s. c. aff. 195 U. S. 625).
    Board v. Coffin, 152 Ind. 439.
    Rose v. Baxter, 81 Ohio St. 522, 7 Nisi Prius (N. S.) 132.

§ 64.—Reputability of Applicant's Medical College

Having submitted his credentials as to his moral character it next devolves upon applicant for a license to make profert of his educational credentials. This is done by filing either a diploma from a recognized medical college, or by passing an examination under the supervision of the board, or by both. It is to be noticed that whenever a diploma is required it is specified that it must be a diploma from a medical college in good standing or from a legally recognized medical college. And as to whether or not a college is in good standing is a question entirely in the board's discretion.[20]

Reputability as used in these statutes would seem to have its ordinary meaning. It is in addition to the other requirements of a college. Provisions of this nature as found in a medical practice act are for the purpose of protecting the public against schools which sell diplomas.[21]

Reputability under the law is within the judgment and discretion of the board of examiners for determination. And whether or no a given school is reputable is a question of fact and not of law.[22]

It is purely a question of fact whether a given college has complied with the law as regards its courses of instruction. Under the law such facts are left to the board of examiners, their action to be predicated on requisite facts. No other tribunal is authorized to have this power of investigation delegated to them, for the act of ascertaining and determining these facts is in nature judicial, and involves investigation, judgment, and discretion.[23]

It may be said that a board of examiners is authorized to endorse diplomas as satisfactory when such are issued by reputable medical colleges of which there has been had sufficient proof as to the good standing thereof. Powers thus conferred are broad and comprehensive and in some respects at least must in their nature be final. The

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20. State v. Vandersluis, 42 Minn. 129.
Vadney v. Board (Ida.), 112 Pac. 1046.
State v. Adcock, 124 Mo. 1100.
Iowa v. Schrader, 87 Iowa 659.
State v. Cooper, 123 Ill. 227.
People v. Board, 110 Ill. 180.
State v. Board, 93 Tenn. 619.

21. People v. Board, 110 Ill. 180.
State v. Schmidt, 138 Wis. 53.

22. State v. Cooper, 123 Ill. 227.
People v. Board, 110 Ill. 180.

23. State v. Cooper, 123 Ill. 227.
People v. Board, 110 Ill. 180.

action of the board does not depend on any specified piece of evidence as fixed by statute, but on such facts as will satisfy the board.[24]

If a board has decided a college to be reputable it has exhausted its judicial power and must issue licenses to applicants therefrom. It is the duty of a board on application of a graduate of a college for a license to decide whether or no the college issuing his diploma is reputable. This question the board itself must decide, since the discretionary power of that purpose cannot be delegated to any other body or person. The question of reputability must be decided on just and fair principles and not on motives of selfish interest or to injure a rival college. The board must be controlled by honest judgment and not by prejudice or passion. Discretion vested in official bodies must not be exercised to gratify feelings of malevolence, or for the attainment of personal or selfish ends, or for arbitrary reasons, but for the public good.[25]

A college which has been declared in good standing cannot arbitrarily be stricken from the list of recognized colleges without timely notice given, and an opportunity to be heard. It is immaterial that well founded charges have been preferred against a college. A board cannot without further investigation order that no certificate be issued to its graduates till the standing of the college be again determined and then adjourn until the next regular meeting. Even if at such regular meeting, and after a proper hearing in due form, the college be finally adjudged disreputable, such ruling cannot affect the application of a graduate filed subsequent to such adjournment, but prior to the ultimate finding of the state board. In refusing to issue a license under such circumstances a board would be acting arbitrarily, unjustly and without authorization. For action taken without investigation, and without other cause or information than the filing of charges by a stranger, is highly improper, and hence adjournment after such a ruling without affording any means of relief to the college or its graduates until the next regular meeting would seem entirely illegal. A board is not precluded from reversing a former ruling, but it may not do so arbitrarily and without investigation. An inquiry need not be as formal as a court's would be, but a determination must be based on inquiry and facts, and not on the mere will of the board. A board is fully authorized to determine upon a proper

24. VanVleck v. Board (Cal.), 48 Pac. 223.
25. Board v. Cooper, 123 Ill. 227.
People v. Board, 110 Ill. 180.

investigation and a full and fair examination that a college is not in good standing.[26]

A graduate cannot be refused a license on the grounds that his college is not in good standing with the board to which he has applied for a license if the college has not been duly notified as to the requirements of such board. All colleges must be given ample opportunity to furnish the board with statements as to their requirements and then the colleges must be duly notified as to any rules and regulations which such board may determine upon as to the receipt of applications and the recognition of credentials. It would be immaterial as respects a given college whether or not all other colleges were given timely notice supposing the college in question failed to receive such notice at such a time that proper action could be taken. A board cannot declare a college unfit when the college has not been properly notified. Hence, the diplomas of any persons graduating before the receipt of such a notice must be recognized and a license must issue.[27]

A board has only such power and authority as the law gives it. Hence, a board cannot refuse a license to an applicant on the ground that his college is not in good standing who is applying under a law which permits a license to issue to all who were practicing under a prior act, and who had been theretofore admitted to practice simply on a presentation of a diploma from a college which had a bona fide existence without raising any question as to their reputability or their good standing. For although a board may be impowered to examine as to the reputability of the college of an applicant under the now law this does not authorize any consideration of the standing of a college whose graduates were duly licensed without question under a prior law and who are applying for recognition under the now law, which says "practitioners under the prior law are fully qualified upon proof of their credentials to practice under the now law." Clearly in such a situation no issue is raised as to the good standing of such an applicant's college, for under the prior law that the college had a bona fide existence was deemed sufficient. It would therefore seem to follow that an applicant who has previously been licensed under such circumstances cannot afterwards be refused a license under a subsequent law because the college is or was disreputable. Of course any person graduating from such a college subsequent to the now law may be refused a license should the college be disreputable. But if a person has a diploma from a college and has been licensed

26. Iowa v. Schrader, 87 Iowa 659.
27. State v. Lutz, 136 Mo. 633.

under a prior law, that fact together with the now law would preclude any refusal by a board of a license on the ground that such college is or was not in good standing, in pursuance with the standards of the now law.[28]

A board may make up a list of all colleges which it deems reputable and may accept diplomas from such colleges without question. But due notice must be given to the discredited colleges prior to any refusal to recognize diplomas of such colleges. Nor can the board refuse to examine any one provided he can prove his college reputable. Under a law which requires all applicants desiring to practice medicine to both present a diploma from a reputable school and to pass an examination, it may thereunder be left to the board to promulgate rules determining as to the requisites of reputability and the like. A board cannot, however, *ipso facto* refuse to admit an applicant to an examination because his diploma is from an unrecognized school, but the applicant must be given full opportunity to prove his college reputable, and on failure so to do he may be disqualified, or if successful, admitted to an examination.[29]

§ 65.—Presentation of Diplomas, Examinations, Fees, Etc., as Conditions Precedent

Medical practice acts in the several states would seem to be tending in the same general directions as regards conditions precedent. The idea seems to be to require the presentation of a diploma from a recognized school as a primary condition precedent to admission to an examination. This apparent tendency by no means approaches universality, as yet, as many states allow these conditions as alternatives. Hence, it may be said that the presentation of a diploma, a successful examination, and the payment of the required fee are the most common conditions precedent to licensure. There are others, such as the registration of licenses and the like, but these above mentioned are the ones to be found most commonly in the several medical practice acts. It will be necessary to make a careful examination of the latest law of each state to ascertain just what is required at any given time. This is somewhat of a burden and no lasting authoritative presentation can be made by reason of frequent changes in the several states of the various states by amendment, repeal and other-

28. Vadney v. Board (Ida.), 112 Pac. 1046.
29. State v. Adcock (Mo.), 124 S. W. 1100.
Barmore v. Board, 21 Ore. 301.

wise. Consequently but the merest outline as to the existing law can herewith be presented.[30]

It is clearly the intention of the government, it would seem, that no one may practice medicine who has failed to comply with the law. That is, all practitioners must be possessed of a license or a certificate notwithstanding the particular school to which they belong. And in order to obtain such license the condition precedent of the law in force at the time of such practitioner's application must be complied with. If the applicant's credentials prove satisfactory he will then be entitled to all the privileges obtaining under the law.[31]

Neither the possession of valid diplomas nor the ability to pass an examination may of themselves be sufficient under a law. But the legislature may require that an applicant present the diploma and submit to an examination. If such be the case the applicant must comply with the law before a license will issue, because neither one is sufficient to vest him with the right to practice medicine.[32]

The mere fact of graduating from a medical college does not entitle a person to practice medicine in Minnesota under the session laws of 1894. But the holder of the diploma must submit to an examination before he will be fully qualified to practice under the law.[33]

An applicant for a license to practice medicine or dentistry in Tennessee is not entitled to such license on the bare presentation of a diploma. But such applicant must present a diploma from a reputable college and submit to an examination to test his qualifications to practice.[34]

Under the law in Vermont it was the duty of the Board of Censors to issue licenses without examination to all persons who furnished evidence by diploma from some medical school authorized to confer degrees in medicine and surgery of their qualifications for licensure.

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30. State v. Adcock (Mo.), 124 S. W. 1100.
Barmore v. Board, 21 Ore. 301.
State v. Lutz, 136 Mo. 633.
State v. Vandersluis, 42 Minn. 129.
State v. Cotner (Kan.), 127 Pac. 1.
Ex parte Whitley, 144 Cal. 167.
Gage v. Board, 93 Tenn. 619.
Arwine v. Board, 151 Cal. 499.
State v. Currans, 111 Wis. 431.
People v. Somme, 104 N. Y. S. 946.
31. Harding v. People, 10 Colo. 387.
Ex parte Whitley, 144 Cal. 167.
Arwine v. Board, 151 Cal. 499.
32. State v. Board (Wash.), 93 Pac. 515.
33. State v. Oredson, 96 Minn. 509.
34. State v. Board, 93 Tenn. 619.

The board could satisfy itself as to whether or no the person presenting such a diploma obtained it after pursuing some prescribed course of study and upon due examination. Under such a law the Board of Censors cannot refuse to grant a license to practice medicine on any other ground than the applicant's lack of medical knowledge without a trial or that the applicant is of an improper character.[35]

Every graduate of any legally authorized college in any one of the United States or in any other country after having registered was, at one time, permitted to practice under the Michigan law. Thereunder it was not prohibited to any physician or surgeon to practice medicine or surgery because he was not a citizen of the said state, but it made the real test of the right to practice that an applicant should be a graduate of any legally authorized medical college in any one of the United States, or in any other country.[36]

A degree of M.D. when conferred by a college which under its charter is not authorized to grant such degree is insufficient and has not the legal efficacy to warrant the issue of a license, and this would seem to follow under the law of any state. Hence a board having the power to decide whether or no a diploma is genuine or spurious may reject such a diploma when its issuance by a college is *ultra vires* and the holder thereof may not practice medicine.[37]

Again, a person who is a graduate of a medical college and has received the degree of M.D. cannot *ipso facto* practice medicine in a state which requires the registration of diplomas and the like as a condition precedent to the right of practice. The purpose of such an act is to restrict the practice of medicine or surgery to those persons whose education and training may reasonably be supposed to have qualified them for the business. These acts apply to all, to the most skillful physician and the mere tyro. Each must register. And hence it is that a person who is a graduate of more than one college even and who has practiced for more than eighteen years in some foreign state before removing to any given state, is not thereby exempted from a compliance with the laws of that state.[38]

The requirement of a diploma or of an examination in lieu thereof must be complied with. The argument that a requirement of an examination or a diploma of all applicants for a license is whimsical, is

35. Gage v. Censors, 63 N. H. 92.
36. People v. Phippin, 70 Mich. 6.
37. Townsend v. Board, 62 Vt. 373.
38. Dodge v. State, 17 Neb. 140.

without foundation. It is entirely reasonable and places no undue burden on any individual to require like conditions of all.[39]

A state board of health refused to recognize the diplomas of a foreign university on the grounds that such university was not a reputable and legally chartered medical school. But the board licensed applicants who had been previously licensed to practice by the board of examiners in the said foreign state and the board of that foreign state licensed the graduates from the college in question. And further the board had licensed the graduates of the said college who had been previously licensed in the foreign state. It would seem that this could only be taken as an endorsement of the college which the board alleged to be without good standing. And thus apparently it would follow that a college can be endorsed as reputable indirectly by accepting its graduates who have been previously licensed under the laws of the state wherein the said college is situated without any other evidence of qualification than the diploma of the said college, which is not otherwise recognized as reputable by the said local board of examiners. A board therefore cannot refuse to recognize the diploma of a college located in a foreign state on grounds of reputability when it in fact admits the holders of diplomas from such college to practice if they have been previously licensed in the foreign state.[40]

An amendment to a medical practice act provided that regular graduates holding diplomas issued by any college of established reputation in the state which had a four-year course of instruction and a standard of not less than 75 per cent. on examination would be admitted to practice upon the presentation of credentials to that effect. It would seem the manifest intention of this law, that upon the presentation of satisfactory evidence as to the standing of a college, and as to having pursued a four-year course of study, to create an exemption in favor of such applicants. Hence, a graduate who holds a diploma from a school with a four-year course but who only actually studied three years himself, that being the time required at the time he matriculated, would not be entitled to the exemption. Nor would such an applicant be entitled to a license to practice merely on the presentation of his diploma and without having taken the examination as required by law.[41]

A statute provided that it should not apply to any student who had matriculated in a medical school prior to a given date and that it should be the duty of the board on receipt of a fee from such student

39. State v. McIntosh, 205 Mo. 589.
40. Boucher v. State, 19 R. I. 366.
41. Moore v. Napier, 64 S. C. 564.

to issue him a license on the presentation of his diploma. Under such facts and under the law a board must simply determine, did any given applicant matriculate? If the weight of the evidence is in the affirmative the board has no discretion and must issue a license.[42]

A physician who has registered his diploma and certificate under a law, and who was thereby entitled to practice under that law would fall within the exception of a subsequent law, even though a law ad interim might apparently seem to render such registration ineffective. For a legislature can restore the efficacy of such registration by the later law through an express provision. If this be done, and if there be no actual revocation then the physician is entitled to practice.[43]

§ 66.—Registration of Licenses as a Condition Precedent

The registration of licenses is in many states by law construed a condition precedent to the right to practice medicine. The presentation of diplomas and the passing of examinations are made conditions precedent to the issuance of licenses. The license having been issued, their registration in the county in which the physician resides or has his principal place of business is made a condition precedent to the right to actually engage in practice.[44]

When an act provides that there must be a registration of all physicians in the county of their respective residences, and that after a fixed date it would be unlawful to practice without so registering, it would seem to be mandatory that such a provision be complied with. Generally speaking it appears to be absolutely essential to comply specifically with such provisions prior to any attempt to practice medicine.[45]

Should a physician see fit to change his residence from one county to another, it would seem incumbent upon him to again register his license in the county to which he has removed prior to any attempt to engage generally in practice therein. That is, once registering would not seem sufficient under some statutes, should a physician see fit to change his residence. Since such provisions are for the general protection of the public, it would seem to follow that they are mandatory. It is not essential, though it would seem, that a physician

42. State v. Adcock, 206 Mo. 550.
43. State v. Carson (Mo.), 132 S. W. 587.
44. Richardson v. State, 47 Ark. 562.
Mayfield v. Nale, 26 Ind. App. 240.
Commonwealth v. Driscoll, 93 Ky. 393.
Marshall v. State, 56 Tex. Cr. Rep. 295.
Rielly v. Collins, 16 Colo. App. 280.
45. Commonwealth v. Driscoll, 93 Ky. 393.

register in each county in which he intends to practice. That is, if a physician be duly registered in the county in which he maintains a bona fide residence, he would have a complete defence to a charge of failure to register, should he chance to be indicted or the like, for practicing in a county in which he has not registered and does not reside. Having registered in the county of his residence a physician is entitled to practice in the adjacent counties or throughout the state, without further registration, unless he changes his residence to another county.[46]

The requirement of a recordation of a certificate or license to practice medicine it would seem is not always mandatory.[47] As to whether or no a statute is mandatory as respects the prior registration would frequently seem to be decided by a provision which precludes any recovery for services rendered prior to a recordation. But a court will not, it would seem, refuse to allow a recovery unless the statute is specific in this regard.[48]

A physician should not be precluded from a recovery when he has failed to register, or has done so imperfectly through misunderstanding or unintentional omission, but in such cases, there should be a statutory provision as in New York, under which the physician may validate his imperfect registration, and that such validation should be in effect as from the original date of issuance of the license. Such validation could be retroactive in effect and legalize any prior practice, so that collection might be enforced therefor.[49]

§ 67.—Persons Who Have Failed to Perform the Condition Precedent

As we have already seen, it is essential that condition precedent be performed in full by all persons prior to their attempting to practice medicine. Many persons attempt to evade the law by claiming they belong to certain so-called sects or schools which purport to treat illness and disease by any other methods than those employed by the usual practitioner. Among such schools are to be found the osteopath, Christian Scientist and the like, but by the majority of the courts it has been generally held incumbent upon such practitioners

46. Mayfield v. Nale, 26 Ind. App. 240.
Murray v. Williams, 120 Ga. 63.
Jones v. State (Ga.), 69 S. E. 315.
Parson v. State, 53 Tex. Cr. Rep. 334.
47. Rielly v. Collins, 16 Colo. App. 280.
48. Mayfield v. Nale, 26 Ind. App. 240.
Murray v. Williams, 121 Ga. 63.
Rielly v. Collins, 16 Colo. App. 28.
49. Ottaway v. Lumsden, 172 N. Y. 129, Sec. 7.

to conform to the law, and secure a license, else they will be held liable for attempting to practice without a license.[50]

An osteopath may not practice medicine without obtaining a certificate from the State Board of Health, as he practices medicine within the meaning of the law, and is not exempt therefrom by reason of not using drugs or performing surgical operations or the like. Such laws are not prohibitory except in regard to those who are not licensed pursuant to the law to practice the art of healing.[51]

A Christian Scientist may not engage in his system of healing, without first obtaining a license as required by law, as he is practicing medicine within the meaning of the statute. He exercises the art of healing for a compensation, whether it be exacted as a fee or as a gratuity, and hence the system cannot be classed as an act of worship, nor as the performance of a religious duty.[52] The practitioners of this sect should therefore it would seem be held amenable to the law.

Magnetic treatment is the practice of medicine and persons using that system must conform to the law and secure a license prior to any attempt to engage therein. No method of attempting to heal the sick, however occult, is prohibited, nor is any one excluded from the profession. The law simply requires that all attain a reasonable efficiency in certain fundamental subjects essential to a thorough grounding in the medical profession. The object is not to make any particular method unlawful, but to protect the community from the evils of empiricism.[53]

The Rhode Island law of 1895, relative to the practice of medicine, provides that no itinerant doctor may register or practice medicine in any part of the state. Under this law a physician who makes a specialty of catarrh, and has a main office in a certain city, but who

50. Little v. State, 60 Neb. 749.
State v. Buswell, 40 Neb. 158.
Parker v. State, 159 Ind. 211.
Evans v. Board, 19 R. I. 312.
State v. Taylor, 106 Minn. 218.
Boone v. Taylor (Tex.), 120 S. W. 446.

51. Little v. State, 60 Neb. 749.
Melville v. State (Ind.), 89 N. E. 490.
Ex parte Collins, 57 Tex. Cr. Rep. 2.
State v. Liffering, 61 Ohio 39.
State v. Gravett, 65 Ohio 289.
State v. McKnight, 139 N. C. 717.
State v. Biggs, 133 N. C. 729.
State v. Herring, 70 N. J. L. 34.

52. State v. Buswell, 40 Neb. 158.
State v. Marble, 72 Ohio St. 21.
State v. Mylod, 20 R. I. 643.

53. Parks v. State, 159 Ind. 211.
State v. Heath, 125 Iowa 585.

travels from place to place to practice, notifying his patients by advertising in the daily papers as to what time he will be in the town, and in what hotel he will receive them, is an itinerant physician and would be precluded from pursuing his profession.[54]

All states, however, do not absolutely preclude the itinerant physician from practicing, resorting simply to a means of restraint and regulation to control that branch of the medical profession. In such states, however, it is made essential that these practitioners secure a license and otherwise qualify themselves as would a regular practitioner using almost the same system of qualification. These practitioners are unreliable, often obtaining money with a total lack of consideration. They differ from the regular practitioner, in that, the latter has an established place of business and is known to the general public, having thereby a reputation to maintain, while the itinerant may be utterly irresponsible in this regard, thereby working great injury.[55]

A person duly licensed to practice medicine is not *ipso facto* barred from practicing dentistry under the language of any statute without a specific statement to that effect. If a physician is qualified to practice medicine, generally he is qualified to practice dentistry. The work of the dentist is included in that of the physician, but notwithstanding this, and while the physician by his preparation, may be able to practice dentistry, yet, we must always look to the statute to be sure whether or no a physician is precluded from practicing the profession of dentistry without a special license therefor.[56]

For the protection and promotion of the general welfare of the public at large, persons not fully educated in the science of medicine are precluded from attempting to practice that profession. Neither may they advertise themselves as physicians by affixing to their names titles and letters commonly used by the medical profession, or by claiming to be specialists and using a term well known in the practice of medicine and having a special meaning therein. Nor would the addition of the word "Osteopath" or "Drugless Healer" be sufficient to distinguish a case so as to allow a violator to escape the penalty.[57]

A person who is a mere masseur and advertises himself as a masseur, claiming the ability to cure all sorts of diseases is not by

54. Evans v. Board, 19 R. I. 312.
55. Kirk v. State (Tenn.), 150 S. W. 83.
56. State v. Beck, 21 R. I. 288.
State v. Taylor, 106 Minn. 218.
57. State v. Yegge, 19 S. Dak. 234.
State v. Pollman, 51 Wash. 110.

law entitled to pursue his profession, but must prove his qualifications and obtain a license. This rule likewise applies to a person claiming to be a doctor of Neurology or Ophthalmology and others of a like nature.[58]

A person who has been licensed to practice the branches of obstetrics and diseases peculiar to women, and who has recently passed examination therein, and has shown qualifications to practice generally, is entitled to more than a certificate to practice those branches only, and is entitled to have a license to practice generally.[59]

Patent granted under the law of the United States authorizing the patentee and his assignees for the term of fourteen years to make constant use and vend to others to be used, a certain improvement in the treatment of certain diseases, simply authorizes the holder to make and sell such improvements and not to practice medicine under the law of the given state.[60]

A person who does not hold an unrevoked license to practice medicine may not operate properly with and divide all remunerations with another person, although such other person should hold an unrevoked license in a state where the law requires all persons who desire to practice to be licensed, and the fact that the unlicensed physician should practice under the supervision of the licensed physician will not bring him within the exemption of the law.[61]

§ 68.—Impossibility of Performing the Condition Precedent—Corporations

From the practical viewpoint corporations as such cannot practice medicine. When considered from the point of view of enforcing the law, it will be seen that the corporation cannot apply for a license, nor can it show good moral character, file a diploma and otherwise show its qualifications by examinations and the like. Of course, it may be argued that its officers when delegated by it might do this and in this way a corporation might be said to practice medicine legally. However, it would seem that on grounds of public policy, and from a practical viewpoint, that when an actual attempt is made to practice medicine through its agents, or in any way what-

58. Newman v. State (Tex.) 124 S. W. 956.
State v. Wilhite, 132 Iowa 226.
State v. Heffernan, 28 R. I. 20.
59. Board v. Taylor (Tex.), 120 S. W. 446.
60. Thompson v. Staats (N. Y.), 15 Wend. 395.
61. State v. Paul, 56 Neb. 369.

soever, that the corporation should be held liable therefor, and that *ab initio* a corporation is incapable of practicing medicine.[62]

It is generally admitted that a corporation cannot practice medicine inasmuch as it cannot obtain a license to do so and because of its nature *per se*. But it is argued that such an organization in treating disease through its agents and in advertising its willingness to do so, is not practicing medicine. In this case it is conceded that while a corporation is in some sense a person, and for many purposes it is so considered, yet it is not such a person that can be licensed to practice. Because it is impossible to conceive of an impersonal entity judging the nature, character and symptoms of disease or determining the proper remedy therefor. But members of the corporation or persons in its employ might do these things, although the corporation itself is incapable of doing them, as the qualifications of a medical practitioner are personal to himself and cannot attach to a corporation as such. But the making of contracts for the healing and curing of disease and the collecting of compensation thereunder is not broadly differentiated from practicing medicine *per se*. And hence it is held that a corporation would not have to secure a license to perform such acts, as the making and enforcing of contracts.[63]

Directly opposed to this view is that a foreign corporation, or any corporation for that matter, whose sole business is to enter into contracts with physicians, engaging to defend them in malpractice suits, is not in an insurance business, but is carrying on a professional business contrary to the law. This would seem to be similar to the contract to treat for any disease and to collect a compensation therefor. Such contracts it would seem are not only *ultra vires,* but are in direct conflict with public policy and generally with the medical practice acts themselves.[64]

And finally a corporation which cannot take out a license to practice medicine, is also, it would seem, prohibited from advertising to practice medicine even through its agents and employees. Such a restriction, however, would not seem to include hospitals, since they are incorporated with the specific intent of treating disease through

62. Institute v. State, 74 Neb. 40.
State v. Laylin, 73 Ohio St. 90.
People v. Woodbury, 1092 N. Y. 454.
In re Cooperative Law Co. (N. Y.), 92 N. E. 15.
Youngstown Park, etc. v. Kessler (Ohio), 36 L. R. A. (N. S.) 50.
63. Institute v. State, 74 Neb. 40.
Institute v. Platner (Neb.) 103 N. W. 1079.
64. State v. Laylin, 73 Ohio St. 90.
In re Cooperative Law Co. (N. Y.), 92 N. E. 15.
Youngstown Park v. Kessler (Ohio), 36 L. R. A. (N. S.) 50.

their agents, but such corporations are subject to specific laws under which corporations in general could not be held liable. The reason for the prohibition against corporations in general is that all display advertising may be taken as emanating from questionable or empirical sources such as quacks and charlatans. Hence it is generally deemed advisable to confine all advertising that is permissible to those who can present qualifications entitling them to practice as physicians. As a corporation cannot qualify as a physician, it should be precluded from advertising its willingness to treat disease unless it shall be in the name of some individual who shall be able to obtain public recognition as a physician. And this it would appear, is the object of such legislation, viz., to prohibit advertising to treat diseases, excepting by those who are *de facto* qualified to pursue the medical profession, and corporations from their very nature are barred from so doing.[65]

§ 69.—The Exceptions Under the Statutes

Nearly all medical practice acts uniformly except certain persons under certain conditions and for certain reasons from the general application of the law. It may be said that nearly all acts except the following:

1. Commissioned surgeons of the United States Army and Navy and Marine Hospital Service.

2. Physicians and surgeons in actual consultation from other states.

3. Persons temporarily practicing under the supervision of an actual medical preceptor.

4. Chiropodists, midwives, masseurs or other manual manipulators who use no other means are frequently excepted.

5. Physicians or surgeons residing on a border of a state and duly authorized to practice under the laws of such adjacent state and whose practice extends into the limits of a state but not so to permit them to maintain an office in the state.

6. Persons rendering gratuitous service.

7. Laws frequently exempt those who are legally licensed to practice at the passage of a given law.

These several exceptions and exemptions have caused a vast amount of litigation not only in determining their constitutionality but in large part in determining just who shall fall within these several classes and so be freed from the general burdens of the law.[66]

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65. People v. Woodbury, 192 N. Y. 454.
66. Scholle v. State, 90 Md. 729.
Watson v. State, 105 Md. 650.
Ex parte Spinney, 10 Nev. 323.
People v. Phippen, 70 Mich. 6.

It would seem to be the general rule that all laws consider those already engaged in the practice as sufficiently qualified to continue therein without a compliance with the new enactments as regards examination and the like. This would seem to be on the basis that those who have been engaged in the practice have been already stamped with the public approbation or disapprobation, and this would seem of itself to be a sufficient test of competency.[67]

But practice for seven years prior to the passage of an act, together with graduation from a reputable college and an internship in a hospital would not be sufficient to excuse a failure to obtain a license when a person has actually had ample opportunity to secure such and has in fact been granted a temporary license until such time as he could completely comply with the full requirements of the law.[68]

Although those who were practicing prior to the passage of a given law are excepted from the broad requirements of the law, nevertheless they too must produce evidence as to their ability and the like in general. That is, it may be required that such a practitioner shall produce his license which was granted under a prior law or he shall file his diploma or the like. In all cases it would seem some such credentials may be demanded. The New Hampshire law provided that every person who was a practitioner of medicine and surgery in that state prior to the passage of the law in question should upon satisfactory proof thereof to the regent, and payment of $1 fee, be entitled to registration. An applicant furnished statements from three residents, that he had attended them as a physician prior to the passage of the act in question, together with a certificate of the city clerk that he had certified to a death on a certain date. But such credentials were deemed insufficient because the applicant did not show that he was still practicing as a physician and surgeon at the time of his application. It would seem a fair construction of such language that only those physicians and surgeons who were actually in practice in the state when the act was passed would be entitled to registration.[69]

Frequently it is required that these practitioners who have been practicing prior to the passage of a given act must show that they have acquired a reputation as a bona fide physician in the community

67. State v. Call, 121 N. C. 646.
Arwine v. Board, 151 Cal. 499.
People v. Langdon, 219 Ill. 189.
Williams v. People, 121 Ill. 84.
Eastman v. State, 109 Ind. 282.
68. Bohn v. Lowry, 77 Miss. 424.
69. Hart v. Folson, 70 N. H. 213.

in which they are actually pursuing their work. Under such a requirement a physician who has been practicing but one or two years prior to the passage of a certain act and had not been very successful therein, but had been compelled to engage in other business at the same time, would not have acquired such a reputation and would not therefore be entitled to a certificate to practice without further evidence of qualification.[70]

Some laws simply make the prior practice evidence of qualification which shall permit such applicants to an examination. Under such laws therein the mere fact that a physician has practiced for any length of time prior to a given law will not permit him to continue in such profession without a full compliance with the provisions of the law as enacted.[71]

It has frequently been attempted to have the exemptions as to prior practice construed to read that practice at any time either prior or subsequent to the passage of a given law will constitute a compliance with that law. But a person who has practiced for the required period subsequent to the passage of the now law cannot be said to have complied with its provisions, inasmuch as he has been practicing contrary to the law. Any ruling by a court that such practice was legitimate would be in effect validating an illegal act, which would be contrary to all law. Hence, it may be said that continuous practice for any length of time in violation of the law after an act has been passed confers no right or authority on any practitioner, and it would constitute no defense to a prosecution for a violation of such an act to prove that the person charged with unlawfully practicing medicine in violation of its provisions had been continuously engaged in the practice of medicine in any given state or in any foreign state. And further practice in a foregn state cannot be said to be not in violation of the law in the given state, for in absence of proof to the contrary it is presumed that the laws of the two states are identical. A person must show that he has been practicing legally. It would, therefore, devolve upon a person to produce such evidence as will tend to show that he has complied with the law in all respects.[72]

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70. Paquin v. State, 19 R. I. 365.
71. State v. Vandersluis, 42 Minn. 129.
72. State v. Wilson, 62 Kan. 621.
Higgins v. State, 104 Pac. 953.
State v. Taylor, 140 Iowa 138.
State v. Miller, 138 Iowa 28.
State v. Pennoyer, 65 N. H. 113.
Commonwealth v. Rice, 93 Ky. 393.
State v. Bair, 112 Iowa 466.

A physician who was a resident of a given state and who had been engaged in the practice of his profession under a prior law and had complied with all the provisions of a subsequent law was refused a license by the board on the ground that they could not recognize his school. But such physician came within the exemption of the subsequent law and was entitled to a license. For under the law the board was not impowered to question the good standing of his school. They could not ignore the plain provisions of the law and thereby make a criminal of a citizen who was legally engaged in pursuing his business.[73]

A statute required all persons engaged in or who wished to begin the practice of medicine to make application for a certificate while a mandatory action omitted the former class, thus apparently limiting the law to beginners. This provision would seem to be taking for granted that those then practicing were legally registered and need not again make application. But if any person were not legally registered then with respect to the amended law such a person would be but a beginner and must make application, not being already a lawful practitioner.[74]

A law provided that any one who treats the sick may register his diploma and the proviso was attached which would seem to say that such a registration is on either one of two conditions, to wit:

First that the person so registering can produce satisfactory evidence of having been legally engaged in practice prior to the passage of the said act, and is a graduate of a legally incorporated college, or, second, must produce evidence of having been in continuous practice in one locality in the state for two years last past. Taking this view of the law it would seem to say that the person who has been practicing for two years must register his diploma and not that the having practiced in one locality was of itself sufficient together with the evidence thereof. However, the law was construed that the two years practice was sufficient and that such a person would be entitled to a license whether or not he had ever had a diploma. Thus the proviso was construed as an exception and not a condition to the first part of the section. And again, by the language of this same section a person who had been engaged in practice for two years in one locality need not have been legally engaged in such practice. This conclusion is reached from the fact that the first clause of the proviso

73. State v. Cooper (Ida.), 81 Pac. 374.

74. Hooper v. Batdorff, 141 Mich. 353.
Metcalf v. Board, 123 Mich. 661.

refers specifically to those who were legally engaged while the second clause omits the word "legally." This seems to imply that the legislature intended licensing the second class, even though they had violated the then law.[75]

No person has a vested right to practice in any given state merely through having practiced in that state prior to a certain date. A person who had left a state prior to the passage of a given law must on returning thereto give evidence of his qualifications and fitness to practice, and must be judged by the law in force at the time he so returns before he will be authorized to engage in practice of his profession and reap rewards therefrom. There is no reason why he should not comply with the conditions imposed by the law in force. There is thereby no deprivation of any vested right for there can be no such thing as a vested right in the practice of medicine and surgery. In such provisions the law is simply providing for its proper administration and regulation of the practice. It is simply requiring that all must give evidence of their fitness and skill before they can be authorized to pursue the medical profession.[76]

The mere fact that a person has practiced prior to the passage of a given law does not, as has been said, *ipso facto* qualify him to pursue such practice. But a board is entitled to examine into his qualifications to practice, especially should they have specific evidence of his lack of educational qualifications. It would seem that a person cannot claim as a matter of law that he has a right to a certificate based on his prior practice, and that under the law the board has no right to inquire as to his competency. It would seem that the law need not specifically give the authority to examine into the competency of such persons, but that the right so to do would come from implication. For a board may after granting a certificate inquire as to a person's competency and if incompetent revoke a certificate. Hence, it would seem to follow that the board could refuse to grant a license for a want of competency, as the question of competency is of the very spirit and purpose of such laws. It would be an unreasonable and impolitic construction to hold that upon such an application with the board in possession of facts to justify an inquiry as to the competency of the board that it must grant a certificate and at once proceed to revoke it. Before holding to that view the language should

75. In re Christensen (Wash.) 109 Pac. 1040.
Gosnell v. State, 52 Ark. 228.
Sherburne v. Board (Ida.), 88 Pac. 762.

76. State v. Davis, 194 Mo. 485.
Dodge v. State, 17 Neb. 140.

be clear and unmistakable. It would seem that the legislative purpose is best subserved by holding that a board upon application has the right to inquire as to the competency of such applicant, and that the established facts of prior practice would be simply prima facie evidence of competency which may be overcome by a clear showing of palpable incompetency. Under such circumstances a physician could not claim exemption under the law and would be liable criminally for any violation of the law.[77]

An applicant from a foreign state who is a graduate of a reputable college and is duly licensed in practice in that state would not on those facts alone be entitled to practice under the law of a given state. He may be entirely excluded from practice in that state, or it may be required that he make a proper showing as to his competency and that he apply for a certificate to practice from a local board. The fact that he may arbitrarily have been refused a license would not entitle him to practice without the license or other showing. It is essential that he comply with the law in all its details. Practice for any specified period in a foreign state is of no avail, nor would simply a showing of good reputation and a diploma from a legally organized college necessarily entitle him to anything more than an opportunity to take an examination under the laws of the state to which he has removed. It is on the basis of comity that such persons from a foreign state are permitted to practice at all under the laws of any state to which they may remove. That is, it is entirely at the discretion of any given state as to whether or no they will permit physicians from a foreign state to practice within their jurisdiction. Their laws in this regard may be as stringent as they may see fit, providing only that due consideration is given as to their constitutionality.[78]

As has been said, physicians are allowed to practice under the laws of a given state on removing thereto from some foreign state through comity. They have been subjected to a suitable test in their own state and oftentimes are simply called into another state temporarily by a properly registered local physician. He alone has the power to extend his courtesy to a non-resident. A very high regard may be placed upon their opinions as to the ability of such a consulting physician. No question can therefore be made as to their

77. State v. Mosher, 78 Iowa 321.

78. Craig v. Board, 12 Mont. 203.
Stone v. State, 48 Tex. Cr. Rep. 114.
Hollis v. Board, 82 S. C. 230.
In re Harold (Wash.), 109 Pac. 1043.
Board v. Fowler, 50 La. Ann. 1358.
Webster v. Board, 130 Ky. 191.

right to practice. This is of course somewhat different from the physician who actually removes to a given state with intention of taking up permanently a residence therein. As to whether or no they shall be permitted to practice is more or less within the discretion of the local board of examiners. The board, however, is not given any arbitrary power therein. But supposing the board has acted in all fairness it is left more or less to its good judgment as to whether or no such foreign physicians may practice within the confines of any given state.[79]

§ 70.—Conditions Subsequent—Unprofessional Conduct

A. In General

Just as the applicant for a license to practice medicine must perform all the conditions precedent prior to obtaining any rights under the law, so is he likewise required to perform all conditions subsequent lest he be divested of whatever privilege he may have acquired under the law.[80]

That is to say, the performance of the conditions precedent must be prior to any vesting of whatever right there may be to pursue the practice of medicine, while a failure to recognize the conditions subsequent serves to divest the practitioner of his right or privilege to continue in that pursuit to whatever extent that may exist. It is said the law abhors a forfeiture. Yet, it would seem that all doubts, if there be any, as to the right of government to enforce the conditions subsequent, under the several medical practice acts, have been resolved

79. State v. Van Doran, 109 N. C. 864.
United States v. Curtis (D. C.), 38 Wash. L. R. 396.

80. Hawker v. People, 170 U. S. 189.
Board v. Eisen (Ore.), 123 Pac. 52.
Meffert v. Board, 66 Kan. 710.
State v. Board, 32 Minn. 324.
Spurgeon v. Rhodes, 167 Ind. 1.
State v. McCrary (Ark.), 130 S. W. 544.
Morse v. Board (Tex.), 122 S. W. 466.
State v. Roy, 22 R. I. 538.
Kennedy v. Board, 145 Mich. 241.
Rose v. Baxter, 81 Ohio St. 522, 7 Nisi Prins. (N. S.) 132.
People v. McCoy, 125 Ill. 289.
Smith v. Board (Iowa), 117 N. W. 1116.
France v. State, 57 Ohio 1.
Fort v. City, 87 Ark. 400.
Aiton v. Board (Ariz.), 114 Pac. 962.
People v. Apfelbaum (Ill.), 95 N. E. 995.
But see also
Matthews v. Murphy, 23 Ky. 750.
Czarra v. Board, 25 App. D. C. 443.
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

affirmatively. For under the power of "continuing regulation" government may supervise the daily relation between physician and patient by means of proper legislation even after the vesting of the so-called right to pursue the practice of medicine.[81]

What are then these conditions subsequent which thus serve to delimitate the physician's sphere of action? The acts or specified events, the happening of which would seem to abrogate a so-called right may be generally grouped, as is the case in most statutes, under the term "Unprofessional and dishonorable conduct." Inasmuch as this term has been held wanting in definitude by several courts it has been attempted to be somewhat more specific in not a few of the more recent statutes. Consequently, in many states there will be found set forth certain specified acts which go to constitute the desideratum of "unprofessional and dishonorable conduct." Even in such jurisdictions, however, it has been found necessary to close these decalogues with the words "and in any other acts of unprofessional and dishonorable conduct which tend to deceive and defraud the public."[82]

It has been well said that human ingenuity could not pass a law which would set forth every conceivable act which might be deemed unprofessional. Nor in fact would it seem necessary, for unless it be permissible to use freely general language legislation in many instances would not accomplish all that is desired, nor afford the fullest protection to the public, because of this very impossibility of enumerating in detail every separate and distinct act intended to be prohibited.[83]

A recent medical practice act enumerated three causes which were thereby constituted conditions subsequent for divesting the actor on the happening thereof. These were:

1. Fraud in obtaining or endeavoring to obtain a license.

2. Conviction of a crime of the grade of felony, or involving moral turpitude, or aiding or abetting the commission of an abortion.

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81. Hawker v. People, 170 U. S. 189.
Reetz v. Michigan, 188 U. S. 505.
France v. State, 57 Ohio 1.

82. Czarra v. Board, 25 App. D. C. 443.
Matthews v. Murphy, 23 Ky. 750, holding that the term "unprofessional" is insufficient.
Contra
Morse v. Board (Tex.), 122 S. W. 446.
Kennedy v. Board, 145 Mich. 241.
Rose v. Baxter, 81 Ohio St. 522, 7 Nisi Prins. (N. S.) 132.
Aiton v. Board (Ariz.), 114 Pac. 962.

83. Morse v. Board (Tex.), 122 S. W. 446.
People v. Apfelbaum (Ill.), 95 N. E. 995.

3. Other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public, or for habits of intemperance or drug addictions calculated to endanger the lives of patients. But even in this attempt at enumeration it would apparently seem that the ingenuity of the legislator was exhausted, for in the third cause we are referred to "unprofessional conduct."[84]

To this list there has been added in many states other causes, such as:

1. Advertising the cure of venereal diseases, which is objectionable as being subversive of the public morals and as constituting an opportunity for fraud.

2. Advertising the cure of chronic complaints and of various incurable diseases. This is also objectionable, because of the fraud prevalent with such practices.

From an examination of these laws it would seem that there is no desire to prohibit the attempt to treat or care for venereal and chronic diseases. But the provision is directed against a physician who makes an unnecessary display of this profession, for fraud and deception are too simple a matter for the charlatan and empiricist, considering the peculiar relationship of physician and patient and the usual condition of most patients. It is therefore submitted that this would seem the basis for all these conditions subsequent.

The law therefore requires the obtaining of a license as an interposition on the part of government in behalf of the weak and oppressed and to aid those who are incapable of guarding their own interests. It is in the furtherance of these ends then that the legislative branch of government is to be found attempting to comply with the suggestions of the courts by making the term "unprofessional conduct" as comprehensive as possible.[85]

The term "unprofessional conduct" will hereinafter be used with two shades of meaning, in a special sense as found in many of the statutes to cover specific acts as therein enumerated, and in a more general sense as having reference to any other acts not particularly

84. Texas Session Laws, 1907.

85. Board v. Ross, 191 Ill. 87.
State v. Chapman, 34 Minn. 387.
Hewitt v. Board, 148 Cal. 590.
But see
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.
Raaf v. Board, 11 Ida. 707.
Matthews v. Murphy, 23 Ky. 750.
Czarra v. Board, 25 App. D. C. 443.
State v. Smith, 138 Wis. 53.

set forth. Generally the term will be found used in the first sense and always with the idea of its being a condition subsequent giving grounds for a revocation of a license.

B. GROUNDS FOR THE REVOCATION OF A LICENSE

1. Fraud in Procuring License

It would seem fundamental that fraud and perjury should constitute unquestionable grounds for the revocation of a license. Indeed, so incontrovertible would this position appear, that one court has said *obiter* it would be slow to hold that there was no authority to set aside a certificate for fraud even in the absence of a statute.[86]

What then should be the position of a board or court when additionally fortified by statutory mandate.[87]

The use of notes and memoranda in answering examination questions may be taken as constituting "unprofessional conduct," for which a license may be either refused or revoked as the case may be.[88]

Acts of this nature constitute fraud *ab initio* for which there can be no possible condonation. Any one detected in the act should, it would seem, be disqualified *ipso facto*. For what possible defense could be made in extenuation thereof.

Under a number of laws applicants are required to state under oath that they are graduates of a reputable college. To make such a statement falsely, and knowing that the statement is false is "unprofessional and dishonorable conduct." Here again the grounds are patent. The only reason for not taking arbitrary action is that it would seem the question of knowledge is an essential.[89] But under some statutes knowledge would not seem an essential. However, even in such a case abstract principles of justice would seem to demand a hearing for the applicant prior to any revocation or refusal of a license.[90] Evidence of fraud may be proven from the public record, kept by the county clerk in pursuance with the law, together with statements of the applicant.[91]

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86. State v. Schaeffer, 113 Wis. 595.
87. State v. District Court, 26 Mont. 121.
Gully v. Territory (Okla.), 91 Pac. 1037.
State v. Schaeffer, 113 Wis. 595.
Stevens v. Hill, 74 Vt. 164.
Curryer v. Oliver, 27 Ind. App. 424.
88. State v. District Court, 26 Mont. 121.
89. Gulley v. Territory (Okla.), 91 Pac. 1037.
State v. Schaeffer, 113 Wis. 595.
90. State v. Schaeffer, 113 Wis. 595.
Stevens v. Hill, 74 Vt. 164.
91. Curryer v. Oliver, 27 Ind. App. 424.

2. Conviction of a Crime Involving Moral Turpitude

In not a few jurisdictions it has been enacted that conviction of any crime involving moral turpitude shall constitute "unprofessional and dishonorable conduct" for which a revocation of a license may be had.[92]

At early common law the words "moral turpitude" seem to have had a positive and fixed meaning. This language was defined as being an act of baseness, vileness, or depravity in those private and social duties which any man owes to his fellowmen or to society in general. "Moral turpitude" seems to have implied something immoral in itself regardless of the fact as to whether or no it was punishable by law, hence the doing of the act itself irrespective of its being *mala prohibita* or *lex scripta* fixed the definitude thereof. And therefore in any statute using the language "moral turpitude" if further undefined, such words will be taken in this well known and common law signification. Thus the illegal sale of intoxicating liquors not being an offense punishable at common law would not come within the definition of a crime involving moral turpitude, and consequently a physician convicted of such an offense would not fall within the meaning of the statute providing for the revocation of the license of any physician who has been convicted of a crime involving moral turpitude.[93]

3.—Felony or Gross Immorality

The expression "gross immorality" may be taken, it would seem, as similar in meaning to "moral turpitude." Phrases of this nature have been handed down through the law for centuries, having thereby received a certain standard of interpretation and understanding. A definite meaning can consequently be affixed thereto. Thus "gross" means willful, flagrant, shameful, with respect to the office involved, and refers to an act of such a nature as would render an officer unfit to retain his license and authority.[94]

As regards a physician it would seem quite unnecessary that he be *per se* immoral with his patients, but that gross immorality in his general habits would constitute unprofessional conduct and be sufficient to give a board jurisdiction. Under these laws the object sought is to protect the home of the sick and distressed from any intrusion

92. Fort v. City of Brinkley, 87 Ark. 400.
State v. Stewart, 46 Wash. 79.
93. Fort v. City of Brinkley, 87 Ark. 400.
Rose v. Baxter, 81 Ohio St. 522, 7 Nisi Prins. (N. S.) 132.
94. Rose v. Baxter, 81 Ohio St. 522, 7 Nisi Prins. (N. S.) 132.

in a professional character of a vicious and unprincipled man. Hence it is that the law disqualifies any man who has been guilty of a felony or of gross immorality and provides for the revocation of their license upon a proper proof of such a charge.[95]

4.—Procuring or Aiding and Abetting in Procuring a Criminal Abortion

By statutory enactment many of the states have denominated the procuring or aiding and abetting in procuring a criminal abortion as unprofessional conduct.[96]

That is any physician who has been convicted of the offense of procuring or aiding and abetting in procuring a criminal abortion is guilty of unprofessional conduct and upon proof of the charge may have his license revoked. This is on the principle of continuing regulation and thereunder it is immaterial that the physician so charged may have expiated at a prior time this same offense by imprisonment or fine or the like. For the revocation of the license is not any attempt to punish the physician for the crime, but is simply attempting to secure the public against a man who by a conviction has proven himself unworthy to further pursue the medical profession as a calling, and so important is this profession and so readily can its members conceal the crime of an abortion together with the too frequently dire results that a law containing such a provision should be upheld even in the face of the fact that it is seemingly *ex post facto*.[97]

The medical profession can be amply protected from a too harsh administration of such a measure by requiring that the facts on which the charge is based shall be set forth in the complaint together with the allegations that there was an intent to destroy the child and that the death of the child was produced by the use of a drug or instrument which also shall be named.[98]

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95. Meffert v. Board, 66 Kan. 710.
Spurgeon v. Rhodes, 167 Ind. 1.

96. Board v. Eisen (Ore.), 125 Pac. 52.
Mathews v. Hedlund (Neb.), 119 N. W. 17.
Munk v. Frink, 81 Neb. 631.
Hawker v. People of New York, 170 U. S. 189.
Reetz v. People of Michigan, 188 U. S. 505.
Freund, Police Power, Para. 545, 546, note.
Macomber v. Board, 28 R. I. 3.
Matthews v. Murphy, 23 Ky. 750.
Czarra v. Board, 25 App. D. C. 443.

97. Hawker v. New York, 170 U. S. 189.
Ch. I, Sec. 8, ut supra.

98. Board v. Eisen (Ore.), 123 Pac. 52.
Munk v. Frink, 81 Neb. 631.
Mathews v. Hedlund, 82 Neb. 825.

5.—Advertising of a Fraudulent or Immoral and Illegal Nature

A state may constitute the advertising the willingness or ability to procure or aid in procuring criminal abortions as unprofessional conduct together with advertising to treat and cure venereal diseases, or diseases and troubles peculiar respectively to the two sexes, and the ability to cure the so-called chronic or incurable diseases and any advertising that may be of a fraudulent, immoral or illegal nature.[99]

It has been held insufficient, however, for a statute simply to use the words "grossly improbable statements" as respects advertising, for it was held, the law can, and should define what may constitute such statements.[100]

Yet again, this would not seem an absolute essential, as the words "grossly improbable statements" could have reference only to an assertion that the physician was able to cure supposedly chronic and incurable diseases, or that he alone could prescribe a certain remedy or that his medicine could cure an inconceivable number of diseases. It would seem no great stretch on the language in question.[101]

Patently a physician who advertises himself through the newspapers and by circulars to be a medicine man of an Indian tribe, and that he has been adopted by that tribe whereby he obtained the proprietorship of certain specific remedies, one of which he claimed would cure cholera morbus when taken internally and rheumatism when applied externally, would be making palpably "grossly improbable statements" and which should be constituted "unprofessional and dishonorable conduct."[102]

And again while all advertisements to cure venereal diseases and the like are not *per se* so worded as to be regarded as improbable in the results claimed, yet, they belong to that class which are injurious to the public through their lack of proper moral tone. Many do

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99. Hewitt v. Board, 148 Cal. 590.
Aiton v. Board (Ariz.), 114 Pac. 962.
People v. Apfelbaum (Ill.), 95 N. E. 995 .

100. Hewitt v. Board, 148 Cal. 590.
And see also
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

101. State v. McCrary (Ark.), 77 Ark. 611, 92 S. W. 775.
Kennedy v. State, 145 Mich. 241.
State v. Board, 32 Minn. 324.
Aiton v. Board (Ariz.), 114 Pac. 962.
People v. Apfelbaum (Ill.), 95 N. E. 995.
Sutherland, State Construc., Para 246, et sequi.

102. State v. Board, 32 Minn. 324.

in fact assert the improbable and hence for one reason or another all such are objectionable.[103]

The public assertion of an ability to cure chronic diseases and contrary to the express law is an act for which there should be a prompt conviction. The fact that no particular disease is named would really seem immaterial, for the words "chronic and incurable" when used with reference to diseases of the body are not variable but have a generally accepted meaning. "Chronic" is the antithesis of acute and a disease of this nature is one which is longstanding, deep rooted, obstinate, persistent and unyielding to treatment. Such diseases are specifically named and discussed in standard works and are known to all physicians who have any considerable knowledge of their profession as chronic and incurable diseases. Hence, it seems that a conviction under such a law can well be sustained.[104]

On the same basis the claim that certain mineral waters and preparations used and controlled only by a certain physician could cure incipient tuberculosis, systemic catarrh, catarrh of the head, Bright's disease, diabetes, rheumatism and numerous other diseases would seem quite clearly fraudulent and to have been made with the sole purpose of deceiving those who can not be supposed to know of such matters. In forbidding such advertising and in constituting it "unprofessional conduct" the law does not do so because of any inherent evil in advertising or because all who advertise are *per se* frauds. Rather such acts are made illegal because of the well known fact that those who are ill with a seemingly incurable disease such as cancer, and some kinds of tuberculosis, are prone to turn to those who claim to give them relief. Should these advertisements merely claim "to relieve," perhaps they would not be so objectionable. But physicians of this ilk claim "to cure" and do not hesitate to take the very sustenance of the poor, the infirm and the diseased, who so trustingly rely on them. It is for this reason that these physicians and most of the so-called schools and cults are objectionable. It is because they knowingly attempt to deceive and defraud those that are helplessly and incurably ill, thereby constituting themselves morally and economically *persona non grata*. They are using funds in a seemingly impossible attempt which can much better be used for

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104. State v. McCrary (Ark.), 77 Ark. 611, 92 S. W. 775.
But see
Chenoweth v. State (Colo.), 135 Pac 771.
104. State v. McCrary (Ark.), 103 S. W. 544.
But see
Graeb v. State (Colo.), 135 Pac. 776.

food, clothing and shelter for the very patients. Acts of this nature can hardly be classed as anything else than "grossly immoral and unprofessional conduct."[105]

Of the same class are those physicians who attempt to secure patients by impersonating another or simply under some other name than his own. Advertising of this sort most surely falls within the term "unprofessional and dishonorable conduct." A citizen may advertise his business in any legitimate manner perhaps, but the law is most clearly justified in precluding any attempt at deception and fraud by irresponsible and quack doctors by advertising under some other name than their own.[106]

6.—Unprofessional or Dishonorable Conduct of a Character Likely to Deceive or Defraud the Public

And finally nearly all laws sum up the unexpressed causes for revocation under the general language "grossly unprofessional or dishonorable conduct" of a character likely to deceive or defraud the public, or some such similar language.[107]

Under this language it is not necessary that a physician shall have committed a felony or the like, that a revocation may be had. It is simply essential that there be an attempt to deceive and defraud the public, and to this extent it is similar in nature to a crime. Acts thereunder may be similar and closely akin to swindling, but all the essentials of swindling need not be proved in order to justify their inclusion under the language "dishonorable or unprofessional conduct." Again the words, "of a character likely to deceive or defraud the public" have been added to many statutes to indicate that the "unprofessional conduct" may be of such a nature as will react to the disadvantage of

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105. Aiton v. Board (Ariz.), 114 Pac. 962.
Meffert v. State, 66 Kan. 710 (s. c. aff., 195 U. S. 625).
State v. Board, 34 Minn. 391.
Hawker v. New York, 170 U. S. 189.
Reetz v. Michigan, 188 U. S. 505.
Sutherland (State Const.), Para. 239, et sequi.
But see
Freund, Police Power, Para. 545, et sequi.
Hewitt v. Board, 148 Cal. 590.
Macomber v. Board, 28 R. I. 3.
Matthews v. Murphy, 23 Ky. 750.
Czarra v. Board, 25 App. D. C. 443.
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

106. People v. Apfelbaum (Ill.), 95 N. E. 995.

107. Morse v. State (Tex.), 122 S. W. 446.
People v. McCoy, 125 Ill. 289.
State v. Roy, 22 R. I. 538.

the public so as to differentiate it from the "unprofessional conduct" referred to in the code of ethics as adopted by the medical profession in general. Under this language then, the law purports to denounce such conduct as does, or tends, to deceive and defraud the public. Acts of this nature are of necessity closely allied to crime because they are generally fraudulent. Yet it was never intended thereunder to include such conduct as might also be covered by the criminal code of a state. Such acts are provided for under other laws and are to be dealt with solely thereunder.[108]

7.—Statute of Limitations

It may be said generally that as regards the application of the statute of limitations to actions of this nature recourse must be had to the several statutes to ascertain their language before any ultimate decision could be reached. However, it has been held that an action of this nature was not covered by these laws, but this case can only be taken with reference to the laws of Washington and other states that may be similar thereto.[109]

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108. Morse v. State (Tex.), 122 S. W. 446.
People v. McCoy, 125 Ill. 289.
State v. Roy, 22 R. I. 538.
People v. Apfelbaum (Ill.), 95 N. E. 995.
Aiton v. Board (Ariz.), 114 Pac. 962.
Kennedy v. Board, 145 Mich. 241.
State v. McCrary, 77 Ark. 611, 92 S. W. 775.
See also
Matthews v. Murphy, 23 Ky. 750.
Czarra v. Board, 25 App. D. C. 443.
Hewitt v. Board, 148 Cal. 590.
Macomber v. Board, 28 R. I. 3.
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.
109. State v. Stewart, 46 Wash. 79.

CHAPTER V

PROCEDURE AND PROOF UNDER THE MEDICAL PRACTICE ACTS

A. PRACTICING WITHOUT A LICENSE

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II. The Proof

(*a*) Sufficiency of the Evidence

A.—PRACTICING WITHOUT A LICENSE

1.—The Indictment

§ 71.—A Misdemeanor—Procedure Taken

Under a majority of the medical practice acts the procedure taken in the event of a violation of the law is quite similar to that used in other cases, civil and criminal, as the facts require. Frequently, however, a summary prosecution or the like is accorded under the law, hence it is always advisable to examine the particular act to ascertain what changes have been made, if any, and then proceed pursuant thereto. Again, in most jurisdictions, a violation of any of the provisions of a public health law is usually denominated a misdemeanor, and practicing or attempting to practice without a license is generally considered as such. When, therefore, the fact that any person seems to be violating the law is brought to the attention of the proper authorities, an investigation may be had, and should the evidence warrant it an indictment may be brought in any court of proper jurisdiction. The person in question may then be compelled to account for his alleged violation. As to who shall take action in the premises, as stated, provision is frequently made therefor in the particular statute. Again, it may be somewhat in doubt as to just whose duty it is to prosecute in these cases. Generally it would seem to devolve upon the county

or state's attorney to proceed against any alleged offender upon information thereof, duly laid before him. In some instances, however, the board of examiners are the actual prosecutors. In any event it is a mere matter of convenience and policy as to who the prosecutor shall be. An indictment or information having been brought, the person prosecuted is to be proceeded against pursuant to the rules of common law and the statutes of the realm. And this is true also in the quasi-civil actions as in a suit for debt.

§ 72.—The Indictment or Information Generally

In all criminal prosecutions the right of the accused to be informed of the nature and cause of the accusation against him is prescribed by the sixth amendment to the federal constitution as well as by similar provisions in nearly if not all the state constitutions.

According to these constitutional requirements it is fundamental that the crime or offense with which a person stands charged shall be defined with reasonable precision. The accused must be informed first by the law and next by the complaint as to what acts or conduct is prohibited and made punishable. It is the duty of the legislature to see that a given statute is properly drawn so as to conform to the constitution. If there be any discrepancy therein and if it constitute ground for a reasonable doubt it is the duty of the court to declare such an enactment invalid. Again it is the duty of the practicing attorney, and in a certain degree of the court as well, to so draft the indictment as to give the accused all necessary information. If the indictment be not so drawn, upon a motion made by the attorney for the defendant and a proper showing, it may be quashed. It is essential that every man should know with certainty when he is committing a crime and with what crime he is charged. Within reasonable limits therefore he may be assured of this protection by the court.[1]

§ 73.—The General Essential of the Indictment

The law being sufficient as measured by the constitution it next becomes essential to pass on the indictment, which if it adheres substantially to the language of the law in force is sufficient. Nor is it always necessary that the precise language of the statute be used.[2]

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1. Czarra v. Board, 25 App. D. C. 443.
2. Whitlock v. Commonwealth, 89 Va. 337, 15 S. E. 893.
   State v. Miller (Iowa), 124 N. W. 167.
   State v. Huff, 75 Kan. 585, 90 Pac. 279.
   State v. Blair, 92 Iowa 28.
   State v. Kendig, 133 Iowa 164.
   Singh v. State (Tex.), 146 S. W. 891.

But an indictment which charges that the defendant "did unlawfully practice medicine for reward and compensation against the form of the statute" without setting forth in what the unlawfulness consisted is insufficient. For the rules of criminal pleading require that the offense shall be charged specifically. First, in order that the accused may know precisely what he is to defend against; and secondly, in order that the record may be a bar to any subsequent prosecution.[3]

While this may seem somewhat technical it is to be noticed that the indictment failed to use the language of the statute, but merely referred the accused to the state for a specific definition of his crime. And in all fairness it would seem that this might be held insufficient. The indictment is sufficient, however, if the words used are equivalent to those employed in the statute. For example, to charge a person with practicing medicine is equivalent to charging that he practiced as a physician.[4]

Again the indictment may be drawn in two counts, in one of which the statutory language is taken that the accused "practiced for a compensation" and in the second this may be omitted and yet the language as a whole is sufficient to support a conviction and should be sustained.[4]

An indictment charging that defendant "did wrongfully, unlawfully and publicly profess to be a physician and did assume the duties thereof and then and there wrongfully, falsely and unlawfully did publicly profess to cure and heal disease and so forth by means of a certain system" was substantially in the language of the statute and was therefore sufficient.[5]

But under the California law of 1907 wherein the term "practice medicine" was construed as meaning "to pursue a business" it was held insufficient to simply allege that defendant did wilfully and unlawfully treat the sick or afflicted without a proper certificate by practicing a system or mode known as "Chiropractic." It was said that the complaint might have been sufficient if it had charged that the defendant had "wilfully and unlawfully practiced medicine without the certificate required by law" and so forth. The indictment was insufficient because the use of the term "practice" therein charged no

2.—*Continued.*
State v. Schaeffer, 129 Wis. 459, 109 N. W. 522.
State v. Pirlot, 19 R. I. 695, 36 Atl. 715.
State v. Wilson, 74 Vt. 379, 65 Atl. 88.
Gee Woo v. State, 36 Neb. 241, 54 N. W. 513.
Ex parte Greenall, 153 Cal. 767, 96 Pac. 804.
3. State v. Pirlot, 19 R. I. 695, 36 Atl. 715.
4. Whitlock v. Commonwealth, 89 Va. 337, 15 S. E. 893.
But see
State v. Pirlot, 19 R. I. 695, 36 Atl. 715.
5. State v. Miller (Iowa), 124 N. W. 167.

offense, simply being used in a descriptive sense and not with the import of the statute. If the second form had been used the statute would have been followed more nearly and the rule as to charging the offense specifically would have been complied with. It would thus seem that a use of similar language will not always be sufficient, for using other words than the statute may change the meaning thereof and name an act which has not been denominated an offense thereunder. Hence to have brought a person within the meaning of the California law of 1907 it was necessary to make it appear that the accused was practicing or attempting to practice medicine as a business or calling.[6]

It is immaterial whether or no a matter of treatment employed by an accused be actually surgery. But even if so it need not be specially alleged as such in the information. It is sufficient to follow the language of the statute, and hence if defendant's acts are within its terms it is immaterial if they also amount to the practice of surgery.[7]

An indictment charged that said party "from ———— day of ———— A. D. ———— till the finding of this indictment, did in said county and state falsely, wrongfully and unlawfully assume the duties of a physician and make a practice of prescribing medicine for the sick, and did wrongfully, falsely and unlawfully publicly profess to cure and heal without first having obtained from the board of medical examiners of the state of ———— and filed for record a certificate conferring on him the right to practice contrary to the statute in such cases made and provided."

The indictment was challenged on several grounds, in that it was not sufficiently certain as to the person charged, or as to the offense intended to be charged. And in that the indictment did not give the slightest information as to the time, place and circumstances of the offense or of the evidence which the defendant would be required to produce to establish a defense. The court, however, held the statutory definition of the crime complete and that the indictment charged the offense essentially in the language of the statute and that was sufficient.[8]

But under a law which enumerates the various acts which should be regarded as practicing medicine an indictment in charging an offense must allege some one of these acts. That is, an indictment which charges a defendant with holding himself out as a physician and does not state how, is insufficient. The statute may enumerate various ways of doing it, and each one of which may be constituted a separate

6. Ex parte Greenall, 153 Cal. 767, 96 Pac. 804.
7. State v. Huff, 75 Kan. 585, 90 Pac. 279.
8. State v. Kendig, 133 Iowa 164.

offense. In such a case it is therefore imperative that the allegations descend far enough into the particulars in order to give the accused reasonable notice of the evidence that will be produced at the trial. A defendant is always entitled under the constitution to "demand the cause and nature of the accusation against him."[9]

From these cases it would seem the rule may be laid down that in drafting an indictment under a medical practice act the safest plan is to follow the language of the statute. For should the statute be invalid there is no remedy in the courts as regards such statute *per se,* but only in the legislature. While should the statute be valid a deviation therefrom, even a hairsbreadth, may prove fatal to the indictment, so that it will be quashed.

§ 74.—Duplicity

To the charge of duplicity as respects indictments under the several medical practice acts it would appear that the courts have lent but an unwilling ear. For usually an indictment has been sustained when a demurrer thereto has been laid on that ground. For instance, it would seem permissible to draw an indictment of one count charging therein that the defendant both prescribed medicine and appended the letters "M.D." to his name. Of course, as to whether or no this may be done generally depends entirely on the language of the given statute. In the statute under which the indictment in question was laid, apparently there was no intent on the part of the legislature to define separate and distinct offenses. Hence it would seem to follow quite naturally that in using the statutory language there could be no duplicity. Herein, therefore, it is first essential to determine whether or no the law sets forth more than one offense and then lay the indictment accordingly.[10]

Again an indictment may allege that the accused "did wrongfully practice or attempt to practice" without being open to the charge of duplicity thereby. But here also the intent of the law must be determined in order to know whether one or more offenses are being set forth.[11]

§ 75.—Uncertainty

Generally as regards the use of the terms "or" and "and" it may be said that the use of the term "or" is only fatal when the statement

9. State v. Wilson, 79 Vt. 379, 65 Atl. 88.
State v. Pirlot, 19 R. I. 695, 36 Atl. 715.
Gee Woo v. State, 36 Neb. 241, 54 N. W. 513.
Schaeffer v. State, 129 Wis. 459, 109 N. W. 522.
10. Hale v. State, 58 Ohio St. 576, 51 N. E. 154.
Schaeffer v. State, 129 Wis. 459, 109 N. W. 522.
State v. Blair, 92 Iowa 28.
11. State v. Welch, 129 N. C. 579, 40 S. E. 120.
State v. Blair, 92 Iowa 28.

of the offense is thereby rendered uncertain. It is not objectionable where one term is used to explain the other, or where the language of the law makes either the attempt or the act itself indictable. Hence it would seem generally permissible in drawing an indictment to follow the statute specifically and charge an accused with both "practicing or attempting to practice medicine." And the use of the disjunctive would not invalidate the indictment.[12]

The governing principle to be applied in passing on the sufficiency of averments in indictments is that the nature of the offense charged must appear so explicitly and plainly from the terms used as to leave the defendant in no unfounded doubt in preparing to meet the accusation. Under one rule it has been held proper to discard the disjunctive even when appearing in the statute and to substitute the conjunctive therefor in the indictment. But this has only been allowed on the ground that the alternative charge left the defendant in doubt as to the nature of the offense with which he was charged. And hence a statute may make two or more distinct acts constituting separate stages of the same act indictable, and either one or both may be charged in a single indictment or a single count thereof. When distinct acts representing successive stages of a transaction are connected in a statute by the word "or" it is in accordance with well-settled precedents in drawing the indictment to couple the independent clauses by using the word "and" instead of following the statute closely and using "or." Nor will the indictment be open to criticism in not following the statute and charging the offense therein set forth, nor as to the making for uncertainty in naming the offense.[13]

These cases would further seem to show that the courts tend to a liberal construction of medical practice acts. Apparently from the idea that these laws are not strictly penal measures, but are in reality police regulations for the protection of the people. Hence to adequately secure this a broad view as to the drafting of indictments is an essential.

§ 76.—Names of Persons Treated by Accused

In drawing up an indictment charging a person with unlawfully practicing medicine it would not seem to be a defect in substance to fail to include in the averment the names of the individuals treated when such names are unknown. It may be said to be sufficient simply to aver that the defendant "did unlawfully practice medicine to divers

12. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.
State v. Welch, 129 N. C. 579, 40 S. E. 120.
See also
Osborn v. Carey (Ida.), 132 Pac. 967.
13. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.

and sundry persons whose names are to the county attorney unknown." In this it would seem that it is not the failure to state the names in the averment, supposing them to be unknown, that would constitute a substantive defect, but the failure to state that said names were unknown. And further it might seem essential to state the names of all persons treated supposing they were known.[14]

But it has been held that, under the Illinois law of 1899, it is sufficient to allege simply that the defendant unlawfully practiced medicine by treating and professing to treat and prescribe certain material remedies for the physical ailments of another without a license so to do. And further to allege that the offense was committed in a certain place and about a certain time and that the defendant had been previously convicted of the same offense. Nor was it deemed essential that the accused be furnished with the names of the parties she was alleged to have treated. It was said to be a matter which rested entirely in the discretion of the trial court as to whether or no the complainant should be compelled to file a more specific statement of claim wherein to set forth the names of the alleged patients. At any rate it was no error to refuse the defendant's request, therefor, so long as the complaint gave the dates on which the alleged offense was committed. And further, even it was not considered necessary to set forth that the names were unknown.[15]

Now it is submitted that the underlying principle in these cases is identical even though the one be a matter of an indictment, while the second is an action of debt. The forms it is submitted are more or less immaterial. It is the purpose which these forms subserve that is of interest. And with either system the idea is to inform the accused adequately of his offense. Now, inasmuch as these statutes are police regulations and not penal, greater liberality may be permitted in drafting an indictment thereunder, but at the same time it must be borne in mind that any policy of liberality permitted in construction must always be commensurate with and delimitated by a policy of justice and equity to the accused. And hence it is said in the second case that it is in the discretion of the trial court as to whether or no the names shall be furnished. If fairness to the accused should demand such further statement the trial court may rule accordingly.

Then again under some acts the definition of the offense may be in such language as entirely to obviate the necessity of setting forth such facts under any consideration. If this be true it can be made apparent to the court and no difficulty need be experienced. Finally,

14. Sofield v. State, 61 Ohio St. 600, 85 N. W. 840.
15. People v. Dunn (Ill.), 99 N. E. 577.

it is said that a complaint is not insufficient because it did not contain the name of the affiant in the body thereof when the name of the affiant was at the bottom of the affidavit, and was the party making the same, with the jurat of the officer taking it.[16]

But this statement need in no way be taken as modifying the one previously made, generally speaking, for it would seem that the Texas case is based on peculiar local statutes as regards pleading and the like. And, of course, if this be the case it is to be expected that there will be some restriction placed on a broad use of terms and the interpretation of the law. In order to mete out perfect justice to all the law must be followed with no little degree of nicety. And this, it may be said, is the basic principle in all pleading. Hence any deviations which are permitted from the law, statutory or common, must be only upon a proper conception of all the facts which may enter into a given case and of all the equities involved.

§ 77.—Compensation

Under many medical practice acts the words, "practice medicine," are defined as meaning "to suggest, recommend, prescribe or direct for the use of any person any drug, medicine, appliance, apparatus or other agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture or other bodily injury or deformity, after having received, or with the intent of receiving therefor, either directly or indirectly, any gift or compensation," or are defined in somewhat similar language.[17]

Hereunder it would seem that the receipt of a fee at some time, and in some manner, was an essential factor in alleging an offense under the statute. And further, that an omission of such an averment might render the indictment fatally defective. But on the other hand it would seem that an indictment which charged the accused with "practicing medicine without a license" and notwithstanding a failure to allege a receipt of compensation therefor might be sufficient to support a conviction, and it has been so held. Such an averment being sustained on the ground that since the statutory definition of the words "practice of medicine" embraced the idea of the exacting of compensation an indictment charging that the accused "did unlawfully practice medicine" would necessarily be inclusive of the meaning as set forth in the statutory definition. And hence an indictment containing such an averment, together with a negation of any qualification

16. Singh v. State (Tex.), 146 S. W. 891.
17. Sec. 1478 Georgia Code, 1904.

essential to the lawful practice of medicine would be good in substance and support a conviction, and even though the apparently necessary allegation of a receipt of compensation were omitted therefrom.[18]

From this will be seen the well-nigh imperative necessity of following the statute closely in laying an indictment. For it is easily conceivable that a statute could be so drawn and contain such language whereunder it would be fatal to fail to allege the receipt of comensation. Thus it appears that no general conclusion can be drawn from this isolated decision as to the sufficiency of all indictments under apparently similar statutes. But it can only be said that having examined the law with due care with the idea of ascertaining its true intent, the indictment must then be so drafted as to follow this intent and to charge the offense named therein. And that in so doing it may or may not be required to aver the receipt of compensation pursuant to the intent of the aforesaid statute.

§ 78.—"Without Having First Been Examined and Obtained a License as Required by Law"

It was claimed that an indictment which charged that an accused "did unlawfully practice as a physician . . . and did not then and there have a license so to do" was insufficient, because it did not contain the specific words of the statute to the effect that the practicing was "without having first been examined and obtained a license as required by law."[19]

And the trial court sustained the demurrer to the indictment on this ground. But the ruling was deemed erroneous and an appeal was reversed. The higher court holding the statement of the offense sufficient for the trial of the party charged, since clearly no license would issue without the applicant having been first examined pursuant to the law. Hence the charge that accused "practiced without a license" was tantamount to saying that he practiced "without first having been examined and obtained a license" and so forth. Thus it would seem unnecessary to aver a failure both to be examined and to obtain a license, as the latter charge alone will carry the former with it. Again, it cannot be presumed that the unlawful act of the accused was due to any dereliction of duty on the part of the examiners, in that the board had failed to afford the accused an opportunity for an examination, nor would such a presumption if true be any defense. But the alleged violation of the law by the accused is *se volunte* to which

18. Blalock v. State, 112 Ga. 338, 37 S. E. 361.
State v. Welch, 129 N. C. 579, 40 S. E. 120.
19. Sec. 1334 Mississippi Code, 1906.

the board can in no way be said to be *particeps criminis,* and hence if the accused had no license it was not because the board failed to examine him, but because said accused did not choose to present himself before the board for an examination. Moreover, the proof by the accused of his possession of a license would import his having had an examination and constitute a complete defense. And so, on the other hand, his not having a license imports a failure to have been first examined and hence an allegation to the effect that defendant had no license is a sufficient definition of the statutory offense whereon to sustain a conviction.[20]

§ 79.—Defendant's School or Branch of Medicine, Etc.

An information is not insufficient because it does not set forth the school of medicine to which the defendant is alleged to belong or the particular method or system which it is alleged that he effects cures and treats for pay.[21] Again, an information need not allege any particular branch in which the defendant is supposed to be engaged under a law which simply forbids any one to practice medicine prior to a compliance with any of the provisions thereof.[22]

Nor is it necessary to allege the existence of certain medical societies to which reference may have been made in the indictment.[23]

For under most statutes it would seem that the essential is to prove that the defendant practiced medicine contrary to the law. That he belonged to any particular school of medicine or employed any special system is really immaterial. All that is essential would be whether or no the employment of this school or system of medicine would constitute the practice of medicine contrary to the law. Thus the allegation that the defendant practiced contrary to the law, and the proof that he engaged in any branch or followed any school would sustain a conviction, provided always that in so doing the accused would come under the statutory offense.[24]

§ 80.—Treating Human Beings

It is not essential that an indictment should charge that a defendant in practicing medicine was practicing on human beings as distinguished

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20. State v. Tucker (Miss.), 59 So. 826.
21. Singh v. State (Tex.), 146 S. W. 891.
22. Antle v. State, 6 Tex. App. 202.
    Singh v. State (Tex.), 146 S. W. 891.
23. People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402.
24. People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402.
    Antle v. State, 6 Tex. App. 202.
    Singh v. State (Tex.), 146 S. W. 891.

from furnishing medicine for domestic animals. For clearly such an objection would be purely hypercritical and without merit, as there is a plain distinction between practicing medicine and treating animals, which is both commonly and legally recognized. Moreover, the general recognition which is given to this distinction is sufficient to save the defendant from any doubt as to the offense with which he is charged, and hence an indictment in such cases which simply follow the statute, is sufficient. If the language of the statute be uncertain it would seem improper to attack the indictment, for under such circumstances it is submitted that the proper course is to question the validity of the statute *per se*.[25]

§ 81.—Exceptions

Nearly, if not all, statutes contain exceptions to the penalties of the law which apply to certain classes, such as students in a physician's office, a physician acting in consultation and the like. By these exceptions certain persons are apparently authorized to practice medicine without first securing a license. Hence the question arises, should an indictment negative these exceptions, that is, deny the fact that the defendant is entitled to avoid the disabilities of the law by reason of his inclusion within some one or more of these provisions? Generally speaking it has been held that an indictment need not negative such exceptions, as said provisions are more properly matters of defense, being provable under the plea of "not guilty."[26]

The general rule as to exceptions, provisos and the like is that when these form a portion of the description of the offense as defined by the statute, so that the ingredients of said statutory offense cannot be accurately and definitely stated if some one, or all of the said exceptions and so forth be omitted, then it is necessary to negative such provisions. But supposing the exception to be separable from the description and not a specific ingredient thereof, then it need not be noticed in the accusation for then it is a matter of defense.[27]

Again, an indictment which charges a violation of a generally prohibitory provision makes a prima facie case and if the accused comes within any clause or provision which would except him from the

25. State v. Kendig, 133 Iowa 164.
26. Antle v. State, 6 Tex. App. 202.
Hale v. State, 58 Ohio St. 576.
State v. Welch, 189 N. C. 579, 40 N. E. 120.
Sofield v. State, 61 Neb. 600, 85 N. W. 840.
State v. Flanagan, 25 R. I. 369.
State v. Kendig, 133 Iowa 164.
27. State v. Kendig, 133 Iowa 164.
Sofield v. State, 61 Neb. 600, 800 N. W. 840.

penalties of the law such a matter would be for him to bring forward as defense.[28]

Moreover, generally speaking, exceptions to a penal or quasipenal statute do not limit the offense therein named by description or qualification, and hence cannot be considered as matter to be negatively charged in the indictment. In fact, the seeming weakness of the position that such matter should be negatively charged is fairly well illustrated when it is remembered that if a negative averment must be made it must likewise be proven. Now, supposing it were the proposition that a physician who is serving in the Army or Navy is excepted under the law, it would be practically impossible for a prosecuting attorney to prove the negative thereof, that is, that a defendant was not a qualified official of the army or navy and thereby free from the disabilities of the law, that is, and comply with the rules of evidence. In the first place there would be no record in the given state to which he could appeal to prove or disprove the fact. Supposing the prosecuting attorney essayed to prove the allegation by the direct testimony of an official from Washington, or by the custodian of the proper records and such witnesses declined to appear and testify. The prosecuting attorney would be helpless. His court having no jurisdiction over said persons there would be no process which could compel their attendance. Nor could the said attorney prove the fact by deposition because of the defendant's constitutional right to be confronted by the witnesses against them. And again, the same difficulties would be experienced, supposing it were attempted to prove a defendant not a legally licensed physician of any other state. From this it would seem that the rule making such fact matter for affirmative defense is founded clearly on reason. For the sake of simplicity and precision, if nothing else, the state should not, and is not required to aver such matters.[29]

§.82.—Prior Practitioner, etc.

Usually it is unnecessary to aver that a defendant was not a legal practitioner at the time a given act was passed, or that he was not the graduate of a medical college, and hence was entitled to practice simply upon registration or the like and without any further evidence of qualification than the proffer of his prior license or of his diploma, and hence an averment that the defendant was an illegal practitioner

28. Hale v. State, 58 Ohio St. 576.
State v. Welch, 129 N. C. 579, 40 S. E. 120.
Antle v. State, 6 Tex. App. 202.

29. State v. Flanagan, 25 R. I. 369.

and otherwise following the statute generally would be sufficient. Again, supposing the statute required that the registration of the prior practitioner be within ninety days after the passage of the subsequent act, the averment need simply be that the required period had expired, and that the said defendant was practicing contrary to the law. But it is submitted that even this is unnecessary, and that the charge of illegal practice is sufficient, leaving it as a matter of affirmative defense that the said ninety days or the like has not expired.[30]

§ 83.—Registration in County of Residence

In some statutes, for example the Georgia medical practice act in force in 1910, it was required that physicians register their licenses in the county of their residence prior to their being entitled to practice. Hence, thereunder in charging a defendant with practicing without a license it must not only be alleged in addition that there was no registration, but that said registration was not had in the county of the defendant's residence. If the accusation fails to set forth that the defendant was not registered in the county of his residence it is failing to allege an essential element of the offense, and if an accusation be thus faulty, clearly it may be quashed on demurrer. To avoid this defect all that is essential is to affirmatively state that the accused was not registered in the county of his residence before he commenced to practice.[31]

§ 84.—Itinerants

It was argued that an indictment which charged a defendant with publicly professing to treat diseases while an itinerant vendor of drugs, and so forth, without a license was defective because the facts constituting the offense were not pleaded. It was argued that it was necessary to allege that drugs were sold or offered for sale in the specified county wherein it was claimed that defendant practiced, but this it would seem was unnecessary as the offense did not consist in the defendant's having sold or offered for sale drugs in any specific county. Rather the offense was the fact of the defendant's being an itinerant vendor of drugs and then and there publicly professing in the said county by writing or printing or other methods to cure or treat diseases by any drug, and so forth, that is, any itinerant vendor who goes into any given county and without even offering to sell any drugs, yet makes the profession of curing or treating disease in any way specified by the law is guilty of the offense contemplated thereunder. The indict-

30. Hale v. State, 58 Ohio St. 576, 51 N. E. 154.
31. Jones v. State (Ga.), 69 S. E. 315.

ment charged that the defendant did by "printing, writing and other methods" publicly profess to treat disease, and this was sufficient.[32]

§ 85.—Miscellaneous

(a) *Proving More Than One Infraction in One Count—Defense.*

Usually in certain misdemeanor cases testimony may be introduced tending to show numerous infractions of the law falling within the period of limitation, although there be only one count or charge in the indictment or presentment.[33]

There is no objection to this as the defendant may as easily prepare his defense, and also it is as simple in pleading former acquittal or conviction, as the indictment for unlawfully practicing medicine may be taken as covering all special instances occurring prior to the indictment and going to sustain the main charge; hence former acquittal or conviction may be pleaded in lieu of any subsequent prosecution of such prior acts.[34]

(b) *Burden on Defendant.*

In some states it is forbidden to use the title "doctor" under certain circumstances and the burden of showing the right to the use thereof is on the accused.[35]

(c) *Conclusions.*

The principal point to remember, it would seem, in drawing an indictment under a medical practice act, is to follow the language of the statute closely. Deviations therefrom may always be considered a poor policy, however liberal a given jurisdiction may be. It is always safest to let the court be liberal in its construction of the statute rather than of the indictment. For it would seem that a court would have more authority to take the statute broadly than to refuse to insist that the exact statutory offense be charged. These cases would also seem to show that the courts are somewhat constrained to a liberal policy in regard to both the acts and the indictments thereunder, and it would seem that there is some justification therefore, at least in regard to the acts, as the statutes are not purely penal measures, but police regulations. As such it is difficult to specifically define an offense so as to cover all offenders. Hence, in the interest of the public health and

32. State v. Blair, 92 Iowa 28.
33. Payne v. State, 112 Tenn. 587, 79 S. W. 1025.
34. Payne v. State, 112 Tenn. 587, 79 S. W. 1025.
35. Schaeffer v. State, 129 Wis. 459, 159 N. W. 522.
And see
Westbrook v. Nelson, 64 Kan. 436, 67 Pac. 884.

safety, courts should, and apparently do, in many cases take a liberal view and permit variations from the strict rules of pleading which might not otherwise be allowed or sustained.

2.—The Proof

(a) *Sufficiency of the Evidence.*

§ 86.—In General

It may be said that the rules of evidence as applicable in other cases apply as well to cases under medical practice acts, generally speaking, and that in proving the allegations made in an indictment any evidence is admissible which will go to sustain the point at issue, namely, whether the defendant was practicing medicine without a license. As to the quantum of proof necessary to justify a verdict of guilty it would be difficult to lay down any hard and fast rule. Broadly speaking, however, in "quasi-criminal" proceedings of this nature it is sufficient to show the guilt of the accused by a clear preponderance of the evidence.[36]

In a certain case a defendant was being prosecuted for unlawfully engaging in the practice of medicine by offering to treat diseases and effect cures thereof for money. Under the information and plea the main issue was whether or no said defendant was treating and offering to treat diseases for pay. As evidence thereof any statement made by the defendant and bearing on this point would be proper, and in fact any evidence would be admissible which would tend to show that the defendant was practicing medicine. As a circumstance showing that defendant accepted cheques in payment for treatments it was proper to introduce a cheque for $10.00 given by a witness to the defendant and made payable to the latter or order, and containing the words "one week's medical treatment for wife," which cheque was paid, and was endorsed on the back with the defendant's name. It was also proper for the witness to state that the defendant declined to give a receipt as his claim was not enforcible as tending to prove that said defendant was aware of the provisions of the law, and that the business he was pursuing was prohibited by law. Nor was it error to permit the witness to state that defendant had prescribed for him for catarrh, and likewise another witness could testify that he had called on the defendant and asked him if he could cure his wife of neuralgia, and that the defendant had stated that he could and what his charges would be.[37]

36. Amer. & Eng. Enc. Law: Title, Evidence.
37. Singh v. State (Tex.), 146 S. W. 891.

Again, in a suit to recover the penalty prescribed by law, two witnesses testified that they were inspectors of the board and that they went together to the defendant's home on a certain date. One of the witnesses asked defendant if she could cure cancer. Defendant said she could, and asked witness if she had one. Witness replied that she did not think so, but that she had a scar on her neck and had been sick for a long time. Defendant then got a magnifying glass and requested the witness to open her collar so that she might examine the scar. The witness was informed that it was not cancer but a tumor which could be cured if directions were followed. Defendant required a cash deposit and a further payment during the course of treatment. It was further shown that defendant diagnosed the case and gave assurances of an ability to treat patients and fixed a time for a first treatment. Further, it was shown that defendant demanded and received pay for the consultation. By these acts defendant was professing to treat the physical ailments of another and contrary to the law.[38]

Another defendant claimed to be an exponent of the "functional ray" system. It was proved that he examined his patients and made a microscopic test of their blood in order to determine whether or no, as he said, his methods would avail. If he decided to give treatments, the patient was first denuded of all clothing and placed in a closed cabinet wherein the body was subjected to the rays of two large electric arc lights. This was continued for about thirty minutes or until the patient was in a profuse perspiration. The patient was then taken into another room and rubbed off. Local applications of the rays were frequently made to parts affected. Defendant also gave medicines of various kinds, and while he did write prescriptions it was mostly to advise patent medicines. He kept an account at a drug store. He was known as "doctor," and he made a uniform charge of $100.00 for the light treatment but claimed he charged nothing for the medicine. The determinative facts against him were the holding himself out to the world as a practitioner of the healing arts and his soliciting patients afflicted with disease for treatment and the treatment thereof.[39]

And again, in another case facts were submitted to show that the defendant had been called in a case and that he had responded thereto that he claimed to be a magnetic healer; that the party on whom he called was sick and that he tried to effect a cure by his system; that he had been called on numerous occasions and had responded; that he

38. People v. Dunn (Ill.), 99 N. E. 577.
39. O'Neil v. State, 115 Tenn. 427, 90 S. W. 627.

advertised as a doctor and made out death certificates. Said evidence was held sufficient to sustain a charge of illegally practicing medicine.[40]

It is to be generally noticed that in the cases cited above the point emphasized has been whether there has been a sufficient showing that defendant was practicing medicine. This question was affirmatively answered in all. Now, it must be remembered, however, that the charge is not simply the "practicing of medicine" but the "practicing of medicine illegally." Hence it must be shown that defendant had no license or had failed to register it in the county of his residence or the like. Clearly such proof is essential to support the charge of practicing medicine illegally.[41]

§ 87.—Intent

There seems to be a rule of law that where a statute creating a criminal offense is silent concerning the intent that then there need be no allegations thereof in an indictment drawn under the said law. Now, it would appear as a corollary thereto that if an allegation of intent be unnecessary in such cases, then proof of intent would also be unnecessary.[42]

Especially it would seem should this be true under the medical practice acts. Yet again, it might seem at least of those jurisdictions where "continued practice" is essential to constitute a violation of the law[43] that the statute was requiring something similar to an allegation and proof of intent. But it is submitted that this is not so. Rather the law is requiring that a plan or general design shall constitute the violation instead of isolated instances as in other states.[44]

In point of fact, it would seem that little account need be given to this matter of "intent." As intent is necessary in criminal acts only, and while medical practice acts may denominate violations of their mandates misdemeanors and thus require that violations be dealt with by the public authorities in accordance, to a certain extent at least, with the rules of criminal procedure, nevertheless, these viola-

40. People v. Phippen, 70 Mich. 6.
41. Lewis v. State (Tex.), 155 S. W. 523.
State v. Lawson, 40 Wash. 455, 82 Pac. 750.
State v. Miller (Iowa), 124 N. W. 167.
Watkins v. Paul, 87 Ill. App. 278.
State v. Kendig, 133 Iowa 164.
State v. Yates (Iowa), 124 N. W. 174.
People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402.
42. Harding v. People, 10 Colo. 387, 15 Pac. 727.
People v. Dudenhansen, 115 N. Y. S. 374.
43. Foo Lun v. State, 84 Ark. 475, 106 S. W. 946.
44. State v. Cotner (Kan.), 127 Pac. 1.

tions are not crimes in the strict sense of the word. Nor are these statutes criminal. But we are dealing with, as has been said before, police regulations enacted for the advancement primarily of the public morals, health and safety. That this is the nature and object of these laws is borne out in a great part by the underlying spirit of the opinions to be found in the books. Unconscious as this expression of opinion may be it is nevertheless in evidence and hence not to be disregarded because unconscious. To be sure there are cases which pronounce these laws penal and stand for a strict interpretation thereof,[45] yet on the whole these are but isolated instances among the general current of judicial thought and should, therefore, carry but little weight.[46]

However, as long as violations are denominated misdemeanors, thus requiring indictments, public prosecutors and the like, so long will courts be compelled to adhere more or less rigidly to the frame-work of evidence as found in the common law. True a line of demarcation may be drawn by denominating medical practice acts police regulations, but even this distinction will hardly suffice to induce all jurisdictions to allow a liberal construction of these measures so as to conduce to an effective administration of the law. Hence it would seem that the remedy is to be found in the legislatures. Which is simply this: "do not draft public health laws as penal measures." Clearly a legislature may, and should change the common law if need be.

§ 88.—Sufficiency of Evidence Under Statutes Forbidding Treatment by Any System Unless Duly Licensed

When the statute is broad in its language it will be much simpler to conduct a prosecution thereunder. In the first place the information can be drafted more easily and in the second place the proof to be adduced thereunder is not limited so strictly. Hence evidence of facts may be shown which might not be permitted under more narrow language. Scientific accuracy is impossible in the prosecution of certain practitioners and only generalizations can be made. This is more particularly true in attempting to prove that a certain system is the practice of medicine, thus when treatment by any means is forbidden the indictment may be drawn charging the defendant with practicing medicine illegally, and the testimony adduced may be in respect to the special system used or the like. Thus a witness for the state was allowed to testify that he took his wife to the defendant to be treated for a

45. People v. Smith, 208 Ill. 31.
46. State v. Oredson, 96 Minn. 509.

tumor; that the defendant gave both present and absent treatment; that he rubbed the affected part, waved his hands and told the patient that she would be cured. The absent treatment consisted in giving the wife a picture to look at to keep the mind on it and to remain quiet.[47]

Such system may not be the practice of medicine in the common acceptation of the word, and so in that point of view such evidence might be improper. But when a person professes to treat disease and advertises to that end, evidence of the facts would seem properly advisable.[48]

§ 89.—Opening an Office

A common provision found in many statutes is that making the opening of an office an autoptic proference of practicing medicine. This fact, together with proof of no license is then taken as sufficient to sustain a conviction of illegally practicing medicine. Hence a person who opens an office and announces to the public a willingness to treat consumption with some patent medicine would be illegally practicing medicine supposing such person be unlicensed or unregistered or the like.[49]

Generally under these provisions it may be said that actual treatment of a patient need not be proven. Nor would the question of compensation arise. It is simply necessary to prove that the defendant opened an office for the purpose of practicing medicine and without the proper authority therefor.[50]

Similarly, placing a doctor's sign over the door or the like would be evidence that the accused had opened the office to practice medicine.[51]

§ 90.—Advertising as a Physician

Again, many of the laws provide in some way that advertising shall have a potential probative value. It may be that a "holding one's self out" is made to constitute the illegal advertising; or it may be advertising the ability to treat and cure; or it may be advertising as a doctor *per se,* that is, using the title "doctor" or the like.

Thereunder a complaint may charge that the defendant held himself out as a physician and surgeon, if so, it will be sufficient to prove

47. Singh v. State (Tex.), 146 S. W. 891.
48. Foo Lun v. State, 84 Ark. 475, 106 S. W. 946.
49. Territory v. Lotspeich (N. Mex.), 94 Pac. 1025.
50. Territory v. Lotspeich (N. Mex.), 94 Pac. 1025.
51. State v. Cotner (Kan.), 127 Pac. 1.
State v. Pollman, 51 Wash. 110, 98 Pac. 88.

that he held himself out as either. For there is but one offense and that is the claiming to be a physician illegally.[52]

Under the Iowa law it would seem that a mere public profession of an ability to heal does not subject the person to the penalties of the law. But the public profession must be made under such circumstances as to indicate that it is made with a view of undertaking to cure the afflicted. And one does this in announcing to the public generally his claim of skill in the art of healing if this be done with the purpose of treating the maladies of patients who may engage his attentions.[53]

Proof that a person prescribes remedies and the like would not tend to prove a charge of professing to be a physician, for the person may be prescribing personally as a friend.[54]

But any one who holds himself out as a physician in any way whatsoever would be liable under the law. Nor would it seem necessary to actually prove that the defendant did treat or receive compensation for treating. For the very idea of this provision of the law is to avoid the necessity of being compelled to submit evidence which it is often times impossible to prove, as for example a physician who advertises the cure of venereal diseases.[55]

Again the mere fact that an advertisement appeared in a paper under the same name as that of an accused would not constitute a prima facie case against such person. Nor could it be presumed therefrom that such advertisement was authorized by the accused. It is essential that a causal connection be established between the advertisement and the accused. And further, if there be a charge that he maintained an office there must be evidence adduced to that end. Profference of the paper containing the advertisement would be entirely insufficient.[56]

It is not necessary, however, to prove that the defendant advertised as a physician *per se*. Evidence that he advertised the capacity and the ability to treat disease is sufficient, and especially when in conjunction there is offered testimony that compensation was received for any treatments.[57]

Again, evidence that the defendant holds himself out as a physician may be shown by the facts that he uses medical titles on his door

52. Comm. v. St. Pierre, 175 Mass. 48.
53. State v. Heath, 125 Iowa 585, 101 N. W. 429.
54. State v. Bresee, 137 Iowa 673.
55. Singh v. State (Tex.), 146 S. W. 891.
56. State v. Dunham, 31 Wash. 636, 72 Pac. 459.
57. Singh v. State (Tex.), 146 S. W. 891.

and on a card; that he has office hours; talks of his patients and gives them treatments; that he makes diagnoses and prescribes diets and remedies and a certain course of conduct; that he asserts an ability to cure disease without the use of drugs and that he is paid for his services.[58]

§ 91.—Recommending Medicine for a Fee

Frequently statutes have included in them a provision forbidding any person to recommend medicine for a fee. Thereunder, evidence of that fact would tend to support a charge of practicing medicine.[59]

As to just what is recommending medicine or advising the use of or selling appliances intended for treatment of disease is sometimes in doubt. Proof that a person sold spectacles and advised them to cure headaches, blurring, itching and the like, was not deemed sufficient to sustain a charge of practicing medicine without a license under a clause of a statute containing similar language to the above.[60]

Nor would it seem that proof of an offering of a device to cure rheumatism is sufficient to sustain a conviction.[61]

And again, it is said that the recommending by a midwife of her remedies to cure eye troubles of infants or the use of those remedies is not evidence that could tend to sustain an indictment of practicing medicine illegally.[62]

It has also been held that proof of merely using hypnotism and massage would not suffice, but advising the use of powders and plasters or other remedies would be sufficient evidence to render a person liable under the law.[63]

Perhaps the two Illinois cases and the Massachusetts case are somewhat extreme as being based on an improper view of the practice of medicine and the like. Hence evidence that medicine was recommended for a fee or any system advised or used should be generally taken as tending to support the indictments.

§ 92.—Prescribing for a Fee

Under these laws the gist of the misdemeanor is that an unlicensed person has practiced medicine. Hence in proving the charge while

58. People v. Allcutt, 117 App. Div. 546, 102 N. Y. Supp. 678.
People v. Somme, 120 App. Div. 20, 104 N. Y. Supp. 946.
State v. Blumenthal (Mo.), 125 S. W. 1188.
State v. Yegge, 19 S. Dak. 234, 103 N. W. 17, 69 L. R. A. 504.
State v. Davis, 194 Mo. 485, 92 S. W. 484, 4 L. R. A. (N. S.) 1023.
59. State v. Huff, 75 Kan. 585, 90 Pac. 279.
60. People v. Smith, 208 Ill. 31.
61. People v. Lehr, 196 Ill. 361.
62. Higgins v. McCabe, 126 Mass. 13.
63. State v. Lawson (Del.), 65 Atl. 593.

testimony to the effect that such a person has for a fee prescribed any drug, medicine or other agency for the treatment of disease is not the exclusive substance of the offense, yet it is one kind of evidence of guilt, and even if it must be submitted with other facts it has a fairly potential probative value.[64]

A physician in his advertisements stated, "Positively no charges made but the labor is worth the hire." But notwithstanding this the evidence disclosed that a large number of his patients paid him directly or indirectly. One paid defendant's wife in his presence. Others by making him or his wife presents. Still another by letting him a house, rent free, for several months. One witness whom he treated stated that in discussing the treatment and his charges he said:

> "'I won't charge you anything (I don't know how many times he said that) nothing; but if you make me a present it is welcome.' I made him a present; it was in money. Sometimes I would hand him $1.00 and sometimes $2.00 or something like that. I never told him, 'here is your money.' I just put it in his hand and he never looked at it. He just put it in his pocket."

This evidence was introduced together with the facts that he actually treated patients and that he advertised in the papers his ability as a physician, and that he called himself "doctor" but advertised as "professor." All of this evidence taken together was considered proper and sufficient proof of the offense as charged.[65]

When the essence of the offense under the statute is simply an opening of an office or claiming to act as a physician or the like, then it is unnecessary to prove either treatment of a patient or the receipt of compensation. But when there is an actual treatment of or prescribing for the sick it is essential that proof of treatment and a receipt of compensation either directly or indirectly be proven. And it is immaterial from whom the compensation is received or from whom it was intended that it should be received. Evidence adduced that the accused received pay for his treatment is sufficient.[66]

The state need not, in some jurisdictions at least, prove the treatment of a specific person and the receipt of pay from that person, for in these states it would seem that the offense alleged in the statute is for treatment for pay. Hence the state need simply introduce testimony to the effect that defendant practiced medicine and offered to treat disease for compensation. And especially is this true when the defendant claims to accept free-will offerings only. These offerings

64. State v. Oredson, 96 Minn. 509.
65. Mueller v. State (Tex.), 153 S. W. 1142.
66. Territory v. Lotspeich (N. Mex.), 94 Pac. 1025.
Singh v. State (Tex.), 146 S. W. 891.

may be taken as direct compensation within the purview of the law, for the term indirect is used to cover evasions.[67]

§ 93.—Prima Facie Evidence

Under a statute making the record of the county clerk prima facie evidence as to a defendant's possession of a license and requiring the recordation to be had in the county of his residence, a conviction cannot be sustained on evidence showing only that the defendant practiced medicine in a given county and that no license had been filed in that county, but the facts proffered must be that he was a resident in the county in which he was practicing or that he was not registered in the county in which he resided. This is because no registration is required in the county to which he may happen to be called.[68]

It is not necessary for the state to show that a defendant was not a practicing physician prior to the enactment of the statute under which he was indicted in order to make a prima facie case. It is sufficient simply to show that the defendant had not filed his license. This may be done by the county clerk. Evidence of this nature when made to constitute a prima facie case is sufficient to prove the existence of the license. The method has been adopted to avoid the objection that the state has not proved the fact, and also makes it possible to prove the fact one way or the other. It may be rebutted by a proffer of the license by the defendant.[69]

§ 94.—Burden on Defendant

The state having proved the fact that the defendant was practicing medicine it then devolves upon the latter to submit evidence in rebuttal thereof. Hence the burden shifts to the defendant as is sometimes said, and he must tender evidence to the point that he was duly authorized to practice medicine under the law. This evidence of proof of qualification rests on defendant and he must submit evidence thereof in

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67. Singh v. State (Tex.), 146 S. W. 891.
But see
State v. Cotner (Kan.), 127 Pac. 1.
See also
State v. Thompson, 48 Wash. 683, 94 Pac. 667.
Richardson v. State, 47 Ark. 562, 2 S. W. 187.
State v. Huff, 75 Kan. 585, 90 Pac. 279.
Territory v. Newman (N. Mex.), 79 Pac. 706.

68. Haworth v. Montgomery 91 Tenn. 16.
Mayfield v. Nale, 26 Ind. App. 240.
Murray v. Williams, 121 Ga. 63.
Riley v. Collins, 16 Colo. App. 280, 64 Pac. 1052.

69. State v. Dodson (Wash.), 102 Pac. 872.

those jurisdictions when a recordation is not made prima facie evidence for or against an accused.[70]

In the jurisdictions which have provided no such law it is taken as true that the accused has no license should he fail to adduce affirmative evidence thereof. And further, it is said to be a well-recognized rule that when there is a negative averment of a fact which is peculiarly within the knowledge of the defendant that the burden rests with him to rebut such averment.[71]

To the same effect is the rule that the burden rests with the defendant to allege and prove the possession of a diploma if this be necessary to the lawful practice of medicine. Or that he had submitted to an examination in lieu thereof. And it is given as a reason for this that such evidence is not accessible to the state and is peculiarly within the defendant's knowledge and is matter under his control. Again, when a defendant attempts to justify seemingly illegal practice by alleging a license from a foreign state, it rests with defendant to prove that the laws of the two states are identical in order that the rule of comity or reciprocity may have application therein.[72]

Supposing a defendant seeks to allege in avoidance of his act that he was acting under the direction of a duly licensed physician, it would seem necessary that the defendant submit evidence of that fact, else it is to be presumed to the contrary.[73]

§ 95.—Evidence as to a Particular School of Medicine

(a) *Osteopathy.*

Evidence to the effect that a defendant uses a system wherein the treatment consists principally in rubbing, pulling and kneading with the hands and fingers on certain portions of the body and in flexing and manipulating the limbs of those afflicted with disease, and that the object of this treatment is to remove the cause of the trouble, is proper evidence tending to support an indictment of practicing medicine illegally.[74]

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70. People v. Fulda, 52 Hun (N. Y.) 65, 4 N. Y. Supp. 945.
Benham v. State, 116 Ind. 112.
Comm. v. St. Pierre, 175 Mass. 48.
State v. Burke, 88 Iowa 661.
71. People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402.
72. State v. Wilson, 62 Kan. 621.
73. Jones v. People, 84 Ill. App. 453.
74. Little v. State, 60 Neb. 749.
People v. Gordon, 194 Ill. 560, 62 N. E. 858.
People v. Jones, 92 Ill. App. 447.
State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791.
Milling v. State (Tex.), 150 S. W. 434.
Newman v. State (Tex.), 124 S. W. 956.

(b) *Christian Science.*

It was shown that healing and curing disease was attempted by invisible agency and by aid of other than the art and science of man, that is by prayer to Deity for the recovery of the sick. Further, that the accused held himself out as able to relieve the ill by Divine power and did actually treat the sick for pay. This was held as competent testimony which would go to prove the illegal practice of medicine.[75]

(c) *Chiropractic.*

Proof that an unregistered and unqualified person attempts for pay to practice chiropractic by pretending to adjust the spine of one afflicted with bodily infirmities or who advertised to treat for pay by chiropractic spinal adjustment persons thus afflicted, would be evidence whereon to render a verdict of guilty and to hold such person liable for the penalty of the law.[76]

(d) *Suggestive Therapeutics and Others.*

It was submitted in evidence that a defendant claimed to be a graduate of an institute of suggestive therapeutics and that in an advertisement he appended the letters "D.S.T." to his name. In addition thereto the evidence tended to show that he held himself out and advertised to the public by signs in his office and by publications in the local newspapers that he was a doctor and was capable and competent to successfully treat all forms of chronic diseases. Further, that he notified all people through the public press that he was not only a doctor, but that as such he was a specialist in the treatment of chronic diseases. He further advised them that he was capable of curing the many diseases mentioned in his advertisement without medicine or surgery, and that there were but few of the many diseases which did not yield readily to his drugless treatment. All of which was held to constitute "probata" whereby the "allegata" might be sustained.[77]

74.—*Continued.* See also
Smith v. Lane, 24 Hun 632.
Hayden v. State, 81 Miss. 291, 33 So. 653.
State v. Herring, 73 N. J. Law 34, 56 Atl. 670.
State v. McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187.
State v. Biggs, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139.

75. State v. Marble, 72 Ohio St. 21, 73 N. E. 1063.
State v. Buswell, 40 Neb. 158, 24 L. R. A. 68.
State v. Mylod, 20 R. I. 643, 40 Atl. 753 (contra).

76. State v. Johnson (Kan.), 114 Pac. 390.
State v. Zechman (Iowa), 138 N. W. 387.
Swarts v. Siveny (R. I.), 85 Atl. 33.

77. Witty v. State (Ind.), 90 N. E. 627.
People v. Mulford, 125 N. Y. S. 680.
Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190.
Vital Healing: State v. Adkins (Iowa), 124 N. W. 627.
Clairvoyant: Bibber v. Simpson, 59 Me. 181.

B.—ADMISSIBILITY OF EVIDENCE

§ 96.—In General

In determining as to the admissibility of testimony under the medical practice acts the broad rules of evidence will in general apply. Thereunder evidence is largely admissible or inadmissible in accordance with whether or no it tends to prove the point at issue. Usually as has been noted the gist of the issue is whether or no the accused has been practicing medicine illegally. Hence in a broad way it may be said that the state may introduce into evidence any facts which will tend to prove the affirmative of this point. Hereunder, of course, incompetent, irrelevant and immaterial testimony is barred, also the best evidence, the hearsay and any other rules that may seem applicable should be borne in mind. Again the defendant may on his part offer in rebuttal any matter tending to prove the negative, subject to similar limitations. In attempting to ascertain as to the admissibility of testimony besides an examination of the common law and the general statutory rules of evidence, it is always well to look into the special statutory law on hand with care, as frequently certain matters are made to constitute a prima facie case or the burden is cast upon the defendant or the like.[78]

§ 97.—Relevancy

Under an indictment which charges the accused with practicing medicine unlawfully and in order to define the offense under the statute sets forth the treatment of a particular individual on a specific date and under a false name, the latter fact being the gist of the misdemeanor, it is error to admit testimony of defendant's relations to two or more persons, one more than two months prior to the crime charged in the indictment and one eight days before. This is on the basis, it would seem, that each act charged is a separate offense. That is to say, each time the accused rendered medical services concurrently with the impersonation of another practitioner he was violating the law. Hence to prove that he treated others whether or no there was an illegal concurrent impersonation would in no way tend to prove the allegation in the indictment to hand, to-wit: the treatment of the person named in the indictment on the day alleged and under a false name.[79]

78. See generally: Wigmore, "Evidence;" Greenleaf, "Evidence;" Jones, "Commentaries on Evidence;" Am. & Eng. Enc. Law, "Evidence."

79. People v. Dudenhausen, 115 N. Y. Supp. 374.

In the same way in those jurisdictions which consider each person treated as a distinct violation of the law it would be improper to admit, under an indictment charging an accused with unlawfully practicing medicine without a license and naming a specific person treated, evidence of treatment of others than the one named.[80]

While in those jurisdictions in which the unlawful practice of medicine without a license is considered in the nature of a continuing offense it would seem entirely competent to admit testimony as to any person treated up to the time the indictment was drawn. Under this rule it will be seen that each treatment is not considered separately, but all are taken as going to show the unlawful act, and perhaps as constituting a general plan or design.[81]

Especially would this be true under a statute which makes the "continued practice" without a license unlawful. With such a provision it would seem absolutely essential to show that more than one person was treated.[82]

Again, testimony showing that defendant is a graduate of more than one medical college and that he has practiced for more than eighteen years in a foreign state would not of itself excuse such person of practicing in some other state without a license.[83]

And it is submitted that such testimony should be inadmissible because incompetent to refute the charge of illegal practice unless the accused be able to establish the fact under the law of the given state that the requirements of qualification in the two states are substantially identical.

It seems that evidence is frequently admitted, as that an accused effected cures by his system, to which it is submitted objection should be made and sustained. For to what purpose is the fact that a system, whatever it may be, whether osteopathic, chiropractic or what not, can cure the diseases supposing the person using the system be unlicensed? All such evidence is inadmissible because incompetent to prove the negative of the point at issue, and should be excluded from the jury.[84] It would seem somewhat comparable to a case when a physician had taken a note from a patient and had subsequently sold the note. It developed that the physician's treatment of the case was unsuccessful and the patient filed a suit sounding in tort for the alleged malpractice. The patient was allowed to introduce into evidence the fact that the physician had taken the note and sold it. The admission of the

80. State v. Cotner (Kan.), 127 Pac. 1.
81. Payne v. State, 112 Tenn. 587, 79 S. W. 1025.
82. Foo Lun v. State, 84 Ark. 475, 106 S. W. 946.
83. Dodge v. State, 17 Neb. 140, 22 N. W. 348.

evidence was declared erroneous as tending to prejudice the jury and as not being logically relevant to the issue at bar.[85]

And so it should be, it is submitted, with prosecutions under a medical practice act, any fact which tends to obscure the issue, prejudice the jury or the like should be excluded for irrelevancy or incompetency or the like. And belonging to this class it would seem are such cases as an attempt by the defendant to prove that he was administering a domestic remedy gratuitously when it had already been shown that he had accepted pay for his services.[86]

Evidence that an accused was acting through or under a duly licensed physician after the state has established the fact that the act of the accused was, *per se,* the practice of medicine, as when a licensed physician and an unlicensed physician divide the fees equally and the like.[87]

Testimony that an accused was simply a vendor of patent medicines under a statute permitting the itinerant vending thereof, supposing it established that he was in reality holding himself out as a physician as by diagnosing cases and prescribing remedies therefor.[88]

Finally, any statements that the accused healed by Divine power and the like. For the accused is not indicted for healing by Divine power, but because he is unlicensed. Hence evidence simply tending to show that the accused is practicing a religion also, in no way appertains to the issue. In those jurisdictions excepting Christian Scientists and the like from the application of the law, it would seem that this policy perhaps cannot be adopted. But it is submitted that these cults should not be excepted. There is no reason why they cannot secure a license as well as any other person who purports to treat human ills. If this be done the rule of exclusion as to testimony of this nature may be made universal. It can be granted in all cases that an accused is possibly practicing a religion, however, he is also practicing medicine. To practice his religion no license is required, but to practice medicine one must qualify under the law. If this be required of all then the fact that one is unlawfully practicing medicine without a license it cannot be shown in evidence that the treatment used is simply a religious custom as such evidence would be incompetent.[89]

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84. State v. Miller (Iowa), 124 N. W. 167.
85. Cozine v. Moore (Iowa), 141 N. W. 424.
86. State v. Huff, 75 Kan. 585, 90 Pac. 279.
87. State v. Paul, 56 Neb. 369, 76 N. W. 861.
    Springer v. District of Columbia, 23 App. D. C. 59.
88. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.
89. Bennett v. Ware, 4 Ga. App. 293.
    Singh v. State (Tex.), 146 S. W. 891.
    State v. Peters (Kan.), 123 Pac. 751.

And finally, it is not competent to show in rebuttal that other physicians have no certificate or have not stood an examination or are practicing illegally. Clearly that others violate the law is no justification for another. *Multitudi erratium non parit errori patrocinum.*[90]

§ 98.—Best Evidence

If the state has proved a prima facie case against the accused it is incompetent for him to attempt to defend under a mere statement that he has a license as this is but hearsay and not the best evidence. The diploma, if of any value, must itself be offered in evidence.[91]

But a diploma which has not been signed by the proper authorities is inadmissible as being an invalid document and hence entirely incompetent to show that defendant was a legal practitioner.[92]

In the same way a diploma from a medical college may be held as inadmissible in evidence if it fail to show on its face that it is from a proper school that the requisite course was given, that there was a proper attendance and the degree granted the holder. It is said that an instrument which fails to set forth these facts cannot be regarded as a diploma or certificate under the law.[93]

Since it is unnecessary in many jurisdictions for the state to show that the defendant has no license it would therefore seem to be unprejudicial error to admit the testimony of a statistical clerk who kept the records of the board to the effect that he could not find any record of a given defendant as a licensed practitioner. However, the testimony would seem to be open to technical objection that such evidence is not the best that could be offered.[94]

It would seem improper for the defendant to offer in evidence a pamphlet purporting to be written and signed by the founder of any particular cult as an exposition of that system of healing for the purpose of showing the method of healing used by the defendant. Such testimony would seem objectionable as being the printed statement of an irresponsible and unknown person and one who is not in court for the purpose of cross-examination. Clearly it is not the best evidence. The defendant must be put on in his own defense and then possibly the pamphlet might be used as corroborative testimony if it can be properly proven and identified.[95]

90. Brooks v. State, 146 Ala 153.
91. McAllister v. State, 156 Ala. 122, 47 So. 161.
92. Brooks v. State, 146 Ala. 153.
93. Ch. 68, Kansas Session Law, 1870.
Sec. 2302, General Statutes, 1899.
State v. Wilson, 62 Kan. 621.
94. Comm. v. Clymer, 217 Pac. 302, 66 Atl. 560.
95. People v. Trenner, 144 Ill. App. 275.

It would seem entirely proper for the state to show that a defendant professed at certain meetings that he could cure rheumatism, kidney and other diseases. Also that he circulated advertisements to the same effect, and to read such advertisements into the evidence. All such testimony would seem competent to prove that a defendant is violating the law.[96]

§ 99.—Expert Witnesses

It would seem that an expert witness can not properly be asked to give an opinion on the point which is directly in issue as this is matter for the jury. Thus it is manifestly improper to ask a physician whether or no in his opinion a person who prescribes a certain medical device as a cure for rheumatism is practicing medicine. The statute defines "practice of medicine," hence it is a question for the jury and not for a witness, not even an expert witness whether certain acts properly constitute the practice of medicine.[97]

Expert evidence is, however, admissible to prove what a midwife does or is expected to do as such. But only so that the court may see whether her acts or any of them are regarded as the practice of medicine in any of its branches. Such witnesses cannot testify whether or no a person is practicing medicine or whether certain acts constitute the practice of medicine. The questions are either matter of fact for the jury or are questions of law for the court if not in dispute between the parties. It is contrary to the plain intent of the law to allow experts to testify that language employed in a statute does not comprehend acts confessedly performed by a defendant.[98]

§ 100.—Ordinary Witnesses

It is within the discretion of the trial judge to allow the prosecuting attorney to recall a witness after the arguments have closed to prove an admission of the defendant that he had no license, since as a matter of fact the burden of proof is on the defendant to prove its existence.[99]

Nor is it reversible error to allow the prosecuting attorney to examine witnesses who were not before the grand jury and whose names were not on the indictment especially if their testimony remains uncontroverted and in a way admitted by the defendant.[100]

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96. People v. Blue Mountain Joe, 129 Ill. 370.
97. People v. Lehr, 196 Ill. 361.
98. Comm. v. Porn, 196 Mass. 326.
99. State v. Burke, 88 Iowa 661.
100. State v. Burke, 88 Iowa 661.

§ 101.—Miscellaneous

(1) non-compliance with the law as a defense in tort

The gravamen of an averment was that the defendant was employed as one professing to have skill and experience in treating cancer. It was shown that he had so held himself out and that the plaintiff had relied thereon. He was therefore within the rule which requires the exercise of that degree of skill and care usually exercised by the general physician in that particular practice. Nor would the fact that the defendant showed he had failed to comply with the law and was therefore not a legally licensed physician be evidence to rebut this presumption once established.[101]

(2) recovery for medical services

A physician cannot recover for medical treatment unless he can show that he has complied with the statutes regulating the practice of medicine.[102]

But in an action to recover for services rendered, plaintiff can establish a presumption that he was duly licensed and it then devolves upon the defendant to rebut this presumption.[103]

The reason for this is that the law presumes a compliance with a statute when a failure to have done so is made a misdemeanor by the enactment in question, and hence any party relying on any failure to obey the law as a defense must establish such fact affirmatively.[104]

(3) former jeopardy

The test to determine whether or no to sustain a plea of former jeopardy is by examining the face of the indictments to see whether the evidence necessary to sustain a conviction in one would likewise sustain a conviction under the second. Frequently a person may offend against a medical practice act divers times, hence indictments may be

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101. Musser v. Chase, 29 Ohio St. 577.
102. Wooley v. Bell, 33 Tex. Civ. App. 399.
103. Leggat v. Carrick, 35 Mont. 91.
104. City v. Wood, 24 Ill. App. 40.
Williams v. People, 20 Ill App. 92.
McPherson v. Cheadell (N. Y.), 24 Wend. 15.
Thompson v. Sayre (N. Y.), 1 Denio 175.
Pearce v. Whale, 5 Barn. & Cres. 758.
Jo Daviess Co. v. Staples, 108 Ill. App. 539.
Lacy v. Kossuth, 106 Iowa 16.
Dickerson v. Gordy (La.), 5 Rob. 489.
Lyford v. Martin, 79 Minn. 243.
Cather v. Damerell (Neb.), 99 N. W. 35.
Rider v. Ashland, 87 Wis. 160.
Good v. Lasher, 99 Ill. App. 653.

drawn charging separate offences to a subsequent one of which a prior conviction will be no bar. Perhaps in those jurisdictions which hold that any act committed up to the time of the indictment is proof under the indictment it would be possible to sustain a plea of former conviction or acquittal to a subsequent indictment for one of those acts. Not so, however, in a jurisdiction dealing with each act as a separate offense.[105]

B. UNPROFESSIONAL CONDUCT

1. The Revocation of a License

(a) Procedure.

§ 102.—The Right to Practice Medicine

Whether the right to practice medicine be classed as a property right strictly speaking, or as a mere privilege is immaterial. But the right whatever its nature, is a valuable right which cannot be taken away without due process of law.[106]

Moreover, the vocation of a physician is in itself a lawful one, and the right of any person to engage therein is subject only to such restrictions as the legislature may impose in the exercise of its general police power. Therefore, the right, whatever its specific nature may be, to engage in this practice is a qualified one, even that is not to be arbitrarily and without reason denied, but only under due process of law.[107]

§ 103.—Due Process of Law

Now due process of law is not necessarily judicial proceedings, but a uniform rule and a uniform process of ascertaining and determining qualifications as prescribed by law; a rule which operates equally on all persons, affording to all persons the right to establish their qualifications before the board: a rule which gives an accused timely notice and full opportunity to defend. This is due process of law.

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105. State v. Van Buren (S. C.), 68 S. E. 568.
Payne v. State, 112 Tenn. 587, 79 S. W. 1025.
State v. Cotner (Kan.), 127 Pac. 1.
As to sufficiency of indictment and proof under law forbidding advertising places where illegal operations may be performed on pregnant women such as abortions and the like, see Comm. v. Hartford, 193 Mass. 464.

106. Smith v. Board (Iowa), 117 N. W. 1116.
Matthews v. Murphy, 23 Ky. 750, 63 S. W. 785, 54 L. R. A. 415.
People v. McCoy, 125 Ill. 289.

107. State v. State, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238.
Matthews v. Murphy, 23 Ky. 750, 63 S. W. 785, 54 L. R. A. 415.
Board v. Ross, 191 Ill. 87.

Again under the exercise of the general police powers of a state it often happens that a person's enjoyment of his property is materially interfered with and restricted, yet it was never held that this exercise of the police power must be by judicial proceedings in court in order to constitute due process of law. A full and fair trial in any tribunal which a legislature is competent to establish is of the essence of due process of law.[108] Hence a revocation of a license need not be under an order of court to constitute due process of law but can be had by a board properly constituted.

§ 104.—The Nature of the Power and of the Action

The ascertainment and determination of the qualifications to practice medicine and proceedings taken to revoke a license by a board of competent experts appointed for that purpose is not an exercise of power which would belong more appropriately to the judicial departments of the government. Such an exercise of power does not touch upon judicial power.[109]

The determination of these and kindred questions may constitutionally be and is very properly devolved everywhere upon boards of inspection composed of experts in the particular occupation in question.[109] Again, many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties. Nor in so doing do they exercise judicial power as that phrase is commonly used and as it is used in the several organic acts, in conferring judicial power upon courts. For example, power conferred on medical boards would seem in no wise different in character from that exercised by boards, to examine public school teachers, tax assessors, boards of equalization; a county surveyor in fixing a boundary line; or the action of numberless other officers or boards in making investigations and decisions in matters committed to them.[110]

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108. State v. State, 34 Minn. 387.
People v. Hasbrouck, 11 Utah 291.
Smith v. Board (Iowa), 117 N. W. 1116.
People v. McCoy, 125 Ill. 287.

109. People v. Hasbrouck, 11 Utah 291.
State v. Webster, 150 Ind. 607.
Board v. Eisen (Ore.), 123 Pac. 52.
State v. Goodier, 195 Mo. 551.
Meffert v. State, 66 Kan. 710, 72 Pac. 247.
Smith v. Board (Iowa), 117 N. W. 1116.
Munk v. Frink, 81 Neb. 631, 116 N. W. 525.

110. People v. Hasbrouck, 11 Utah 291, 39 Pac. 918.
State v. Webster, 150 Ind. 602.

Again neither is the circumstance that an appeal is allowed from a decision of the board an indication that its action is judicial. The right of appeal from the action of boards in their administrative character is frequently conferred by statute. In such case the appeal is not permitted, because the action of the board is considered judicial, but it is granted as a method of getting the matter involved before a court that it may be determined judicially.[111]

Clearly a board of examiners or the like is not a court, nor is it a judicial tribunal. For oftentimes it can issue no writ; can try no case and can render no judgment. It is merely a governmental agency in many states exercising ministerial functions.[112]

While in other jurisdictions it may partake more of a judicial character, and hence the power which it exercises in those states may be denominated quasi-judicial.[113]

But frequently judicial power is almost, if not entirely foreign to these boards. And in such cases the board is left to investigate charges and the like as best they may. In such cases especially, it would seem that this power is not judicial but simply ministerial or at most quasi-judicial.[114]

Formerly boards were authorized to act "after giving the accused opportunity to be heard." And these were the only words which might suggest a trial, and it may be seen that they fall far short of a judicial trial. More recently though, numerous acts have given much broader power judicially to the boards. But even so it is submitted that the power so vested is in no proper sense judicial power such as is vested in the courts.[115]

Generally investigations before these boards for the revocation of a license are not to be carried on in observance of the technical rules of evidence and of the law. As usually the boards are composed principally, if not entirely, of physicians, or laymen as far as the law is concerned, and clearly such a tribunal cannot be expected to be qualified in the law, so that a compliance with technical rules may be required. Rather it is simply the intention of the legislature to adopt summary proceedings by which the morals of the people and the dignity of the profession may be protected. And to that end the law usually requires in the main timely notice of the charges preferred

111. State v. Webster, 150 Ind. 602.
Board v. Eisen (Ore.), 123 Pac. 52.
112. State v. Goodier, 195 Mo. 551.
113. State v. Webster, 150 Ind. 607.
114. State v. Goodier, 195 Mo. 551.
115. State v. Goodier, 195 Mo. 551.
Smith v. Board (Iowa), 117 N. W. 1116.

and of the date of the hearing, together with full and ample opportunity to defend[116]

And further these hearings being summary and before a quasi-judicial tribunal only may be carried on without the intervention of a jury.[117]

§ 105.—Procedure Necessary

In a trial under a complaint for unprofessional conduct it is not necessary that the proceedings be conducted with that degree of exactness which may be required in a trial for criminal offense in an ordinary tribunal of justice.[118]

But it is essential that the accused have a hearing on the specific charge after a reasonable notice of the time and place of hearing has been given. In this hearing or trial the accused must be afforded full opportunity to present a defense to the charges made. Nor can there be any conviction unless on competent evidence.[119]

Usually it is prescribed by statute that a certificate or license cannot be revoked except at a regular meeting or at a special meeting of which notice must be duly given the accused. And it is not enough that the accused chance to have a notice or that he may as a matter of favor have a hearing. The law must require that the notice be actually served and that a full and impartial hearing be duly afforded the accused.[120]

However, if the board has proceeded with the hearing and has taken proper testimony and has given the respondent an opportunity to appear in person or by counsel to cross examine the witnesses, and to introduce testimony in his own behalf and has passed on the sufficiency of the evidence so taken, then such proceedings of a board will usually be upheld on an appeal to a regular court of law.[121]

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116. Meffert v. Board, 66 Kan. 710, 72 Pac. 247.
Smith v. Board (Iowa), 117 N. W. 1116.
117. Munk v. Frink, 81 Neb. 631, 116 N. W. 525.
Gully v. Territory (Okla.), 91 Pac. 1037.
State v. District Court, 39 Mont. 134, 101 Pac. 961.
118. Munk v. Frink, 81 Neb. 631, 116 N. W. 525.
Iowa v. Schrader, 87 Iowa 659.
119. Munk v. Frink, 81 Neb. 631, 116 N. W. 525.
Matthews v. Hedlund, 82 Neb. 825, 119 N. W. 17.
Iowa v. Schrader, 87 Iowa 659.
120. Smith v. Board (Iowa), 117 N. W. 1116.
Iowa v. Schrader, 87 Iowa 659.
121. Munk v. Frink, 81 Neb. 631, 116 N. W. 525.
Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 117.
Smith v. Board (Iowa), 117 N. W. 1116.
Iowa v. Schrader, 187 Iowa 659.
But see
People v. McCoy, 125 Ill. 289.
Macomber v. Board, 28 R. I. 3, 65 Atl. 263.

But it would seem that it may sometimes be implied that a notice be given the accused, and this implication is sufficient.[122]

That is to say, the statute need not specifically state that notice be given an accused in order that the proceedings taken under it may be upheld, but the requirement of giving notice may at times be fairly implied from the general language of the statute and this is sufficient to support the validity of the board's action.[123]

However, it is essential that de facto service he had on the accused as to notice of the hearing and an affidavit affirming such service is entirely insufficient to overcome the statement of the accused that he was not so served.[124] And thus a record which fails to show de facto service may be taken as defective, while a record which shows a specific charge, notice, hearing and the determination of the board thereon is sufficient to sustain any action taken by the said board.[125]

§ 106.—Criminal Abortion

Generally speaking, a complaint filed with the state board of examiners for the purpose of procuring the revocation of a license for unprofessional conduct is sufficient if it informs the accused not only of the nature of the wrong laid to his charge but of the particular instance of the alleged perpetration. Hence, in a charge of procuring or aiding or abetting in procuring a criminal abortion it is not necessary to either allege or prove that the woman had become quick. It is not the murder of the living child which constitutes the offense, but it is the destruction of gestation when not necessary to preserve the life of a woman. In some jurisdictions it is held that the moment the womb is instinct with embryonic life and gestation has begun crime may be committed. In these jurisdictions then it is sufficient if the complaint of unprofessional conduct charge the act within the meaning of the statute. It need not in apt terms charge the criminal destruction of a vitalized human fetus by the accused as either principle or accessory. And further it seems that it is unnecessary to allege or prove any stage of utero gestation but simply that the woman on whom the abortion was committed was pregnant of a vitalized embryo or fetus.[126]

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122. Smith v. Board (Iowa), 117 N. W. 1116.
123. Ch. 17, Iowa Code, Secs. 2576, 2578.
124. People v. Apfelbaum (Ill.), 95 N. E. 995.
125. State v. State, 32 Minn. 324, 20 N. W. 238.
Wolf v. State (Minn.), 123 N. W. 1074.
126. Munk v. Frink, 81 Neb. 631, 116 N. W. 525.
Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 17.

Again, complaint charged a defendant with unprofessional and dishonorable conduct committed on or about a certain date and at a designated place by wrongfully and unlawfully procuring a criminal abortion on a named woman and by means unknown to the complainant, the woman being then pregnant with child, and the abortion not being necessary to preserve her life. This complaint was said to be insufficient because it did not specifically charge that the accused was concerned in procuring the abortion, but merely draws the conclusion. Such a statement was deemed insufficient to allow the court to deduce the conclusion of guilt on the part of the accused. Nor did the complaint set forth any intent to destroy the child, and this charge was a material element of the offense under the statute in question. And the complaint was further defective in failing to charge that the death of the mother or of the child was caused by means of the administration of medicines, drugs or other substance, or by the employment of the instruments or other means mentioned in the statute.[127]

It would seem that any apparent conflict in these cases may be explained by the different policies pursued in the several jurisdictions as regards criminal abortion and the method of controlling the practice by statute. Considering the gravity of the offense from a purely concrete point of view would be entirely sufficient to necessitate an effective regulation herein. Hence, the necessity for care in charging unprofessional conduct, particularly if an alleged criminal abortion be made the basis thereof is at once seen. These cases cited above would seem simply to go to the point that both the statutes and general policy of a given state must be given due consideration in making this complaint in order that the law may be given full effect. And also since criminal abortion is covered now in large part by statute, it is essential that the act charged be the statutory act of criminal abortion. For example in Oregon it would seem that the statutory offense of criminal abortion as found in the Oregon laws was by the code of the same state, also made unprofessional conduct. Quite clearly in charging an accused with being guilty of unprofessional conduct in which the gravamen of the charge was the statutory criminal abortion, it would seem essential to charge the act with relation to all the statutes, care being taken not simply to name a common law offense or an offense as designated in the code of some foreign jurisdiction.[128]

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127. Board v. Eisen (Ore.), 123 Pac. 52.

128. Board v. Eisen (Ore.), 123 Pac. 52.
Munk v. Frink, 81 Neb. 631, 116 N. W. 525.
Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 17.

§ 107.—Appeal to Court of Law

The constitutional provision as to "due process of law" impels most jurisdictions to include in their medical practice acts a provision for an appeal to a court of law frequently on both the law and the fact from the decision of the medical boards. Once the courts obtain jurisdiction there is usually nothing to prevent an appeal to, or a review by the highest court of the given state. In some states it would seem that appeals are recognized only from judicial decisions and a medical board not rendering such that appeals therefrom could not be considered.[129]

The effect of this decision should simply be to compel the amendment of the law to provide for an appeal, or to provide some means to take the cases from the boards in court.

A state having provided some means to give the courts jurisdiction of cases from the boards has adequately protected the rights of any person who may deem himself aggrieved.[130]

In providing for these so-called appeals it may not always be necessary to allow a trial de novo.[131]

It would seem sufficient simply to vest the courts with jurisdiction to refuse to sustain a revocation of a license unless it be based on proper evidence and to prevent the boards from exceeding their authority. It would seem that no complicated machinery is essential and that technical rules should be dispensed with. Recourse must be had to the statutory law to ascertain the exact procedure provided in any given state.[132]

Again it seems that it is not always essential that notice of an appeal to a proper court from a decision by a board should be entitled by the name of "the party appealing v. the board of medical examiners of the state . . ." in order to give the court jurisdiction. In some jurisdictions it is required only that an intelligible reference be made to the action specified and that to do so strictly formal pleading is unnecessary, that the court obtaining jurisdiction by any reference which would give due notice to the party aggrieved of the action to be taken by the court.[133]

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129. Ferner v. State, 151 Ind. 249.
130. Wolfe v. State (Minn.), 123 N. W. 1074.
State v. Roy, 22 R. I. 538, 48 Atl. 802.
131. State v. Roy, 22 R. I. 538, 40 Atl. 802.
132. State v. Roy, 22 R. I. 538, 48 Atl. 802.
Iowa v. Schrader, 87 Iowa 659.
State v. District Court, 27 Mont. 103, 69 Pac. 710.
State v. Webster, 150 Ind. 602.
Board v. Eisen (Ore.), 123 Pac. 52.
133. State v. District Court, 27 Mont. 103, 69 Pac. 710.

But generally speaking, it is understood that a court will not review matters in which the board is called to exercise discretion or perform quasi-judicial functions. Courts will, however, compel a board to act when they fail in duty or exceed the power conferred. In thus appealing to a court of proper jurisdiction from a decision of the board it is required to set forth in the petition all the facts necessary to entitle the petitioner to a license. If the board has refused to perform its legal duty a court will deny a motion on its part to quash the application for an appeal. Further, if the answer of the board denies matters of record on information and belief, such answer is no denial at all, especially when the records are accessible to the defendant. And, supposing the petitioner were entitled to practice by right of a prior license and applied for a new license on that basis, the board would have no jurisdiction to determine as to the reputability of the petitioner's college, and hence an allegation in the petition that the college is not in good standing would be of no avail. If the defendant board admits matters as set forth in the petition, and said petition shows all matters necessary for a license the board has no authority to refuse a license. The court will not dismiss the petition but will sustain the same and take such action as may be necessary under the circumstances.[134]

Again, in drawing a complaint against a board, it is necessary to plead and prove that the petitioner was engaged in practice on the date set under the act. It must also be pleaded that compliance with the statute was had as to furnishing the board with the evidence showing the existence of essential facts. And unless the petitioner establish the existence of the facts in a legal way, he is not entitled to a writ from the court.[135]

B. EVIDENCE

§ 108.—As Essential to Sustain a Conviction by a Board of Unprofessional Conduct

In the revocation of a license under medical practice acts, generally speaking, it would seem largely, that the law does not contemplate the use of technical rules of evidence as applicable to a judicial trial, as a mere administrative or quasi-judicial board could hardly be expected to adhere thereto. And hence, if one of these boards

134. Vadney v. Board (Ida.), 112 Pac. 1046.
135. Sherburne v. Board (Ida.), 88 Pac. 262.
State v. State, 93 Tenn. 619, 27 S. W. 1019.
Board v. Coffin, 152 Ind. 439.
State v. District Court, 39 Mont. 134, 101 Pac. 961.
State v. Goodier, 195 Mo. 55.

should make a plain, common sense, honest investigation in good faith and as thorough as may be with the light of such evidence as is obtainable on either side, and in many jurisdictions without process, but only with the means at hand, this will be sufficient. It may be said that it is simply required that a medical board should make such an investigation as any fair-minded intelligent man would make in his own business concerning the alleged misconduct of an employee. However, it is laid down as a hard and fast rule that a board cannot revoke a license except for cause, and pursuant to the procedure of the particular statute. But while a board must hear evidence and make its findings thereunder, yet it need not recognize the technical rules of evidence as would be observed in a court of law. Since boards as established under these statutes are composed in a large part of laymen as regards the law, who cannot be expected to have any knowledge of judicial trials. Moreover, as has been said, the revocation of a license is a summary measure for the protection of the health and morals of the state at large, and hence, it would appear that no legislature intends to circumscribe a board by technical rules of pleading or the like.[136]

Again, if the record of an examination should be produced in court neither judge or jury could be required to review the questions, answers and credits given to each. Nor could "expert witnesses" properly be permitted to testify for the reason that the state has designated experts to pass on such matters. And thus it will be seen that, when a board has once passed on the qualifications of an applicant for a license, or the like, generally speaking, such findings should be sustained by the courts, and without review.[137]

But a Supreme Court has refused to sustain the revocation of a license on mere negative evidence, on the grounds that a court is not a body of experts and that such evidence would not assist a court in coming to any conclusion as to the value of any specific device or the like. And further, it was said, that the state should either submit the opinion of experts, or produce the testimony of witnesses who had examined these devices. If this were done there would then be affirmative findings from which a court could deduce conclusions and thus either sustain the findings of a board, or reverse them as the case might warrant.[138]

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136. State v. Goodier, 195 Mo. 55.
Meffert v. Packert, 66 Kan. 710, 72 Pac. 247.
137. State v. Board (Wash.), 80 Pac. 544.
138. Macomber v. State, 28 R. I. 3, 65 Atl. 263.

As evidence of fraud in obtaining a license, it has been held that the state may be permitted to introduce into testimony the record kept in the office of a county clerk showing the issuance of a license to the party accused. But the clerk who made the record, should be required to testify that the license would not have been issued, had the party not made an affidavit, alleging that he had fully complied with the law and that his record was taken from this affidavit. The clerk must also testify that the affidavit itself could not be found, although search had been made therefor in the proper place at various times. He must further identify the book containing the copy of the license as his record kept pursuant to the law, requiring that the county clerk should keep a record of licenses and names of the colleges from which applicants had graduated, as a public record. In the case in question, there was further introduced into evidence an affidavit made by the accused, on applying for a license under a subsequent law, in which he had denied that he was graduated from a specific university. This evidence taken together, was held as sufficient to constitute a prima facie case against the accused and therefore that the burden would also rest with him to rebut the testimony of the clerk, it being presumed till this was done that the clerk had performed his duty.[139]

But it has been held to be error to allow the accused to read into the record as evidence of his right to practice medicine a receipt for a license fee which was given him by the secretary of the board. Such a receipt is not a license and can furnish no excuse for a violation of the law. And even if the accused should show that he was entitled to a license, and that it was arbitrarily withheld, this could afford him no sufficient justification to practice medicine.[140]

Again, the testimony of a physician was introduced into evidence over objection that before he would treat a woman on whom an illegal operation had been performed, he had demanded that she sign a written statement that defendant had operated on her at his office to bring her around, and that another physician had later curetted the womb. The admission of this testimony and the writing was error. If the death of the woman had been an issuable fact under the allegation, it would have been competent to inquire into her declaration as

139. Curryer v. Oliver, 27 Ind. App. 424.
State v. Lutz, 136 Mo. 633.
Gully v. Territory (Okla.), 91 Pac. 1037.
State v. Adcock (Mo.), 124 S. W. 1100.
State v. District Court, 26 Mont. 121, 66 Pac. 754.

140. Melville v. State (Ind.), 89 N. E. 490.
Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 228.

to the cause of her death, supposing it to have been made under a sense of impending death. The evidence as given was the only testimony on record to show that the defendant did intend to perform a criminal abortion on the woman, as his own testimony flatly contradicted the charge, and such evidence would seem insufficient to sustain a conviction.[141]

It will thus be seen that the courts allow considerable liberty in the matter of evidence in hearings before medical boards. And that, for the most part, if due discretion and common sense be exercised, the findings based on such evidence will be deemed sufficient to sustain a charge of unprofessional conduct, under a given statute.

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141. Board v. Eisen (Ore.), 123 Pac. 52.
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

CHAPTER VI

THE SANCTION OF THE LAW; EXTRAORDINARY REMEDIES

A.—The Sanction of the Law

§ 109.—In General

As to whether or no medical practice acts may more properly be construed as penal statutes or as remedial is really a question of no little importance and one to which a variety of answers may be given. It may be argued that if a law has a sanction it must of necessity be penal. And yet it may be said that the penalties attaching to these laws are not such in the strict sense of the word, and as a consequence do not render the measures penal. Rather it may be said that the penalties of fines and imprisonment are not so much to punish violators of the law as it is to protect the general public. This point

would seem quite apparent as regards the revocation of a license. Here it is submitted that the physician does not have his license revoked because of his unprofessional act; but from the commission of the act he has proved himself unworthy of the public confidence, and consequently to prevent any imposition on the public, his right to treat for disease is taken away. Then if being unlicensed he persists in his attempting to pursue his profession he may be fined. Yet here again it is not in the nature of punishment but rather the sanction is the beneficent arm of the state interposed between the fraud, charlatan and the like and the people as a protection to the latter. Nor should the method of enforcing these laws be any argument materially supporting the claim as to the statutes being penal. That is, the fact that a violator is criminally presented by the state means nothing. It is simply a convenient way of managing the affair for the citizen. In point of fact it may be provided that the penalty be recovered in an action of debt brought either by a private citizen or by the state.[1]

Of course it is well recognized that no mandatory law can well exist without sanction, and to this extent the penalties attaching are for a punishment and not simply as gentle reminders to desist from practice till a license be secured.[2]

But even so the unlicensed practitioner is punished not because there is anything inherent by wrong in practicing without a license, as it is because it is essential for the public welfare to maintain a supervision over this calling to restrain those who might enter the profession in the event of its being free from all limitations. The state cannot make the law apply only to those who may work harm, so it compels all to qualify and secure a license, penalizing those who do not comply with its mandates. And again, it may be said that murder is a crime in itself, while practicing without a license is not. The law does seek to prevent murder *per se,* but a medical practice act is not seeking to prevent solely the practice of medicine by the unlicensed. It is attempting something more. It is impelling the possession of the highest average of professional skill and integrity, and is seeking to eliminate from the practice those who will not or cannot maintain this standard. To this extent then these laws are remedial, and for this reason must be liberally construed. Hence it is that any penalty attaching whether from practicing without a license *ab initio* or after a revocation of a license has been had, and further, the remedial

1. Staats v. Thompson, 15 Wend. 395 (N. Y.).
   People v. Dunn (Ill.), 99 N. E. 577.
   State v. Cotner (Kan.), 127 Pac. 1.
2. State v. Cotner (Kan.), 127 Pac. 1.

measure of the revocation *per se* are for the purpose of preventing frauds and to conserve the public health. Indeed such a measure may at once be termed a statute of frauds and a health ordinance. They are police regulations quasipenal in form.[3]

§ 110.—Fines and Imprisonment

Many laws are directory as to who shall enforce the provisions thereof, specifying some public official, and thus not leaving the invoking of a penalty to private initiative or the promptings of mercenary motives. Thus the enforcement of a medical practice act may be laid on the secretary of the board of examiners and all other law officers may be enjoined to assist him.[4]

Or again it may be left to private initiative to recover the penalty.[5]

All these measures make it mandatory that they be complied with and provide a penalty in the nature of a fine or imprisonment or both in some fixed amount for any violation.[6]

§ 111.—Saving Clause

On the repeal of a medical practice act it should be borne in mind that a saving clause must be attached to the law which is to take its place else no prosecution of a violation under the prior law may be had by the common law rule. And also the repeal of a statute pending a prosecution thereunder without attaching any saving clause to the repealing law effectually prevents any further prosecution of the pending case. And again the same rule applies even after a judgment rendered but still pending on an appeal, just as well as before a final determination in a trial court.[7]

§ 112.—Continuing or Single Offenses

In determining whether or no violations of a medical practice act are to be considered as a whole and grouped as one offense or whether each attempt to practice legally should be held as a separate

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3. State v. Oredson, 96 Minn. 509.
   1 Kent's Com. 461.
   State v. Beck, 21 R. I. 288.
4. State v. Cotner (Kan.), 127 Pac. 1; aff'd Green v. Hodges (Kan.), 138 Pac. 605.
5. Staats v. Thompson, 15 Wend. 395 (N. Y.).
6. State v. Hathaway, 115 Mo. 36.
   State v. Chapman, 69 N. J. L. 464.
   Dodge v. State, 17 Neb. 140.
   State v. Davis, 194 Mo. 485.
   People v. Langdon, 219 Ill. 189.
7. State v. Hanover (Wash.), 105 Pac. 624.
   People v. Jones, 9 Ill. App. 445.

offense must depend in no little degree on the precise wording of the statute. Not that any law says that all acts violative thereof are to be deemed "single offenses" in just so many words, but many laws do provide that "prescribing a drug for a fee" is practicing medicine. And such language may very well be construed as meaning that each act is a separate offense and must be punished accordingly.[8]

Authority is to be found for each contention and with good grounds for either position taking all the circumstances into consideration of the statute at bar. Thus when a statute prescribes that "treating any person for a fee" is practicing medicine, it would seem that the court is compelled to hold each act as a separate offense. For under the language it is not necessary that the "treating" be done frequently, customarily or habitually. One isolated instance is sufficient and the penalty should be affixed for each offense.[9]

And the same would be true of similar language denouncing surgical operations or other specific acts. And moreover, it would seem that any fair consideration of the mischief which the legislature is seeking to remedy would lead to this conclusion.[10]

Of course, should a statute read that the "prescribing or treating be done habitually" then a court cannot take an isolated act, but must group them and consider all as "continuing offenses." But it is submitted that such language would seem objectionable in making the law more difficult to administer effectively. That is, being compelled to prove "continued" violation when a single act might constitute the infringement. Here it would seem that the consummation of the true object of the statute, which is the protection of the public, is prevented by such a construction. Yet again it is said that in construing the language of a statute, in which the word "habitually," or the like, is not used, it might seem that to consider each act as a single offense would be to render the statute invalid in as much as that if the defendant were fined for each act, and he were unable to pay the fines he might be imprisoned for life. Hence it is argued that the cumulative construction is not to be applied unless the court is constrained thereto by the very letter of the statute, and that a violator is to be subject to but one conviction of the whole period of time next preceding the institution of the prosecution.[11]

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8. State v. Cotner (Kan.), 127 Pac. 1.
   Antle v. State, 6 Tex. App. 202.
   Wilson v. Comm., 26 Ky. 685.
9. State v. Cotner (Kan.), 127 Pac. 1.
   Antle v. State, 6 Tex. App. 202.
10. State v. Cotner (Kan.), 127 Pac. 1.
11. Wilson v. Comm., 26 Ky. 685.

On the other hand, however, it must be remembered that these statutes are to protect the lives, health and financial resources of men, women and children from ignorance and imposture and therefore the measures being remedial they must receive a liberal interpretation and all mere doubts as to their constitutionality should be resolved affirmatively.[12]

And, too, each act of unlicensed practice may be fraught with danger, every repetition thereof is a new peril, and instead of applying to a continuous course of conduct the statute if possible should be construed as specifying and condemning each impulse to the very end that it may not unite with others in swelling a common stream of action.[13]

The opening of an office with a physician's sign on the door would be establishing a place, the criminal consequence of which would merely persist. And any attempt to split up this persistence would be purely arbitrary. But it has been said that there is nothing arbitrary in taking separate account of the separate cases of the different individuals treated by a given defendant and penalizing each act as an individual offense. And it has been argued that such a construction is but for the best interest of the people and that it might very well fairly obtain.[14]

Taking, therefore, these several constructions into consideration it might be well to so draft the act that both single and continuing violations may be dealt with. In this way, supposing an unlicensed physician treat ten patients he need not be prosecuted as for ten violations, but as for one, and proof of any one will sustain a conviction. Again, a physician may be prosecuted for one violation on proper evidence.

§ 113.—Non-Compliance with the Law Renders Contract for Services Void

Just as it may be provided by legislative enactment that all who desire to practice must give evidence of qualification, so a legislature may also provide that any services rendered without having qualified under the law must be gratuitous, and that any contract for a fee therefore will imprimis be *nudum pactum*. And hence a physician may not have the benefit of the courts in attempting to recover on any such contract.[15]

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12. State v. Cotner (Kan.), 127 Pac. 1.
13. State v. Cotner (Kan.), 127 Pac. 1.
Antle v. State, 6 Tex. App. 202.
14. State v. Cotner (Kan.), 127 Pac. 1.
Antle v. State, 6 Tex. App. 202.
15. Hewitt v. Charier, 16 Pick. 353 (Mass.).

Clearly under such laws it is the design of the legislature not only to take away all right of action of such services but to make them when rendered with the evident intent to violate the law absolutely gratuitous. Hence it could not be competent for a legislature to create an obligation out of a by-gone transaction which at the time of its occurrence all parties understood to be and was strictly gratuitous.[16]

The principle on which these statutes are based is one well recognized at common law and is simply that a contract founded upon an illegal consideration or one made against public policy is void and no action can be maintained thereon; and when the doing of an act is prohibited by legislative authority under a penalty it cannot constitute a consideration to support a contract. Illegality whether arising from common law or from statute affects the act or contract with a like infirmity. Hence it is of no avail that a defendant is a skilled physician and a graduate of a university. If he has violated the law any contract he may have entered into for services is absolutely null and void and he is without recourse under the law.[17]

Some statutes require physicians to register their license in the county of their residence, and this would seem to require a new registration for each change of residence a physician may make. Under these laws it is frequently provided in addition that no recovery may be had for services rendered should a physician have failed to so register. And usually a subsequent compliance with the law will not permit a recovery for any illegal services rendered.[18]

But under some statutes it would seem that a recordation is not mandatory, that is a failure to do so will not preclude a recovery for services rendered, provided, of course, that the physician actually had a certificate. But in these jurisdictions it usually appears in the statute that the issuance of the certificate is conclusive as to the rights of the lawful holder to practice in the state. Here it would seem that any recordation required is but a mere additional protection.[19]

And clearly it is not necessary to have a recordation in each county in which a physician may practice. That is, a party defendant in a suit on a physician's contract would have to show that the physician was a resident of the particular county before the contract could be abrogated.[20]

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16. Warren v. Saxby, 12 Vt. 146.
17. Bohn v. Lowry, 77 Miss. 424.
    Wooley v. Bell, 33 Tex. Civ. App. 399, 76 N. W. 797.
18. Mayfield v. Nale, 26 Ind. App. 240, 59 N. E. 415.
    Murray v. Williams, 121 Ga. 63.
    Haworth v. Montgomery, 91 Tenn. 16, 18 S. W. 399.
19. Riley v. Collins (Colo.), 64 Pac. 1052.
20. Riley v. Collins (Colo.), 64 Pac. 1052.

In New York it was provided by statute that an imperfect registration might be subsequently corrected as of the date of the issuance of the physician's license. That is, the correction was said to have a retroactive effect and thereby the physician was permitttd to recover for services rendered subsequent to such imperfect registration. But the benefit of this law could only be availed of by physicians whose imperfect registration was due to some error, misunderstanding or unintentional omission on their part. All of which must be satisfactorily shown to the proper authorities as well as that the physician had all the requirements prescribed by law at the time of his imperfect registration. This latter may be proved by obtaining a certificate of facts from the regents and then filing it together with any other evidence the said physician may wish to submit.[21]

§ 114.—The Refusal or Revocation of a License—Sanction

It would seem perhaps somewhat more of an anomaly to denominate the revocation of a license a remedial measure than it would to so class the refusal of a license. And yet it may be urged that from one point of view there would seem to be no possible distinction between refusing to grant a license and revoking one already granted. Both, it may be said, are an exercise of the police power vested in government and that the primal object is identical, viz: to exclude incompetent and unworthy persons from the medical profession.[22]

And again any distinction taken between the right to establish a practice and the right to continue in that practice already estab-

21. Ottaway v. Lowden, 172 N. Y. 129.
And for cases on kindred or related topics see Musser's Ex'c'r. v. Chase, 29 Ohio 577, holding that a failure to register is no defense to a suit for malpractice; Leggat v. Carrick, 35 Mont. 91, holding that when a failure to register or otherwise qualify is made a defense in a civil action the burden of proof is with the defendant to rebut the presumption that the physician is duly qualified, and to the same effect see also
Williams v. People, 20 Ill. App. 92.
McPherson v. Cheadell (N. Y.), 24 Wend. 15.
Thompson v. Sayre (N. Y.), 1 Denio 175.
Pearce v. Whale, 5 Barn & Cres 758.
J. Davies Co. v. Staples, 108 Ill. App. 539.
Lacy v. Kossuth Co., 106 Iowa 16.
Dickerson v. Gordon 5 (La.), Rob. 489.
Lugford v. Martin, 79 Minn. 243.
Cather v. Damerell (Neb), 79 N. W. 35.
Rider v. Ashland Co., 87 Wis. 160.
City of Chicago v. Wood, 24 Ill. App. 40.
Good v. Lasher, 99 Ill. App. 653.
22. State v. State, 34 Minn. 387.

lished seems to be without clear support in view of the fact that the practice of medicine is so closely associated with the health and best interests of the people generally. Hence it would seem contrary to all right principles of justice and reason to hold that a distinction may be taken because of a so-called vested right to continue in an established practice.[23]

And yet such a distinction is attempted by not a few authorities.[24]

And notwithstanding the fact that it is just as conducive to evil to permit a man guilty of unprofessional conduct to remain in the profession as it is to allow such a man to enter therein. Clearly it would seem a man has no vested right in that which he has shown himself incapable of using with due regard to the rights of others. *Sic utere tuo ut alienum non laedas.* Nor is it the law that a man has acquired such a right merely because he has become established in his profession and has built up a valuable business.[25]

It would therefore seem that the conclusion may safely be drawn that there is no real distinction between the refusal of a license and the revocation, at least from the point of view of the object which each act is supposed to accomplish, and that after all that is of the primal importance. Again, when it is said that the refusal of a license because of a lack of qualification is for the purpose of protecting the public the assertion would seem necessary of less proof than when a like statement is made with regard to the revocation of a license. The fact that there must be "due notice" and "a hearing" together with various other proceedings, to say nothing of the fact that the licensed physician has an established business, would seem to go far in controverting any idea of a revocation being simply remedial and in no way a penalty. But nevertheless the fact remains that the courts do hold both to be simply remedial measures and not for the purpose of punishment. The fact that the physician by an act termed "unprofessional and dishonorable conduct" does invite a forfeiture of a valuable right would seem to constitute punishment for his allegal act. And in point of fact the revocation of a license is a penalty and a heavy one. To argue to the contrary is more or less academic, but yet in view of the rules of construction which might apply to do so is not without practical value. Hence the courts have held that the revocation of a license whether

23. State v. Gravett, 65 Ohio St. 289.
24. Freund, Police Power, Para. 546.
25. Hawker v. New York, 170 U. S. 189.
Reetz v. Michigan, 188 U. S. 505.
Collins v. Texas, 32 Sup. Ct. Rep. (U. S.) 286.

arbitrarily or no is simply a remedial measure for the protection of the public and in no sense a penalty.[26]

Having taken the view that the revocation of a license is remedial and not in the nature of a penalty it would seem that courts would find it more within the bounds of reason to give a liberal construction to this provision in a medical practice act.

The court in Chenoweth v. State, cited supra, seemingly went on the ground, at least in part, that the cure of disease of the sexual organs is of itself highly beneficial and hence that advertising the ability to cure such diseases could work no harm. Consequently, to prevent a man from working at his profession for merely advertising a benefit to humanity would be a most unreasonable penalty, and such as would invalidate any measure prescribing such action. Now had the court taken the position that the revocation of a license is not a penalty irrespective of the fact that a forfeiture is being effected, but that a revocation is had for remedial purposes only, it would seem impossible to draw any other conclusion than that a law forbidding a physician to advertise the cure of diseases of the sexual organs was to protect the public. At any rate it needs no great stretch of the imagination to recognize the evils attendant upon professional advertising of this nature, and by construing these laws regulating physicians as remedial, a court may with entire propriety take this position and uphold the law as constitutional.[27]

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26. Meffert v. Board, 66 Kan. 710.
People v. Apfelbaum, 95 N. E. 995.
Fox v. Territory, 2 Wash. T. 297.
Hawker v. New York, 170 U. S. 109.
Reetz v. Michigan, 188 U. S. 505.
State v. Schaffer, 113 Wis. 595.
State v. State, 34 Minn. 387.
Smith v. Board (Iowa), 117 N. W. 1116.
But see
Freund, Police Power, Para. 545.
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

27. Meffert v. Board, 66 Kan. 710.
People v. Apfelbaum (Ill.), 95 N. E. 995.
Aiton v. Board (Ariz.), 114 Pac. 962.
Rose v. Baxter, 81 Ohio St. 522, 7 Nisi Prins. (N. S.) 132.
Smith v. Board (Iowa), 117 N. W. 1116.
Board v. Eisen (Ore.), 123 Pac. 52.
State v. Webster, 150 Ind. 607.
Fort v. City, 87 Ark. 400.
Munk v. Frink, 81 Neb. 631.
Mathews v. Hedlund, 82 Neb. 825.
State v. Roy, 22 R. I. 538.
People v. McCoy, 125 Ill. 289.
Morse v. Board (Tex.), 122 S. W. 446.
Spurgeon v. Rhodes, 167 Ind. 1.
State v. McCrary, 77 Ark. 611, 92 S. W. 775.

It would therefore seem entirely competent to conclude that medical practice acts should not be construed as penal but as purely and simply remedial measures. This position is, as the authorities would seem to show, supported by justice and equity and is in every way commensurate with the best interests of humanity. And that these ends may obtain, a liberal construction must be given to medical practice acts even should there be a tendency to militate to a marked degree thereby against those composing the medical profession itself.

B.—Extraordinary Remedies

§ 115.—In General

Upon a performance of all the conditions precedent it at once devolves upon the board of examiners to issue to the applicant a license to pursue his profession.[28]

And the applicant has his remedy at law to enforce his right to a license providing he can prove to the reasonable satisfaction of the board that he is fully qualified in all respects.[29]

But a statute forbidding anyone from practicing medicine till declared qualified by the proper authorities, is as much a prohibition on the courts as on the people themselves.[30]

As the provisions of the various acts would seem to show that beyond any question it is the clear intention of the legislature that all desiring to practice must be fully qualified. Consequently, the courts

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27.—*Continued.*
Kennedy v. Board, 145 Mich. 241.
State v. Board, 32 Minn. 324.
Curryer v. Oliver, 27 Ind. App. 424.
Gulley v. Territory, 91 Pac. 1037 (Okla.).
State v. District Court, 26 Mont. 121.
State v. Stewart, 46 Wash. 79.
France v. State, 57 Ohio 1.
State v. State, 34 Minn. 387.
Fox v. Territory, 2 Wash. T. 297.
Hawker v. United States, 170 U. S. 189.
Reetz v. Michigan, 188 U. S. 505.
But see
Freund, Police Power, Para. 545, et sequi.
Macomber v. Board, 28 R. I. 3.
Hewitt v. Board, 148 Cal. 590.
Matthews v. Murphy, 23 Ky. 750.
Czarra v. Board, 25 App. D. C. 443.
Chenoweth v. State (Colo.), 135 Pac. 771.
Graeb v. State (Colo.), 135 Pac. 776.

28. Gage v. Censors, 63 N. H. 92.

29. Gage v. Censors, 63 N. H. 92.
Board v. People, 102 Ill. App. 614.
United States v. Curtis (D. C.), 38 W. L. R. 396.

30. State v. District Court, 26 Mont. 121.

hesitate to act in any other case than a clear and palpable invasion of rights or total disregard for the law.[31]

And in the same way the licensed practitioner may protect his right to pursue his profession by a recourse to the courts, but only in cases of gross abuse of powers conferred upon a given board of examiners.[32]

§ 116.—Mandamus

An applicant for a license has no grievance which can be redressed in court if it be impossible to show that he has complied with the several conditions precedent. But if a license be wrongfully withheld the applicant should apply to a proper jurisdiction for a writ of mandamus or in some other such appropriate action as may be afforded by law.[33]

§ 117.—Function of the Writ of Mandamus

In general the office of the writ of mandamus is to compel a board of examiners or some such subordinate body to perform certain ministerial or quasijudicial acts as prescribed by law. It is a command from a superior tribunal to an inferior one to compel action on the part of the subordinate in the case of a failure of duty. But never to compel the lesser tribunal to decide a particular case in a particular manner. A subordinate body can be directed by a writ to act in any matter in which it has a right to express a judgment, but not how to act. The character of the duty and not that of the body or officers, determines how far the performance of a duty may be enforced by mandamus.[34]

Courts cannot review the discretion which has by law been vested exclusively in an inferior tribunal, and therefore mandamus will not

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31. Harding v. People, 10 Colo. 387.
Goswell v. State, 52 Ark. 228.
Metcalf v. Board, 151 Cal. 499.
Paquin v. State, 19 R. I. 365.
State v. Wilson, 62 Kan. 621.
United States v. Wilson (D. C.), 38 W. L. R. 396.

32. State v. Webster, 150 Ind. 607.
State v. Goodier, 195 Mo. 551.
Wolf v. Saylor, 42 Ore. 546.

33. Paquin v. State, 19 R. I. 365.
Metcalf v. Board, 123 Mich. 661.
Melville v. State (Ind.), 89 N. E. 490.
Stone v. State, 52 Ark. 228.
Board v. Fowler, 50 La. Ann. 1358.
State v. Cooper (Ida.), 81 Pac. 374.
Harding v. People, 10 Colo. 387.
See Green v. Hodges (Kan.), 138 Pac. 605, in which petition for mandamus denied to compel governor to appoint chiropractic board.

34. People v. Board, 110 Ill. 180.
United States v. Curtis (D. C.), 38 W. L. R. 396.

lie to compel the performance of acts or duties which necessarily call for the exercise of discretion on the part of the officer or board at whose hands their performance is required, because the state has specified the officers on whose judgment reliance is to be placed.[35]

Courts will compel by mandamus the honest performance of official duty and will grant relief where power is exercised with manifest injustice or is grossly abused, or duty is avoided under a pretense of exercising discretion.[36]

In such cases courts may order the due and proper exercise of any legal duty. Clearly in such cases the abuse of a discretion may be controlled by mandamus, for an abuse of a discretion may amount to a virtual refusal to perform a duty legally enjoyed, and would tend to the working of the grossest injustice.[37]

It may be said that the action of the court is based on the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed. For in acting arbitrarily or fraudulently or through unworthy motives or in conspiring against the rights of individuals the board is in fact acting against the law itself. And hence, in acting against the law, it is submitted that the board has not "abused its discretion," but that in contemplation of the law it has actually not "exercised its discretion." On the contrary, however, it has sought to substitute arbitrary and fraudulent disposition and determination of the question of the honest discretion demanded by law. And consequently, mandamus will lie to compel its tribunal to act honestly and fairly or to exercise due discretion.[38]

It has been held that a petition for a writ of mandamus will not lie to compel the issuance of a license when, as alleged, an applicant has been improperly rejected. But in such cases an action for damages against the individual members of the board will lie and is the only proper remedy. Further, that the jurisdiction of the court is not dependent on the "manner" in which the board has discharged its duty when it has been called upon to exercise judgment, but that it does depend on whether there has been an absolute refusal to perform a ministerial or judicial duty.[39]

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35. State v. Board (Wash.), 80 Pac. 544.
State v. Cooper, 123 Ill. 227.
United States v. Curtis (D. C.), 38 W. L. R. 396.
36. State v. Board (Wash.), 80 Pac. 544.
State v. Cooper, 123 Ill. 227.
United States v. Curtis (D. C.), 38 W. L. R. 396.
37. State v. Cooper, 123 Ill. 227.
United States v. Curtis (D. C.), 38 W. L. R. 396.
38. State v. Board (Wash.), 80 Pac. 544.
39. Kennedy v. Board, 26 R. I. 538.

But it would seem the statutory law permitting that the better view is expressed by the Washington court "supra" and that the "manner" in which a duty is discharged may be of no little importance.[40]

It has come to be fairly well recognized that as long as a man, or a body of men, fill any position the law will presume that whenever any matter is legally presented for action the duty devolving upon them will be performed. Hence mandamus will not lie merely because it is to be presumed that a board might act arbitrarily or unjustly, but the arbitrary conduct or unjust act must be definitely established, and an application improperly refused before the court can be given jurisdiction to act.[41]

Nor yet can a court assume jurisdiction when a board has acted properly under a valid law, and as a consequence has in its discretion rejected a candidate. It is not the function of a court to review the gradings of an applicant's paper or the like, and indeed it would seem most patent that neither a judge nor a jury is fitted to arrogate to themselves such a duty. The office and nature of the writ of mandamus does not make it a remedy for erroneous decisions.[42]

§ 118.—Unprofessional Conduct and the Writ of Mandamus

Mandamus will not lie to compel a board to issue a license when in the discretion of the said board the said license has been refused because of "unprofessional and dishonorable conduct."[43]

But a board can under a writ of mandate be compelled on an application to grant a proper hearing to determine as to the character of the applicant.[44]

It is the duty of the board of examiners under some laws to pass on the qualifications of an applicant and to use their discretion therein. But in refusing a license because of bad character, proper discretion must be exercised and no arbitrary or hasty action taken. For it is only after a due investigation and a proper hearing that an applica-

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40. People v. Board, 115 Ill. 180.
State v. Cooper, 123 Ill. 227.
State v. Board (Wash.), 80 Pac. 544.
United States v. Curtis (D. C.), 38 W. L. R. 396.
41. State v. Adcock (Mo.), 124 S. W. 1100.
Webster v. Board, 130 Ky. 191.
42. State v. State, 32 Minn. 324.
State v. Board (Wash.), 80 Pac. 544.
People v. Board, 110 Ill. 180.
United States v. Curtis (D. C.), 38 W. L. R. 396.
43. Morse v. Board (Tex.), 122 S. W. 446.
State v. Webster, 150 Ind. 607.
44. State v. Webster, 150 Ind. 607.

tion for a license may be refused because of improper or unprofessional conduct.[45]

No person is *ipso facto* entitled to practice under a subsequent law merely because such person was licensed to practice under a prior law. But usually the board or some similar tribunal is given power to review the evidence on which such prior license was obtained, and if cause be found, to refuse to issue a new license. The board must satisfy itself upon a proper examination that the prior license was obtained without fraud or misrepresentation and besides that the applicant was morally a fit person to engage in the practice of medicine. And then in its discretion the board may refuse or grant the license as it may see fit. But the board may not by mandamus be compelled to issue a license should it have held the applicant to have acted improperly. The office of this writ is simply to compel the board to act should it have acted improperly or refused to act in any event.[46]

From the inherent nature of the writ it is found that a board cannot be restrained from revoking a license for unprofessional conduct. For the office of the writ of mandate is to compel action not to restrain, it being a function of the writ of prohibition or of the injunction to prohibit an act. But the writ of mandamus might lie to compel a reinstatement supposing a revocation to have been had after improper action. However, a court of justice will not interfere even in such an instance when the record which the petitioner desires reinstated was admittedly fraudulent and made so through a palpably illegal act on the part of said petitioner, such as erasing a date to change a temporary to a permanent license or the like.[47]

§ 119.—Matriculation

A board having merely administrative or ministerial duties to perform cannot act arbitrarily and against the great weight of evidence. For example under a law which authorized the licensing of all applicants who had matriculated at a medical school prior to a certain date, a board would have no discretion supposing an applicant had submitted proof of his matriculation prior to that date and no material evidence contra thereto had been adduced, but would be compelled to issue the license as applied for. Under such circumstances a party

45. Morse v. Board (Tex.), 122 S. W. 446.
State v. Webster, 150 Ind. 607.

46. State v. Webster, 150 Ind. 607.
Morse v. Board (Tex.), 122 S. W. 446.
Wolf v. Saylor, 42 Ore. 546.

47. Wolf v. Saylor, 42 Ore. 546.
State v. Webster, 150 Ind. 607.

aggrieved by a refusal to issue a license could apply to the courts of redress under a writ o fmandamus.[48]

§ 120.—Diploma from a Reputable College

The refusal to grant a license because it has been decided by a board of examiners that an applicant is not from a college in good standing is not sufficient ground on which to issue a writ of mandamus.[49]

But a court will order the issuance of a license and an application for a writ of mandamus will lie therefor should a board arbitrarily or improperly hold a college to be disreputable and for that reason refuse to issue a license. And again the failure to issue a license after a college has been pronounced reputable may be enforced by mandamus.[50]

In most cases the board of examiners or the like is vested with authority to use its discretion in determining as to the reputability of a college. But once a college has been dominated as reputable the board has exhausted its power and must issue licenses to all graduates therefrom, reserving of course the right to reverse this decision at any time after a due and proper hearing. The power conferred on a board of examiners is broad and comprehensive and in some respects must in their nature be final, as the action of the board does not depend on any specified piece of evidence fixed by statute, but on such facts as will satisfy the board. Hence it is that the question of reputability must be decided on just and fair principles and not on motives of selfish interest or to injure rival colleges. Discretion vested in official bodies must not be exercised for the gratification of feelings of malevolence or for the attainment of personal or selfish ends or for arbitrary reasons, but for the public good.[51]

A board possesses a discretionary power to determine whether or no a college is in good standing as is required under the statute and may reject an applicant should his college fail to measure up to these

48. State v. Adcock, 206 Mo. 550.
49. People v. Board, 110 Ill. 180.
State v. Cooper, 123 Ill. 227.
Van Vleck v. Board (Cal.), 48 Pac. 223.
Board v. People, 102 Ill. App. 614.
Barmore v. Board, 93 Tenn. 619.
State v. Lutz, 136 Mo. 633.
50. State v. Cooper, 123 Ill. 227.
State v. Lutz, 136 Mo. 633.
51. State v. Cooper, 123 Ill. 227.
Van Vleck v. Board (Cal.), 48 Pac. 223.
Barmore v. Board, 21 Ore. 301.
State v. Board, 93 Tenn. 619.

requirements. And in order that a diploma be accepted the college issuing it must be in good standing at the date of its issuance, for it is totally immaterial if the college be in good standing subsequent thereto. If under such circumstances a board decide against a college such opinion is not subject to review in any court of law under mandamus proceedings.[52]

But colleges must be afforded full opportunity to comply with the requirements of the board. It must be shown that a given college has received a notice of these requirements. For simply mailing notices without due consideration as to the receipt is totally insufficient. And therefore, a writ of mandamus will issue to compel the granting of a license to an applicant who is the graduate of a college, especially which it can be proved that his college has not been duly notified.[53]

§ 121.—Requirement of a Four Years' Course

An applicant is not entitled to a license who has failed to complete a de facto four years' course in pursuance with the law. And an application for a writ of mandamus will not lie to compel a board to issue a license when it has refused so to do, and on these grounds.[54]

§ 122.—Requirement of a Diploma and an Examination

Not a few statutes require all applicants desirous of practicing medicine to both present a diploma and to submit to an examination to evidence their qualifications to practice. These dual requirements are entirely within the power of the legislature and quite valid. It is essential therefore that all applicants conform thereto and hence a writ of mandamus will not issue to compel a board either to admit an applicant to an examination without the presentation of a diploma or to accept the diploma as sufficient evidence of qualification and to compel the granting of a license, or either one of the two.[55]

Boards are expressly given power to pass on the requirements of applicants, hence the courts cannot intervene and direct a board to issue a certificate to one whom the majority of the board has decided is unqualified. Courts cannot by mandamus compel them to act contrary to the truth. Should a board refuse to grant an examination to one who has presented his diploma, or who has otherwise proven

52. Board v. People, 102 Ill. App. 614.
53. State v. Lutz, 136 Mo. 633.
54. Moore v. Napier, 64 S. C. 564.
55. State v. Board (Wash.), 93 Pac. 515.
State v. Currans, 111 Wis. 431.

himself duly qualified, as the law may require, then a court will intervene and by mandamus compel a license to issue.[56]

§ 123.—Registration

Under the law of Pennsylvania it is required that a physician must duly register his license in a county medical register kept by the prothonotary, who is an officer of the court. Hence, if a licensed physician should apply for registration and be refused for no good reason, then any court of proper jurisdiction may by mandamus or other summary order compel its officer to perform his duty as laid upon him by statute.[57]

§ 124.—Licensure Under the Exceptions, Verifications, Etc.

A law required all who had been licensed under a prior law to deposit their licenses with the board of examiners in order that a verification license might be issued to them. An applicant who had under a prior law been licensed simply to practice "obstetrics and to treat diseases peculiar to women and children" likewise applied for a verification but was refused anything other than a license limited as theretofore. The applicant was, however, fully qualified to practice medicine in all its branches and had proven that fact in examination. It was therefore held that the applicant was entitled to an unlimited license because fully qualified as well as on the ground that the board was not authorized in the first place to issue a limited license. Hence, in issuing a verification license the board could not limit the applicant to the special field, but a license must issue *in extenso* and mandamus will lie for that purpose.[58]

Under a law authorizing the licensure of all who were practicing a given length of time prior to the passage of the said law, provided such persons present themselves and submit to an examination by a fixed date in pursuance with the said law, it is essential to comply specially with such provisions. The law has reference only to those who were continuously practicing up to its enactment and makes it imperative that all applications for the day set, otherwise there are no grounds on which to issue the writ of mandamus.[59]

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56. Ewbank v. Turner, 134 N. C. 77.
State v. Baily, 181 Ill. 512.
57. In re Campbell, 197 Pa. 581.
58. Board v. Taylor (Tex.), 120 S. W. 446.
State v. Taylor (Tex.), 129 S. W. 600.
59. Webster v. Board, 130 Ky. 191.
Sherbourne v. Board (Ida.), 88 Pac. 762.

In proving that applicant was practicing for the length of time required, it is frequently provided that an affidavit or a statement verified by oath be submitted to that effect. An examination into the facts is then had by the board and on a negative finding the license will be refused. Mandamus would not lie to compel a different finding or action by the board.[60]

When the exception in the law permits a license to issue to those who were legally registered under a prior law, which only licensed those who were graduates of a legally authorized medical college, it is essential that the applicant for the new license did actually graduate from a college. Hence a mere attendance for one day would not be a compliance with the law and such an applicant could not compel the board by mandamus to register him as a duly licensed physician.[61]

But a board cannot refuse to issue a license to an applicant who has fully complied with the requirements of the prior law and who is now applying for registration under the new law on the grounds that said applicant is not a graduate of a reputable college, unless there is specific authority for such action on the part of the board, and mandamus will lie to compel the board to recognize such an applicant supposing the board has exceeded its authority or violated the law by a refusal to do so.[62]

And a board will also be compelled to recognize the diploma of a college of a foreign state directly, which is tacitly recognized by permitting licensees from the foreign state to practice locally who had no other evidence of qualification than their diplomas from the said college as a basis for licensure in the said foreign state.[63]

A board, however, may under a reciprocity clause generally exercise its discretion. And under such a provision the courts will not attempt by mandamus to compel a license to issue to an applicant even should the law provide for recognition of licentiates with his qualifications. For his recognition is not entirely dependent on the possession of the said qualifications, but in a large measure on the discretion of the board. And therefore, supposing the board to have acted justly in its decision there can be no possible ground for complaint.[64]

But mandamus will issue to compel the recognition of an applicant under a reciprocity clause should the board have illegally refused to

60. Sherbourne v. Board (Ida.), 88 Pac. 762.
61. Metcalf v. Board, 123 Mich. 661.
62. Vadney v. State (Ida.), 112 Pac. 1046.
63. Boucher v. State, 19 R. I. 366.
64. Hollis v. Board, 82 S. C. 230.

do so. A board cannot arrogate to itself the right to determine the qualifications of applicants under a reciprocity clause, but must follow the law, and any rules which the board does make must be simply to carry out the law and not to change it in any way. Any contention that a board can absolutely determine what would constitute conditions equivalent in the face of expressed law would seem to be contrary to the public policy. Such statutes are for the purpose of opening the doors to reputable practitioners and to this end give full faith and credit to the acts of the board of a neighboring state having equivalent conditions. And hence when a board attempts to nullify this law by changing these conditions it is assuming to act arbitrarily and illegally. Any person injured by such action may appeal to any court of competent jurisdiction for redress and the court must act in the premises.[65]

§ 125.—The Writ of Prohibition

The granting of a writ of prohibition is in the sound discretion of the court as the very right and justice of every case require.[66]

But even so a court cannot compel a board to act or to refrain from acting under such a writ, for it would seem the remedy does not go against such a body as a board of medical examiners, but that it goes only against a court or a tribunal exercising judicial functions, and a board of examiners does not exercise such a function.[67]

Whether or no the writ of prohibition will never lie as against a medical board clearly it cannot lie supposing the action which was sought to be prohibited was determined or dismissed prior to any notice of the writ being given. And even a judgment rendered though not finally entered would seem to be sufficient grounds for dismissing an application for such a remedy.[68]

And again it would seem if there be a complete and adequate remedy at law that an application for the writ of prohibition will not lie, as clearly a court has no jurisdiction under such circumstances.[69]

Nor will a court attempt by a writ of prohibition to prevent a board of examiners from examining into and investigating charges of alleged improper conduct in pursuance with the law. For the duties of these boards are of an administrative or ministerial character and therefore as long as its acts are within the scope of reasonable dis-

65. United States v. Curtis (D. C.), 38 W. L. R. 396.
Van Vleck v. Board (Cal.), 48 Pac. 223.
66. State v. Goodier, 195 Mo. 551.
67. State v. Goodier, 195 Mo. 551.
68. In re Roe Chung (N. Mex.), 49 Pac. 592.
69. In re Roe Chung (N. Mex.), 49 Pac. 952.

cretion they are free to act. The mere fact that the relator has been licensed under a prior law or the like would not serve to preclude the board from acting in the premises.[70]

§ 126.—The Writ of Injunction

A court will not entertain an application for a writ of injunction to restrain a board from taking further proceedings to revoke a license supposing the power which the board is seeking to exercise is clearly vested in it under a valid law. Nor is a board to be precluded from serving notice on the defendant and the like although not specifically empowered so to do by the law, for the board must adopt some procedure to try the case.[71]

And further, a petition for an injunction will not lie at the suit of a medical school to restrain a state board from issuing a license on allegations that the applicant is not properly qualified for licensure. This was placed on the ground that such a body has no legal interest in the matter and is not charged with the duty of enforcing the law, nor can it be permitted to assume such functions even from motives of benevolence. And again, supposing the license has already issued clearly an injunction may not issue to restrain such an act. A court cannot reach back and undo what has been done by writ of injunction.[72]

§ 127.—The Writ of Certiorari

Action may be had by a writ of certiorari to inquire into the legality of any action of a board of examiners. That is on a writ of certiorari a court will review the proceedings of a board of examiners to ascertain whether or no proper action in the premises has been had.[73]

Thus in determining whether or no a college is in good standing a board must not act arbitrarily, but with a due regard for the rights of all concerned. And in case of arbitrary action a court may review the proceedings on a writ of certiorari and if the allegations be substantiated may reverse the findings of the board. But when an office or a board has jurisdiction and is given discretion the courts cannot inquire into the correctness of the decisions upon matters of fact, nor review the exercise of discretion given. The inquiry is limited exclus-

70. State v. Goodier, 195 Mo. 551.
State v. State, 34 Minn. 391.
71. Wolf v. State (Minn.), 123 N. W. 1074.
Rose v. Baxter, 81 Ohio St. 552, 7 Nisi Prius (N. S.) 132.
72. University v. Paynter, 60 Neb. 338.
73. Iowa v. Schrader, 87 Iowa 659.
Raaf v. State, 11 Ida. 707.
Stevens v. Hill, 74 Vt. 164.

ively to the jurisdiction and the legality of the action taken, and if the jurisdiction actually existed and the action taken was legal, then the judgment of the board must be affirmed. Nor will action taken be deemed illegal or arbitrary simply because no specific provision was made therefor. The law will always presume the existence of authority to do acts incidental and necessary to discharge any lawfully vested power. And on a review under a writ of certiorari such acts should be sustained.[74]

Again a board is given power to grant and refuse licenses and is expected to use its discretion therein. Hence a writ of certiorari may not be had simply to review action taken by the board entirely consonant with such discretion, as for example the grading of examination papers or the like. All questions relating to bias, prejudice, incompetency, errors or mistakes of judgment should be brought to the attention of the executive appointing the board as on certiorari it is competent for a court to review only questions of jurisdiction and acts contravening legal rights.[75]

It is submitted that through bias and prejudice legal rights may be contravened, and while these may not be reviewable on a writ of certiorari, strictly speaking, yet any one aggrieved thereby may have recourse to the courts, as under a writ of mandamus in a proper case, and is not left simply to the possibility of action by an execution. But all matters of this nature are oftentimes covered by statute, hence it is advisable to refer in all cases to the specific law of any given state as to the proper course to take.[76]

Finally a writ of certiorari will not issue to review proceedings of a board on the revocation of a license supposing the defendant although properly cited failed to appear before the board for trial. For since he chose to stay away it is not just that he shall take objection to proceedings had by this extraordinary writ. And further, he had his day in court and must be treated as having waived any formal objections just as much as if he had been present and had held his peace.[77]

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74. Iowa v. Schrader, 87 Iowa 659.
75. Raaf v. State, 11 Ida. 707.
76. State v. Board (Wash.), 80 Pac. 544.
77. Stevens v. Hill, 74 Vt. 164.

ABSTRACTS

OF

SUPREME COURT DECISIONS

ON THE

REGULATION OF THE PRACTICE OF MEDICINE

ARRANGED CHRONOLOGICALLY
BY STATES

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WYOMING

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UNITED STATES

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ABSTRACTS OF SUPREME COURT DECISIONS ON THE REGULATION OF THE PRACTICE OF MEDICINE

OSTEOPATHY THE PRACTICE OF MEDICINE

Bragg v. The State, 134 Ala. 165; 32 So. 767; 59 L. R. A. 925

1902

The Supreme Court holds that osteopathy is the practice of medicine, within the meaning of the medical practice act of the state. The contention of the defendant was that, as in the practice of osteopathy no drugs or other medicinal substances are administered or applied internally or externally, nor the knife used or any form of surgery resorted to in the treatment of cases, it is therefore not the practice of medicine. Practitioners of this school, therefore, know nothing of the medicinal properties of drugs and other medicinal substances or of their administration for the cure of disease. Their method of treatment is entirely external. It is admitted that osteopaths must know anatomy, physiology, hygiene, histology and pathology, a knowledge of which is evidently to enable the osteopath to determine the disease with which his patient is afflicted and to aid him in his system of manipulation. It is clear from the evidence that the osteopathic practitioner does not make the same application of his remedies to all diseases, but applies such treatment as is most remedial in the particular disease which he is called upon to treat. The practitioner of medicine is required to know anatomy, physiology, hygiene, histology and pathology, but must also know how and by what remedial agents the disease may be cured or alleviated. The only difference, therefore, between the two is the matter of therapeutics, that branch of medical science which considers the application of remedies as a means of cure. The result sought to be accomplished by each is the same, namely to relieve the patient's illness and to cure him. Both are practicing the art of healing or curing human diseases. It is contended that the words, "practice of medicine" as used in the statutes includes only those persons who employ medicinal substances or drugs as remedial agents, this contention being based on the proposition that the word "medicine" in its popular sense is a remedial substance or drug, and that the practice of medicine is inseparable from the administration of drugs and other medicinal substances. This is the basis of the contention of the defendant and if it is fallacious his conclusion must be false. The question then, is on the correct interpretation of the words "practice of medicine." This question the court discusses and concludes that the word "medicine" has a technical meaning, is a technical art or science and as a soience the practitioners of it are not simply those who prescribe drugs or other medicinal substances but that the term is broad enough to include and does include all persons who diagnose diseases and prescribe or apply any therapeutic agent for their cure. The court is unable to find anything in the history of legislation on this subject to controvert this conclusion and consequently rules that the defendant was engaged in the practice of medicine.

Regarding the constitutionality of the medical practice act, the court referred to numerous cases in which the constitutionality of such laws has been upheld. Regarding the contention of the defendant that the Board of Medical Examiners discriminated in favor of regular physicians, the court ruled that if such were the fact the recourse for the defendant lay in the civil courts and that even if the Board had practiced discrimination this was no justification for violation of the law on the part of the defendant. Furthermore, the record does not show any attempt on the part of the defendant to secure a license. He rather chose to construe the law to suit his own notion and engaged in the practice of medicine without making any effort to comply with its mandates or even to have the unjust discrimination of which he complains removed before engaging in practice. The court decides that the defendant was properly convicted.

OSTEOPATHY THE PRACTICE OF MEDICINE

Ligon v. State, 145 Ala. 659; 39 So. 662

1906

This case was tried on an agreed state of facts similar in all essential respects to the case of Bragg v. State (V. S.), in which it was held that the practice of osteopathy was the practice of medicine within the meaning of the code provisions of that state. It says that the object of the appeal in this (Ligon) case was to have the Bragg case overruled. Counsel said, in brief: "It is respectfully submitted that on review of the point involved this court should not affirm the correctness of that decision, but should depart from it." The court's answer is that the decision in that (Bragg) case was unanimous. It covered all of the questions here involved, after careful and mature consideration. The court has reexamined it, and on reason and the authorities cited it has been unable to conclude that it is wrong. It should not, therefore, be overruled. The court can add nothing new in this decision to what was there said. To attempt it would be to go over the same grounds with inability to shed new light on them.

POWER OF STATE ASSOCIATION—CERTIFICATE REQUIREMENTS

Brooks v. State, 146 Ala. 153; 41 So. 156

1905

Section 5333 of the code of 1896 reads: "Any person who practices medicine or surgery without having first obtained a certificate of qualification from one of the authorized boards of medical examiners of this state must, on conviction, be fined not less than $25 nor more than $100." Section 3262 says: "The standard of qualification, the method or system and the subjects of examination of practitioners of medicine shall be prescribed by the Medical Association of the State of Alabama and must be observed by the boards of medical examiners." It will be observed, the court continues, that the lawmakers have clothed the Medical Association of the State of Alabama with full authority to prescribe the rules and regulations governing the issuance of certificates to medical practitioners, and the Alabama statutes in this respect are not only intended as a means of maintaining a high standard in the ranks of the medical profession, but are designed to protect the public from imposition and fraud by authorizing the state medical association to prescribe the rules and restrictions governing the issuance of certificates to those engaged in or desiring to engage in the practice of medicine.

The state medical board adopted in 1899 the following ordinance: "Be it ordained by the Medical Association of the State of Alabama that hereafter all certificates conferring the privilege of practicing medicine in this state, issued by county boards of examiners, shall be countersigned by the senior censor of the state association before the same shall become legal and valid." It is to be noted, the court says, that every certificate issued by a county board after the adoption of the above had to be countersigned by the senior censor, else it would be invalid. The state proved a *prima facie* case against the defendant (party first named, who was convicted of a violation of section 5333, quoted above), who attempted to defend under a certificate issued by the county board, Jan. 29, 1900, but which had not been countersigned by the senior censor of the state, and which was insufficient, and an objection by the state to the introduction of same was properly sustained.

There was no error in sustaining the state's objections to the defendant's attempt to introduce a diploma or proof of the length of time he had practiced medicine. These facts may have been sufficient to authorize the county board to issue him a certificate without undergoing an examination, but could in no sense make valid a certificate not issued in conformity with the rules of the state association.

It was not competent for the defendant to show the action of the Medical Society of Marion County, since he did not show that it issued him a certificate

prior to the adoption of the ordinance in 1899. Neither was it competent to show that other physicians had no certificates or had not stood examinations. If they were violating the law, it did not justify the defendant in doing so.

HAVING A DIPLOMA DOES NOT MAKE A LICENSED PHYSICIAN

McAllister v. State, 156 Ala. 122; 47 So. 161

1908

The Supreme Court of Alabama says, where it was averred that a certain person was a licensed physician, that the fact that the physician had a diploma did not prove it, and to allow him to testify that he had such a diploma was incompetent and illegal evidence. Furthermore, the diploma, if of any value as evidence, should have been produced, and hearsay evidence of its contents was inadmissible.

BURDEN OF PROOF OF REGISTRATION IS ON DEFENDANT

Richardson v. State, 47 Ark. 562; 2 S. W. 187

1886

The defendant was charged before a justice of the peace with practicing medicine without license. Having been convicted, he appealed to the circuit court, where he was again tried, convicted, and fined. He filed a motion for a new trial upon the grounds that the affidavit did not charge a public offense, and that the verdict of the jury was contrary to the weight of evidence. The court says that the statute prohibits, under a penalty, all persons from practicing medicine or surgery, as a profession, without being first duly registered as a practitioner in the office of the clerk of the county court of some county in the state; and it defines a physician or surgeon to be one who prescribes or administers medicine for, or in any manner treats diseases or wounds for, pay. Registration is granted upon a certificate of qualification, after examination by a medical board, or upon satisfactory proof before the county clerk that the applicant was continuously engaged in a reputable practice of his profession for a period of five years next before the passage of the act (March 9, 1881). Such legislation is a valid exercise of the police power of the state. The object is to protect the public health against the impositions of charlatans and empirics, who pretend to exercise an art requiring skill without a previous special training.

The law does not require a license. The act of registering might be called a license to practice, just as the enrolment of an attorney on a court of record is his license to practice law. It will be presumed that it was properly explained to the jury that the offense for which the appellant was on trial was a failure to register. Regarding the second assignment,—whether the testimony showed that the appellant practiced medicine, a witness testified to being present and seeing the defendant treat a patient for cancer and dropsy, and receive money for his services. The defense introduced an affidavit from a physician stating that the defendant was a student under him and treated the patient in question under his direction. The court says that the verdict is not satisfactory to the court. It was not a case of conflicting evidence. Every word of the evidence can be reconciled. Taken altogether, it fairly shows that the defendant rendered such services as a nurse might have rendered, and that the money he received was collected by him as an agent, and was paid over to his principal. But the weight of evidence, and the credibility of witnesses, are to be determined by the jury. It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence. But, when the case reaches the Supreme Court, the question is no longer whether the evidence preponderates on one side or the other, or whether due credit has been given to the statements of a witness who has testified fully and fairly, but the question is whether there is a failure of proof on a material point. The court cannot order a new trial because it

differs in opinion from the circuit judge as to the weight of the testimony, or the truth or falsity of a witness.

"There were but two questions of fact in the case: (1) Was the defendant registered as a physician or surgeon? (2) If not, did he practice? His own witness said 'he was not eligible to the practice of medicine.' We take this to mean that he was unregistered. At any rate, if he held a certificate of registration, it developed upon him to show it; this being a fact particularly within his own knowledge. The conclusion is that he administered medicine to a patient for a certain disease; and received money for his services.

Judgment affirmed.

TIME LIMIT FOR REGISTRATION CONSTITUTIONAL

Gosnell v. State, 52 Ark. 228; 12 S. W. 392

1889

Upon an indictment under the act of 1887, 259, regulating the practice of dentistry in this state, appellant was convicted and fined, and appealed. He was a resident of the state, and had been, and was at the date of the passage of the act, practicing dentistry in Franklin county; he failed to procure a certificate from the board of dental examiners authorizing him to practice the same, in accordance with section 5 of said act, within three months after the passage of the same; he practiced dentistry on the 10th of April, 1888. The act was approved 4th of April, 1887. The board was appointed the 6th day of May, 1887, and organized the 28th of said month. After the first meeting, there was no other meeting of the board before the finding of the indictment. By resolution at their first meeting, the board fixed their annual meeting at such time and place as the State Dental Association might hold its annual meetings. The substance of a resolution passed by the board at its first meeting, calling on all dentists to come forward and register, was published in the Arkansas Gazette. On the 14th of July, 1887, appellant applied by letter to the secretary of the board to register, and was informed that the time had expired for registration, and that he would have to come before the board and be examined. He afterwards applied to be registered as of July 14, 1887, and was not permitted to register. It is contended that the act deprived appellant of a right to follow a lawful occupation; that it is unreasonable, unwise, and unconstitutional. Whatever may be thought of the hardships the act might work, it was not impossible for the appellant to have complied with section 5. It is not to be presumed that the board would not have acted upon the registration of the name of the applicant. Had it failed to act, it might have been compelled to do so by *mandamus*. The court found no case in which such acts have been declared unconstitutional. On the contrary, they have been repeatedly held to be constitutional by the highest courts. It is competent for the legislature to regulate the practice of dentistry and dental surgery in such way as will not deprive the citizens of the right to follow a lawful avocation. While it was and is unlawful to practice dentistry or dental surgery, after the lapse of three months from the passage of the act, without the requisite certificate, the appellant may make his application and proof that he was practicing at the date of the passage of the act, and thereupon he will be entitled to a certificate authorizing him to practice. Affirmed.

CHARGES BY STUDENT MAKES PRACTICE UNLAWFUL

State v. Reed, 68 Ark. 331 58 S. W. 40

1900

In Arkansas there is a statute which declares that it shall be unlawful for any person to practice or attempt to practice dentistry or dental surgery, in the state of Arkansas, without first having received a certificate from the board of dental examiners: provided, this shall not be construed as preventing any regular

licensed physician from extracting teeth, nor to prevent any other person from extracting teeth, when no charge is made therefor by such persons. From this language, the Supreme Court of Arkansas holds that it is impossible to escape the conclusion that the performance of dental work, and charging and receiving pay therefor, is practicing dentistry. And it condemns the theory of the trial court in this case, which seemed to be that, notwithstanding this, yet, as the party accused of practicing dentistry without first obtaining a certificate from the board of dental examiners was, when he did the work in question, a mere student, and doing his work under the direction of a licensed dentist, he was not answerable to the law on the subject. This relation existed in this case between the accused and a regular practicing dentist, so far as the dental work in question was concerned, yet the charge for the work was not made in the name of the licensed dentist, nor was the pay received by him. The charge was made by the accused for himself, independent of his preceptor, and the pay was received by him. Under such circumstances, the Supreme Court holds, it was error for the trial judge to instruct the jury that if they believed that the accused was in the office of the regular dentist mentioned, and was working under the latter's directions and advice, he should be acquitted.

STATUTE MUST BE FOLLOWED IN DEFINING PRACTICE OF MEDICINE

Foo Lun v. State, 84 Ark. 475; 106 S. W. 946

1908

The party appealing had been convicted of practicing medicine without first having procured a certificate and license as prescribed by the statutes. A witness named Montgomery testified for the state: "I went up and got some medicine from defendant, paid him, and he gave me a receipt. I was requested by the medical board to go there to get evidence to see whether or not he was practicing medicine. He asked me my symptoms. He has an office something like a doctor's room." Cross-examination: "I answered the questions he asked me. He felt my pulse, and asked me if I had pains. I did not ask him to feel my pulse or tell him I had stomach trouble. I acted as a detective. He didn't tell me he only sold medicines, but he told me to take this until Wednesday. I saw other persons in the waiting-room." The state then introduced the county clerk, who testified that there was no certificate of the state board allowing the defendant to practice medicine. This was all the evidence. There was a jury trial and a verdict of guilty.

A reversal of this case was asked on the ground that the trial judge had erred in instructing the jury that "by the term of 'practicing medicine' it is meant to charge a person who undertakes to consider the nature of the ailment of a patient and to prescribe for him a remedy therefor; and if you find from the evidence in this case that defendant examined into or in any manner considered the physical ailments as represented to him by the witness Montgomery, and prescribed or attempted to prescribe a remedy therefor, you will find him guilty." The Supreme Court agrees that in this there was cause for reversal.

A number of the states, the court says, have passed statutes regulating the practice of medicine. In some instances the legislatures have undertaken to define what is meant by the phrase "practice of medicine." In others they have not. In cases where the legislatures have not undertaken to define the meaning of the phrase it has been construed to be used in its ordinary and popular sense. In cases where the words "practice of medicine" have been defined by the legislatures, the definition has been followed by the courts.

Section 5243 of Kirby's Digest (the Arkansas statute) provides that "any person shall be regarded as practicing medicine, in any of its departments, within the meaning of this act, who shall append M.D. or M.B. to his name; or repeatedly prescribe or direct, for the use of any person or persons, any drug or medicine or other agency for the treatment, cure or relief of any bodily injury, deformity or disease." The court thinks it was the intention of the legislature to define the crime by the use of the language quoted. The statute defines practicing medicine as repeatedly prescribing or directing, etc. The trial court erred

in giving its own meaning to these words in the instruction quoted, and in not defining them in the meaning of the statute. It was the duty of the court to give effect to the intention of the lawmakers as embodied in the statute.

WHAT CONSTITUTES MORAL TURPITUDE AUTHORIZING REVOCATION OF LICENSE

Fort. v. City of Brinkley, 87 Ark. 400; 112 S. W. 1084

1908

The Supreme Court says, that the statute of that state provides that: "Whenever any physician and surgeon or person engaged in the practice of medicine or surgery in this state shall be convicted of any crime and misdemeanor involving moral turpitude, in addition to the other penalty or penalties imposed on him, shall be added a revocation of his license to practice medicine and surgery."—Section 5247 of Kirby's Digest. This section makes the revocation of the license a part of the punishment for the offense, and contemplates that it shall be imposed by the court in which the case is tried.

"Moral turpitude is defined to be an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen or to society in general." Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.

It seems clearly deducible from the authorities that the words "moral turpitude" had a positive and fixed meaning at common law, and that the illegal sale of intoxicating liquors, not being an offense punishable at common law, does not come within the definition of a crime involving moral turpitude. In a statute using a word, the meaning of which is well-known, and which has a definite sense at common law, the word will be restricted to that sense.

LAW FORBIDDING ADVERTISING NOT TOO VAGUE

State Medical Board of Arkansas Medical Society v. McCrary, 95 Ark. 511; 130 S. W. 544

1910

McCrary was notified to appear before the State Board of Arkansas Medical Society and show cause why his certificate to practice medicine should not be revoked under subdivision d of section 8 of Act 219, approved May 6, 1909. He filed a complaint against the board to enjoin them from acting on the complaint filed against him. The board demurred to the complaint. The court overruled the demurrer on the ground that subdivision d, which authorized the board to revoke the license of a physician, if he "publicly advertise special ability to treat or cure chronic and incurable diseases is too indefinite and uncertain for enforcement." The board electing to stand on its demurrer, and refusing to further plead, a decree was entered enjoining it and the members thereof from in any way interfering with the right of the plaintiff to practice medicine, because of the advertisement charged in the complaint made against him. To reverse the decree this appeal is prosecuted.

The constitutionality of the above-quoted statute is attacked by appellee. He contends that his license to practice medicine is a property right, the revocation of which is an exercise of judicial power, which cannot be vested in any administrative board, but only in the courts; and that to assume to invest this power in the board is to deprive him of his property without due process of law, in violation of section 8 of article 2 of our constitution. The court cites many decisions to show that the position is not well taken.

It is also contended that section 4 of the section of the statute in question is too vague and indefinite to be upheld and enforced. After citing authorities,

the court decides that the language of subdivision d in question is not too uncertain and indefinite to be upheld and enforced. A statute forbidding a physician to advertise for patients in newspapers would be upheld; and by analogy, a statute forbidding them to advertise their ability to treat and cure certain named diseases would be a valid exercise of the police power.

While the particular disease against which the prohibition of the statute is directed is not named, yet the words "chronic and incurable," when used with reference to diseases of the body, are not variable, but have a settled and generally accepted meaning. The word "chronic" is the antithesis of "acute," and a chronic and incurable disease is generally understood to be one of long standing, deep-rooted, obstinate, persistent, and unyielding to treatment. On this account those afflicted with such diseases become discouraged, and to an extent desperate, and more easily become the prey of conscienceless and unscrupulous practitioners in the medical profession. Such diseases are specifically named and discussed in standard medical works, and are known to all physicians, who may possess a sufficient knowledge of their profession to practice the art of healing, as chronic and incurable diseases. For the board to consult these standard medical works would not be to use them as evidence as contended by appellee, but such act would be rather done as an aid to the memory and understanding of the members of the board. The decree will be reversed, and the complaint dismissed for want of equity.

LEGISLATURE MAY DESIGNATE SOCIETIES TO APPOINT BOARDS

Ex parte Frazer, 54 Cal. 94

1880

The Supreme Court of California assumes that the state, in the exercise of the police power, may provide for boards authorized to examine persons seeking to be admitted to practice medicine, to be appointed by any citizen or citizens named. The second section of the act of April 3, 1876, "to regulate the practice of medicine," as amended in 1878, conferred the exclusive power to appoint boards of examiners on three medical societies. The court does not consider that, by conferring the authority and imposing the duty of appointing boards of examiners on the three societies named in the act, and prohibiting the issuing of certificates by others than the appointees of such societies, the legislature exceeded the limitation of its powers contained in the provision in the state constitution that "corporations may be formed under general laws, but shall not be created by special act." It was deemed unnecessary to express any opinion as to the other portions of the law, since, even if it be assumed that such other portions were unconstitutional, the remaining portions were stated independently, and of themselves contained a complete scheme for the examination of diplomas and applicants, and for the prohibition of certificates by others than those empowered by the act to issue them.

WHAT IS EMERGENCY TREATMENT?

People v. Lee Wah, 71 Cal. 80; 11 Pac. 851

1886

The defendant was accused of practicing medicine without having procured a certificate, as provided by the act of April 3, 1876, and the act of April 1, 1878. The uncontradicted facts are that the defendant had a place of business in San Jose, at which he kept herbs. Two women went to his place of business, stated to him their ailments, and asked if he could give them herbs to effect a cure. He said he could. He prepared herbs of his own selection, and delivered them to the women, who took the herbs to their homes, and made and drank teas. They paid him at times $10 per week; at other times $6 per week. The payments were made regularly, without reference to the kind or amount of herbs, and continued several weeks—in one case ten weeks. The women testified that they did not pay him for medical services, but for the herbs only. The jury must have been of opinion that both the herbs and services were paid for.

The court instructed the jury that if they believed the services testified to were rendered gratuitously, and in an emergency, a verdict of not guilty should be rendered. The court then proceeded to define "an emergency" as a case in which the ordinary medical practitioners of the schools provided for by the statute, who are provided with the proper diplomas, and have submitted themselves to the proper examination, are not readily obtainable. This is an emergency, as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured. The jurors will readily understand that if a person has received an injury in a remote, isolated part of the country, in which some person not a regular practitioner should be called upon to render immediate assistance, and should render it, as in the case of a severe injury, a case of obstetrics, or the like, such instance would be an emergency which would justify a party in rendering assistance, and that humanity and decency would require he should not be liable in a criminal prosecution for so doing. If, however, a party is satisfied that another school of physicians, or another individual, can render him more efficient aid—more beneficial services than others—and he therefore seeks his aid, that is not such an emergency as the statute contemplates." The appellant urged that these instructions are contradictory. The court sees no contradiction. Judgment and order affirmed.

DECISIONS OF BOARD REGARDING GOOD STANDING OF SCHOOLS NOT SUBJECT TO REVIEW OF COURTS

Van Vleck v. Board of Dental Examiners, 48 Pac. 223

1897

This is a mandamus proceeding against the board of dental examiners to compel the issuance to the petitioner of a certificate entitling him to practice dentistry under the dental act of 1885. The lower court granted the writ and the board appealed. The defendant board demurred to the petition on the ground that the petition did not state facts entitling the petitioner to the relief sought. The demurrer was overruled and this ruling was the only question presented to the Supreme Court. The petition states that John D. Van Vleck is the holder of a diploma issued to him by the American College of Dental Surgery of Chicago, which college was, at the time of application for a license, a reputable college and that the petitioner had complied with the law in every respect. Section 5 of the dental act of 1889 authorizes the board "to endorse as satisfactory diplomas from any reputable dental college when satisfied of the character of such institution." The board contends that its functions under the statute are judicial or quasi-judicial, involving the exercise of discretionary power, the determination of facts from evidence, and that the determination of such facts is exclusively and finally vested in the board and that, while a mandamus will lie to require the board to act, when the board has reached a particular conclusion or where it has acted and reached one result, it cannot be coerced by mandamus to act differently. Respondent (Van Vleck) contends that the power vested in the board is ministerial or clerical and that, while the board has discretionary powers to pass on the facts on which its action is to be based, its determination of these facts is not final but is subject to review in the courts. The court is unable to agree with this construction of the act. The object of the legislature in passing the act of 1885 was to protect the public against incompetent and unqualified dental practitioners. It provides for a board with power to examine and license those who have not graduated elsewhere and to investigate and pass on the reputability of dental schools and colleges. The powers thus conferred are broad and comprehensive and, in some respects at least, must in their nature be final. If the statute required that the applicant make a prescribed showing in a particular manner and that thereupon the board should endorse his certificate, then the act might with reason be held to be more ministerial than judicial, but the action of the board does not depend upon some specified piece of evidence fixed by the statute but upon such facts as will satisfy the board. The whole

question as to the facts is committed to the board's discretionary judgment and its determination in such a case is conclusive and not subject to the mandatory control of the courts. There is consequently no ground for mandamus and the judgment and order of the lower court must be reversed.

PROOF OF LICENSE RESTS IN DEFENDANT

People v. Boo Doo Hong, 122 Cal. 606; 55 Pac. 402

1898

Boo Doo Hong was convicted of practicing medicine without a license, and appealed. He first demurred to the information, and, his demurrer being overruled, pleaded not guilty, was tried and found guilty. The court says that the demurrer was properly overruled. The facts stated in the information were sufficient to constitute a public offense, and it was not necessary to allege the existence of the medical societies referred to. Uncontradicted evidence was introduced showing that, for several months prior to the filing of the information, defendant had been practicing medicine. No evidence was introduced on either side showing, or tending to show, that defendant had or had not a certificate to so practice, as required by law. The court instructed the jury that the burden was upon the defendant to establish that he had a certificate to practice medicine as provided by law, and, if he failed to prove that he had such certificate, then it must be taken as true that he had not procured a certificate to so practice medicine.

It is contended for appellant that this instruction was erroneous and misleading, that the verdict was not justified by the evidence, and that it devolved upon the people to prove that the defendant had no license, and, having entirely failed to offer any such proof, he ought not to have been convicted, and his motion for new trial should have been granted. The general rule is undoubtedly as above stated, but there is a well-recognized exception to the rule, where there is a negative averment of a fact which is peculiarly within the knowledge of the defendant. The court concludes that the trial court did not err in giving the instruction complained of, and that the verdict was justified by the evidence. Judgment affirmed.

VALIDITY OF MEDICAL PRACTICE ACT—ASSOCIATION OF AMERICAN MEDICAL COLLEGES STANDARD

Ex parte Gerino, 143 Cal. 412; 77 Pac. 166; 66 L. R. A. 249

1904

The act of Feb. 27, 1901, for the regulation of the practice of medicine and surgery, provides, with respect to the membership of the board of examiners, that "five members thereof shall be elected by the Medical Society of the State of California, two members thereof by the California State Homeopathic Medical Society, and two members thereof by the Eclectic Medical Society of the State of California." The power of the state to constitute such a board, and to impose restrictions on the right to practice medicine, to be enforced by the board, rests entirely on the theory that such regulations are for the general welfare, and specifically to protect people from the arts of quacks and pretenders and from the mistakes of incapable practitioners. The societies named, by receiving this power of appointment, are constituted agencies of the state to perform a part of the duty pertaining to the sovereign power of the state, and they are not, in that respect, the recipients of private rights or privileges. It may be true that in making these appointments each medical society will choose persons who believe in the school of medicine of which its members are composed. This, however, does not render the law unconstitutional. The board, when appointed, must act equally for the benefit of all applicants, and impartially with respect to each, regardless of the school of medicine to which they belong. Moreover, even if the method provided in the law for the appointment of the members was invalid, the other provisions of the law would stand unaffected. There

would then be a legal office established, without any specific provision for the appointment of any person to fill it, and the vacancy thus existing could be filled by appointment of the governor. But, as it would be a legal office, it could be filled by a de facto officer, and in that case the *validity* of his appointment and his right to hold the office could not be questioned in a proceeding in habeas corpus. Nor does the court think the act rendered unconstitutional by the provision that the applicant for examination must produce a diploma issued by some legally chartered medical school, the requirements of which "shall have been, at the time of granting of such diploma, in no particular less than those prescribed by the Association of American Medical Colleges for that year." It says that the law on this point is not to be construed so as to require these colleges to have the identical course of study and other requirements prescribed by the association. The standard of scholarship required is that it shall be equal to the standard required by the association. It need not be the same course of study, nor the study of the same text-books, nor the attendance for the same length of time, but it must be such as requires of the student a degree of proficiency in the studies necessary to prepare him for practice equal to that which would ordinarily be produced by the requirements prescribed by the association. Whether or not the Association of American Medical Colleges is composed of those only which teach the allopathic branch of that profession, the court cannot say; but, admitting it to be so, it cannot say that there is in this provision of the law, thus understood, an arbitrary or unjust discrimination against other schools. Surely they would not claim the right to have their adherents admitted to practice the profession on a less degree of proficiency in the preparatory studies than is required of those in the regular school. It being proper for the legislature to demand some standard of efficiency, the court thinks it equally within its power to declare that it shall be the same as that prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession. It says that evidently the standard of proficiency in scholarship as a preparation, and the particular studies necessary to secure a fair preparation, must change as the discoveries in natural science open new fields of investigation, and suggest or reveal new curative agencies. The legislature cannot successfully prescribe in advance a standard to meet these new and changing conditions. Lastly, the court says that it was not necessary to consider whether or not the provision for reciprocity is constitutional. Conceding, but not deciding, that such provision is void, it did not affect the other provisions of the act under which the petitioner was held in custody on the charge of practicing medicine without a certificate from the state board of medical examiners.

VALIDITY OF PRACTICE ACT EXEMPTING THOSE IN PRACTICE AT TIME OF PASSAGE OF THE LAW

Ex parte Whitley, 144 Cal. 167; 77 Pac. 879

1904

The Supreme Court of California says, with reference to the constitutionality of a statute exempting from its requirements those practicing at the time of its passage, that in some instances the question arose under acts regulating the practice of medicine, and in others, as here, regulating the practice of dentistry; but the same reasoning would apply and the same constitutional principles govern as to the validity of provisions of a dental as of a medical act, because the profession of dentistry is but a special branch of the medical profession, and the power of the state to regulate both in the interests of the public is equally clear. Such legislation has been uniformly upheld. It is neither special nor class, and no privileges or immunities are conferred thereby on one class to the detriment of another. Nor does the court find any merit in the contention that the statute arbitrarily creates three classes of persons who may practice dentistry in the state after examination: 1, Graduates of reputable dental colleges; 2, graduates of high schools or similar institutions of learning requiring a three years' course of study, who have served an apprenticeship of four years with licensed practitioners within the state; 3, dentists from other states who have been licensed

practitioners for five years. The court says that it is entirely within the power of the legislature to fix any reasonable standard for determining the competency of an applicant for admission to the practice of dentistry. It might, as under the act regulating the practice of medicine and surgery in California, where only those who are graduates from a medical college can be admitted to practice, have also made a similar single standard, limiting admission to practice dentistry to those alone who had graduated from some dental college. As this might have been the sole condition on which an applicant could be examined, it cannot be said that legislation which enlarges the right and extends it to others is discriminatory. The law no doubt is discriminatory, but not in any constitutional sense. It does not discriminate between classes. The discrimination goes to the degree of learning and skill which all applicants for examination must possess. It is a discrimination which, in the interest of the public welfare, it is the duty of the legislature to make, and concerning the necessity for which, and its nature and extent—whether an examination and right to practice shall depend on the possession by the applicant of a diploma of a dental college only, or be extended to others and how far—depends primarily on the judgment of the legislature which, when reasonably exercised, the courts cannot control. The court says that the power to determine whether a college was reputable had to be lodged somewhere, and it was properly committed to the only body which could fairly and intelligently determine, not only the qualifications of the applicant, but on the reputation of the college whose diploma he claimed to possess—the state board of dental examiners.

REQUISITES TO LAW AUTHORIZING REVOCATION OF LICENSE

Hewitt v. Board of Medical Examiners, 148 Cal. 590; 84 Pac. 39; 113 Am. St. Rep. 315

1906

Legislation of the character embraced within the general scope of the act of 1901 for the regulation of the practice of medicine and surgery and for the appointment of a board of medical examiners in the matter of such regulation, in so far as it provides for the revocation of the certificate of a physician, is sustained on the ground that the legislature has authority under its general police power to provide all reasonable regulations that may be necessary affecting the public health, safety or morals, and with this object in view to provide for the dismissal from the medical profession of all persons whose principles, practices and character render them unfit to remain in it. As the duty of determining whether such professional or moral unfitness exists must necessarily be vested in somebody other than the legislature, it is usually committed by appropriate legislation to boards composed of men learned in their profession. Such power, however, to revoke the license of a practitioner when conferred on a board must be under provisions of law which are reasonable, must apply to matters of conduct on the part of the practitioner which affect the health, morals or safety of the community, and the acts or conduct which shall render him liable to the penalty of forfeiture of his right to practice his profession must be declared with such certainty and definiteness in the act that he may know exactly what they are. The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the constitution and laws of the state, one is entitled to be protected and secured. And so the court holds void the provision in the act of 1901 authorizing the board of medical examiners to revoke the certificate of a physician for "grossly improbable statements" in an advertisement of medical business. It says that the right which a person possesses under the constitution and laws to practice his profession as a physician and surgeon cannot be made to depend on a provision of a statute as vague, uncertain and indefinite as this one. If a physician's license is to be revoked for "grossly improbable statements"; if he is to be thereby deprived of his means of livelihood, of his right to practice a profession which it has taken him years of study and a large expenditure of money to qualify himself for, on the ground that he has made "grossly improbable statements" in advertising his medical business—it is requisite that the statute authorizing such revocation define what

shall constitute such statements so that the physician may know in advance the penalty he incurs in making them. It is an easy matter for the legislature to declare what statements in the advertisement of medical business shall be deemed "grossly improbable," and it must do so, and not leave it to a board of medical examiners after the publication is made to determine, in its judgment, whether the statements were or were not "grossly improbable," and according to its particular view of the matter revoke or refuse to revoke the license. The right to practice medicine cannot be made to depend on such a vague, uncertain and indefinite provision.

REQUIREMENTS OF MEDICAL PRACTICE ACT

Arwine v. Board of Medical Examiners of California, 151 Cal. 499; 91 Pac. 319

1907

Arwine sought to compel the board to give him a license. The Supreme Court held that the medical practice act required that, in order to procure a certificate to practice medicine and surgery in California, the plaintiff must produce before the board of medical examiners, in addition to satisfactory testimony of good moral character, a "diploma issued by some legally chartered medical school, the requirements of which medical school shall have been, at the time of granting such diploma, in no particular less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such a diploma, of a license from some legally constituted institution which grants medical and surgical licenses only on actual examination, or satisfactory evidence of having possessed such a license."

In the matter of credentials, the only documents alleged to have been produced to the board of medical examiners were, first, a diploma issued to the plaintiff from the medical department of the University of the South, Sewanee, Tenn., which was alleged to be a legally chartered medical school, the requirements of which at the time of granting the diploma were in no material particular less than those prescribed by the Association of American Medical Colleges for that year; and, second, certificates or licenses to practice medicine and surgery granted by the boards of examiners of the District of Columbia and the State of Indiana. As to the latter, it was not alleged, nor did it otherwise appear that either of such boards granted licenses "only on actual examination," or that the legal requirements of either of said boards were at the time it issued the certificate in no degree or particular less than those of California at the time when such certificates were presented for registration. So far as the record showed, these certificates were, therefore, insufficient under the requirements of the act, and could not authorize the granting of a license by the defendants.

Concerning the diploma, the court says that, while the allegations of the plaintiff indicated that the requirements of the school were in no particular less than those prescribed by the Association of American Medical Colleges for that year, that allegation was denied by the defendants in their answer. The issue of fact thus made was not determined by the District Court of Appeals; that court saying in its opinion that on the evidence before it that question of fact could not be determined. That opinion did not state any evidence which enabled the Supreme Court to determine that question, and no evidence was introduced before the Supreme Court on the issue. The burden is, of course, on the plaintiff in a proceeding of this character to prove such material allegations in behalf of his claim as are denied by the answer. The finding on this issue must, therefore, be against the plaintiff, and it followed, that, on the case before the Supreme Court, the diploma must be held insufficient under the requirements of the act.

It was suggested that that provision of the act, which makes the rule of guidance the standard set by the Association of American Medical Colleges, is void, because the effect thereof is to delegate to this association a power which, it was claimed, can be exercised only by the legislature itself. But the court holds to the contrary.

It was further urged that the act should be construed as rendering an applicant entitled to a certificate on his passing a satisfactory examination even though he fails to produce the required diploma or license; in other words, that

the act entitles him to a certificate either on the production of a proper diploma or license, or on passing a satisfactory examination. But clearly the act will bear no such construction. The language of the provision as to production of diploma or license is such as to necessarily make it applicable to every case, and no exception thereto is declared in any other part of the act. A diploma or license coming up to the requirements of the act is essential in every case to the right to a certificate, however well qualified the applicant may be in other respects.

Wherefore, the court is forced to the conclusion that, notwithstanding the long experience of the plaintiff as a practicing physician and surgeon, extending over a period of more than ten years, and notwithstanding that he may have successfully passed the examination as to his qualifications to practice, it must be here held that he failed to comply with the provisions of the act in the matter of producing a proper diploma or license, and, therefore, that he must fail in this proceeding, which was brought to compel the board of medical examiners to issue to him a certificate to practice medicine and surgery.

WHAT CONSTITUTES THE PRACTICE OF MEDICINE

Ex parte Greenall, 153 Cal. 767; 96 Pac. 804

1908

The Supreme Court of California construes the act of that state of March 14, 1907, with reference to what constitutes the "practice" of medicine, etc., under it. The act is entitled "An act for the regulation of the practice of medicine and surgery, osteopathy, and other systems or modes of treating the sick or afflicted, in the state of California, and for the appointment of a board of medical examiners in the matter of said regulation."

The court says that the 1907 act provides: "Any person who shall practice or attempt to practice or advertise or hold himself out as practicing medicine or surgery, osteopathy, or any other system or mode of treating the sick or afflicted, in this state, without having, at the time of so doing, a valid, unrevoked certificate, as provided in this act, shall be guilty of a misdemeanor." The act nowhere states, as did the act of 1901, which was limited to a regulation of the practice of "medicine and surgery," what is meant by the term "practice" as used therein.

The act of 1901, after providing that "any person practicing medicine or surgery" without a license should be deemed guilty of a misdemeanor, provided, in section 16: "The following persons shall be deemed as practicing medicine or surgery within the meaning of this act: 1. Those who profess to be, or hold themselves out as being, engaged as doctors, physicians or surgeons in the treatment of disease, injury or deformity of human beings. 2. Those who, for pecuniary or valuable consideration, shall prescribe medicine, magnetism or electricity in the treatment of disease, injury or deformity of human beings. 3. Those who, for pecuniary or valuable consideration, shall employ surgical or medical means or appliances for the treatment of disease, injury or deformity of human beings . . . 4. Those who, for a pecuniary or valuable consideration prescribe or use any drug or medicine, appliance or medical or surgical treatment, or perform any operation for the relief or cure of any bodily injury or disease." There was thus given by that act to the term "practicing medicine or surgery" a definite meaning, corresponding substantially with the popular understanding of the term. When we say that one is practicing medicine or surgery or osteopathy, we ordinarily mean that he is engaged in that line of work as a business, holding himself out as being so engaged, or for a consideration treating those who will accept his professional services, and we would not apply the term to one who incidentally and gratuitously suggests or puts into operation some method of treatment in the case of one who is "sick or afflicted."

The court is satisfied that the term "practice" in the act of 1907 should not be given any broader meaning than it had in the act of 1901. One who within this meaning "practices" medicine or surgery or osteopathy, or any other recognized mode of treatment of the sick, without a certificate, violates the provisions

of the act. It might be sufficient in the complaint to charge simply that one had practiced medicine, or osteopathy, or chiropractics, without such certificate. In such an allegation, the word "practice" would, in view of the accepted meaning it is given when used in such connection, reasonably bear no other construction than the one the court has described, and so construed would show an offense.

But the complaint in the case before the court contained no such allegation. The allegation was simply that the defendant did wilfully and unlawfully "treat the sick or afflicted" without having at the time a valid unrevoked certificate as required by the act, the words "by practicing the system or mode known as 'chiropractic,'" being simply descriptive of, the method by which he treated the sick. As thus used, the word "practicing" could not reasonably be given the meaning the court has described, but was synonymous with the word "using."

The court was informed in the briefs that the word "chiropractic" meant a treatment somewhat analogous to that of osteopathy, the removal of the cause of disease without the use of drugs or any other means except the adjustment of the vertebræ of the spine by manipulating them with the hand. If this was correct, the complaint in this case simply charged that the defendant used this method in "treating" the sick or afflicted, without having any certificate under the act, and the allegations of the complaint would be fully sustained by proof that he had incidentally and gratuitously attempted to administer aid to one who was sick or afflicted by the use of this method. It might as well be contended that a complaint simply charging that one treated a sick person by administering medicine, without having a certificate, would state a public offense under this act. To bring a person within the provisions of the act, it must appear that he practices, or attempts to practice, medicine, etc., as a business or calling, or advertises or holds himself out as so doing, and, as the court has said above, an allegation that one "practiced medicine" or surgery, etc., might show this.

MEDICAL PRACTICE ACT NOT INVALIDATED BY PROVISION AS TO PRAYER

Ex parte Bohannon, 14 Cal. App. 321; 111 Pac. 1039

1910

The Court of Appeal, First District, holds that the medical practice act of that state of 1907 is not rendered unconstitutional by the proviso that nothing therein shall be held to apply or to regulate any kind of treatment by prayer. It was contended that this exemption made the whole act unconstitutional and void, and that it gives to a certain class of persons, to-wit, those who treat physical ills by prayer, privileges and immunities, which "under like conditions are not granted to all citizens." But the court does not so construe the section. If prayer can be regarded as practicing medicine and as an immunity, the act, the court says, allows every person, man, woman or child, such immunity and the right to pray for the sick and afflicted, and that is the only way that disease can be treated by prayer. Whether such treatment avails anything or not is not for the court to say; but the privilege of practicing such treatment or such supplication is granted and allowed to all. The proviso or exception was evidently put into the act to prevent any interference with the right of any one to pray for the sick and afflicted.

MEDICAL PRACTICE ACT NOT IN CONFLICT WITH FEDERAL CONSTITUTION

Harding v. People, 10 Colo. 387; 15 Pac. 727

1887

The Supreme Court holds that an act entitled "An act to protect the public health and regulate the practice of medicine in the state of Colorado" was not in conflict with section 2, article IV, of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges

and immunities of citizens in the several states," or with that part of the fourteenth amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Nor did the statute violate the provision of the state constitution that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, it being clear that the act concerned but one subject of legislation, namely, the regulation of the practice of medicine within the state. It was true that the title expressed both the general and special character of the act, but the court sees no objection to that. It none the less clearly expressed the subject of the act.

Objection made to the regularity of the appointment and organization of the board need not be considered in this case, which is a prosecution for unlawfully practicing medicine. It was enough that the board was *de facto* the state board of medical examiners, acting under the provisions of the statute, and that its certificate would have protected the defendant from prosecution under the statute.

It was claimed that the act nowhere prohibited the practice of medicine without a certificate from the board of medical examiners. This objection applied alone to the letter of the law. The provisions of the act showed beyond any question that the clear intention of the legislature was to require all persons desiring to practice medicine or surgery within the state after its passage to apply for and receive a certificate of qualification from the state board of medical examiners before they were authorized to do so. This was the essential requirement of the statute, and all its provisions were substantially to that end.

Section 4 of the act declared that every person practicing medicine in any of its departments should possess the qualifications required by this act. Whether a person possesses the qualifications required could be determined only in one way, namely, in the mode prescribed by the statute, and could be proven only in one way, namely, by the evidence prescribed by the statute. The provisions respecting the mode of determining this fact, and the evidence of the determination were exclusive. The party wishing to practice must appear before the state board of medical examiners established by the act, must present the requisite diploma or stand the examination prescribed. If his diploma or his examination, as the case might be, was satisfactory to the board of examiners, they "shall issue their certificate in accordance with the fact," "and the holder of the certificate shall be entitled to all the rights and privileges mentioned in the act." Until he does this, he is without the requisite and only admissible evidence that he possesses the qualifications required by the act, so as to entitle him to practice medicine within the state, and cannot say that he has complied with the provisions of the act.

This is not a law which comes within the rule that penal laws are to be construed strictly. It was not necessary to allege any criminal intent. The rule is that, if the statute creating the offense is silent concerning the intent, there need be no intent alleged. The evidence showed that the accused was engaged in the practice of medicine by the administration or application of electricity as a curative agent, and without having first obtained a certificate from the state board of medical examiners as required by the act. If it was true that the board of examiners arbitrarily refused her application for a certificate to practice, her remedy was mandamus.

EQUAL REPRESENTATION ON STATE BOARD NOT NECESSARY

Brown v. People, 11 Colo. 109; 17 Pac. 104

1888

The plaintiff was found guilty and fined $50 on an information preferred against him for practicing medicine within the state, without having received from the state board of medical examiners a certificate authorizing him to practice. The questions presented by the record and discussed by counsel are, in the main, identical with the questions raised and decided in the case of *Harding* v. *People* (*vide supra*). The court considers two objections, going to the constitutionality of the statute under which the plaintiff was convicted.

1. There is nothing in the constitution which requires that each school of medicine named in the act should be represented by equal numbers on the state board of medical examiners. The framers of the constitution did not attempt the establishment of a government that should be administered absolutely free from prejudice. In this respect the restraint of an official oath is the chief safeguard prescribed.

2. A point is made that section 2 of the act is unconstitutional, in that it provides for the appointment of the state board of medical examiners by the governor, whereas, under the provisions of section 6, article 4, constitution, it is contended the governor should nominate, and by and with the consent of the senate appoint. This constitutional provision does not apply to offices created by statute to be filled as therein otherwise provided. Independently of this, the office being *de jure*, one appointed to it is *de facto* an officer, notwithstanding the mode of appointment may be unconstitutional. Judgment affirmed.

CAN COLLECT BILL WITHOUT RECORDING CERTIFICATE

Riley v. Collins, 16 Colo. App. 280; 64 Pac. 1052

1901

Section 2624 of the General Statutes of Colorado reads: "Every person holding a certificate from the state board of medical examiners should have it recorded in the office of the clerk of the county in which he resides, and the record shall be endorsed thereon. Any person removing to another county to practice, shall procure an endorsement to that effect on the certificate from the county clerk, and shall record the certificate in like manner in the county to which he removes; and the holder of a certificate shall pay to the county clerk a fee of $1 for making the record." It will be observed that the section, if mandatory at all, the Court of Appeals of Colorado says, is such only to the extent of requiring a record in the county where the physician resides. Then, even conceding that the certificate must be recorded there before services are rendered in order to entitle a physician to recover for same, the court points out that a want of compliance with this requirement would not appear simply from the fact that the certificate was not recorded in the county in which the services were rendered. It must further appear that the physician resided in that county; and this would be a matter of defense, properly to be established by the party sued, if it could avail at all. The most strained construction of the statute would nowhere indicate an intent on the part of the legislature to require a physician, if called into a county other than that of his regular residence, first to file in such county, and have recorded his certificate or license, before he would be authorized to attend a patient, or be permitted to recover for his services rendered. Such a construction, the court declares, would be absurd. Nor does it believe that the statute will bear being construed to make the recording of the certificate in the county of residence a condition to maintaining an action for services. The recording of the certificate is probably a reasonable requirement, so that the public might have an opportunity of ascertaining from an examination of the public records who were licensed to practice, and could also see whether the certificate was issued upon a diploma of a college—and, if so, of what college—or upon examination, or by reason of practice for a term of years. But, in the absence of a provision that this must be done before the holder of the certificate could practice, or could recover for services rendered, the court feels that it would be an unwarranted construction to so hold. The party who employs a physician is not wronged nor imposed upon by the failure to file if the physician holds the required certificate of qualifications. The authorities cited in support of a contrary view were based, so far as the court can ascertain from the opinions in the cases, upon statutes essentially different from that here under consideration, of which another section (2628) plainly says that the issuance of the certificate by the state board "shall be conclusive as to the rights of the lawful holder of the same to practice medicine in this state."

LIMITING PRIVILEGE TO PHYSICIANS OF STATE

Head Camp, Pacific Jurisdiction, Woodmen of the World v. Loeher, 17 Colo. App. 247; 68 Pac. 136

1902

Section 3649 of the General Statutes of Colorado provides: "A physician or surgeon duly authorized to practice his profession under the laws of this state, shall not without the consent of his patient be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." The question was raised as to the effect to be given the words, "duly authorized to practice his profession under the laws of this state." It was urged that the words should not be construed in the sense of limiting or restricting the class to which the statutory privilege applied, but rather in accord with what it was contended was the policy and intent of the enactment as expressed in the preamble, which recites that "there are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate," etc. In other words, it was insisted that the words in question should be entirely eliminated from the statute, thereby making it apply to all physicians, authorized or unauthorized to practice, licensed or unlicensed. But the Court of Appeals of Colorado does not see how, under any authority or rule of construction, a court would be permitted to pursue that course in this case, where it was conceded that the witness, a physician resident in New Jersey, was not authorized to practice his profession under the laws of Colorado. It says that the provisions of the statute as it now reads are clear, intelligible, and easily understood, cannot be said to be in any sense unreasonable or absurd, are subversive of no legal private rights, and are not inconsistent with themselves or with any other law. Under such circumstances, however fully the court might agree with counsel that they should be extended and broadened, the courts are without power in that regard. The remedy is with the legislature alone. That no state has a similar law—one containing the restrictive words under consideration—the court says, is not an argument that they were improvidently used, and that the courts of Colorado should disregard them. Rather, if the fact has any bearing upon the question at all, it would tend to support the contention that they were inserted advisedly, and for a specific purpose. The statute was enacted in 1883. This was the legislative session immediately succeeding the one (1881) in which the legislature first adopted the law providing regulations for the practice of medicine in Colorado, and prohibiting it without a party having been first authorized under its provisions. It may well be that the legislature placed these words in the later statute with the deliberate purpose of carrying out and aiding the policy which it had adopted in the prior one. Wherefore the court holds that the physician referred to was not rendered incompetent to testify as a witness because of this statute.

BOARD NOT LIABLE FOR DAMAGES FOR PROSECUTION

Van Meter v. Bass, 40 Colo. 78; 90 Pac. 637

1907

Bass sued Van Meter and others, constituting the state board of medical examiners, for alleged malicious prosecution for practicing medicine without a license, under the law of 1881, he being an osteopath, and having been held not guilty of violating the statute of 1881. The Supreme Court says that Dr. Van Meter, who was secretary of the board, and was instructed by it to consult with the district attorney and ascertain if those practicing osteopathy were violating the statute, and if so, to file informations against them, not only consulted with the district attorney and his deputies, but with several other able and conscientious counsel. He read the reports of decided cases from other states, and presented the matter fully and thoroughly to the public prosecutor. The public prosecutor advised the commencement of the action. The case against Bass failed, not because of the lack of testimony, not because it was shown that the statements made to the district attorney were untrue, not because of any mistake as to the facts, but because the trial court differed with the district attorney

in the interpretation of the statute. Afer having taken the advice that he did take, the secretary of the board was justified in instituting the prosecution, and the board could not be held responsible to Bass for damages because the district attorney and the trial court disagreed as to the law. Inasmuch as the statute involved was amended by the legislature in 1905, the Supreme Court does not see that a construction of the old law by it would serve any useful purpose.

ILLEGAL PRACTICE OF MEDICINE FOR TEN YEARS DOES NOT ENTITLE TO LICENSE

Higgins v. State Board of Medical Examiners, 46 Colo. 476; 104 Pac. 943

1909

The plaintiff, not a graduate in medicine, having applied to the board for a license to practice medicine and surgery without examination, and the board having denied his application, brought this action to compel the board, by mandamus, to issue the license. He claimed that, as he had made the practice of medicine and surgery his profession continuously for a period of more than ten years prior to Feb. 2, 1905, the date of his application, he was entitled to a license under section 4 of the law of 1881, the concluding sentence of which reads: "All persons who have made the practice of medicine and surgery their profession or business continuously, for the period of ten (10) years, within this state, and can furnish satisfactory evidence thereof to the state board of medical examiners, shall receive from said board a license to continue practice in the state of Colorado."

The plaintiff insisted that the practicing of medicine and surgery for any continuous period of ten years, whether before or after the passage of the statute mentioned, although in defiance of law, entitled him to a license. The board, on the other hand, contended that no person is entitled to a license from it unless: (1) He proves that he is a graduate of a legally chartered medical school of good standing. (2) He passes a satisfactory examination. (3) He proves that he has made the practice of medicine and surgery his profession or business continuously for the period of ten years prior to the passage of the act.

Section 12 of the act provides that the person who practices medicine in the state of Colorado without a license from the board of medical examiners shall, on conviction, be punished by fine or imprisonment, or both; and to adopt the plaintiff's construction would be to reward, not punish, those who elude prosecution for the period of ten years. The law should not be so construed, and the court holds that the contention of the board is correct, and that those only who have practiced for ten years prior to the passage of the law of 1881 are exempted from the provisions of the statute requiring examination and proof of graduation. In the case of *State* v. *Wilson*, 62 Kans. 621; 64 Pac. 23, that court said: "Can it be that the legislature intended that a person might qualify himself for the practice by that which the act prohibited? Is the direct and persistent violation of the law to be deemed the equivalent of character, education, experience, and skill which the statute requires for the protection of life and health?" These identical questions are presented to this court, and it does not hesitate to answer them in the negative. A judgment of nonsuit is affirmed.

PRETENDING TO CURE SICKNESS BY REMOVING EVIL SPIRITS

State v. Durham, (Dela.) 5 Pennewill 105; 58 Atl. 1024

1904

The Court of General Sessions says that it was claimed on the part of the state that the defendant pretended that a certain Rachel A. Fitzgerald was possessed of an evil spirit, that her sickness was caused by the presence of this evil

spirit, and that he alone possessed the power to remove the same, and to heal her disease or cure her of her sickness. The indictment was founded on a statute of that state against pretending to exercise the art of witchcraft, conjuration, fortune-telling, or dealing with spirits, which statute, the court says, is founded in wisdom. The purpose of that statute manifestly is to protect people in certain grades of life from being imposed on by persons pretending to possess a power that they do not have. It is a matter of common experience that persons afflicted with disease rely ofttimes on, or give credit to, persons who claim to be possessed of supernatural powers. Those who are oftenest subject to that imposition are particularly people who are weak, and who are in great stress of sickness; and this law was designed to protect just such people from imposters, if any such there be, who may go around and make pretense of healing or curing through the exercise of supernatural power, which the intelligence and enlightenment of this day utterly denounce and discredit. If the jury believed from the testimony in this case that the defendant did make pretense that he alone had the power to remove these evil spirits and cure Rachel A. Fitzgerald of her sickness by reason of his influence over these spirits, its verdict should be "guilty." If the defendant was guilty, he ought not to be turned loose. The verdict returned was "guilty."

WHAT CONSTITUTES "PRESCRIBING REMEDIES," AND THE PRACTICE OF MEDICINE?

State v. Lawson (Dela.) 6 Pennewill 395; 65 Atl. 593

1908

The chief justice of the Court of General Sessions, in charging the jury, said that the defendant was charged with practicing medicine without a license which, under the statutes of Delaware, is a misdemeanor. The persons classed by the statute as physicians are as follows: "Every person (except apothecaries) whose business it is for fee and reward to prescribe remedies or perform surgical operations for the cure of any bodily disease or ailing shall be deemed a physician or dentist, as the case may be, within the meaning of this act." The defendant did not contend that he had a license to practice medicine, but relied on the defense that he treated his patients personally by hypnotism and massage, without prescribing any remedies, and that such treatment was not in violation of the statute.

The jury's inquiry then was: "Did the defendant for fee or reward 'prescribe remedies' or perform surgical operations for the cure of any bodily disease or ailing?" The court instructed the jury that to "prescribe remedies" is "to write or to give medical directions; to indicate remedies." It is not necessary that such prescription should be in writing. It may be given or indicated verbally. Any directions given to the patient for drugs, medicines or other remedies for the cure of bodily diseases, directing how they are to be applied to or used by the patient, is prescribing remedies within the meaning of the statute. It would make no difference whether the direction was given by the defendant himself or by another person, even though such other person be a licensed physician, but engaged by and acting under the control and direction of the defendant in that particular in the conduct of his business.

If the testimony showed that the defendant gave directions to or indicated to any of his patients that they use powders, plasters, baths of alcohol, whiskey or mud, or other remedies of any kind, such direction or indication by him would be prescribing remedies, and make him liable under this statute. If the defendant was guilty of the crime charged in the indictment, it was the jury's duty to convict him. The laws of the state are designed to protect the community, and especially that portion of it which by reason of sickness and disease is peculiarly subject to imposition.

WHAT CONSTITUTES PRACTICING MEDICINE

Springer v. The District of Columbia, 23 App. D. C. 59

1904

The Court of Appeals of the District of Columbia, affirming a conviction of practicing medicine and publicly professing to do so without first having obtained a license so to do in the manner required by law, says that the statute not declaring what specific acts shall constitute "practicing medicine" or what it is to "publicly profess to do so," it is for the courts to determine whether the facts proved in a particular case bring it within the terms of the statute, taking these in the sense in which they are commonly understood. Here it appeared from the evidence that the party proclaimed himself an expert in the treatment of alcoholism, and had several patients. He furnished the remedies and employed licensed physicians to take immediate charge. These gave his remedies, and the only discretion exercised by them was in respect of the frequency of the doses, and of any complication that might ensue. In other words, professing knowledge of the science of medicine, he obtained patients, diagnosed their cases, decided that they were suffering from a malady for which he had discovered or compounded a remedy, prescribed and furnished that remedy, and employed other physicians to take immediate charge of the patients and administer the same. Selling his compound to such persons as he might examine and pronounce fit subjects of medical treatment was "practicing medicine" as much as if he had given them, instead, an ordinary prescription that could be satisfied in any regular drug store. The fact that he registered at a hotel as "Dr." would not be sufficient proof of a violation of the statute, but it was admissible to show, in connection with other evidence, that he held himself out as a practitioner.

COMPLAINT MUST SPECIFY "UNPROFESSIONAL" ACTS

Czarra v. Board of Medical Supervisors of the District of Columbia, 24 App. D. C. 251; 32 Wash. L. R. 744

1904

This is an appeal from the decision of the Board of Medical Supervisors of the District of Columbia revoking the license of Czarra, on account of alleged unprofessional and dishonorable conduct.

The authority of said board to revoke the licenses of physicians is derived from section 10 of an act of Congress of June 3, 1896 (29 Stat. L. 198), entitled "An act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof, in the District of Columbia." Said act authorizes the revocation of licenses for any of the following causes:

"The employment of fraud or deception in passing the examinations provided for in this act, chronic inebriety, the practice of criminal abortion, conviction of crime involving moral turpitude, or of unprofessional or dishonorable conduct."

It is also provided, in section 10 of said act, as follows: "In complaints under this section the accused shall be furnished with a copy of the complaint and given a hearing before said board, in person or by attorney, and witnesses may be heard for and on behalf of the accused, and for and on behalf of the said board. Appeal from the decision of said board may be taken to the Court of Appeals of the District of Columbia, and the decision of said court shall be final."

On the 6th day of January, 1904, a complaint was presented before the board against the appellant, Czarra, and a copy was served upon the appellant Czarra, with notice of the time and place of hearing to be had thereon. At the hearing before the board Czarra denied the legal power and authority of the board to determine whether he was guilty of the offense of distributing an obscene circular or other lewd or immoral publication in the District of Columbia, the law having

vested such jurisdiction in the police court of the district, and the board having no power to revoke his license as a physician until he shall have been duly tried and convicted of such offense. The proceeding was further objected to on the ground that the complaint filed against him was insufficient, because there is no identification of the corpus delicti . . . there is no specification . . . nothing to which this party can plead. . . . It does not designate a circular, book, or pamphlet. . . . There is no means of identification by which he may be informed of the nature and cause of his offense."

These objections were overruled by the board, and the trial proceeded with, resulting in a revocation of appellant's license. The appellant asks for a reversal of the board's action, claiming that the board of medical supervisors were without authority to pass the resolution revoking the license of the appellant, because so much of the act of Congress of June 3, 1896, as purports to confer upon said board authority to revoke the license of a licentiate for "unprofessional or dishonorable conduct" is unconstitutional and void for uncertainty; that the complaint filed against the appellant does not state facts sufficient to cause him to answer, and that the evidence adduced at the hearing was not sufficient to warrant the board in revoking his license.

The court disregards the first and third objections, but holds that a careful reading of the complaint filed against the appellant fails to disclose that he is anywhere charged with anything for which he could be held to answer under any possible interpretation of the act in question. The complaint simply charges: (1) That the appellant was "arrested and charged in the police court of the District of Columbia with distributing obscene literature." (2) That "when the case against him was called in the said court he forfeited the collateral of $50, which he had put up for his appearance." (3) That the appellant, in conversation with the complainant (Proctor), admitted "that he had distributed the circular for which he was arrested and forfeited collateral." (4) "All of which is conduct of an unprofessional and dishonorable character."

The language of this complaint may be searched in vain to find any charge of unprofessional or dishonorable conduct against the appellant, unless it could be said that by being charged in the police court with distributing obscene literature, depositing collateral, and thereafter forfeiting such collateral, the appellant was guilty of unprofessional or dishonorable conduct. It is not even charged that the circular which is alleged to have been distributed was distributed within the District of Columbia, nor that the appellant ever distributed it at all. He is simply charged with having made the admission that he had distributed the circular referred to; and surely such admission does not constitute "unprofessional or dishonorable conduct" within the meaning of the statute. The alleged distribution should have been charged as a fact, if such was relied upon as the ground of complaint, and not the mere admission of such distribution. It is not conceivable that any man can be held to answer a charge so grave in its character and so far-reaching in its influence upon his standing and reputation as a physician, and yet so vague and indefinite as this.

The court bases its opinion in this case on the insufficiency of the complaint filed against the appellant, but notes that this was not the principal question that was dwelt upon in argument, which was devoted to the question of the alleged invalidity of the statute for the violation of which the appellant was tried. Without expressing any opinion on this point, the court calls the attention of the authorities to the fact that grave doubt is entertained as to the power of Congress to delegate to the board of medical supervisors or to any other similar body the authority to determine what shall constitute "unprofessional or dishonorable conduct" in a medical practitioner so far as to render such a practioner guilty of a criminal offense if he attempts to continue in the practice of his profession after having been adjudged guilty of such conduct by a board of medical supervisors. Certainly it would seem more appropriate that Congress itself in its enactments should specifically define what shall constitute "unprofessional or dishonorable conduct" for the purpose of this legislation than leave so vital a subject to the possible caprice of any board of supervisors. Reversed.

TERM "UNPROFESSIONAL OR DISHONORABLE CONDUCT" TOO INDEFINITE

Czarra v. Board of Medical Supervisors of the District of Columbia, 25 App. D. C. 443; 33 Wash. Law Rep. 470

1905

The appellant was first brought before the board of medical supervisors in January, 1904, and his license ordered revoked upon a complaint made of unprofessional and dishonorable conduct in the distribution of obscene literature, consisting of a pamphlet purporting to relate to the cause, prevention and cure, among other things, of venereal and secret diseases, and of certain filthy and indecent habits and practices. Upon appeal the order was reversed because of the insufficiency of the complaint. On January 11, 1905, another complaint was made against Czarra, charging him with unprofessional and dishonorable conduct, in distributing a pamphlet, containing obscene language, a copy of which was attached as part of the complaint and was identical with that referred to in the former complaint.

Due notice was given to the party, and he appeared by counsel before the board. Czarra stated that the act of Congress in so far as it purports to convey authority to revoke his license for alleged unprofessional or dishonorable conduct is void for uncertainty; that the board had not prior to the commission of the alleged offense established any rules defining unprofessional or dishonorable conduct, and any such made since are *ex post facto*; and that he had been once tried and convicted of the same offense.

The court holds that the last two grounds of the plea to the jurisdiction are without merit. No question of an *ex post facto* law can arise because the conviction was had upon the law previously enacted by Congress and not upon any regulations of the board of medical supervisors made thereunder. Nor is there any case of former jeopardy. Without regard to the question whether the proceeding is criminal, it is sufficient to say that there has been no final judgment of conviction or acquittal. The former decision was reversed because of the insufficiency of the complaint, and a new trial was the necessary consequence. The defect in the complaint being fatal, there was nothing to prevent the filing of a new and effective one.

That Congress had the power to regulate the practice of medicine and surgery in the District of Columbia, and to prescribe the reasonable qualifications required by this act, as well as to create a special tribunal and invest it with the power to revoke the licenses of practitioners for sufficient cause, there can be no doubt. Nor can there be any reasonable doubt that sufficient cause exists in the employment of fraud or deception in passing the examinations required, in chronic inebriety, the practice of criminal abortion, or in case of conviction of crime involving moral turpitude, as declared in the act.

The only question to be determined is whether, independently of the causes mentioned, "unprofessional or dishonorable conduct," as declared in the act, are sufficiently specific and certain to warrant a conviction thereof, and the exercise of the power of revocation by the board of medical supervisors.

In all criminal prosecutions the right of the accused to be informed of the nature and cause of the accusation against him is preserved by the sixth amendment. In order that he may be so informed by the indictment or information presented against him, the first and fundamental requisite is that the crime or offense with which he stands charged shall be defined with reasonable precision. He must be informed by the law as well as by the complaint what acts or conduct are prohibited and made punishable.

In the exercise of its power to regulate the conduct of the citizen, within the constitutional limitations, and to declare what shall constitute a crime or punishable offense, the legislature must inform him with reasonable precision what acts are intended to be prohibited. "Every man should be able to know with certainty when he is committing a crime." *U. S.* v. *Reese*, 92 U. S. 214, 220.

This obvious duty must be performed by the legislature itself, and cannot be delegated to the judiciary. It may, doubtless, be accomplished by the use of words or terms of settled meaning, or which indicate offenses well known to and defined by the common law. Reasonable certainty, in view of the conditions, is

all that is required, and liberal effect is always to be given to the legislative intent when possible. But when the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite as that it may embrace within its comprehension not only acts commonly recognized as reprehensible, but others also which it is unreasonable to presume were intended to be made criminal, the courts, possessing no arbitrary discretion to discriminate between those which were and those which were not intended to be made unlawful, can do nothing else than declare the statute void for its uncertainty. *U. S.* v. *Reese*, 92 U. S. 214, 221. As was said in that case: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." The general principle was applied in the following cases: *Stoutenburgh* v. *Frazier*, 16 App. D. C. 229, 234; 28 Wash. Law Rep. 256. In that case a party convicted in the police court under an act of Congress authorizing the punishment of "all suspicious persons," was discharged on a writ of habeas corpus.

State v. *Gaster*, 44 La. Ann. 636, 638. The statute declared void in that case provided: "If any judge, justice of the peace, sheriff, or any other civil officer shall be guilty of any misdemeanor in the execution of either of their respective offices, he shall on conviction suffer fine," etc.

Ex parte Jackson, 45 Ark. 158, 164. The statute annulled in that case made it a misdemeanor "to commit any act injurious to the public health, or public morals, or in the perversion or obstruction of public justice or the due administration of the law."

In *Augustine* v. *State*, 41 Tex. Cr. App. 59, 76, "mob violence" was held to be uncertain and to leave too much to the discretion of the court. See also, *Jones* v. *State*, 100 Ala. 32, 34; *State* v. *Partlow*, 91 N. C. 550, 553; *State* v. *Mann*, 2 Or. 238; *L. & N. R. R.* v. *Commonwealth*, 99 Ky. 132.

"Unprofessional or dishonorable conduct," for which the statute authorizes the revocation of a license that has been regularly obtained, is not defined by the common law, and the words have no common or generally accepted signification. What conduct may be of either kind remains, as before, a mere matter of opinion. In the absence of some specification of acts by the law-making power, which is alone authorized to establish the standard of honor to be observed by persons who are permitted to practice the profession of medicine, it must, in respect of some acts at least, remain a varying one, shifting with the opinions that may prevail from time to time in the several tribunals that may be called upon to interpret and enforce the law.

As has been said by the Supreme Court of the United States in a case involving the same principle, the question must be reduced to one of fact as contradistinguished from mere opinion. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 106. In that case an injunction was granted restraining a postmaster from refusing to deliver mail to the appellant, under an order of the postmaster-general authorizing him so to do, founded on section 3929 R. S., which authorizes the postmaster-general to withhold from the addressee and return to the senders all letters induced by any scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, etc. The appellant was a chartered institution, engaged, as it alleged, not only in treating people afflicted with ills, but also in the business of teaching and educating others in the practical science of healing. Its system was alleged to be "founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting, and remedying thereof. And that the human race does possess the innate power, through proper exercise of the brain and mind, to largely control and remedy the ills that humanity is heir to, and complainants discard and eliminate from their treatment what is commonly known as Divine healing and Christian Science, and are confined to practical scientific treatment emanating from the source aforesaid."

After discussing the prevalent differences of opinion with respect to opposing systems of ordinary medical treatment, Mr. Justice Peckham, speaking for the majority of the court, said: "Other instances might be adduced to illustrate the

proposition that these statutes were not intended to cover any case of what the postmaster-general might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis. It may, perhaps, be urged that the instances above cited do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and, although we may think the opinions may be better founded and based upon a more intelligent and a larger experience in some cases than in others, yet after all it is in each case opinion only and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood and as, in our opinion, it is used in these statutes."

If a licensed practitioner of the District of Columbia were to engage in a similar practice and advertise a similar treatment, there can be little doubt of the opinion in respect of his conduct that would be entertained by the adherents of the several reputable systems of medical practice recognized by the act of Congress; and it is quite probable that the board of medical supervisors would agree with the postmaster-general that it amounted to a case of false pretenses, and would therefore regard the act as constituting both unprofessional and dishonorable conduct within the meaning of the act under consideration.

Doubtless all intelligent and fair-minded persons would agree in the opinion of the board of medical supervisors that the act charged against the appellant, in the case at bar, amounted to conduct both unprofessional and dishonorable. But this is not the test of the validity of the particular clause of the statute. The underlying question involved in all cases that may arise is whether the courts can uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts.

As this is not strictly a case of prosecution for crime, it is contended that the doctrine above announced has no application, but that the appellant's case must be governed by the more liberal rule which applies in the enforcement of statutes generally regulating admission to practice under licenses. We concur in the view that statutes requiring proof of general qualifications, such as good moral character and the like, before one can be granted a license to practice medicine, stand upon a different ground from those creating offenses and providing penalties therefore upon conviction. Such statutes in general are undoubtedly valid and enforcible. The police power of every state warrants the requirement of the possession of all reasonable qualifications by those who seek to engage in the public practice of medicine, and, incidentally, the extension of a wide discretion to those agencies charged with the duty of inquiry and determination. But we do not agree that the exercise of the same wide discretion can be extended to a case where, when one has been regularly admitted, the deprivation or forfeiture of his license is sought under another or an independent provision of the same statute. The right to practice the profession, once regularly obtained by compliance with the law, becomes a valuable privilege or right in the nature of property, and is safeguarded by the principles that apply in the protection of property lawfully acquired. And these are of the same general nature, though not in all particulars, as those which safeguard him when prosecuted for the commission of a minor offense. This conclusion has the support of the following well-considered cases: *Ex parte McNulty*, 77 Cal. 164, 170; *Matthews* v. *Murphy*, 63 S. W. Rep. 785 (Ky. 1901). And in the *American School of Medicine* v. *McAnnulty, supra*, the Supreme Court made no distinction between a civil proceeding relating to the forfeiture of a privilege in the nature of property and a criminal prosecution founded on the same acts.

Moreover, while not itself a criminal prosecution, the proceeding to revoke the license is, nevertheless, a preliminary step thereto. The statute provides a penalty for practicing medicine after the revocation of a license, and in a prosecution therefore the order of revocation must necessarily be held to be conclusive evidence of the fact.

In several cases relied on by the appellee, state statutes have been upheld which authorize the revocation of licenses for "gross immorality," "unprofessional, dishonorable, or immoral conduct," and the like. *Mcffert* v. *State Board of Med. Registration*, 72 Pac. Rep. 247 (Kansas, 1903); *State* v. *Board, etc.*, 34 Minn. 387; *State Board, etc.* v. *Ray*, 22 R. I. 538; *People* v. *McCoy*, 125 Ill. 289; *State* v. *Kellogg*, 14 Mont. 426. In no one of these cases, however, was the question under consideration here raised, discussed, or decided. The question discussed in each, and upon which the decisions apparently turned, was the power of the state to enact regulations of the kind as the conditions of admission to practice medicine. Of this, as heretofore observed, there can be no doubt.

The case of *State* v. *Kellogg, supra*, is peculiar, and, in our opinion, well illustrates the soundness of the view that the statute itself should indicate the facts which constitute unprofessional or dishonorable conduct, and not leave them to be ascertained and settled by either medical boards or the courts. The license had been revoked in that case by the board of medical supervisors, upon proof that the appellant had been seen to deposit in a furnace and destroy a headless fetus, and when questioned had refused to make any statement, or to explain his conduct. Two of the district courts, in succession, held, with the trial board, that his conduct was unprofessional and dishonorable. On final appeal one member of the court concurred with the inferior tribunals, but the majority, being of a contrary opinion in respect of the necessary conclusion to be deduced from the facts, reversed the order revoking the license.

For the reasons heretofore given we are of the opinion that the order appealed from must be reversed with costs, and the cause remanded with directions to dismiss the complaint. It is so ordered. Reversed.

RECIPROCITY PROVISION IN MEDICAL PRACTICE ACT—POWERS OF BOARD AND THEIR LIMITATION

United States ex rel. Thompson v. Custis et al., 35 App. D. C. 247; 38 Wash. Law Rep. 396

1910

This case was brought to compel the defendant, the Board of Medical Supervisors of the District of Columbia, to grant the relator a license to practice medicine and surgery in the District of Columbia.

The statute regulating the practice of medicine and surgery in the District of Columbia authorizes and directs said board to license to practice medicine and surgery in the District, without examination, any applicant for such license who has been engaged in the practice of medicine and surgery in any other jurisdiction (state, etc.), on condition, among other things, that the applicant acquired the right to practice medicine and surgery in such jurisdiction under conditions equivalent to those with which he would have had to comply in order then to have practiced medicine and surgery in the District. "And said board of medical supervisors is further authorized to determine all matters of fact required to be determined in the execution of the provisions of this section."

It was conceded that the material provisions of the Maryland statutes were the same as those of the District of Columbia; that the relator was regularly admitted to practice medicine and surgery in Maryland, and practiced thereafter for a period of two years; that he presented satisfactory evidence of good character, paid the fees required and complied with all the requirements of the statute. The board, however, claimed the power, by rules and regulations, to determine what should constitute "conditions equivalent" under the statute, before reciprocal relations between Maryland and the District of Columbia could be said to exist. But the court thinks equivalent conditions exist under this statute by virtue of the provisions of the law, and not under the rules of the board.

The rules which the board are authorized to make are, the court says, for its guidance in carrying into effect the provisions of the law in the District of Columbia, and not in the State of Maryland. The Maryland board may have an entirely different set of rules for carrying into effect substantially the same statute as that of the District of Columbia; but that is a mere matter of local procedure, which cannot affect the reciprocal rights of practitioners of one jurisdiction to practice in another, provided they meet the requirements of the board in the state where originally admitted and the provisions of the statute in the jurisdiction where they desire to practice. If the contention of the board be correct, it lies within its power to prescribe conditions of admission to the boards of all states and territories in order to entitle any of their licentiates to practice in the District of Columbia, thereby absolutely annulling the express provisions of the statute. It is against public policy to place such arbitrary power anywhere, much less in a mere medical board.

The object of this statute was to open the doors to reputable practitioners, and, to this end, give full faith and credit to the acts of the board of a neighboring state having equivalent conditions, until it is clearly shown that the applicant does not come up to the requirements of the statute as to two years' practice or good moral character, or that he wrongfully obtained his original license to practice, either through his own fraud or through the fraud of the board. These are matters which the board would have authority to investigate, matters of fact on which they could pass, and their decision would not be subject to review in a proceeding of this kind. But no such showing was here made. The whole action of the board was based on the fact that they had a different system of grading for admission to practice than that adopted by the Maryland board. About the most inequitable test of ability that can be applied is the comparison of examination grades derived from either the same or different sources. It would certainly be dangerous to make arbitrary power dependent on such a deceptive test. It is well settled that licensing boards are not vested with personal or arbitrary power, but are subject to the control of the courts when it appears that they have acted arbitrarily in refusing a license. This power is inherent in the court, and no statutory authority is necessary for its exercise.

If a board or officer deprives a citizen of a legal right, to which he is clearly entitled, and the citizen has no right of appeal or other adequate remedy, the proper court will review the action and see that justice is done and legal rights preserved. The rule is well expressed in Spelling on Injunctions and Other Extraordinary Remedies, 2d Ed., sec. 1433: "But, while the action of an officer clothed with a discretion is not reviewable, if exercised on matters left to his discretion, yet his judgment as to the extent of his discretion under the law, and the matters on which it may be exercised, are reviewable on mandamus; and where a discretion is abused, and made to work injustice, it may be controlled by mandamus."

The answer of the board totally failed to set forth any legal justification for its refusal to grant the relator a license. The rules and regulations of the board were its sole defense. As the court has observed, this was insufficient. The relator had complied with all the requirements of the law and the board had no discretion left in the premises. It was its duty to have acted favorably on the application. Refusing to do so, the relator availed himself of the only remedy afforded him, and the court below should have sustained the relator's demurrer to the board's answer to his petition and issued the writ of mandamus he asked for to compel the board to grant him a license to practice medicine and surgery in the District of Columbia.

INDICTMENT WHERE PRACTICING MEDICINE IS DEFINED

Blalock v. State, 112 Ga. 338; 37 S. E. 361

1900

Section 1477 of the Political Code of Georgia defines what persons shall practice medicine in that state. Section 1478 declares: "For the purpose of this chapter, the words 'practice medicine' shall mean, to suggest, recommend, prescribe or direct, for the use of any person, any drug, medicine, appliance, appar-

atus, or other agency, whether material or not material for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or other bodily injury or deformity, after having received or with the intent of receiving therefore, either directly or indirectly, any bonus, gift or compensation." The indictment charged the accused with the offense of a misdemeanor, "for that the said O. C. Blalock, on the 24th day of August, in the year 1900, in the county aforesaid, did then and there unlawfully and with force and arms practice medicine, without then and there being authorized to do so either by diploma from an incorporated medical college, medical school, or university, nor after having attended one or more full terms at a regularly chartered medical college, having been in the active practice of medicine since the year 1866, nor being then and there authorized to practice medicine in 1866, nor having been then and there licensed by the medical board; contrary to the laws of said state," etc. Now, this indictment the Supreme Court of Georgia holds, not only substantially complied with the provisions of sections 485 and 486 of the Penal Code of Georgia, on which it was based, but was not defective in not alleging that the accused did illegally practice medicine with the intent of receiving, or after having received, directly or indirectly, any gift, bonus, or compensation for his services in prescribing, suggesting, or recommending any drug, medicine, appliance, apparatus, or other agency for the cure of disease. It says that this indictment charged the accused with unlawfully practicing medicine. What "practicing medicine" means is defined by section 1478 above quoted. Every person is supposed to know the law. Therefore, the accused was presumed to have known what was meant by the term "practice medicine" under the state code. In other words, the court holds that since, by statutory definition, the words "practice of medicine" embrace the idea of exacting compensation, an indictment charging that the accused did unlawfully "practice medicine," and expressly negativing his having any of the qualifications essential to the lawful practice of medicine set forth in section 1477 of the Political Code, is good in substance, and will support a conviction, although there be no allegation that the accused received or intended to receive compensation.

EVIDENCE OF RIGHT TO PRACTICE

Trentham v. Waldrop, 119 Ga. 152; 45 S. E. 988

1903

Where a physician brings an action against a patient to recover for professional services, and alleges that he is a duly licensed, practicing physician, and this allegation is denied by the party sued, a certificate of the clerk of the superior court of the county of his residence, showing that such physician duly registered prior to the year 1895, in compliance with the provisions of section 1479 of the civil code, is *prima facie* evidence of his right to practice medicine. Where, in such an action, it appears that the party sued was a married woman, having a separate estate, and the physician testifies that she, before the services were rendered, agreed to be herself responsible for payment for them, while the party sued pleads and testifies that she made no such special contract or promise, there is such a conflict in the evidence as should be submitted to the jury, and it is error to direct the jury to find in favor of the party sued on this issue.

FAILURE TO REGISTER PREVENTS RECOVERY FOR SERVICES

Murray v. Williams, 121 Ga. 63; 48 S. E. 686

1904

The only question presented for adjudication in this case was whether a physician who has registered, as required by the statute, in the county of his former residence in the state of Georgia can, after his removal into another county in the state to reside and practice his profession, recover for professional services rendered by him in the latter county before he has registered therein. The code

provides that: "Every person lawfully engaged in the practice of medicine within this state, before commencing to practice, shall register in the office of the clerk of the superior court of the county wherein he resides and is practicing, or intends to commence the practice of medicine, in a book to be kept for the purpose by said clerk, his name, residence and place of birth, together with his authority for practicing medicine. The person so registering shall subscribe or verify, by oath or affirmation, before a person duly qualified to administer oaths under the laws of this state, an affidavit containing such facts, and whether such authority is by diploma or license, and the date of the same, and by whom granted, which shall be exhibited to the county clerk before the applicant shall be allowed to register.—Political Code of 1895, Sec. 1479. "Any such registered physician in this state, who may change his residence from one county into another county in this state, shall register within the clerk's office of the county to which he removes and wherein he intends to reside and to practice medicine, as provided in the preceding section."—Pol. Code, 1895, Sec. 1480. "Any person who shall fail to register or who shall practice medicine or surgery in violation of the provisions of the Civil Code, shall be guilty of a misdemeanor."—Penal Code of 1895, Sec. 485. These sections of the code are intended to protect the public against incompetent and unqualified practitioners of medicine, and are not for raising revenue, and are, therefore, prohibitory. One who practices medicine without having registered as the code requires cannot recover for his services. The court holds that a physician who has failed to register in compliance with the provisions of sections 1479 and 1480 of the Political Code of 1895 cannot recover for professional services rendered by him, and that the judgment of the trial judge, who decided contrary to the views herein expressed, must be reversed.

COMPETENCY OF WITNESSES

Macon Railway & Light Co. v. Mason, 123 Ga. 773; 51 S. E. 569

1905

Regarding the competency of a witness, the court holds that had he been licensed under the laws of that state to practice medicine, he would have been competent to testify as an expert witness on the fact being made to appear that he was a licensed physician. But, generally, nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade or profession. Knowledge gained by consistent and close study of medical works renders one competent to testify as an expert concerning the matters of which he has thus learned. It is not essential that he should be actively engaged in the practice of medicine. Nor is it essential that one who really has a scientific education on the subject should be a graduate of any medical college, or have a license to practice from any medical board. What he knows is what really qualifies him to express an opinion as an expert, and a diploma or license is only important as furnishing satisfactory evidence of his competency as a witness. Accordingly, a person who is neither a physician nor surgeon can express an opinion on a medical question, when the matter inquired about lies within the domain of the profession or calling which the witness pursues. But not being a licensed practitioner, it is necessary to lay the proper foundation showing him to be an expert as to the subjects on which he proposes to express his opinion. The court also holds that the wife of an injured party is not, because of the marital relation existing between them, and the policy of the law to preserve inviolate the confidential communications between husband and wife, incompetent to testify as to the nature of the injury received by him, and its effect on his physical condition, when there is nothing to indicate that her knowledge on the subject was gained because of any confidence which he reposed in her as his wife. The wife may testify to symptoms which she has observed indicating that her husband suffered from headache, but she should not be permitted to generalize or state any bare conclusion on her observation of others who had headache, she not professing to be an expert.

"MAGIC HEALING" NOT THE PRACTICE OF MEDICINE

Bennett v. Ware, 4 Ga. App. 293; 61 S. E. 546

1908

The plaintiff was arrested on a warrant sworn out by the defendant charging the plaintiff with practicing medicine without a license, in violation of the statutes of that state. On a preliminary investigation the plaintiff was discharged, and thereupon he brought this suit against the defendant for malicious prosecution and false imprisonment. In his petition he alleged that at the time of his arrest and incarceration in the common jail he was engaged in the "profession of healing diseases without the use of medicine, commonly and better known as a 'magic healer'"; that he had healed the sick without the use of medicine in any form or manner whatever by placing his hands on that portion of the body which was affected by pain; that this gift or magic power was given him direct from the Lord; that he made no charge for his services, but accepted such compensation as the gratitude of his patients induced them to offer voluntarily; that, as a result of his arrest and prosecution for practicing medicine without a license, he suffered great humiliation and mortification, lost two days' compensation in "gifts," amounting to $25 per day, was put to an expense of $15 in employing a lawyer to defend him against the untruthful accusation and, in fact, "lost almost his entire practice"; that his prosecution was malicious and without probable cause; and that he had been damaged in the sum of $5,000. A demurrer was filed to this petition on the ground that the allegations showed that the plaintiff was in fact practicing medicine and suggesting remedies for the sick and afflicted, and receiving compensation therefore, without complying with the statutes of the state regulating the practice of medicine, and therefore that there was probable cause for his arrest and prosecution. The demurrer was sustained.

The direct question for determination was whether the plaintiff, under the facts set out in his petition, was engaged in the practice of medicine as defined by the statutes of Georgia. By virtue of its police power, the state has enacted legislation to protect the public against unfit and incompetent practitioners of medicine, and to prevent the results of malpractice.

In construing these statutes it is apparent that the law of this state recognizes only three systems or schools of medicine—the "regular," the homeopathic and the eclectic schools. It is impossible for one who desires to practice any other system to do so in this state as a practitioner of medicine, because under the law he cannot procure a license. In other words, the law only proposes to grant a license to practice medicine to the allopath, the homeopath or the eclectic. It is true the statute provides that, "if the applicant desires to practice a system not represented by any of the" three boards, "he may elect for himself the board before which he will appear for examination"; but this is a barren privilege, for none of the three boards can or will examine any applicant except one who has a diploma from a regular medical college, or who proposes to practice one of the three systems. It would be absurd to say that one who practiced the healing art by magnetism, Eddyism, spiritualism, hypnotism, mesmerism or any other form for the treatment of disease based on a supernatural agency would be entitled to be examined by any one of the medical boards of the state; for the science of medicine is based on natural agencies. The court, therefore, concludes that only those who propose to practice medicine by one of the schools or systems recognized by the statutes of the state are required to have a license.

It was said that section 1478 of the Political Code of Georgia of 1895 undertook to define the practice of medicine, and that this definition embraced the particular practice of the plaintiff. According to his statement, his method consisted simply in laying his hands on the sick at the point or place of pain or disease, and the healing which followed was by a direct divine agency. Do the words in the statutory definition "or other agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body" embrace an agency of this character? It may be conceded that the words "material or not material" are sufficiently broad to include at least every human or natural agency. But the court cannot believe that the legislature intended

to include in the practice of medicine what may be called psychotherapeutics, or any form of the treatment of the sick which makes faith the curative agency. The words "other agency," "material or not material," should be construed in obedience to the maxim, "*Noscitur a sociis*" (it is known from its associates), and the meaning of the word "agency" must be limited by the associated words "drug, medicine, appliance, apparatus." In other words, the word "agency," even as qualified by the words "material or not material," was intended by the legislature to mean a substance of the general character of a drug or medicine, or surgical apparatus or appliance, the obvious purpose being to protect society against the evils which might result from the use of drugs and medicines by the ignorant and unskilful.

The purpose of the act is clearly indicated by its title, "to regulate the practice of medicine." It was not intended to regulate the practice of mental therapeutics, or to embrace psychic phenomena. These matters lie within the domain of the supernatural. Practical legislation has nothing to do with them. If they are a part of a man's faith, the right to their enjoyment cannot be abridged or taken away by legislation.

However the so-called wisdom of this world may regard these things, it cannot be denied that long before the Saviour told His disciples that in His name they should heal the sick and prevent all manner of diseases by the laying on of hands, the practice of healing by means of prayers, ceremonies, laying on of hands, incantations, hypnotism, and other forms of psychotherapeutics existed. To the iconoclast who denounces these things as the figments of superstition, or to the orthodox physician who claims for his system all wisdom in the treatment of human malady, the court commends the injunction of Him who was called "the Good Physician," when told that others than His followers were casting out devils and curing diseases: "Forbid them not." What matters the system, if, in fact, devils are cast out, and diseases are healed?

The court deduces: That the practice of medicine, defined by the code, is limited to prescribing or administering some drug or medicinal substance, or to those means and methods of treatment for prevention of disease taught in medical colleges and practiced by medical practitioners; that the purpose of the act regulating the practice of medicine was to protect the public against ignorance and incompetency by forbidding those who were not educated and instructed as to the nature and effect of drugs and medicine, and for what diseases they could be administered, from treating the sick by such remedial agencies; that the law is not intended to apply to those who do not practice medicine, but who believe, with Dr. Holmes, that "it would be good for mankind, but bad for the fishes, if all the medicines were cast into the sea," nor to those who treat the sick by prayer or psychic suggestion.

The court is clear that the plaintiff was not a practitioner of medicine in the sense of the statute or in the popular sense; and the fact that he received fees and compensation for treatment in the shape of gifts could not make what would otherwise not be the practice of medicine a violation of the statute regulating such practice, for it must be apparent that, if the mere laying on of hands amounts to the practice of medicine in any sense, it is so without reference to fee or reward.

But while the court holds that, under the allegations of the petition, the plaintiff was not engaged in the practice of medicine, and therefore was not violating the law regulating such practice in this state, it does not think that he was entitled to recover damages for malicious prosecution from the defendant physician who swore out the warrant against him. The question of law involved was sufficiently in doubt, in its application to his practice, fully to warrant a legal investigation of the question; and, in taking out the warrant, the defendant was fully justified by the existence of the probable cause; his act was without malice, and in behalf of the public. Besides, the court thinks that the practice of the plaintiff, while not in violation of the statute regulating the practice of medicine, was presumptively an imposition on the credulity of the public, which might in its consequences result in much injury, and that he was exercising a pretended power of magnetic healing to the deception of the people, and was obtaining their money in the shape of gifts under false pretenses, and the court does not think that the law should permit him to recover damages resulting from a legitimate effort on the part of a citizen to test the legality of his practice.

The court therefore affirms the judgment of the court below in sustaining the demurrer and dismissing the plaintiff's petition.

ONLY ONE REGISTRATION REQUIRED

Jones v. State, 69 S. E. 315

1910

An accusation was filed against W. F. Jones in the city court of Albany, charging him with practicing without a license. This accusation was demurred to on the ground that it set forth no crime under the law, and the case is before this court on exceptions to the judgment overruling the demurrer.

The accusation states that the accused did practice medicine, and charge and receive pay for doing so, without first registering with the clerk of Dougherty county superior court. It fails to allege that Dougherty county was the county wherein he resided. It is plain that if the county of his residence was somewhere else, and in that county he had duly registered as required by law before commencing the practice of medicine, he could, under such registration, have practiced medicine in Dougherty county. In other words, the accusation wholly fails to set forth the essential elements of the offense, to wit, the failure to register in the county of the physician's residence. For this reason, the accusation was defective, and should have been quashed on demurrer. It is not the intention of the statute to require the practitioner of medicine to register in every county where he may practice medicine. It only requires him to register in the office of the clerk of the superior court of the county wherein he resides at the time he commences the practice of medicine; and in the accusation it should be affirmatively stated that the accused had failed to register in the county of his residence before he commenced the practice of medicine.

RIGHTS UNDER LATER, OF PRACTITIONER UNDER FORMER, LAW

State v. Cooper, 11 Idaho 219; 81 Pac. 374

1905

The Supreme Court holds that under the provisions of section 5 of what is known as the "Medical Law of 1899," the board of medical examiners are not empowered to call on applicants for a license for their diplomas, who were engaged in the practice of their profession under the law of 1887. Where it is shown that an applicant for a license to practice medicine and surgery was a resident of the state, engaged in the practice of his profession under the provisions of the law of 1887, and had complied with all the provisions of the law of 1899, the court holds that, in case the board of medical examiners refused to issue his license, it was not criminal in him to pursue his profession. It was urged in this case by counsel for the state that the applicant should have resorted to his civil remedy by an appeal from the action of the board of medical examiners to the district court, and there had the action of the board reviewed. It appeared that the board called on him for his medical diploma, which he sent to the board, who thereafter informed him that they did not and would not recognize the institution giving it as one having authority to issue a diploma to a doctor of medicine. The court says that when he received this notice he had the right to appeal from the action of the board, or he could treat their action as an infringement on his rights under the laws of 1887 and 1899. The statute of 1899 did not authorize the board to demand of him his diploma. He had furnished them all that they were entitled to under the law. They could not ignore the plain provisions of the 1899 law, and thereby make a criminal of a citizen of the state engaged in a legal and lawful business. If the board of medical examiners could withhold a license from an applicant in this manner until he could appeal to the courts for redress, making a criminal of him every time he prescribed for or visited a patient, they could not only deprive him of valuable property rights, but ruin him in his profession, and brand him as a criminal. This is neither the spirit nor intent of the law.

RELATIVE POWERS OF EXAMINING BOARD AND COURTS

Raaf v. State Board of Medical Examiners, 11 Idaho 707; 84 Pac. 33

1906

The Supreme Court holds that, under the act approved March 3, 1899, known as the "State Medical Law," the state board of medical examiners, in the examination of applicants for a license to practice medicine and surgery, is required to exercise judgment and discretion in granting or refusing licenses to such applicants, and in so doing exercises *quasi* judicial functions. The state medical law contains no provision granting the right of appeal from the action of the board of examiners in refusing a license to an applicant, but by the terms of section 9 of the act it is provided that the action of the board in refusing to grant a license under the provisions thereof may be reviewed by the district court on *certiorari*, as it is called, provided proceedings therefore are instituted within ten days after notice of such refusal. By conferring the right to have the action of the board in refusing to grant a license reviewed, as provided in section 9 of the act, the legislature has indicated an intention to limit and confine the authority and jurisdiction of the courts in considering the action of the board to the procedure and scope of investigation and inquiry usually and ordinarily pursued and exercised by the courts in the issuance and consideration of writs of review. The legislature has provided for a board of experts learned in medicine and surgery for the purpose of examining applicants for license to practice within the state, and the language of the medical act and the purposes and objects thereof preclude any inference that the legislature ever intended that a disappointed applicant might apply to the court and there have his answers reexamined, marked, graded and passed on as to their correctness by the court. The courts are open to compel action by the state board of medical examiners when they fail or refuse to act, and to review their authority where they have assumed to exercise powers not conferred; but the courts will not review and reexamine matters in which the board is called on to exercise judgment and discretion, and perform *quasi* judicial functions in reference thereto.

The legislature, the court says, had in view the protection of the health of the people of the state, and, as a means to effect that end, determined that all persons thereafter intending to enter the practice of medicine and surgery should be examined as to their fitness, learning and qualifications by a board of experts learned in the science and art of that particular profession. Is it at all probable that the legislature ever intended that a disappointed applicant might apply to the court and there have his answers reexamined and passed on by one unlearned, perhaps, in a single one of the branches of this science? Courts are neither required nor expected to be experts in therapeutics, gynecology, toxicology, diagnosis, etc., and for them to undertake to examine and grade physicians on such branches would be an unwarranted assumption of jurisdiction. The layman, wandering among the puzzling mazes of materia medica and the speculative bewilderments of pathology, might with equal assurance and conscientiousness grade an applicant who had correctly answered all the questions at 10 per cent., and one who had correctly answered none at 100 per cent. As to the plaintiff's contention that, since he had introduced in evidence what he claimed were correct text-book answers to the questions, the court could have a standard by which to examine and grade answers, the court says that this would hold good so long as the answers of the applicant might be in the same language as the answers which were shown to be correct, but the moment the applicant's answer branched out into different language, and his own mode of expression, a court, not proficient in the science of a profession characterized by abundant technical language and phraseology, would encounter perplexities and difficulties unnumbered.

Again, the court says that there are no set, fixed or inviolable rules by which such a board must determine whether a question has been answered correctly or incorrectly. Knowledge must be brought to bear and judgment must be exercised. The science of medicine is not such an exact and immutable science but that those who are eminent and learned in the profession often differ in a diagnosis, or as to what would be an absolutely correct answer to a given question.

It is a progressive science. This is one of the chief considerations for requiring such examinations to be conducted by those who are proficient and learned in the profession. If the board should fail to act when it is its duty to act, the courts are open to enforce action. If it acts without jurisdiction, the courts are open to inquire into and review the authority they have assumed to exercise. The court cannot, however, under the medical law of Idaho, be converted into a board for the examination of applicants for a license to practice medicine and surgery. Questions of bias or prejudice existing in the mind of any member of the board against an applicant or of incompetency of a member, or of errors and mistakes of judgment or unfairness in marking and grading an applicant's papers are matters that may be properly addressed to the executive authority from which they receive their appointment, who may take such action thereon as the best interests of the public demand.

MUST BE ACTUALLY ENGAGED IN PRACTICE TO BE EXCEPTED

Sherburne et. al. v. Board of Dental Examiners, 13 Idaho 105; 88 P. 762

1907

The respondents commenced this action in the district court to secure a writ of mandate compelling the dental board of examiners to register the respondents and issue to them certificates entitling them to practice dentistry within this state. The board answered the complaint, and the plaintiffs demurred to the answer, and the demurrer was sustained, and the peremptory writ was thereupon issued. This appeal is from the judgment and order.

The application for registration was made under the provisions of the act of February 16, 1899, which went into effect on the 16th of February, 1899. Plaintiffs allege that they came into the state of Idaho on the 8th of February, 1899, and opened a dental office at the city of Idaho Falls, and that on the 16th of February they made application in accordance with the provisions of section 4 of the act for registration and the issuance of certificates to them, and that the board refused to register them or to issue to them certificates. The board answered, denying that the plaintiffs were practicing dentistry within this state on February 16, 1899, or that they had been doing so prior to that date. The board admits that the applicants filed the oath and application required by law. The board alleged that after receiving the affidavits and applications of the petitioners they made an investigation and examined witnesses to ascertain whether the applicants were in fact engaged in the practice within the state of Idaho at the time the dental law went into effect, and that from their investigation and examinations they ascertained that they were not. It is further alleged that by arrangement "with one Edward Beaudette, who was in Boise City prior to the 16th day of February, 1899, the plaintiffs, who were then actually practicing their profession in the town of Anaconda, state of Montana, were notified by the said Beaudette that the governor of the state of Idaho would sign and approve said law on or about the said 16th day of February, 1899, and that upon receiving said information, the plaintiffs came to the town of Idaho Falls, in the state of Idaho, in attempting to make it appear that they were actually residing in the state on that date; that while in Idaho Falls on said 16th day of February, 1899, the said plaintiffs were informed that the governor of Idaho had approved said law; that they immediately executed their said affidavits set out in the petition of the plaintiffs herein, and on the same day left the state, returning to Anaconda, Mont., and resumed the practice of their profession at said place, and from that place on the 27th of April, 1899, mailed to the secretary of said state dental board of examiners, the said affidavits set out in plaintiffs' petition herein; and defendants state upon information and belief that the said plaintiffs never returned to the state of Idaho until in the summer of 1903." The trial court held that these facts did not constitute any defense to the plaintiffs' action, and accordingly sustained a demurrer to the answer.

Under the dental law every person who was actually engaged in the practice of dentistry within this state at the time the same went into effect was entitled to be registered and receive a certificate to that effect, upon furnishing the board

a written statement, verified by his oath, showing that he was in fact a person entitled to practice under the provisions of the act. All other persons were required to pass an examination, as provided by section 5 of the act. In the case of applicants for registration who were practicing in the state at the time the law went into effect, the board had no duty or discretion in the matter of determining the qualifications of the applicant. The law deemed every person who was at the time so engaged qualified to continue the practice and impliedly authorized him to do so on furnishing the necessary proof within three months after the act went into effect. Furnishing the affidavit, however, to the effect that an applicant was entitled to registration under section 4, *supra*, was not the vital and decisive fact entitling him to register. That was only intended as written evidence of the actual existence of the fact it purported to show. The vital and essential fact which was necessary to exist was that the applicant should have been "engaged in the practice of dentistry in this state" at the time of the passage of the act. If he was not in fact so engaged, an affidavit stating that he was would not entitle him to registration. It was intended, however, that such affidavit should constitute sufficient evidence of the fact to justify the board in registering him and issuing a certificate to that effect. While the board was not in so many words given the power to make investigation and ascertain whether or not the affidavit was true or false, nevertheless the clear purpose and intent of the entire act is necessarily an implied grant of such authority. The power of the board to "carry out the purposes and enforce the provisions" of the act, and the clear and unmistakable purposes of the act to prohibit the registration of any one who was not in fact engaged in the practice of dentistry at the time the act went into effect, are a clearly implied grant of authority to ascertain the real existence of the facts entitling the applicant to register. The law would be a farce if it were intended to make it obligatory on the board to register every person who might file an affidavit stating that he was engaged in the practice of dentistry on the 16th day of February, 1899, if they knew that affidavit was untrue. The fact entitling an applicant to register under this provision of the law is more in the nature of a jurisdictional question, to be determined by the board before registering the applicant, than one of a *quasi* judicial discretion. If he was not engaged in the practice of dentistry at the time of the passage of the act, then the board would have no jurisdiction or authority to register him. The determination of this fact differs widely from the determination by the board of the qualifications of an applicant who takes an examination, because in the latter instance the board must bring to bear its professional knowledge and exercise professional and official discretion. In this case the fact to be determined does not require any professional skill or knowledge, and might as well be determined by any other board, body, or officer.

The petitioners, in drawing their complaint, recognized the necessity of pleading and proving that they were engaged in the practice of dentistry within this state on the 16th of February, 1899, and they accordingly pleaded such fact, and they also pleaded a compliance with the statute in furnishing the board evidence showing the existence of the essential facts. When the board denied those facts and pleaded a contrary state of facts, an issue was joined, and, unless the applicants could establish in a legal way the existence of the facts pleaded, they were not entitled to a writ directing their registration. We have no doubt but that the answer of the defendant board was sufficient to form an issue on the material and vital allegations in the complaint, and the demurrer should have been overruled, and the facts at issue have been determined. Judgment is reversed.

DIPLOMA OF REGULARLY CHARTERED MEDICAL SCHOOL ENOUGH

Vadney v. State Board of Medical Examiners, 112 Pac. R. 1046

1911

This is an original application to this court for a writ of mandate directed to the State Board of Medical Examiners, requiring them to issue to the applicant a license to practice medicine and surgery. The plaintiff is a graduate of

the Western University of Chicago and Independent Medical College of Chicago; that on the 4th of October, 1897, he established an office and residence in Morrow, and has ever since continued to practice medicine and surgery in that town; that before he began the practice of medicine and surgery, he filed his affidavit of identity and his diploma with the county recorder of Ada county; that at the time of the passage of the act of 1899, plaintiff was legally engaged in the actual practice of medicine and surgery within the state of Idaho under the provisions of the medical act of 1887, that in the month of June, 1899, and within six months after the medical act of 1899 went into effect, applicant made application for a license to practice medicine and surgery, and was informed that the board did not and would not recognize the Independent College of Chicago as one having authority to issue a diploma to a doctor of medicine.

The first contention made by the board is that under the laws of 1887, no person was entitled to practice medicine in the state of Idaho who had not received a medical education and who had not received a diploma from a regularly chartered medical school, the said school to have a bona fide existence at the time the diploma was granted. It sufficiently appears from the petition that the plaintiff was lawfully engaged in the practice of medicine and surgery under the laws of 1887, when the medical act of 1899 was passed. If the plaintiff was lawfully engaged in the practice of medicine and surgery at the time of the enactment of the medical law of 1899, the question is whether he made a sufficient showing to the board under that law to require it to issue a license to him.

It appears from the petition that the plaintiff was legally engaged in the actual practice of medicine and surgery under the medical act of 1887, and that he made a proper application to the State Medical Examining Board, as provided by section 5 of said act, and if the facts presented in his affidavit be true, the board had no option whatever in said matter. It was its duty to issue to him a license to practice medicine and surgery.

It is next contended that the plaintiff had a plain, speedy and adequate remedy by appeal under the provisions of said law of 1899, which provided that the applicant shall have the right to have the action of the board reviewed by the district court, provided proceeding for such review is instituted within ten days after notice of such refusal upon the applicant. But this court has already held that the courts will not review and reexamine matters in which the board is called on to exercise judgment and discretion and perform *quasi* judicial functions in relation thereto; but will compel the board to act when they fail or refuse to do so, and will review their proceedings where they have assumed to exercise powers not conferred. Under this rule the petitioner has no plain, speedy and adequate remedy at law by appeal.

Counsel for defendant board contend that the complaint is insufficient, because it does not directly allege that the defendant had a "medical education." Under the law of 1887, a diploma from some regularly chartered medical school which had a *bona fide* existence at the time said diploma was granted, and a compliance with the provisions of the law was proof of the applicant's having received a medical education and all of the evidence that the statute required at that time of that fact. That being true, the complaint states a cause of action, and, if said facts are true, they entitle the plaintiff to the relief prayed for.

The plaintiff alleges in his complaint all of the facts necessary to entitle him to a license from the State Board of Medical Examiners to practice medicine in this state, and the board by refusing to issue a certificate to him refused to perform a duty imposed on it by the medical act of 1899. For that reason the motion to quash must be denied.

The answer denies matters of record on information and belief. A denial on information and belief of matters of record is no denial at all, where such records are accessible to the defendant; therefore said denials do not make an issue in the case. The answer denies that the Independent Medical College of Chicago, from which plaintiff held a diploma, was a "reputable college of medicine in good standing." The board had a right to determine that question under the act of 1899, where the applicant had not been practicing medicine and surgery under the act of 1887; but when the applicant had been practicing under the laws of 1887, and made application under the fifth section of the act of 1899

for a license, the board had no authority whatever to determine whether or not the diploma under which the applicant had been practicing was issued by "a reputable college of medicine in good standing." If the plaintiff had a diploma from a regularly chartered medical school that had a *bona fide* existence at the time the diploma was granted, that was all that was necessary, so far as the diploma was concerned. The answer admits that said Independent Medical College was a regularly chartered medical school and had a *bona fide* existence, and avers that its charter was revoked in the year 1899 on account of fraud. Under the admitted facts and law, the board had no authority whatever to refuse the applicant a license, on the ground that the medical college from which he graduated was not a "reputable college of medicine in good standing." Said board avers in its answer that it did not and would not recognize said Independent Medical School of Chicago as one having authority to issue a diploma to a doctor of medicine, and avers "that said refusal was made upon the ground that said alleged college of medicine was not a reputable college in good standing." Under the law of 1887, said board had no authority to refuse to grant the plaintiff a license on that ground.

It appears from the record that the real reason for refusing the application of the plaintiff was that said board did not recognize said Independent Medical College as "a reputable college of medicine in good standing." That was not a sufficient reason for refusing to grant said application.

DECISIONS ON FACTS BY STATE BOARDS NOT SUBJECT TO REVIEW OF COURTS

People ex rel. Sheppard v. State Board of Dental Examiners, 110 Ill. 180

1884

The Supreme Court says that it is a question of fact and not a legal question whether a dental college is reputable or not within the ordinary meaning of the word. It is also a question of fact whether the requirements in the act of 1881, regarding courses of instruction, etc., have been complied with. These questions are by the statute submitted to the State Board of Dental examiners for decision. Their action is to be predicated upon the requisite facts and no other tribunal is authorized to investigate them. The act of ascertaining and determining what are the facts is in its nature judicial, involving investigation, judgment and discretion. The office of the writ of mandamus is in general to compel the performance of mere ministerial acts prescribed by law. Subordinate judicial tribunals may by mandamus be compelled to act where it is their duty to act, but they cannot be compelled to decide a particular case in a particular manner. A writ of mandamus is not a remedy for erroneous decisions. A subordinate body can be directed by a writ to act, but not how to act, in a matter in which it has the right to express its judgment. The character of the duty and not that of the body or officers determines how far performance of duty may be enforced by mandamus. The refusal of the Illinois State Board of Dental Examiners to grant a license to a person whose application was based on a diploma issued by a dental college is not cause for a writ of mandamus to compel the board to grant the license, since to entitle the applicant to a license the diploma must have been issued by a reputable dental college and whether the college is a reputable one is, under the statute, within the judgment and discretion of the board to determine. The petition for a writ of mandamus to compel the board to issue a certificate is denied.

REGULATION REGARDING YEARS OF PRACTICE NOT UNCONSTITUTIONAL

Williams v. The People, 121 Ill. 84; 11 N. E. 881

1886

The plaintiff was indicted, tried and convicted for violating the medical practice act of 1877, and appealed to the Supreme Court, claiming that the act was unconstitutional. The court held that it is an undoubtedly valid exercise of

the police power of the state to prescribe regulations for securing admission of qualified persons to professions and callings demanding special skill and that nowhere is this power more wise and salutary, or more imperviously called for, than in the case of the practice of medicine as it concerns the preservation of health and the lives of the people. The constitutional objection urged against the act in question is that it is special legislation and contrary to the provision of the state legislature in that it provides that the act shall not apply to those who have been practicing for ten years within the state. The court holds that this proviso does not confer upon ten-year practitioners any special privilege, immunity or franchise. It does not confer upon them anything; it leaves them as they are, simply prescribing as a qualification that ten years' practice within the state shall constitute a qualification for practicing medicine. The plaintiff argues that "the provisions of this act" — that is, not only its provisions in respect to qualifications, but each and every one of its provisions—should not apply to the ten-year practitioners. This includes the section empowering the board to exclude from practice for unprofessional or dishonorable conduct. The court regards this provision as merely a regulation pertaining to qualifications for admission to practice. The purpose of the provision making certificates subject to revocation for unprofessional or dishonorable conduct, the court does not regard as involved in this case since the plaintiff has no grievance in this respect. He has not had any license revoked, has never received a certificate or been licensed to practice. Judgment affirmed.

ABUSE OF DISCRETION BY BOARDS SUBJECT TO MANDAMUS

State Board of Dental Examiners v. John M. Cooper, 123 Ill. 227; 13 N. E. 201

1887

The Supreme Court says that while a mandamus will not lie to compel the performance of acts or duties which call for the exercise of judgment on the part of the officer or body at whose hands their performance is required, yet if a discretionary power is exercised with manifest injustice, or if such discretion is grossly abused or is exercised from selfish and unworthy motives, the courts may order its due and proper exercise. Abuse of discretion by such bodies may be controlled by mandamus. Such an abuse of discretion may amount to a virtual refusal to perform the duty enjoined. Discretion vested in official bodies must not be exercised for the gratification of feelings of malevolence, for the attainment of personal or selfish ends or for arbitrary reasons, but for the public good. It should be controlled by an honest judgment and not by prejudice or passion. It is the duty of the State Board of Dental Examiners on the application of a graduate of a dental college for a license to decide whether the college issuing the license is reputable or not. If the board decides that the college is reputable it has exhausted its judicial power and must then issue a license. Failure to issue such a license after the college issuing the diploma has been pronounced reputable may be enforced by mandamus. The question of the reputability of the college must be decided on just and fair principles and not on motives of selfish interest or to injure a rival college. The question of reputability must be decided by the board which cannot delegate its discretionary power to an organization outside of the state. The action of the Appellate Court in issuing a writ of mandamus is affirmed.

REVOCATION VOID IF RECORD FAILS TO SHOW NOTICE TO ACCUSED

People, for use of State Board of Health v. J. C. McCoy, 125 Ill. 289; 17 N. E. 786

1888

The Supreme Court says that it may be conceded that, under the tenth section of the act of 1877, to regulate the practice of medicine in Illinois, the State Board of Health had power to revoke certificates issued to individuals to practice medicine, for the same reasons it might refuse to issue such certificates,

namely, for "unprofessional or dishonorable conduct." The statute, in this respect, however, must have a reasonable construction. The board could not, from mere caprice, or without cause, revoke a certificate fairly issued on sufficient evidence of the applicant's qualifications. The right of the citizen to practice his profession, for which he has expended time and money to qualify himself, is too important to be taken away from him without some reasonable cause. It must be done for some act or conduct that would, in common judgment, be deemed "unprofessional" or "dishonorable." Had the board found the defendant guilty of making statements and promises calculated to deceive and defraud the public, that would have been "unprofessional and dishonorable conduct." Treating the record of the board, in the matter of revoking the certificate that had been issued to the defendant, as having the force of a proceeding in its nature judicial on the part of the board in a case where it had jurisdiction of the subject-matter to be investigated, yet the record was fatally defective, for the reason that it was made to appear that the defendant had no notice of the proceedings proposed to be taken against him. The prosecution put the defendant on the stand, and made him their own witness, and he distinctly stated, at their instance, that the notice found in the record was never in fact served on him. The affidavit of service was not sufficient to overcome his testimony in that respect. It is contrary to the analogies of the law that a proceeding, in its nature judicial, should be obligatory and conclusive on a person not a party thereto, otherwise a party might be deprived of important rights with no opportunity to defend against wrongful accusations. Whether the right to practice medicine or law is property, in the technical sense, it is a valuable franchise, and one of which a person ought not to be deprived, without being offered an opportunity, by timely notice, to defend it.

ITINERANT VENDORS SUBJECT TO MEDICAL PRACTICE ACT

People v. Blue Mountain Joe, 129 Ill. 370; 21 N. E. 923

1889

This was an action for debt brought against "Blue Mountain Joe" before a justice of the peace, appealed to the county court, where a verdict and judgment was rendered for the defendant. Plaintiff appealed to the Superior Court. The defendant moved to dismiss the appeal on the following grounds: (1) From the record it does not appear that a crime, a franchise, a freehold, or the validity of a statute is involved or that the court has jurisdiction; (2) the appeal was improperly taken; (3) this appeal is contrary to the spirit of the law forbidding appeals by the people or twice putting the defendant in jeopardy. The court holds that the case is a civil proceeding for the recovery of a penalty and that the third ground is without value, and that if the validity of the statute under which the suit is brought is involved the appeal was correctly prosecuted to this court. The court, therefore, first considers the question of the validity of the act of 1887. The record shows that the defendant was engaged in selling medicine by means of a show consisting of a band of music and some Indians, either real or pretended. He paraded the streets twice a day and gave free shows at night, after which his medicines were sold to anyone who would buy them. In the trial court the board offered to show that the defendant professed at his meetings that he could cure rheumatism, kidney diseases and other diseases and that he sold these medicines for the cure of such diseases, to the proof of which matters the counsel for the defendant objected and the court sustained the objection. It was shown that the defendant circulated advertisements of his remedies and counsel for the board offered to read such advertisement to the jury. The trial judge held the evidence to be incompetent and refused to permit any proof to be made on the ground that the eleventh section of the law was unconstitutional and void. The trial judge instructed the jury to return a verdict for the defendant, which was done. The Supreme Court holds that it was clearly competent to show that the defendant was an itinerant vendor of drugs and nostrums for the treatment of diseases and that the question whether he was such an itinerant vendor was for the jury to determine. The only theory on which the

action of the trial court could be sustained is that the act under consideration is void. If the statute is void the action was right. If the statute is valid the action of the court was erroneous. The Supreme Court, therefore, holds that the only question at issue is the validity of section 11 of the act of 1887. This section provides that itinerant vendors shall have a license and that failing to do so, they shall be subject to fine. This provision falls clearly within the police power of the state. The defendant holds that the subject matter of this section is not embraced in the title of the act and is consequently void. The Supreme Court holds that if the subject of the act be expressed in the title in general terms it is sufficient. The right to prescribe medicines for the cure of diseases and to administer them, falls clearly within the practice of medicine and the regulation of the sale of drugs and nostrums by itinerant vendors as clearly falls within the purpose of the act as expressed in its title. The judgment of the county court is reversed and the case remanded.

MIDWIFERY IS PRACTICE OF MEDICINE

People v. Arendt, 60 Ill. App. 89

1895

The Appellate Court of Illinois, third district, says that it appeared from the proof that the defendant held herself out as a midwife and practiced in that capacity. It was urged that this was not a violation of the act to regulate the practice of medicine. The court thinks very clearly it was. Midwifery is an important department of medicine, and is so recognized by the act. The law-making power of the state has enacted that "No person shall practice medicine in any of its departments in this state without the qualifications required by this act." It needs no argument to show the importance of obstetrics as a department of medicine, nor the necessity that those who assume to practice in that department should possess due knowledge and skill. The welfare of their patients is certainly within the purview of the law, no less than in other departments, where, in many instances, at least, even less care and skill may be essential, and where the consequences of ignorance and unskilfulness may be less unfortunate. The services which the defendant usually rendered were not within the exceptions of "emergency or the domestic administration of family remedies," mentioned in section 10.

TREATMENT NOT LIMITED TO THE USE OF DRUGS

Eastman v. People, 71 Ill. App. 236

1897

The Appellate Court, third district, says that it appeared that the appellant was engaged in the practice of "the profession of osteopathy," as it was termed in the briefs; that he had an office where he received patients, and that he visited patients at their homes; that he advertised his system and his skill therein by publication in the newspapers, and that he professed ability to understand and treat human ailments intelligently and successfully. So far as shown, his treatment consisted wholly of rubbing and manipulating the affected parts with his hands and fingers, and by flexing and moving the limbs of the patient in various ways. It was insisted on his behalf that because he used no medicines or instruments he was not amenable to the statute, which declared that "Any person shall be regarded as practicing medicine within the meaning of this act who shall treat, operate on, or prescribe for any physical ailment of another." It was argued that this provision must receive reasonable interpretation, and that to "treat" implies the use of medicines or drugs of some sort, and to "operate on" implies the use of instruments of some sort. This is not so necessarily. Many of the minor operations are effected without the use of instruments by mere pressure, extension, and flexion. This of course implies some knowledge of anatomy and some skill. So, many forms of disease are treated by attention to the diet, habits and mode of life without resorting to medical remedies.

It was said by counsel that if the statute reached this case, it must include treatment by Turkish baths, massage and the like. The court thinks not. The evidence showed that the appellant held himself out as competent to treat and cure numerous diseases, such as all forms of fevers, cerebro-spinal meningitis, catarrh, diphtheria, croup, pneumonia, asthma, indigestion, dysentery, kidney diseases, measles, paralysis, and many others, including in fact a large proportion of the ailments common to mankind. He represented himself as a graduate of the new school of "osteopathy," and held himself out as qualified to examine and treat all who might seek his aid. Herein he differed from those who give Turkish baths, massage and the like. He professed to be able to diagnose and advise in respect to a long list of diseases, and to furnish discriminating and efficient treatment to those who might come to him, and while he might rely wholly upon manipulation, flexing, rubbing, extension, etc., yet he professed to have skill and judgment in those methods, so as properly to adapt the treatment to each case, giving it what was appropriate, in amount, and with repetition at such times and to such extent as might be dictated by his knowledge and experience. By his skill in the use of his peculiar remedies or methods he claimed to be competent to relieve and cure various ailments, and therefore he invited patronage.

It was suggested rather than argued that as the title of the act in question was "An act to regulate the practice of medicine in the State of Illinois," and as the constitution provides that no act shall embrace more than one subject, which must be expressed in the title, any construction which would include a matter not within the practice of medicine must be avoided, or the act would be unconstitutional. "Medicine is the art of understanding diseases and curing or relieving them when possible." (Bigelow.) "It is that branch of physic which relates to the healing of diseases." (Dunglison.) This act is not restricted to any particular methods or remedies. Indeed these are almost innumerable, considering what are used and what have been discarded. The court is of the opinion that the proofs brought the appellant within the act, and that he was liable to the penalty imposed thereby for practicing medicine without license.

HABEAS CORPUS NOT PROPER METHOD OF TESTING CONSTITUTIONALITY OF ACT

People ex rel. Birkholz v. Jonas, 173 Ill. 316; 50 N. E. 1051

1898

The Supreme Court says that the petitioner was held in custody by virtue of a conviction for practicing medicine without a license, and the avowed purpose of the petition for a writ of habeas corpus was to test the constitutionality of the act to regulate the practice of medicine. The question presented was, whether or not, under the Illinois statute regulating the subject of habeas corpus, the petitioner, who was regularly imprisoned by virtue of a mittimus by a justice of the peace, might, in the mode here pursued, test the constitutionality of the act under which the conviction was had. It is held that he could not.

TREATMENT BY RUBBING IS PRACTICE OF MEDICINE

W. D. Jones v. People, 84 Ill. App. 453

1899

The Appellate Court of Illinois, third district, says that section 10 of the medical practice act declares that any person shall be regarded as practicing medicine who shall treat, operate on, or prescribe for any physical ailment of another. If to advertise that one had effected marvelous cures, and that patients reap rich rewards of this large experience and new methods, and by means of such advertisements secure the attendance of persons whom he actually treated and operated on does not fall literally within the definition of the statute of what shall be regarded as practicing medicine, then it would be difficult to imagine

the legislative intent by such enactment. If to treat or operate upon a person for physical ailment, by rubbing the affected part, is not a treatment or operation for a physical ailment, what is it? It seems to the court that the mere statement of the question demonstrates the absurdity of every opposite position. It was insisted that the appellant (accused) was acting under the direction of a licensed physician, and in its instructions the trial court told the jury, in substance, that although the treatment may have been requested and directed by a regular attending physician of the person being treated, yet the person in fact administering the treatment would be guilty of practicing medicine. As an abstract principle, such instruction is wrong and vicious, should not be given in any case, but in the case presented there was no evidence admitted to the jury, and no competent evidence offered that in any of the three instances wherein it was proved that the appellant had practiced medicine, he was acting under directions of a regular attending physician of the persons who were, in fact, treated or operated on by the appellant, and hence the instruction, although wrong in principle, could not and did not harm the appellant. In view of the whole evidence, no other verdict than the one returned, that of guilty, would have been proper or responsive to the evidence, and in such cases errors of instructions will seldom reverse.

APPEAL ON CONSTRUCTION OF STATUTE NOT TO SUPREME COURT

State Board of Health v. People ex rel. Bailey, 181 Ill. 512; 54 N. E. 1011

1899

This was a petition for mandamus brought by Millard Fillmore Bailey, in the circuit court of Cook county, against the state board of health, to compel the board to issue him a license for the practice of medicine in this state. The court granted the writ. To reverse the judgment of the circuit court, the state board of health sued out a writ of error in this court. Under the act of 1887 the state board of health adopted certain rules under which persons might be permitted to practice medicine in this state. The only questions presented are: First, what construction shall be placed on the statute as to the powers of the board; and, second, whether the petitioner complied with the rules of the board, so as to entitle him to a license to practice medicine in this state. It is therefore plain that this court has no jurisdiction to entertain this writ of error; that the writ should have been sued out in the appellate court. In cases involving merely the construction of a statute, not its validity, and none of the other conditions existing necessary to give the right of appeal or writ of error directly from the trial court to the supreme court, the latter court will have no jurisdiction. The appeal in such case should be taken to the appellate court.

MEDICAL COMPANIES REQUIRED TO TAKE OUT ITINERANT VENDOR'S LICENSE

Watkins Medical Co. v. Paul, 87 Ill. App. 278

1900

The Appellate Court of Illinois, second district, says that section 11 of the medical practice act of 1887 requires "any itinerant vendor of any drug, nostrum, ointment or appliance of any kind, intended for the treatment of disease or injury, or who shall, by writing or printing, or any other method, profess to cure or treat disease or deformity by any drug, nostrum, manipulation or other expedient," to "pay a license of $100 per month" to the state board of health, etc. The medical company entered into a written contract with one Wehmeyer to sell and distribute its remedies by itinerant vending, Paul and another guaranteeing performance on his part, the contract being of such a nature that the court thinks the medical company was the seller, and Wehmeyer was but its agent and employee; and it holds that, under the statute, the company was required to take out a license. As it did not take out a license, its sales, through its traveling salesman, were in violation of law. Again, the

court says that in the statute is a recurring penalty for each sale without a license, showing the object of the statute is to prevent the itinerant vending of drugs except under the license and control of the state board of health. The court thinks it obvious that the purpose of the statute was not the collection of revenue, but to prevent the public from being injured in health and defrauded by itinerant sales of harmful drugs and nostrums. Therefore, the contract referred to, by which the company sought to evade the statute, was impliedly prohibited, and was therefore void, and Wehmeyer was not liable to the medical company thereon, and, as he was not liable, his guarantors were not liable.

MANIPULATION IS PHYSICAL REMEDY

People, for the use of the State Board of Health v. B. E. Jones, 92 Ill. App. 447

1900

The Appellate Court of Illinois, third district, says that the evidence showed that the defendant, in connection with his father, maintained an office in the city of Bloomington, where he treated persons for physical ailments and received fees for the same. The treatment consisted of rubbing and manipulating the parts affected, and by flexing and moving the limbs, commonly known as "massage" treatment. The decision of the case hinged upon the construction of the last clause of section 7 of the act of 1899, to regulate the practice of medicine, which provides that this act shall not apply to surgeons of the United States Army, etc., "or to any person who ministers to or treats the sick or suffering by mental or spiritual means, without the use of any drug or material remedy." It was contended that "massage treatment" is a treatment of the sick by "mental or spiritual means," and does not involve the use of a "material remedy." It is clear to the court that rubbing or manipulating the affected parts is the employment of a physical agency as distinguished from a mental or spiritual one. There may be a combination of the two, as was testified to by the defendant, but to bring the person applying the treatment within the exemption, the treatment must be exclusively mental or spiritual. The term "material" remedy means a physical remedy.

As the [trial] court took a contrary view and instructed the jury that a person giving massage treatment was not liable under the act, the judgment must be reversed.

MANIPULATION IS PHYSICAL TREATMENT

People, for the use of the State Board of Health v. W. D. Jones, 92 Ill. App. 445

1900

The Appellate Court of Illinois, third district, says that the evidence showed that the defendant kept an office in the city of Bloomington for some time prior to July 1, 1899, where he treated persons afflicted with diseases. His treatment consisted of rubbing and manipulating with his hands the parts supposed to be affected, and constituted a violation of the medical practice act of 1887, as held by this court in *Eastman* v. *The People, etc.*, 71 Ill. App. 236, and in *Jones* v. *The People, etc.*, 84 Ill. App. 453.

The act of 1887 was expressly repealed by the medical practice act of 1899, with no "saving clause," saving penalties incurred under the repealed act. For that reason, the defendant contended that he was not liable for the statutory penalty sued for and called to his aid the old rule that where a statute imposing a penalty is repealed, and the repealing statute contains no saving clause, the penalty provided by the repealed statute cannot be recovered in an action brought after the repeal. Section 4 of chapter 131 of the Revised Statutes of Illinois, entitled construction of statutes, provides that no new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any manner whatever to affect any such

offense or act so committed, or any penalty, forfeiture or punishment so incurred, save only that the proceedings thereafter shall conform to the laws in force at the time of such proceedings. The rule cited by the defendant cannot prevail over this plain statutory provision.

DISCIPLINARY POWER OF STATE BOARD OF HEALTH

State Board of Health v. Ross, 191 Ill. 87; 60 N. E. 811

1901

The question in this case is whether, under the act of the legislature of Illinois to regulate the practice of medicine, in force July 1, 1899, the State Board of Health has power to discipline and revoke the certificates of persons who had been licensed to practice medicine and surgery by the board prior to that date. Section 6 of the act provides that the board may refuse to issue the certificates provided for in the act in certain cases, and "may revoke such certificates for like causes." The Appellate Court held that this power of revocation plainly referred to certificates issued under the act, stating that if it was the intention of the legislature to give the board of health the power to discipline the holders of certificates issued prior to July 1, 1899, and to revoke such certificates, it had certainly failed to express such intention by this act. If the consequences of interpreting the statute according to its plain and obvious meaning are likely to prove disastrous to the people of the state at large, as contended by counsel, and as would seem not improbable, considering the large number of physicians and surgeons throughout the state, and the temptations to obtain money and practice by a resort to dishonorable conduct which are supposed to beset professional men, the responsiility must rest with the legislature, and not the courts. If the tendency of a law is vicious, the stricter its enforcement the sooner it will be amended or repealed. So the court answered the question raised in the negative. And the opinion of the Appellate Court is now adopted by the Supreme Court of Illinois, which affirms its judgment. The Supreme Court merely adds to that opinion that it has carefully examined all of the questions involved, and considered the criticisms of the opinion by counsel and their arguments against the correctness of the same, and is of the opinion the conclusions reached and announced in the opinion are correct.

POWER TO DETERMINE STANDING OF MEDICAL COLLEGE

Illinois State Board of Health v. The People, 102 Ill. App. 614

1902

This case was instituted under the statute of 1887 providing that the State Board of Health "shall issue certificates to all who furnish satisfactory proof of having received diplomas or licenses from legally chartered medical institutions in good standing, as may be determined by the board." Prior to 1890, the board adopted a resolution that medical colleges in good standing under the first section of this statute, which contained a provision substantially the same as that quoted, with reference to applicants who relied on a diploma, was thereby defined to include only those colleges which should, after sessions of 1890-91, require four years of professional study. A diploma dated March 22, 1894, was presented. The defense was that the institution which granted it was not, at the time the diploma was issued, a medical institution in "good standing," within the meaning of the statute above quoted from, as determined by the board of health—in that students therein were required to take a regular course of study of only two years, instead of four years, as required by the rules and regulations of the board. Now, the Branch Appellate Court of the First District of Illinois holds it to be undoubtedly the law that the State Board of Health is possessed of discretionary power to determine whether a medical college is in "good standing," within the meaning of the statute and as defined in its resolution above men-

tioned, and that when the board has determined that question in favor of the applicant, it has exhausted its discretion, and may not refuse a license for arbitrary reasons of its own. But it appeared most satisfactorily that the refusal to grant the license in question was because the institution granting the diploma was not in "good standing" within the rules adopted by the board. If there was in the record anything which showed that the institution had brought itself within the statute subsequent to the issuance of the diploma in question, it was immaterial for the purposes of this case. The question here was whether the medical institution was in good standing at the time the diploma was issued, and that inquiry, on investigation, had been answered by the State Board of Health adversely to the applicant, and was not subject to review by mandamus proceedings.

TREATMENT BY MANIPULATION NOT MENTAL TREATMENT

People, for the use of the State Board of Health v. Gordon, 194 Ill. 560; 62 N. E. 858; 88 Am. St. Rep. 165

1902

The Supreme Court says that it thinks it clear, from the several sections of the act of 1899 to regulate the practice of medicine in the state of Illinois, that the State Board of Health is authorized to divide those who desire to practice medicine in this state into two classes; that is, those who desire to practice medicine and surgery in all their branches, and those who desire to practice any other system or science of treating human ailments without the use of medicine or instruments. In this case, the party said that his treatment was a mental science. But he said, too, "I first make a diagnosis. Then I remove the cause for that condition by working and freeing the nerve force. . . . I get as near the muscles as I can. If a person is fleshy, it takes more force." He also flexed, or, as one witness said, bent the limbs. The court declares that it is at a loss to perceive how it could be said that his own testimony did not tend to show that he did treat and operate on patients for physical ailments, within the meaning of section 7 of the act, which defines who shall be regarded as practicing physicians, within the meaning of the act, as including both classes above mentioned, and defines the practice of medicine as including all "who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another." In short, the court thinks that all the testimony tended to show that he practiced what is known as osteopathy, at least, the treatment was of that nature. It says further that it hardly thinks that the school of osteopathists and those who believe in their method and system of treatment, would be willing to concede that such treatment is no more than that which a trained nurse might administer. While it may be truthfully said that it is not the practice of medicine in the common acceptation of that term, it cannot be claimed that it does not "profess to treat, operate on or prescribe for any physical injury to or deformity of another," and certainly it cannot be insisted that such persons do not practice another "system or science of treating human ailments without the use of medicine internally or externally." Nor is the court able to see how, under his own evidence, the position advanced could be maintained that he was exempt from the operation of the statute by the last clause of the proviso to section 7; that is, that he was a person "who ministers to or treats the sick or suffering by mental or spiritual means, without the use of any drug or material remedy." Very clearly this provision, the court says, means that those who pretend to relieve the ailments of others by mental or spiritual means shall not be considered within the act; but if this party, under the proof in this case, could bring himself within that exception, then every one who treats diseases without administering medicine, either externally or internally, could also be brought within the exception. Few, perhaps, if any, physicians attempt to treat the sick and suffering without appealing to the mental faculties, to a greater or less degree, in aid of the remedies they apply or prescribe; but that is not treating the sick by mental or spiritual means. Again, the court says, that merely giving massage treatment or bathing a patient is very different from

advertising one's business or calling to be that of a doctor or physician, and, as such, administering osteopathic treatment. The one properly falls within the profession of a trained nurse, while the other does not.

SALE OF A DEVICE NOT THE PRACTICE OF MEDICINE

People, for the use of State Board of Health v. Lehr, 196 Ill. 361; 63 N. E. 725

1902

The Supreme Court holds that a question was manifestly improper in which a physician was asked to state whether or not, in his opinion, a person prescribing a medical device, claiming that it would cure rheumatism, etc., would be regarded as practicing medicine, as the witness understood the term. The court says that the statute defines the practice of medicine, and that it was for the jury, and not for a witness, even though he might be called an "expert," to say whether certain conduct amounted to the practice of medicine. In other words, this question sought to have the witness decide the very ultimate question which the jury had been sworn to try, and, consequently, an objection to it was properly sustained. Then it was asked that the jury be instructed that if it found from the evidence that the party charged with illegally practicing medicine prescribed a certain instrument or device to persons suffering from physical ailments, and recommended it as a means of cure or relief for such ailments, and that he did so without first obtaining a license therefor from the State Board of Health, then the jury should find him guilty and assess his fine as provided by statute. But this instruction, in view of the facts of the case, the court holds, did not correctly state the law. It says that the party did not "treat, or profess to treat, operate on or prescribe for any physical ailment, or any physical injury to or deformity of another." He simply offered and recommended the instrument or device in question for sale. He was practicing medicine, within the meaning of the statute, no more than is the druggist or pharmacist who sells and recommends surgical instruments, atomizers, and innumerable other appliances used by the afflicted. If this instruction should be held to announce the correct rule of law, then any neighbor or friend who might prescribe or recommend the use of a particular instrument or device would be guilty of a violation of the statute, which is certainly not in accord with the spirit of the statute or the intention of the legislature. The evidence not showing that he was an itinerant vendor of the device, he could not properly be convicted of violating section 8 of the statute, which provides "that any itinerant vendor of any drug, nostrum, ointment or appliance of any kind intended for the treatment of diseases or injury, who shall, by writing or printing, or any method, profess to cure or treat disease or deformity by any drug, nostrum or application, shall pay a license," etc., admitting that the device in question was an appliance, within the meaning of this statute. This, like all other penal statutes, must be strictly construed. The statute is a wise and humane one, and, within its reasonable construction, to be rigidly enforced; but any attempt to make it cover cases like this would be an abuse, rather than an enforcement of it.

FITTING GLASSES NOT THE PRACTICE OF MEDICINE

People, for use of the State Board of Health v. Smith, 208 Ill. 31; 69 N. E. 810

1904

The Supreme Court says that there was nothing in the record from which it could determine just what the complaint against the defendant was; but for the purposes of this decision, let it be assumed, as asserted by counsel, that the charge was a violation of sections 7 and 8 of the act of 1899, to regulate the practice of medicine in this state—that is, by professing "to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another," as provided in said section 7, and being an itinerant vendor of an appli-

ance for the treatment of diseases or injuries, as prohibited by section 8. The finding of the Appellate Court was that all he did was to fit spectacles to the eyes of persons of defective vision, and sell them to such persons. By so doing, the Supreme Court goes on to say, he did not treat, operate on or prescribe for any physical ailment or injury or deformity of another, within the meaning of section 7; nor did he, by advertising himself as an eye expert, and inviting persons afflicted with certain defects of vision to call on him, profess to treat, operate on, or prescribe for any physical ailment or physical injury to or deformity of another, but in the same advertisement stated that he did not give medical or surgical treatment. All that he asserted by the advertisement was that glasses fitted and ground by his method benefited, and had cured, headaches, blurring, itching, and burning of the eyes, etc. The Supreme Court also thinks it clear that he was not, under the facts here found, an itinerant vendor of any drug, nostrum, ointment, or application of any kind intended for the treatment of diseases or injury; nor did he, by writing or printing, or any other method, profess to the public to cure or treat diseases or deformity by any drug, nostrum, or application, within the meaning of section 8. It would be a strained construction of that section to hold that the mere fitting of spectacles to the eyes of a person is an appliance intended for the treatment of diseases or injury to another. This statute is penal in its character, and must be strictly construed. It is a well-known fact that headaches, dizziness, and other similar ailments, often result from defective vision, which may be relieved by the use of spectacles; but it cannot be seriously contended that the person who sells such spectacles, or who tests the eyes and fits such glasses, practices medicine or surgery, or professes to cure or treat diseases or deformities thereby. While the statute under consideration is a wise and humane regulation for the protection of the public, and should be rigidly enforced, the construction here contended for could have no other effect than to bring it into disrepute. And the Supreme Court thinks that, on the facts recited in the judgment below, the Appellate Court ruled properly in holding that the evidence did not warrant a conviction.

APPLICATION OF ILLINOIS MEDICAL PRACTICE ACT

People v. Langdon, 219 Ill. 189; 76 N. E. 387

1906

The Supreme Court denies a rehearing and reverses the decision of the Appellate and Circuit courts. This was an action to recover the penalty for practicing medicine without a license from the State Board of Health, imposed by section 9 of the act in force July 1, 1899, entitled, "An act to regulate the practice of medicine in the state of Illinois, and to repeal an act therein named." The dates of the violations of the act charged were in 1903, without any averment that the defendant began the practice of medicine after July 1, 1899, and it was contended that without that averment no cause of action was stated. Thus the question raised was whether a person who has no license to practice medicine, who began such practice before July 1, 1899, when the present act took effect, and continued such practice thereafter without a license, is subject to the penalties named in section 9.

The Supreme Court says that it is clear that such a person comes within the express language of that section. He is a person who is practicing medicine without a certificate issued by the State Board of Health in compliance with the provisions of the act, and who does not hold an unrevoked certificate from the State Board of Health issued prior to the taking effect of the act. Having no license at all to practice medicine, he is within the terms of the statute and subject to its penalties.

But counsel contended that because section 2 only provided for the granting of licenses to persons entering on the practice of medicine after July 1, 1899, when the act took effect, the only persons subject to the penalties imposed by section 9 were those who began the practice after that date. The Supreme Court, however, does not see how that position can be maintained. It says that the pro-

vision of section 2 relied on is as follows: "No person shall hereafter begin the practice of medicine or any of the branches thereof, or midwifery, in this state without first applying for and obtaining a license from the State Board of Health to do so." Taking that section and the other provisions of the act together, they amount to this: Any person desiring to enter on the practice of medicine after the act took effect could only do so after first applying for and obtaining a license from the State Board of Health in compliance with the provisions of the act, and any person practicing medicine without a certificate issued under said act, or an unrevoked certificate issued under previous acts, was subject to certain penalties specified in section 9. The act is penal in character, and is to be strictly construed, but not with such technicality as to defeat its purpose. When the true meaning and intent of the act are apparent, the act is to be given effect in accordance therewith. The proviso excluding persons practicing medicine who hold unrevoked licenses issued by the State Board of Health prior to the taking effect of the present act cannot be ignored in interpreting the act, and the proviso would be useless and senseless, if the legislature intended the act to apply only to persons who began the practice of medicine after the act took effect. To say that the legislature intended to grant immunity from prosecution to persons who were unlawfully practicing medicine at the time the act took effect would be wholly unwarranted. On the contrary, an unrevoked license or certificate issued under some previous act was required by the proviso.

CONTRACT "TO NURSE" A PERSON NOT ONE TO PRACTICE MEDICINE

Oswald v. Nehls, 233 Ill. 438; 84 N. E. 619

1908

The Supreme Court says that the duties assumed by the plaintiff under a contract set forth were "to personally care for and nurse the said Ludwig J. Nehls for and during the term of his natural life." It was argued that this contract was unenforceable because its performance required the plaintiff to practice medicine without being legally licensed so to do. But the court does not agree with that view. The agreement "to nurse" an adult person necessarily conveys the idea that the object of the care is sick or is an invalid. It means more than mere watchfulness. It means such care of the person and attention to the surroundings as will conduce to the comfort and hasten the recovery of the patient. The practice of medicine, within the meaning of the Illinois statute regulating the practice of medicine, and as generally understood, necessarily requires a knowledge of all those things a professional nurse is supposed to know. It embraces much more. It includes the application of knowledge of medicine, of disease, and the loss of health. Neither the terms of the contract nor the acts done in performance thereof by the plaintiff were illegal under the Illinois statute relating to the practice of medicine.

"WELTMERISM" IS PRACTICE OF MEDICINE

People v. Trenner, 144 Ill. App. 275

1908

The Appellate Court of Illinois, second district, says that this was an action of debt, for the use of the State Board of Health, to recover a penalty for practicing medicine without a license, contrary to the provisions of the act of 1899 regulating the practice of medicine in this state. The defendant did not take the witness stand or offer any proof denying the proof made by the plaintiff, but offered in evidence a pamphlet purporting to be signed by S. A. Weltmer, professing to be an exposition of the Weltmer method of healing. This was offered as the evidence that the defendant would testify was the treatment given by him if he had been sworn as a witness. Its admission in evidence was clearly improper; it was admitting in evidence a printed statement published by an irresponsible and unknown person as the statement of the defendant on his own

behalf, without any opportunity to the opposite party to cross-examine. If the defendant practiced mental suggestion only and strictly according to the Weltmer method, still this pamphlet stated, "It is often very helpful for the healer to magnetize a bottle of water which the patient takes home with him and drinks at stated intervals with the understanding that certain beneficial effects will follow," and suggests the use of "Animal Magnetism" and "Electro Biological Force" through the laying on of hands over the affected part.

It is very questionable whether these practices do not come within the statute which was enacted for the protection of the citizens of the state from such practitioners. However, the defendant in no way denied the proof of manipulation that was made on behalf of the plaintiff. The case of the *People v. Gordon, 194* Ill. 560, lays down the rule, that one who advertises himself as a magnetic healer and who gives treatments by rubbing or kneading the body for the purpose of freeing the nerve force, in the nature of osteopathic treatment, is not within the exception in favor of those treating the sick by mental or spiritual means, even though he accompanied his treatment by mental suggestion, but is practicing medicine within the meaning of the statute and liable to the penalty. It is unnecessary for this court to say anything more on the merits of this case as the case cited decides the question argued by the appellant against him. Judgment for the plaintiff affirmed.

ACT LICENSING ITINERANT VENDORS OF NOSTRUMS VALID

People, for the use of State Board of Health v. Wilson, 249 Ill. 195

1911

A minority of the Supreme Court of Illinois interprets and holds constitutional section 8 of the medical practice act of 1899, and holds that said section was not repealed by the pharmacy act of 1901. Said section 8 provides: "That any itinerant vendor of any drug, nostrum, ointment or appliance of any kind intended for the treatment of diseases or injury, who shall, by writing or printing, or by any other method, profess to the public to cure or treat disease or deformity by any drug, nostrum or application, shall pay a license of one hundred dollars ($100) per month into the treasury of the board, to be collected by the board in the name of the People of the State of Illinois, for the use of said board. And it shall be lawful for the State Board of Health to issue such license on application made to said board . . . but said board may, for sufficient cause, refuse said license. . . .

It was contended that the section was unconstitutional for the reason that it delegated legislative and judicial powers to the State Board of Health by giving it the right to refuse a license for sufficient cause without laying down any rule for its guidance. And the court says that it is the province of the legislature, alone, to enact law, and that power cannot be delegated to any other body. A law must be complete in all its terms and conditions when it leaves the legislature, so that every one may know, by reading it, what his rights are and how it will operate when put into execution. But this section is complete in all its terms, and it does not confer on the State Board of Health any power to legislate or to make any law. The only powers delegated to the board pertain to the execution of the law. Had this section given the board arbitrary power, in its discretion, to refuse to issue a license in any case it would then be open to the objection urged. As it stands, this section merely confers on the board, by express terms, that power and authority which it would have possessed had the clause complained of been entirely omitted.

This statute is designed to protect the public health and is a proper exercise of the police power of the state. The practice of medicine, which includes the itinerant vending of drugs and nostrums, is subject to legislative regulation and control. Had the clause, "but said board may, for sufficient cause, refuse said license," been omitted from this section of the act, the board would have possessed a discretion, which it might exercise to safeguard the public health, in granting or refusing a license. By the insertion of this clause the board is given no greater power. In the absence of either express restriction or authority the board would have been vested with a reasonable discretion, which it might exer-

cise, when necessary, to safeguard the public health. If the board would possess such power without express authority it certainly cannot be said that the granting of that power in express terms renders the act void. Should the board abuse the discretion thus vested in it the party aggrieved has his remedy. If such discretionary power is exercised with manifest injustice the courts are not precluded from commanding its due exercise. They will interfere where it is clearly shown that the discretion is abused. Such abuse of discretion will be controlled by mandamus.

Under this act the State Board of Health is not vested with an arbitrary discretion, but on the contrary, is only authorized to refuse a license for sufficient cause. Should the board exercise this discretion unreasonably or unfairly its action would be subject to review by the courts. The act is not subject to the objection that it confers legislative powers on the State Board of Health. Nor does the court agree with the contention that, even though this act be valid, section 8 was repealed, by implication, by the pharmacy act of 1901, so far as it applies to the itinerant vending of patent or proprietary medicines. The drug or nostrum sold in this case ("Porter's Pain King") was a proprietary preparation and bore a trade-mark. It was sold by the defendant in the original and unbroken package, and it was not claimed that it contained cocain or any other of the interdicted substances enumerated in the pharmacy act. The second proviso of the first section of the pharmacy act exempts from its provisions the sale of patent or proprietary preparations which do not contain cocain and other enumerated substances, and, so far as that act is concerned, leaves those preparations free to be sold by any one when sold in original and unbroken packages. The pharmacy act is not in reference to the same subject-matter as section 8 of the medical practice act. The pharmacy act merely provides that one who sells certain patent or proprietary preparations need not be a pharmacist, and that the provisions of that act do not apply to the sales of such preparations. It contains nothing which in any way modifies or repeals the provisions of the medical practice act regulating the vending of drugs and nostrums, whether such drugs and nostrums be patent, proprietary or other preparations.

It was urged, however, that, as by the pharmacy act the legislature removed all restrictions from the sale of certain patent or prietary preparations, that act must be held to operate to repeal said section 8 in order to prevent unjust discrimination between vendors of the same patent or proprietary preparations, and it was insisted that it cannot be made unlawful, on the ground of regulating the practice of medicine, for a citizen to sell medicine from a wagon or by traveling from house to house when the same medicine can be lawfully sold by the proprietor of a grocery or drug store. This argument was based on the assumption that itinerant vendors of patent and proprietary preparations fall within the same class as vendors of the same preparations who have a fixed and permanent place of business. This assumption is without foundation. A merchant with a permanent place of business deals, as a rule, with his regular customers and sells wares to such as come to buy. He is not a stranger in the community, and his character, reliability and reputation are known. He has a business reputation to maintain and has a fixed abiding place at which he may be found. An itinerant vendor, on the other hand, is not bound by any of the rules which govern the local merchant. He may be an entire stranger to every member of the communities in which he plies his trade. He has no business reputation to sustain. He is bound by no restraint in the representations he may make as to the particular drug or nostrum he offers for sale. He is here to-day and to-morrow is gone, perhaps never to be heard of again. The local dealer and the itinerant vendor of patent medicines are of separate and distinct classes. To regulate the practice of medicine is clearly within the police power of the state, and to discriminate between peddlers or itinerant vendors of medicinal preparations and local dealers in the same preparations is not an abuse of that power. The pharmacy act in nowise repeals any of the provisions of the medical practice act.

It was finally contended by the defendant that there was no proof that he was an itinerant vendor of any drug, nostrum, ointment or appliance of any kind intended for the treatment of disease or injury, or that he did, by writing or printing or any other method, profess to the public to cure or treat disease

or deformity by any drug, nostrum or application. The evidence disclosed that the preparation sold by him was contained in bottles. Around each bottle was wrapped a printed circular, and bottle and circular were inclosed in a paste-board box. The circular or pamphlet gave specific directions for external and internal use in the treatment of almost every ailment known to science with which man, beast or fowl may be afflicted, representing that "Porter's Pain King" was the best known remedy for all such ailments and guaranteeing satisfaction. The pamphlet also contained copies of a number of testimonials by various persons, in which wonderful cures of various ailments were claimed to have been effected by the use of the preparation. This pamphlet was delivered, with the preparation, to the purchaser. Such professions, although made only to those who purchased the nostrum, come within the clear meaning and intent of the statute. On this question the evidence on the part of the people made out a case against the defendant as an itinerant vendor of a nostrum, in violation of the statute.

[Minority opinion—majority holds provision in question unconstitutional.]

ABSENCE OF COMPENSATION DOES NOT FORM EXCEPTION TO PRACTICE ACT

Eastman v. The State, 109 Ind. 282; 10 N. E. 97; 58 Am. Rep. 400

1887

This case involves the constitutionality of the state medical practice act. The Supreme Court says that the police power of the state is very broad and comprehensive and quotes authorities to show that all kinds of restraints and burdens on persons and property are valid if their object is to secure the general comfort, health and prosperity of the state. The practice of medicine and surgery is a function which concerns the comfort, health and life of every person and it is an almost imperious necessity that only persons possessing skill and knowledge should be permitted to practice. The power of the board to accept or reject an application for license is not a judicial one, although it may involve some exercise of discretion. It is the purpose of the statute to prevent persons who do not possess necessary qualifications from treating diseases, wounds and injuries and to keep out of the profession of medicine all who do not possess sufficient learning and skill to discharge properly the duties incumbent upon members of the profession. The courts have no right to create an exception which will defeat that intention. It is immaterial whether the person who undertakes to treat diseases or wounds does it for hire or not. The courts cannot divide professional persons into classes and assert that one class is within the law and the other is not. The law applies to all who assume the duty of treating the sick, wounded or injured and applies to those who expect compensation for their services as well as to those who do not. It is not material whether reward is paid or promised or whether the services are rendered without compensation. The law was framed not to bestow favors upon a particular profession, but to discharge one of the highest duties of the state, that of protecting its citizens from injury and harm.

EVIDENCE OF PRACTICING MEDICINE WITHOUT A LICENSE A QUESTION OF FACT AND NOT OF LAW

Benham v. The State, 116 Ind. 112; 18 N. E. 454

1888

Appellant was indicted and convicted of practicing medicine without a license and appealed, claiming that the indictment was not sufficiently explicit. This objection was not sustained by the Supreme Court. The court also holds that the burden of proving that the defendant was duly licensed to practice medicine is on the defendant and not on the prosecuting board. The important question in this case is whether there was sufficient evidence in the record to justify the jury in finding that the appellant, within the period of the statute of limita-

tions, practiced medicine as charged in the indictment without a license to do so. This is a question of fact and not of law, and in the opinion of the court was clearly proven.

REFUSING A LICENSE—POWER OF BOARD

State ex rel. Burroughs v. Webster et al., 150 Ind. 607; 50 N. E. 750; 41 L. R. A. 212

1898

This was an action for a writ of mandate, to require the state board of medical registration and examination to issue a certificate entitling Burroughs to a license to practice medicine, under the act of 1897. In his complaint the relator recites that he has been practicing medicine in Indiana continuously since Sept. 19, 1896, under a license issued according to the law of 1885. He applied for a certificate to practice medicine under the new law, showing that he was a graduate, in 1893, of the American Eclectic Medical College of Cincinnati, and in 1897 of the American Medical College of Indianapolis. The board has refused to issue him a certificate. Written charges were filed, charging that the licenses received by him were obtained by misrepresentation as to the character of the colleges on whose diplomas the licenses were granted, and that he has been and is guilty of gross immorality in seeking and obtaining medical practice by false and fraudulent representations as to his ability to effect cures, and by falsely and fraudulently guaranteeing cures, and that he is also guilty of gross immorality in circulating indecent and obscene literature through the mails and through the community. The board set a date for the hearing of the charges, and immediately served a copy of the charges, with written notice of the time and place of the hearing set by the board, on the relator.

The relator was in the practice of medicine at the time the law of 1897 took effect, under licenses procured under the act of 1885. If the provisions in section 2 were all that were contained in the act in relation to persons already in the practice of medicine at the date of the approval of the law, there is no doubt that the relator would have been entitled to the writ of mandate asked for. The act would then mean that any one already practicing medicine by virtue of a license issued under the old law would be entitled to a certificate and license, to be issued under the new law. The simple fact that a license had been given under the old law would be the only evidence needed to entitle him to a license under the new law. And this is what the relator contends for. But there are provisions in section 5 of the act which materially modify the foregoing provisions of section 2, as follows: "The state board of medical registration and examination shall have the right to review the evidence on which a license has been obtained, and, if it shall be found that a license has been obtained by fraud or misrepresentation, the board may revoke such license. The board may refuse to grant a certificate to any person guilty of felony or gross immorality, or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery, and may, after notice and hearing, revoke a certificate for like cause. An appeal may be taken from the action of the board." These words certainly authorize the board to do something more than merely inspect the old license before they issue the certificate for a new one. Under those sweeping provisions, the old license is merely *prima facie* evidence of a right to the new one. The board is given authority to inquire whether the former license was rightfully obtained; and, even then, if the applicant is an unfit person to practice medicine, by reason of criminal conduct or immoral character or habits, the board may refuse a certificate. Moreover, after the giving of the certificate, provided no license has been issued on it, the board may, after notice and hearing, revoke the same. To protect the applicant from any injustice on the part of the board in so refusing or revoking a certificate, the act provides for an appeal. The tribunal of appeal, though not named in this section, is the Circuit or Superior Court of the proper county—the county of his residence. It thus appears that the relator's licenses, issued to him under the act of 1885, did not necessarily entitle him to a certificate from the board, unless the board were also satisfied, on examination, that such licenses were obtained without fraud or misrepresentation, and, besides, that the applicant was morally a fit person

to engage in the practice of medicine. The appellant is therefore in error in contending that any finding or judgment of a court is necessary to the revoking of a license granted under the old law. Such license was revoked by the law itself, in the act of 1897, and remains in force only until the board has acted on the application for the new license. If the new license is granted, it takes the place of the old one. If it is refused, the applicant has no right to practice medicine, unless, on appeal to the court from the action of the board, the board is required to issue a license.

The legislature has judged that the safety of the public health requires the guards that are placed around the practice of medicine by this law; and the court is unable to see that the act is not a valid exercise of the police power of the state. Had the board refused to act on the application of the relator, he could undoubtedly have compelled action. But the petition for mandate is not to compel the board to act on his application, but to compel it to grant him certificate for a license. This, under the act, he cannot compel the board to do. The board must act after investigation, and then grant or refuse the application, as may be found right. In case of refusal, the statute grants the right of appeal. The relator has therefore no cause to complain.

We do not understand what failure as to notice is shown in the statute. The statute itself is notice that the legislature has set aside the old licenses, and given a reasonable time in which to apply for new licenses in their place. The applicant for a new license has presented himself before the board, and, of course, must be held to have notice of whatever disposition the board may make of his application. In case he is granted a certificate, and the board sees fit to revoke it before he has procured his license, notice and a hearing are provided for. And, if he actually receives his license, it cannot be revoked until a formal action is had in court, including the filing of a verified charge against him, by way of complaint, followed by summons, finding, and judgment. The court finds no existence of failure of notice in the statute. The statute of 1897 is a much more guarded and limited exercise of the police power in regard to the licensing of physicians than many that have been upheld by the courts as valid and constitutional. Statutes similar to the one under consideration, denying to all physicians in the state, lawfully engaged in practice, the right to continue such practice, until they conform to the requirements of the statute, and restricting the practice of medicine to persons who are able to demonstrate their qualifications, have been held constitutional, as a proper exercise of the police power of the state in nearly every state of the union and in the Supreme Court of the United States. It is within the power of the general assembly to prescribe qualifications for the practice of the professions or trades named, and to regulate and control these professions, even to the point of taking away the right to practice from persons lawfully engaged in the practice who may be deemed insufficiently qualified in the judgment of the board or official to whom the examination of the applicant has been intrusted.

While in some respects *quasi* judicial, the action of the board is not judicial any more than is the action of a county surveyor in fixing a boundary line, or of a county superintendent in giving or refusing a teacher's certificate, or the action of numberless other officers or boards in making investigations and decisions in matters committed to them. Neither is the circumstance that an appeal is allowed from a decision of the board an indication that its action is judicial. The right of appeal from the action of boards in their administrative character is frequently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial, but it is granted as a method of getting the matter involved before a court that it may be determined judicially. Judgment affirmed.

VALIDITY OF MEDICAL BOARDS UPHELD—APPEALS

Ferner v. State, 151 Ind. 247; 51 N. E. 360

1898

The appellant was charged by information with having unlawfully practiced dentistry. The court thinks it quite clear that it is made a crime to practice dentistry "without being registered." Registry, within the purpose of the law,

relates to the permanent authority to practice dentistry, and the temporary permit is only a protection until the board shall meet to make the registry. The permit would be a bar to a prosecution, and available as a defense to a charge of practicing without registry.

It is insisted, also, that section 5596 is unconstitutional, as in violation of section 23 of article 1 of the state constitution, forbidding the granting of privileges which shall not, on the same terms, equally belong to all citizens. Said section provides for the appointment of a board of examiners consisting of five members, three of whom to be chosen by the Indiana State Dental Association. By this provision, it is claimed, a special privilege is given the Indiana State Dental Association of naming members of the board of examiners, and prescribing the standard of qualification. It is not necessary that members of the association shall be appointed upon the board. Whether the law itself should prescribe the standard of qualification, and whether it does so, are questions not presented. It is not objected that the law discriminates against the appellant in extending the right to practice dentistry, but it is that it discriminates in favor of the dental association in permitting it to exercise official duties. The power to appoint is in the nature of a duty, rather than a privilege. It may not be said to be a special privilege any more than that conferred on circuit judges to appoint city commissioners or a drainage commissioner, or that the governor, the president of the state university, and superintendents of common schools shall be members of the state board of education, or in many other instances where nonjudicial functions are imposed on judicial officers or nonexecutive functions are cast on the executive, or where men, by reason of their learning, are designated to perform a service to the public. Every man appointed to an office in a sense enjoys a privilege not enjoyed by another, but the appointment does not deprive any other citizen of a privilege; on the contrary, the appointee is an instrument of the government to protect such other citizen in his rights.

It has been suggested, rather than argued, that the act in question does not afford due process of law, in that it fails to extend the right of appeal from decisions by the board. It may be seriously doubted if one who does not seek a decision of the board may complain that he could not appeal from its action. It may be suggested, also, that the general rule is that appeals are recognized as allowable only from judicial decisions, and boards of the character of that in question do not render judicial decisions. It is further objected that the evidence did not support the verdict that the appellant engaged in the practice of dentistry. It showed that the appellant leased and occupied rooms for several months for the declared purpose of practicing dentistry; that he had done dental work for three or more persons; that at times he engaged in filling teeth, and at other times did dental work at the bench. The court regards this as sufficient to require the inference that he engaged in the practice. The judgment is affirmed.

JUDGMENT BY AGREEMENT VOID WHEN ENTERED BY AN ATTORNEY ACTING WITHOUT AUTHORITY

State Board of Medical Registration and Examination v. Coffin, 152 Ind. 439; 53 N. E. 458

1899

Eliza E. Coffin filed with the State Board of Medical Registration her application for a certificate entitling her to a license to practice medicine, conformable to the act of 1897. The board refused to grant her a certificate on the ground that she had been guilty of gross immorality. She appealed to the Circuit Court and the cause was put on the docket for the March term. The only entry made was "this cause is continued." The next appearance was on the second day of the following term, when a judgment by agreement was entered that the applicant was entitled to a certificate and that the board should issue her one. From the affidavits it appears that judgment was entered by agreement by an attorney acting for the prosecuting attorney without authority. The Supreme Court holds that such an agreement is void and remands the case with directions to set aside the judgment by agreement.

CHANGE OF RESIDENCE REQUIRES NEW COUNTY LICENSE

Mayfield v. Nale, 26 Ind. App. 240; 59 N. E. 415

1901

The Appellate Court says that the statute of that state is plain that, if a physician changes his residence from one county to another, he must obtain a new license in the county where he proposes to reside. This is a condition precedent to his right to practice in that county, and it is made unlawful for him to practice in such county without such license. In consequence, he cannot maintain an action for medical services rendered in a county, after moving thereto, without first having procured the requisite license. That he may subsequently comply with the law will not enable him to recover for services rendered in such county prior to obtaining a license therein. Whether the law that makes possible such a defense where competent professional services have actually been rendered is a wise one, it is held, is not for the courts to say.

EVIDENCE OF MISREPRESENTATION IN PROCURING LICENSE

Curryer v. Oliver, 27 Ind. App. 424; 60 N. E. 364; 61 N. E. 593

1901

The issue in this case was whether a physician's license had been obtained by fraud and misrepresentation, the misrepresentation alleged being that the holder was a graduate of a reputable medical college, when in fact he was not a graduate of any medical college. The evidence consisted of the record kept in the office of the clerk of the Clay Circuit Court, showing the issuance of a license to the party under the act of 1885. The clerk who made the record testified that the license would not have been issued if the party had not made an affidavit, and that the information as to the name of the university from which he graduated and the date of his diploma were taken from such affidavit. The affidavit itself could not be found, although search was made in the proper place at various times. The book containing the copy of the license was identified as "The Record of Physicians' Certificates." It was kept in the clerk's office of Clay county. No objection was made to the admission in evidence of this record. The statute then provided, among other things, that "such applicant shall pay to such clerk for such license the sum of $1.50, and the clerk shall record such license, together with the name of the college in which such applicant graduated, and the date of his or her diploma, in a book to be kept for such purpose, and which shall be a public record." Upon this evidence there can be no doubt, the Appellate Court of Indiana holds, that the party procured a license upon the misrepresentation that he graduated from the institution named at the time named; at least, it says, such inference might be fairly drawn, the presumption, until the contrary is shown, being that the clerk properly discharged his duty. Moreover, there was introduced in evidence an affidavit made by this party in 1897 on which a certificate of registration was issued to him in which affidavit it was stated by him that he was not a graduate of the university before referred to. And the court holds that from the evidence so introduced, in the absence of any explanation or denial by the party, the ultimate facts charged might have been properly inferred, wherefore it holds that it was error to sustain a motion for a finding and judgment in favor of the party on the evidence at the close of the petitioner's or secretary's evidence.

CONSTITUTIONALITY OF MEDICAL PRACTICE ACT—POLICE POWER

Parks v. State, 159 Ind. 211; 64 N. E. 862; 59 L. R. A. 190

1902

The appellant practiced magnetic healing, and had done so for eight years; he did not use medicines or surgery; he held himself out as a magnetic healer, advertised as such, and styled himself "Professor"; he was not a graduate of

any school of medicine, and had no license; he diagnosed cases entirely by the nerves. On the 8th day of April, 1901, one Edward Garvey came to him to be treated for a lame ankle; after examining the ankle, appellant diagnosed the case as rheumatism, and proceeded to give treatment, which consisted, at least in so far as there was anything manual about it, in holding the afflicted parts and rubbing them. An effort upon the part of appellant, while testifying as a witness, to describe magnetic healing, was prefaced by the statement that "it is pretty hard to describe for people to understand." At this point he was interrupted by the court, and the subject does not seem to have been pursued further. Appellant charged and received $1 for the treatment that he gave said Garvey. There can be no question as to appellant's guilt, if the act under which he was convicted is valid.

The prosecution in this case is based on the act of March 8, 1897, and its subsequent amendments. The appellant challenges the validity of the amended statute as applied to him on the ground that the amended statute is in conflict with the fourteenth amendment to the federal constitution.

The most extensive and pervading power existing in the states by virtue of their general sovereignty is the police power. There are doubtless some rights of a purely personal and private character that their possessor does not surrender to the whole people by becoming a member of organized society. But it is evident that he must concede to society, in return for the enjoyment of its privileges, a large measure of authority over his conduct and possessions, and that in the process of development from a rude state of society to a complex civilization the zone of personal and private rights that are beyond legislative control must constantly diminish. The maxim, "Sic utere tuo ut alienum non lædas" ("So use your own that another you may not injure"), is the source of the police power, and furnishes the implied condition upon which every member of society possesses and enjoys his property. Under the law of eminent domain, the owner of property is entitled to compensation when his property is actually taken, and, while the distinction between the exercise of this power and that of the police power may sometimes be difficult to perceive in practice, yet in their leading theories they are broadly differentiated, by reason of the fact that if the imposition of the burden or the control of the privilege can be affirmed as an act done within the scope of the police power, under existing laws, then there is no right of compensation. To that extent must the individual right be subordinated to the public weal. Until this power, various burdens are imposed: Criminals are deprived of their liberty; the implements of crime are destroyed; vice and pauperism are controlled; noxious trades are regulated; nuisances are suppressed; children are required to attend school; the property of infants and persons non compos is placed in the control of others; the construction of buildings in populous neighborhoods is regulated; provision is made for the greater safety of passengers upon railways and steamboats; employers are required to provide safe places in which the work of their employees is to be performed; the hours of work, in employments deleterious to the health, limited; the employment of children in factories prohibited; pure-food laws are enacted; physicians, dentists, and druggists are licensed; and so the list might be almost indefinitely expanded by specific instances of authorized legislative regulations enforcing the social compact, for the protection of life, health, morals, property, and the general weal of the community, until we perceive that definition is impossible, and that the whole matter of the legislative element of sovereignty, as opposed to individual liberty, must, in the absence of other constitutional restriction, be left, as the federal supreme court has declared, to the gradual processes of judicial inclusion and exclusion, as the cases presented for decision require.

For hundreds of years the matter of the conservation of the public health has been a leading matter of police control. If a man holds himself out to the community as a person skilled in the science of healing, and on that ground seeks the opportunity to exercise the skill he claims to possess, his business becomes impressed with a public character, and he is therefore subject to reasonable regulation in its prosecution.

Counsel for appellant denounce the law in question as "an attempt to determine a question of science, and control the personal conduct of the citizen without regard to his opinion, and in a matter in which the public is in no wise concerned."

The court thinks that the matter is one of very considerable concern, and that the legislature is the appropriate tribunal to determine the degree of learning that those who gain a livelihood by seeking to relieve the bodily ailments of others should possess. While it is true that the often-quoted definition of "police" power afforded by Chief Justice Shaw, contains the limitation that such laws must be wholesome and reasonable, yet it is evident, as the power to enact laws has been confided to the legislative department, that a very large measure of authority is vested in that department to determine what is reasonable and wholesome in the enactment of statutes under the police power. The courts would never venture to run a race of opinion with the legislature upon questions of mere expediency. Such a course would be a gross judicial usurpation of power.

Appellant's counsel objects to the classification that the statute provides for, on the ground that it is unjust and arbitrary. In the exercise of the police power there must needs be a considerable discretion vested in the legislature, whereby some people have rights or suffer burdens that others do not. If the objection mentioned has any real basis, the statute must be condemned by the courts. The statute of a state that deprives any person of his life, liberty, or property without due process of law, or that denies to any person within the jurisdiction of the state the equal protection of the laws, cannot be upheld on the theory that it is an exercise of the power of classification. It is undoubtedly true, as stated by Judge Cooley, that a proper exercise of the police power cannot come in conflict with the national jurisdiction, the ultimate test of propriety must be found in the limitations of the fourteenth amendment, since it operates to hedge in the field of the police power to the extent of preventing the enforcement of statutes in denial of the rights that the amendment protects. Especially in cases where statutes are enacted that deny to persons the right to follow their accustomed vocations in life, while the same right is granted to others, are the courts insistent that there must be some substantial basis in reason and justice for the discrimination. In cases where there is room for the presumption that a substantial and just reason furnished the basis for legislation enacted in the carrying out of a public purpose, the exercise of the legislative discretion in the establishing of a classification must be respected by the courts.

The court does not think that there is involved in this case a question as to the authority of the legislature to discriminate against a particular school of practitioners. It is not judicially advised that magnetic healing, so called, is so far based on co-ordinated, arranged, and systematized knowledge that it can be termed a science, or that any considerable degree of instruction is a prerequisite to its prosecution, as it is actually practiced by those whose knowledge does not go beyond the manifestation of the phenomena of magnetism. It may have been the judgment of the legislature, in its implied exclusion of appellant, that both the limitations of value that the treatment possessed and the dangers attending it made it wise to confine its use to a body of men in whose hands it would be safer to intrust it, because of their education in subjects relevant to its administration. The legislature, in judging of a matter of this kind, was authorized to give heed to the opinions of scientific men, and, presuming that it did so, it doubtless found substantial reason for the act of exclusion complained of. Judged by such authority, it appears that, while the practice of magnetic healing is based on some elements of ascertained knowledge, yet that its prosecution is attended with danger to such a degree that the legislature was justified in its effort to take it out of hands of empirics. The statute in question goes no further than to establish a standard that may be attained by reasonable application, and the means has an appropriate relation to the end. There is plainly, as applied to the case in hand, no arbitrary or unreasonable deprivation of right, neither is the classification unreasonable or arbitrary.

The court also holds that the contention that the statute of 1901 is invalid for the want of a sufficient title is not sound. It is not required that the title to an act should be an epitome of the act. It is the "subject" of the act, and not the "matters properly connected therewith," that the constitution requires to be "expressed in the title." It was certainly competent for the legislature to submit a fairly relevant definition of the "practice of medicine." The court is not called upon to determine whether all of the acts mentioned can properly be denominated as practicing medicine. It is only necessary

to determine whether the appellant has brought himself within the statutory definition of the practice of medicine, in so far as the acts therein mentioned can be said, in a substantial sense, to amount to practicing medicine. The term "practice of medicine" is, at least in its popular sense, generic in its character.

The court concludes that appellant was engaged in the practice of medicine, since he held himself out as a magnetic healer, and his method of treatment was, at least in part, the method that medical practitioners sometimes employ. If it was competent for the legislature to have enacted the amendment of 1901, as a part of the act of 1897, it is immaterial whether the acts on which appellant's conviction was based were or were not a violation of law in the interim. As the act of 1901 is now a part of the law of 1897, it follows that appellant was properly convicted. The judgment is affirmed.

RIGHTS OF STATE BOARDS TO REVOKE LICENSES

Spurgeon et al v. Rhodes, 167 Ind. 1; 78 N. E. 228

1906

The Supreme Court of Indiana holds that it was error to grant a temporary injunction, on the application of the latter-named party, restraining the members of the State Board of Medical Registration and Examination from proceeding to hear and determine charges of "gross immorality" pending against him before said board and from revoking his license to practice medicine. It says, among other things, that the allegation in the complaint to the effect that a certain-named woman was employed to procure evidence in regard to his character was not denied, but this alone would not authorize the granting of a temporary injunction. The gist of the complaint was that the defendants had prejudged his case and had intended to revoke his license without any evidence and without giving him a hearing. The affidavits of five members of the board and their attorneys denied the charge, and said in effect that they intended to and would give him a fair and impartial hearing, and would determine the charges according to the evidence. This was all that he was entitled to demand. The fact that the woman mentioned was not in the state and could not be compelled to attend the hearing of the charges, or that the board would try the charges without her presence or testimony, furnished no ground for enjoining the board from hearing and determining the truth of the charges.

It was insisted that the temporary injunction was properly granted for the reason that section 7322 of Burns' Annotated Statutes of Indiana of 1901, under which the charges in question were presented to the board, so far as it attempted to confer on the board the power to try complainant and determine whether or not he was guilty or not of the gross immorality charged, and to revoke or refuse to revoke his license therefor, was wholly unconstitutional and void, in that it attempted to confer on the board such judicial power; that it was in violation of the fifth amendment of the Constitution of the United States, which provides that "no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment by a grand jury," and of the sixth amendment, which provides that "in all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"; and that it violated the provision of said Constitution that "the trial of all crimes except in cases of impeachment shall be by jury." But the court says that these provisions apply only to proceedings and prosecution in the courts of the United States and laws enacted by Congress; not to laws enacted by the legislatures of the states.

Statutes prescribing the qualifications of practitioners of medicine and surgery, and otherwise regulating the practice of those professions have been uniformly upheld by the courts as a valid exercise of the police power of the states, infringing no provisions of either federal or state constitutions. Statutes containing a provision like the one in question here, authorizing the board to revoke a license when the holder has been guilty of a felony or of gross immorality, have been held not to violate any provision of the federal or state constitutions, and it

has been held that the granting or refusing to grant a license to practice medicine, or the revocation thereof by the board, is not the exercise of judicial power.

PRACTICING MEDICINE WITHOUT A LICENSE

Melville v. State, 173 Ind. 352; 89 N. E. 490

1910

The Supreme Court says, where it affirms a conviction of practicing medicine without a license, that the accused argued that a diploma held by him from a school of osteopathy at the time the law went into effect entitled him to a license to practice medicine, and having applied to the Board of Medical Examination for a certificate, and exhibited and filed with the board his diploma and paid the legal fees, and done, as he averred, all that he was required by the law to do, and his license being wrongfully withheld, he had a right to practice medicine. But in this contention he fell into error.

The mere delivery of the diploma to the board, and the payment to it of $10 as a fee, of themselves amounted to nothing. Calling the money paid a license fee did not make it a license fee. The Indiana statute requires the payment of $10 to the board as an examination fee, to determine whether the candidate for license is a fit person to receive it. The payment of the $10 secures to the candidate no privilege or advantage beyond the right to an examination by the board as to fitness to exercise a license. And because the contrary was not alleged, the court infers that the accused never had an examination by the state board, or, if he had one, he failed to prove himself qualified and entitled to a certificate; and if he had in fact received a certificate, that he never presented it to the county clerk, and requested the issuance of a license on it. If either of these assumed facts existed, he was not entitled to a license.

Again: According to his plea, he had no qualification, or right, to a license to practice medicine beyond that conferred by his diploma from a Chicago school of osteopathy. If the court granted that the school that issued to him the diploma was a reputable and an approved school of osteopathy, that would not strengthen the answer. His failure to affirm that he was practicing osteopathy only was equivalent to an admission that he was practicing medicine generally, and the very most he could claim the right to do was to practice osteopathy.

Nor was there error in denying to the accused the right to read in evidence, as a license to practice medicine, the receipt, given by the secretary of the board for "ten dollars in payment of legal fee on diploma for certificate." The receipt was not a license, and furnished the accused no excuse for the violation of a specific requirement of the law. Even if he had shown that he was entitled, and that a license was arbitrarily withheld, it would have afforded him no sufficient justification to practice medicine. If a license was wrongfully withheld, his remedy was to proceed by appeal, or some other appropriate action to obtain it.

UNLAWFUL PRACTICE OF MEDICINE BY A "D. S. T."

Witty v. State (Ind.), 90 N. E. 627

1910

The Supreme Court says, that the party appealing, the defendant in the court below, who claimed to be a graduate of an institute of suggestive therapeutics, and in one of his advertisements appended the letters "D. S. T." to his name, was charged with practicing medicine without a license, in violation of the statute. The evidence established that he held himself out and advertised to the public by a sign in his office, and by publication in a local newspaper, that he was a "doctor," and capable and competent to successfully treat all forms of chronic diseases. He notified all persons, through the public press, that he was not only a "doctor," but that as such he was a specialist in the treatment of chronic diseases. He further advised them that he was capable of curing the many diseases mentioned in his advertisement without medicine or surgery, and that there were but few of the many diseases which did not yield to his drugless treatment.

The mere fact alone that in his practice he did not use drugs in any form whatever as a medicine to cure or heal the many diseases which he professed to successfully treat did not place him, in the eyes of the statute, within its meaning in the position of one not engaged in the practice of medicine. The term "doctor," as defined by the lexicographers, signifies or means, in one respect, a person who practices medicine. Consequently, when the defendant held himself out to the public, and advised them that he was a "doctor" located in the city; that he had certain office hours—he gave all persons to understand and be informed that he was at least engaged in the practice of healing or curing suffering humanity of diseases by some method or means adapted to that purpose, notwithstanding the fact he disclaimed the use of medicine of the character of drugs in his treatment of the diseases mentioned. He did not profess in his advertisement to be but a mere masseur engaged in giving massage treatment to all persons who might desire such, or who had been advised by their physician to take such treatment. He undertook to show by his advertisement that he was learned in his profession, and competent to diagnose diseases and prescribe the treatment necessary for a cure.

His counsel insisted that while it was true that he was shown to have had an office, that he advertised and held himself out as a doctor, "and was ready to and did administer to the wants of the sick, he did so exclusively by mental suggestion and by manual rubbing, and did not pretend to practice medicine in any shape or form." But the mere fact that he did not administer to his patients drugs in any form or manner, but confined his treatment to rubbing their afflicted parts, could not be held to except him from the provisions of the statute. If he, under the facts in this case, could be held as not coming within the provisions of the statute, then any person unlicensed to practice medicine might hold himself out to the public as a doctor, and treat all classes of diseases without administration of drugs, and not offend against the statute. Such a construction of the law would be inconsistent with its letter and spirit. The very object or purpose of the statute is to protect the sick and suffering and the public at large against the ignorant and unlearned by prohibiting them from holding themselves out to the world as doctors or physicians without having acquired any knowledge whatever of the human system, or the diseases and ailments with which it may be afflicted.

The defendant under the facts was properly convicted, and the judgment of conviction is therefore affirmed.

POWER OF CONTINUING REGULATION SUSTAINED

State v. Mosher, 78 Ia. 321; 43 N. W. 202

1889

The defendant was tried upon information before a justice of the peace, and convicted. On appeal to the district court there was another conviction, and judgment, from which he appeals to this court.

The defendant was convicted of practicing medicine and surgery without a certificate.

The record discloses that the defendant applied to the board of medical examiners for a certificate to practice medicine, and with it he filed his affidavit showing that he was 52 years of age; that he was a resident of Sioux City, and had practiced medicine and surgery there since October, 1875. The record further discloses that the defendant was to some extent examined by the board touching his qualifications for the practice. To such an examination the defendant then objected, claiming that under the law he was entitled to his certificate upon the evidence as to his former practice, and that under the law he was not required to submit to an examination. The record of the board of medical examiners, as it appears in evidence, shows that the certificate was refused for two reasons: *First*, because of insufficient evidence to show that the defendant had practiced for the time and as required by law; and, *second*, the examination furnished palpable evidence of his incompetency.

1. The argument of appellant deals largely with the constitutionality of the act under which the certificate was refused. The argument in this respect is based

upon assumptions of fact and law, as follows: (1) That the real grounds for refusing the certificate by the board was a finding of incompetency. (2) That as a legal proposition, under the act in question, if it was a fact that the defendant had practiced the profession both as to time and place as specified in the act, he was, as a matter of right, entitled to the certificate. (3) Under such an application the board has no right to inquire as to the competency of the applicant before granting the certificate. These assumptions are not thus arranged or stated in terms in argument, but they are our understanding of the position of counsel. The affidavit as to the time and place of practice is undisputed, and appellant is disposed to treat it as a legally established fact. At the trial in the district court the defendant attempted to prove as defensive matter that his application for a certificate was based entirely on the facts as to his prior practice, and attempted to show the facts as to such practice, which the court refused, holding that the fact that he had practiced, and without the certificate, was conclusive against him. Appellant contends that if this holding of the district court is correct, then a law investing the board with such absolute power to deprive a person of his professional or property rights is unconstitutional on several grounds, and among them, that the deprivation is without due process of law. That the holding of the district court in this respect is correct, we entertain no doubt,—that is, we entertain no doubt that such is the intent of the act. The act plainly provides that the qualifications prescribed, when ascertained, shall be evidenced by a certificate of the board, and that the certificate shall be recorded in the county where the holder resides; and the record must show the facts upon which the certificate was granted. The certificate or record is the proper evidence of qualification, and the offense consists in the practice of the profession without first procuring the certificate. This holding disposes mainly of the questions as to introduction of testimony.

The questions presented as to the invalidity of the act are only available for consideration if it be held that the board at the time of the application could only inquire as to the time and place of practice, and that the examination as to competency is unauthorized, because we can only adjudge a law invalid or unconstitutional in a case where a party is to be deprived of his rights in consequence of the invalidity of the law. If the law in this case authorized an examination as to competency, and the certificate was legally refused because of incompetency, the case furnishes no grounds of complaint, even if the law is invalid in other respects.

The court inquires as to the right of the board to examine as to the competency of the applicant for a certificate where the application is based on the fact of a five-years' practice. The term "*prima facie* qualifications" is used to avoid an inference that certificates granted under the "tests," as there mentioned, were conclusive thereafter as to qualifications. Counsel for appellant have assumed in the argument that no such right of examination is given the board. Under the language of the section it could hardly be doubted that the board, after the granting of a certificate, could in some manner make inquiry as to the competency of the holder, and, if palpably incompetent, revoke it. In such a case the certificate would only be *prima facie* evidence in his favor. The effect of the certificate might be overcome by other evidence. It certainly, then, is not a fact that either the certificate or the fact of the five-year practice gives to the holder or the practitioner the absolute right to practice, but at the foundation of his claim lies the question of competency. Such is the very spirit and purpose of the law, and in its construction care should be taken to subserve that purpose. The court inquires after the legislative intent. The section says that the board may refuse to grant the certificate if the applicant has been convicted of felony committed in the practice of his profession. It must be, then, that the board may inquire after that fact, for it may either refuse or revoke for that cause; and we reach the query, may it refuse or revoke for incompetency? The language in this respect is not as decisive as with regard to felony, but it is clearly the law. It is an unreasonable and impolitic construction to hold that upon such an application with the board in possession of facts to justify an inquiry as to the competency of the party, if in possession of a certificate, that it must grant the certificate, and at once proceed to revoke it. Before holding to that view, the language should be clear and unmistakable in its import. Nothing more can be said of the

language of the law under consideration than that it is of doubtful meaning, and that the doubt extends only to the query, which of the two constructions should prevail? The court thinks the legislative purpose is best subserved by holding that the board, upon the application of the defendant, had the right to inquire as to his competency, and that the established fact of his prior practice was no more than equivalent to the possession of a certificate, which might be overcome by a showing of palpable incompetency.

The defendant, in his testimony, denies having been examined before the board as to competency, but his testimony in this respect is conclusively overcome by the record. His examination, as shown by the abstract of appellant, is brief, and in these words: "Dr. S. Mosher was sworn. Said his name was Sidney Mosher. That he was fifty-two years of age. Says he began reading medicine in New York state, when 17 years old, with Kelly & Robinson, near Batavia. Never attended lectures. Been in the practice about twenty years. Began treatment of medicine before the war. Began in Iowa, when government first required revenue tax. Said he did a general practice. Did but little surgery. Could not say how many cavities were in the heart. Cannot give the origin or insertion of any one muscle in the body. Select any one? Said he could not answer now. He was not prepared to be examined. Can you give the therapeutic action of any drug? Did not answer. Can you give the curative action of any single drug and you select the drug? Could not say." The examination discloses that the defendant was either palpably incompetent, or stubbornly silent, in either of which cases he has no grounds for complaint as to the action of the board. If he knew, and would not tell, the board was justified by his misconduct in believing him incompetent. If he did not know, the result is a vindication of the law.

It is urged that the defendant is not amenable to the penal provisions of the act because of the exceptions contained in section 8 regarding physicians who have been in practice in the state for five consecutive years, three years of which shall have been in one locality; provided such physicians shall furnish the state board of examiners satisfactory evidence of such practice, and shall procure the proper certificate, as provided by this act. It is true, the defendant, as a five-years practitioner, is mentioned in the exceptions, but before he can make the provisions of the section as to exceptions available to him, he must comply with the proviso, and present to the court "the proper certificate." This he has failed to do.

It is said that the examination of the defendant was not legal, because not in writing, as required by law. The abstract does not disclose the character of the examination in this respect. The court discovers nothing in the record to reverse the judgment, and it is affirmed.

MEDICAL BOARD NOT VESTED WITH ARBITRARY POWERS

Iowa Eclectic Medical College Ass'n v. Schrader et al., Board of Medical Examiners, 87 Ia. 659; 55 N. W. 24; 20 L. R. A. 355

1893

Action by writ of certiorari to inquire into the legality of certain action ot the defendant board with respect to the plaintiff college. Judgment was entered in the district court dismissing the petition, from which judgment plaintiff appeals.

The inquiry is whether the defendant has "exceeded his proper jurisdiction, or is otherwise acting illegally." When the defendant has jurisdiction. and is given a discretion, the courts cannot, on certiorari, inquire into the correctness of its decisions upon matters of fact, nor review the exercise of the discretion given. Our inquiry is exclusively as to jurisdiction and legality of action, and if jurisdiction existed, and the action was legal, we must affirm, even though the motive was wrongful. The plaintiff was a legally incorporated and organized medical college, carried on for the purpose of giving instructions in medicine and surgery, and to confer degrees upon and issue diplomas to its graduates. The defendants constituted the board of medical examiners of the state. It is required by the statute that every person practicing medicine, surgery, or

obstetrics within this state shall first procure a certificate from the board of medical examiners of his right to do so. Section 2546 provides, "If the diploma is found genuine, and is issued by a medical school legally organized and in good standing, of which the state board of examiners shall determine, and if the person presenting and claiming such diploma be the person to whom the same was originally granted, then the state board of examiners shall issue its certificate to that effect, signed by not less than five physicians thereof, representing one or more physicians of the schools on the board, and such certificate shall be conclusive as to the right of the lawful holder to practice medicine, surgery, and obstetrics within this state." At a meeting of the defendant board, May 30, 1888, "it was moved that the Iowa Eclectic Medical College, located at Des Moines, be recognized as in good standing." This motion was adopted by a vote of five ayes to two nays, and thereupon and thereafter certificates were issued to graduates of said college. On March 22, 1890, C. P. Evans, a graduate of said college in the class of 1889-90, exhibited his diploma to the secretary of the defendant board, which was then verified as to its genuineness, and returned to the applicant with a blank for making application for a certificate when he desired to do so. His application was not received until May 21, 1890, and no other application from plaintiff's graduates was before the defendant board during that time. The defendant board, at its organization, adopted a schedule of minimum requirements as to qualifications of students on entering college, branches to be taught, how to be taught, length of course and attendance, facilities for teaching, and that "the aggregate graduates of a college shall not exceed 45 per cent. of its aggregate matriculates during the period of five years ending with any session subsequent to sessions of 1885-86." At the regular meeting of the board, May 7, 1890, and when the board was about to adjourn until the regular meeting in November, written charges were received from Thomas A. Brazill against the plaintiff college, charging that it was conducted and operated in violation of the laws of the state, and specifying certain particulars. The specifications show a disregard of the requirements in every respect, except as to the per cent. of graduates. On receipt of these charges it was moved and carried that they be placed on file, and a copy be furnished to plaintiff, with notice to appear at the next meeting of the board and answer the charges. Dr. Clark offered the following resolution, which was carried: "Resolved, that this board will not issue certificates to graduates of the Iowa Eclectic Medical College at Des Moines, for the session of 1889-90, until the standing of said college shall have been determined." Following this action the board adjourned until the November meeting. At the regular November meeting of the board, on the testimony of the dean of the faculty of the college, the board found sufficient corroborative evidence to satisfy it that the teaching in said college is not up to its minimum requirements, and it therefore voted to withhold certificates from the graduates of said college. The secretary called attention to the application of Charles P. Evans, a graduate of the said Iowa Medical College, on file in the office of the secretary since May 12, 1890. It was moved and seconded that the application be rejected, on the ground that he fails to furnish satisfactory evidence of having graduated from a college recognized by this board as in good standing.

Appellant's contentions are that said action of the defendant board is illegal because not authorized by the statute, and, if authorized, is illegal because a statute so authorizing is in violation of the constitution. There is a diversity of opinion as to the necessity for such statutes, but with that the court has nothing to do. Its inquiry is whether the statute authorized the action had, and, if so, whether that authority is in contravention of the constitution. The purpose of these statutes is the protection of the public against incompetent persons practicing medicine, surgery, or obstetrics, by restraining the practice of those sufficiently learned in that profession. As a means of determining who are thus learned, the board of medical examiners was created, with authority, subject to certain restrictions, to determine who are entitled to certificates authorizing them to practice medicine. This they determine upon examination of the applicant, or upon his diploma, "issued by a medical school legally organized and in good standing." A genuine diploma from such a school is made sufficient evidence of learning to entitle the holder to a certificate. It must be ascertained, however, that the diploma is genuine, that it is to the person presenting it, and that it was

issued by a medical school legally organized and in good standing. The statute expressly authorizes the state board of examiners to determine these matters. That board may determine not only the identity of the applicant, the genuineness of the diploma, but also whether it was issued by a medical school legally organized and in good standing. To the end that such determinations may be intelligibly and properly made, section 2547 authorizes any member of the board "to administer oaths and take testimony in all matters relating to their duties as examiners aforesaid." The statute contains no other provision as to how these matters shall be inquired into and determined; but as said in Wood v. Farmer, 69 Iowa, 537, 29 N. W. Rep. 440, "it is a familiar rule of law that authority to do an act implies authority to do all other acts necessary to be done in executing the power conferred. The law will always presume the existence of authority to do acts incidental and necessary to the discharge of lawful power." It is clear that the defendant board did have power, by proper investigation, to determine the identity of applicants, the genuineness of their diplomas, and whether they were issued by a medical school legally organized and in good standing.

The first action complained of is that of May 7, 1890, upon the charges being filed resolving that the board would not issue certificates to graduates of the plaintiff college of the class of 1889-90 until the standing of the college had been determined. This action was unauthorized, unjust, and arbitrary. It was taken without investigation, and without other cause or information than the filing of charges by a stranger, who did not even present them in person, but by a messenger. It was taken when no application for a certificate was pending, Evans not having presented his until May 21st. It was in the face of their former action determining the plaintiff college in good standing, upon the faith of which the course of instructions were continued, and students encouraged to attend. It deprived the graduates of the class of 1889-90 of receiving certificates, without investigation, and, by adjourning until November, left the college and its graduates without even the hope of investigation or relief until that time. The future of the college depended upon whether the defendant board would continue to recognize it as in good standing, for without such recognition it must close its doors. It was known that its next term commenced in October, and that this action must tend to lessen its patronage; yet the adjournment was until November, without providing for an earlier meeting, as the statute authorizes, and as a due regard for the rights of the plaintiff college and its graduates would have suggested. There is surely much in this action of the defendant board to warrant the criticism that is made upon it by plaintiff's counsel. It was illegal because it reversed the former action of the board without any investigation and without sufficient cause. The constitutionality of the statute might well be questioned if it authorized the board to determine, without investigation, that a particular medical school was not in good standing, and especially so when that school had been previously determined to be in good standing. We do not say that the board is precluded, by having once determined that a school is in good standing, from thereafter determining differently, but only that it has not power to do so arbitrarily and without investigation. We do not say that such inquiries must be attended with the formality of a trial in court, but the determination must be based upon inquiry and facts, and not upon the mere arbitrary will of the board.

The remaining complaint is against the action taken upon the investigation had Nov. 21, 1890. The complaint is not against the manner of the investigation, but against the result as shown in the resolutions copied above. The finding was "that the teaching in said college is not up to our minimum requirements." The board having authority to determine the standing of colleges, it was certainly proper that they should advise them in advance what would be required of them. The requirements prescribed, save the one quoted above, look to the thoroughness of the education to be given, and are in harmony with the purpose of the statute. The standing of a college, as contemplated in this statute, is rather what the college is, in respect to the thoroughness of its course, than what it may be reputed to be. The board was fully authorized to determine, upon proper investigation, that a college was not in good standing that did not meet the minimum requirements as to extent and thoroughness of its course. The

legality of the requirements as to the per cent. that may graduate is not involved in this case, but, as it has been discussed, the court may say that it is certainly questionable. While the graduation of an unusual per cent. may be ground for closer scrutiny, it may well be questioned whether the defendant board may arbitrarily say that but 45 per cent. shall be permitted to graduate. The standing of the plaintiff college was a matter within the jurisdiction of the defendant board to determine, and on Nov. 21, 1890, after a full and fair examination, it determined that said college was not in good standing because its teaching was not up to said minimum requirements. The board having jurisdiction to determine this question of fact, and having determined it, upon full investigation and evidence by unanimous vote, the court must hold their action legal, even though it might reach a different conclusion on the facts, if it were our province to consider them. Much is said in argument about the composition of the defendant board as to the different schools of medicine, but, as the statute does not require that the different schools shall be represented on the board, its composition cannot affect its jurisdiction or the legality of its acts in the respect under consideration.

Appellant's remaining contention is that, if the statute conferred power upon the defendant board to do the acts complained of, it is in violation of section 6, article 1, and section 1, article 8, of the constitution. Said section 6 is as follows: "All laws of the general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Section 1 of article 8 is as follows: "No corporation shall be created by special laws; but the general assembly shall provide by general laws for the organization of all corporations hereafter to be created, except as hereinafter provided." The exceptions provided have no application to this case. In McAunich v. Railroad Co., 20 Iowa, 343, the rule was announced as follows: "These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." This rule has since been followed in many cases, notably in Land Co. v. Soper, 39 Iowa, 112; Deppe v. Railroad Co., 36 Iowa, 52. The statute under consideration is clearly within this rule "because every person who is brought within the relations and circumstances provided for is affected by the law." It is uniform in its operation "upon all persons in the like situation," and grants no privileges or immunities that do not equally belong to all citizens. Article 8 of the constitution, it will be observed, relates to the creation of corporations, and does not apply to the defendant board. It is not a corporate body, but a branch of the government. The authority to refuse certificates to graduates of medical schools not in good standing does not extend special privileges or immunities to other schools that are determined to be in good standing. It is argued, on behalf of the plaintiff, that with the authority claimed by the defendant board it may determine "absolutely and unconditionally, without limitation or restraint, and without appeal, what rights the graduates of the different colleges of the state shall enjoy." It is said: "The power to determine what colleges are in good standing, and what are not, is simply an arbitrary power, that may be exercised at the will of the board, without restraint and without remedy by appeal." It is true no appeal is provided for, but the students of a school that has not been determined to be in good standing, in common with all other persons, have the right to go before the defendant board and be examined, without regard to diploma, and, if found to have the requisite qualifications, to receive a certificate. It is not correct to say that the defendant board may determine whether a medical school is in good standing, arbitrarily and without restraint. The law does not authorize such action, and it is illegal. The defendant board acts under the restraints of law that require proper inquiry into the matters to be determined, and we may not presume that the defendant board will act arbitrarily and without investigation, and upon that presumption hold the statute that confers the power to be unconstitutional. This statute is not unlike many others found in the Code of Iowa, conferring authority upon officers and

boards to determine similar questions as to qualifications, notable among which is our statute for the examination of teachers, applicants for admission to the bar, and to practice pharmacy and dentistry. Our conclusion is that the defendant board exceeded its jurisdiction, and acted illegally, in the action taken May 7, 1890, and that a certificate should have been issued to C. P. Evans upon his diploma from the plaintiff college, and his application made thereon May 21, 1890. We are of the opinion that the action of the defendant board, Nov. 21, 1890, was within its jurisdiction, and legal. As the purpose of the petition is to test the legality of this last action, the judgment of the district court dismissing the petition was correct, and is therefore affirmed.

ITINERANT VENDOR SUBJECT TO MEDICAL PRACTICE ACT

State v. Burk, 88 Ia. 661; 56 N. W. 180

1893

This is an appeal from a judgment, on an indictment charging that the defendant sold liniments, nostrums, ointments and other drugs without being licensed as an itinerant vendor. At the trial, it was shown that the defendant was in the employ of a manufacturer of proprietary medicines; that he traveled with a team and wagon, selling medicines from house to house. He did not hold himself out as a physician nor assume to diagnose ailments. He distributed printed circulars issued by the manufacturing company, representing that their medicines were cures for certain diseases named in the circulars. The acts of the eighteenth general assembly exempted the sale of proprietary medicines from the operation of the medical practice act. This section was amended by the nineteenth general assembly by limiting it to preparations manufactured in the state and sold and distributed by agents from an established place of business. The twenty-first general assembly repealed this section and enacted a substitute, regulating dispensing by physicians. The defendant claims that the original section 12 was not repealed but only the amendment passed by the nineteenth general assembly and that, therefore, the medical practice act does not apply to the sale of proprietary medicines. The court holds that this contention was not valid and that the defendant was amenable to pay the license provided. In the trial, after the arguments were closed, the trial judge suggested to the county attorney that he had failed to prove that the defendant had no license. The county attorney claimed that it was for the defendant to show that he had a license and that he had proven by one witness that the defendant had admitted that he had no license. On this testimony being read and on it appearing that the witness had not so testified, the trial judge permitted the county attorney to recall the witness and to prove this admission by the defendant. The supreme court holds that this was within the discretion of the court and was no abuse. The state was also permitted, over objection, to examine three witnesses who were not before the grand jury and whose names were not upon the indictment. The supreme court holds that if this was error, it was error without prejudice to the defendant, as the statements of these witnesses were not only uncontroverted but were admitted by the defendant. The court holds that there was no error and reaffirms the judgment of the district court.

REGULATING ITINERANT VENDORS—INDICTMENT

State v. Blair, 92 Ia. 28; 60 N. W. 486

1894

Indictment for publicly professing to treat diseases while an itinerant vendor of drugs, nostrums, etc., without licenses. The district court sustained a demurrer to the indictment, and the state appealed.

It is urged by the defense that the indictment is defective, because the facts constituting the offense are not pleaded. It is said that the indictment fails to

allege that any drugs were sold, or offered for sale, in Monroe county. The offense does not consist in the defendant's having sold, or offered for sale, drugs in Monroe county, but in the fact of his then being an itinerant vendor of drugs, etc., and then publicly professing, in Monroe county, by writing or printing or another method, to cure or treat diseases, etc., by any drug, etc. For instance, any person, being an itinerant vendor of drugs, who, going into Monroe county, and without a sale or an offer to sell, makes the profession of curing or treating in the way and by means specified, is guilty of the offense contemplated by the act.

The indictment charges that the defendant did, by "printing, writing, and other methods, profess," etc. It is urged that, if more than one printing or writing was used, each would be a separate offense, and hence that the indictment is bad for duplicity. The court thinks not. It is the professing to cure or treat that constitutes the offense, and that may be done by one or many writings or printings, or both.

It is further insisted that the act under which the indictment was found is in violation of the constitutional provision that "every person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." Const. Iowa, art. 1, § 7. The statute in question is a part of a chapter regulating "The Practice of Pharmacy, and the Sale of Medicines and Poisons," and is designed to guard against evil consequences liable to result therefrom. The prohibitive features of the act do not go to the rights intended to be secured by the constitutional provision as to speaking, writing, or publishing one's sentiments, or as to abridging or restraining the liberty of the press.

The indictment charges the offense in the language of the law, substantially, which is particularly specific as to the facts constituting an offense. In such a case it is sufficient to charge the offense in the language of the statute. The court thinks the indictment is sufficient, and that the court erred in sustaining the demurrer. While it disproves the order of the court in sustaining the demurrer, the appeal being by the state, it does not reverse the judgment.

PRACTICE FOR FIVE YEARS A VALID EXCEPTION

State v. Bair, 112 Ia. 466; 84 N. W. 532

1900

The defendant was accused of practicing as an itinerant physician, without first having obtained a license from the state board of medical examiners. The defendant demurred thereto on the ground that certain provisions of the Code with respect to license are obnoxious to section 6 of article 1 of the constitution of Iowa and the fourteenth amendment to the constitution of the United States.

The court says that every citizen has the undoubted right to follow any lawful calling, business, or profession he may select, subject only to such restrictions as the government may impose for the welfare and safety of society. This right is one of the distinguishing features of republican institutions. Many of the occupations of life may be followed by persons, irrespective of fitness, without danger to the public health or in detriment to the general welfare. Others demand special knowledge, training, or experience; and the power of the state to prescribe such restrictions and regulations for these as in its judgment shall protect the people from the consequences of ignorance or incapacity, as well as of deception and fraud, has never been questioned. This is especially true with respect to the practice of medicine. Nearly every one, of necessity, consults the physician at some period of life, but few are able to judge his qualifications in point of learning and skill. And because of the importance of the interests committed to his care, involving health and life, this law was enacted, requiring knowledge and capacity commensurate therewith, and upon which the community may rely. Prior to Jan. 1, 1899, this was to be evidenced in three different ways: (1) By examination before the state board of medical examiners; (2) by a genuine certificate of graduation from a medical school, found by the board to be of good

standing; and (3) by a showing that the physician had "been in practice in this state for five consecutive years, three years of which time shall have been in one locality." The nature and extent of these qualifications were primarily for the determination of the legislature. No objection can be urged because of their severity, if appropriate to the profession, and attainable by reasonable study or application. No one is deprived of the right to practice medicine. All that is exacted is that every one who assumes to do so shall be possessed of the requisite knowledge and skill, and that this be evidenced by a certificate of the board designated by the state to ascertain his fitness. In other words, the real test, applicable to all alike, is that of qualification, and this statute relates to the proof to be furnished in order to establish this as a basis for such certificate. The satisfactory character of a diploma from a reputable medical school, and the disclosures of an examination, as such proof, is not questioned; and statutes which, in addition thereto, treat the practice of the profession within the state for a number of years, or the fact of being in practice at the time of their enactment, as sufficient evidence of qualification, have often been upheld, as invulnerable to the charge of discrimination.

But section 2579 not only requires practice of medicine in the state for five consecutive years, as prima facie evidence of qualification, but stipulates that three of these shall have been in one locality; and it is asserted that thereby physicians of five-years residence in the state are divided into two classes,—those who have practiced three of the five consecutive years in one place, and those who have not. This may be conceded, as, for the purpose of efficient legislation, it is often necessary to divide the subjects upon which it operates into classes. Such division may not be based on differences which merely serve to definitely separate, but must rest on those of the "situation and circumstances of the subjects placed in the different classes as suggest the necessity or propriety of different legislation with respect to them." If the distinction upon which the classification is grounded is not arbitrary, but reasonable and apparent, relating somewhat to the subject of the enactment, it will justify the application of different rules to the subjects thus separated, and legislation founded thereon is not subject to condemnation as class legislation. Actual experience in the practice of medicine tends to render the physician capable. Continuing in the profession several years in a particular locality indicates a degree of merit not likely to be found in a person moving from place to place. The itinerant doctor, roving about, without remaining in one locality longer than a few days or weeks, is usually wanting in honesty, and too frequently but a charlatan or quack. A professional residence affords opportunity of becoming known, and, if lacking in capacity or character, obstacles may be interposed to the issuance of a certificate; since notwithstanding continuous practice in one place, a certificate may be denied, owing to incompetency or immorality. In practical operation, the law admits those to practice who have followed the profession at one place long enough to acquire knowledge through experience in the profession, and to become known, unless want of capacity or good character affirmatively appears. Others must be examined or present diplomas. It makes a distinction recognized in all the affairs of life. Will any one contend for a moment that, everything else being equal, the permanent resident of a locality is not likely to be superior in capacity and morals to him who has no fixed professional abiding place? That there may be and are exceptions is readily conceded, but the legislature was not bound to adopt an absolutely infallible rule. If, within the ordinary experience of men, and as a matter of common observation, physicians of learning, skill, and character are generally permanently located, and seldom change the places where their profession is followed, as appears to be true, there is no tenable reason why this circumstance might not be treated by the legislature as evidence of qualification under the statute. For the law does not purport to grant privileges or immunities to any physician or class of physicians. It simply establishes a rule of evidence by which qualification to practice medicine and surgery shall be ascertained. What should be such evidence, if appropriate for that purpose, and bearing somewhat on the matter of fitness, was peculiarly within the discretion of the lawmakers. The distinction is neither arbitrary nor unreasonable, but in harmony with common knowledge of differences which ordinarily exist between persons following the medical profession who have a permanent

locus in quo, and those who do not. The court is not unmindful of a decision to the contrary, construing a somewhat similar statute, by the supreme court of New Hampshire. But that court appears to have grounded its conclusion on the erroneous assumption that permanency in the practice in a locality furnishes no evidence of qualification. This, as we have undertaken to demonstrate, is not warranted.

As the statute is not in contravention of the provision of the constitution prohibiting unjust discrimination, the demurrer to the indictment should have been overruled. Reversed.

CONSTRUCTION OF PRACTICE ACT AND WHAT VIOLATES IT

State v. Heath, 125 Ia. 585; 101 N. W. 429

1904

The supreme court says that certain penalties are denounced by section 2580 of the Code against those who shall practice medicine, surgery or obstetrics in that state without first having obtained and filed for record the certificate required by the chapter of which that section forms a part. Section 2579 defines who shall be deemed to be practicing medicine as follows: "Any person shall be held as practicing medicine, surgery or obstetrics, or to be a physician, within the meaning of the chapter, who shall publicly profess to be a physician, surgeon or obstetrician, and assume the duties, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal." The manifest intention of the legislature was to divide those who shall be deemed practicing medicine into three classes: 1, all "who shall profess to be a physician, surgeon or obstetrician and assume the duties;" 2, those "who shall make a practice of prescribing or prescribing and furnishing medicine for the sick;" and 3, those "who shall publicly profess to cure or heal." It is doubtless true that a mere public profession of an ability to heal would not subject any one to the penalties of the law. Such profession must be made under such circumstances as to indicate that it is made with a view of undertaking to cure the afflicted. One publicly professes, in announcing to the public generally his claim of skill in the art of healing, and is guilty, under section 2580 of the Code, if, without a certificate, and not within the statutory exceptions, this is done with the purpose of treating the maladies of patients who may engage his attention. There is some reason for not exacting proof of actual treatment in all cases. Should one profess to be a physician, and assume the duties or prescribe for the sick, little difficulty might be experienced in obtaining evidence of the fact. But suppose a charlatan, quack or other persons assumes or pretends to believe he may effect cures in an invisible manner, and undertakes to do so? Proof of his effort would be all but impossible. The statute, in order to be effective, has denounced the public profession that he will cure or heal, and this may be proven without exacting evidence that he has actually undertaken to do so. The statute, when fairly construed, does not seem capable of a broader construction. Nor does the court deem this essential in order to sustain its constitutionality. The statutes do not attempt to discriminate between different schools of medicine or systems for the cure of disease. No method of attempting to heal the sick, however occult, is prohibited. All that the law exacts is that, whatever the system, the practitioner shall be possessed of a certificate from the State Board of Medical Examiners, and shall exercise such reasonable skill and care as are usually possessed by practitioners in good standing of that system in the vicinity where they practice. This excludes no one from the profession, but requires all to attain reasonable proficiency in certain subjects essential to the appreciation of physical conditions to be affected by treatment. The object is not to make any particular mode of effecting a cure unlawful, but simply to protect the community from the evils of empiricism. Often the individual alone suffers from the want of proper attention, but in cases of contagious or infectious diseases the entire community may be endangered. In no profession, occupation or calling are the people more easily or readily imposed on. Section 2576 of the Code requires all, regardless of the particular school, to be examined in anatomy, physiology, general chemistry, pathology, surgery and obstetrics. Surely it is

not unreasonable to exact for every one who proposes to undertake to prevent, cure or alleviate disease and pain some knowledge of the nature of disease, its origin, its anatomical and physiologic features, its causative relations and of the preparation and action of drugs. At any rate, the state, in order to guard the people against the effects of imposition or ignorance, had the right to exact such knowledge. The examination in materia medica, therapeutics and the principles and practice of medicine must correspond to the school according to which the applicant proposes to practice. In this case it conclusively appeared that the accused, who had never obtained a certificate from the State Board of Medical Examiners, professed publicly to heal a great variety of ailments (by "magnetic treatments"), and so did for the purpose of procuring patients and treating them. The question of his guilt should have been submitted to the jury.

UNLAWFUL PRACTITIONERS

State v. Edmunds, 127 Ia. 333; 101 N. W. 431

1904

The charge in this case was that the defendant, being a non-resident, assumed the duties of, and publicly professed to be, a physician, and did attempt and profess to heal and cure diseases by dieting his patients and causing them to take certain exercises and to wear glasses furnished by him; that he went about and in various ways solicited persons to meet him for treatment, and did, while so practicing as an itinerant physician, treat and attempt to cure injuries, diseases, etc. Did the acts charged constitute an offense under the laws of Iowa? Section 2579 of the Code defines "physician," "practice of medicine," etc., as follows: "Any person shall be held as practicing medicine, surgery or obstetrics or to be a physician within the meaning of this chapter who shall publicly profess to be a physician, surgeon or obstetrician, and assume the duties, or who shall make a practice of prescribing or prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal." Section 2580 provides a penalty to be imposed on "any person who shall practice medicine, surgery or obstetrics in the state without first having obtained and filed for record the certificate therein required." Section 2581 defines an "itinerant physician" as follows: "Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal diseases, ailments or injuries, by any medicine, appliance or method, who goes from place to place, shall be considered an itinerant physician." This section also provides for a license fee of $250 per annum, the same being payable into the state treasury for the use of the state of Iowa. Such license may issue only to such as hold a certificate from the State Board of Medical Examiners. It was contended that as the defendant did not profess or attempt to cure by any medicine, appliance, or method similar to medicine, but by dieting his patients, etc., his acts did not come within the prohibitions of section 2581. The supreme court says that the question here was a narrow one, depending wholly on the construction to be given the words "medicine, appliance, or method." Do they mean a medicine or drug, or something administered as a medicine or drug would be? The court thinks this too narrow a construction. It says that an appliance can hardly be said to be a medicine or drug, and a method may or may not involve the administration of any substance, either internally or externally. True, when general terms follow specific words of a like nature, the general terms are presumed to embrace things and methods of the kind designated by the specific words. But for this rule to apply, it must appear that the general words are of a like nature. This was not true here. Undoubtedly the state has the right to determine what acts shall constitute the practice of the healing art, and it may impose conditions on the exercise of that privilege. Having defined the terms it uses, courts should accept the definition given, and not be too subtle in the use of refined distinctions. To save its people from quacks and charlatans, the state has plenary power to prohibit or supervise the exercise of the healing art. Statutes similar to the one in question have been enacted in many states, and they have been held to apply to magnetic healers. Cases from other states cited and relied on by the defendant's counsel were not in point, for the reason that the statutes therein construed

were not so broad as the one here before the court. The Iowa legislature evidently intended to prohibit the practice of the healing art by the use of medicine or any kind of appliance or methods, except on certain named conditions. The language used is very broad and comprehensive, and covers any and every kind of public profession to cure and heal by the use of any method or device. It confines the practice of medicine to the school or schools regarded as lawful, and does not permit quacks and charlatans to impose on the public. The charge against the defendant was that he was practicing as an itinerant physician without the required license, and it was unimportant, the court says, to inquire as to whether or not he had a state certificate, as this would afford him no protection. There may be some doubt as to whether a non-resident may obtain this certificate, maintain his residence in another state, and practice his profession in Iowa without obtaining the additional license required by section 2581 of the Code. But as to this the court expresses no decided opinion at this time. As to the contention that the license tax is unreasonably high, oppressive, and prohibitive, the court says that, being in the nature of an occupation tax, the state undoubtedly had the right to fix it at such sum as it saw fit. While the practice of medicine is often spoken of as a right, it is not, strictly speaking, a right, but a mere privilege, upon the exercise of which the state may impose conditions such as it deems advisable. The title of the act is, "Of the practice of medicine," and, the court says, the subject-matter is sufficiently expressed. It was error to sustain a demurrer to the indictment.

OBJECT OF MEDICAL PRACTICE

State v. Wilhite, 132 Ia. 226; 109 N. W. 730

1906

The supreme court holds sufficient, and affirms a judgment of conviction on, an indictment which, though inartistically drawn, charged, in substance, that the defendant did wilfully and unlawfully practice medicine and publicly profess to cure and heal the diseases and ailments to which the flesh is heir by means of a certain system, a more particular description of the peculiar and mysterious workings of which was to the grand jury unknown; that he advertised in a certain newspaper that by said system he could cure and heal tuberculosis and cause the same to be cured, as also that he was a "doctor of neurology and ophthalmology," with an office at a certain place and certain office hours; that he maintained such office and had placed near the entrance thereto an advertisement sign containing the words, "Dr. Wilhite, Neurologist," by means of which advertisement he solicited persons to meet him at his office to participate in the beneficent results arising from treatment under his said system; that he did then and there undertake to cure and heal diseases and ailments, but did not have a certificate or license from the proper authorities so to practice, nor did he file with the county recorder such certificate to practice, and had never applied therefor.

The evidence, the court says, established the defendant's guilt. True, he modestly ascribed to Nature the healing of all diseases, and merely claimed to discover and remove the causes so as to give Nature a chance. To accomplish this he proposed to "stop the leaks in the nervous system and repair the damages done by methodical rest and dietetics." In a long screed criticizing the treatment of disease by physicians generally, published in a local paper, he announced himself "the master mechanic of the human body," adding: "The system I practice is taught in but one school in the world, and I am a graduate of that school;" and proceeded: "If your organs are not all working properly call on a master who will remove the cause. If there is a leak of power he stops it. If there is a pressure on some of the shaftings (or nerves), causing a hot box (or pain), he removes it. If the right fuel has not been used, he orders the right kind, and if the fireman does not know how to fire, he teaches him or her the business." And, after quoting a letter said to have been received from a patient, he said: "I do not claim to be a specialist on tuberculosis any more than a great many (in fact, almost all) so-called diseases that the medical men and other specialists have not been able to

do much for in the way of curing. This system gives a permanent cure. We prefer those who have tried other systems. In that way we prove the system I practice is the best because we get good results. We do not care much what your troubles are if you want to get well and stay well. Dr. J. C. Wilhite, 526½ Central Avenue, Fort Dodge, Iowa." This was a public profession to cure and heal. Publishing his card as "doctor of neurology and ophthalmology" was also a public profession that he was a physician, and this with the assumption of duties as such, by advising patients how to care for themselves so that Nature might effect a cure, constituted practicing medicine within the meaning of the statute.

Continuing, the court says that the defendant complained that if he be adjudged guilty there were others equally so, and many were enumerated who, as counsel seemed to think, must come beneath the ban of the law. But it will be time enough to determine each case when it reaches the court, and should some escape it may afford the accused some consolation to reflect that also at the fall of the tower of Siloam those who escaped were quite as great sinners as the 18 who were crushed beneath its walls. At any rate, the zeal of the prosecutor was not misdirected in this case. The "doctor" left the farm in 1902, and after studying at the "Northern College of Ophthalmology and Otology" two months, was awarded the degree of "doctor of optics." He then pursued a correspondence course in the same school during the summers of 1902 and 1903 and became entitled to a diploma on the payment of $10. Thereafter he took a "regular course" of three months at the "McCormick Neurological College" and became a "doctor of neurology" March 1, 1905. Aside from this he has read several articles in the magazines and a couple of works on the eye. No argument is required to demonstrate that his preparation was utterly inadequate, and that his pretensions savored of the charlatan and imposter. Even though familiar with his alleged "system," he could not have been reasonably proficient in those subjects essential to the appreciation of physical conditions to be affected by treatment.

The design of the law is not to render any mode of treatment whatsoever unlawful but that every one before he shall undertake to prevent, cure or alleviate diseases and pain as an occupation shall have some knowledge of the nature of disease, its origin, its anatomic and physiologic features, its causative relations and of the preparation and action of drugs. Experience has shown that this is necessary for the protection of the people against fraud and empiricism. No one is thereby deprived of the opportunity to exploit his "system." All that is exacted is that before undertaking to do so by applying it to the functions of life he shall be possessed of that degree of knowledge and skill required by the statute of all and evidenced by a certificate from the proper officers of the state.

The considerations urged in this case against the constitutionality of the statutes were pressed on the court's attention when State v. Heath, 125 Iowa 585, was decided. The court is not inclined to reconsider the conclusions reached in these decisions.

A physician having testified that Dunglison's Medical Dictionary, revised edition, is accepted by the medical profession as authority in the definition of words, and thereupon the definitions of "anatomy," "neurology," "opthalmology," "pathology" and "physiology" contained therein having been introduced in evidence, over objection, the court holds that, even though the court might have taken judicial notice of the meaning of these words, it was not error to receive a standard medical dictionary in evidence as an aid to the memory and understanding of the court. Bixby v. Railway Co., 105 Iowa 293, and like cases are not in point. They hold that medical works, treating of the symptoms and cure of disease, are not admissible; not that standard authorities may not be received as proof of the meaning of medical terms.

GOOD CASE MADE AGAINST ILLEGAL PRACTITIONER

State v. Kendig, 133 Ia. 164; 110 N. W. 463

1907

The supreme court affirms a conviction of practicing medicine without a license. The indictment, found under Sections 2579 and 2580 of the Iowa Code, charged that "the said A. J. Kendig, on the first day of September, A. D. 1903,

and from the said first day of September, A. D. 1903, until the time of the finding of this indictment, did, in the county of Madison and state of Iowa, falsely, wrongfully and unlawfully assume the duties of a physician and make a practice of prescribing and furnishing medicine for the sick, and did wrongfully, falsely and unlawfully publicly profess to cure and heal, without having first obtained from the board of medical examiners of the state of Iowa, and filed for record, a certificate conferring on him the right to practice, contrary to the statutes in such cases made and provided."

The indictment was challenged on several grounds, and, first, that it was not sufficiently certain as to the person charged, or as to the offense intended to be charged, in that the act or omission charged was not set forth with sufficient particularity. It was said that the indictment did not give the slightest information as to the time, place or circumstances of the offense, nor of the evidence the defendant would be required to produce to establish his defense. But the court holds that here the statutory definition of the crime was complete, and, as the indictment charged the defendant's offense in the language of the statute, it was sufficient.

Again, it was said that the indictment did not charge the defendant with prescribing medicine for, or practicing on, human beings, as distinguished from furnishing medicine for domestic animals. This objection, the court says, was purely hypercritical and without merit. According to the common understanding, as well as in law, there is a distinction between the practice of medicine and the healing of the sick and the treatment of diseased animals.

Nor does the court think that the indictment was insufficient in that it did not negative the exceptions contained in the statute, as that it shall not be construed to prohibit students from prescribing under certain conditions or gratuitous services in the case of emergency, etc. The court says that the general rule as to exceptions, provisos, and the like is that where the exception or proviso forms a portion of the description of the offense so that the ingredients thereof can not be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso, but, where the exception is separable from the description and is not an ingredient thereof it need not be noticed in the accusation; for it is a matter of defense.

That there was ample testimony to justify the verdict returned, the court explains by saying that there was no doubt that the defendant was visiting the sick, diagnosing their ailments and furnishing medicines for their cure. Not only this, but he filed claims against the estates of some of his patients for medical services rendered and asked the county to recompense him for treating a "county charge." The statute, the court further says, was intended to cover the advertising and selling of all medicines except those known as "patent" or "proprietary," and there was no testimony that the medicines which the defendant was vending belonged to either of these classes. Moreover, the defendant was not merely selling certain preparations, but he was visiting the sick and prescribing them for his patients.

TRAVELING PHYSICIANS MUST PAY LICENSE TAX

City of Fairfield v. Shallenberger, 135 Ia. 615; 113 N. W. 459

1907

The supreme court upholds a city ordinance requiring traveling physicians engaging for pay or reward in that occupation or profession in the city to pay a license of $50 per year. Section 700 of the Iowa Code provides that cities and towns shall have power "to regulate, license and tax . . . itinerant doctors, itinerant physicians and surgeons," while Section 2581 thereof provides that the state board of medical examiners may issue to itinerant physicians a license to practice within the state. But the court does not think that Section 2581 repeals or limits the power of Section 700 by implication or by any express language used therein.

The power to license conferred on cities and towns by Section 700, the court says, is in reality a grant of power to enact police regulations for the general

welfare of the particular community. And it is on this principle that physicians, other professional men, and skilled workmen generally may be required to procure a license which certifies to their fitness to pursue their respective callings in which professional skill is most necessary, and in which the ignorance of the practitioner is likely to be productive of harm to the public and to individuals having business relations with them. What the state may do in its sovereign capacity it may authorize its creatures to do, and the court thinks there can be no doubt of its power to delegate to municipal corporations the enactment of such local police regulations as shall be deemed reasonably necessary for the protection of the public in the particular localities. That the legislature may, in the exercise of its police power, regulate a state license for the practice of medicine, and at the same time authorize municipalities to require a license for the practice thereof within their boundaries, the court does not doubt. It would, in effect, be nothing more than the imposition of an increased charge for the privilege, and the court was cited to no authority which holds this to be beyond the power of the state. If the state may thus act, it follows that no inconsistency necessarily exists between the two acts under consideration. In one the power is given municipalities to license within their confines, and in the other a license for the whole state is issued, but by implication it is not effective where a local license is required until such license has been obtained. That a license may be required from the same person for the same business by the state and by its municipalities is a rule of general application.

The court does not consider that the ordinance violates Section 1 of the fourteenth amendment to the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person the equal protection of the laws."

Nor does the court think the ordinance open to the charge that it discriminates against a non-resident of the city or of the state. It requires a license only from traveling physicians, it is true, but it nowhere confines its operation to traveling physicians who are non-residents of the city of Fairfield. If a resident of said city was a traveling physician and sought to practice his profession therein, he would be as surely subject to the ordinance as was the defendant. The ordinance is of uniform operation because it embraces all of the class designated therein.

Neither was the license required unreasonable. Fifty dollars per year for the privilege of practicing medicine is not in and of itself unreasonable or exorbitant.

PRESCRIBING OF "TISSUE FOODS" IS THE PRACTICE OF MEDICINE

State v. Bresee, 137 Ia. 673; 114 N. W. 45

1907

The Supreme Court of Iowa says that the indictment against the defendant charged, not only in general statutory terms that she practiced medicine without a necessary certificate, but that she unlawfully professed to be a physician and assumed the duties of a physician; that she prescribed and furnished medicine for the sick, and publicly professed to cure and heal, for a valuable consideration. It was shown and admitted that she maintained an office or place in the city of Council Bluffs, Iowa, where she kept and sold to others a preparation known as "Schuessler's Tissue Food," the use of which was supposed or claimed to be a benefit to the sick, but whether it was sold or used as a medicine or remedy for diseases, or as an article of diet, was a matter on which the testimony was in some conflict.

If the witnesses were to be believed, the defendant assured the sick applying to her of her ability to cure them, and professed to be able merely by looking at them to determine the nature of their diseases. Such was her confidence in her skill that she boasted that she had never lost a patient, and declared that she would not take any patient whom she could not cure. To those desiring her aid she dealt out what she claimed to be "bio-chemical remedies," or tissue food. On her door she placed a card or sign advertising her business as a "bio-chemist," whatever that may mean.

According to her statement, the remedies or tissue food dealt out by her were prepared by a distinguished German scientist, Professor Schuessler, who was alleged to have discovered that the human system is made up of fourteen different elements or properties, and that with a sufficient tissue food or remedy for the building up of these elements or component parts all diseases would become curable. Twelve of these ultimate elements and their proper tissue food had been discovered by Professor Schuessler, and, when the other two had been found, "you simply need never die."

These remedies she had in tablet form, and her manner of dealing them out was thus described by one of the witnesses, who had applied to her for this valuable secret of earthly immortality: "She said we should come to her because, while the tablets did the work, they should be administered in just such a form. She would take one bottle, then another, and, when people were sitting around the table, she would not give them all from the same bottle. She would kind of give them in a certain way. They were tablets. She called them 'tissue food,' I believe. I don't know as I ever heard her call them that, but I suppose she was referring to the remedies—the tissue food and the benefits to be derived from the use of these remedies taken in just such form as she prescribed. These remedies were in bottles. My father ate them from plates she put them on, taking same from particular bottles. I think I asked her once how she could know which to give to the different patients. Her only answer was she said she never got mixed up. I don't know whether the manner in which these remedies were to be administered were on the bottles or not."

Another witness said: "I live in this city; am acquainted with defendant; have consulted her for my ailments about two years ago last August. I told her what my condition was. She said she thought she could help me. She gave me some tablets and some paste made from the tablets. The paste was an external application. I took treatment several months, don't remember exactly how long. I think the price was $1 a treatment. My husband paid her. She was paid for the services rendered me. The number of these tablets she gave me varied; sometimes I took more than at other times. She would give me directions how to take the tablets. I took some of them home. She directed me how to take them."

At the close of the testimony the trial court instructed the jury that there was no evidence that the defendant publicly professed to be a physician, or that she assumed the duties of a physician, or that she publicly professed to cure or heal; and that the only question remaining for their consideration was whether during the time covered by the indictment she made a practice of prescribing, or prescribing and furnishing, medicine for the sick. The court also instructed the jury that the defendant had the right to keep and sell Schuessler's Tissue Food and other proprietary medicines, and, if a customer indicated to her the nature of his complaint, she could rightfully give her opinion what remedy she had therefor, and state her judgment as to which was best, and give gratuitous advice as to their use, but that she would have no right to diagnose a case and determine for the purchaser the character of the remedy he should use.

The trial resulted in a conviction, the judgment for which is affirmed by the supreme court.

The supreme court says that it was argued that to prescribe and furnish medicines is part of duties of a physician, and, as the trial court withdrew from the jury the allegation of the indictment that the defendant wrongfully assumed such duties, the charge that she unlawfully prescribed and furnished medicines necessarily fell with it. The court thinks the reasoning is unsound. The Iowa statute specifically and separately enumerates each of these acts; (a) Publicly professing to be a physician and assuming the duties of the profession; (b) prescribing medicines for the sick; (c) prescribing and furnishing medicine for the sick, and provides that any person making a practice of either shall be held to be practicing medicine within the meaning of the law. It is quite clear from the statute that the legislature did not understand that these phrases are merely different expressions of the same idea. Both expressions appear to have been used in order to bring within the scope of the act both the person who professes to be a physician and assumes the duties of that profession and the person who, while not claiming to be a physician, and not assuming the duties of the profession generally, yet undertakes to prescribe and furnish remedies for the sick and

afflicted. There was no error, therefore, of which the defendant could complain in submitting the case to the jury on the theory that the practice of prescribing, or prescribing and furnishing, medicines for the sick is not necessarily included in the charge of publicly professing to be a physician and assuming the duties pertaining to such profession.

Again, the point was made that under the trial court's instructions as to what acts would amount to prescribing and furnishing medicines, and as to the plaintiff's right to sell tissue food, there was no evidence on which a verdict could be upheld. But, on a careful reading of the record, the supreme court finds no such lack of testimony in support of the indictment as called for its interference with the findings of the jury.

The instructions were to the effect that, if the accused after diagnosing a case undertook to determine for a sick person applying to her the character of the remedy best suited to his ailment, said act would be prescribing medicine for the sick within the meaning of the statute. The supreme court is of the opinion that this definition was correct as far as it went and, if it was not as full, exact, and complete as might be framed, the error was one of which the defendant could not be heard to complain. The fact that the defendant was careful to call the article which she supplied to the sick "food," instead of "medicine," was not at all decisive of the merits of the case. It was evident she was catering to the patronage of the sick who were asking relief from their ills, and, if she listened to their statements, assured them of her ability to help them, and supplied them with her alleged appropriate remedies giving instructions for their application or use, this would seem to come within the definition given by the court, as well as within the ordinary and usual signification attached to the words "prescribing" or "prescribing and furnishing medicines," as they are commonly used and understood. Medicine as defined by Webster is "any substance administered in the treatment of disease; a remedial agent; a remedy." The fact that the substance so employed as a remedial agent may have value as a food, and have a tendency to build up and restore wasted or diseased tissue, will not deprive it of its character as a medicine if it be administered and employed for that purpose.

NO RIGHT TO PRACTICE MEDICINE WITHOUT A LICENSE

State v. Taylor, 140 Ia. 138; 118 N. W. 301

1908

The Supreme Court of Iowa says that the defendant commenced the practice of medicine in 1884, and continued in the practice thereof without a license until indicted in this case. He claimed that, having practiced in the state for five consecutive years, three years of which time was in one locality, he was within the exception of section 2579 of the Iowa Code, which provided that the provisions of the chapter shall not be construed to prohibit practice of physicians, as defined therein, "who have been in practice in this state for five consecutive years, three years of which time shall have been in one locality."

The first act regulating the practice of medicine in Iowa was passed in 1886, and the law as then enacted is substantially the law now as found in sections 2576-2583 of the Code. In the original act an exception was made as follows: "If not a graduate, the person practicing medicine or surgery within this state, unless he or she shall have been in continuous practice in this state for a period of not less than five years, of which he or she shall present to the state board of examiners satisfactory evidence in the form of affidavits, shall appear before the state board of examiners and submit to such examinations as said board may require." In section 2579 the requirement of satisfactory evidence of practice was omitted, and the defendant claimed that because of such change the legislature intended to say, and did say, that whoever had been in the practice of medicine in Iowa, whether rightfully or wrongfully, for a period of five years before that time, had the right to go ahead and practice without a certificate or license. The contention was manifestly unsound.

The original act was in force all of the time until the Code became the law, and the dropping therefrom the requirement of evidence cannot be construed into

a legalizing act intended to shield one who had confessedly violated the law. Section 9 of the act of 1886 made it a misdemeanor for any person to practice without having complied with the provisions of the act, but that no penalties for a violation thereof should be enforced prior to the 1st day of January, 1887. It is very clear that after Jan. 1, 1887, no one could legally practice medicine without complying with the act, or without bringing himself within the exceptions therein provided, and this the defendant did not do. He had never qualified under the exception of the statute but was daily violating the law, and, if his contention that the change referred to gave him the right to continue practice without a certificate or license be sustained, the court should have to hold that he had acquired such right by practice in violation of law. Such a holding would not only destroy the public protection intended by the statute, but it would offer a direct premium for a practice wholly in violation of such statute. The legislature had no such intention, and the defendant was clearly not within any exception to the statute.

RIGHT TO PRACTICE MEDICINE NOT ACQUIRED

State v. Miller, 138 Ia. 28; 115 N. W. 493

1908

The Supreme Court of Iowa says that the point most strongly urged by counsel, and the only debatable one presented by the record, was whether the defendant was entitled to practice his profession without a certificate from the board of medical examiners under that provision of Section 2579 of the Iowa Code which exempts from a compliance with the requirements of said statute all physicians "who have been practicing in this state for five consecutive years, three years of which time shall have been in one locality." This statute appears to have been first enacted in the year 1886, and was reenacted in substantially the same form in the Code of 1897.

As a witness, the defendant stated that his early life was spent in Iowa; that he had practiced magnetic healing since he was 10 years old; that for about sixteen or seventeen years prior to the year 1899 he had lived in South Dakota, where he conducted a farm; that since that date he had lived six years in Iowa, the last four years of which had been in Waterloo; and that during all or most of this period he had been practicing the healing art.

The court does not think there was any error in excluding proof of the defendant's practice in Iowa for five years or more prior to his removal to Dakota about the year 1882. The exception made in the statute was very clearly intended for the protection of such citizens of the state as were then, and for five years prior to the enactment of the law had been practicing medicine within this jurisdiction (Iowa). At that date the defendant was, and for four years had been, a resident of South Dakota, and the fact that he had at an earlier time practiced medicine in Iowa for five years did not give him any advantage under the provisions of the act, over a non-resident practitioner who never resided in Iowa.

In short, the court thinks that, when fairly construed, the words "who have been in practice in this state for five consecutive years" must be held to have reference to those resident physicians who have been in practice for five years immediately prior to the date of the enactment. Such is the obvious import of the language employed. ,

Lastly, the court thinks it hardly necessary to say that proof that the defendant had been engaged in the practice for five years immediately prior to his indictment could not avail to acquit him of the offense charged. Even if that fact be established, the law prohibiting such practice had been in force for a still longer period, and it would not do to say that the successful avoidance of prosecution for any length of time would operate to give the offender a vested right to continue his defiance of the law indefinitely.

A conviction of practicing medicine without first obtaining a certificate therefor from the State Board of Medical Examiners is affirmed.

POWER OF STATE BOARD TO REVOKE CERTIFICATE

Smith v. State Board of Medical Examiners, 140 Iowa 66; 117 N. W. 1116

1908

The supreme court says that the power of the State Board of Medical Examiners to revoke the certificate of a physician is contained in the following clause of Section 2578 of the Iowa Code: "The Board of Medical Examiners may refuse to grant a certificate to any person otherwise qualified, who is not of good moral character, and for like cause, or for incompetency . . . . may revoke a certificate by an affirmative vote of at least five members of the board." It was claimed that the statute violates the provisions of the federal and state constitutions, which declare that no person shall be deprived of life, liberty, or property without due process of law, and the provision of the state constitution which declares that "the legislative authority of the state shall be vested in a General Assembly, which shall consist of a senate and house of representatives. . . . "

It was contended that the statute is unconstitutional and void because it does not provide or require that the accused shall be notified in any manner of the proceeding to revoke his certificate, or provide or require that he shall be given an opportunity to appear and defend himself; and hence it is possible for the board "to arbitrarily take from the physician his property, and deprive him of the liberty to follow his chosen profession, without due process of law, or without any process."

Whether the right to practice medicine be classed as a property right, strictly speaking, or as a mere privilege, is not material; for, whichever name be given it, it is a valuable right which can not be taken away without due process of law, the essential elements of which are notice and opportunity to defend. But due process does not require that any particular form of proceedings be observed, but only that the same shall be regular proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it. And, while statutes regulating the practice of medicine clearly fall within the police power of the state, they can not be permitted to override the constitution, but they must be reasonable, and, when a valuable right is sought to be disturbed thereunder, the provision of the constitution prohibiting the taking of property without due process of law is paramount, and must be observed.

In Beebe v. Magoun, 122 Iowa, 94, in discussing the necessity of notice of the assessment of the cost of street improvements, this court quoted with approval the language of the Court of Appeals in Stuart v. Palmer, 74 N. Y., 183, as follows: "It is not enough that the owners chance to have notice, or that they may, as a matter of favor, have a hearing. The law must require notices to them, and give them the right to a hearing and the opportunity of being heard." And this rule is, the court thinks, supported by the decided weight of authority and applicable to the question here before it.

But, although a statute may not expressly provide for notice, it will not be held unconstitutional or invalid if the requirement of notice may be fairly implied therefrom. In some of the cases it is said that notice is to be implied from the very fact that it is a constitutional requirement, irrespective of particular provisions in the statutes apparently contemplating that notice is to be given.

Section 2576, Chapter 17, of the Code, relating to the practice of medicine, must be considered in connection with Section 2578 in determining the question before the court, for it relates to the same manner, and that section provides as follows, so far as the same is material here: "The State Board of Medical Examiners . . . shall hold regular meetings in May and November and special ones as may be necessary, due notice thereof being given, at which it shall discharge the duties contemplated by this chapter. . . . In all examinations made or proceedings had pursuant to the provisions of this chapter, any member of the board may administer oaths and take testimony in any manner authorized by law."

The granting of a certificate and its revocation are an exercise of the police power of the state identical in their objects and power. Also by the express terms of Section 2576 the granting of a certificate, or the revocation thereof, can only be done at a regular meeting, or at a special meeting of which due notice

has been given. And the court thinks it fairly implies that parties interested in the matters pending before the board shall be given an opportunity to be heard.

The further provision that in all examinations made or proceedings had pursuant to the provisions of the entire chapter oaths may be administered and testimony taken in any manner authorized by law, in the court's judgment contemplates contests which are possible only when all interested parties are before the board. The board does not act in a judicial or legislative capacity in granting or revoking certificates, but it acts in a ministerial or quasi judicial capacity. And in its ministerial capacity it may, without violating article 3 of the constitution, determine the character of notice and the method and manner of procedure. Every requirement of the law is met if the party be given a fair and reasonable opportunity to be heard.

"CHIROPRACTOR" GUILTY OF PRACTICING WITHOUT A LICENSE—VALIDITY OF STATUTE CONFERRING POWER ON EXAMINING BOARD

State v. Miller, 146 Iowa 521; 124 N. W. 167

1910

The supreme court says that the indictment charged that the defendant "did wrongfully and unlawfully publicly profess to be a physician and assume the duties of a physician, and then and there wrongfully, falsely and unlawfully did publicly profess to cure and heal diseases, nervous disorders, displacements, injuries and ailments by means of a certain system and treatment known as chiropractic," etc.

He advertised as follows: "Dr. F. M. Miller, chiropractor, . . . Read carefully the contents of this booklet. It will interest you. The cure of disease. Cure of disease follows chiropractic adjustment because chiropractic removes the cause. Chiropractic is a distinct and complete drugless and knifeless system and has nothing in common with osteopathy, massage, Swedish movement or any other system. Chiropractic is successful in all forms of disease. This means your disease. If your case is numbered among those supposed impossibilities, do not despair. Try chiropractic and get well. . . . Chiropractic is a common-sense treatment. It will bear investigation. It is based on a correct knowledge of the nervous tissues. It adjusts all displacements and allows the innate builder to reconstruct the broken-down tissues."

The evidence showed that the defendant treated patients for a consideration, and that he professed to cure and heal diverse diseases by the use of his system. He gave no medicine, nor did he prescribe medicine. His system consisted of certain mechanical appliances which were used in connection with hand manipulations and an electric vibrator. The court cannot agree with the contention that the evidence wholly failed to show that any offense was committed by the defendant. The facts in the case brought it clearly within the construction given the statute in previous decisions. The cases from other jurisdictions cited by the defendant were, of course, not controlling. In fact, most of them were based on statutes unlike that of Iowa.

The trial court received testimony that the treatment given by the defendant was beneficial to some of his patients, but the jury were afterward instructed to disregard such evidence. The instruction was right.

The indictment was assailed on the ground that it charged no crime, but it charged a violation of the statute in substantially the language of the latter, and that was sufficient.

Nor does the court agree with the contention that the Iowa statute under which the prosecution was brought is unconstitutional. The only new question presented with regard to it was in the contention that it makes an unwarranted delegation of authority to the State Board of Health. The chapter under consideration provides that the Board of Medical Examiners shall consist of the physicians of the State Board of Health, and names the subjects that shall be covered by the examination. The physicians of the State Board of Health are appointed by the governor. Section 2582 of the Iowa Code and Supplement pro-

vides that all persons desiring to practice medicine in the state must submit to an examination, and also present diplomas from some medical school of recognized standing.

It was contended that the power thus given to the board of examiners might be so exercised as to exceed proper police protection, and because of such possibility the statute was unconstitutional. But a statute is not unconstitutional because it provides a board for certain purposes and gives such a board discretion. Such a statute does not discriminate against any class of citizens. Nor does it confer on the board of examiners arbitrary power, or enable it to discriminate in favor of any particular school of medicine. While the board acts within its reasonable discretion, it will be protected, but, when it seeks to go beyond that and to act illegally, the court will interfere. A medical board of examiners may prescribe reasonable rules and regulations for the conduct of its work. The statute itself furnishes no warrant for an unjust discrimination, and the courts will not presume for the purpose of holding it unconstitutional that the board will exceed its power, or do any unlawful act.

There was a conviction in this case of practicing medicine without a license, and there being no substantial error in the record, the judgment is affirmed.

SUFFICIENT EVIDENCE OF PUBLICLY PROFESSING TO PRACTICE MEDICINE

State v. Yates, 145 Iowa 332; 124 N. W. 174

1910

The supreme court says that one witness testified that the defendant said he was healing the sick and curing people. Another witness said that he applied to the defendant for treatment for an arm injured by a severe fall on the sidewalk, and was told by the defendant: "Take off your coat, and I will cure you, and it will be all right when you leave here," after which the defendant worked at him for twenty minutes. A third witness testified that he got acquainted with the defendant at a boarding house, and heard him talk with people about the business he was in: "He talked about treating people. He told that he rubbed people and cured them. He said that he was treating people any place he went. He did not say how many people he treated, nor name, nor describe the treatment he gave his patients." This witness said that he applied to the defendant for treatment, and was told that he (the witness) "had a healing in his throat," which the defendant rubbed, and said he could relieve. The defendant gave him treatments, but he got no relief. Subsequently, in regard to payment, the defendant told this witness that he was in the habit of charging $5 for three treatments. The witnesses who testified to being treated said that the defendant did not use medicine or surgical instruments. The court thinks that there was enough evidence to sustain a conviction for publicly professing to practice medicine and to cure and heal within the general rule stated by this court in State v. Heath, 125 Iowa, 585.

VIOLATION OF MEDICAL PRACTICE ACT BY "DOCTOR OF VITAL SCIENCE"

State v. Adkins, 145 Iowa 671; 124 N. W. 627

1910

The Supreme Court of Iowa says that, prior to having attained his majority the accused had led a bucolic life, and thereupon entered a "college of psychic-sarcology" in Missouri. Three years were devoted to the study of psychology, neurology, hygiene, dietetics, biology, anatomy, diagnosis, and actual practice. Having passed an examination on all branches appertaining to the science of "vital healing" he was granted a "diploma," and the degree of "doctor of vital science" conferred on him. Equipped with "all the rights and privileges pertain-

ing to said degree," he returned to his father's house with the benevolent design of curing "all diseases without drugs, medicines, or surgical operations."

Quite naturally he first directed his attention to the appendix, insisting that "no part of the body is useless, but it takes all and every part to make up the perfect machine." In the local newspaper he wrote eloquently of the wrongs perpetrated by modern surgery, and directed atttention to his "own peculiar methods" of healing by "natural laws." "When people learn," he said, "what appendicitis really is, they will understand that the removal of the vermiform appendix by a surgical operation is a crime against Nature. Then surgical operations will be abandoned and rank thereafter as a cruel and barbarous practice—the outgrowth of ignorance and stupidity. . . . Appendicitis as well as most every kind of disease yields very readily to the vital science treatment, which . . . is applied by Dr. L. M. Adkins' own peculiar methods and there are evidences of remarkable cures. For testimonials and other information call on or address Dr. Adkins," etc.

Later on, in sympathetic exaggeration, he again undertook to turn people from the surgeon's knife to "vital science institute . . . where all manner of diseases are treated successfully. . . . Surgical operations to remove the appendix have been a costly experiment to humanity. Not only has the sufferer been subject to the torture of the surgeon's knife, from which many never recover, but, should life be continued, a recent discovery of medical experts shows that 80 per cent. of those who survive the operation for appendicitis afterwards go hopelessly insane. This hitherto unthought of calamity will bring sorrow and regret to the homes of thousands of the survivors of this terrible operation. While people are suffering and dying with appendicitis, the news is being carried to all parts of the country of the new method known as vital science, which cures appendicitis in almost every case. This method of treatment uses neither drugs nor surgical operations, but is in perfect harmony with Nature's laws. There is a place in this city where the vital science treatment is given, known as the vital science institute, where all manner of diseases are treated successfully. For further information call on or write Dr. L. M. Adkins," etc.

He testified that he had treated several patients, and thus described his method: "Our system of treatment is by manipulation, stimulating the nerve centers so as to increase their vital force, the action of the blood and also the action of the muscles and all of the organs of the body, stimulating them up to their normal action by physical contact."

Enough has been said to indicate that the young man, even though a genius in the healing art, both publicly professed and undertook to heal and cure the afflicted, and, as this was without first having procured a license from the state board of medical examiners, he was rightly convicted of practicing without a license; and the judgment is affirmed.

RECOVERING FEE—LICENSE REQUIRED

Underwood v. Scott, 43 Kan. 714; 23 Pac. 942

1890

This action was commenced in October, 1886, before a justice of the peace of Crawford county, by the plaintiff below, to recover for medical services and medicine furnished. The principal question is whether the plaintiff was entitled to recover anything for the medicine furnished. The discussion of this question involves the construction of the statute passed in 1870 to prevent empiricism. The trial court required the plaintiff to remit a part of the verdict of the jury on the theory that the plaintiff was only entitled to recover for the medicine furnished, and on this theory the court instructed the jury. Was this error? Was the furnishing of medicine alone the practice of medicine in any of its departments, within the meaning of the statute? To hold that a person who furnished medicine as a physician could recover compensation for the medicine so furnished or prescribed would, in the judgment of the court, render the statute nugatory; and any unauthorized person might prescribe for a patient, and sim-

ply charge for his medicine, and thus defeat the very object of the law. The practice of medicine may be said to consist in three things: First, in judging the nature, character and symptoms of the disease; second, in determining the proper remedy for the disease; third, in giving or prescribing the application of the remedy to the disease. If the person who makes a diagnosis of a case also gives the medicine to the patient, he is practicing medicine, within the provisions of the statute in question; and if unauthorized to practice, or if acting in violation of the provisions of the statute, he is not entitled to compensation for the medicine which he furnishes at the time as a physician. The instructions of the court that the plaintiff would recover for the medicine furnished, though he might not have been entitled to practice medicine, were erroneous; and the judgment of the court below should be reversed. Judgment reversed, and the cause remanded.

PRACTICE IN ANOTHER STATE—GOOD AND BAD DIPLOMAS

State v. Wilson, 62 Kan. 621; 64 Pac. 23; 52 L. R. A. 679

1901

The Supreme Court previously held that a person of good moral character, who had practiced medicine continuously for ten years or more before the taking effect of "An act to protect the people from empiricism, and to elevate the standing of the medical profession" (chapter 68 of the Laws of 1870; sections 2302, 2303, General Statutes of 1899), is deemed to be qualified and to have complied with the provisions; but continuous practice for ten years in violation of law, after the act was passed, confers no right or authority on the practitioner. And now it holds, on the second appearance of that case before it, that it is no defense to a prosecution under the act to prove that the person charged with unlawfully practicing medicine in violation of its provisions has been, since the passage of such act, continuously engaged in the practice of medicine for a period of ten years or more in another state, as, for example, in Nebraska. The contention on behalf of the defendant was that, having practiced without the state of Kansas during a period of ten years, he could not be said to be one who had been engaged "for ten years in violation of law." But the Supreme Court answers that, in the absence of proof to the contrary, it will be presumed that the laws of the other state referred to (Nebraska) are the same as those of Kansas. Besides, it says, it is known of all men that throughout the civilized world schools, colleges, dispensaries, hospitals and institutions for clinical instruction are maintained at public and private expense for the education of those men and women to whom are committed the responsible duty of ministering to the health and endeavoring to prolong the life of human beings. All, or nearly all, of these institutions issue certificates or diplomas reciting the term and course of study which has been pursued by the student therein. And those colleges whose curriculum includes a complete course of those studies which are regarded as requisite for a physician and surgeon to pursue do uniformly issue to one who has completed such course, and exhibited proficiency therein, a diploma reciting such facts, and evidencing that by reason thereof the graduate has been made a doctor of medicine. Wherefore, the court makes a point of the fact that in this case the defendant did not claim to have attended any of these schools of special learning, nor claim that he had devoted any time to the study of any of the branches of this learned profession, nor avow that in Kansas or elsewhere he ever submitted to an examination before a board of competent members of the profession which he sought to follow, and the court holds that the purpose of the statute would not be carried out, and the evident intent of the legislature would not be given effect, by holding it sufficient that he had practiced in another state for more than ten years. In such a case as this, it devolves upon the defendant, the court holds, to produce evidence tending to show that he has attended two full courses of instruction and graduated in some medical college in this or some foreign country, or a certificate of qualifications from some state or county medical society, as such evidence is not accessible to the state, and is peculiarly

within the defendant's knowledge and under his control. To this, the court adds, that if the defendant should show, on the new trial, which it orders because the judge usurped the functions of the jury in practically directing it to return a verdict of guilty, that he had attended two full courses of instruction, and graduated in some medical college of this or some foreign country, then, in the absence of some evidence raising a question about it, the presumption would be that such college was respectable. To avoid misunderstanding, however, with reference to the facts of this particular case, it says that it thinks the trial court would have been justified, for reasons appearing on the face of the documents themselves, in excluding from the jury the paper, which counsel for the defense called a "diploma," issued by the so-called Independent Medical College of Chicago, and the other paper purporting to have been issued by a physio-medical society in Illinois (which latter was excluded), because neither of these papers proved, nor tended to prove, that the defendant had attended any course of instruction in either institution, or had graduated at either, and because neither of them can be regarded as a diploma, nor as such a certificate as is contemplated by the Kansas statute.

INSUFFICIENT ALLEGATION OF QUALIFICATION

Westbrook v. Nelson, 64 Kan. 436; 67 Pac. 884

1902

The Supreme Court holds, that an allegation in a bill of particulars filed for the purpose of recovering an account for medical and surgical services performed, which alleges "that plaintiff is a physician and surgeon duly entitled to practice medicine and surgery under the laws of the state of Kansas," is not a sufficient allegation of qualification and authority under the law to engage in the practice and recover compensation for services performed months before the commencement of the action in which such pleading is filed. For this reason, the court, in this case, reverses a judgment obtained by a physician, holding that error was committed in overruling an objection to the introduction of evidence under the pleadings. It says that it was essential to a recovery by the physician that at the time of performing the services he possessed the requisite qualifications prescribed by statute. The act expressly so declares. That such qualification may be shown, it must be pleaded. Had the pleadings alleged qualification and authority to engage in the practice of medicine and surgery at the time of performance of the services, and no issue thereon had been joined by proper denial, the allegation of authority would have required no evidence in its support. The fact of proper authority and qualification under the law would have stood admitted. In the light of the authorities, it must be held the allegation of qualification at the time of filing the pleading found in the pleading in this case, was not a sufficient allegation of authority to admit of proof of proper qualification to follow the profession at the time the services were alleged to have been performed, months prior to the filing of such pleading.

CONSTITUTIONALITY OF MEDICAL PRACTICE ACT

State v. Wilcox, 64 Kan. 789; 68 Pac. 634

1902

The Supreme Court holds, that chapter 254 of the Laws of Kansas of 1901, "An act to create a state board of medical registration and examination and to regulate the practice of medicine, surgery and osteopathy in the state of Kansas, prescribing penalties for the violation thereof, and repealing chapter 68 of the Session Laws of 1870," is a constitutional enactment. It says that if the title had been "An act to regulate the practice of medicine and surgery," instead of the more elaborate one used, it would have covered every provision of the statute, and under numerous decisions would have been considered as a single subject, and not void because of its generality. The provisions fixing the standard and

testing the qualifications of medical practitioners are not prohibitive in their nature. It is not an arbitrary discrimination, nor an invalid deprivation of right, to provide that only those possessing a knowledge of the human system, of its ailments and diseases, and who possess the skill to apply remedies and practice the art of healing, shall be allowed to practice. If such regulations and conditions are adopted in good faith, and operate equally upon all who may desire to practice, and who possess the required qualifications, the fact that the tests and conditions imposed by the legislature may be rigorous will not invalidate the legislation. 'It is to be presumed that the board of examination and registration, like all other tribunals vested with such powers, will act with judgment and conscience, and will deal justly with all applicants for license. It is vested with discretion to determine the standing of medical schools from which the diploma comes, and also whether a physician who submits to an examination possesses the requisite character, learning and skill; but it is not an arbitrary, capricious and unrestrained discretion. The law requires that the board shall exercise an honest and impartial judgment and discretion in accordance with just rules, and if the board should depart from this course, and should act arbitrarily and unjustly towards applicants for license, the courts are open to them, and will award them relief and protection. The act is not invalid because it provides that "nothing in this act shall be construed as interfering with any religious beliefs in the treatment of diseases, providing that quarantine regulations relating to contagious diseases are not infringed upon." The express exclusion of the element of religious belief in the application of the law was hardly necessary. Religious freedom is guaranteed by the constitution, and without mention in the statute would have been implied. And the court can see nothing in this provision which makes an illegal discrimination against or in favor of any class of physicians. Neither, it says, is there any force in the objection to the provision making the statute inapplicable to the administration of domestic medicines, or to gratuitous services which one friend or neighbor may render to another. It is the practice of medicine and surgery for compensation that is sought to be regulated and controlled, and not the use of home remedies, nor the neighborly offices which one may kindly and gratuitously perform for another.

POWER OF BOARD TO REVOKE LICENSE FOR IMMORAL CONDUCT

William M. Meffert v. The State Board of Medical Registration and Examination, 66 Kan. 710; 72 Pac. 247; 1 L. R. A. (N. S.) 811

1903

Chapter 254 of the Laws of Kansas of 1901 provides, among other things, that the state board of medical registration and examination may refuse to grant a certificate to any person guilty of felony or gross immorality, and may, after notice and hearing, revoke the certificate for like cause. The Supreme Court says, that a surfeit of authority might be cited holding that the state, in the exercise of its police power, may prescribe the qualifications which a physician must possess before entering on the practice of medicine or surgery. The State Board of Medical Registration and Examination is not a judicial tribunal; while it may be said to act *quasi* (as if) judicially it is only a ministerial board and performs no judicial functions. It is classed with such boards as the county boards of equalization, boards for the examination of applicants for teachers' certificates, city councils in granting and refusing a business or occupation license, and numerous other boards of similar character. Such boards perform no judicial functions, are not judicial tribunals, and have never been classed as such. It was contended that the procedure before the board in the admission and rejection of evidence was violative of the rights of Meffert, in that the evidence received and acted on was made up largely of unsupported accusations, hearsay and street rumor, and was not sufficient to sustain the findings. The provisions of the act creating the board, the court goes on to say, plainly indicate that such investigation was not intended to be carried on in observance of the technical rules adopted

by courts of law. The act provides that the board shall be composed of seven physicians. These men are not learned in the science of law, and to require of a board thus composed that its investigations should be conducted in conformity to the technical rules of a common law court would at once disqualify it from making any investigation. It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician. It was the intention of the legislature to adopt a summary proceeding by which the morals of the people and dignity of the profession might be protected against such a possibility without being embarrassed by the technical rules of proceedings at law. Meffert was timely notified of the charges preferred against him and the time when a hearing would be had and was given ample opportunity to refute such charges. The findings by the board are conclusive on this court. Next, it was contended that the immoral conduct with which this party was charged was not practiced in the line of his profession, therefore not cognizable by the board, and the court says that it only mentions this contention to condemn it. The law is not that the board must find that such person has been grossly immoral with his patients, but that he is grossly immoral in his general habits. The object sought is the protection of the home of the sick and distressed from the intrusion therein, in a professional character, of vicious and unprincipled men —men wholly destitute of all moral sensibilities. It was not the purpose of the lawmakers to clothe a man with a certificate of moral character and send him out to prey on the weak and unsuspecting, on those who would be entirely at his mercy, and quietly await the accomplishment of that which observation and experience has taught us is certain to follow before depriving such person of the endorsement which gave the opportunity to commit such wrong. The law disqualifies one guilty of a felony. It would hardly be contended that the felony for which a license may be revoked must have been committed on a patient or against the property of a patient, or while such physician was attending a patient. Nor does the court agree with the contention that to deprive a physician of his right to practice medicine otherwise than by a judgment or forfeiture by a judicial tribunal violates the fourteenth amendment to the constitution of the United States, which forbids any state to deprive any person of property without due process of law. It says that we have seen that it is within the police power of a state to prescribe the qualifications of one desiring to practice medicine, and also to provide for the creation of a board or tribunal to make the examination and determine whether the applicant for a license to follow this profession possesses the required qualification, and, if so, to issue to him such license. It must follow that the state may confer on the same board or tribunal the power to revoke such license, if it should thereafter be made to appear that the license should not have been issued, or if for any reason the holder thereof since its issuance had become disqualified. This constitutional provision is not a restriction or limitation on the police power of the state to pass and enforce such laws as in its judgment will inure to the health, morals or general welfare of its people. Such power is reserved to the state, and has been so recognized by all courts since the adoption of this amendment. Another contention was that the state board of medical examiners had no power to revoke the license theretofore issued, because the acts for which the commission was revoked, if committed at all, were committed before the passage of the law creating the board and, therefore, as to such acts the law was *ex post facto*. But the court says that an *ex post facto* law is meant one which imposes a punishment for an act that was not punishable at the time it was committed or imposes an additional punishment to that then prescribed, etc. The revocation of a license to practice medicine for any of the reasons mentioned in the statute was not intended to be, nor does it operate as a punishment, but as a protection to the citizens of the state; such requirements go to his qualifications, and where the qualification imposed is reasonable, one has no right to complain that he is deprived of the right to practice his profession because he has not conformd to such reasonable regulations. If the revocation was intended as a punishment, there might be force in this argument, but, since the only purpose of the law was to require a certain standard of morals of the physician, the argument is without force.

PRACTICE OF MEDICINE BY FARMER WITH CANCER CURE—MEANING OF PROVISION AS TO "DOMESTIC MEDICINE"

State v. Huff, 74 Kan. 585; 90 Pac. 279

1907

The Supreme Court affirms a conviction on a charge of violating the statute which forbids any one to practice medicine who has not received a certificate of qualification from the state board of medical registration and examination. It says that there was little room for controversy as to the facts in the case. The defendant took the stand in his own behalf, and testified that he was a farmer; that he was not a doctor; that he manufactured from vegetables grown on his own farm what he believed to be a remedy for cancer; that he had used it on from 50 to 75 different patients, one of whom was Mrs. Stewart, the person named in the second count of the information; that he applied it himself, describing the process thus: "I take a little stick and get a little medicine on it, and put it on the cancer, the diseased part, and that works from fifteen minutes to half an hour, until it works the strength out of the medicine, and I then clean that off and apply it again." The state's evidence showed, or tended to show, that the defendant had treated Mrs. Stewart under a contract, by the terms of which he was to receive $50 down and a like amount when a cure should be effected; that the first $50 had been paid to him.

It was claimed on behalf of the defendant that the evidence, the scope of which was fairly indicated by the foregoing statement, did not warrant a conviction under the pleading, inasmuch as the application of the purported remedy was a surgical operation, while the information charged only the practice of medicine, and nowhere even mentioned surgery. But the court considered that to discuss the technical distinctions relied on to sustain this contention would be a useless waste of effort. The court was concerned only with the interpretation of the Kansas act, which provides that for its purposes any one shall be regarded as practicing medicine and surgery "who shall prescribe, or who shall recommend for a fee, for like use, any drug or medicine . . . for the cure or relief of any . . . infirmity or disease of another person." The language quoted was followed in the information, and, if the defendant's acts were within its terms, it was immaterial whether they also amounted to the practice of surgery.

But it was further argued that "the prescribing and recommending denounced by the act refers to drugs and medicines to be used by the patient himself," and that as the defendant in this case applied the remedy he was not within the terms of this part of the statute. Possibly the word "prescribe" may sometimes have the meaning thus attributed to it, although it is not clear why the same person may not prescribe and administer a remedy. But a broader intention is evidenced by the accompanying phrase "or recommend for a fee for like use," which appears to have been employed to guard against any narrow or technical construction. The jury were abundantly justified in finding that the defendant did not contract for the payment to him of the $100 either as the purchase price of the material he furnished, or as compensation for his service in applying it, but that the charge was essentially one for imparting his peculiar knowledge of its curative powers, and that the transaction therefore amounted to recommending a medicine for a fee within the letter and spirit of the law.

Several assignments of error involved the consideration of the meaning of the provision of the medical act that nothing therein shall apply to "the administration of domestic medicines." The trial court instructed the jury that: "The term 'domestic medicines,' as used in this law, means medicines as practiced by unprofessional persons in their own families or households." This instruction was manifestly based on the definition of the phrase "domestic medicine," found in several standard dictionaries. The Century and Imperial define it as "medicine as practiced by unprofessional persons in their own families;" the Encyclopedic as "the practice or use of medicine by unprofessional persons in their own households."

Objection was taken to the application made of these definitions on the somewhat plausible ground that "medicine" is there used abstractly, referring to the science or practice of medicine, while in the statute "medicines" is obviously used

concretely, referring to substances as a synonym for "remedies." The force of this objection is lessened by having regard to the entire phrase employed in the statute—"the administration of domestic medicines." Although it can hardly be strictly accurate to say that the bare words "domestic medicines" means "medicine as practiced by unprofessional persons in their own families," the expression, "the administration of domestic remedies," taken by itself, might well be thought to mean just that. Of course, if the instruction conveyed a correct idea as to the force of the statute, it is not material that it was open to verbal criticism.

The Kansas medical act does not follow closely that of any other state, but it bears internal evidence of having been modeled in part on the Ohio statute of 1900, where the corresponding language is that the act shall not be construed to prohibit "the domestic administration of family remedies." Precisely the same expression is found in the laws of California, Massachusetts and New Mexico. Those of Indiana and Utah read, "the administration of family remedies;" of Nebraska, "the administration of ordinary household remedies." In Illinois, in a recent revision, "the domestic administration of family remedies" was changed to "the administration of domestic or family remedies." These slightly different but substantially similar phrases seem intended to express the same essential thought. That they were in such general use when the Kansas statute was enacted suggests a purpose to cover about the same ground by the words, "the administration of domestic medicines;" that is, the domestic administration of medicine—the administration of medicine in one's own family.

The court quotes further from the lexicographers, and then says that the greatest difficulty with the view adopted by the trial court seems to be that, as the statute permits gratuitous services of all kinds, there could be little or no force to a further provision that any one might administer medicine in his own family, inasmuch as it can hardly be thought to have been within the contemplation of the legislature that a charge would ever be made for such administration. This difficulty is so serious that rather than attempt its solution the court prefers to inquire whether under any reasonable view of the law the defendant could have been prejudiced by the instruction referred to. It thinks that he could not.

The defendant's attorney maintained, in effect, that no definition of the word "domestic" was necessary; that it is a primitive word, not capable of being made clearer by other terms; that only confusion could result from an attempt to explain it; that it should have been left to the jury to say what domestic medicines were, and whether the substance applied by the defendant was a domestic medicine. To this the court can not agree. There are, of course, it says, some words which are so common and so well understood that they require no definition; but "domestic" is not one of them. It is susceptible of a variety of meanings, and shades of meaning, according to the connection in which it is employed. As used in the statute, the court does not believe that it referred to medicines of home manufacture, or to those manufactured from vegetables grown at home. If it did not have the precise meaning attributed to it by the trial court it must have had much the same force as in the pharmacy act. No other reasonable construction occurs to the supreme court, and none was suggested. There it is provided that "in rural districts, where there is no registered pharmacist within five miles, it shall be lawful for retail dealers to procure license from the board of pharmacy at a fee of $2.50 annually, to sell the usual domestic remedies and medicines." In determining the meaning of this the court is aided by judicial and legislative construction.

The phrase "domestic medicines," referring to those remedies which are in fact used by a non-professional person in his own home, appears to have been diverted from its original and literal import, perhaps in part by the addition of the qualification "usual," so as to signify such substances as are commonly kept by non-professional persons in their own homes for use as remedies in the absence of a physician, being necessarily substances the effect of which is a matter of general knowledge, so that no special training is required for their safe administration. If this signification be accepted as that intended in the medical law, it is obvious that cases may arise in which it is proper to submit to a jury the question whether a particular remedy, which a defendant may be charged with administering under such circumstances as to make the act unlawful, was a domestic medicine; but no such situation was presented here. There was nothing in the evidence in this case

to suggest that the substance applied by the defendant was one in common use or one the effect of which was generally understood.

Apart from this, other considerations compel the conclusion stated. The statute in general terms forbids one not having a certificate to practice medicine. It adds that any person shall be regarded as practicing medicine who shall prescribe or recommend for a fee for like use any drug or medicine; that registered osteopaths may practice their profession, but "shall not administer drugs or medicine of any kind;" and that nothing in the act shall "apply to the administration of domestic medicine" or "prohibit gratuitous services." It would defeat the manifest purpose of the law to hold that under these provisions a defendant, charged and proved to have received money for recommending a certain substance as a cure for disease, might exculpate himself by showing that the substance he recommended was a domestic medicine, in the sense that it was a well-known remedy, the effect of which was a matter of common knowledge. A non-professional person is permitted under the law to administer domestic medicines, but not to take pay for recommending their use. The theory of the state is that one who proposes to ask and receive compensation for advice as to the use of medicines thereby holds himself out as possessed of special and peculiar information on the subject, and that it is the province of the state to see that he possesses it, or in default of proof thereof to prevent his making the unfounded claim a source of revenue. To the charge that an incompetent person had unlawfully taken pay for recommending the use of a particular remedy it is no answer to say that the remedy is one the effect of which is a matter of common knowledge, and which for that reason may be administered by any one without a violation of the law.

Under the defendant's own statement he was guilty of the offense charged against him, if, for a fee, he recommended the use of his medicine as a remedy for cancer, whether it was a "domestic medicine" or not. The jury by their verdict found that he did so, and the evidence abundantly justified the verdict. The instruction referred to therefore could not have prejudiced him, and constituted no error of which he could complain.

"CHIROPRACTIC" THE PRACTICE OF MEDICINE

State v. Johnson, 84 Kan. 411; 114 Pac. 390

1911

The supreme court holds that a statute creating a state board of medical registration and examination and regulating the practice of medicine, surgery, and osteopathy, was constitutional and embraced within its terms one who without registration, examination, or license from such board, and for pay, practiced or attempted to practice chiropractic by pretending to adjust the spine of one afflicted with bodily infirmities, or who advertised to treat, for pay, by chiropractic spinal adjustment, persons thus afflicted. The court said: "Webster's New International Dictionary defines 'chiropractic' as: 'A system of healing that treats disease by manipulation of the spinal column.' Counsel for appellee advises us that: 'The chiropractor claims that all the diseases which are in any way affected by his adjustments are caused by the partial displacement of the vertebræ, thus causing the nerves which pass through the openings in the vertebræ to press against the sides of the openings and prevent the life fluid from flowing freely through the nerve to the part of the human system to which the particular nerve reaches. Diseases not caused by the pressing of the nerves against the sides of these openings the chiropractor does not in any way treat. The chiropractor claims that the only treatment so called which he uses is not a treatment, but merely an adjustment of the vertebræ, which restores the vertebræ and the nerves to their normal position and thus removes the cause of the disease. He does not practice surgery or medicine and does not use any other manipulations whatever than the adjustment of the vertebræ.' But the language of the 1908 amendment is very broad, and even under the foregoing description of chiropractic it may well be said that one whose vertebræ are partially displaced, causing impairment of nerve function, is one afflicted with bodily infirmity, and that one who restores the functional activity of the nervé on which the maladjusted vertebræ had

formerly pressed is treating, or attempting to treat, such afflicted person. It may be argued that, giving the entire language a close, critical, and discriminating meaning and construction, this method of so-called 'treatment' is in no sense the product of medicine or surgery, and would, indeed, come more nearly under the term 'osteopathy.' But the manifest object and intent of the legislature was to protect the public from ignorance and imposition in the healing art. Osteopathy is carved out as a separate department, and registration and license are required, while its practitioners are prohibited from giving medicine and performing surgical operations; that is, from practicing medicine and surgery as distinguished from osteopathy. But 'medicine and surgery,' which the appellee is charged with attempting to practice, by common use and adjudged meaning cover a wide portion of the domain of healing, and may and should be held to cover the case of one who, not claiming to be a physician or surgeon, really practices osteopathy under another guise without possessing the qualifications required of the osteopath."

INFORMATION FILED WITH WARRANT SUFFICIENT NOTICE OF CHARGES

Driscoll v. Commonwealth, Commonwealth v. Rice, 93 Ky. 393; 20 S. W. 431; 14 Ky. Law Rep. 376

1892

M. Driscoll was convicted of practicing medicine without authority, and appeals. Affirmed.

Information against C. W. Rice for practicing medicine without authority. From a judgment sustaining a demurrer to the information the commonwealth appeals. Reversed.

These two cases, involving the same question, are considered together.

An act was passed in 1874 to prevent incompetent physicians and surgeons from practicing. This enactment has been amended from time to time, and by the act of April 25, 1888, it is provided that there shall be a registration of all physicians in the county court of each county, and "that on and after the first day of April, 1889, it shall be unlawful for any person to practice medicine in any of its departments within the limits of this state who has not exhibited and registered in the county clerk's office of the county where he is practicing, or intends to commence the practice of, medicine, his authority for practicing medicine." The act was again amended on the 24th of May, 1890, dispensing with the indorsement of a medical school or medical society when the diploma was obtained out of the state, and requiring the indorsement to be made by the state board of health. This last amendment does not apply to cases where physicians have prior thereto, by complying with the previous enactments on the subject, entered upon the practice of their profession, and affects only those who have failed to comply with the provisions of the former statute, or who, since the passage of the act of 1890, have commenced the practice without complying with its provisions. If Driscoll, who seems to have been practicing his profession before the act of 1890 was passed, had complied with the law in existence prior to that time, his right to practice could not be questioned. The act of 25th of April, 1890, is not retroactive, nor should such a construction be given it. He produces a diploma from the Starling Medical College, located in the state of Ohio. It is agreed that it is a chartered institution, and a reputable college. In the month of March, 1889, he registered in the Jefferson county clerk's office by presenting his diploma with the indorsement of one Kalfus, who was the secretary of the board of regents, Kentucky School of Medicine. Kalfus had no authority to indorse diplomas, nor was he a member of the faculty of the Kentucky school; still on his statement that he had the authority to make the indorsement, the appellant Driscoll registered. In April, 1889, he also sent his diploma to Dr. McCormick, at Bowling Green, for indorsement, and it was returned without explanation. The appellant seems to have made an effort, at least, to comply with the law, but failed to have the indorsement as required prior to the act of the 25th of April, 1890, and it is not pretended that he has the indorsement required by the provisions of that act. We perceive no constitutional objection to any of the provisions of the act, unless they

are so unreasonable as to preclude those qualified from practicing their profession. We see no reason for denying the right of the legislature to enact laws for the protection of the people by requiring those who undertake to practice a profession to give evidence of their qualifications and skill by the exhibition of a license from those who, in the legislative judgment, are competent to determine whether or not the applicant has the necessary qualifications to practice the particular profession. The citizen, of necessity, when diseased, must employ the physician, and the lawyer when his right of person or property has been violated. The entire public is interested in knowing, or in having the means of ascertaining, whether the physician it desires to employ has a sufficient knowledge of medicine to enable him to practice his profession; and for the welfare and safety of the citizens the legislature may say that you shall not practice medicine unless you have the indorsement of a board skilled in the profession. The patients of the physician must rely on his knowledge of medicine, and the mode of administering it; and the entire public being interested in having physicians learned in the profession, it is competent for the legislature to prescribe the mode of determining the qualifications of those who propose to embark in the practice. The constitutional question has been raised and decided by many courts, all holding that, when the conditions imposed upon the profession by the lawmaking power before one can enter upon the practice are reasonable, they must be complied with, or the penalty imposed will be enforced. The judgment as to Driscoll is affirmed, this court further holding that the information filed with the warrant, and upon which that writ issued from the city court, gave to the appellant sufficient notice of the charge made against him.

In the case of the appellee Rice, unless he had been a practitioner ten years before the passage of the act of 1874, it was his duty to comply with the provisions of that act. The information on which the warrant was issued, and that must be regarded as the complaint, states that the appellant registered by stating that he had been a practitioner for twelve years prior to the year 1889, when the act required that he should have practiced ten years prior to the passage of the law of 1874. If, therefore, Rice had not practiced medicine ten years prior to the act of 1874, he has been violating its provisions since, if he has continued to practice. It is an unreasonable construction to hold that one can become qualified to practice by the mere lapse of time after the law has been enacted, when he is violating its letter and spirit every day that he fails to comply with its provisions. We think, on demurrer, that the information is sufficient, and the same technical rule should not be applied in such a proceeding as in an indictment; but, if it is to be so held, the failure to register as required by the statute is distinctly alleged in the information. As to Rice, the judgment is reversed, and remanded for proceedings consistent with this opinion.

OSTEOPATHY

Nelson v. State Board of Health, 108 Ky. 769; 57 S. W. 501; 22 Ky. Law Rep. 438; 50 L. R. A. 383

1900

The decision of the Court of Appeals is very largely one of statutory construction. First, the statute regulating the practice of medicine in that state requires the State Board of Health to issue a certificate to any reputable physician having a diploma from a reputable medical college, without any discrimination against any peculiar school or system of medicine. The term "physician," as used therein, the court holds, refers to those exercising the calling of treating the sick by medical agencies, as commonly practiced throughout the state at the time the act was passed. The term "medical college" refers to those schools of learning teaching medicine in its different branches, at which physicians at that time were educated, or schools of that character organized since. At such an institution an essential part of the instruction was in teaching the nature and effects of medicines, how to compound and administer them, and for what maladies they were to be used. Surgery was also an essential part of the instruction. But osteopathy teaches neither therapeutics, materia medica, nor surgery. Bacteriology is also ignored by it. Hence, the court holds that a school of osteopathy which

teaches neither of these branches can not be regarded as a reputable medical college, within the meaning of the statute. The title of this act is, "An act to protect citizens of this commonwealth from empiricism." The act, the court therefore holds, is "an act to protect the people of this commonwealth from the practice of medicine founded on mere experience, without the aid of science, or a knowledge of principles." And as the board is only authorized to issue a certificate to a reputable physician having a diploma from a reputable medical college, and no discrimination is allowed against any peculiar school or system of medicine, the court holds that the penalties provided by the last section of the act must be limited to that which is referred to in the title and previous sections—the practice of medicine in some of its branches in the state (Kentucky); and the words, "who shall practice medicine or attempt to treat any sick or afflicted person by any system or method whatsoever, for reward or compensation, without first complying with the provisions of this law," must be held to refer to physicians or surgeons belonging to some school or system of medicine practicing or desiring to practice medicine in Kentucky, as provided in the preceding section. In other words, taking the statute as a whole, the court does not think that it was designed to do more than regulate the practice of medicine by physicians and surgeons, while an osteopath, it holds, is in no proper sense a physician or surgeon, and does not practice medicine. He is rather, it holds, on the plane of a trained nurse. Services in kneading and manipulating the body, it says, are no more the practice of medicine than services in bathing a patient to allay his fever or the inflammation of a wound. And if by kneading and manipulating the body of the patient he can give relief from suffering, it sees no reasons why he should not be paid for his labor as other laborers. So it holds that so long as he confines himself to osteopathy, kneading and manipulating the body, without the use of medicine or surgical appliances, he violates no law, in Kentucky, and the State Board of Health should not molest him. But, it at the same time declares, he may not prescribe or administer medicine or perform surgery.

LICENSE A "RIGHT"—VALIDITY OF ACT AS TO REVOKING

Matthews v. Murphy, 23 Ky. Law Rep. 750; 63 S. W. 785; 54 L. R. A. 415

1901

The license to practice medicine which one receives, the Court of Appeals of Kentucky declares, is certainly a "right" or "estate." Then it takes up the question of whether a person having fitted himself for this learned profession, and having been licensed to practice the same, the state board of health has the right to charge him with "unprofessional conduct likely to deceive or defraud the public," and erect a standard by which that conduct is to be measured, and if in its judgment he does not meet its requirements summarily deprive him of a right or estate or both. Referring to the Kentucky statute bearing on the subject, one section of which provides that the board may refuse to issue a certificate to practice medicine to any individual guilty of grossly unprofessional conduct of a character likely to deceive or defraud the public; and it may, after due notice and hearing, revoke such certificates for like cause, the court remarks that the statute does not prescribe the manner by which a physician may regulate his conduct. It does not advise him in advance what act or acts may be in violation of its provisions. He is not told what is lawful or unlawful. He might do an act which he regarded as entirely proper, which neither violated moral law or involved turpitude, still such acts might, in the opinion of the state board of health, amount to unprofessional conduct, and which in its opinion did or was calculated to deceive or defraud the public. The physician who did the act of which complaint was made before the state board of health could not know at the time the act was done what standard would be thereafter erected by the board by which its effect was to be determined. As the statute does not advise him beforehand as to what is unprofessional conduct, he could not knowingly or intentionally be guilty of it. In other words, the legislature, in effect, has attempted to commit to the state board of health the right, after the physician has done some act, to determine what its effect is to be, and if, in its judgment, he should be deprived of the right

to practice his profession, it can inflict the punishment upon him by revoking his license. Besides, what the present state board of health might consider unprofessional conduct might be adjudged by another board not to be. For such reasons, the court does not think the Kentucky statute is valid in so far as it attempts to confer upon the state board of health the right to revoke a license which has been granted by it to a physician to practice his profession. This conclusion, however, applies alone to so much of the statute as authorizes the board to revoke a physician's license to practice medicine for unprofessional conduct. That part of the statute which authorizes the board to pass upon the qualifications of persons to practice medicine and to license them, the court says, is valid, though if the board should exercise that power either arbitrarily or capriciously, the party injured may obtain relief in the courts. It also says that if the legislature desires to declare for what acts or conduct a physician's license to practice medicine shall be revoked, it is competent to do so, and to vest in some tribunal the authority to investigate and try the charge which may be made under such a statute.

VIOLATION OF PRACTICE ACT ONE CONTINUOUS OFFENSE

Wilson v. Commonwealth, 119 Ky. 769; 26 Ky. Law Rep. 685; 82 S. W. 427

1904

Section 4 of the Kentucky act of May 10, 1886, regulating the practice of dentistry, provides that "any person who shall, in violation of this act, practice dentistry or dental surgery in the state of Kentucky, for fee or reward, shall be subject to indictment by the grand jury of the county in which the offense is committed; and, on conviction, shall be fined in the sum of not less than fifty dollars nor more than two hundred dollars for each offense." The question was raised, whether or not the offense denounced by the statute is of such continuous nature as to subject the violator to only one conviction for the whole period of time next before the institution of the prosecution, or is it of such a character as that each act of practice constitutes a separate offense? The Court of Appeals of Kentucky says that it is apparent, upon very slight consideration, that if each time an unregistered dentist pulls a tooth he is subject to a fine of from $50 to $200, in a short while these would aggregate so large a sum as to make payment impossible, and, as a result the defendant might lie in jail a large part of his life. Such a conclusion is not to be reached, unless constrained by the very letter of the statute. We are not without high authority, as well as sound reason, against the cumulative construction. So the court decides against it, or that the offense denounced by the statute is of such continuous nature as to subject the violator to only one conviction for the whole period of time next before the institution of the prosecution. The first case cited on the subject is the English one of Apothecaries v. Jones, 1 Q. B. 89, where the court says that there was involved an act similar in principle to the one here under consideration. The apothecaries act of 1815 (55 Geo. III, c. 194, sec. 20) provided that "any person who shall 'act or practice as an apothecary' without a certificate is liable to a penalty 'for every such offense,'" The defendant had practiced as an apothecary without a certificate, and given medical advice and supplied medicine to three different persons at different times on the same day, and it was held that the words "act or practice as an opothecary" were directed against an habitual or continuous course of conduct, and that the defendant was not guilty of a separate offense in attending each of the three persons, and was only liable to one penalty.

REGARDING SCHOOLS OF MEDICINE, CHEMISTRY, PHARMACY

Louisville College of Pharmacy v. City of Louisville, 26 Ky. Law Rep. 825; 82 S. W. 610

1904

The Court of Appeals of Kentucky says that if the teaching of law, medicine, chemistry and pharmacy in universities does not deprive them of the character of "institutions of education," it seems to the court that an institution which confines its instructions to one of them is no less an institution of education. The

question in this case before the court was whether the college of pharmacy mentioned was an "institution of education" exempted from taxation under the state constitution. The court says that it can conceive of no more useful and important branch of knowledge than that of pharmacy. That knowledge is necessary to protect the lives and health of the citizens of the commonwealth. So important is this branch that the general assembly has taken the matter in hand and has prohibited any one from compounding medicine unless he has been graduated from some institution of education where pharmacy is taught. In this case public-spirited persons had associated themselves together and organized an institution not for gain or profit but that persons might be educated in pharmacy so that the drug business might be conducted according to law, and the public protected from the uneducated and ignorant pharmacists. It is a home institution, infantile in the matter of age, and merits the protection given by the constitution. Consequently the court is of the opinion that it is exempt from taxation.

PRACTICE OF MEDICINE PRIOR TO 1864 OR TO 1884 DOES NOT ENTITLE TO CERTIFICATE

Webster v. State Board of Health, 130 Ky. 191; 113 S. W. 415

1908

The Court of Appeals says that this case was instituted for the purpose of obtaining a writ of mandamus requiring the board to issue to the plaintiff a certificate authorizing him to practice medicine in that state. The principal allegation in the petition on which the right to the certificate was based was that for several years prior to Feb. 23, 1864, he was reputably and honorably engaged in the practice of medicine in the State of Kentucky.

The plaintiff at the time he filed his petition was evidently under the impression that Section 2613 of the Kentucky Statutes of 1903 was still in force, and overlooked the fact that the act of 1893, relative to empiricism, which forms a part of Chapter 85 of the Kentucky Statutes of 1903, has been repealed by an act on the same subject, which was approved March 18, 1904, and is found in Acts of 1904, Chapter 34.

By Acts of 1904, Chapter 34, no person is permitted to practice medicine in Kentucky unless he shall first stand a satisfactory examination by the board in the branches of medicine as taught in reputable medical colleges. The mere fact that the plaintiff practiced his profession prior to 1864 did not entitle him to a certificate. It would only entitle him to an examination, and not to a certificate, unless his examination showed that he was qualified in the opinion of the board to practice his profession.

Moreover, the petition alleged simply that the plaintiff had for several years prior to 1864 practiced medicine in Kentucky, but it did not allege that he had continuously practiced medicine since that time. Over forty years have passed since 1864, and it was not alleged that during any of that time the plaintiff had practiced his profession. If we take the mere letter of the statute, the allegation would seemingly be sufficient; but the legislature did not mean that any person who was practicing the profession of medicine prior to 1864, as in the act of 1893, or prior to 1884, as in the present statute, should be entitled to a certificate if he had not been continuously practicing since that time.

The object of the statute is to elevate the practice of medicine, and to raise a high standard of proficiency which the applicant must fully measure up to in order to secure a certificate authorizing him to practice his profession. One who had simply practiced medicine prior to 1864, but had not practiced it since, or prior to 1884, but had not practiced it since, would be in no wise qualified to practice medicine in 1907.

Construing the act, then, according to its spirit rather than its letter, in order to authorize the plaintiff to stand an examination and receive a certificate under the present law, he must either receive a diploma from a reputable medical college legally chartered under the laws of Kentucky or of some other state in this Union, or, in the absence of a diploma, furnish satisfactory evidence that he was

reputably and honorably engaged in the practice of medicine in Kentucky continuously from Feb. 23, 1884, until his application was made.

The statute under consideration is a wise and beneficent exercise of the police power of the commonwealth, enacted for the purpose of protecting the people of the state from imposition by empirics and quacks. It does not seek to prevent any honorable man or woman from practicing the profession of medicine. It only requires that they will show, by a satisfactory examination before the State Board of Health, that they are qualified.

There was no suggestion in the plaintiff's petition that the board was acting arbitrarily, or that it unlawfully sought to prevent him from obtaining a certificate; and the court is not entitled, in the absence of such an allegation, to indulge in any presumption against its fairness. It is the high duty of the board to protect the health and safety of the public by requiring every applicant for a certificate to practice medicine to first show his qualifications.

It is not necessary to demonstrate the constitutionality of the act. Such legislation has been uniformly upheld by this court and other courts throughout the land.

CONSTRUCTION OF MEDICAL BOARDS—VALIDITY

Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358; 24 So. 809

1898

Action by the State Board of Medical Examiners against Augustus C. Fowler. Judgment for plaintiff. Defendant appeals. Affirmed.

Plaintiff obtained from the district court an injunction forbidding defendant from further practicing medicine in any of its departments in this state until he shall have first obtained the certificate provided for under the provisions of Act No. 49 of the general assembly of the state of Louisiana of 1894. Defendant moved to dissolve the injunction. He also excepted to plaintiff's demand on the grounds: First, that they were without authority or capacity to institute the suit; second, that the allegations of the petition were too vague and indefinite for him to answer; third, that the allegations of the petition disclosed no cause of action; fourth, that Acts No. 49 of 1894 and N. 13 of 1896 are in violation of the constitution. The motion to dissolve and the exceptions filed were overruled. Defendant denied that he had violated the provisions of the Act of 1894. He denied that any of the provisions of the acts alleged were applicable to him. In the event that said acts be held as a prohibition to the practice of medicine in any branch or school of medicine other than that of the allopathic or homeopathic, without a diploma from an allopathic or homeopathic institution, or without previous examination by the plaintiffs' medical board of examiners, or if it should be held that the medical board of examiners were authorized to determine upon the qualification of practitioners of other schools of medicine he averred that such construction discriminates between persons engaged in the profession of medicine and would be depriving him of his constitutional rights guaranteed him by the constitutions of this state and of the United States, and is an unjust and illegal discrimination, is class legislation, and specially violative of the bill of rights of the state constitution and of section 2 of article 4 of the constitution of the United States, as well as of the fourteenth amendment of the constitution; that it deprives him of his property and liberty without due process of law; and that said acts were ultra vires. The district court rendered judgment in favor of the plaintiffs making the injunction perpetual, and decreeing that defendant be enjoined from practicing medicine until he should have received a certificate. It further condemned defendant to pay a fine of $100 and costs.

The court held that the constitutionality of a law would not be considered where an issue to that effect has not been raised in the case below.

Appellant's contention that Act No. 49 of 1894 is violative of the constitution, in that it embraces more than one object, and that not expressed in its title, the court holds to be without merit.

The appellant maintains that every citizen has the constitutional right to obtain a livelihood; that the legislature is without power to cut any one off from doing so by statute; that the prescribing for and alleviation of the sufferings of the sick is a praiseworthy and lawful occupation, which the general assembly cannot prohibit a person from pursuing, especially under the guise of mere regulation; that the eclectic school of medicine is as much entitled to legal recognition as are the allopathic and homeopathic schools; that the legislature has no legal right to ignore it, or to discriminate against it in favor of the other schools; that it has no right to force a person who is proficient and skilled as a practitioner in the eclectic school to have his qualifications examined into and passed upon by examining boards composed entirely of allopathic and homeopathic physicians; that when a person's qualifications as a physician have been tested by the laws of another state, and he has been pronounced qualified, and admitted by the constituted authorities thereof to practice medicine in that state as holding a diploma from a reputable medical institution, he has acquired a vested right to practice, which follows and protects him in the exercise of his profession in the other states of the Union; that if a person with such a diploma, and so recognized as qualified, removes to another state, and there practices medicine for some time as a physician, his right to further do so cannot be taken away from him by a statute subsequently passed, as it would deprive him of his property or right to make a lawful living without due process of law; that the legislature was without power to stop him in his practice, and make further continuance dependent upon his obtaining and exhibiting a certificate of qualification from a medical board of examiners; that the legislature was without power to constitute the pursuing of a worthy and praiseworthy calling a misdemeanor. The court says there can be no question of the right of every citizen to earn a living. Any statute attempting in general terms to prohibit a person from doing so would be utterly null and void. There is a very great difference, however, between so radical and sweeping a prohibition and a prohibition extending either absolutely or conditionally to certain specified pursuits which the legislative branch of the government, as guardians of the public good and general welfare, should declare dangerous to the community, and necessary for that reason to be either entirely suppressed or exercised only under certain circumstances, conditions, and limitations. Whenever the pursuit of any particular occupation or profession requires for the protection of the lives or health of the general public, skill, integrity, knowledge, or other personal attributes or characteristics in the persons pursuing it, the general assembly has the power and the authority to have recourse to proper measures to insure that none but persons possessing these qualifications should pursue the calling. This right is constantly put in force by the general as well as the state governments. Masters of boats, engineers, mates, pilots, attorneys at law, and others are required as conditions precedent to pursuing their respective business or profession to have their qualifications tested. The medical profession, upon whose skill is so much dependent the lives and health of others, is and should be, as much subject, if not more, to legislative control in this matter, as are the occupations above mentioned. There is no more natural, absolute right in a person to practice medicine or surgery than there is to practice law. What is claimed to be a natural or absolute right is nothing more than a privilege or a right upon conditions. The legislature of this state has not attempted to suppress or prohibit the practice of medicine or surgery, nor to prohibit any particular person from practicing as physician or surgeon. The field is open to every one possessing the necessary qualifications for that purpose; these qualifications to be passed upon by public agencies provided by the legislature. The general assembly having the undoubted right to attach as a condition precedent to the privilege or right of any one to practice medicine in this state that he should be subjected, before doing so, to a prior examination as to his qualifications, and found and declared worthy and qualified, it has, as a consequence, the right to select the particular agencies to which should be delegated the right and duty of testing those qualifications. It cannot resolve itself into an examining board, and must, of necessity, act through delegated authority. Courts cannot control the selection of these agencies by the general assembly. The legislature has not dealt with the eclectic school of medicine, and discriminated against it; it has simply selected as examiners, as it had

the constitutional right to do, boards of examiners composed of physicians recommended for appointment by two certain named medical societies, and appointed by the governor on such recommendation. It has required that a person, before practicing medicine in the state, should present to the boards mentioned a diploma from a medical college in good standing, but it has not attempted to declare and fix what constituted a medical college, nor what particular colleges nor classes of colleges were to be considered as "medical colleges in good standing." There must of necessity, be some tribunal to which should be left the decision of those questions primarily, at least. The fact that in some particular instance a board should have improperly rejected an application made it for the issuing of a certificate to practice, might possibly give rise, in case of abuse, to a right of action for correction, but the possibility of such misconduct would certainly not go to the extent of rendering unconstitutional the law under which the board was created. The court knows of no constitutional right given to particular persons, who, entertaining peculiar theories of medicine, group themselves together, and call themselves a special school of medicine under a selected name, to be recognized as and dealt with as such. An indefinite number of schools of medicine might claim recognition, with no fixed ascertained standard to pass upon their pretensions. Defendant's claim that recognition of his qualifications by the constituted authorities of another state under a decision by them that the medical college whose diploma he presented was a medical college in good standing, carries with it a vested right in him to practice in this state, has no legal basis on which to rest. The laws of other states in respect to this matter, and the action of local officers under those laws, have no force in themselves in this state. Each state acts independently of the others in matters of this character. Attorneys practicing law in other states under diplomas from institutions recognized there as having authority to grant them are not entitled, simply by reason of that fact, to practice law in Louisiana. There is no reason why the rule should be different as to physicians.

The claim made that defendant was protected from legislation making it obligatory upon him, before continuing to further practice his profession in Louisiana, to procure a certificate from the medical boards organized under the act of 1894, because he had been for several years in active practice, without objection, before the passage of the law, is not tenable. The fact that the legislature had not, before the year 1894, considered the practice of medicine by persons not possessing qualifications fixed by a legal standard a matter productive of sufficient mischief or injury as to call for the enactment of a statute, did not prevent it from passing one when, in its opinion, such a law had become necessary. We are not called upon to say what defendant's rights would have been had he, before the present law was passed, been expressly authorized to practice, through compliance by him with the provisions of a prior existing law granting such right. That question does not arise in this case, for it is not claimed that defendant occupied such a position or status under the prior law.

Defendant's contention that the general assembly was without authority to constitute as a misdemeanor the pursuit of any legitimate and proper calling, is answered by the fact that it is not the pursuit of the calling which is prohibited and made criminal, but the pursuit of the same by unauthorized persons. The general assembly, having the authority to attach prior conditions to the practice of medicine, was vested with the right to enforce enactments on that subject by prescribing penalties for violations of the same either by fine, by imprisonment, or by civil remedies. The right to practice medicine being conditioned by law upon the prior obtaining of a certificate from a medical board under Act No. 49 of 1894, plaintiffs were clearly authorized, when they had reason to believe that defendant was violating the law in this respect, to test the facts of the case through injunction. Whether or not the injunction taken out would be justified would depend upon the facts as disclosed by the evidence. The right to practice being dependent upon a condition precedent, it was defendant's duty, when his right was called in question, to show that he was acting under legal authority.

Coming to the merits of the case the issue is a very limited one. The court is not called on to say whether the college whose diploma defendant holds is "a medical college in good standing" or not, nor to say whether defendant has, in point of fact, the qualifications necessary to entitle him to obtain a diploma from

a "medical college in good standing." Those questions are not closed by the judgment below, and they will remain open for examination and decision hereafter by the medical boards organized under Act No. 49 of 1894. The question is simply whether defendant, prior to the issuing of the injunction which issued herein, was practicing medicine in the parish of Jefferson before obtaining the certificate required by section 2 of Act No. 49 of 1894, and, if so, whether he was justified in so doing, as falling under any of the exceptions provided for in the act. It is conceded that defendant was so practicing medicine without a certificate. Independently of this, however, the evidence and the line of defense set up both establish this fact. The evidence fails to show defendant to be protected by any of the exceptions of the act. Under these conditions, the law attacked being constitutional, its provisions control the case, and the judgment must be affirmed. The court notes in the minutes of the medical state board, offered in evidence herein, an entry to the effect that "Dr. Fowler, from Gretna, had diploma from fraudulent college, and was denied the right to go before the board." In respect to this matter the court says that there exists no authority in any one to prevent the defendant from going before the board by a prejudgment that the diploma under what he claims to be entitled to practice is not from a "medical college in good standing," but a fraudulent college. It is the duty of the medical board to receive and pass upon all applications made to it on evidence submitted to them in each case.

LOUISIANA MEDICAL PRACTICE ACT NOT UNCONSTITUTIONAL

State v. Lee, 106 La. 400; 31 So. 14

1901

The title of Louisiana Act No. 49 of 1894 reads: "An act to regulate the practice of medicine, surgery and midwifery; to create state boards of medical examiners, and to regulate the fees and emoluments thereof; to prevent the practice of medicine, surgery and midwifery by unauthorized persons; and to provide for the trial and punishment of violators of the provisions of this act by fine or imprisonment, or both; and to repeal all laws or parts of laws in conflict or inconsistent with this act." Section 12 provides "that any itinerant vendor of any drug, nostrum, ointment or application of any kind, intended for the treatment of disease, or injury, or who may by writing, print, or other method, profess to cure or treat disease or deformity, by any drug, nostrum, manipulation, or other expedient, in this state, shall, if found guilty, be fined in any sum, not less than $25, and not exceeding $100, for each offense, to be recovered in an action of debt before any court of competent jurisdiction, or shall be imprisoned for a term of not less than ten days or more than thirty days, or both fined and imprisoned." The supreme court holds that the title expresses but one object, and that section 12 does not go beyond the title, by denouncing the mere selling of drugs and nostrums, etc., as an offense; the offense there denounced consisting of the itinerant vendor professing to treat and cure disease and deformity by the use of drugs, nostrums, etc., sold by him, and by the other means mentioned. It says that it can hardly be denied that, if the general purpose of the act is to protect the public from unskilled and incompetent practitioners, provision relating to vendors who undertake to prescribe and effect cures with the nostrums which they sell are quite as germane to the purpose as the provisions which relate to persons who, without having had their qualifications tested, undertake to treat disease by the use of compounds sold by others. It does not think that the section was intended to apply to the itinerant vendor, merely in his capacity of vendor, but that, as above suggested, the lawmaker was undertaking to deal with him, for the purposes of the act, as a person professing to treat or cure disease or deformity by the use of drugs and nostrums which he sells, or by manipulation or other expedients. Nor, although the section is inartificially drawn, does the court consider that it can be interpreted as defining and denouncing two offenses: the one, of selling, and the other, of professing to cure with, drugs and nostrums. It ignores the disjunctive "or" after the word "injury."

TESTIMONY OF UNREGISTERED PHYSICIANS NOT EXCUSABLE

State Board v. Howard, 120 La. 311; 45 So. 260

1908

The supreme court holds that when a witness in a criminal prosecution is offered, and, over the objection that he has not been examined and has not registered as required by Act No. 49 of 1894, is permitted to testify, as an expert physician or surgeon, it is no answer to the objection that the testimony is incompetent to say that the facts testified to might have been established by competent testimony, or that the testimony as given "was not strictly that of a medical expert." The act in question provides that practitioners who have not been examined and passed by the state board of medical examiners and have not otherwise complied with its provisions "shall not . . . be allowed to testify as medical or surgical experts in any court of this state."

NO RECOVERY FOR SERVICES BY UNLICENSED PERSON

Bibber v. Simpson, 59 Me. 181

1871

It appeared from the plaintiff's testimony that she professed to be a clairvoyant; that when asked to examine the patient she saw the disease, and felt as the patient did; that sittings or seances were of different durations; that she did not pretend to understand medicine or anatomy; that she was requested by the patient to visit him and render him professional services, and did so; that she helped him, but he died from taking cold; acquainted him with the prices, and he agreed to pay them, but never did. Therefore this action, on account, was brought against the administrators of his estate. The result was a nonsuit, which is confirmed by the Supreme Judicial Court of Maine.

The services rendered, the court says, were medical in their character. True, the plaintiff did not call herself a physician, but she visited her sick patients, examined their condition, determined the nature of the disease, and prescribed the remedies deemed by her most appropriate. Whether the plaintiff called herself a medical clairvoyant, or a clairvoyant physician, or a clear-seeing physician, mattered little; assuredly, such services as she claimed to have rendered, purported to be and were to be deemed medical, and were within the clear and obvious meaning of section 3 of chapter 13 of the Revised Statutes of 1871, which provides that "no person, except a physician or surgeon, who commenced prior to Feb. 16, 1831, or has received a medical degree at a public medical institution in the United States, or a license from the Maine Medical Association, shall recover any compensation for medical or surgical services, unless previous to such services he has obtained a certificate of good moral character from the municipal officers of the town where he then resided." The plaintiff did not bring herself within the provisions of this section, and could not maintain this action, on account for services.

MEDICAL PRACTICE ACTS ARE POLICE REGULATIONS

State v. Bohemier, 92 Me. 257; 52 A. 643

1902

Joseph E. N. Bohemier was convicted for practicing medicine without registration. Judgment for the state sustained.

The defendant was indicted for practicing medicine and surgery for hire without being registered as required by chapter 170 of the Public Laws of 1895. He formally admits of record that he did so practice without being thus registered. He also concedes, or at least does not question, the constitutional power of the legislature to regulate the practice.

The defendant claims, however, that this particular statute is inoperative against him personally for two reasons.

1. Before the passage of the statute in question he had obtained from the Maine Eclectic Medical Society, a corporation chartered by the state, by chapter 597 of the Special Laws of 1868, a license to practice medicine and surgery. His argument is, that by incorporating the Maine Eclectic Medical Society with "such powers and privileges as pertain to other like corporations," the state contracted with the society and its regular licensees to permit them to practice medicine and surgery in this state without being subject to any additional rules or limitations not imposed by the society itself; and that Acts 1895, c. 170, impairs the obligation of this contract.

The court cannot find in the act incorporating the Eclectic Society, any words importing a contract with the society or its members that any of its members or licensees shall be exempt from such rules as the legislature might find necessary to impose for the better protection of the health of the people. There are no such words in any charter of any medical society nor any stipulation that its members may practice medicine and surgery unrestrained by the police power of the legislature.

But, if there were any such stipulation in the charter, it was revocable at the pleasure of the legislature. The statute first enacted in 1831, and declaring that "acts of incorporation may be amended, altered or repealed by the legislature as if express stipulation were made in them, unless they contain an express limitation," was in existence when the Maine Eclectic Medical Society was incorporated in 1868, and that act of incorporation contains no express limitation. The legislature, therefore, reserved full power to revoke any privilege therein granted. Hence, if Acts 1895, c. 170, did rescind any agreements made in the act of incorporation of the society, it does not impair the obligation of any contract.

2. In section 10, c. 170, of the Acts of 1895, it is provided that the act shall not apply "to any physician or surgeon who is called from another state to treat a particular case, and who does not otherwise practice in this state." The defendant contends that this is a discrimination against residents of this state in favor of those of other states, which is forbidden by the fourteenth amendment to the constitution of the United States, and which therefore destroys the whole act. In support of this contention, he cites several cases. All, however, arose out of alleged discriminations in matters of business, trade, or manufactures, and outside of the police power of a state. They were also cases in which the state had attempted to put special business burdens on citizens of other states which it did not impose on its own citizens.

The fourteenth amendment does prohibit arbitrary discrimination between persons, or fixed classes of persons, such as that based on color or race or nationality or state citizenship. It does not prohibit reasonable determination based on the requirements of the public health or morals. In this legislation (Act 1895), there is no attempt at oppression of any fixed class of people, nor at denying equal rights to any fixed class. It is purely police legislation, designed solely for the promotion of the health of all the people within the state. To effectuate this purpose, it requires all persons practicing or proposing to practice "medicine or surgery within this state for gain or hire [i. e., as a business] to furnish the statutory evidence of their qualifications." All persons within this class have the same rights and duties, without any discrimination between them. The defendant admits he is within this class, and he does not show any discrimination against him in favor of any other person in the same class.

The statute, however, still in the interest of the health of the people, allows a physician or surgeon to be called from another state to treat a particular case without first applying for registration and certificate under the statute, provided he does not otherwise practice in this state. Here is another and distinct category from that above named. The defendant is not within this class because he is otherwise practicing in this state. The distinction made by the legislation between the two classes is certainly not arbitrary. It is one clearly required by circumstances and by the purpose of the act, viz., the health of the people. It does not break against the fourteenth amendment nor against any other constitutional provision to which our attention has been called.

DENTAL LAW SUSTAINED

State v. Knowles, 90 Md. 646; 45 Atl. 877; 49 L. R. A. 695

1900

Section 5 of Chapter 378 Maryland acts of 1896, reads: "Any person twenty-one years of age, who has graduated at, and holds a diploma from, a university or college authorized to grant diplomas in dental surgery by the laws of any one of the United States, and who is desirous of practicing dentistry in this state, may be examined by said board (state dental board of examiners) with reference to qualifications, and after passing an examination satisfactory to the board, his or her name, residence or place of business, shall be registered in a book kept for that purpose, and a certificate shall be issued to such person. Any graduate of a regular college of dentistry, may, at the discretion of the examining board, be registered without being subjected to an examination." This was attacked as containing the vulnerable points in the state dental law, rendering it invalid. It was argued that as the word "may" occurs twice in the section, and that as there could be no question that in the latter sentence it was employed in the usual and natural sense, the same sense must necessarily and unalterably be impressed upon its employment in the first sentence. Such being the case, the contention was that the board might, if it chose, refuse to examine one holding a diploma from a college or university authorized to grant diplomas in dental surgery, and could thus arbitrarily deny the right to practice dentistry in that state, to any one holding such diploma, however skilled in his profession, or however qualified to pass an examination. But the Court of Appeals of Maryland says that the law does not permit itself to be frightened out of its propriety by the hobgoblin of inconsistency, and that it itself has no hesitation in holding that the only discretion conferred is to waive an examination when the applicant is a graduate of a regular college of dentistry, and that in all other cases covered by the act examinations must be granted when application is made in accordance with reasonable rules as to time and place. In other words, it construes the first "may" as "shall" or "must," while it says that the latter "may" is required to be used in the permissive sense because it is expressly coupled with "discretion." Furthermore, it thinks the act does mean to distinguish, for the purpose of examinations, between "a college or university authorized to grant diplomas in dental surgery" and "a regular college of dentistry." In the former, it says, by way of justification, dentistry may be but an adjunct to the course, and there is no assurance of thoroughness of instruction and practical application, as must be presumed in a regular dental college, where the whole time of the students and instructors is given to the theory and practice of dental science. The principle underlying this discrimination has been recognized in numerous cases where the authority to determine what colleges are "reputable and in good standing" has been held not to be an arbitrary or unreasonable authority. With reference to the criticism that the language "may be examined with reference to qualifications" was so vague and indeterminate as to be fatal to the validity of the law, the court answers that it might well have been more specific, but that it is impossible to suppose that it refers to any other qualifications than those appropriate to and requisite for the practice of dentistry. And so the court holds the law constitutional, stating, too, that the same reasons which apply to the profession of medicine apply with equal force to the profession of dentistry, which is but a special branch of the medical profession.

VALIDITY OF EXEMPTIONS IN PRACTICE ACTS

Scholle v. State, 90 Md. 729; 46 Atl. 326

1900

The Court of Appeals gives special attention to the contention that the exemptions of the statutes of that state from the burden of obtaining a license to practice medicine invalidate all of the state legislation regulating the practice of medicine. Those to whom the provisions of the latter do not apply, by reason of these exemptions, are: 1, commissioned surgeons of the United States army

and navy and marine hospital; 2, physicians and surgeons in actual consultation from other states; and 3, persons temporarily practicing under the supervision of an actual medical preceptor. The argument advanced was that these exemptions were an unjust and unreasonable discrimination between persons engaging in the practice of medicine, and infringed right of equality guaranteed by the fourteenth amendment of the Constitution of the United States. In answer, the court says that, if the conditions surrounding all persons who desired to practice were alike, there could be no differences made as to the terms upon which a certificate could be obtained. But if there are differences as to conditions and situations, by which it becomes reasonable that greater precautions are required in some cases than in others, classes may be formed by which certificates can be granted to some without examination, and by which others may be exempted altogether from the burden of being registered. But these classes must be created upon considerations only that are promotive of the public interests. If they are so created, they do not constitute an unlawful discrimination, and do not impair the "equal right which all can claim in the enforcement of the laws." And the reasons for the exemptions in question the court thinks are apparent, and are entirely of a public character. The competency of the first class is assured by the exactions required of them before they become commissioned in the service of the United States as physicians or surgeons. So, also, physicians in a marine hospital are selected for their special adaptation and skill for that work. There could be no public reason, therefore, that these medical officers should be required, for the protection of the public, to be registered. Nor can any reason having in view the public protection be assigned for requiring certificates of the remaining classes. Neither of these classes can be said to be practitioners within the state of Maryland. The physician from another state, "in actual consultation," has cooperating with him a registered physician. To require him to license as for general practice would have no other effect than occasionally to deprive the patient and the local physician of the benefit of the advice of some of the most eminent and skillful gentlemen of the profession. Moreover, as to both the second and third classes, the public are fully protected from the incompetency of the foreign physician and the student by the presence and supervision and restraints of the certified physicians of the state. Hence, the court concludes, there can be no objection to these exemptions as in any respect arbitrary or unreasonable, or as in any manner creating any unjust discrimination. Neither does it consider it a valid objection that one of the bodies charged with the duty of appointing one of the boards of medical examiners is the Medical and Chirurgical Faculty of the State of Maryland—a private corporation.

VALID CLASSIFICATION AND EXCEPTIONS

Watson v. State, 105 Md. 650; 66 Atl. 635

1907

The Court of Appeals holds that the provision of the medical practice act of that state under which physicians who were practicing in the state prior to Jan. 1, 1898, and who were practicing at the passage of that act, and could prove by affidavit that within one year from that date they had treated in a professional capacity at least twelve persons, should be exempt from the requirement to obtain a license, is not an unreasonable and arbitrary discrimination or classification forbidden by the fourteenth amendment to the Constitution of the United States. It says that the object sought to be accomplished by this law is to protect the public against incompetent and ignorant practitioners of medicine, while at the same time protecting actual practitioners of medicine against arbitrary and unreasonable exclusion from the practice of their profession. The law deals with that class of the people who have adopted and are engaged in the practice of the profession of medicine, and who are dependent on it for the support of themselves and their families, and with that other and larger class to whom competent medical practitioners are essential for the preservation of their health. These two classes are recognized classes, and each is entitled to consideration in framing the law.

In Dent vs. West Virginia, 129 U. S. 21, the Supreme Court of the United States upheld a law which exempted from examination and license all physicians who had practiced medicine in that state continuously for ten years. The period of practice required under the Maryland statute under consideration at the time of its passage was a little more than four years, and that law has now been in force five years. If it was within the discretion of the legislature to fix a ten-year period, it was equally within its discretion to fix a four-year period, since the supreme court has said the legislature has a wide latitude in dealing with such classifications. To justify the striking down of such a classification it must be "obviously arbitrary," and must be shown "not to rest on some difference which bears a reasonable and just relation to the act—the thing—in respect to which the classification is proposed." This was not shown. On the contrary, re-examination of the authorities and a careful reading of the briefs convinces the court that the law is not open to this objection.

Nor does the court think the law unconstitutional because of the provision that nothing contained in the subtitle pertaining to practitioners of medicine should be construed to apply to: 1, Those rendering gratuitous services; 2, resident or assistant resident physicians or students at hospitals in the discharge of their hospital or dispensary duties, or in the office of physicians; 3, physicians or surgeons from another state or territory, when in actual consultation with a legal practitioner in this state; 4, to commissioned surgeons of the United States Army or Navy, or Marine-Hospital Service; 5, chiropodists; 6, to midwives; 7, to masseurs or other manual manipulators, who use no other means; 8, to physicians or surgeons residing on the borders of a neighboring state, and duly author- that it should be sufficient to say that they all come, in the court's judgment, ized to practice under its laws, and whose practice extends into the limits of the state, but not so as to permit them to maintain an office in this state. It thinks within the wisdom and discretion of the legislature.

UNLICENSED PERSON CAN NOT RECOVER FOR SERVICES

Hewitt v. Charier, 16 Pick. 353

1835

This was an action for services in attempting to cure the defendant's son of a contraction of the sinews in the neck. The defense set was that the plaintiff had not been licensed by the Massachusetts Medical Society, nor been graduated as a doctor of medicine. It was agreed, that the plaintiff professed and practised bonesetting, and reduced sprains, swellings and contractions of the sinews, by friction and fomentation, but no other branch of the curing art. The questions raised were: (1.) Whether the plaintiff was within the operation of the provision of the Massachusetts statute of 1818, chapter 113, section 1; and (2) Whether such provision was unconstitutional. The Supreme Judicial Court of Massachusetts holds that the plaintiff should be nonsuited.

The court held that there is no doubt, that, by the common law, physicians and surgeons, undertaking to practice those professions, are responsible, not only for due care and diligence, but for that degree of skill and capacity which ordinarily belong to those who practice them, and this will depend much upon the state of science and the means of education at any particular period. *Seare v. Prentice,* 8 East, 348 (English case.) They are placed in this respect upon the same footing with attorneys, brokers, carriers, pilots, and persons of many other professions and callings, who undertake to perform services, requiring knowledge and skill, for reward. In undertaking to perform the service, there is an implied undertaking, that the party has, and will bring to the performance of it, this ordinary and competent skill; and the reward, by being adapted to the requisite skill, is a compensation for such skill, and renders the undertakings of the parties equal and mutual.

But the legislature, from a due regard to the importance of the lives and health of the citizens, and the deep interest which they have in this profession, and wisely acting upon the maxim drawn from the profession itself, that "pre-

vention is better than cure," not content with holding the ignorant, careless and unskilful responsible in damages, have provided by positive enactment, for giving encouragement to those, who before they engage in the practice shall give evidence of their having enjoyed the means of a good professional education, and faithfully availed themselves of them, by requiring such persons to obtain the sanction and permission of those who have the best means of judging of their qualifications, the members of the Medical Society, or the customary sanction of a degree from the University, known to have a medical faculty and to be otherwise amply provided with the means of affording a good professional education. *St.* 1818, c. 113, § 1. This statute provides, that no person practicing physic or surgery shall be entitled to the benefit of law for the recovery of any debt or fee for his professional services, unless he shall, previously to rendering such services, have been licensed by the Medical Society, or been graduated a doctor in medicine at Harvard University.

The first question for the court, is whether, upon the facts agreed, the plaintiff can be held to be engaged in the practice of physic or surgery. It appears that he professes and practices bonesetting and reducing sprains, swellings and contractions of the sinews, by friction and fomentation; but no other department of the curing art. By bonesetting is understood the relief afforded as well in cases of dislocation, as in those of fracture. The court holds that this brings him within the meaning of the statute, as one who practices physic or surgery. It is not necessary for one to profess to practice generally, either as a physician or surgeon, to bring him within the operation of this statute, but that it extends to any one engaging in practice in a distinct department of either profession, and that the plaintiff's practice forms a considerable department in the practice of surgery.

It has, however, been insisted, that this statute is unconstitutional and void, as being contrary to the sixth article of the Bill of Rights: viz., "No man nor corporation or association of men, have any other title to obtain advantages or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver or judge, is absurd and unnatural."

Taking the whole article together, it is manifest, that it was especially pointed to the prevention of hereditary rank, and the privileges attributed to birth. But applying the first clause in the article according to its literal meaning in considering its operation upon any particular enactment, it is necessary to consider whether it was the intent, or one of the leading and substantive purposes of the legislature, to confer an exclusive privilege on any man or class of men. Many legislative acts have a direct effect to confer on persons and sections of country very important advantages, such as those establishing roads, bridges, ports, and very many others, which have an immediate effect to enhance the value of real estate, to encourage particular branches of trade, and in various ways to confer valuable privileges. But when this is indirect and incidental, and not one of the purposes of the act, it cannot be considered as a violation of this article of the Bill of Rights.

The leading and sole purpose of this act was to guard the public against ignorance, negligence and carelessness in the members of one of the most useful professions, and that the means were intended to be adapted to that object. If the power of licensing were given to the Medical Society, exclusively, there would be much more plausible ground, at least, to maintain, that the power was conferred on a body who would have a temptation to abuse it, so as to promote their private interests; but where the power is conferred equally on the University charged with the great interests both of general and professional education, and which cannot be perceived to have any such interest, that ground of argument seems to be wholly removed; and it seems difficult to perceive how a power which it is important to the community should be placed somewhere, could be placed more safely. The courts are all of the opinion, that the law in question

is not repugnant to the article of the Bill of Rights, above cited, and that its validity cannot be impeached on the ground that it is a violation of any principle of the constitution. *Plaintiff non-suit.*

TREATMENT OF EYES NOT DUTY OF MIDWIFE

Higgins v. McCabe, 126 Mass. 13; 30 Am. Rep. 642

1878

It was alleged that the defendant held herself out as a competent and skilful midwife; that the mother of the plaintiff was about to be delivered of child, and, at the defendant's request, employed the defendant as midwife; that thereafter the mother of the plaintiff was delivered of child, being the plaintiff, and the defendant acted as midwife; that the defendant neglected to take proper care of the plaintiff, and treated her so negligently and carelessly that she contracted a disease of the eyes, and became totally blind, etc.

The Supreme Judicial Court of Massachusetts, in overruling exceptions to a verdict ordered for the defendant, says, among other things, that this action (in tort) proceeded upon the ground that the defendant failed to discharge a legal duty which she owed the plaintiff, resulting in the injury complained of. The question was whether the evidence relied on by the plaintiff would justify a verdict in favor of the child; and, in the opinion of a majority of the court, it would not.

It appeared that the defendant was originally employed only as a midwife. The parents had employed her twice before in that capacity. There was no competent evidence that the treatment of diseases of the eye which might be developed in the child was embraced in the duties which the defendant undertook as midwife; and there was no evidence that the defendant was unskilful or negligent in the performance of any of the duties with which she was properly chargeable in that capacity.

The services of the defendant in respect to the cure of this disease were wholly gratuitous; they were performed as acts of benevolence only. The defendant was a midwife; the jury would not be justified in finding that she claimed to possess, or might reasonably be expected from her calling to have, the peculiar knowledge, skill, and experience of an expert in such matters. The representations of the defendant, that she could cure the child with simple remedies and washes, that she had cured other children in the same way, who were similarly afflicted, and that there was no need of a doctor, were but the expression of an opinion as to the efficacy of her remedies, and did not imply that she undertook to use that higher skill of the medical profession which is required in the treatment of the more complicated and delicate organs. The question was whether she had discharged the duty which she assumed with that skill which she professed to have, and with that diligence which might reasonably have been expected of her. Upon that question, the fact that the service was rendered without compensation must have an important, if not decisive, bearing.

Under the rule requiring ordinary care as applied to this case, the court sees no evidence of neglect in any degree. A physician must apply the skill and learning which belong to his profession; but a person who, without special qualifications, volunteers to attend the sick, can at most be only required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances. To hold otherwise would be to charge responsibility in damages upon all who make mistakes in the performance of kindly offices for the sick.

The defendant was attentive and diligent in her treatment of the child, and in the use of the remedies she proposed. There was evidence, it was true, from regular physicians, that, if other and more powerful remedies had been seasonably applied, they would probably have effected a cure; but these were remedies known to the medical profession, of which the defendant neither had nor professed to have knowledge. It was not a case where the defendant assumd to act as a regular surgeon or a regular practitioner.

MIGHT NOT BE ACTING AS A PHYSICIAN

Commonwealth v. St. Pierre, 175 Mass. 48; 55 N. E. 482

1899

This case was a prosecution for unlawfully practicing medicine. The government had introduced in evidence the testimony of a number of persons to the effect that they had visited the defendant at various times; that he gave to them medicines, and advised them how to use them; that at these times they had conversations with him about the nature of their complaints; that he afterward visited some of them at their houses, and treated them there, and that they paid him money; and the bottles and packages, which the witnesses testified were given to them, had been put in evidence. The defendant offered to prove that on each and every occasion, at the time, the parties were told by him that he was not a doctor, and that he did not charge anything for his services. This evidence was excluded. The Supreme Judicial Court of Massachusetts holds that such exclusion constituted reversible error. It says that if the defendant sold the medicines, receiving payment therefor, and gave advice gratuitously as to the use to be made of them, he was not, so far as those instances were concerned, holding himself out as a physician. His declarations accompanying the acts and showing the character of them were admissible as part of the *res gestæ*, or things done. It was open to the government to contend that in these instances he was really acting as a physician, and was paid as such for his services, and that these statements were efforts to evade the statutory provisions. But when the commonwealth put in testimony to the effect that he had given directions and advice as to the use of the contents of the packages and bottles sold by him, and had been paid by the persons to whom the contents were sold, it was the right of the defendant to prove that in each instance he was paid, not for advice, but only for the drugs; and in that way to raise the question whether, so far as these instances were concerned, he was selling the drugs, and giving information gratuitously as to their use, and therefore not thereby holding himself out as a physician, taking payment therefor, and was seeking by such declarations to evade the effect of his action. This question was for the jury, under all the circumstances. The ruling, in a prosecution for unlawfully practicing medicine, that, if the defendant held himself out as an eye specialist, he held himself out as "one who devoted himself to a branch of the healing art which is the profession of the physician and surgeon," and that, "if the defendant held himself out as an eye specialist, he held himself out as a physician and surgeon, within the meaning of the statute," the Supreme Judicial Court of Massachusetts holds was correct. It further holds that proof that the defendant acted either as a physician or surgeon was sufficient to support the complaint, which charged him with holding himself out as a physician and surgeon. There is, it continues, but one offense, and that may be committed by the defendant's holding himself out as a physician or a surgeon. If the complaint charges that the offense is committed by the defendant's holding himself out both as a physician and surgeon, the whole offense is proved if he is shown to have held himself out as either. Moreover, the court holds, the burden is on the defendant to show that he is a registered physician, if he relies on such justification. This, it adds, applies in cases where the absence of a license is made part of a description of the offense.

SUFFICIENT EVIDENCE OF ABORTIONAL ADVERTISING

Commonwealth v. Hartford, 193 Mass. 464; 79 N. E. 784

1907

The Supreme Judicial Court overrules exceptions to a conviction on an indictment, under the statute of that state, charging the defendant with knowingly distributing a circular or advertisement giving notice of a place where illegal operations might be performed on pregnant women. It says, among other things, that, while the acts made criminally punishable are distinct from the crime of procuring an abortion, evidence describing the rooms with their fur-

nishings, the envelopes addressed to physicians containing similar cards, and her statements relating to the origin of her acquaintance with the officer to whom she had given the card described in the indictment, was properly admitted, not only as being descriptive either of the defendant's place of business, or of her employment, but also as indicative of her guilty knowledge of its contents. It is true that mere possession of this card was not a crime, for the offense charged was its distribution or circulation as a paper conveying information where operations were performed for the purpose of procuring the miscarriage of pregnant women, but if intentionally handed to a patient who was seeking such treatment the offense would have been complete, and this equally would be true if the receiver was inquiring as to similar aid in behalf of a proposed patient. The weight of the defendant's argument, therefore, was that because it was procured by false representations there was no proof either of distribution or of circulation. Generally solicitation to commit a crime to which the party solicited yields does not exonerate the wrongdoer, or exempt him from prosecution, and under the statute it is the circulation or distribution with guilty knowledge which is made unlawful, although patients may not be obtained. The intention with which it is put out is the controlling element, and if the defendant issued the card as an advertisement containing the information sought this would be a violation of the statute. If from a desire to obtain patronage she chose to rely on the officer's statements rather than to require any corroboration before acting on them such conduct would neither lessen her criminal responsibility, nor render his testimony incompetent if the jury were satisfied that it was delivered voluntarily with a criminal purpose, which was clearly and accurately explained in the instructions given.

PRACTICE OF MIDWIFERY THE PRACTICE OF MEDICINE

Commonwealth v. Porn, 196 Mass. 326; 82 N. E. 31

1907

The Supreme Judicial Court says that it was charged that the defendant "did practice medicine" and "hold herself out as a practitioner of medicine," contrary to Section 8 of Chapter 76 of the Revised Laws of Massachusetts. The case was tried on an agreed statement of facts, the substance of which was that at the time mentioned in the complaint, and for some years prior, the defendant held herself out as a midwife and practiced midwifery, but did not claim to be a general practitioner of medicine, nor was she lawfully authorized to practice medicine as provided by Section 3 of said Chapter 76. She delivered many women in childbirth for compensation and carried with her to her patients the usual obstetrical instruments, which she used rarely on occasions of emergency, but never if a physician could be called in time.. She used six printed prescriptions or formulas in treating her patients, which contained directions for their application, and the purposes for which they were used, as follows: "For vaginal douche," "For postpartum hemorrhage," "To prevent purulent ophthalmia in the newborn," "For after pains," "For uterine inertia," and "For painful hemorrhoids or piles." She used no other prescriptions or formulas. She was a trained nurse of experience, and was a graduatè of the "Chicago Midwife Institute," from which she received a diploma which stated that she had received theoretical and practical instruction in the art of midwifery for a period of six months, and was declared a graduate midwife.

On these facts the trial court ruled that the jury would be authorized to find the defendant guilty, and the defendant's first exception related to this ruling. When the facts are undisputed, the Supreme Judicial Court goes on to say, it is generally a question of law whether they constitute a violation of the statute. Both medical and popular lexicographers define midwife as a female obstetrician, and midwifery as the practice of obstetrics. Section 7 of said Chapter 76 mentions obstetrics as one of the subjects of examination for the purpose of testing an applicant's fitness to "practice medicine." This goes far toward showing that obstetrics is a branch of the practice of medicine. It requires no discussion to demonstrate that, when, in addition to ordinary assistance in the normal cases

of childbirth, there is the occasional use of obstetrical instruments, and a habit of prescribing for the conditions described in the printed formulas which the defendant carried, such a course of conduct constitutes a practice of medicine in one of its branches. Although childbirth is not a disease, but a normal function of women, yet the practice of medicine does not appertain exclusively to disease, and obstetrics as a matter of common knowledge has long been treated as a highly important branch of the science of medicine. In view of all the agreed facts, there was no error in submitting the case to the jury.

The defendant also offered expert evidence to prove that the practice of the defendant, as shown in the agreed facts, was not the practice of medicine in any of its branches, and that the conduct of the defendant was not holding herself out as a practitioner of medicine. This offer of evidence was excluded against the objection and exception of the defendant. The former decision of this case said that expert medical evidence was admissible to prove "what a midwife does or is expected to do as such, so that the court may see whether her acts or any of them are regarded as the practice of medicine in any of its branches. . . . Whether on such evidence it would appear that the ministrations of a midwife are those of a physician or rather of an attendant nurse and helper would ordinarily be a question of fact, or if the facts were not in dispute a question of law." 194 Mass.—At the present trial the facts were agreed. All that the defendant sought to show was that these facts in the opinion of experts did not constitute the practice of medicine. But as the facts were not in dispute, within the former decision, the question was not one for expert evidence, but for the court. Moreover, on all the facts shown as to the use of prescriptions and the pains they were stated to alleviate and the use of obstetrical instruments, as well as attendance and service at childbirth by the defendant, it would be contrary to the plain intent of the statute and flying in the face of the common use of words to permit experts to testify that the language employed in the statute did not comprehend the acts confessedly performed by the defendant. The court is far from saying that it would not be within the power of the legislature to separate by a line of statutory demarcation the work of the midwife from that of the practitioner in medicine. See Midwives Act, 1902, 2 Edw. 7, c. 14, and collection of statutes in 1 Witthaus & Becker Med. Jurispr. 137 et seq. The statute now under consideration does not make such separation. Whatever hardship there might be on the defendant, who was a woman of good character and reputation as shown by the agreed facts, came from the scope of the statute.

The defendant contended that the statute as thus construed is unconstitutional. Its validity can not be questioned on this ground. The maintenance of a high standard of professional qualifications for physicians is of vital concern to the public health, and reasonable regulations to this end do not contravene any provision of the state or federal Constitution.

IN WHAT PRACTICE OF MEDICINE MAY CONSIST

Commonwealth v. Jewelle, 199 Mass. 558; 85 N. E. 858

1908

The Supreme Court says that the defendant was convicted under a complaint charging him with a violation of Section 8 of Chapter 76 of the revised laws of Massachusetts by practicing medicine in that commonwealth without being lawfully authorized to do so. There was conflicting evidence at the trial in regard to what he had done. To quote from the judge's charge: "The commonwealth says that on different occasions the defendant has prescribed medicines and administered, and advertised that he prescribed as a part of his treatment, what he called 'vitalizer,' and that he has been in the habit of giving what are called electric or ray baths, and that on one or more occasions in the giving of what was called the stomach wash, another substance than water was in the tumbler, which was taken by the patient." There was also evidence that on different occasions he did make a diagnosis of the patients, for the purpose of ascertaining what ailed them and that then he prescribed for them treatment which

was afterward administered to them. The defendant did not admit this. In his charge the judge said: "The defendant does not claim that he has any knowledge of drugs or of disease in the ordinary sense in which that word is used. I understand him to testify that he did not understand about diseases, that he did not treat disease; but that he treated the healthy portions of the body."

The defendant asked the court to rule that "there is no law against a person being a mind cure healer, or a massage healer, or an osteopathist; he can practice his healing so long as he does not prescribe or deal out medicine." The defendant excepted to the refusal of the judge to give in terms the last part of this request. He also excepted to the "rulings and refusals to rule." The defendant's request implied that one could not practice medicine within the meaning of the words in Section 8 without prescribing or dealing out medicine, that is, prescribing or dealing out a substance used as a remedy for disease.

The judge, on the other hand, allowed the jury to find that one might practice medicine within the meaning of the statute, that is, might practice the healing art, or the art or science which relates to the prevention, cure or alleviation of disease, without necessarily prescribing or dealing out a substance to be used as a medicine. In this the court thinks he was right. It would be too narrow a view of the practice of medicine to say that it could not be engaged in any case otherwise than by prescribing or dealing out a substance to be used as a remedy. The science of medicine, that is, the science which relates to the prevention, cure or alleviation of disease, covers a broad field, and is not limited to that department of knowledge which relates to the administration of medicinal substances. It includes a knowledge, not only of the functions of the organs of the human body, but also of the diseases to which these organs are subject, and of the laws of health and the modes of living which tend to avert or overcome disease, as well as of the specific methods of treatment that are most effective in promoting cures. It is conceivable that one may practice medicine to some extent, in certain classes of cases, without dealing out or prescribing drugs or other substances to be used as medicines. It is conceivable that one may do it in other ways than those practiced as a part of their respective systems, by either "osteopathists, pharmacists, clairvoyants or persons practicing hypnotism, magnetic healing, mind cure, massage cure science, or the cosmopathic method of healing."

The purpose of the statute seems to be to permit the practice of these several methods of treatment, including everything that strictly belongs to each; but not to permit the unlicensed practice of medicine otherwise. If a practice of medicine otherwise, without dealing out or prescribing drugs or other substances to be used as medicine, is possible, the rulings and refusals to rule were right. The court thinks such a practice of medicine is possible, and the defendant's exceptions are overruled.

VALIDITY OF A MEDICAL PRACTICE ACT—COMPLAINT

People v. Phippin, 70 Mich. 6; 37 N. W. 888

1888

William W. Phippin was arrested on July 28, 1887, for unlawfully advertising and holding himself out to practice medicine.

The respondent was tried and convicted and appealed to the circuit court for the county of Kent. Before the trial of the cause in the circuit court, a motion was made to dismiss the complaint and warrant, quash the proceedings, and discharge the respondent. The court overruled the motion, and on trial the respondent was found guilty. The defendant brings the case to this court upon writ of error, and assigns as error—"*First*, the circuit court erred in not granting respondent's motion to dismiss the complaint and warrant herein, and to quash the proceedings, and discharge the respondent; *second*, the circuit court erred in permitting Exhibits A, B, and C to be read in evidence to the jury; *third*, the circuit court erred in not instructing the jury that there is no proof that between

the 29th day of June and the 28th day of July this man advertised or held himself out to practice medicine."

We think the complaint sufficiently specific. The other objections to the complaint are not well taken. The objection that there was no evidence in the case to go to the jury that respondent advertised or held himself out to practice medicinie between June 29th and July 28th has no force. It was shown upon the trial that he was called by Mr. Jones to visit his wife, and did visit her, and claiming to be a magnetic healer; that Mrs. Jones was sick, and her husband got him to cure her if he could, and he treated her as a magnetic healer. It is also shown that in June or July respondent was called to the house of Mr. Wheeler and there treated Mrs. Wheeler and child as a magnetic healer. On June 24, 1884, the respondent signed and swore to a paper that purported to be a medical practitioner's sworn statement, and he had a sign out as "Dr. W. W. Phippin, Magnetic Healer." Mr. Wheeler's child died, and a "certificate of death" was made by the respondent. Proof was also offered tending to show that respondent had not practiced medicine continuously for five years in this state, and that he was not a graduate of any legally authorized medical college in said state, or in any of the United States, or in any other country.

Exhibits were received and read in evidence to show that respondent held himself out to practice medicine. All these facts were submitted to the jury under proper instructions from the court, and under the facts so submitted the jury found the respondent guilty.

The claim of respondent's counsel that the law under which the respondent was convicted has been repealed is abandoned on the argument, and needs no further mention.

Respondent's counsel also alleges that the object of the act is not expressed in its title, and is therefore void, under section 20, art. 4, of the constitution of this state, which provides: "No law shall embrace more than one object, which shall be expressed in its title," etc. We think the object is fairly indicated in the title, and the body of the act is not inconsistent or incongruous with the title, and that this objection is not well taken.

The court finds no error in the record. The only remaining question is upon the constitutionality of the act itself under which respondent was convicted.

It is claimed by the counsel for the respondent that the act is unconstitutional for the reason that its provisions are in conflict with and repugnant to section 1, art. 14, of the amendments to the constitution of the United States.

The court reviews the cases cited by the counsel for the respondent that the distinction might be seen between them and the case under consideration. Statutes very similar to this have been upheld in many of the states, where their constitutionality has been brought in question, and in many of the states very similar statutes have been enforced without question, and we are unable to find a case in the courts of any of our sister states, or in the federal courts, where such statutes have been overturned upon constitutional grounds as, "abridging the privileges and immunities of citizens of the United States," or as "depriving any person of property without due process of law," or as "being in conflict with section 2 of said article, providing that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." The several states of the Union possess a general police power, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. They belong emphatically to that class of objects which demand the application of the maxim *solus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. A great variety of cases could be enumerated where the state

legislatures have required licenses to be granted before persons could engage in certain kinds of business or in certain professions. The practice of the law is a profession which the legislature of every state has deemed one which should be regulated by law, and those engaged in it are under restraint for the protection of the general public. Persons proposing to engage in that profession are required to pass an examination before some court or persons qualified to determine whether the applicant has the qualifications necessary to practice law. The design of this license is to protect the community from the consequences of a want of professional qualifications, and for the reason that none but those who have been specially educated with reference to practicing law can do so without great injury to the community, who must employ lawyers in their business, and who are necessarily incompetent to judge, and who would otherwise be imposed upon by all sorts of pretenders, solicitors for business, and ignorant of their profession. The right of the legislature is universally recognized to restrain persons in their business or professions when the public security or prosperity would be promoted by such restraints. The legislatures have frequently gone further, and imposed a tax upon persons practicing law, and these laws have been upheld. There is no good reason why restraints should not be placed upon the practice of medicine as well as the law. The public are more directly interested in this than in the practice of law; and persons who engage in this profession require a special education to qualify them to practice. A great majority of the public know little of the ills that human flesh is heir to; and there is no profession, no occupation or calling, where people may more easily or readily be imposed upon by charlatans. It is almost an every-day experience that people afflicted with disease will purchase and swallow all sorts of nostrums because some quack has recommended it. Up to the passage of the act in question, the people of this state were wholly unprotected against quackery, except such protection as the common law afforded. The constitutionality of such statutes has never been questioned.

In *Wert* v. *Clutter*, 37 Ohio St. 348, the court say: "This statute was not intended to create a right in any one to practice medicine. It was simply intended to prohibit the exercise of the right (which before was universal) by unqualified persons. The right remains in all persons, except those from whom it is taken away by the statute, and it is not taken away from a person who at any time has been in the continuous practice for ten years or more." This act was assumed as a matter of course to be valid.

State v. *Green*, 14 N. E. Rep. 352, holds that the Indiana act of April 11, 1885, making residence in that state for a certain number of years one of the necessary qualifications of an applicant for a license to practice medicine, is not repugnant to section 2, art. 4, nor to section 1, art. 14, of the United States constitution, as granting privileges or immunities to citizens of Indiana not given to citizens of other states.

An examination of this act will not disclose any violation of the provisions of the constitution. Every graduate of any legally authorized medical college in this state, or in any of the United States, or in any other country, after having registered, etc., may practice in this state. It must be conceded, from cases cited, that the legislature has power to define the qualifications of those who shall be licensed to practice those callings or professions the exercise of which may affect the public health or safety, and that this law would be entirely constitutional in that view if it stopped short with prohibiting all except medical graduates from practicing. But it is contended that the exception in favor of those who come under subdivision 1, § 2, of the act, "that every person who shall have actually practiced medicine continuously for at least five years in this state, and who is practicing when this act shall take effect, shall be deemed qualified," etc. is not founded upon any natural, fair, or reasonable distinction, and makes it a discriminating law, within the prohibitions of the federal constitution. This question was raised *Ex parte Spinney*, 10 Nev. 328; and Mr. Justice BEATTY, delivering the opinion of the court in that case, says: "The question was one of policy, and its decision is not subject to our review." This act does not prohibit any physician or surgeon from practice of medicine or surgery because he is not a citizen of this state; it makes a medical qualification the test of the right to

practice. The real test of the right to practice is that he shall be a "graduate of any legally authorized medical college in this state, or in any one of the United States, or in any other country"; and in this there is no discrimination. Now, the legislature saw fit, in establishing this test, to except from its provisions a certain class of physicians and surgeons. In so doing it in effect declared that the physician or surgeon who had actually practiced medicine continuously for at least five years in this state, and who is practicing when this act shall take effect, was as well qualified, in its judgment, to continue the practice of his profession as the student coming fresh from the halls of college with his diploma was to commence it. The reasons which induced the legislature to insert the exception may have been as varied as the different minds of its members. It certainly had power to insert it, and whether the power was reasonably or unreasonably exercised, or whether it was expedient to enact the law, are questions exclusively within the province of the legislative branch of the state government, and their judgment must necessarily be decisive upon these questions.

The judgment of the court below is affirmed.

WHAT CONSTITUTES GRADUATION

Metcalfe v. State Board of Registration in Medicine, 123 Mich. 661; 82 N. W. 512

1900

Richard Metcalfe made application to the Michigan State Board of Registration in Medicine for registration as a medical practitiner under act 237 of the Public Acts of 1899. His application was refused. He then made application for a writ of mandamus to compel said board to register his name and grant him a certificate of registration under the provisions of section three of the act, subdivision one of which provided that the applicant should be registered and given a certificate if he should present sufficient proof within six months after the passage of the act of his having already been legally registered under act No. 167 of 1883, as amended in 1887. He produced proof of having been registered in February, 1897, under the earlier act, and insisted that the board was not authorized by the act of 1899 to look behind the fact of previous registration to ascertain whether he was entitled to be registered, although he conceded that the law of 1899 was within the police power of the state, and that the legislature might have vested the board with full power to investigate the right of the applicant to registration. But, before passing upon the case, the Supreme Court of Michigan says that, inasmuch as the provision relied upon required as a prerequisite to registration without examination that the applicant should have been "already legally registered," it was necessary to turn to the earlier act to ascertain whether he was "legally registered." This provided that every graduate of any legally authorized medical college in any one of the United States should be deemed qualified to practice medicine and surgery after registration, and that the latter might be obtained in certain cases by the filing of an affidavit showing certain facts. Thereunder an affidavit was filed by this party which was as follows: "State of Michigan, County of Berrien, ss. Richard Metcalfe being duly sworn deposes and says, that he is a physician and actually engaged in practice in the county above named, and that he has been so engaged for the period of ten years and — months; also, that he is a graduate of Independent Medical College, a medical college located at Chicago, in the State of Illinois; that he attended said college for the period of one day during the examination and graduated therefrom February 4th, A. D. 1897. Deponent's present residence and place of business is St. Joseph in said county, and he belongs to the Physio-Medical School of Medicine. That he practiced under Dr. Hugons for a period of ten years. [Signed] Richard Metcalfe." This was subscribed and sworn to Feb. 5, 1897. Now this leads the Supreme Court of Michigan to state that if it is able to say that a showing of attendance for one day only and the grant of a diploma by a so-called medical college does not constitute the fortunate recipient of such a certificate a graduate within the meaning of the law

of 1887, it follows that on the face of the record of Berrien county this applicant was not legally registered. And it declares that it does say it, and that it follows that he was not entitled to the relief prayed.

POLICE POWER TO REGULATE PRACTICE OF MEDICINE

People v. Reetz, 127 Mich. 87; 86 N. W. 396

1901

The Supreme Court holds constitutional Act No. 237 of the Public Acts of Michigan of 1899, entitled "An act to provide for the examination, regulation, licensing and registration of physicians and surgeons, and for the punishment of offenders against this act, and to repeal acts and parts of acts in conflict therewith." It says that the first act passed by the legislature of Michigan to regulate the practice of medicine and surgery was Act. No. 167, Public Acts of 1883. This was amended by Act No. 268, Public Acts of 1887. Then followed the act of 1899, covering the entire subject, and providing for a board of examiners. The act of 1899, it goes on to say, is not different in principle from the other acts. If the act of 1883 was valid, then the act of 1899 is valid. And so it holds it. But it was further argued that such legislation is an interference with the inalienable right of a citizen when ill to employ anybody he chooses as his physician. The court's answer is that this contention is not supported by authority or reason. The practice of medicine affects the public health, and it is clearly within the police power of the state to provide that those dealing with disease shall be amply qualified to do so, so far as human experience and education may qualify them. If this contention be adopted, then the law providing for the admission of attorneys to practice law is unconstitutional and void. This legislation has been almost universally sustained by the courts of other states, and the Supreme Court of the United States. (See also 188 U. S. 505, 23 Sup. Ct. Rep., 390.)

UNREGISTERED PRACTITIONERS MUST GET CERTIFICATES

Hooper v. Batdorff, 141 Mich. 353; 104 N. W. 667

1905

The Supreme Court of Michigan says that attention was called to the fact that the act of 1899 required all persons engaged in or who wished to begin the practice of medicine and surgery to make application for a certificate, while the amendatory act of 1903 omits the former class, thus apparently limiting the laws to cases of beginners in practice. But the court thinks this inconsistent with the legislation on the subject, which began as early as 1883. It says that, considering the several acts, it is reasonable to believe that in 1903 the legislature took it for granted that practitioners then engaged in business had complied with the law of 1899, and that it was not the design to compel them to make application again. The court can not believe that it deliberately intended to offer a premium to law breakers, which is the effect of the first stated contention. It is more reasonable to say that a man practicing medicine in violation of law prior to the taking effect of the act of 1903 is a beginner for the purpose of making such application, not being already a lawful practitioner.

VALIDITY OF LAW AUTHORIZING REVOCATION OF CERTIFICATE FOR ADVERTISING RELATIVE TO VENEREAL DISEASES

Kennedy v. the State Board of Registration in Medicine, 145 Mich. 241; 108 N. W. 730

1906

The Supreme Court of Michigan had before it the question of the constitutionality of the state law authorizing the board to revoke a physician's certificate for the insertion in a newspaper of an advertisement relative to venereal dis-

eases. Subdivision 6 of section 3 of No. 237 of the Public Acts of Michigan of 1899, as amended in 1903, provides: "The board of registration in medicine shall refuse to issue a certificate of registration provided for in this section to any person guilty of grossly unprofessional and dishonest conduct of a character likely to deceive the public, and said board shall, after due notice and hearing, revoke a certificate issued subsequent to the date of the passage of this act, or subsequent to the date of the passage of Act No. 237 of the Public Acts of 1899, for like cause or for offenses involving moral turpitude. . . . And provided further, after the passage of this act, the board may at its discretion revoke the certificate of registration, after due notice and hearing of any registered practitioner who inserts any advertisement in any newspaper, pamphlet, circular, or other written or printed paper, relative to venereal diseases or other matter of any obscene or offensive nature derogatory to good morals."

The court says that in support of his contention that this section was unconstitutional, the complainant cited several cases. The strongest and best reasoned of these cases was Matthews v. Murphy. That case alone would receive consideration because the grounds on which it was held inapplicable made all the others inapplicable. In that case it was held that a statute giving the State Board of Health authority to revoke a certificate to practice medicine on proof that the holder was guilty of "grossly unprofessional conduct of a character likely to deceive or defraud the public" was unconstitutional on the ground that the statute did not advise the physician "in advance what act or acts may be in violation of its provisions. . . . He might do an act which he regarded as entirely proper, which neither violated moral law nor involved turpitude, still such acts might, in the opinion of the State Board of Health, amount to unprofessional conduct, and which in its opinion did or was calculated to deceive or defraud the public. . . . The legislature in effect has attempted to commit to the State Board of Health the right, after the physician has done some act, to determine what its effect is to be, and, if in its judgment he should be deprived of the right to practice his profession, it can inflict the punishment on him by revoking his license." This reasoning presented no argument for declaring unconstitutional that part of subdivision 6, under which the defendants were proceeding to try the complainant, viz., that giving them authority to revoke his certificate because he inserted an advertisement in a newspaper relative to venereal diseases. Indeed, in deciding Matthews v. Murphy, the court recognizes the constitutionality of such a law. This is shown by the following quotation from its opinion, viz.: "If the legislature desires to declare for what acts or conduct a physician's license to practice medicine shall be revoked it is competent to do so, and to vest in some tribunal authority to investigate and try the charge which may be made under such a statute." What the Supreme Court of Michigan would have decided had the constitutionality of the first part of subdivisin 6 been necessary to be decided it does not intimate, unless such intimation may be found in the above remarks.

But, further, as to the law which authorized the defendants to revoke the complainant's certificate on the ground that he inserted an advertisement relative to venereal diseases in a newspaper, the court says that it might fairly be stated that all of the many reasons which he advanced in support of the contention that it was unconstitutional rested on the assumption that the revocation of that certificate was an exercise of judicial power, and that all of his objections to the constitutionality of the law were completely answered by saying that this assumption was unfounded. So far as the court has been able to discover, there is no authority against it.

Nor does the court consider that the statute in question violates the rule that a statute can not deprive one of the right to seek redress in a court for the invasion of a constitutional right. It says that if this statute is observed no one will be deprived of a constitutional right, and in that case a provision for an appeal to a court is not essential. If through non-observance of the statute the complainant or any other physician is deprived of a constitutional right, there is nothing therein which prevents his obtaining adequate redress in a court.

POWER OF BOARD—UNPROFESSIONAL CONDUCT

State ex rel. Powell v. State Medical Examining Board, 32 Minn. 324; 54 Am. Rep. 575; 20 N. W. 238

1884

The relator sought by *mandamus* to compel the State Medical Examining Board to issue to him the certificate required by chapter 125 of the Laws of 1883, to authorize him to practice the profession of a physician in this state. He appealed from an order of the district court quashing an alternative writ.

The act referred to creates a board of medical examiners, consisting of the faculty of the medical department of the University of Minnesota, and requires all persons, excepting such as have been practicing medicine five years within the state, to procure from this board its certificate. Section 9 provides: "The board of examiners may refuse certificates to individuals guilty of unprofessional or dishonorable conduct, and they may revoke certificates for like causes."

The relator applied for a certificate, presenting a diploma, which was found to be genuine, showing that he was a graduate of the Louisville (Kentucky) Medical College, in which institution he had passed the prescribed course of study. His application was refused upon the ground that the applicant was at that time conducting himself in an unprofessional and dishonorable manner, in advertising himself through the newspapers and by circulars to be a medicine man of the Winnebago tribe of Indians, adopted by that tribe, and assuming the name of "White Beaver"; and claiming in such publications the proprietorship of certain specific remedies, one of which he claimed would cure cholera morbus when taken internally, and rheumatism when applied externally; which claims are alleged by the board to be untrue and impossible.

The court first considers the constitutionality of that part of the act on which the refusal of the board to grant its certificate is based. The relator urges this objection upon the grounds that the act gives to the appellant no opportunity to be heard in his own defense in relation to any charge of unprofessional and dishonorable conduct, and that by its enforcement he is deprived of his property without due process of law. These objections to the validity of the act cannot be sustained. The vocation of the physician is in itself a lawful one, and the right of any person to engage in it is only subject to such restrictions as the legislature may impose in the exercise of its general police power. While, therefore, the right to engage in this practice is a qualified one, even that qualified right is not to be arbitrarily, and without reason, denied. It is so opposed to the principles of the common law that any fact affecting the rights of an individual shall be investigated and determined *ex parte*, and without opportunity being afforded to the party to be affected thereby to be heard, that this act should not be construed as contemplating such a proceeding unless that purpose is expressed in the plainest terms. While the act does not prescribe the manner in which the proceedings for the determination of the matters referred to in section 9 shall be conducted, there is nothing to indicate that it was intended that such investigations, and the determination of the fact, should be made *ex parte*, or without reasonable opportunity given to the party interested to be heard. The contrary conclusion is rather indicated by the requirement that the board shall "take testimony in all matters relating to the duties," and by the fact that a right of appeal from the determination of the board is conferred.

It may be stated as a general proposition that any person has a right to pursue any lawful calling, but in respect to certain occupations, not in themselves unlawful, this right is necessarily subject to legislative restrictions from considerations of public policy. In the profession of medicine, as in that of the law, so great is the necessity for special qualifications in the practitioner, and so injurious the consequences likely to result from a want of it, that the power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties, cannot be doubted.

But the legislature has the same power to require, as a condition of the right to practice the profession, that the petitioner shall be possessed of the qualifications of honor and a good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority,

in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be intrusted with the discharge of its duties. And as the duty of determining upon these qualifications, both as to learning and skill, and as to honor and moral fitness, must from necessity be committed to some person or body other than the legislature, there is no reason why it may not be committed to the legally constituted body of men, learned in this profession, named in this act.

The court finds no decision sustaining the position that an adverse determination of such a body upon such a question, by reason of which the appellant is precluded from engaging in the practice of his profession, deprives him of his property without due process of law, or that such enactments are for any reason unconstitutional. On the contrary, such enactments have been repeatedly enforced, and their constitutionality sustained, in cases involving a consideration of those provisions relating to the mode of determining the qualification of the practitioner in respect to learning.

The legislative requirement of a good moral character has also been sustained. There can be no distinction, upon constitutional grounds, as to the mode of determining in regard to professional or intellectual fitness, and as to the moral fitness for the profession. The means properly adopted by the legislature to determine the one, cannot be said to be unconstitutional when prescribed for the determination of the other.

The court holds that the words "unprofessional or dishonorable conduct" do not refer to matters of merely professional ethics, but that the term "unprofessional" was used convertibly with "dishonorable." The meaning may be expressed by using the conjunctive *and* in place of disjunctive *or*. It might, for instance, be deemed unprofessional for the members of one school of medical practice to consult professionally with a member of a different school; but such matters are not within the plain purpose of the act, which was the affording of protection to the people against ignorant, unqualified and unworthy practitioners of this profession.

The law under which the board acted was constitutional and the relator cannot, by *mandamus*, compel the issuing of a certificate to him. The action of the board is not merely ministerial, but partakes of a judicial character. It is to inquire concerning and to determine as to the existence of certain facts, and whether it should grant a certificate of qualification to an applicant must depend upon that determination. The board has not refused or neglected to act upon the matter submitted to it. It has decided upon the application, and the correctness of that decision, involving the exercise of the judgment of the members of the board, cannot be brought into review by this proceeding, and is not properly before us.

REVOCATION OF LICENSE NOT A JUDICIAL PROCESS

State ex rel. Chapman v. *State Board, 34 Minn. 387; 26 N. W. 123*

1885

The State Board of Medical Examiners under the act of 1883 notified the plaintiff that a complaint having been made to the board that he had been guilty of dishonorable and unprofessional conduct, he must appear and show cause why his certificate should not be revoked. The plaintiff, having obtained a writ of prohibition against the board, asked to have it made absolute, on the ground that the act, in so far as it gives the board power to revoke certificates, is unconstitutional, since a license to practice medicine when once granted is property and the revocation of this license is an exercise of judicial power which cannot be vested in any executive or administrative board but only in the courts, and that to assume to vest this power in this board is to deprive a person of his property without due process of law. The supreme court says that the fallacy of this argument is the assumption that the revocation of such a license is an exercise of judicial power. Due process of law is not necessarily judicial proceedings. The exercise of the general police power of the state often materially interferes with or restricts a person's enjoyment of his property, yet it was never held that

the exercise of the police power must be by judicial proceedings in court in order to constitute due process of law. There is no possible distinction between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power and their object is identical, viz., to exclude an incompetent or unworthy person from this employment. Therefore, the same body which may be vested with the power to grant or to refuse to grant a license may also be vested with the power to revoke that license. The constitutionality of laws under the police power revoking licenses of many different classes has often been sustained and has rarely been questioned.

MAKING FALSE STATEMENTS DISHONORABLE CONDUCT

State ex rel. Feller v. *State Board of Medical Examiners, etc., 34 Minn. 391; 26 N. W. 125.*

1885

This is an application for a writ of prohibition to restrain the State Board of Medical Examiners from further action in proceedings instituted to revoke, on the ground of alleged unprofessional and dishonorable conduct, a certificate issued to relator entitling him to practice medicine. The ground upon which the writ is asked for is that the facts stated in the information or complaint do not constitute "unprofessionable or dishonorable" conduct, within the meaning of the statute. The respondent makes the point that, if true, this is no ground for issuing the writ; at least not until relator had first pleaded to the jurisdiction of the board, and his plea had been denied. The court holds that the complaint or information is entirely sufficient. The argument of relator proceeds upon the assumption that all that is charged is a breach of a rule of professional ethics by simply publishing an advertisement of relator's business as a physician. But this is a mistake. The complaint sets out, in full, the advertisement in which the relator, among other things, asserts to the public his ability to speedily cure *all chronic*, nervous, blood, and skin diseases of both sexes; also *all* diseases of the eye and ear, without injurious drugs or hindrance from business; *all* old, lingering constitutional diseases, where the blood is impure, causing ulcers, blotches, sore throat and mouth, pains in the head and bones, cured for life, etc. The complaint further charges that relator published this advertisement for the purpose of soliciting and procuring, wrongfully and fraudulently, patients to submit themselves to medical treatment by him; and that the statements therein contained are *false*, and that relator *well knew* them to be false when he made them, and that it was intended thereby to deceive the public and impose on the credulous and ignorant. The gist of this charge is, not that he advertised his business, nor merely that the statements contained in the advertisement were false, but also that the relator *knew them to be false*, and made them *with intent to deceive and impose on the public*. If true, this is unprofessional and dishonorable conduct of the grossest kind.

The further point is made that the board is assuming to exceed its jurisdiction because it cites relator to show cause, not only why his certificate should not be revoked, but also why he should not be *forever* debarred from practicing medicine in this state. There is nothing in this point. If relator's certificate is revoked, the legal effect will be to forever debar him from the practice unless the statute is repealed, or he obtains a new certificate.

Writ quashed.

STATUTE CONSTRUED—POWER NOT ARBITRARY

State v. *Fleischer, 41 Minn. 69; 42 N. W. 696.*

1889

The defendant stands convicted of the offense of practicing medicine in this state without first obtaining license, as prescribed by the terms of chapter 9, Gen. Laws 1887. On appeal he alleges the unconstitutionality of the entire chapter, because section 3, after specifying the various branches in which the applicant

must be examined by the board, which consists of nine members, and the number of courses of lectures he must have attended, provides that "after examination said board shall grant a license to such applicant to practice medicine and surgery in the state of Minnesota, which said license can only be granted by the consent of not less than seven members of said board," etc. The appellant's position is that by means of the language quoted, and especially by the use of the noun "consent," the legislature intended to and did clothe the board of examiners with the right and power to absolutely disregard the learning and qualifications of the applicant, to unreasonably and arbitrarily reject his claims, and, at will, grant or refuse the contemplated certificate. No such construction should be given the statute unless the design is unmistakably manifest, and the court does not think it is. From the spirit and object of the act, it is obvious that the lawmakers intended to establish a high standard of qualification and fitness for the medical profession, whereby the people might be protected from ignorance and quackery. In creating the board before which all persons desiring to practice medicine must appear for an investigation as to skill and ability, it was within the legislative discretion to require that all, or more or less than a majority, of its members should participate in the examination, and, before issuing a certificate, affirmatively pass upon the merits of each applicant. The requirement that at least seven of the nine members must concur and approve, is a slight innovation upon the majority rule, which would prevail in the absence of another. It is a mere declaration of the mode in which a determination must be reached. Judgment affirmed.

REASONABLE QUALIFICATION STANDARD UPHELD

State v. Vandersluis, 42 Minn. 129; 43 N. W. 789; 6 L. R. A. 119

1889

That the legislature may prescribe such reasonable conditions on the right to practice medicine or law as will exclude from the practice those who are unfitted for it, is so well settled by decisions of the courts as to be no longer an open question. The power rests on the right to protect the public against the injurious consequences likely to result from allowing persons to practice those professions who do not possess the special qualifications essential to enable the practitioner to practice the profession with safety to those who employ him. The same reasons apply with equal force to the profession of dentistry, which is but a branch of the medical profession. In the exercise of that power, the legislature may require, as a condition of the right to practice that the person shall procure a license; may designate some officer or board to issue the license, and to determine whether an applicant possesses the qualifications required to entitle him to it; and may prescribe what qualifications shall be required, and how the possession of them by the applicant shall be ascertained. It is for the legislature, and not for the courts, to determine these things. The only limit to the legislative power in prescribing conditions to the right to practice in a profession is that they shall be reasonable. Whether they are reasonable, the courts must judge. By the term "reasonable" we do not mean expedient, nor do we mean that the conditions must be such as the court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to-wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If a condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and, especially, if it appeared that it must have been adopted for some other purpose—such, for instance, as to favor or benefit some persons or class of persons—it certainly would not be reasonable, and would be beyond the power of the legislature to impose.

After reviewing the Dental Act of 1889 the court says that section 5, the provisions of which furnish one of the grounds on which appellant assails the act as unconstitutional, provides that any person who shall desire to begin the practice of dentistry in the state after September 1, 1889, shall make application for examination to the board of examiners, paying a fee of $10, and shall undergo an examination. The section further enacts: "In order to be eligible for such examination, such person shall present to said board his diploma from some dental

college in good standing, and shall give satisfactory evidence of his right to the possession of the same: Provided, also, that the board may in its discretion admit to examination such other persons as shall give satisfactory evidence of having been engaged in the practice of dentistry ten years prior to the date of the passage of this act. Said board shall have the power to determine the good standing of any college or colleges from which such diplomas may have been granted." It then goes on to prescribe the manner, extent and subjects of the examination. Appellant claims the section to be objectionable because, no matter how well qualified by learning and skill or experience one may be, he has no absolute right to be examined by the board, unless he has a diploma from a dental college in good standing, such good standing to be determined by the board, and this he claims to be discrimination between the rich and poor, because one may be pecuniarily able, and another not able, to attend a dental college. The mere fact of discrimination in such a law is no objection to it. Requiring a certain degree of learning and skill as a condition of being allowed to practice is discrimination between those who have and those who have not that regree of learning and skill—between those who are able and those who are not able to acquire it. If there were discrimination between persons or classes on any matter not pertinent to the legitimate purpose of the law, to-wit, to secure fitness and competency in those who shall be permitted to practice, it would be objectionable. As, for instance, if it were as to place of birth, color, or religious belief. The requirement of a diploma from some college or learned society, in order to practice medicine, has been inserted in the laws of many states, and questioned in but few. The fact of having graduated at and received a diploma from a school or college devoted to teaching the particular science, medicine, surgery, or dentistry, bears directly upon the person's qualifications to practice. The legislature might have made that the sole test. That this statute allows, in the discretion of the board, ten years' practice prior to the passage of the act as a substiute for the diploma of a college, furnishes no objection, on constitutional grounds, to the act. It is asked why ten years' practice after the passage of the act ought not to entitle one to the same right as ten years' practice before its passage. A sufficient answer to this is that such practice after the act, if in this state, would be in violation of law, and the legislature surely may provide against inviting violations of the law, and for that purpose withhold all benefit from its violators.

It is objected that it is left to the discretion of the board to determine whether ten years' practice, instead of a diploma, shall admit one to examination. On the score of expediency, some question might be made upon it. But the legislature might have left that provision out altogether, and made no exception to the requirement that an applicant for examination should have a diploma. The court does not see that any question can be made of the power to fix the period of ten years, nor of the power to leave it for the board to determine in each particular case whether the extent and character of the applicant's practice during the period has been such as to be equal, as evidence of his qualifications, to the possession of a diploma.

It is claimed that section 7 shows the law to be an arbitrary measure for the benefit of dentists, by giving them a monopoly to practice a branch of surgery which has heretofore been largely carried on by regular physicians and surgeons. It was proper, in order to give precision to the law, to define what was meant by practicing dentistry. It is not to be supposed the legislature intended to enlarge the sphere of the profession. The act could hardly be so construed as to limit the right of the surgeon under his license. It is claimed, also, that it discriminates between students of dentistry, by allowing them to operate upon the teeth and jaws during the period of their enrollment in a dental college and attendance upon a regular, uninterrupted course in such college, and excluding others. The purpose of this provision of the law is apparent. It is to permit to actual, bona fide students the benefits of practical work under an instructor. But, to prevent evasions of the law by persons practicing the profession under the pretense of being students, the act very properly defines who shall be regarded as students, within the clause allowing them to perform operations, or parts of operations. It is open to every student to bring himself within the definition.

The interpretation of the clause under consideration, upon which appellant argues that it was intended to prefer schools of dentistry within the state, as

against those out of it, is too narrow. There is no reason why a student in such a school in another state may not, during vacation, pursue his studies here under a licensed dentist, and be within the meaning of the clause. By "regular, uninterrupted course," the act does not mean a course in which there are no vacations, such as all schools have. The provisions and requirements of the law are undoubtedly rigorous. They ought to be, in any law aiming to protect the public against ignorance and incompetency in so important a profession as the medical profession, in any of its branches. The court sees nothing in the provisions of this law that was not clearly inserted by the legislature, in good faith, to effect the end in view. The law is valid. Judgment affirmed.

SURGERY INCLUDED IN PRACTICE OF MEDICINE

Stewart v. *Raab, 55 Minn. 20; 56 N. W. 256*

1893

In this case it was contended that a person holding a certificate to practice medicine could not lawfully practice surgery nor recover for surgical services. The Minnesota medical practice act of 1887 provides that every person practicing medicine in any of its departments shall possess the qualifications required by the act. The court says that the terms "practice of medicine" in the title of the act and "practicing medicine" in the first section, are used in the sense in which they are generally understood. The practice of medicine embraces the art of preventing, curing or alleviating disease and remedying as far as possible the results of violence and accidents. Therapy is the treatment of disease and surgery is operative therapy. A certificate which authorizes its possessor to practice medicine necessarily authorizes him to practice surgery. The act does not require a certificate for each separate department in medicine. The court holds as invalid the argument that because surgery is not specifically mentioned that the holder of a certificate violates the law by performing surgical operations.

PRACTICING WITHOUT LICENSE—STATUTE CONSTRUED

State v. Oredson, 96 Minn. 509; 105 N. W. 188

1905

The Supreme Court holds that section 7896 of the General Statutes of Minnesota of 1894, imposing a fine or imprisonment, or both, on anyone practicing medicine without a license, is to be liberally construed, so as reasonably to effectuate its purpose, to prevent frauds, and to conserve the public health. That an unlicensed person has practiced medicine is the gist of the misdemeanor, and not a gratuitous incident to it. That such person has for a fee prescribed any drug, medicine, or other agency for the treatment of disease is one kind of evidence of guilt, and not the exclusive substance of the offense. The mere fact of graduation from a medical college does not entitle to practice medicine in Minnesota. The offense defined by statute may be committed by a graduate of a medical college, as well as by any other person not licensed to practice medicine, who is not shown to be a medical student practicing under the direction of a preceptor, or not then and there being a physician or surgeon of the United States Army or Navy.

The definition of practicing medicine given on the trial of this case was in accordance with the statute. The act is a beneficial one, and is entitled to a liberal construction. Its purpose was not to merely make prescribing for a fee the offense; so that the defendant could have practiced medicine generally, could have held himself out to the world as a physician and surgeon, could have examined patients, and inferentially could have operated on them as a surgeon for pay, and yet would not have been guilty of a misdemeanor within the meaning of the act. On the contrary, its plain object was to prevent the public wrong of practicing medicine without a license.

The act was not enacted for the benefit of any profession or of any school or theory of medicine. It was designed to secure the public in whole and in every part from quacks, humbugs and charlatans masquerading under the venerable and honorable titles of surgeons, physicians and doctors, and to protect the public in a just reliance on the one using these titles as a man of proper education and sufficiently trained in the sciences involved. A just enforcement of that act would tend to prevent the most deplorable swindling of the ignorant poor, who can least afford to pay for the luxury of deception, and who are the most likely to be the dupes of ostensible practitioners, whose competency has not been determined by law, and whose moral deficiencies are evidenced by their false pretenses. Its terms should be construed, so far as reasonably may be, so as to tend to eliminate the suffering of an individual from the misuse of inert drugs when potent ones are needed, and of powerful agencies productive of ill where proper ones might bring relief or effect a cure, so as to avoid many evils of malpractice, and so as to minimize the exposure of the community at large to the spread of avoidable pestilence. The act is at once a statute of frauds and a health ordinance.

LIMITATION ON RIGHT OF LICENSED PRACTITIONERS OF MEDICINE TO PRACTICE DENTISTRY

State v. Taylor, 106 Minn. 218; 118 N. W. 1012

1908

The Supreme Court holds, that a person who is licensed to "practice medicine and surgery" under the statutes of that state can not by virtue thereof "practice dentistry" without securing a license as a dentist, as required by Chapter 117 of the General Laws of Minnesota of 1907.

The defendant in this case was a licensed physician and surgeon and claimed that such license entitled him to engage in the incidental practice of dentistry on his own patients. He extracted two teeth for one of his patients and took an impression in wax of the mouth and cavities. He sent this impression to a dental laboratory, where artificial teeth were made and returned to him, and he delivered them to his patient and received a fee of some $38 for his services. It was conceded that he did not hold a certificate from the State Board of Dental Examiners authorizing him to practice dentistry in Minnesota, and that what he did came within the terms of the statute which defines the practice of dentistry. He was therefore properly convicted, unless protected by his license as a physician and surgeon.

The statute provides that a person shall be regarded as practicing medicine "who shall append the letters M.D. or M.B. to his name, or for a fee prescribe, direct or recommend for the use of any person any drug or medicine or other agency for the treatment or relief of any wound, fracture or bodily injury, infirmity or other disease: Provided that this section shall not apply to dentists." It is true, as the defendant contended, that the practice of medicine and surgery in its broad and comprehensive sense includes the practice of dentistry, which "is medical, surgical or prosthetic. In so far as it is a direction of medical science to the prevention, modification or removal, by medicinal and hygienic remedies, of the causes and effects of disease in the dental organs, it forms part of the physician's practice, just as does the treatment of cerebral, cardiac or pulmonary diseases. In so far as it is an application of surgical skill to the fractures or to staphylorrhaphy, it is simply oral surgery, involving only such knowledge and skill in the use of instruments as every surgeon must possess." Harris, Principles and Practice of Dentistry, p. 33.

In the absence of any legislative declaration to the contrary, a certificate authorizing the holder to practice medicine and surgery would therefore entitle him to practice dentistry. But for reasons of public policy, with which the court has no particular concern, the legislature adopted the policy of dividing the field of medicine and surgery, and making a separate profession of a part thereof. It was thought that men who engaged in the treatment of diseases of the dental organs should receive special preparation and be specially licensed to practice

that particular branch or department of medicine and surgery. A State Board of Dental Examiners was created and authorized to determine who should be licensed and entitled to practice dentistry in the state. A department of Dental Surgery was also established at the university, with a course of study, the satisfactory completion of which would entitle the student to a special degree of Dental Surgeon. An examination of this course shows that it includes a considerable part of the work required in the medical school, but it also includes studies which relate particularly to diseases of the dental organs and others designed to insure efficiency in the mechanical work connected with the treatment.

The statute now in force provides that: "No person shall practice dentistry in the state without having complied with the provisions of this subdivision. . . . Any person who shall . . . violate any provision of this subdivision shall be guilty of a misdemeanor." And: "All persons shall be said to be practicing dentistry within the meaning of this section . . . who shall for a fee, salary or other reward paid or to be paid either to himself or to another person . . . replace lost teeth by artificial ones."

The legislature has thus defined both the practice of medicine and the practice of dentistry, and made of them two distinct professions. This statute relating to dentistry makes no exception in favor of one who holds a certificate entitling him to practice as a physician and surgeon. The court can find no implied exceptions in this statute. The words "no person" in a criminal statute, are to be given their literal meaning. From an examination of the statutes of other states relating to the practice of dentistry, the court learns that many contain express exceptions in favor of physicians and surgeons. Probably the most of them permit physicians to extract teeth or perform such other comparatively simple work. In the absence of any such exceptions, it must conclude that the legislature intended to restrict the scope of the practice of the physician and surgeon, and require him, if he desires to practice dentistry, to obtain a license from the State Board of Dental Examiners in addition to his other certificate. What was said in State vs. Vandersluis, 42 Minn., 129, to the effect that the statute then under consideration would not limit the right of a surgeon under his license, was dicta, and is not controlling.

The conviction in this case is affirmed.

SUFFICIENCY AND CONSTRUCTION OF STATUTE AUTHORIZING BOARD TO REVOKE LICENSES

Wolf v. State Board of Medical Examiners, 159 Minn. 360; 123 N. W. 1074

1909

The Supreme Court says that the complaint of the plaintiff set forth that the board had caused a notice to be served on him to appear before it at a time and place stated and show cause why he should not have his license to practice medicine revoked. The ground stated in the notice was that he had been guilty of unprofessional conduct in that at divers times he had entered into business relations with a certain medical institute and had aided and abetted it in carrying on a questionable medical practice. The board, it was alleged, had not the capacity, qualification, or power to properly examine, pass on, or ascertain the facts as to whether the plaintiff had been guilty of immoral, dishonorable, or unprofessional conduct, or to summon, administer oaths, or compel the production of documentary evidence; "the ethics of the medical profession are vague and shadowy; there are a variety of medical schools represented on said board, all differing in their theory of ethics as well as on their medical theories; . . . they do not act under oath, and their action is wholly unrestrained, either by judgment, law, or conscience;" the board had fully determined in advance to revoke the license of the plaintiff without regard to the facts.

Section 2296 of the Revised Laws of Minnesota of 1905 provides in part that "the board may refuse to grant a license to, or may revoke the license of, any person guilty of immoral, dishonorable, or unprofessional conduct, but subject to the right of the applicant to appeal to the governor." It is obvious that this section is incomplete in itself. It is equally certain that the section must be

construed together with other sections of the Revised Laws and general principles of law which are applicable. It is not true, as the complaint set forth, that the board is not required to take oath. The subscription of an oath is expressly required by section 2677. It is true that no notice nor form of notice is prescribed by section 2296. The gist of the power to revoke necessarily implies, however, the ability on the part of the board to prescribe legal forms. This section does not expressly confer on the board power of administering an oath. The deficiency, however, is fully supplied by section 2682. The nature and necessary construction of that statute confers that power. It is immaterial that its exercise is limited to questions of fact. No witness could properly swear to matters of law. While it is true that this section provides that such a board "shall have the power to administer such oaths as they may deem necessary to the proper discharge of their duties," it does not provide that they must. It was objected that the administration of an oath is therefore discretionary. If an instance were presented in which, as a matter of fact, the conclusion of the board rested on unsworn testimony, the question involved in that argument would be presented. No such state of facts was before the court in this case. The objection that the board has not the power to compel the production of documentary evidence is equally untenable. Section 4655 expressly confers the authority.

Objection was made to the form of notice served on the plaintiff by the board. That notice recited that it had been made to appear to said board that he had been guilty of unprofessional conduct. This he said demonstrated the prejudgement by the board of the merits of the case. Of this notice the trial court said: "From a lawyer's standpoint, the language employed (in the notice) might be improved, but it is simply a citation to answer before the board certain charges touching the professional and possibly the moral conduct of the plaintiff." This the supreme court thinks was the logical and proper construction. The notice was infelicitous, but not legally ineffective.

The constitutionality of the statute was attacked. This proceeding was commenced under the statute as it existed prior to the amendment thereof by chapter 474 of the General Laws of 1909; but it is clear that subsequent proceedings must conform to the statute as thus amended. The principal objection to the old statute was that it failed to provide a physician proceeded against for removal with an opportunity to review a possible removal before some tribunal authorized to hear and protect his rights, and hence deprived him of his liberty and property without due process of law. The new statute expressly provides for an appeal to the district court of the proper county on questions of law and fact, and thus answers every requirement of due process of law. It was intended to obviate the constitutional objection of the old statute. As it will govern further proceedings herein, it is unnecessary to determine the validity of the old statute. It is to be noted that the definition of the offense against professional propriety is in no wise altered. The change is one of procedure alone, and secures to the person proceeded against all his constitutional rights. The ability of the legislature to effect such change is beyond question. If the plaintiff should be removed, he would then have the right to review all proper questions on appeal. No adequate reason appears for granting him an injunction enjoining the board from proceeding further in the matter.

WANT OF LICENSE BARS RECOVERY OF FEE

Bohn v. Lowery, 77 Miss. 424; 27 So. 604

1900

Action by H. R. Bohn against R. J. Lowry for professional services. From a judgment in favor of defendant, plaintiff appeals. The defense set up was that appellant had not been examined and had not obtained license to practice medicine in the state of Mississippi, as required by law. At the trial in the court below, appellant testified that by profession he was a physician; that he had practiced medicine seven years; that he was a graduate of Tulane University and of the Charity Hospital of New Orleans, La.; that he had not been examined and had not received a license from the state board of health to practice as a physician, but that he had applied for and received a temporary license from the

board on the 3d day of June, 1897; that his temporary license expired in April, 1898; that he did not go before the board of examiners at the April meeting because he was sick. The deposition of Dr. J. F. Hunter, secretary of the state board of health, and executive officer of said board, was introduced in evidence, and shows that the temporary license granted appellant in June, 1897, expired on May 10, 1898. The trial resulted in a verdict and judgment for defendant, and plaintiff appeals.

The court says that by the common law a contract founded upon an illegal consideration, or one made against public policy, is void, and no action can be maintained thereon; and where the doing of an act is prohibited by legislative authority under a penalty it cannot constitute a consideration to support a contract. The illegality, whether arising by the common law or from the statute, affects the act or contract with like infirmity. An exception to this rule of law prevails where the penalty is imposed on the offending party merely for the benefit of the revenue, and not to prohibit the act done, or avoid the contract. After quoting authorities the court says: That Dr. Bohn was a graduate of Tulane University, and a skilful physician, is not to the purpose. He had no license when he performed the services upon which the action is founded. His temporary license had expired in May, 1898, and he was disabled by sickness from obtaining a permanent license at the May meeting of the board, which, doubtless, he would have done, if he had been before it; but that was his misfortune. Looking back, it seems that it would have been a reasonable and wise provision of law that it should have authorized the board of health to extend a temporary license for inability to attend a meeting of the board on account of sickness or other adequate cause. But it is for the legislature to insert such provision, and not for the court to ingraft it. Affirmed.

MISSISSIPPI MEDICAL PRACTICE ACT AND OSTEOPATHY

Hayden v. State, 81 Miss. 291; 33 So. 653; 95 Am. St. Rep. 471

1903

Hayden was indicted for practicing as physician without first having been examined and obtained a license so to do. The admitted facts were that he was a graduate of a school of osteopathy and practiced it. In treating diseases, and in his treatment of the witnesses for the state case he did not use any drug or medicine, but his treatment consisted of manipulating scientifically the limbs, muscles, ligaments and bones which were pressing on the nerves of the blood-supply. This treatment was had so that Nature would have free action. In his treatment of diseases or pains he was confined solely to his manipulation as above described. For said services to said witnesses he received pay. The witnesses were being treated for rheumatism, and claimed that they had entirely recovered as a result of that treatment. The circuit judge instructed the jury that, if they believed the admitted facts, they should convict the party. This they did, and thereon the judge imposed a fine of $20 on him. The Supreme Court says that the sole question was whether, under Chapter 68, Acts 1896, an osteopath is required to be examined and licensed for the practice of his branch of the healing art. The act of 1896 provides: "That the practice of medicine shall mean to suggest, recommend, prescribe or direct for the use of any person, any drug, medicine, appliance or agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound or fracture or other bodily injury or deformity or the practice of obstetrics or midwifery, after having received, or with the intent of receiving therefore, either directly or indirectly, any bonus, gift, profit or compensation." It was perfectly manifest, the court thinks, from the agreed statement of facts, that the party used neither drug nor medicine, as meant by the act. It was equally manifest that the legislature, by the use of the words "appliance and agency," did not intend to include such treatment as he gave the state witnesses. Continuing, it says that its attention has been called to no statement of osteopathic treatment in all the literature on this subject which characterizes the treatment of an osteopath of his patient as an appliance or

agency. There is an incongruity in such application of such words. Osteopaths themselves do not speak of their manipulation of the nerves, ligaments, bones and other parts of the human body as being agencies or appliances of any sort or in any sense. In any strict and proper use of such words they can not be so denominated. If one not an osteopath directs a blow at their art it is becoming that he use a term of description not to be mistaken. The Supreme Court concludes that the act of March 19, 1896, was not intended to regulate the practice of osteopathy in Mississippi. It says that the course of study and examination prescribed in the law of that state on this subject seems to mark it out as curriculum of the allopaths. It at least suits them in many respects, but its chemistry and materia medica are not specially adapted to assist the practice of osteopathy. They make no use of the immense learning contained on these subjects, so highly valued by the regular physician. It appears to the court that the Mississippi legislation on the subject of the practice of medicine has been framed by the allopaths to suit their views of the medical art, and with the laudable design of excluding from the practice the unskilful and the ignorant; and it was not intended to set up a universal standard of therapeutics, from which none could depart. Courts in other jurisdictions where similar statutes prevail have led the way for the decision in this case. The court says that while its own views of the subject would probably have led it to the conclusion it has reached, yet, if the case had been otherwise, it should have felt itself strongly constrained by the authority and reasoning contained in them. It adds that a wise legislature some time in the future will doubtless make suitable regulations for the practice of osteopathy, so as to exclude the ignorant and unskilful practitioners of the art among them. The world needs and may demand that nothing good or wholesome shall be denied from its use and enjoyment.

EXCEPTION AS TO PRIOR PRACTICE VALID

State v. Hathaway, 115 Mo. 36; 21 S. W. 1081

1893

J. N. Hathaway was convicted for practicing medicine without a certificate, and appeals. Affirmed.

This proceeding charges that the defendant did unlawfully and wilfully engage in the practice of medicine by publicly professing to be a physician and without being authorized to practice.

The defendant attacks the constitutionality of the act of the legislature approved April 2, 1883, entitled "An act to regulate the practice of medicine and surgery in the state of Missouri," on the ground that it discriminates between practitioners of medicine, by conferring special privileges upon certain physicians, exempting them from the obligations and burdens imposed upon others engaged in the same profession, and is therefore class legislation, and because, in contravention of article 3 and section 1 of article 6 of the constitution of Missouri, it confers on the board of health judicial powers, which can only be exercised by the courts of this state. This act has twice before been before this court. In neither of those cases was the validity of the law challenged as obnoxious to the organic law of the state. Considering the objection that this act invests the board of health with judicial powers, the court thinks this is a clear misapprehension of this law. This statute is the exercise by the legislature of its prerogative to pass all needful laws for the preservation of the health of the people of this commonwealth. Its right to regulate the practice of those trades and professions requiring professional skill and learning can no longer be doubted. It is an acknowledged part of that undefined power, inherent in the state, and denominated "police power." The right to require examination and a certain amount of technical knowledge has been exercised by the several states, not only in the profession of medicine, but in the law, and pharmacy, and extends to engineers, pilots, and the like, and has been sustained in the highest courts of the land. The legislature, in the interest of society, and to prevent the imposition of quacks, adventurers, and charlatans upon the ignorant and credulous, has the power to prescribe the qualifi-

cations of those whom the state permits to practice medicine. To ascertain whether they come to the standard the state prescribes, it is within the power of the legislature to provide for a board of experts, who shall conduct the examinations. All this is within the scope of the legislative branch of the government. And the objection now made that because this law vests in this board the power to examine, not only into the literary and technical acquirements of the applicant, but also into his moral character, it is a grant of judicial power, is without force.

The act being otherwise a valid exercise of the legislative power, does the provision "that the provisions of this act shall not apply to those that have been practicing medicine five years in this state," render it unequal, and discriminating between physicians, and therefore unconstitutional? This objection has been made so often to statutes identical in principles with ours, and has, with one exception, been so uniformly overruled, that the court forbears any extended discussion of it. To be obnoxious to the objection that it is class legislation, there must be a discrimination between persons of the same class. It is evident that the legislature regarded those physicians who had lawfully exercised their profession in this state for five years before the act was passed as belonging to a different class from those who had never practiced in this state, and the distinction is one that commends itself to our ideas of justice. The mere fact that the state saw fit to adopt a more rigid rule for the practice of medicine, as to those who should hereafter desire to follow that vocation, without applying it to those who had for years followed it, works no injustice to the new applicant. It is a well-settled rule that statutes should be construed to act prospectively only, unless the intent of the legislature that they should operate retrospectively is clearly expressed, and so as to admit of no other reasonable construction; and giving the act in question this construction, it would apply, from the time of its taking effect, to all physicians who might desire to practice in this state, and under this view is certainly not open to the charge of class legislation. The point is not well taken, and must be overruled. The judgment is affirmed. All concur.

ARBITRARY CLASSIFICATION OF COLLEGE OBJECTIONABLE

State ex rel. Johnson v. Lutz et al, 136 Mo. 633; 38 S. W. 323

1896

This is a mandamus proceeding to compel the State Board of Health to issue a certificate authorizing the plaintiff to practice medicine and surgery. The plaintiff states that he graduated from the Physio-Medical College of Indiana on March 18, 1896, and appeared before the Missouri board in July 1896, presented his diploma, tendered the fee and made application for a certificate which was refused on the ground that the college issuing the diploma was not, in the judgment of the board, a medical institution in good standing within the meaning of the statutes, and that the board had mailed a copy of a resolution passed by the board to each medical college in the United States requiring them to furnish on or before Jan. 1, 1896 a list of their respective matriculates and the basis of their matriculation and that the Physio-Medical College of Indiana had not complied with this order. The record shows that on April 19, 1894, the board of health adopted a rule prescribing certain conditions upon which medical students might be admitted and requiring the secretary of the board to notify all medical colleges that this rule would go into effect on Feb. 1, 1895, and that on Oct. 28, 1895, the board passed another resolution requiring all medical colleges to report on or before January 1 of each year a complete list of all its matriculates, together with the basis of matriculation. On Jan. 6, 1896, the board passed another resolution, instructing its secretary to refuse recognition of the diplomas of any medical college which had not complied with the conditions imposed upon colleges by the resolution and ordering copies of the Missouri Sanitarian for November, 1895, sent to all the medical colleges in the United States. It was shown by the secretary of the board that he had sent copies to all medical colleges including the Physio-Medical College of Indiana but he did not state when or how they were sent, whether by mail or otherwise. Dr. Lutz, the president of the board, testified that in the latter part of October, 1895, he sent a printed notice of the require-

ments of the board to every medical college in the United States. Dr. Bedford testified that he had been secretary of the faculty of the Physio-Medical College for ten or twelve years and that at no time prior to 1896 was there received by the college, or by him, any communication from the State Board of Health of Missouri, but that on the 24th day of June, 1896, he received through the mail a slip of printed matter purporting to be the minimum requirements of the State Board of Health of Missouri. The envelope was stamped "St. Louis, June 23," and bore the stamp of the postoffice at Indianapolis which shows that it reached there at 4 a. m., June 24, 1896. While the evidence on the part of the state board tended to show that the notice was sent by the board to the Physio-Medical College in 1895, the witnesses testified from memory only, and were indefinite as to the exact time, while the secretary of the faculty of the medical college testified positively that no such notice was received until the 24th day of June, 1896, and in corroboration produced the notice and the envelope. The Supreme Court holds that the weight of evidence was in favor of the relator and that the notice was not sent to the college until June 23, 1896, five days after the relator had graduated, and that he was, therefore, in no way affected by the failure of the college to comply with the rulings of the board. If the certificate had been refused on the ground that the Physio-Medical College was not in good standing, mandamus would not lie to compel the board to issue a certificate because that question is, under the statute, within the judgment and discretion of the board to determine, but the certificate was refused upon entirely different grounds which did not involve matters of discretion or of judgment. While the members of the medical board are to be commended for their efforts to elevate the standard of medicine and surgery, they must keep within the limits of the statute creating the board. A peremptory writ was awarded.

SEEING PATIENTS IN ONE STATE AND SENDING MEDICINE FROM ANOTHER—NO VESTED RIGHT

State v. Davis, 194 Mo. 485; 92 S. W. 484; 4 L. R. A. (N. S.) 1023

1906

The Supreme Court says that the defendant had a room at the hotel in Memphis, Scotland county, Mo., professed to be a physician, and held himself out as such. One Hoover applied to him at the hotel as a physician for treatment. He diagnosed his case in the usual and ordinary way of practicing physicians, and prescribed remedies. His prescription for medicine, however, was in the form of a blank, which was required to be sent to the state of Illinois, and then the defendant would send the bottles of medicine to Hoover by express from Warsaw, Ill. Hoover took the medicine according to the defendant's directions, and according to the directions on the bottle. He paid the defendant at the rate of $5 per month for such treatment. The payments were made to the defendant and the defendant would come to the hotel for the purpose of seeing his patient, Hoover, the first Monday in every month. This, in the court's opinion, was clearly practicing medicine in Missouri as contemplated by the statute. The mere fact that the medicine was sent from Illinois did not in any way alter the construction placed on his acts, that he was a practicing physician in Missouri.

The practice of medicine, as contemplated by the provisions of the statute covering that subject, the court says, may consist only of the examination of a patient, diagnosing the cause of the trouble complained of, or, by one professing to be a physician, seeing the patient at stated intervals, and the indication and prescribing of remedies to be applied, and the acceptance of pay for such services. The mere fact that the remedies indicated and prescribed are sent from another state does not negative the idea that the defendant was practicing medicine or attempting to practice medicine in Missouri. It would not be an uncommon occurrence for a regular practicing physician of Missouri to examine his patients, diagnose the cause of their illness, and then say to them, "The remedies I indicate and prescribe you must obtain from the state of New York." This is not a case where the physician does not come to the state and undertake to secure patients, but simply furnishes blanks, which are sent to him in another state, and he sends the

medicine in accordance with the requests; but here we have a person coming to Missouri, holding himself out as a physician, has patients visit him, examines them, advises them as to the nature and cause of their trouble, indicates the remedies to be applied, and accepts pay for such services. The bare statement of the two classes of cases makes manifest the distinction between them. The proof in this cause was amply sufficient to show that the defendant was undertaking to practice his profession in Scotland county, Mo., and, it being conceded that he was not a regularly registered physician in Missouri, and had no license from the State Board of Health to practice medicine, the testimony fully warranted the conclusion reached by the jury in their verdict finding the defendant guilty as charged, of practicing medicine without a license.

Moreover, the court says that it was clearly manifest that the defendant had no vested right to practice medicine in Missouri by virtue of his former practice there in 1857. On returning to the state to practice his profession, his qualifications, fitness, and skill to do so must be judged by the law in force at the time he so returns, and before he will be authorized to engage in the practice of his profession and reap the rewards from such practice, there is no reason why he should not comply with the conditions imposed on him by the law in force at the time he so undertakes to engage in the practice.

It is but common knowledge that the people who have ill health or whose families are troubled with disease are more easily and can be more readily imposed on by persons who represent themselves as physicians, claiming that they can give them permanent relief, than any other class; and it may be added that intelligence is no protection from impositions along that line, for, when a man is sick or his family ill, whether he be intelligent or ignorant, they readily give an attentive ear to any sort of a doctor who claims that he can give them relief, and are at all times ready to purchase and swallow all sorts of nostrums because they are recommended by some one who claims to be a physician. The prime object of the Missouri law on the subject of the practice of medicine is the protection of the people from the impositions herein indicated by persons who are not sufficiently skilled in the profession to authorize them to properly administer medicine, and therefore relieve the afflicted. And, again, the court says that it is apparent that the general assembly of Missouri, in the enactment of the provisions of law regulating the practice of medicine and surgery in Missouri, intended to fix a standard of fitness, skill and qualification which would authorize the practice of that profession. This law does not undertake to deprive any person of a vested right, for there can be no such thing as a vested right in the practice of medicine. It does not undertake to suppress or prohibit the practice of medicine or surgery nor to prohibit any particular person from practicing as a physician or surgeon, but it simply undertakes to require the necessary and essential qualifications for that purpose.

NATURE OF STATE BOARD OF HEALTH AND ITS ACTS—POWERS—REVOCATION OF CERTIFICATE

State ex rel. McAnally v. Goodier et al., 195 Mo. 551; 93 S. W. 928

1906

The relator (McAnally) asked for a writ of prohibition to prevent the State Board of Health proceeding in an investigation of charges of alleged improper conduct and revoking a certificate to practice medicine and surgery issued to him in 1883. Under the act of 1883 he was not required to have a certificate from the State Board of Health to entitle him to practice medicine, because he had been practicing for a period more than five years before the law was enacted, and he maintained that the board had no right to revoke the certificate issued to him, even if it should find after investigation that he was morally unworthy to exercise the high calling, because he said that the board had no right to issue it in the first place. But a complaint of that kind does not make a very persuasive appeal for a writ which, after all, is within the sound discretion of the court to issue or refuse independent of strict technicality, as the very right and justice of the case require. The certificate implied not only that the holder is learned in the science, but that he is, from a moral or ethical standpoint, worthy to be trusted. In this

case, if the board, on investigation, should find the relator guilty of the charges preferred, the utmost it could do would be to cancel the certificate that it had itself issued, leaving the relator in full possession of what he said the law gave him independent of the board—that is, the right to practice medicine on his own merits; but it would not leave him armed with his certificate of good character from the State Board of Health. The relator had no right to hold that certificate if he was unworthy of the confidence it invited.

The relator complained that the board was going to try him without exercising compulsory process to bring before it the witnesses he needed for his defense. But the State Board of Health is not a court—is not a judicial tribunal. It can issue no writ. It can try no case—render no judgment. It is merely a governmental agency, exercising ministerial functions. It may investigate and satisfy itself from such sources of information as may be attainable as to the truth or falsity of charges of misconduct against one holding one of its certificates, but its investigation does not take on the form or character of a judicial trial. The law does not contemplate that the technical rule of evidence applicable to a judicial trial will be strictly followed, or that compulsory attendance of witnesses will be made. It contemplates that a plain, honest, common-sense investigation shall be made, with good faith and as thorough as may be with the light of such evidence on either side as is obtainable without process and with the means at hand, much like the investigation that fair-minded, intelligent men would make in their own business concerning the alleged misconduct of one of their employes, with this difference only, that the board can not revoke the license except for cause and after the accused has had an opportunity to be heard.

The statute says the board may refuse to issue the certificate, or may revoke it after it has been issued, if the man is unworthy. This implies that the board may have some information of misconduct of an applicant which would justify a refusal to issue the certificate, or, after the certificate is issued, that would justify its recall, and in either case the board is authorized to act, "after giving the accused an opportunity to be heard." Those are the only words that suggest a trial, and they fall far short of a judicial trial. To guard and protect the health and welfare of its people the state must have its ministerial agents or officers and entrust them with power. If every administrative act that looks to the enforcement of the law should be required to be reduced to the compass of a lawsuit and be put into effect only after a court had at the end of a formal trial stamped its judgment on it, the government would make slow progress. There must be trust reposed somewhere and the power to execute the law. The General Assembly has taken great care to secure trustworthy men to perform the duties that are devolved on the State Board of Health. The duties of the board are of an administrative or ministerial character, and, therefore, as long as its acts are within the scope of the exercise of a reasonable discretion it is free to act. If perchance, through a misunderstanding of the law, the board should refuse to perform a given duty, the writ of mandamus will right the wrong, but the writ of prohibition does not go against such a body. It goes only against a court or a tribunal exercising judicial functions.

In other words, the court holds in this case that the State Board of Health is not a judicial body; that it has the power to revoke a license or certificate issued by it, if, after investigation, in which the licensee is afforded an opportunity to be heard, it is satisfied that he has been guilty of unprofessional or dishonorable conduct; and that, in conducting such investigation (or "trial," if that term is preferred), it is not assuming to exercise a judicial function. Therefore a writ of prohibition does not lie to prevent the investigation.

CONSTITUTIONALITY OF PRACTICE ACT REQUIRING DIPLOMA, ETC.

State ex rel. Crandall v. *McIntosh et al., 205 Mo. 589; 103 S. W. 1078*

1907

The supreme court finds no legal fault with the requirement of a diploma or of an examination by the board. It finds no legal fault with the legislative theory that it was largely impracticable for an applicant to acquire in the first instance suitable skill in technic and adequate professional knowledge by himself or in an

office. The line has to be drawn somewhere, and, so long as it was not chalked out whimsically and arbitrarily at an unreasonable place, it was well enough—the legislature having plenary power.

Measurably, the same with other reasons underlie and support the alternative requirement of a certificate from a dental board of another state. It is apparent that no scheme should overlook the fact that Missouri is but one of many states in this union. Some comity must be provided for, and no legislation could be enacted so perfect as to avoid the hardships of a hard case such as within the imagination or by pathesis of ingenious counsel.

Finally, it was argued, in effect, that the limitations and classifications imposed by the statute were not germane to the subject matter of dentistry. That to say a dentist shall not be examined or licensed who holds no college diploma or no certificate from another dental board is as unreasonable as to put up the bars to one who had gray eyes or red hair, or who stood, say, 5 feet 8 inches in his socks—all restrictions of that ilk, it was argued, are whimsical, unreasonable, arbitrary, and hence plainly outside the legitimate province of legislative control and void. But is a statute calling for a certificate from a reputable dental college (or other like voucher or safeguard) attesting the bearer to be proficient in the learning and technic of his profession, obnoxious to the criticism that such requirement is not germane? The court thinks not.

STATE BOARD MAY BE COMPELLED AFTER DECIDING AGAINST IT TO ISSUE LICENSE TO PRACTICE

State ex rel. McCleary v. *Adcock et al., 206 Mo. 550; 105 S. W. 270; 121 Am. St. R. 681*

1907

The supreme court says that the only disputed question in this case, to compel the issuance to the relator of a license to practice medicine, was as to whether the relator was a matriculant in the school claimed prior to March 12, 1901. If he was, he was entitled to his license. The act of 1903 stated that it should not apply to any student who had matriculated in a medical college on or prior to March 12, 1901, and that it should be the duty of the said board of health on receiving a fee of $15 from said student to issue to him a license to practice medicine when said student presented a diploma from any medical college of the state. Under the facts of this case, and under this law, the only thing for the board to do was to rightfully determine the question as to whether or not the relator was a matriculant in this school prior to March 12, 1901.

If the board cannot act judicially, as held in the Goodier Case, this case resolved itself into the plain proposition—did or did not the conditions exist? If so, the license must go. The great weight of the evidence showed that the relator had matriculated prior to March 12, 1901, and, such being the case, the peremptory writ of mandamus must go.

The court concludes by saying that boards of this character, having merely administrative and ministerial duties to perform, cannot act arbitrarily, nor against the great weight of the positive testimony on a given question, and, if they do so act, there is redress for the party aggrieved by an action of this kind.

REQUIREMENTS AND RIGHTS OF APPLICANTS FOR EXAMINATION—POWER OF STATE BOARD TO DETERMINE WHAT ARE REPUTABLE MEDICAL COLLEGES

State ex rel. Abbott v. Adcock et al., 225 Mo. 335; 124 S. W. 1100

1910

The supreme court says that a reading of section 1 of an act approved April 4, 1907, shows that it requires three things of each applicant who desires to be examined touching his qualifications to practice medicine and surgery in Missouri: First, that he shall make application in writing to the secretary of the board

thirty days before the meeting thereof; second, that he furnish to the board satisfactory evidence of his scholastic qualifications as therein provided for; and, third, that he shall also furnish to the board satisfactory evidence of having received a diploma from some reputable medical college of four years' requirements at the time of his graduation.

While the act mentioned does not undertake to state what medical colleges are or what are not reputable within the meaning thereof, by clear implication it leaves that question for the determination of the Board of Health. This is made manifest by the act requiring the proof of reputableness to be furnished to the board when the applicant presents himself for examination, and by withholding from the board the authority to issue the license until such satisfactory evidence is furnished. In the court's opinion the language of this act is susceptible of no other construction than that it placed the burden on the relators, when they presented themselves for examination before the board, to prove to its satisfaction by satisfactory evidence the reputableness of Barnes University, and especially the medical department thereof.

If the court correctly understands the position of counsel for the relators, they did not controvert the soundness of the conclusions above stated, but contended that, under the laws of Missouri, "the State Board of Health has no authority to adopt and promulgate fixed rules and regulations as to the standard by which the various medical colleges of this state will be adjudged reputable or non-reputable within the meaning of the statute relating to the practice of medicine and surgery. The word 'reputable,' as applied to medical colleges, means reputation, and must be proved in the same way." But, in the court's opinion, counsel misconceived the meaning and object of the rules and regulations adopted by the Board of Health fixing the standards by which various medical colleges would be adjudged reputable within the meaning of the act under consideration. The rule simply provides that all medical colleges, wherever located (and not simply those situated in Missouri), which should, on or before October 1, 1907, conform to the standards specified in the schedule of minimum requirements adopted by the board on July 11, 1907, "should be rated and classified as accredited and reputable, and whose students, after being graduated therefrom, should be admitted to the examination of the State Board of Health for licenses to practice medicine aud surgery in the state of Missouri," without being required to furnish other proofs of reputableness, and thereby save each of them the time and expense of furnishing the proofs required of them by said act. In other words, the board, by such rules, undertook to require all medical colleges to adopt such standards as would establish and prove their reputableness in all cases, and thereby remove those burdens from each student who applied for a license, as provided by said act. But said rules of the board do not provide that no graduate from any medical college which has not conformed to those requirements shall not be examined touching his qualifications to practice said professions. This construction seems to have been adopted subsequent to the origin of this controversy. Neither rule nor board is responsible for it.

In the court's opinion, since the act left it to the board to pass on the reputableness of all medical colleges whose graduates applied to it for examination, and to determine the character of the evidence by which said fact was to be established, said rules were not only reasonable and just, but were also wise and proper. All medical colleges and their students were thereby notified in advance as to what would satisfy the board as to the reputableness of each college. The diploma alone from all colleges which had adopted those standards would entitle the holder thereof to take the examination without further ado. Otherwise many students might innocently be induced to attend colleges which were not, in fact, reputable, and consequently such students would thereby be prevented from establishing their reputableness. In all such cases a great hardship would be visited on all such graduates, but under these rules of the board no injustice could be done to any college or graduate thereof. And, beyond that, the adoption of said standards by the board, and the direct tendency thereof, if the colleges will only conform thereto, would be to uplift and better medical instruction, place her institutions of learning on a higher plane, and reduce the practice of medicine and surgery to a more perfect science, all of which would result in great good to suffering humanity.

But suppose, for argument's sake, that the court is in error in its views regarding the meaning and object of the rules of the board establishing said standards, and that it was the intention of the board to thereby notify, in advance, all persons who might present themselves for examination for licenses to practice medicine and surgery that it would examine no one except those who presented a diploma from some one of the medical colleges which had adopted said standards. That would not excuse the applicant for examination from tendering to the board such evidence as he might have tending to prove that his alma mater was a reputable school within the meaning of the statute. The rule would be illegal and void, and would constitute no legal bar to the applicant's right to stand the examination for his license. Nor could the adoption of such a rule be construed to mean that the board had thereby refused to examine a particular person for a license to practice medicine. The board might change its mind before the date fixed arrived, and before being called on to act. As long as a man or a body of men fill any official position, the law presumes he or they will perform his or their duties whenever any matter is legally presented for action, notwithstanding general declarations previously made to the contrary.

If the relators possess the necessary scholastic attainments and diplomas from some reputable college, and if they can produce before the Board of Health satisfactory evidence of the reputableness of said college, then doubtless the board will, on proper request, give them an examination, as provided for by act of 1907, and, if found qualified, will presumably issue to them licenses. But if, after such showing, the board should unjustly and arbitrarily refuse to examine them, it would then be time enough to institute mandamus proceedings to compel it to act.

GIVING MEDICAL TREATMENT FOR EYES, PRACTICE OF MEDICINE—ADMISSIBILITY OF EVIDENCE—ADVERTISING—CLAIMING TO BE AN "OPHTHALMOLOGIST" NO DEFENSE

State v. Blumenthal, 141 Mo. App. 502; 125 S. W. 1138

1910

The Kansas City Court of Appeals says that the evidence in this case tended to show that the defendant had an office in a hotel, and that on his door was the sign, "Dr. H. M. Blumenthal"; that a woman went to his office and engaged him to treat her eyes, he telling her that she had a cataract, astigmatism, and other ailments of the eyes, which he treated by prescribing ointments or salves and eyewashes, for which he charged her $10; that he likewise furnished and fitted eyeglasses, for which he charged $15. The eye medicine was sent to her by her brother at one time and delivered personally by the defendant at several other times. In view of such evidence, there can be no doubt that the defendant was practicing medicine within the meaning of the law.

It was decided by the Supreme Court of Illinois (People v. Smith, 208 Ill. 31) that a traveling optician who invited persons, by advertisements, who were afflicted with dizziness, neuralgia, etc., to visit him and obtain relief by purchasing spectacles, and disclaimed medical or surgical treatment, was not treating, operating, or prescribing for physical ailments under the statute of that state. That was no more than to say that one who merely sold and fitted eyeglasses was not practicing medicine, and the trial court gave such declaration of law in this case. But the facts which the evidence tended to prove against the defendant in this case were that he not only sold and fitted spectacles, but gave medical treatment for the eyes.

Objection was made to the admission of the evidence showing the sign at the defendant's room door at the hotel, as set out above, but the ruling was proper. It tended, connected with the other evidence, to support the charge made.

The trial court likewise propertly admitted evidence of the defendant advertising as a practitioner of medicine. It is true that the Missouri statute constitutes

the act of advertising as a physician as an offense within itself, yet that fact does not exclude the fact as probative of the offense of practicing. The fact that evidence having a tendency to prove the offense charged may also tend to prove some other offense not charged does not necessarily render it incompetent.

There was some claim made by the defendant that he was an ophthalmologist. If that be accepted as true, it would not serve him any purpose, since that is a branch of medical science, and its practice would fall within the terms of the statute. That term seems to signify some disease or diseases of the eye, and the court can see no reason why one who prescribes medicines for such diseases would not be as guilty as by any other name. It is the act committed, and not its designation, which constitutes the offense.

The court was not impressed with the defendant's argument as to lack of proof as to his practicing. His sign, office, advertisement, treatment for a considerable period of the prosecuting witness was ample evidence.

PHYSICIANS EXCEPTED FROM MISSOURI MEDICAL PRACTICE ACTS

State v. Hellseher, 150 Mo. App. 230; 129 S. W. 1035

1910

The St. Louis Court of Appeals says that the act of 1901, in so many words, was limited to those who should thereafter practice who had not theretofore registered. Those who had theretofore been duly registered were excluded from the law. In other words, this statute, as originally enacted in 1901, did not create a general offense on the part of all who should thereafter practice, but created an offense limited to a particular class of persons; that is, those who had not been theretofore registered, who should thereafter practice without first registering with the State Board of Health. The law related to acts committed by those particular persons only, to those thereafter practicing medicine or surgery who had not theretofore been licensed as provided by law.

This court does not think that the amendment made by the act of 1907 in any manner changed this phase of the law, nor made it any the less part of the enacting clause, notwithstanding the fact that what was before in the body of the enacting section or clause now appears as attached to that clause by way of a proviso. Changing the position of the words did not change the law. Looking at what the general assembly was attempting to do and considering the matter and phraseology of the amendment of 1907, it is obvious that this arrangement was more for the purpose of avoiding awkwardness of expression, than with any intent of change in the object of the law itself, and the mere fact that what had before been in another place in the enacting section (namely, the phrase "except physicians now registered") is transposed, and appears under the designation of a proviso, has not had the effect of eliminating the words from the enacting clause itself.

It is still the intention of the act regulating the practice of medicine and surgery that its operation shall apply only to those who had not been licensed or registered as physicians or surgeons prior to March 12, 1901. Obviously the legislature, by the amendment of 1907, did not intend to invalidate the registration and licenses of physicians and surgeons who had been regularly licensed and registered under the laws prior to March 12, 1901, the date of the approval of the act of 1901, any more than it had by the act of March 12, 1901, made its provisions applicable to those who had registered as physicians or surgeons prior to that date.

Another reason for the insertion of this limitation at the end of the section, instead of leaving the exception as in the original section, may have been that, as new prohibitions were inserted by the amendment, the lawmakers did not intend to leave any doubt that those new requirements were not to be made of the old physicians.

WHO ACCOUNTED "PHYSICIANS NOW REGISTERED" UNDER MEDICAL PRACTICE ACT

State v. Carson, 231 Mo. 1; 132 S. W. 587

1910

The Supreme Court holds that, as the defendant was concededly registered and licensed under the Missouri act of 1877, he came squarely within the exception to the act of 1901, as "a physician now registered," and that no subsequent act of the Missouri legislature has revoked the license given him under the act of 1877, so that it was error to require him to have been also licensed by the board of health.

The court says that, after the defendant was duly registered under the act of 1877, namely, in 1880, by filing a copy of a diploma, the legislature passed the act of 1883, which provided that it should not apply to those who had been practicing medicine five years in that state prior to the enactment of that law, but contained no provision as to prior registration. Then came the act of 1901, making it a misdemeanor for any person, "except physicians now registered," to practice medicine or surgery without a license from the State Board of Health. The trial court held that a physician registered under the act of 1874 was a registered physician within the meaning of the law of 1901, and a physician registered under the act of 1877, five years before the act of 1883 went into effect, would be registered within the purview of the law of 1901, but, inasmuch as the defendant was not registered until 1880, less than five years before 1883, he was not a registered physician within the meaning of the law of 1901, which last conclusion was erroneous.

The construction which the state sought to have given the act of 1901 would necessitate the court amending the statute so that it would read: "Any person, except physicians now registered and qualified to practice under the laws of 1883." The defendant was not prosecuted for a violation of the act of 1883 while it was in force. That act was, in turn, repealed by the act of 1901, and five years' practice no longer afforded protection. Thus if a physician had practiced five years before 1883, but was not registered, he would clearly fall under the condemnation of the act of 1901 because he was not registered. What effect then had the act of 1901 on the registration of the defendant's diploma and certificate in 1880? The diploma was registered under the law of 1877, and no subsequent act required or permitted it to be registered again. While it might or might not have protected him from prosecution during the life of the act of 1883, what was there to prevent the legislature repealing the act of 1883 as it did, and providing that his registration under the act of 1877 should protect him from prosecution and permit him to continue his practice? No act of the legislature had revoked the license the state had granted him in 1880, and no tribunal authorized to do it had done so. Even if it should be said that the act of 1883 impliedly rendered his registration ineffective, it cannot be doubted that the legislature could restore its efficacy by express provision as it did in 1901. This court is unable to see any substantial reason why a physician registered under the act of 1874 should be within the exception to the act of 1901, and one registered under the act of 1877 under the broad language of the exception of the act of 1901 does not also fall within the act of 1901.

PRACTICE IN FOREIGN STATE INSUFFICIENT QUALIFICATION

Craig v. Board of Medical Examiners of State of Montana, 12 Mont. 203; 29 Pac. 532

1892

James Craig applied to the board of medical examiners for a certificate authorizing him to practice medicine and surgery. The board refused to grant such certificate, unless applicant submitted to and successfully passed an examination. Decision of board affirmed by district court, and applicant appeals. Affirmed.

It is agreed that the appellant is a citizen of the United States, and a resident of this state; that he removed, in April, 1891, from the state of Maine, where he had been engaged 14 years in the practice of medicine and surgery; that he applied for and received from the respondent a certificate, dated April 22, 1891, which entitled him to practice his profession until the next regular meeting of the board; and that respondent demanded, and appellant paid, the sum of $15. The board required appellant to submit to and successfully pass an examination. Appellant refused to submit to such examination, or to any examination whatever. The board thereupon refused to grant him a certificate to practice medicine and surgery in the state of Montana. Prior to such refusal the appellant presented his diploma to said board for verification as to its genuineness. The board found appellant's diploma to be genuine, and to have been issued by a medical school legally organized and in good standing, whose teachers were graduates of a legally organized school, and that appellant was the same person to whom such diploma was originally issued. The appellant claims that the board of medical examiners is not authorized by the statute, to require him to pass an examination. He became a resident of this state about two years after the passage of the act of 1889, the fourth section of which provides that all persons hereafter commencing the practice of medicine and surgery in any of its branches in the territory, shall apply to said board for a certificate so to do, and such applicant at the time and place designated by said board, or at the regular meeting of said board, shall submit to an examination, etc. There can be no controversy respecting the meaning of these clauses when viewed by themselves; but the appellant contends that we must consider the entire statute, and that the third section limits its operation to non-graduates.

The question was inquired into when the subject was before this court in State v. Board, 10 Mont. 162, 25 Pac. Rep. 440, and it was adjudged that these provisions required the examination of all graduates "who commence to practice medicine in this state after the passage of this act." The court approves this construction of the statute. The appellant maintains that, if this view be sound, the act creates an unjust discrimination against the rights and privileges of the citizens of another state, and is in conflict with the constitution of the United States, of the fourteenth amendment. Legislation similar to that under consideration has been thoroughly discussed in many cases, and uniformly upheld by the court. It is founded upon the police power of the state. The court quotes from Mr. Justice Field of the U. S. Supreme Court in Dent v. W. Va., and concludes: "We concur in this opinion, which has not been criticized, and it is needless to multiply citations. It is ordered and adjudged that the judgment be affirmed."

COURT CAN NOT SUPPLANT BOARD OF MEDICAL EXAMINERS

State ex rel. State Board of Medical Examiners v. *First Judicial District Court of Montana, 26 Mont. 121; 66 Pac. 754*

1901

An applicant for a certificate to practice medicine was detected in the use, during his examination, of certain notes and memoranda to aid him in answering the questions propounded, and was thereupon denied the privilege of continuing the examination. A charge was preferred to the board by its secretary, accusing him of "unprofessional, dishonorable, and immoral conduct," the specifications being that he had been detected in the use of said notes and memoranda for the purpose stated. After written notice, and an examination by the board into the facts, he was found guilty, and refused a certificate. He immediately appealed to the District Court, and thereupon applied to it for an order permitting him to engage in the practice of his profession until a hearing could be had upon the merits, and the judge, after requiring him to submit to an examination in open court as to his qualifications, made such an order. Was this within the power of the court? The legislature of the state has deemed it proper, in a case where a certificate has been revoked, to authorize the courts, in their discretion, to grant the appellant permission to practice pending his appeal, but it is silent as to the

power of the court in cases in which the board has refused a certificate. Under these circumstances, the Supreme Court of Montana holds that it was not within the power of the District Court to make the order mentioned. It says that the prohibition directed to the individual citizen against practicing medicine until he has been examined by the lawfully constituted authorities and declared sufficiently qualified is as much a limit to the power of the court as if it had been expressly provided that the court should not grant permission to pursue the practice pending appeal in this class of cases. It sees a difference, too, in granting the right to practice medicine pending an appeal between such a case as the legislature has provided for and that here under consideration. In the former, it says, the conditions precedent have all been fulfilled. The party's right has accrued. He has, perhaps, by his energy and application, built up a profitable practice. It is the means of support for himself and family. This should not be taken away without good cause. It is, therefore, but just that he be permitted to exercise his right until it is finally adjudged that he has forfeited it; especially so, if it is made to appear that the forfeiture has been declared upon doubtful evidence, or from bad motives on the part of the board. But in the case of an applicant for a certificate in the first instance no such reason exists. No right has been established. No practice depends upon his attention. He will suffer no immediate material injury if the certificate be withheld for a reasonable time until he can demonstrate that the action of the board in denying it was arbitrary or erroneous. The burden is upon him to establish his right. In the other case the burden rests upon the state represented by the medical board.

APPEAL FROM DECISION OF BOARD OF MEDICAL EXAMINERS

State ex rel. Riddell et al., State Board of Medical Examiners v. *District Court, 27 Mont. 103; 69 Pac. 710*

1902

The Supreme Court says that it was urged that a notice of an appeal to the District Court from a decision of the board should have been entitled by the name of the party appealing v. The Board of Medical Examiners of the State of Montana, and that not being so entitled, it was not sufficient to give the District Court jurisdiction of the appeal. But the Supreme Court holds that there was no merit in this contention. It says that section 1892 of the Code of Civil Procedure provides, "An affidavit, notice or other paper, without the title of the action or proceeding in which it is made or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding." Though the proceeding on the appeal in such cases as that under consideration is not properly an action, in the strict sense of the term, but a special proceeding, it should, perhaps, have been entitled as contended; yet the failure of the clerk to so entitle it did not affect the merits of the controversy. Then it did not appear whether the board was represented at the trial. However, this was of no moment, the Supreme Court says, the notice in the case having been sufficient to meet the requirements of the statute. It contained intelligible reference to the decision of the board, by which the party appealing felt aggrieved, and his purpose to appeal therefrom. That the board allowed the appeal to go by default, if such be the fact, did not affect the case. Furthermore, upon the theory that the board was the person aggrieved by the action of the District Court in reversing the action of the board and declaring the applicant entitled to a certificate, the proper course to be pursued by it was to appeal to the Supreme Court from the judgment, as provided in the statute, or to move for a new trial. Under the statute no formal pleadings are required. Wherefore, the district had jurisdiction of the appeal from the board, and to render the particular judgment stated, and the board's application for a writ of certiorari must be denied.

PROVING BEING PHYSICIAN IN ACTION FOR SERVICES

Leggat v. Carrick, 35 Mont. 91; 88 Pac. 788

1907

Suit was brought to recover a balance of $100 for professional services rendered for the defendant, by the plaintiff, a physician. The physician obtained a judgment in the District Court, which is affirmed, although it was urged that the evidence was insufficient to sustain the decision of the lower court, in that there was not any evidence offered on behalf of the plaintiff to show "that the plaintiff holds a certificate granted by the state medical board of the state of Montana, entitling him to practice medicine."

If the fact affirmatively appeared that, at the time the services were rendered the plaintiff did not have a certificate, then, the Supreme Court says, the question of his right to recover would be raised directly. But, as that fact did not appear, the only question presented here was: On whom rested the burden of proof? Was the burden on the plaintiff in the first instance to show that he had such certificate, or was it on the defendant to show that he did not have it?

The testimony given at the trial on behalf of the plaintiff by a witness named Kremer was: "I knew Dr. Leggat at that time, and I can state that I knew him to be a physician and surgeon in the city of Butte, and at that time was the city physician." In view of this testimony, the Supreme Court thinks that the presumption followed that Dr. Leggat had complied with the law, and that the burden of proof was on the defendant to show that he had not done so. And, in the absence of any attempt on the part of the defendant to make this proof, the court thinks the evidence was sufficient to sustain the decision of the lower court.

The Supreme Court says that after a careful review of the authorities the Court of Appeals of Illinois, in Williams v. People, 20 Ill. App. 92, said: "Where the question of license or qualification of a physician arises collaterally in a civil action between party and party, or between the doctor and the one who employed him, then the license or due qualification under the statute to practice will be presumed. McPherson v. Cheadell, 24 Wend. (N. Y.) 15; Thompson v. Sayre, I Denio (N. Y.) 175; Pearce v. Whale, 5 Barn. & Cres. 758." The reason for the rule is stated by the same court in the City of Chicago v. Wood, 24 Ill. App. 40, as follows: "The reason why the license will be presumed where there is no evidence to the contrary, rests on the principle that, when an act is required by positive law, to be done, the omission of which would be a misdemeanor, the law presumes that it has been done, and therefore the party relying on the omission must make some proof of it though it be a negative."

While there is some conflict in the decisions, the decided weight of authority seems to be in favor of the rule stated above in Williams v. People. McPherson v. Cheadell, 24 Wend. (N. Y.) 15; Jo Daviess County v. Staples, 108 Ill. App. 539; Lacy v. Kossuth County, 106 Iowa, 16; Dickerson v. Gordy, 5 Rob. (La.) 489; Lyford v. Martin, 79 Minn. 243; Cather v. Damerell (Neb.) 99 N. W. 35; Rider v. Ashland County, 87 Wis. 160; Good v. Lasher, 99 Ill. App. 653.

The same general rule is recognized by the Court of Appeals of Indiana in Cooper v. Griffin, 13 Ind. App. 212, but, by reason of a special statute in that state, the contrary rule is upheld.

A somewhat analogous question is presented in an action brought in a court of this state (Montana) by a foreign corporation. It has been held that it is not necessary for the foreign corporation to prove, in the first instance, that it has complied with the laws of this state entitling it to do business here.

Nor does the Supreme Court think that the trial court erred in allowing interest on the amount recovered, its action appearing to be warranted by section 4280 of the Civil Code of Montana, which provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt"—and by the construction given to that section by this court in Hefferlin v. Karlman, 29 Mont. 139.

PROCEDURE IN MONTANA AFTER REVOCATION OF LICENSE

State ex rel. Gattan v. *District Court, 39 Mont. 134; 101 Pac. 961*

1909

The Supreme Court says that the relator was, prior to Nov. 23, 1907, a physician duly licensed by the State Board of Medical Examiners. Complaint having been made to the board that he had been guilty of unprofessional and dishonorable conduct, a trial was had and the board revoked his license. He appealed to the District Court, which held trial Nov. 23, 1907, with a jury of six physicians in conformity with the statute, Section 1588 of the Revised Codes of Montana. The trial resulted in a verdict finding the charges sustained and affirming the judgment of the board of examiners, and judgment was by the court entered accordingly.

The relator subsequently filed in the Supreme Court his application for a writ of review to annul the judgment so entered against him. It was alleged that the District Court was without jurisdiction to render and enter the judgment because the jury selected to try the charges was not a legal jury, in that the names of the persons constituting it were not drawn from the regular jury box in conformity with the provisions of law on the subject, but that the jurors were selected under arbitrary order and direction of the court, and that the jury, as constituted, consisted of six persons only, whereas the relator was entitled to have the issue involved tried by a constitutional jury of twelve persons, drawn and impaneled as provided by law for all actions and proceedings in the district. But the application must be denied for two reasons:

1. The relator had a right of appeal from the judgment. While proceedings had under the law before the board of medical examiners touching the granting or revoking of a license may not in any sense be regarded as the administration of a judicial remedy an appeal to the District Court from one of its determinations, whereon a trial of the issue is had de novo (anew), must be regarded as an application to that court for a judicial remedy. The appeal is granted as a method of getting the matter involved before a court that it may be determined judicially. It is a special proceeding commenced in the District Court by the filing of the appeal. In all such proceedings the party aggrieved has an appeal to the Supreme Court, provided he avails himself of his right within one year. He may not permit the time for appeal to lapse and then have the judgment reviewed on writ of review.

2. The application did not question the jurisdiction of the District Court to entertain the appeal from the board to it. The only question made with reference to the proceedings there was as to the action of the court in selecting the jury. Its action in this regard, if erroneous, amounted only to error within jurisdiction, and could not be corrected by writ of review. The application for a writ of review must therefore be dismissed.

ONE REGISTRATION REQUIRED OF ALL

Dodge v. *State, 17 Neb. 140; 22 N. W. 348*

1885

The plaintiff was convicted of practicing medicine in Lancaster county without first having complied with the act "to regulate the practice of medicine in the state of Nebraska," approved March 3, 1881. The testimony shows that he is a graduate of one or more medical colleges, and that he has practiced medicine for about eighteen years before removing to this state. He therefore claims that the provisions of the act do not apply to him. He therefore did not register with the county clerk as required by law, although he was entitled to do so. The court says that the statute authorizes any person designated in the act to register, and thereupon practice medicine or surgery for a livelihood. The act applies to all alike—to the most skillful physician and the mere tyro; each must register, and bring himself within one of the classes named. The evident purpose of the act is to restrict the practice of medicine or surgery to those persons whose education and training may reasonably be supposed to have qualified them for the business.

The fact that a person is a graduate of a medical college, and has received the degree of "Doctor of Medicine," will not authorize him to practice medicine in the state unless he registers as required by the second section of the act. He must not only possess the qualifications designated in at least one of the classes named, but must allege the same in his written statement filed with the county clerk, and unless he do so he is liable to the penalties prescribed in the act. Judgment affirmed.

INDICTMENT DEFECTIVE

Gee Woo v. *State, 36 Neb. 241; 54 N. W. 513*

1893

The plaintiff was convicted of practicing medicine in the state without lawful authority so to do, as provided in the act of 1891. It appears from the record that the plaintiff, in 1889, had filed the statement and affidavit required by the law of 1881, and was practicing under the law when the act of 1891 took effect. The plaintiff claimed the indictment was faulty in that it failed to show that he belonged to either of the two classes mentioned in the act of 1891, viz., those already in practice at the time of the passage of the act, and those about to engage in practice. The court held that the indictment was defective and reversed the finding of the lower court.

TREATMENT OF SICK NOT AN ACT OF WORSHIP

State v. *Buswell, 40 Neb. 158; 58 N. W. 728; 24 L. R. A. 68*

1894

The defendant, a Christian Scientist, was tried on an indictment charging him with professing to heal and otherwise treat sick persons without being licensed to practice medicine. The defendant was acquitted and the case was brought to the supreme court to review the instructions given to the jury, at the request of the defendant. The sixth instruction was that the object of the legislature in the enactment of the medical practice act was only to provide for the regulation of the practice of medicine, surgery and obstetrics as those terms are usually and generally understood and that unless the jury believed from the evidence, beyond a reasonable doubt, that the defendant practiced medicine, surgery and obstetrics as those terms are usually and generally understood, they should find the defendant not guilty. The sole question for the determination of the supreme court is whether or not the instruction is proper in view of the evidence adduced. The court concedes perfect toleration of religious sentiment and the enjoyment of liberty in all religious matters is of paramount importance. It reviews the evidence of a number of witnesses who testified that they were cured of various ailments by the defendant and quotes from the counsel for the defense, who argued that to hold the defendant guilty of practicing medicine and surgery without a license would be to abrogate the sections of the constitution which provide that all persons have a right to worship God according to the dictates of their own conscience, and which also provides that no person shall be molested on account of his mode of worship. The court holds that the exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship, neither is it the performance of a religious duty. The evidence convinces the court that the defendant was engaged in treating physical ailments or others for compensation. He was within none of the exceptions provided by the statutes. The instructions of the court that, for a conviction he should be found guilty of practicing medicine, surgery and obstetrics, as generally or usually understood, are erroneous. The object of the statute is to protect the afflicted from the pretensions of the ignorant and avaricious, and its provisions are not limited to those who follow beaten paths and established usages. The sole question presented was whether the defendant had treated any physical or mental ailment of another. There is involved no question of sentiment nor of religious practice or duty. If the defendant was guilty as charged, neither

pretense of religious worship nor the performance of any other duty should have exonerated him from the punishment which an infraction of the statute involved. The exceptions of the county attorney are sustained.

TREATMENT UNDER DIRECTION OF PHYSICIAN IS PRACTICE OF MEDICINE

State v. *Paul, 56 Neb. 369; 76 N. W. 861*

1898

Howard Paul was charged with unlawfully practicing medicine and surgery without a license. From an acquittal, the state brings error, based on exceptions to certain instructions. Exceptions sustained.

Howard Paul was charged with unlawfully practicing medicine and surgery without a license. Upon the trial he was acquitted. The defendant was not a registered physician, and had never been admitted to practice medicine. Dr. Bedell, a duly registered physician and surgeon in North Platte, was assisted in his work by Charles Thorp, called "Dr. Thorp" by the witnesses, although not shown to have been a registered physician, and the defendant. The three operated jointly, and all remuneration for the services was divided between them equally, each receiving one-third. Paul assisted in the performance of surgical operations, and administered remedies to the sick and infirm, under the direction of Dr. Bedell. The state produced evidence to establish that the defendant treated patients without instructions from Dr. Bedell, and in his absence. The court, at the request of the defendant, instructed the jury that a person not a physician or surgeon who gives or applies medicines in quantities or in a manner as directed by a licensed physician in charge of the patient, or who assists a licensed surgeon in charge of an operation, and only does what the surgeon in charge directs him to do, is not, by reason of such acts, practicing medicine or surgery in violation of law. Instruction No. 6 contains the following: "The court further instructs the jury that, although you may find from the evidence that the defendant assisted in the operations and treatments of the persons named in the several counts in the information contained, or that he administered medicines to such persons, or any of them, yet if the assistance rendered and the medicines administered were done and given under the direction and charge of a licensed physician and surgeon, and not upon the prescription or under the direction of the defendant, you will find the defendant not guilty." Exceptions were taken by the prosecutor to, and complaint is now made of, the giving of the foregoing portion of the charge of the court in this case. It is argued that said instructions are erroneous, in that they authorized and required an acquittal in case the jury found that his acts were performed under the direction and instructions of a registered physician and surgeon, and that the court, in its charge, excepted from the operation of the statute persons not within the contemplation of the framers of the law.

The legislature has excepted from the operation of the law persons belonging to any one of the classes designated in the act, and the only proper inference to be drawn is that any person other than a registered physician or surgeon, not embraced in one of such classes, who shall "operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another," is, on conviction, subject to the penalties prescribed by said section 16, already quoted. The court, in its instructions, excepted from the force and effect of the statute persons not within the meaning of the law. Under the instructions the jury were fully warranted to acquit the defendant. The statute will not bear the interpretation the trial court has placed upon it. A person not coming under the exemptions in the act is within the condemnation of the statute, even though he acted under the direction of a registered physician. Any other interpretation would do violence to the language employed by the legislature. The construction adopted by the trial court would protect one not a registered surgeon in the amputation of the limb of another, in case the operation was guided by the instructions of a registered surgeon. Such interpretation would nullify and defeat the beneficent object of the law. The fifth instruction is faulty in that it makes the representation, claiming, or advertising of the defendant "to be a regular, legal, or

competent practitioner of medicine" an essential element of the crime, while the statute contains no such ingredient of the offense of illegal practice of medicine. Under this instruction, if the defendant did not advertise himself to be a regular, legal, or competent practitioner of medicine, there could be no conviction, though he was not at the time a registered physician, and had performed all the acts charged in the information prohibited by the statute. The exceptions of the county attorney are sustained.

INJUNCTION WILL NOT LIE TO RESTRAIN ISSUANCE OF LICENSE AFTER BOARD HAS CONSTRUED LAW

Lincoln Medical College of Cotner University v. *Poynter, Governor, et al., 60 Neb. 228; 82 N. W. 855*

1900

The district court of Lancaster county, at the instance of the Lincoln Medical College of Cotner University, rendered a decree perpetually enjoining the members of the State Board of Health, and the secretaries of said board, from issuing to Brestislaw W. Drasky a certificate authorizing him to engage in the practice of medicine and surgery in this state. The board had determined that Drasky was a graduate of a legally chartered medical college, in good standing, and entitled to the statutory credential. The trial court decided that the medical college at which Drasky was graduated did not meet the requirements of chapter 55, Comp. St. 1899, and that the evidence submitted to the board of health did not justify the conclusion reached and decision made by that body.

The appellants insisted that the Lincoln Medical College has no legal interest in the matter in controversy, and is therefore not entitled to maintain the suit. The only interest asserted by plaintiff is that the action of the board will induce medical students to matriculate at institutions having a lower standard of education than that established by the plaintiff, and that the plaintiff will be thereby exposed to unfair competition. The purpose of the law is not to protect medical schools or medical practitioners from competition in business. It is a police measure, designed to prevent imposition upon the afflicted by quacks and pretenders. The plaintiff does not stand within the shelter of the act, and hence can claim nothing under it. The plaintiff has no legal interest in the matter. It is not charged with the duty of enforcing the law, and cannot be permitted to assume that function, even from motives of benevolence. It bears no commission from the state authorizing it to take up the cudgel pro bono publico. Even if plaintiff could rightfully appeal to the law to protect it from business competitors, it has not shown in this case that there exists the relation of cause and effect between the act complained of and the injury apprehended. It does not claim that loss of patronage will result from the delivery of the certificate to Drasky, which is the act enjoined; but, rather, that it will suffer by the decision of the board—an act already completed, accomplished, and beyond recall. The substance of plaintiff's contention is that the State Board of Health has placed a construction on the law regulating the practice of medicine which is prejudicial to its interests, and which ought to receive judicial condemnation. The office of an injunction is to prevent action. It cannot reach back and undo what has been already done. The decision of the board has been made. It is a past act, and, whether right or wrong, it cannot be annulled by injunction. The threatened injury is obviously not the proximate consequence of the act enjoined. The judgment is reversed, and the cause dismissed.

OSTEOPATHY THE PRACTICE OF MEDICINE

Little v. *State, 60 Neb. 749; 84 N. W. 248; 51 L. R. A. 717*

1900

The supreme court affirms the judgment of the district court of Lancaster county holding that osteopathy is the practice of medicine. The practice of osteopathy was described as consisting principally in rubbing, pulling and knead-

ing with the hands and fingers certain portions of the bodies and flexing and manipulating the limbs of those afflicted with disease, the object of such treatment being to remove the cause, or causes of trouble. This, it was urged, did not make the practitioner a practitioner of medicine within the meaning of the statute defining the latter as any person "who shall operate or profess to heal or prescribe for or otherwise treat any physical or mental ailment of another." The supreme court, however, is of the opinion that those who practice osteopathy for compensation come within the purview of the statute as clearly as those who practice what is known as "Christian science," and that, therefore, this case falls within the principle of State v. Buswell, which it decided in 1894; 40 Neb. 158. It then held that the act to establish a state board of health; to regulate the practice of medicine in Nebraska, etc., is as much directed against any unauthorized person who shall operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another, as against one who practices "medicine, surgery, and obstetrics," as those terms are usually and generally understood. And it now declares that with the rule announced in that case it is fully satisfied, although it is possible that the decisions of some other courts are in conflict with it. The doctrine declared in that case, it goes on to say, will carry out the legislative intent and effect the object of the statute, which is "to protect the afflicted from the pretentions of the ignorant and avaricious," no matter whether the person pretending to heal bodily or mental ailments does or does not profess to "follow beaten paths and established usages." In construing statutes effect should be given to the intention of the legislature. But it was argued that osteopaths do not profess to treat any physical or mental ailment, that they merely seek to remove the cause of such ailment or disease, and, therefore, do not come within the definition mentioned. The answer to that is that it is apprehended that all physicians have the same object in view, namely, the restoring of the patient to sound bodily or mental condition, and whether they profess to attack the malady or its cause, they are *treating* the ailment as the word is popularly understood. Wherefore, the court says that it can see no good reason why the practice of osteopathy does not fall within the provisions of the statutes under which this prosecution was instituted, as clearly so as do ordinary practitioners, or those who profess to heal by what is known as Christian science. Nor does it consider that the offense is without a penalty under the Nebraska statutes. It holds that one who practices what is known as osteopathy, without obtaining a certificate from the State Board of Health, is a practitioner of medicine as defined by article 1, chapter 55, Compiled Statutes, and is liable to the penalty prescribed specifically for practicing medicine without a license. It further holds that "surgery and obstetrics," as those terms are popularly understood, are embraced in the title of an act to regulate the practice of medicine, and hence that the act in question is not invalid on the ground that the definition of a practitioner of medicine contained therein and quoted above is broader than the title of the act, which is "to regulate the practice of medicine." Then, it holds that the act is not void as being prohibitive in its effect, its attempt being to regulate the practice of the art of healing and it being prohibitive only as to those who have not been duly licensed by the State Board of Health to practice the art of healing. Last of all, it holds that several misdemeanors of the same kind, as for example charging violations of such a statute, may be set forth in as many counts of an information, and the prosecutor is not required to elect upon which count he will proceed.

SUFFICIENT INFORMATION AGAINST ILLEGAL PRACTITIONER

Sofield v. *State, 61 Neb. 600; 85 N. W. 840*

1901

The Supreme Court of Nebraska holds that the information on which trial was had in this case was not defective in substance although it omitted to state the name or names of the persons upon whom the accused, who was charged with the crime of practicing medicine without a license or certificate so to do, practiced his profession. The court holds that the averment that he "did unlawfully practice

medicine to divers and sundry persons, whose names are to the county attorney unknown," was sufficient. Of course, it says, the county attorney was not required to set out in the information the names of the persons the accused treated, when such persons were unknown to such officer, and he so pleaded in the information. The case, it explains, is distinguishable from one where the information omitted the names of the persons treated, and failed to allege that their names were unknown to the county attorney. Furthermore, it holds that an information need not negative the exceptions of a statute which are not descriptive of the offense, and that, therefore, the information in question was not defective in failing to contain any negative averment relative to the exceptions contained in section 17 of chapter 55 of the Compiled Statutes of Nebraska bearing on this offense.

CORPORATIONS INCAPABLE OF PRACTICING MEDICINE

State Electro-Medical Institute v. *State*, *74 Neb. 40; 103 N. W. 1078*

1905

This was an information in the nature of quo warranto to prevent the defendant from doing business in this state. The defendant is a foreign corporation, and has an office in the city of Omaha, and transacts its business there. It is engaged in the business of practicing medicine for hire, and it contracts, and through its agents assumes for hire, to practice medicine, prescribe for and treat the physical ailments of human beings. The defendant advertises in several papers published in the city of Omaha that it treats various physical diseases. The answer admits that the plaintiff advertises to treat diseases for hire; is now conducting its business by physicians who were duly licensed to practice medicine; that the defendant does not practice medicine, but that said business is conducted solely by duly licensed and practicing physicians in the employ of the defendant. The reply denied this allegation, but it is admitted in the stipulation of facts upon which the case was tried. The Code of Civil Procedure.

The contention is that this defendant has violated chapter 55 of the Compiled Statutes of 1901, which is "An act to establish a state board of health, to regulate the practice of medicine," etc. It is conceded that this defendant has not obtained and could not obtain a license in compliance with this provision of the law. While a corporation is in some sense a person, and for many purposes is so considered, yet it is not such a person as can be licensed to practice medicine. This position seems to be maintained by both parties. The defendant, therefore, not having a license, has violated this law, if it has practiced medicine, surgery, or obstetrics, or any of the branches thereof, within the meaning of the statute. The statute attempts to define what is meant by "practicing medicine." There was no necessity of legislation to prohibit corporations, as such, from practicing medicine. It is impossible to conceive of an impersonal entity "judging the nature, character and symptoms of the disease," or "determining the proper remedy," or giving or prescribing the application of the remedy to the disease. Members of the corporation, or persons in its employ, might do these things, but the corporation itself is incapable of doing them. The qualification of a medical practitioner is personal to himself. The intention of the law is that one who undertakes to judge the nature of a disease, or to determine the proper remedy therefor, or to apply the remedy, must have certain personal qualifications; and, if he does these things without having complied with the law, he is subject to its penalties. Making contracts is not practicing medicine. Collecting the compensation therefor is not practicing medicine, within the meaning of this statute. No professional qualifications are requisite for doing these things.

It is urged that no one who is not himself licensed to practice can be beneficially interested in the practice of medicine, and that it is contrary to public policy, and therefore unlawful, for a person or corporation not competent to practice medicine to be beneficially interested in such practice, and to be allowed to receive compensation for the services of one who is qualified. This question and others that are discussed in the brief in this case are more fully considered in the opinion in the case of the Electro-Medical Institute v. Platner.

It seems clear that this defendant has not practiced or attempted to practice medicine, within the meaning of this statute, and is not guilty of the violation of the law charged against it. The judgment of the district court is therefore reversed, and the cause dismissed.

CONTRACT FOR MEDICAL SERVICES BY CORPORATION IS VALID

State Electro-Medical Institute v. *Platner*, 74 *Neb. 23; 103 N. W. 1079*

1905

This plaintiff made a contract in writing with the defendant whereby it agreed "to render professional services to the party of the second part until the party of the second part shall be cured of a certain disease as appears on the books of the party of the first part." And the defendant agreed to pay for the services and to "follow directions carefully and take the medicine and remedies prescribed from time to time by the party of the first part, until a complete cure is effected." This contract was signed by the defendant and was also signed, "State Electro-Medical Institute, Physician in Charge." In the district court the plaintiff set out the foregoing contract and alleged that it was doing business "by and through duly licensed and practicing physicians," and was organized for this purpose, and alleged that by and through L. H. Staples, a duly licensed and practicing physician, the plaintiff had partially performed the contract, and that the physician had been ready at all times, and is now ready and willing, to perform all the duties and obligations imposed by the terms of the contract, but the defendant has refused to perform, etc. The plaintiff asks judgment for the amount due it upon the contract. There was a general demurrer to this petition upon the ground that it did not state facts sufficient to constitute a cause of action, and also upon the ground that "said petition shows that the plaintiff is a corporation; that the contract forming the basis of the plaintiff's action is for medical services, and the plaintiff is incapacitated to render or contract to render or to sue for medical services." This demurrer was sustained, and judgment entered for the defendant, which judgment is brought here for review.

It is contended that a contract for medical services made by a corporation, to be performed by a licensed physician, is void, and that the corporation cannot recover upon such contract. The court holds that to make contracts such as the one in question here, and to collect compensation thereunder, do not constitute practicing medicine, as those words are used in this statute, and that therefore it is not forbidden to do these things without first being licensed.

The first ground set forth in the brief is that no person may practice medicine in the name of another, or under the direction and supervision of another. The qualifications of one who practices medicine are personal qualifications, and it is the one who actually performs the surgical operation or administers the remedy that must be qualified and licensed under the statute. The fact that the doctor who makes the contracts, and who takes the patients and undertakes to treat them, is duly qualified and licensed, is immaterial.

The next point urged is that "no person may profit by or enforce an agreement for the practice of medicine, except he is qualified and licensed for the practice of the profession." This construction of the act would prevent action in the name of any assignee of a physician's claim for his services, whether such assignee might be a corporation, a copartnership, or an individual. Ordinarily a disqualifying statute is strictly construed. Unless its provisions plainly disqualify the plaintiff from maintaining the action, it ought not to be given that effect. There is no language of the statute in question that can be so construed, nor is there anything in the spirit and purpose of the legislation that requires such construction. The statute under consideration cannot be construed to prevent licensed practitioners of medicine to form a corporation, and to make contracts with their patients in the corporate name. If one or more of the incorporators should not be licensed physicians, the case would not be different. The person who practices medicine—that is, who undertakes to judge the nature of disease, or to determine the proper remedy therefor, or to apply the remedy—must have the necessary qualifications and obtain license. No recovery can be had for the services of any physician who is not so qualified.

Making such contracts as the one involved herein, and collecting compensation for services of qualified and licensed physicians rendered pursuant to such contracts, do not constitute practicing medicine, and are not in violation of the statute or public policy.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

FEE COMPENSATION OF SECRETARY DOES NOT INVALIDATE ACT

Munk v. *Frink, 75 Neb. 172; 106 N. W. 425*

1905

The supreme court holds that the act of 1891 creating a state board of health is not rendered void by the fact that it provides for compensation of its secretaries by fees which are not required to be accounted for or paid into the state treasury.

A complaint filed before the State Board of Health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused, not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration. By section 580 of the Code of Civil Procedure the district court is given jurisdiction to review, by proceedings in error, an order of the State Board of Health revoking the license of a physician.

The supreme court commissioners in writing the opinion of this case say that a licensee does not necessarily have a property or contractual right in his privilege, so as to render a revocation of his license a judicial act, but they think that the legislature confers a quasi property or contractual right by providing that revocation shall be only for specified cause or causes arising out of the conduct of the licensee and analogous to a forfeiture, the declaration of which is essentially a judicial act. This view does not, of course, involve a limitation of the power of the legislature to revoke the license by direct enactment.

PROCEDURE BEFORE STATE BOARD OF HEALTH AND REVOCATION OF LICENSE FOR CRIMINAL ABORTION

Munk v. *Frink, 81 Neb. 631; 116 N. W. 525*

1908

The supreme court holds that a complaint filed before the State Board of Health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused, not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration. And in a trial under such a complaint it is not necessary that the proceedings should be conducted with that degree of exactness which is required on a trial for a criminal offense in an ordinary tribunal of justice.

Proceedings by the State Board of Health to revoke a physician's license for cause are summary in their nature and are triable before the board without the intervention of a jury. A trial and conviction in a court of competent jurisdiction is not a condition precedent to a proceeding by the State Board of Health against a physician to revoke his license for any of the causes provided by statute.

The power conferred on the State Board of Health to revoke a physician's license for cause is an administrative and not a judicial function, and the limit of judicial interference in such cases is to protect the accused in his right to a hearing on specific charges after reasonable notice of the time and place of hearing has been given and a full opportunity afforded him to present his defense to such charges and against a conviction, unless on competent evidence. And in such a case, when the State Board of Health has so proceeded and taken testimony, and has given the respondent full opportunity to appear in person or by counsel to cross-examine the witnesses against him, and to introduce testimony in his own behalf, and has passed on the sufficiency of the evidence so taken, the findings of the board as to the sufficiency of the evidence to sustain the charges will be upheld, unless it appears that there is no evidence to sustain such findings.

In a hearing by the State Board of Health of charges against a physician for procuring or aiding or abetting in procuring a criminal abortion, it is not necessary to either allege or prove that the woman had become quick. It is not the murder of a living child which constitutes the offense, but the destruction of gestation, where such destruction is not necessary in order to preserve the life of the woman. The moment the womb is instinct with embryo life and gestation has begun the crime may be perpetrated.

The supreme court commissioners say in this case that the section of the statute under which the proceedings in this case were had defines "unprofessional and dishonorable conduct," and includes "the procuring or aiding or abetting in procuring a criminal abortion" in that definition. This definition was assailed as "a profound legal bizarrerie," counsel saying that the author of that definition "should be immortalized as an apostle of the incongruous." But the commissioners are unable to concur in this severe criticism of the author of the section of the statute under consideration or of the definition referred to. If "the procuring or aiding or abetting in procuring a criminal abortion" is not "unprofessional or dishonorable conduct" in one holding a certificate entitling him to practice medicine, then the commissioners are unable to conceive of any conduct of which such person might be guilty which could be called unprofessional or dishonorable.

With regard to the contention that a sufficient complaint of unprofessional or dishonorable conduct within the meaning of the statute must, in apt terms, charge the criminal destruction by the accused, either as a principal or accessory, of a vitalized human fetus, the commissioners say that authorities are not wanting to sustain this contention, but the doctrine of the Supreme Court of Pennsylvania, in Mills v. Commonwealth, 13 Pa. 632, is preferred. If the theory contended for should be sustained, it would be practically impossible to convict an abortionist for any abortion, or attempted abortion, during the first five months of pregnancy, for, if gestation had not proceeded to the period of quickening, there would be no way of disputing the testimony of the abortionist that what he removed from the woman was, in fact, a dead fetus. Even the woman herself could not dispute this testimony prior to pulsation following the quickening period. It would be giving unlimited license to the abortionist to ply his nefarious calling, provided he confined his criminal operations to the early months of gestation. The commissioners prefer to be in line with the Supreme Court of Pennsylvania, and say, although it has been so held in Massachusetts and some other states, it is not the law "in Nebraska," and never ought to have been the law anywhere.

No error is found in this case in the revocation of the appellant Munk's license as a physician.

In the companion case of Walker v. McMahan, the commissioners say that it was true that the appellant Walker acted as assistant only to Dr. Munk in performing the operations complained of, but the evidence showed such a concert of action between these two doctors in these and other cases of a similar nature, and such a ready and unquestioning participation by the appellant Walker with Dr. Munk in the performance of the two operations involved that there was no escape from the conclusion that if one were guilty both were.

RIGHTS IN LICENSES AND POWERS WITH REFERENCE TO REVOCATION OF SAME

Mathews v. *Hedlund and the State Bank of Nebraska, 82 Neb. 825; 119 N. W. 17*

1908

This case was originally brought to revoke the license of Mathews as a physician. The State Board of Health revoked the license, and the District Court of Lancaster County affirmed its action. Then this appeal was taken, wherein the supreme court affirms the judgment of the district court, sustaining the revocation of the license.

The supreme court holds that an order made by the State Board of Health, under Section 9800 and following sections of Cobbey's Statutes of 1907, revoking for cause the license of a physician to practice medicine, surgery and obstetrics in Nebraska, may be reviewed in the district court by error proceeding under section 580 of the Cole of Civil Procedure, which provides that a judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court. Said sections do not contravene section 15, article 3, of the constitution of the state of Nebraska, nor are they repugnant to the fourteenth amendment to the constitution of the United States.

In a hearing before the State Board of Health for committing a criminal abortion on a pregnant woman it is not necessary to allege or prove that she was in any stage of uterogestation, but simply that she was pregnant of a vitalized embryo or fetus. A trial and conviction in a competent court is not a condition precedent to the institution and prosecution of said proceedings.

In case the secretaries of the board refuse to issue subpœnas for witnesses for the defendant, or to compel witnesses to answer material questions propounded by him, or refuse to hear argument, that conduct will not be considered in the district court, unless the defendant requested the board to direct its secretaries to comply with the defendant's requests, and said board improperly refused so to do. In case the secretaries and the board find against the defendant, but by mistake or oversight the record does not evidence their said action, said board has power to correct its record so that it will speak the truth, even though error proceedings are then pending in the district court.

In contested proceedings for the revocation of a physician's license to practice medicine, it is within the discretion of the State Board of Health, and of its secretaries, to receive affidavits relating to relevant facts at issue in said hearing. In said proceedings, if it appears that the State Board of Health has acted within its jurisdiction, and that all of the jurisdictional facts essential to uphold its final order are sustained by some evidence competent for that board to consider, its orders will be upheld in error proceedings to the district court, and on appeal to the supreme court.

The supreme court bases its decision on reasons stated therefor by the supreme court commissioners. In the opinion prepared by the latter they say, among other things, that the State Board of Health filed a motion to dismiss this case for want of jurisdiction of the court to review the board's order in error proceedings. The argument of counsel, although forceful and learned, urged no better reasons in favor of his client's contention than were presented in Munk v. Frink, 75 Neb. 172, wherein the identical point was considered and decided against said board. The court was asked to overrule Munk v. Frink for the alleged reasons that the board is not inferior in jurisdiction to the district court; that in said proceedings it exercises administrative functions only, and that its orders may not be reviewed by petition in error. But in the instant case the legislature selected three state officers and vested them with power to subpœna and examine witnesses, to take depositions according to the Code and to determine certain facts. While sitting as that special board, their functions approximate the judicial, and they are as well within the scope of section 580 of the Code as were any of the officers referred to in the Nebraska cases cited.

It was urged that one cannot have a property right in a license to practice medicine; that it is within the police power to name the conditions on which such a permit shall issue and may be enjoined, and that the holder thereof takes the privilege with the conditions annexed that his license may be revoked at any time by the power that gave it. There is much force in the argument, and many authorities may be cited to sustain it, but the commissioners are of opinion that after a license has been issued, the right thereunder to practice medicine is a valuable right, and one that may not be taken away without good cause; that if such license is canceled by a board of health, it must be on proper charges, with opportunity to appear and defend by the introducing of evidence and the cross-examination of those witnesses who testify against him at the hearing. The hearing in the present case did not involve the determination of the learning or professional skill of the defendant, but whether he had performed a criminal operation on the person of a patient. Under the circumstances of this case the revocation of

the defendant's license was analogous to a forfeiture, and involved the exercise of judicial or quasi judicial power, within the meaning of section 580 of the Code.

It has been uniformly decided in numberless cases that the legislature may regulate the practice of medicine, and require practitioners to conform to those requirements, or in default thereof cease their practice; that subsequent legislation may impose greater burdens on a practicing physician, and that thereby he is not deprived of any privilege or immunity guaranteed by the constitution.

TEN YEARS' PRACTICE EXEMPTION NOT UNCONSTITUTIONAL

Ex parte Spinney, 10 Nev. 323

1875

The Supreme Court of Nevada holds that the provision in the act of that state entitled "An act to prevent the practice of medicine and surgery by unqualified persons" to the effect that no portion of this act shall apply to those who have practiced medicine or surgery in this state for a period of ten years next preceding the passage of this act was not unconstitutional, or, according to one opinion, was not unconstitutional when the words "next preceding the passage of this act" were omitted.

TEMPORARY CERTIFICATES ABOLISHED BY PASSAGE OF NEW LAW

State v. *Lee, 28 Nev. 380; 82 Pac. 229*

1905

The Supreme Court holds that that portion of the act of 1899 providing for the issuance of temporary certificates of the secretary of the State Board of Medical Examiners has no longer any force as a part of the law of that state regulating the practice of medicine and surgery. It was argued that for several reasons there had been no repeal of the 1899 provision by the act of 1905. But, taking the act of 1905 as a whole, the court thinks it clearly manifest that it was the intention of the legislature to provide that no one should be permitted to practice medicine, surgery or obstetries in the state, except after obtaining a license so to do from the State Board of Medical Examiners. Lastly, it says that it was argued that, as only two regular meetings of the board are provided for per annum, a construction of the statute as here given would impose a great hardship on those seeking to enter the practice between such regular meetings, and to impute such intention to the legislature would be unfair to that body. Doubtless the legislature in the passage of the act of 1905 was considering the public good, rather than the convenience of private individuals; but the legislature also doubtless intended to obviate the inconvenience that applicants to practice might experience from being unable to longer obtain temporary certificates by the provision, not found in the act of 1899, permitting special meetings of the board to be held at the call of the president of the board on two weeks' published notice.

TRIAL MUST PRECEDE REFUSAL TO GRANT LICENSE

Gage v. *Censors of the New Hampshire Eclectic Medical Society, 63 N. H. 92; 56 Am. Rep. 492*

1884

The Supreme Court of New Hampshire says that the statute required every medical society, organized under the laws of that state, to elect a board of censors consisting of three members. Authority was conferred upon the board to examine and license persons to practice medicine, surgery, or midwifery. It was made the duty of the board to issue licenses without examination to all persons who furnished evidence by diploma from some medical school authorized to confer degrees in medicine and surgery, when the board was satisfied that the person presenting such diploma had obtained it after pursuing some pre-

scribed course of study and upon due examination. The board had power, upon due notice and hearing, to revoke any license granted by it, when improperly obtained, or when the holder had, by conviction for crime or from any other cause, ceased to be worthy of public confidence.

The court holds that, under such law, the board of censors could not refuse to grant a license to practice medicine on any other ground than the applicant's lack of medical knowledge, without a trial.

Character, no less than medical education, skill, and experience, is, within the meaning of the statute, a qualification for a competent physician or surgeon. One who does not possess the requisite qualifications cannot be worthy of public confidence. But a license once granted cannot be revoked except upon due notice and a hearing. The holder is given an opportunity to meet charges and evidence tending to show his unfitness. The same considerations that forbid the revocation of a license except upon notice and a hearing, also require that the applicant for a license who possesses the requisite medical qualifications shall not be denied a license without a hearing on the question whether he is in other respects worthy of public confidence.

The plaintiff was exempted by the statute from the examination which would be required if he had no diploma. But the legal meaning of the statute did not require the issue of a license which should be immediately revoked for want of other qualifications than medical and surgical skill. A license might be refused if, on other grounds, upon due notice and hearing, he was fairly proved by the defendants to be unworthy of public confidence.

DISCRIMINATION BASED ON RESIDENCE UNCONSTITUTIONAL

State v. *Pennoyer, 65 N. H. 113; 18 Atl. 878; 5 L. R. A. 709*

1889

The court quotes from the statutes to the effect that all physicians except those who practiced all the time between Jan. 1, 1875, and Jan. 1, 1879, and during that period did not remove from one town to another, are required to obtain a license and to pay therefor five dollars, or one dollar, according as it may be issued upon examination or upon diploma.

The law cannot discriminate in favor of one citizen to the detriment of another. The principle of equality pervades the entire constitution. The bill of rights declares expressly that all government is "instituted for the general good." All the declarations of right are imbued with the same spirit. With them the body of the constitution is in full conformity. To secure to all as perfect equality of privelege and of burden as human wisdom permits was the chief end sought by the framers of the instrument. To this all other purposes were incidental and subordinate.

The preservation of the life and health of the people is one of the chief ends of government. The power of the legislature to regulate the practice of medicine by general laws, applicable to all who engage in it, is as unquestionable as its authority to adopt measures tending to suppress the sources of disease, to avert the spread of contagion, prevent the adulteration of provisions, the sale of unwholesome food, and to legislate in various other particulars for the protection of the public health. The purpose of the statute is to protect the public from the imposture and fraud of quacks and charlatans. To this end, all who practice medicine, and have not either obtained a license or resided and practiced in some one town of the state during the prescribed period, are subjected to a fine. Practitioners are divided into two classes: (1) Those who have, and (2) those who have not, resided continuously in some one town of the state during the four years beginning January 1, 1875. The atter class must, while the former need not, pay five dollars, or one dollar, each, as the case may be, for a license, in order to continue their business. If all physicians alike, as well those who have as those who have not resided and practiced during the specified period in a single town, were required to procure and pay for a license, it may be that the statute would be open to no constitutional objection. Whether it would or would not is not now the question. The present objection is not to the rule of

evidence by which the statute requires qualification to practice to be determined. It is not that residence and practice during the specified time in one place is made sufficient evidence of fitness—equivalent to a diploma—rendering an examination unnecessary. It is that, of those physicians who are declared by the statute, or under its provisions are found, qualified to practice, some are, and others are not, subjected to the burden of obtaining a license. Exemption from the burden is made to depend not on integrity, education, and medical skill, but upon a continuous dwelling in one place for a certain time. It is an arbitrary discrimination, permitting some and forbidding others to carry on their business, without regard to their competency, or to any material difference in their situation. The test is not merit, but unchanged residence. For the right to continue the pursuit of his profession, one physician is not, while another, his neighbor—who may be his equal or superior in learning, experience, and ability—is required to pay five dollars. This is not the equality of the constitution. The magnitude of the unequal burden is not material. If any inequality were permissible, the discrimination might be made prohibitory, and a monopoly of the business given to the physicians who have resided in a town or city for a specified time. Indictment quashed.

RIGHT OF APPLICANT FOR REGISTRATION TO HEARING

Hart v. *Folsom*, *70 N. H. 213; 47 Atl. 603*

1900

Section 13 of chapter 63 of the New Hampshire Laws of 1897 provides that "every person who is a practitioner of medicine and surgery in this state prior to the passage of this act shall be, upon satisfactory proof thereof to the regent and upon the payment of a fee of one dollar, entitled to registration," and a certificate of the facts which shall entitle him to practice medicine. An applicant furnished statements of three residents to the effect that he attended them as a physician prior to the passage of the act, and a certificate of the city clerk that he had certified to a death in 1896. His application, however, was denied because he did not comply with a rule of the regent requiring the applicant to furnish certificates of a member of one of the medical societies mentioned in the act and of two well-known citizens that he was a practitioner of medicine and surgery. Now, a practitioner of medicine and surgery is a physician and surgeon who habitually holds himself out for the practice of the profession. But the language quoted, the court thinks, raises the question of whether it is enough for the applicant to show that he had been such a practitioner in the state at some time in the past, or whether he must show that he was one when the act was passed. The language, it says, seems to refer to the present time—"every person who is a practitioner"—and, although these words are qualified by the expression "prior to the passage of this act," it holds that they cannot reasonably be held to refer to persons who had been practitioners, but had ceased to be such when the act was passed. So it thinks that a fair construction of the language is that only those physicians and surgeons who were in practice in the state when the act was passed are entitled to registration, a view which it believes is strengthened by a consideration of the purpose of the act. Then, it holds that it is the duty of the regent to issue a license to each applicant who comes within the provision of the act. Whenever application is made under section 13, the regent must determine whether the applicant is a physician and surgeon, and whether he was engaged in practice when the act was passed. In performing this duty he acts in a judicial capacity, and is bound to receive and consider all evidence that legally bears upon the questions. If, for any reason, the applicant is unable to furnish such a certificate as the regent may require, the fact does not conclusively show that the applicant does not possess the necessary qualifications. Hence, in this case, while it denies that the applicant was entitled to a writ of mandamus to compel the regent to issue him a certificate to practice medicine, the court holds that the regent should give the applicant a hearing, and admit all competent evidence bearing upon the questions at issue. If the evidence submitted amounted to satisfactory proof that the applicant was a physician and surgeon in practice in the state at the time of the passage of the act he should be registered; if not his application should be denied.

A PROFESSION IS PROPERTY—REGULATION OF PRACTICE

State v. *Chapman, 69 N. J. Law 464; 55 Atl. 94*

1903

The supreme court holds that a calling, business, or profession chosen and followed is property. The legislature can not destroy it by statute without providing for compensation, any more than it can authorize the taking of real estate for a public use except on compensation. But it is within the power of the state to place reasonable regulations on the business or calling of any person. The laws regulating dentistry are of later enactment than those regulating the practice of medicine, but the principles underlying their legality are the same. And it is within the power of the state, under the police power, to impose by statute reasonable restrictions as to registration and the obtaining of a certificate of authority to engage in the practice of dentistry, and to make it a misdemeanor for a person to practice without first obtaining such certificate. The New Jersey act of March 17, 1898, entitled "An act to regulate the practice of dentistry in the state of New Jersey, and to repeal certain acts now relating to the same," is not an act taking or destroying property, but is a reasonable regulation of the practice of dentistry in that state. The act does not impair vested rights, nor is it in its criminal provisions an *ex post facto* law.

CONSTRUCTION OF STATUTE AS TO "OTHER AGENCY"

State v. *Herring, 70 N. J. Law 34; 56 Atl. 670*

1904

The supreme court holds that an osteopath whose treatment of his patient consists simply of the manipulation of the body, does not violate that provision of the act of May 22, 1894, Section 8, which forbids the applying of "any drug, medicine or other agency or application" by an unlicensed person. It says that the phrase "other agency or application" is a very broad one, and, in its general sense, would undoubtedly include the use of the hands. But it is conjoined to the terms "drug" and "medicine," which are much more special; and, under the maxim, "Noscitur a sociis" (the meaning of a word is or may be known from the accompanying words), its interpretation should be such as will confine it to the class in which its special associates stand. Moreover, as a phrase employed to create and define offenses unknown to the common law, it must be strictly construed. In forbidding an unlicensed person to apply any drug or medicine for remedial purposes, the legislature plainly contemplated the use of something other than the natural faculties of the actor—some extraneous substance. A similar restriction must attach to the more general terms "agency" and "application," and they must likewise be held to import only some extraneous substance.

REGULATION OF PRACTICE OF MEDICINE A VALID EXERCISE OF POLICE POWER

In re Roe Chung, 9 New Mexico 130; 49 Pac. 952

1897

Application for a writ of prohibition was made to the court. The following questions raised by the counsel for petitioner and respondent are considered: (1) Assuming the act of the legislative assembly of New Mexico "to regulate the practice of medicine," etc., approved February 27, 1895, to be a rightful subject of legislation, can the penalties prescribed be legally enforced? (2) Has a justice of the peace court jurisdiction in an action to recover the penalty for a first offense? (3) Does it appear that the causes the trial of which is sought to be prohibited relate to subsequent offenses?

While some attack is made upon this class of legislation as invalid, it is so well established that it is not only a rightful, but a most frequent, subject of

legislation, that the court concluded, despite such attack, to assume this: The New Mexico statute is very liberal in respect to the requirements for obtaining a certificate legally authorizing the holder to practice medicine in this territory, graduation and diploma not being necessary if examination satisfactory to the board of health be passed,—a provision more liberal, perhaps, than should be in a matter so vital to the interests of the public, to whom such a certificate accredits the holder. It is objected by counsel for petitioner that there is a provision requiring the recovery of a penalty in an action of debt, which is converted into a fine in proceedings to enforce its collection. In other words, they say that a civil action eventuates in a judgment in a criminal case. The reply is that such a statute comes under the police power of the state, and it is frequently the case that imprisonment is embraced as a part of the judgment. There is no inconsistency between recovery and enforcement of the fine which prevents, in any sense, their standing legally together.

The last inquiry is: Do the causes whose trial is sought to be prohibited relate to subsequent offenses? If they do affirmatively appear to be suits or prosecutions for subsequent offenses, it is contended that nevertheless the plaintiff could waive demanding more than the amount recoverable for a first offense. Remission of a part of a claim simply to obtain jurisdiction, and without consent of a debtor, is generally held not to be allowable, though there are authorities both ways upon this question. The court sees no necessity for determining this question, however, as our conclusion depends upon other grounds. These proceedings were within the jurisdiction of the court, so far as appears on the face of the record. The actions sought to be prohibited were yet undetermined, or they were already determined. If they were determined before notice of the writ of prohibition, there is, of course, an end of this case. If they were not determined, then upon the trial the petitioner would have a complete remedy at law by showing by evidence that they were subsequent offenses, if in fact they were. The answer of the respondent shows that judgment had been regularly rendered, but not formally entered, in this cause, before notice of the writ of prohibition, and this application might have been dismissed on that ground. As, however, the question seemed one of public importance, the court preferred to give these views. The application for the writ of prohibition will be denied, and it is so ordered.

DRUGLESS HEALING IS PRACTICE OF MEDICINE

Territory v. Newmman, 13 New Mexico 98; 79 Pac. 706

1905

The defendant was indicted for practicing, or offering to practice, medicine without having obtained a license, and the jury were instructed as follows: "'The practice of medicine' . . . means (1) to open an office for the practice of medicine; or (2) to announce to the public or to any individual, in any way, a desire or willingness or readiness to treat the sick or afflicted, or investigate or diagnose, or offer to investigate or diagnose, any physical or medical ailments or disease of any person; or (3) to suggest, recommend, prescribe, or direct for the use of any person any drug, medicine, appliance, or other agency, whether material or not material, for the use, relief, or palliation of any ailment or disease of the mind or body, or the cure or relief of any wound, fracture, or bodily injury or deformity, after having received or with the intent to receive therefor, either directly or indirectly, any bonus, gift, or compensation." This instruction, which was objected to, seems to the court to have been favorable to the defendant, rather than otherwise, since it greatly restricted the number of acts which the jury might otherwise have found the defendant committed in violation of the statute. It says that the subdivision complained of was a proper and appropriate one, under the circumstances.

Then the defendant objected that by the statute a new, unusual, and false meaning was given to the phrase "practicing medicine"; that he never engaged or offered to engage in the practice of medicine; that, on the contrary, the evidence showed him to be a practitioner of a system of drugless healing; and that the

legislature could not so extend the meaning of said words "practice of medicine" as to cover and include methods of healing diametrically opposed to the practice of medicine as theretofore commonly understood and defined. The court answers it would perhaps have been possible for the legislature to choose a better phrase under which to group healing methods of all kinds, although the use of the expression "practicing medicine" to mean the art of healing is by no means new, but rather a return to the original meaning of the word "medical." But whatever may be thought of the terms in which the prohibition of the statute is expressed, there can be no doubt of their meaning; and the defendant was clearly forbidden to do that which the evidence showed, and he did not deny, that he did, without a license from the board of health as provided for by the statute. That it was not claimed he had, and, if the statute was valid, he was liable to the penalty imposed by it.

Again, the court says that it should be noted that the statute does not forbid the use of methods which the defendant said he followed for the cure of disease, or any other methods whatever, but only requires that those who prescribe or make use of them in the practice of medicine, as defined by the statute, shall have qualified themselves for such practice, and received a license, as evidence of such qualification. That the practice of the art of healing, in whatever form and in whatever name it may be followed, is subject to regulation by legislative enactment, under the police power of the state, is so well established that it is no longer open to question. If there were no such rights and regulations, it would be necessary to create them, for the protection of the public against those who take advantage of the widespread ignorance which exists in relation to the human organisms to impose their useless and often harmful nostrums and treatments on those who are, or may be led to believe they are, in some way diseased. It is equally certain that the right to regulate should be exercised only in the public interest, and not to create monopolies, or otherwise to violate those fundamental rights which are secured to all citizens.

That certain acts should be made punishable if done for gain, which are not prohibited if done without bad motive, seems to the court to be a matter properly within the discretion of the legislature. It says that it may reasonably have been assumed that the public needed no protection against charitable or friendly ministrations, in which the elements of good faith and sincerity of belief in the remedies prescribed would naturally be present, and in which greed could have no place. It is true that the statute commits the licensing power to a board composed of physicians who shall be graduates of some medical school in good standing, but the inclusion under the term "practice of medicine" of what it is made to cover by the statute might reasonably be construed to extend the meaning of the words used to describe the members of the board in like manner. Whether that view be taken or not, it is certain that the board provided for could be held by the courts to the exercise of its powers in a reasonable and just manner, and would have no right to refuse to issue a license to any one merely because of his being a practitioner of some school of healing different from that to which the members of the board belong. The defendant claimed, also, that the educational qualifications imposed by the statute were not adapted to or required in the simple method of healing which he followed, and that they amounted to a prohibition of his constitutional right to follow his calling. But the court says that the requirements are the same for all who purpose to engage in the practice of medicine, as defined by the statute in question, and therefore not open to the objection that any particular class is unduly favored.

WHAT CONSTITUTES PRACTICE OF MEDICINE

Territory v. *Lotspeich, 14 New Mexico 412; 94 Pac. 1025*

1908

The information in this case charged that the defendant attempted to practice medicine without first complying with the provisions of the act of 1903, and without being the holder of a certificate entitling him to practice medicine in the

territory of New Mexico. The information described the unlawful act as opening an office and announcing to the public his willingness to treat consumptives with "Pulmonine," and receiving compensation from the Pulmonine Company for so doing.

Was the court below right in holding that this information, when measured by the act of 1903, stated no offense? That act subjects to punishment any person who shall practice or attempt to practice medicine without first complying with its provisions, and without being the holder of a certificate from the Territorial Board of Health entitling him to practice. There was no contention that the information failed to state a lack of this certificate, but the point urged and sustained by the court below was that the information failed to allege facts showing that Lotspeich was engaged in the practice of medicine within the meaning of the act.

The supreme court says that it is of opinion that under this act, to constitute practice of medicine, it is only necessary to do some one of the three following things: Either, first, to open an office for the practice of medicine; or, second, to announce to the public or to any individual in any way a desire or willingness or readiness to treat the sick or afflicted, or investigate or diagnose, or offer to investigate or diagnose, any physical or medical ailment or disease of any person; or, third, to suggest, recommend, prescribe or direct for the use of any person any drug, medicine, appliance or other agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture or bodily injury or deformity, after having received, or with intent of receiving therefor, directly or indirectly, any bonus, gift or compensation.

Under the first two subdivisions the essence of the act is the public announcement of a general readiness and willingness to treat the sick, in the first subdivision the announcement being made by the act of opening an office, in the second by advertisement or other public statement. Under neither of them is any actual treatment of a patient necessary, and therefore the question of compensation is immaterial to a prosecution thereunder.

The third subdivision deals with the actual treatment of or prescription for the sick, and provides that such attention, even to only one person, and even without previous opening of an office or advertisement or announcement, shall constitute the practice of medicine, provided it be for pay, either present or prospective. Under this last clause the court is of opinion that it is immaterial from whom compensation was received, or from whom it was intended that it should be received.

By the terms of this act an unlicensed person has no more right to treat patients on a general undertaking from another, as, for instance, the city or some philanthropic person, that all such persons will be paid for by such city or philanthropist, than he has to treat such persons on the latter's personal payment or undertaking to pay. It must, however, be compensation for services rendered the patient, not for services rendered the third party paying for the same and to which the treatment of the person is purely an incident.

On the argument in the supreme court, and apparently in the court below, the sufficiency of the information under the third subdivision was the principal matter of controversy, and the particular criticism was that the information failed to allege payment or expectation of payment from the party treated. The supreme court concurs with the court below in holding the information as to the third subdivision of the statute insufficient, not, however, for the reason urged (for, as we have seen, it is immaterial from whom the compensation comes), but because there was no allegation of the treatment of any specified person, or any person at all, which is a necessary element under this branch of the statute. The supreme court is of opinion, however, that the information was sufficient under the first two subdivisions in that it alleged both the opening of an office for the practice of medicine and an announcement to the public of a desire, willingness and readiness to treat the sick.

The supreme court holds, therefore, that the trial court erred in holding the information generally insufficient, and in discharging the defendant thereon.

PATENT DOES NOT CONFER RIGHT TO PRACTICE

Thompson v. Staats, 15 Wend. 395

1836

Staats sued Thompson in the justice's court of the city of Albany for practicing physic, not being authorized by law. It was proved tnat the defendant visited a sick man, felt his pulse and gave him medicine, which he took, and charged and received two dollars from the patient. The defendant offered in evidence letters patent, granted under the laws of the United States to Samuel Thompson, 28th January, 1823, authorizing him and his assigns, for the term of 14 years, to make, construct, use, and vend to others to be used, a certain improvement in the preparing, mixing, compounding, administering and using certain medicines, and offered to prove that the defendant (John Thompson) was an assignee of the patentee, and that the medicine administered by him to the patient was composed of the materials, and compounded in the manner described in the schedule annexed to the letters patent; and insisted that as such assignee he had the right under the patent, to administer such medicine, without being licensed to practice physic, as required by the laws of this state. The evidence was objected to by the plaintiff and rejected by the court. The cause was tried by a jury, who found a verdict for the plaintiff for ten dollars, for which sum judgment was rendered. The Supreme Court of Judicature, in affirming the judgment said:

The letters patent were properly rejected as irrelevant. They only authorized the patentee and his assigns to make, construct, use and vend his newly discovered compound of medicine; not "to practice physic or surgery," within the regulations of the statutes of this state, as found in 1 R. S., 454, Sections 16 and 19. This affords a sufficient justification for the decision, if there were no other reasons for it. When the terms of the patent are broad enough to enable the patentee to put himself upon a footing with these statutes, it will be time enough to consider the constitutional question raised by the defendant, how far the law of congress under which the patent was granted, and the laws of this state regulating the practice of physic and surgery, come in collision. The defendant pretended to no authority to practice physic under the laws of the state, and whether he had thus practiced was a question of fact which the jury found against him. Judgment affirmed.

MANIPULATION NOT THE PRACTICE OF MEDICINE

Smith v. Lane, 24 Hun. 632

1881

This action was brought to recover the price defendant agreed to pay plaintiff for the treatment of himself and his wife for certain bodily disabilities. It consisted entirely of manipulation with the hand, by rubbing, kneading and pressure. The plaintiff testified that he was employed by the defendant to perform these services for a specific compensation, and that he had performed them until the amount due to him was the sum of $149. The referee dismissed the complaint because it appeared that the plaintiff was not a graduate of any medical school, and had no license permitting him to practice either medicine or surgery. Whether the act of 1874 contains anything subjecting him to such disability, is the only substantial point which requires to be considered in the case. The act did not in terms prohibit any person from following an occupation of the description, and without some prohibition it would seem to be as lawful as any other in which one person might render services at the request of and for the benefit of another. The statute in terms merely declared it to be a misdemeanor for any person to practice medicine or surgery who is not authorized to do so by a license or diploma from some chartered school, state board of medical examiners or medical society, or who shall practice under cover of a medical diploma illegally obtained.

For the purpose of qualifying a person, neither licensed nor possessing a diploma of the nature of that mentioned, to practice medicine or surgery, it was provided that he should obtain a certificate from the censors of a medical society

either in the county, district or State, in which it should be set forth that he had been found qualified to practice all of the branches of the medical art mentioned in it. The second section of this act is not required to be considered, for it merely provided the manner in which persons might be obliged to apply for and obtain the certificate. It was in no manner shown upon the trial that either of these societies would issue a certificate for the mere purpose of including in it the occupation followed by the plaintiff. And the language of the act is at variance with the supposition that it would be done, for the certificate is not permitted to be issued unless the person applying for it shall be found qualified to practice all the branches of the medical art mentioned in it. To entitle a person to a certificate under this provision, it would be necessary that he should be qualified either to practice medicine or surgery in all its branches. If that was not made to appear he could receive no certificate under the provisions of this act. For that reason it appears to be quite manifest that the object of the legislature in the enactment of this chapter was only to provide for regulating the practice of medicine and surgery, as those terms are usually or generally understood, and confining them to such significance, it is evident that they would not include the occupation of the plaintiff. The practice of medicine is a pursuit very generally known and understood, and so also is that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating or alleviating bodily diseases, while the functions of the latter are limited to manual operations usually performed by surgical instruments or appliances. It was entirely proper for the legislature, by means of this chapter, to prescribe the qualification of the persons who might be intrusted with the performance of these very important duties. The health and safety of society could be maintained and protected in no other manner. To allow incompetent or unqualified persons to administer or apply medical agents, or to perform surgical operations, would be highly dangerous to the health as well as the lives of the persons who might be operated upon, and there is reason to believe that lasting and serious injuries as well as the loss of life have been produced by the improper use of medical agents and surgical instruments or appliances. It was the purpose and object of the legislature by this act to prevent a continuance of deleterious practices of this nature, and to confine the uses of medicines and the operations of surgery to a class of persons who, upon examination, should be found competent and qualified to follow these professional pursuits. No such danger could possibly arise from the treatment to which the plaintiff's occupation was confined. While it might be no benefit, it could hardly be possible that it could result in harm or injury.

For that reason no necessity existed for interfering with this pursuit by any action on the part of the legislature. It may be that credulous persons would be received into the employment of the plaintiff, and in that manner subjected to imposition. But it was no part of the purposes of this act to prevent persons from being made the subjects of mere imposition. If the plaintiff's pretentions were well founded then diseases would no longer be formidable, and even death itself would be deprived of its terrors. But because he has professed more than he has the ability to accomplish he cannot, on that account, be subjected to the disability provided for in this act. His system of practice was rather that of nursing than of either medicine or surgery. It could, in no event, result in any other injury to the person practiced upon than that of possible financial loss. No bodily disability or diseases could either result from or be aggravated by the applications made by him. And what he did in no sense either constituted the practice of medicine or surgery. He neither gave nor applied drugs or medicine, nor used surgical instruments. He was outside of the limits of both professions, and neither one of the schools or societies mentioned in the act had jurisdiction over him or could have intervened to authorize, restrict or prevent him in the occupation he was engaged in following. While his services may have afforded no benefit to the persons receiving them, he was not prohibited from performing them by anything in this act, and no other law was violated by the contract which the evidence tended to show had been entered into.

It was not necessary that proof should be given of the value of the services. It was sufficient for the purposes of the action that a contract had probably been made, by which a specific sum was agreed to be paid for their performance. As the case stood, the referee was not justified in dismissing the complaint. The judgment for that reason should be reversed and a new trial ordered, with costs to abide the event.

BURDEN OF PROOF OF QUALIFICATION ON DEFENDANT

People v. Fulda, 52 Hun. 65; 4 N. Y. Supp. 945; 7 N. Y. C. R. 1

1889

The evidence showed that the defendant had been practicing medicine in the city of New York since 1858; that he was naturalized as a citizen in 1868; that he had received medical education at the universities of Halle and Jena, but that he had never received a full diploma, such as was given by the universities to their graduates upon the completion of their course of study. The evidence also showed that during the war he passed an examination for a commission as medical officer in the New York volunteers, and received a commission after such examination as assistant surgeon in one of the regiments of the New York infantry.

The court charged the jury that, if the evidence satisfied them beyond a reasonable doubt that the defendant practiced medicine at the time and place and in the manner set forth in the first count of the indictment, they should convict the defendant, unless they were satisfied that at that time he had a license authorizing him to practice from some chartered school, state board of medical examiners, or medical society. To this instruction the defendant excepted. There seems to have been no error in this charge. The law made the defendant amenable to punishment, did he practice medicine without the license provided for by said section.

The court further charged that, if the practice were proved, the burden of proof was thrown upon the defendant to prove that he had a license or diploma from some chartered school, state board of medical examiners, or medical society. To this instruction the defendant excepted. This seems to have been entirely correct. The burden was upon the defendant to prove, after the people had proved the fact of the practicing of medicine, that he was authorized to practice under the provisions of the statute.

The court further charged that none of the papers produced by the defendant was a license from a chartered school, state board of medical examiners, or medical society. The evidence certainly did not disclose any such license or diploma as was required by the statute. He had no license from the medical school in Prussia. It was merely a certificate that he had passed a limited course of study. The commission which he received as medical officer in the New York volunteers was not a license or diploma from a state board of medical examiners, allowing the defendant to practice medicine generally. It was an examination for a specific purpose, and the certificate issued was simply a limited commission, for the practice of medicine within a limited sphere.

Neither does the fact that before the enactment of the provisions of the law of 1874, which formed the basis of section 356 of the Code, the defendant had been practicing medicine, restrict the power of the statute to compel the taking out of a license in order to justify his practice. This was part of the police regulations of the state. It was thought necessary for the protection of the people that these safeguards should be thrown around them in reference to those who assumed to practice medicine in the community. The state had a right to determine upon what conditions and under what circumstances its citizens should be entitled to pursue any vocation. It was in no way interfering with any vested rights, nor was it a usurpation of authority which was not possessed. There seems to have been no error committed in the disposition of the case, and the conviction must be affirmed.

COUNTY ASSOCIATION ENTITLED TO FINES

New Yourk County Medical Association v. *the City of New York, 32 Misc. 116; 65 N. Y. S. 531*

1900

Section 153 of chapter 398 of the laws of New York of 1895 provides that "when any prosecution under this article (for practicing medicine without lawful registration as a physician) is made on the complaint of any incorporated medical society of the state, or any county medical society entitled to representation in a state society, the fines, when collected, shall be paid to the society making the complaint," etc. The right of the association to such a fine, which had been collected in a case where it had made complaint, was the issue in this case. The association showed that it had been since 1890 a duly incorporated society of the state of New York, entitled to representation in the New York State Medical Association, which was incorporated in 1884, and that the state association is the accredited society in the national body of physicians known as The American Medical Association. Such being the case, the Supreme Court of New York, New York County, holds that the New York County Medical Association meets all the requirements of the act of 1895 above mentioned, and that there appears to be no solid legal reason why it should be excluded from the benefit of its provisions. "Association" and "society," the court holds, are convertible terms. To this it adds that the statute was not enacted for the benefit of any particular corporation, but for "any incorporated medical society" entitled to representation in the state society, and that it was passed to protect the public from illegal medical practitioners, and that the more numerous the informers and rigid the prosecution the better for the public and the medical profession. Nor does the court yield assent to the argument that the act was for the exclusive benefit of three societies—the regular, homeopathic and eclectic—because they were named in certain prior acts, and possess certain rights which the New York County Medical Association does not possess.

VALIDATION OF IMPERFECT REGISTRATION RETROACTIVE

Ottaway v. Lowden, 172 N. Y. 129; 64 N. E. 812

1902

The Court of Appeals reverses the decision of the lower court, holding the validation of imperfect registration not retroactive. Section 148 of Chapter 661 of the New York Laws of 1893 provides, among other things, that: "If any person, whose registration is not legal because of some error, misunderstanding or unintentional omission, shall submit satisfactory proof that he had all requirements prescribed by law at the time of his imperfect registration and was entitled to be legally registered, he may, on unanimous recommendation of a state board of medical examiners, receive from the regents under seal a certificate of the facts which may be registered by any county clerk and shall make valid the previous imperfect registration." The physician by whom this action was brought to recover for medical services had attempted to make registration as required by the statute, and failed; but, assuming that he was correctly registered, he proceeded with the practice of medicine, in the course of which he rendered the services sued for. A short time thereafter he obtained from the regents a certificate which made valid the previous imperfect registration. This validation, it was held, in the decision now reversed, was not retroactive and did not authorize the maintenance of this action. But the court of appeals is persuaded that the statute operated to give life to the imperfect certificate from the date of its filing, and hence authorized the physician to recover for all services rendered after its filing, and freed him from the various misdemeanors as well. It says that the object of the comprehensive statutes of which the section quoted from forms a part is not to provide a trap for the bona fide and competent physician who, through inadvertence or ill advice, fails to secure a perfect registration, but to shut out from the practice of medicine those whose lack of knowledge of the human body and ignorance touching methods of treatment render their attempts

to make diagnosis and prescribe treatment a menace to society. Not only is the standard very high for those who are admitted to the practice of the profession by the authorities of this state, but the statutes attempt to guard against any practicing in this state by unskilful and improper practitioners coming from sister states, showing throughout an intent on the part of the legislature to protect the people from imposition by the unlearned and unskilful who may nevertheless obtain from institutions in other states diplomas purporting to assure competency. To that end the certificate of the board of regents, based on the unanimous recommendation of a board of medical examiners, is exacted, and the requirements of license and registration are insisted on, and not for the purpose of bringing within the penalties of the statutes a physician coming from another state, possessed of all the qualifications which the statutes require. As experience teaches that mistakes are sometimes made in attempting to comply with statutes —especially by those whose training may be in other directions than the law— the legislature has undertaken to provide a method by which imperfect registration may be corrected by the same authorities who acted in the first instance; and as the object of the section authorizing the correction is only to make such corrections as are due to "some error, misunderstanding or unintentional omission," there is no good reason why the legislature should not provide that the correction shall operate as of the date when the "imperfect registration" took effect, thus wiping out the penalties which the statute imposed to better secure its enforcement. And the phrase, "shall make valid the previous imperfect registration," as it seems to the court, when considered in connection with the general scheme of the statute, and the fact that all of the applicant's proofs must go to show that he was entitled to be registered at the time of his imperfect registration, means that that which was once imperfect and invalid shall become perfect and valid as of the beginning.

"PRACTICE OF MEDICINE" WITHOUT DRUGS

People v. *Allcutt, 117 App. Div. 546; 102 N. Y. Supp. 678*

1907

The Supreme Court of New York, Appellate Division, First Department, affirms a judgment convicting the defendant of the crime of practicing medicine without being lawfully authorized and registered. The court says that the evidence tended to establish that in the window of the defendant's residence was exhibited a sign, "Dr. E. Burton Allcutt, Mechano Neural Terapy;" that on the bell outside the door was the name "Dr. Allcutt;" that in the office building in which he had an office there appeared on the directory in the hall, "Dr. E. Burton Allcutt;" that he had and distributed a card reading, "Dr. E. Burton Allcutt, mechanoneural therapy," giving two addresses with office hours at each and 'phone number, and that his receipt for services rendered was signed "Dr. E. Burton Allcutt."

The evidence in this case further tended to establish that the complaining witness visited the defendant at the office address given; that he said he was Dr. Allcutt, and, "I usually see all my patients up town in the afternoon and I am down in this office in the morning." The witness having said that she was troubled with severe headaches, was nervous and had frequent spells of vomiting, the defendant told her that he wished her to remove her corsets in order to examine her thoroughly to find out what her trouble was. He examined her chest, heart and back by placing his ear to her heart; he tapped with his fingers. The witness asked, "Doctor, I also have a very severe pain in my left arm; do you think it is rheumatism?" He said, "You are entirely too young to have rheumatism; it is from your stomach; you have malaria and stomach disease." She said to him, "Can you cure me?" The defendant said, "Certainly I can. You will have to take twelve treatments, which will cost $25 in advance." He said he gave no medicine at all, but quieted the nervous system. He was asked if he called at patients' residences, and he replied, "Certainly." Witness asked, "Doctor, can you cure all kinds of diseases without drugs?" He said, "Yes; I find I can cure without drugs, I can cure all diseases that any physicians can cure

without drugs, and also diseases that they cannot cure with drugs." He said that he had practiced medicine; that he had given up drugs; that he could cure anything that physicians cured. The witness then paid $5 for the examination and received a receipt. Subsequently the defendant called at her residence in response to a telephone call. The witness told him that she felt ill all day, that she had a chill and had been vomiting, had a pain in the region of her abdomen. The defendant took hold of her hand, felt of her pulse, looked at her tongue, examined her throat and said: "It is all from your stomach. I want you to drink a quantity of luke-warm water with salt in it." He gave it to her in spoonfuls. He said, "You must not eat pork or potatoes or any kind of sweets," and then said, "I will give you a treatment." Witness testified that the defendant started to treat her back with his fingers; he said he was treating her nerves; he treated her spine by putting the fingers on her spine, the ends of the fingers, a touching sensation, nothing like kneading; he did this for about an hour. He varied that treatment, on the neck, breast, heart and stomach in the same way, just by his fingers. He advised her in case she had pains in the night, if the pain in her abdomen were severe, to place an ice bag on it and one on her feet, and if her bowels troubled her to place a hot-water bag on her back and go to bed, not to lie on the couch, and if she got any worse to send for him. Her husband asked him, "Doctor, what are you doing?" He replied, "I am treating her nerves. Don't you see how quiet she is now?" Five dollars was paid for that visit. The witness testified that as a matter of fact there was nothing the matter with her, and that she was acting during these interviews as a detective.

The defendant testified in his own behalf that he practiced the art of mechano neural therapy and that he was a graduate of a college of mechano neural therapy. It was conceded that such college was not recognized by the Regents of the State of New York, and that a diploma of that institution would not give the right to practice nor to an admittance to an examination to determine the fitness of such a person to practice medicine, and that the defendant was not registered as a physician in the County of New York. The defendant also testified that prior to his attendance at said college he had been practicing massage, and was a graduate of the Mills Training School, attached to Bellevue Hospital, and had engaged in his profession as a nurse; that the statement of the complaining witness was substantially correct; that he had not studied medicine, except from the standpoint of a nurse; that mechano neural therapy means mechanical nerve treatment, a gentle pressure on all parts of the body; that the whole theory of this science is that disease comes from lack of blood circulation, and that the treatment proceeds on the theory of assisting the circulation back into normal condition.

The contention of the defendant was that, conceding all the facts proved, he was not guilty of the crime charged, inasmuch as he was not practicing medicine within the meaning of the statute, in that he neither gave nor applied drugs or medicine nor used surgical instruments.

Section 153 of the New York Public Health Law (Chap. 661 of the Laws of 1893) provides as follows: "Any person who, not being then lawfully authorized to practice medicine within this state and so registered according to law, shall practice medicine within this state without lawful registration . . . shall be guilty of a misdemeanor."

Continuing, the court says that to confine the definition of the words "practice medicine" to the mere administration of drugs or the use of surgical instruments would be to eliminate the very cornerstone of successful medical practice, namely, the diagnosis. It would rule out of the profession those great physicians whose work is confined to consultation, the diagnosticians, who leave to others the details of practice. Section 146 of the Public Health Law provides that persons desiring to practice must pass a Regent's examination made up of "suitable questions for thorough examination in anatomy, physiology and hygiene, chemistry, surgery, obstetrics, pathology and diagnosis and therapeutics, including practice and materia medica." Diagnosis would, therefore, seem to be an integral part of both the study and practice of medicine, so recognized by the laws as well as common sense. The correct determination of what the trouble is must be the first step for the cure thereof. It is a well-known fact that the disease popularly known as consumption may, if discovered in time, be arrested, if not

entirely eradicated from the system, by open-air treatment in the proper climate, and that in such cases use of drugs has been practically given up. Would the physician, in such a case, who by his skill discovered the incipient disease, advised the open-air treatment and refrained from administering drugs, not be practicing medicine? It may be difficult by a precise definition to draw the line between where nursing ends and the practice of medicine begins, and the court should not attempt, in construing this statute, to lay down in any case a hard and fast rule on the subject, as the courts have never undertaken to mark the limits of the police power of the state or to have precisely defined what constitutes fraud. What the courts have done is to say that given legislation was or was not within the limits of the police power, or that certain actions were or were not fraudulent.

The court is of the opinion, from the general current of the authorities throughout the country and from examination of the history and growth of our own public health statutes, that it should not apply the rule as claimed to have been laid down in Smith vs. Lane. When we find, as in this case, a defendant holding himself out by sign and card as a doctor, with office hours, who talks of his patients and gives treatments, who makes a diagnosis and prescribes diet and conduct and remedies, simple though they be, and who asserts the power to cure all diseases that any physician can cure without drugs and also diseases that they cannot cure with drugs, and who takes payment for a consultation wherein there was an examination and determination of the trouble, that is, a diagnosis, as well as payment for subsequent treatment, even if no drugs are administered, we must hold that he comes within the purview of the statute prohibiting the practice of medicine without being lawfully authorized and registered.

The judgment of conviction should, therefore, be affirmed.

RECEIVED THE MEDICAL DEGREE

People v. *Somme, 120 App. Div. 20; 104 N. Y. Supp. 946*

1907

The Supreme Court of New York, Appellate Division, First Department, says that the defendant was convicted by the Court of Special Sessions for a violation of Section 153 of the public health laws in that on a named date, in the County of New York, he did unlawfully, without having legally received a medical degree, and without having received a license according to law which constituted at the time an authority to practice medicine under the laws of the state then in force, then and there assume and advertise the title of "Dr." and "M.D." in such a manner as to convey the impression to one Katie Farenga that he, the said Joseph Somme, was then and there a legal practitioner of medicine. Said section provides that: "Any person who shall append the letters M.D. to his or her name (or shall assume or advertise the title of doctor, or any title which shall show or tend to show that the person assuming or advertising the same is a practitioner of any of the branches of medicine), in such a manner as to convey the impression that he or she is a legal practitioner of medicine, or any of its branches, without having legally received the medical degree, or without having received a license which constituted at the time an authority to practice medicine under the laws of this state then in force, shall be guilty of a misdemeanor."

The evidence showed, among other things, that there was a sign in the defendant's window, "Dr. Somme, Osteopath," and on the bell, "Dr. J. Somme." The complainant testified that she said to the defendant: "Are you Dr. Somme?" He said, "Yes." She then described her condition to him. The defendant asked some questions, and, in reply to her query, "Can you do anything for me?" said: "'Yes, I can perform an operation.' I said: 'Can not you give me some medicine?' He said: 'No; medicine will do no good.' I told him I was afraid of an operation. He said: 'The only thing for you is a good scientific operation.'" He also handed her his card, which read: "Dr. Somme," etc. On another occasion she saw him again, and after a conversation left $2 on deposit.

In the newspapers he advertised: "Dr. J. Somme, Osteopath. Specialist for all chronic difficult diseases. Safe, scientific treatment." It was conceded that the defendant possessed the diploma of a medical school in Indianapolis called the "College of Medicine and Midwifery." He did not produce or offer to produce any other authority for the assumption and use of the title of "Dr." or "M.D."

The essence of the section of the statute under which the defendant was prosecuted was that he should not assume or advertise that title in such a manner as to convey the impression that he was a legal practitioner of medicine. The evidence was sufficient as to the manner of the use. Putting up a sign, advertising as a specialist for all chronic, difficult diseases, discussing symptoms with a proposed patient, advising an operation, and receiving money in part payment in advance therefor were facts establishing an invitation to the public to come to him for medical treatment, and clearly conveyed the impression that he was a legal practitioner of medicine or some of its branches.

But the real question involved was: What do the words "without legally having received the medical degree" mean?

No person is now a legal practitioner in the State of New York unless he comes within one of these three classes: First, those who registered diplomas prior to 1890; second, those who registered licenses since 1890; and, third, a small class who received certificates from the censors of medical societies under Chapter 436 of the Laws of 1874—because Section 140 of the public health laws provides that no person shall practice medicine after Sept. 1, 1891, unless previously registered and legally authorized, or unless licensed by the regents and registered as required by this article (Article 8 of the public health law).

The defendant was not within any of the three classes. His claim was that he had a degree of M.D. from an Indiana college. If it be conceded that the college was a legitimate institution with power to grant the degree, yet that degree was worthless as a license to practice medicine in New York, and was worthless as a preliminary requirement to take the regent's examination for a license. By the legislation referred to a medical school diploma conferring the title "M.D." does not serve as a license to practice medicine in New York. Its holder is required to pass the regents' examinations. He cannot be admitted to the examination unless he has received the degree from some institution approved by the regents. If he succeeds in the regents' examination, a regents' license is issued, which is the sole authority to practice medicine and which must be registered in the county clerk's office before beginning practice. Therefore, when we consider that the statute prohibits the assumption or advertisement of the title of "Dr." in such a manner as to convey the impression that he or she is a legal practitioner of medicine or any of its branches, without having legally received the medical degree, the words "without having legally received a medical degree" are meaningless unless interpreted as meaning " having received a medical degree such as legally entitled the holder to practice."

It is now the settled policy of the state to hedge admission into the learned professions with strict requirements in order to secure, so far as possible, competent services to patients and clients from physicians and lawyers, and the statutes in regard to admission to the bar, as well as to the practice of medicine, have to some extent, gone hand in hand. Formerly the degree from the law school or the medical school in and of itself entitled the holder to admission to practice. Now in both professions it is merely a preliminary to examination. Neither the lawyer nor the physician coming from another state, or holding a degree of a law or medical school in another state, can hold himself out or advertise in such a manner as to convey the impression that he is a legal practitioner of either profession, unless duly and legally licensed and admitted to practice in New York State under its laws, without being guilty of a misdemeanor.

Therefore, the court thinks that the defendant came within the spirit and the letter of the statute, and that the judgment of conviction was proper.

In a dissenting opinion Justice Ingraham says, among other things, that the construction given to Section 153 by the prevailing opinion treats the words "without having legally received the medical degree" as synonymous with the second clause, so that under this construction any foreign physician coming to New York State and appending to his name the letters "M.D.," unless he had received a license which authorized him to practice medicine in New York State,

would be guilty of a misdemeanor, a construction which seems to Justice Ingraham to be at variance with the express intention of the legislature. As he reads the section, the prohibition against a person assuming or advertising the title of "Dr." in such a manner as to convey the impression that he or she is a legal practitioner of medicine only applies where the person has not legally received the medical degree, or has not received a license which constituted at the time an authority to practice medicine under the laws of the state. A person who has legally received a medical degree is not prohibited from calling himself a physician because he has not also been authorized to practice medicine.

CORPORATIONS OTHER THAN HOSPITALS, ETC., ARE PROHIBITED FROM ADVERTISING TO PRACTICE MEDICINE.

People v. *John H. Woodbury Dermatological Institute, 192 N. Y. 454; 85 N. E. 697*

1908

The Court of Appeals affirms the judgment of conviction of the defendant of the crime of unlawfully advertising to practice medicine in violation of the provision of the statute of that state that "any person not a registered physician who shall advertise to practice medicine, shall be guilty of a misdemeanor."

The court says that it was argued that the context in the general act of 1907 regulating the practice of medicine, which contains the prohibition against advertising to practice medicine by any person not a registered physician, indicates conclusively that "any person" therein mentioned could not possibly have been intended to mean "any corporation."

The great difficulty in the adoption of a construction making this statute apply to corporations grows out of the existence of hospitals, dispensaries, and similar corporate institutions, which are unquestionably authorized by law to practice medicine, although, of course, only through the agency of natural persons who are duly registered as physicians. But the objects for which the defendant was incorporated were stated in the certificate of incorporation to be: "The carrying on of business of manufacturing chemical preparations and printing, publishing and selling books and pamphlets, relating to the same and advertising same." There could be no suggestion or pretense that this was a hospital corporation or dispensary.

In reference to hospitals and dispensaries, it could hardly have been the intention of the legislature in the act of 1907 to prohibit such corporations from advertising to do what they might do lawfully—that is to say, from advertising to practice medicine; yet it was argued that, if the court held that the act of 1907 made it a misdemeanor for any corporation (making the term "person" embrace a corporation) to advertise to practice medicine, it must also hold that incorporated hospitals and dispensaries fell within the prohibition. If this were the necessary result of the construction adopted, it would furnish a strong reason for rejecting that construction.

It seems to the court, however, that it can affirm this judgment without in any wise denying the lawful right of hospitals, dispensaries, and similar corporate institutions to advertise their readiness to exercise their lawful functions; and this simply for the reason that the general medical law of 1907 is obviously not intended to apply to the case of such corporations at all. In other words, the prohibitions therein contained against the practice of medicine without lawful registration in New York state, or in violation of any of the provisions of the statute, or against advertising by any person not a registered physician, were not intended to apply and plainly could not reasonably be held to apply to corporate bodies which by the express provisions of other statutes are authorized to carry on the practice of medicine on compliance with their provisions and without registration.

The incorporation of hospitals is provided for in Section 80 of the membership corporations law of New York. An institution of this character, possessing legislative authority to practice medicine by means of its staff of registered physicians and surgeons, comes under the direct sanction of the law in so doing,

and by the plainest implication, under well-settled rules of statutory construction relating to enactments dealing with the same general subject matter, is excepted from the operation of the act of 1907 under which the defendant was convicted.

It was suggested in behalf of the defendant that to attribute to the legislature a design to prohibit a corporation which was not registered as a physician from advertising to practice medicine was to charge the lawmakers with doing an absurd act, inasmuch as it is impossible under the law for a corporation to register as a physician. There is nothing in this point. It might just as well be urged that there is no need of a law prohibiting a minor from voting, since everybody knows that a minor has no legal right to vote. This fact does not prevent illegal attempts on the part of minors to exercise the right of suffrage, and the facts in the present case show that a corporation may undertake to practice medicine without authority of law.

We do not need the statutory definition to determine that this is advertising "to practice medicine" by a non-registered physician. But the defendants demanded acquittal on the contention that the strict construction required of all penal statutes would not here permit the extension of "person" to include a corporation, and counsel supported this contention with arguments and citations which, but for the New York Statutory Construction Act, seemingly ought to be convincing. This act provides that "the term person includes a corporation" in "every statute, unless its general object, or the context of the language construed, or other provisions of the law indicate" differently.

The general object of the medical law, instead of supporting, seemingly negatives the contention of the defendants. There is no escape from the conclusion that the legislature intended to confine the practice of medicine to registered physicians, and as an incident to such practice, similarly confined its advertising. It is the individual alone, in his own name, who has legally qualified and secured registration, that may practice or advertise to practice medicine. Even if registered he may not hide his identity by assuming some other name. Possibly the defendant Buggeln was a registered physician—there was no evidence thereof—and was seeking for some ulterior purpose to conceal his identity through this species of advertising. If so, he offended the statute other than as charged, but that did not excuse the legal entity, which existed purely by statute, for offending a plain provision of law.

Undoubtedly, on the subject of advertising the legislature had in view the common knowledge that any medical advertising beyond the simplest disclosure of name, location, office hours and school of medicine, contravenes, and long has contravened, time-honored ethics of the medical profession. It is quite probable from this knowledge it was assumed that all display advertising on the subject emanated from questionable or empirical sources. And as a protection against quacks and charlatans, it was deemed prudent to confine all advertisement to those who could and did present qualifications entitling them publicly to register as physicians, believing that any invasion of professional ethics would invite suitable professional penalties, leaving all others to the ordinary penalties of the law. This statute, therefore, does not forbid medical advertising, whether modest or bombastic, if done by a registered physician, but any and all advertising emanating from other sources is clearly forbidden.

The statute simply forbids all advertising unless it shall be in the name of some individual who shall be able to obtain public registration as a physician. This conclusively appears to have been the object the legislature had in view, and being both within the letter and the spirit of the act, it is the duty of the court to enforce it.

The doctrine of vested rights was not well taken. The powers secured by incorporation were those of "manufacturing chemical preparations and printing, publishing and selling books and pamphlets relating to the same." Not a single exhibit before the court pertained to these chartered rights; each was wholly outside and within a sphere of doubtful incorporate purposes.

The constitutional argument, in view of previous legislation and adjudications, was not convincing. If the legislature has constitutional competence to restrict medical practice to persons of ascertained qualifications, it may limit all individual matters, such as advertising, to the same class.

The effect a decision adverse to the defendants might have on incorporated hospitals, sanitariums and medical institutes need not be discussed. If they are offending the present law these defendants could not claim it as an excuse. As to such enterprises, however, it may be added that they come under other provisions of law, and the court is not informed that any advertise as did the defendant corporation. So far as this court is concerned, these other corporations carry on businesses which furnish accommodations for registered physicians to prosecute their professions with better results than at the home of the patient, and free accommodations for the unfortunate poor, who thus get medical care and wholesome attention which otherwise might be denied. As to them, the court knows of no alluring bait openly trailed to catch the dollars of those able and willing to pay for the promised conversion of plainness, or even ugliness, into beauty.

Every motion should be denied, and each defendant should be convicted on the count of the information which was selected by the prosecution for this trial.

EACH ACT BY WHICH ONE PRACTITIONER PERSONATES ANOTHER IS A SEPARATE CRIME

People v. *Dundenhausen, 130 App. Div. 760; 115 N. Y. Supp. 374*

1909

The First Appellate Division of the Supreme Court of New York holds that under Section 153 of the public health law of New York, which provides that "any person who shall practice medicine under a false or assumed name, or who shall falsely personate another practitioner of a like or different name, shall be guilty of a felony," each act by which one physician personates another constitutes a separate crime, and the commission of one crime has no relation to or bearing on the other.

As a consequence, the court further holds that when the indictment in this case charged a practicing of medicine with a particular individual on a particular date under a false name it was error to admit evidence of the defendant's relations to two other witnesses, one more than two months prior to the crime charged in the indictment, and one eight days before.

Here, the court says, the defendant was indicted for violating a particular statute, which provided that personating another practicing physician was a crime. To prove the crime it was necessary to prove that the defendant personated another practitioner, and the indictment alleged that that was what he did. To prove that he did practice medicine by prescribing for a person named in the indictment on a particular day named was not a part of a scheme the successful accomplishment of which the defendant was indicted for, but for violating the statute by doing a specific act charged in the indictment, and the intent of the defendant was not an essential element of the crime.

Justice Clarke, however, takes the ground, in a dissenting opinion, concurred in by Justice Scott, that the continued advertisement in the papers, inviting various persons to the same office for medical treatment by the same man, under the same impersonation, furnished a connection between the various occasions which permitted evidence thereof on the ground of a common intent and design; the offense charged being the fraudulent practicing of medicine.

OSTEOPATHS AND DEATH CERTIFICATES

Bandel v. *Department of Health of City of New York, 193 N. Y. 133; 85 N. E. 1067*

1909

The Court of Appeals holds that the statute of that state makes doctors of osteopathy physicians, while the Sanitary Code requires every physician in the City of New York to register his name with the department of health.

The court says that the only ground on which the health department refused to register this party, and the only reason advanced for opposing the motion to compel his registration, was, as specifically stated by the sanitary superintendent

in his affidavit, that "a doctor of osteopathy by reason of his limited training and the express prohibition against his use of drugs and medicines and the use of surgical instruments, is not a physician and is not competent to diagnose and treat disease as a physician, nor to give a certificate of death showing the cause thereof." The effect of the denial of registration as a physician to the party by the health department was that the body of a person who died while he was the medical attendant could not be buried on his certificate and not until a coroner had taken charge of the case and had held an investigation.

The court also expresses the view that when a person employs one licensed to practice, his family, in case of his death, should not be subjected to the intense annoyance of a coroner's investigation where the law does not require it. But it adds that, while, doubtless, the department of health can make stringent regulations as to the persons whose certificates of death it will accept for the purpose of a burial permit, it was sufficient to say that, so far as appeared, when this proceeding was commenced it had not made any regulation which excluded licensed osteopaths from the right to give such certificates.

But Chief Justice Cullen, with whom Justice Haight concurs, declares that the function of a coroner's inquest is to investigate the cause of death where there are reasonable grounds for suspicion that it has been occasioned by crime or violence. One purpose and a chief purpose of accepting a physician's certificate as evidence of the cause of death is doubtless to exclude suspicion of crime. Where death is caused by criminal means, it usually occurs through external violence or from poison. The osteopath is precluded by the law from practicing surgery or administering drugs, presumably for the reason that his education does not qualify him to practice where either drugs or surgery may be necessary. "I am, therefore," the Chief Justice continues, "not prepared to say that the board of health might not properly require that a certificate of death, which would exclude from the cause thereof either wounds or poison, be made by a physician who is competent to judge of such matters. It is sufficient for the disposition of this case to say that the Sanitary Code now in force draws no distinction between the two classes of physicians, but I think we should not intimate that the Sanitary Code may not properly be amended in this respect."

SCHOOL NOT "REGULARLY CONDUCTED" IF INCORPORATED ONLY IN ANOTHER STATE

People v. *Reid, 135 App. Div. 89; 119 N. Y. Supp. 866*

1909

The defendant applied for a license to practice osteopathy in the city of New York. The "college" from which the applicant for the license claimed to be a graduate, was located in the city of New York, but was incorporated under the laws of the state of West Virginia, as a stock concern, and had not been given permission by the regents of the state of New York to assume the name "college" or to confer diplomas or degrees, and had not obtained from the secretary of state a certificate authorizing it to do business within the state of New York. The evidence, the court holds, made the question as to whether this was a school or college regularly conducted, within the purview of the statute, one of law, which is decided in the negative.

The legislature of the state of New York evidently intended, the court says, to provide for licensing osteopaths who are graduates in good standing of a school or college of osteopathy duly organized, existing, and conducted under the laws of any state or territory within the United States; but it was not intended to provide that graduates of schools or colleges of osteopathy conducted within the United States, but without the sanction of the law of the state in which they are conducted, which is presumed to provide for proper supervision, should be licensed to practice osteopathy. Surely the legislature did not intend to recognize a school or college which was being conducted in violation of the laws of this state (New York), nor did it intend to recognize a school or college conducted in any other state or territory in violation of the laws of that state or territory.

It will not do to give to the words "regularly conducted school or college" the limited meaning for which counsel contended, namely, that they have reference only to the regularity of the sessions and continuity of the course of study at the school or college. The word "regularly," as used in legal proceedings and statutes, has a much broader meaning, and is ordinarily used in the sense of "duly," which means "lawfully," or "legally;" and such, the court thinks, is the meaning that the legislature intended by the use of those words in the provision of the statute involved here.

CORPORATIONS CANNOT PRACTICE MEDICINE

In re Cooperative Law Company, 198 N. Y. 479; 92 N. E. R. 15

1910

The Court of Appeals says that a corporation can neither practice law nor hire lawyers to carry on the business of practicing law, for it, that it cannot do so any more than it can practice medicine or dentistry by hiring physicians or dentists to act for it. The legislature, in authorizing the formation of corporations to carry on "any lawful business," did not intend to include the work of the learned professions. Such an innovation, with the evil results that might follow, would require the use of specific language clearly indicating the intention. Business in its ordinary sense was aimed at, not the business or calling of members of the great professions, which for time out of mind have been given exclusive rights and subjected to peculiar responsibilities.

PRACTICE OF MEDICINE BY "SUGGESTIVE THERAPEUTICS"

People v. *Mulford, 140 App. Div. 716; 125 N. Y. Supp. 680*

1910

The Fourth Appellate Division of the Supreme Court affirms a conviction of the defendant of practicing medicine without having a license and being registered as required by Chapter 344 of the Laws of New York of 1907, which declares that "A person practices medicine within the meaning of this act . . . who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

It appeared from the evidence, without contradiction, that the defendant had an office, where he received patients, and treated them for physical ailments, and received compensation therefor; that he gave no medicine, and prescribd none; that he performed no surgical operations, and used no surgical instruments; that his entire treatment consisted of the laying on of hands, and manipulation, breathing and rubbing his hands together; and that his treatment was beneficial to his patients. The sign in front of his office indicated that his treatment was known and designated as "suggestive therapeutics." On the evidence he was practicing medicine, the court holds, as defined by the above statute, and was guilty of a misdemeanor thereunder.

The only contention of the defendant was that the statute is a violation of the state and United States constitutions, but it does not seem to the court to require any extended discussion to show that the legislature had the right to enact the provisions of this law, and that it does not violate the provisions of the constitutions.

It was said that the defendant could do no harm, if he did no good, and that he should therefore have been permitted to practice his calling without interference, and that this law, which brought him within the definition of one who practiced medicine, and was therefore prohibited from doing so without a license and being registered, deprived him of a legal right to carry on a proper business, and was a violation of the provisions of the constitutions. But a patient may often suffer as well from a failure to prescribe proper remedies, or afford surgical relief promptly, as from making improper prescriptions, or performing unskilful

operations. A physician who holds himself out to treat patients for physical ills should know whether to do anything, and what to do, to relieve his patient; otherwise, he should not be permitted to practice, and impose on the unfortunate sufferers who, like the poor, are always with us, and many of whom need the protection of the state against quacks in and out of the profession of medicine. "I [Justice Williams wrote the opinion] have no sympathy with this class of practitioners, who seek to remain outside of the control of the state, for the welfare of the people."

PROSECUTION BY A MEDICAL SOCIETY NOT MALICIOUS

Schmidt v. *Medical Society of New York County, 142 App. Div. 635; 127 N. Y. Supp. 365*

1911

Action to recover damages for malicious prosecution. The defendant is a domestic corporation. The object of its incorporation is to assist in the preservation of the public health and secure the enforcement of laws regulating the practice of medicine in the county of New York. The plaintiff was arrested on a charge of practicing medicine without being legally authorized to do so. He was tried and acquitted. After his acquittal, he brought action to recover damages for his prosecution, alleging that the same was malicious and without probable cause. The answer put in issue the material allegations of the complaint. Plaintiff had a verdict for a substantial amount, and, from the judgment entered thereon and an order denying a motion for a new trial, defendant appeals.

At the trial the evidence established that the plaintiff was not authorized to practice medicine in the state of New York; that he held himself out as Dr. Schmidt, and claimed to have produced a remedy which would cure glanders; that he offered to treat and did treat a Dr. Gannett who was in Bellevue Hospital suffering from glanders.

The plaintiff must establish by a fair preponderance of evidence that his prosecution was malicious. Malicious prosecution has been defined as "one that is begun in malice without probable cause to believe it can succeed, and which finally ends in failure." In order to succeed, therefore, the plaintiff had to prove that his prosecution was malicious, without probable cause, and that he was acquitted. At the conclusion of plaintiff's case, the defendant moved for a dismissal of the complaint on the ground that the plaintiff had failed to prove want of probable cause. The motion was denied and an exception taken, and at the conclusion of the case defendant moved for the direction of a verdict on the same ground. This motion was also denied and an exception taken.

The court is of the opinion that the trial court erred in each case and that each exception necessitates a new trial. The trial court apparently was of the opinion that actual guilt and probable cause must concur in order to constitute a defense. This is not the law; probable cause alone being a complete defense. It is not necessary that the accused, in order to justify a prosecution, should appear to be guilty beyond all reasonable doubt. The test as to whether reasonable or not must be applied at the time when the prosecution was commenced. As to whether or not probable cause exists is a question of law for the court.

Plaintiff not only failed to prove want of probable cause, but, on the contrary, the existence of probable cause was conclusively shown. There is nothing to indicate that defendant was actuated by malice, or that it had any desire to do otherwise than carry out one of the objects of its incorporation, which was to prevent persons practicing medicine without being authorized to do so by the statutes of the state. It is unnnecessary to determine whether the plaintiff was actually engaged in the practice of medicine within the meaning of the statute; it being sufficient for the purposes of this appeal that there was at least probable cause for the defendant's believing that he was doing so. Any person of ordinary intelligence would have probable cause for believing that the plaintiff was engaged in the practice of medicine when the receipt of the letters from the "Department of Glanderine," offering to cure Dr. Gannett of glanders, plaintiff's subsequent visits to the hospital, his conduct there, leaving the medicine which

he did with directions as to its use, and permitting himself to be called a doctor, are considered. These facts, being uncontradicted and unexplained, justified the defendant in doing what it did. The trial court should have so held and dismissed the complaint at the close of plaintiff's case, and, having failed to do that, should have directed a verdict for the defendant at the conclusion of the whole case.

SUFFICIENCY OF INDICTMENT—PRACTICING MEDICINE DEFINED

State v. *Van Doran, 109 N. C. 864; 14 S. E. 32*

1891

Where a statute makes two or more distinct acts, constituting separate stages of the same transaction, indictable (as, in the case at bar, the acts of practicing, or attempting to practice, medicine), both or all may be charged in a single count of the indictment. If the distinct acts, representing the successive stages of the transaction, were connected in the statute by the word "or," it was in accordance with the settled precedents in drawing the indictment to couple the independent clauses by using the word "and," instead of following closely the language of the statute and using "or." The reason for discarding the disjunctive, and substituting the conjunctive, was that usually the alternative charge left the defendant in such doubt as to the nature of the offense which he was held to answer that he could not intelligently prepare his defense. But upon the maxim, *cessante ratione legis cessat et ipsa lex*, the better rule seems now to be that "or" is only fatal when the use of it renders the statement of the offense uncertain, and not so when one term is used only as explaining or illustrating the other, or where the language of the law makes either an attempt or procurement of an act or the act itself, in the alternative, indictable. 1 Whart. Crim Law, Section 294; U. S. v. Potter, 6 McLean, 186. Where it is manifest that the defendant cannot be embarrassed by uncertainty in preparing his defense by reason of the use of the disjunctive instead of the conjunctive, if the form ordinarily used in drawing the indictment should be treated as an established precedent essential in all cases, it would be an arbitrary and unreasonable rule. Taking the language of the statute under which the indictment in U. S. v. Potter, supra, was drawn, as an illustration, it would be difficult to explain how the accused would be put to disadvantage or left in doubt in making his preparation to meet the accusation, because he was charged with "cutting or causing to be cut," and was uncertain whether the state would offer testimony tending to prove the commission of the one act or the other, when all the authorities concur in stating the rule to be that, if the usual precedent had been followed and the language employed in the indictment had been "cutting and causing to be cut," the prosecution could have sustained the charge by proof of either act, thus leaving the defendant in equal uncertainty. 10 Amer. & Eng. Enc. Law, "Indictment," p. 599*d*, par. 16*h*; State v. Keeter, 80 N. C., 472; Bish. St. Crimes, Section 244; State v. Ellis, 4 Mo., 475; State v. Locklear, Busb. 205; Whart Crim. Pl. & Pr., Section 252. But if we admit (as many authorities tend to prove) that, where no statute affecting procedure has been passed to modify it, it is a rule of law that charges of the acts representing the different stages of the same transaction must be coupled by the word "and" in the indictment, still, giving a fair interpretation to our curative act (Cole, Section 1183), we think that the charge is expressed "in a plain, intelligible, and explicit manner" (certainly as definitely as in the old prescribed precedent); that sufficient matter appears in the indictment to enable the court to proceed to judgment; and therefore that it should "not be quashed." State v. Rinehart, 75 N. C., 58; State v. Walker, 87 N. C., 541; State v. Lane, 4 Ired., 113; State v. Wilson, 67 N. C., 456; State v. Sprinkle, 65 N. C., 463; State v. Parker, Id. 453. The defendant moved in arrest of judgment because the indictment failed to specify upon what particular person he practiced medicine or surgery. The governing principle to be applied in passing upon the sufficiency of the averments in an indictment is that the nature of the offense charged should appear so explicitly and plainly from its terms as to leave the defendant in no well-founded doubt in preparing to meet the accusation. The indictment is framed under section 5, c. 181, Laws 1889. It is not essential that the prosecution should show, in order to con-

vict under the statute, that the defendant ever prescribed for or practiced upon a particular patient; but it would be sufficient to prove that he held himself out to the public as a physician or surgeon, and invited or solicited professional employment from any who might need or desire such service. If the defendant merely held himself out to the public as a physician or surgeon, he was guilty of the offense created by the statute. It would be unreasonable, therefore, to declare that the indictment upon its face is defective because the charge is not more specific in describing the manner of practicing or attempting to practice. The precedents found in the books, and used in prosecutions, under similar statutes, tend to sustain our position. Bish. Dir. & Forms, Sections 996-1000. The offense seems to be described with sufficient certainty in the language of the law, and no extrinsic proof is needed to bring it within its terms. This indictment is not analogous to the charge of disposing of mortgaged property, drawn under the acts of 1873-74 and 1874-75, because in that case, as the court declared, the words "dispose of," in their literal sense, were worse than a drag-net, and, taken with reference to the subject at hand, they might mean disposition by removing from the county, concealing, selling, or by the actual consumption of such as were fit for food." State v. Pickens, 79 N. C., 652. Besides, there were certain extrinsic facts that it was essential to aver and prove. State v. Burns, 80 N. C., 376. The offense is charged in the indictment in such terms that the defendant cannot be guilty of it without being brought within the express meaning of the statute, and this has been declared a test of its sufficiency in such cases. Young's Case, 15 Grat., 664. It has been stated as an established rule that where an offense is prohibited in general terms in one section of the statute, and in another and entirely distinct section the acts of which the offense consists are specified, it is not necessary that anything but the general description should be set out in the indictment. State v. Casey, 45 Me., 435. Where the very nature of a charge is such as to involve the idea of attempting to engage in a business, or unlawfully engaging in a business, prohibited by statute, there is not the same reason for specifying the act as where the allegation is, and the specific proof must be, that the accused was guilty of a single unlawful act, which would constitute a distinct offense as often as the act might be repeated. Bish. St. Crimes, Section 1037; People v. Adams, 17 Wend., 475. Thus, if the defendant were indicted for retailing, every distinct sale to the same or different persons would constitute a criminal offense, while separate indictments would not lie for every attempt to practice, or every separate solicitation of practice, within the statutory period. State v. Bryan, 98 N. C., 644, 4 S. E. Rep., 522.

It is too late to question the constitutional validity of a statute, enacted in the exercise of the police power of a state, and purporting to protect the public against imposition and injury to health by requiring that persons who engage in the practice of medicine shall submit to an examination conducted by learned physicians, and shall produce a license from such competent masters of the medical science. Cooley, Const. Lim., *596.

The proviso to section 5 (under which the bill is drawn) declares that "this act shall not apply to women pursuing the avocation of midwife, nor to reputable physicians or surgeons resident in a neighborhing state, and coming into the state for consultation with a registered physician of this state." The comity thus extended to reputable physicians, who have probably been subjected to some suitable test of competency (under the laws of the states in which they reside) before being permitted to practice, is widely different in its nature from the attempt to grant the exclusive privileges coming within the inhibition of article 1, section 7, Const. N. C. The proviso to the section is merely an exception to a restrictive or prohibitory law, inserted through courtesy to sister states, upon the assumption that they have provided amply for the protection of the health of their citizens by legislation similar to ours, and with the further safeguard that our own registered physicians alone have the power to extend this courtesy to non-residents upon whose opinions they may place a high estimate.

At the request of the solicitor, the court charged the jury that if "the defendant attended any sick person, examined the condition of such sick person, and prescribed the medicine of his own make for the sick person, and held himself out to the public as competent to prescribe the medicine of his own make in those

cases wherein it was the proper remedy in his opinion, and did prescribe it in such cases, the defendant had violated the criminal law," and should be found guilty. A witness testified that the defendant examined his throat, diagnosed the disease, declaring it to be catarrh, said he would cure the witness and furnished some pills that he had been selling as a proprietary medicine. Another witness testified that the defendant stated, when on trial before the justice of the peace, that he was a practicing physician in Washington county. Mr. Armistead testified that the defendant told him that he had a right to practice medicine, and intended to do it; that he did not understand the defendant to say that he used only his own proprietary medicine. Dr. Murray visited Mrs. Mathews, and found the defendant in attendance upon her, when he said that he had as much right to practice medicine as Dr. Murray, a registered physician, had. He had medicine in the sick-room, and said he was giving it to the patient, who was having fits,—Indian hemp and pulsatilla. The defendant, when examined in his own behalf, said that he had been called to see plenty of sick people, and, "after examining them," if it was appropriate, prescribed his medicine. We think that the instruction embodied the law applicable to the testimony bearing upon the charge. An unlicensed person, claiming to be a physician, and holding himself out to the world as such, cannot, after examining a patient who has asked his services, diagnosing the disease, fixing an amount or price for which he will cure the patient, and giving him a prescription, evade the law by proving that the medicine administered was a proprietary remedy prepared and sold by him. If such were the law, a pretender, with a half dozen or more medicines of his own manufacture, and marked as nostrums suitable for certain classes of diseases, might declare himself a graduate in medicine, and capable of curing diseases of all kinds. After examining the patient, and determining which one of his ready-made preparations would prove the panacea to meet the particular symptoms, might administer it, and thus defeat and evade this salutary law passed for the purpose of preventing quacks from masquerading as trained medical men. A vendor of patent medicines, who does not pretend to diagnose disease and determine which of his remedies is proper in a particular case, is not a violator of this statute; but that avocation cannot be used to shelter one who is practicing medicine, and holding himself out as a physician, and who varies his prescriptions to meet symptoms discovered on his own examination. We think that the evidence warranted the judge in giving the instructions asked by the solicitor, and in adding that, if "the defendant had practiced in the county [Washington] within two years without first having registered and obtained a certificate,—that is, prescribed for sick persons or held himself out to the public as a physician or surgeon,—he was guilty." State v. Bryan, supra. Defendant's counsel in his brief says, after enumerating the exceptions to which we have adverted, that all others are abandoned. He does not insist upon the motion to quash for want of the negative averments that the defendant was not a reputable physician, etc., and his abandonment must be considered as complete a waiver as an agreement to cure the defect, if any, except by amendment, would have been. There is no error, and the judgment is affirmed.

Shepherd, J. (dissenting). Fully sympathizing, as I do, in all reasonable efforts to free the administration of the criminal law from the refinements of needless technicalities, I am nevertheless unable to concur with my brethren in sustaining the indictment in the present case. The defendant is indicted under section 5, c. 181, Acts 1889, which makes it a criminal offense for any person to "practice, or attempt to practice, medicine or surgery in this state" without having first registered, and in other respects complied with the law. It thus appears that the statute has expressly created two offenses, viz., the commission of the inhibited act and the attempt to commit it. These offenses are so distinct that in the latter a greater particularity is required in the indictment; this court having conclusively settled in State v. Colvin, 90 N. C., 717, that in such indictments some overt acts of the accused, which in the ordinary course of things would result in the commission of the particular offense, must be alleged and proved. The offenses being distinct, it seems quite clear to me that they cannot be charged with the alternative, and I am unable to find a single authority in which such an indictment has ever been sustained. In addition to the elementary

works on the criminal law, we have an express decision of this court that such a bill is fatally defective. State v. Harper, 64 N. C., 130. Even the very statute (Code, section 1183) which does away with formal objections, etc., provides that the offense shall be set forth "in a plain, intelligible, and explicit manner;" and how can it be said that this requirement is complied with by charging the defendant, as Mr. Archbold puts it (Crim. Pr. & Pl. 278), "with having done so or so?" It is true that there are some authorities which hold that the use of the disjunctive is not fatal when the acts represent successive stages of one criminal transaction, as when the charging is "cutting or causing to be cut;" but it must be noted that these cases relate only to one distinct offense, and rest upon the idea that one part is used only as expressing or illustrating the other. Mr. Wharton (Crim. Law, section 294) shows that the weight of authority is even against this practice; for he says that if the charge is "in the disjunctive, as that he 'murdered or caused to be murdered,' 'forged or caused to be forged,' 'burned or caused to be burned,' 'sold spirituous or intoxicating liquors,' * * * it is bad for uncertainty." After citing some few American decisions to the contrary, he remarks that "the principle in those cases seems to be that 'or' is only fatal when it renders the statement of the offense uncertain, and not so when one term is used only as explanatory or illustrating the other." It is very difficult to understand how the mere charge that one attempted to do an act can explain or illustrate that act when already completed. I think that we should adhere to the well-settled rule that alternative charges of distinct offenses ought not to be sustained.

EXEMPTING PRIOR PRACTITIONERS UPHELD

State v. Call, 121 N. C. 643; 28 S. E. 517

1897

The defendant is indicted for practicing medicine in violation of the law, His counsel contends that the law is contrary to the state constitution, which forbids exclusive privileges and emoluments to any set of men, and which prohibits monopolies and perpetuities; and, further, that it is obnoxious to the fourteenth amendment to the constitution of the United Sates, which prohibits any state to deny to any person the equal protection of the laws. That the statute is not in violation of the state constitution is thoroughly discussed and held in State v. Van Doran, 109 N. C., 864, 14 S. E., 32. It is not to be questioned that the lawmaking power of a state has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine; to teach, to be druggists, pilots, engineers, or exercise other callings, whether skilled trades or professions, affecting the public and which require skill and proficiency. To require this is an exercise of the police power for the protection of the public against incompetents and imposters, and is in no sense the creation of a monopoly or special privileges. The door stands open to all who possess the requisite age and good character, and can stand the examination which is exacted of all applicants alike. The defendant, however, contends that the statute is unconstitutional on the additional ground that it exempts from its requirements those physicians who were already practicing medicine and surgery in this state on March 7, 1885. The first statute, making it indictable to practice medicine and surgery without an examination by the state board of medical examiners, and a license therefrom, was enacted at the session of 1885, and was made prospective, so as to apply only to those who should begin the practice of medicine and surgery thereafter. This was not unreasonable. It was fair to assume that those already in the practice, many of whom had grown gray in the service of humanity and the alleviation of suffering, had already received that public approbation which was a sufficient guaranty of their competency, and should not be needlessly subjected to the humiliation of an examination, while those already in practice, who had proved incompetent, had been equally stamped with public disapproval. When the act of 1889 was enacted, it recognized that the new legislation had been prospective by the act of 1885, and March 7, 1885 was made the dividing line, those practicing medicine and surgery before that date being left to the test of the public approval or disapproval acquired by them, and

those beginning practice since that date, having presumably knowledge of that statute, were required to undergo the examination and obtain the license exacted by it. The statute, bearing alike upon all individuals of each class, is not a discrimination forbidden by the state constitution nor by the fourteenth amendment. It has been frequently adjudged by the supreme court of the United States that the fourteenth amendment does not restrict the powers of the state when the statute applies equally to all persons in the same class, and that the state is the judge of the classification. A classification of physicians practicing before the act and of those beginning thereafter, and distinguishing between those having the diplomas of a medical college and those not, was held to be reasonable, and within the legislative discretion.

OBSTETRICS PRACTICING MEDICINE—INDICTMENT

State v. *Welch, 129 N. C. 579; 40 S. E. 126*

1901

The defendant is indicted for practicing medicine or surgery without license. The defendant moved to quash the bill, and also in arrest of judgment, because: (1) It did not negative the provision in the statute allowing persons to pursue the avocation of midwifery. (2) The bill fails to allege the defendant practiced for "fee or reward." (3) The bill alleges defendant "unlawfully and wilfully did practice or attempt to practice medicine or surgery," and the offenses of practicing and attempting to practice are so distinct that the charge is not set forth in "a plain, intelligent, and explicit manner." (4) That the words "register and obtain" license should be in the bill, and not merely a failure to obtain license. The motion being overruled, the defendant excepted. The provision as to the exception of "women practicing as midwives" is in the proviso, and, instead of constituting a part of the offense, withdraws a certain class from its operation. Hence the bill need not negative the defendant belonging to that class. That would be a matter of defense, and, indeed, it affirmatively appears in the evidence that the defendant is not a woman. This statute does not contain the words "without fee or reward." The first two exceptions are passed upon and denied in State v. Call, 121 N. C., 643, 28 S. E., 517. The third exception is fully discussed and held invalid in State v. Van Doran, supra. The words excepted to in the fourth ground of defendant's motion are copied from the bill in Van Doran's Case, which was cited again in State v. Call, supra, which case says "an approved form of indictment under the act of 1889 may be found in State v. Van Doran." Indeed, as the bill charges that the defendant did not exhibit to the clerk the license nor make the oath necessary to procure registration, and did practice, "not then and there having obtained from said clerk of the court a certificate of registration," it certainly charges that the defendant "did not register and obtain license." The evidence was uncontradicted that the defendant practiced obstetrics. The defendant offered no evidence, and requested the court to charge the jury "that the practice of obstetrics was not in any sense the practice of medicine or surgery." This the court refused, and told the jury, if they believed the evidence, to find the defendant guilty. In this also there was no error.

PRACTICE OF MEDICINE—OSTEOPATHY—USE OF TITLE

State v. *McKnight, 131 N. C. 717; 42 S. E. 580; 59 L. R. A. 187*

1902

The law of 1885 amended Section 3132 of the Code with regard to practicing without license by adding thereto: "And any person who shall begin the practice of medicine or surgery in this state for a fee or reward, after the passage of this act, without first having obtained license from said board of examiners, shall not only not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery, or any of the branches thereof, but shall also be guilty of a misdemeanor," etc. In this case

the question was the simple one, whether one who practices "osteopathy" is indictable if he has not procured the license required for any one by the above section before beginning "the practice of medicine or surgery." A special verdict of the jury found that the defendant's "treatment of his patient did not consist in the administration of drugs or medicines, but in the manipulation, kneading, flexing and rubbing of the body of his patients and in the application of hot and cold baths, and in prescribing rules for diet and exercise; . . . that the defendant was engaged in the general practice of that science; that he also prescribed hypnotism and suggestion under hypnotism." It also found that "upon two occasions he used a small surgeon's knife in opening an abscess in the mouth of one Shedd, but charged no fee for his services." The Court says that all it can declare on the facts found in the special verdict is that the defendant's practice was not the practice of medicine or surgery, and no license from the medical board of examiners was required. It says that the only surgery was without fee or reward, an act of charity and that was incidental and not in the usual course of the practice of osteopathy. It can not be said that one practices "medicine and surgery" when he uses neither drugs, medicines or surgery. Section 3124 requires the "board of medical examiners" to examine all applicants, "to practice medicine or surgery in anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics and the practice of medicine." It can not be conceived that the legislature would require the above examination for a profession which eschews the use of drugs and surgery. As to the argument that the science, if it be a science, of osteopathy is an imposition, the court, legally speaking, knows nothing. It only knows that the practice of osteopathy "is not" the practice of medicine or surgery as is commonly understood, and therefore it is not necessary to have a license from the board of medical examiners before practicing it. If it is a fraud and imposition, and injury results, the osteopath is liable both socially and criminally. Doubtless there is an appeal to the imagination, but that is a necessary ingredient in all systems of healing. The aim of medical science, now probably the most progressive of all the professions, is simply to "assist nature." Osteopathy proposes to do that by other methods than by the use of medicines, or the surgeon's knife. Moreover, the court says that it attaches no weight to the argument that the defendant hung out his sign and advertised himself as "doctor." The special verdict found that he had a diploma from a college of osteopathy bestowing that title upon him. There are many kinds of doctors besides medicine—as doctors of law, doctors of divinity, doctors of physics and veterinary doctors and others still. Besides in this country, so far at least as titles go, "honors are easy." If the General Assembly shall deem osteopathy a legitimate calling it may see fit, possibly, to protect educated and skilled practitioners by requiring an examination and license by learned osteopaths of applicants for license, but certainly the examination would be on subjects appropriate to secure competency therein, and not on an entirely different course such as that prescribed for applicants to practice medicine and surgery. Dentistry is not the "practice of medicine of surgery," but it is a related profession, as is also pharmacy, and each has its prescribed course of examinations of applicants for license. Whether the same rights and dignity shall be bestowed on osteopathy is a matter for the general assembly, or if it is found to be a fraud, its exercise may be made indictable. It seems that it more nearly approximates nursing in many respects (though differing in others) when taught as a profession.

CONSTITUTIONAL LIMITS TO SCOPE OF MEDICAL PRACTICE ACTS

State v. *Biggs, 133 N. C. 729; 46 S. E. 401; 64 L. R. A. 139; 98 Am. St. Rep. 731*

1903

The Supreme Court refers to the incorporation of "The State Medical Society," in 1858-59, and the sustaining, but not without great hesitation, of the medical-practice act, passed in 1885, and says, among other things, that, after the decisions in State v. Call, 121 N. C., 646, and State v. McKnight, 131 N. C.,

723, moderation and wisdom would have suggested that the matter rest. Those who wished to be treated by practitioners of medicine and surgery had the guaranty that such practitioners had been duly examined and found competent by a board of men eminent in that high and honorable profession, and those who had faith in treatment by methods not included in the "practice of medicine and surgery," as usually understood, had reserved to them the right to practice their faith and be treated, if they chose, by those who openly and avowedly did not use either surgery or drugs in the treatment of diseases. The courts have declared that they possessed this right, and that the legislature could not, under the constitution, restrict all healing to any one school of thought or practice. What is "the practice of medicine and surgery" is as well understood, and its limits, as the practice of dentistry. The courts have also held that of the many schools of "medicine and surgery" the legislature could not prescribe that any one was orthodox and the others heterodox, but that those professing the different systems—"allopathic," "homeopathic," "Thompsonian," and the like—shrould be examined on a course such as is taught in the best colleges of that school of practice, but that it is not essential that a member of each, or of any special school, should be on the board of examiners. It is common knowledge that railroad charters are drafted by "promoters," and hence should be construed most strongly against the grantees and in the interest of the public. The same construction can fairly be applied to act of 1903, amendatory of the charter of this corporation, in whose supposed interests it was evidently drafted, and not solely in the interest of the public. Under the guise of "construction" of those well-understood terms, the "practice of medicine and surgery," the act essays to provide that the expression "'practice of medicine and surgery' shall be construed to mean the management 'for fee or reward' of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever." That is, the practice of surgery and medicine shall mean practice without surgery or medicine, if a fee is charged. If no fee is charged, then the words "surgery and medicine" drop back to their usual and ordinary meaning, as by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward? Yet, unless the act confers, and is intended solely to confer, protection on the public, it is invalid. The legislature can not forbid one man to practice a calling or profession for the benefit or profit of another. The act is too sweeping. Beside, the legislature could no more enact that the "practice of medicine and surgery" shall mean "practice without medicine and surgery" than it could provide that "two and two make five," because it can not change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M.D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the constitution. This is a free country, and any man has a right to be treated by any system he chooses. The law can not decide that any one system shall be the system he shall use. If he gets improper treatment for children or others under his care, whereby they are injured, he is liable to punishment; but whether it was proper treatment or not is a matter of fact, to be settled by a jury of his peers, and not a matter of law, to be decided by a judge, nor prescribed beforehand by an act of the legislature. The public has a right to know that those holding themselves out as members of that ancient and honorable profession—the medical profession—are competent and duly licensed as such. The legislature can exert its police power to that end, because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have a right to use such methods if they wish, and the attempt to require an examination of the character shown for the application of such treatment is not warranted by any legitimate exercise of the police power. In this case, the court says, the defendant was found guilty of the following acts, and no more: (1) Administering massage baths and physical culture; (2) manipulating muscles, bones, spine and solar plexus; (3) kneading the muscles with the fingers of the hand; (4) advising his patients what to eat and what not. And all this without prescriptions, without any drugs or surgery. These acts, by the terms of the statute, are

harmless and not indictable, "unless done for fee or reward." There is nothing in this treatment that calls for an exercise of the police power by way of an examination by a learned board in obstetrics, therapeutics, materia medica and the other things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine. And the court reverses a conviction of unlawfully practicing medicine and surgery.

EXAMINING BOARDS AND REDRESS OF REJECTED APPLICANTS—EVIDENCE

Ewbank v. *Turner et al., 134 N. C. 77; 46 S. E. 508*

1903

The power of the legislature to require examination and certificate as to the competency of persons desirinig to practice professions or skilled trades is upheld, the court calling attention to the fact that the state exercises this police power for the protection of the public from impostors and incompetents, and not to the end of conferring exclusive privileges on any particular body of men, for to do the latter is prohibited by the state constitution. It is a power to be exercised for the public good, and the legislature is to judge of the method of appointing the examiners, and can prescribe the nature of the examination, unless it appear plainly that the power to regulate is used in reality in violation of the guaranties in the constitution, and for the purpose of conferring exclusive privileges, and not solely for the protection of the public. The code provides for a board of examiners, to consist of six members of the North Carolina Dental Society, to be elected by said society. The presumption is that this honorable body will elect six of its ablest and most prominent members for the important duty of keeping up the standard of their profession by a just, reasonable and impartial examination of applicants. Should this important duty be neglected and incompetent or unworthy members be chosen, the remedy is by legislative repeal, or change of the method of selecting the board. Section 3151 provides that "said board shall grant a certificate of proficiency in the knowledge and practice of dentistry to all applicants who shall undergo a satisfactory examination, and who shall receive a majority of votes of said board on such proficiency." The lawmaking power having intrusted such examination to the board thus constituted, and required that the examination shall be satisfactory to them, and such requirements being reasonable and in violation of no constitutional provision, the courts can not intervene and direct the board to issue a certificate to one who the majority of the board have held has not passed a satisfactory examination, because, on the examination of experts, the court or jury might think the examination of the plaintiff ought to have been satisfactory to the board. That is a matter resting in the consciences and judgment of the board, under the provisions of the law, and the courts can not by a mandamus compel them to certify contrary to what they have declared to be the truth. Had the board refused to examine the applicant on his compliance with the regulations, the court could by mandamus compel them to examine him; but it can not compel them to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking. One remedy, if there should ever happen such abuse of trust as that the board "wrongfully, unlawfully, unjustly, arbitrarily, and without just cause or reason" declined to issue a license, would be, as already stated, by the legislature repealing the act, or providing a different method of selecting the board, or regulating the method or course of examination, or prescribing a review of the finding of the board by some other body, if the General Assembly should think proper. Another remedy would be to follow the precedent set by applicants for license to practice law, who, when rejected, study their prescribed course over again, and stand for examination at the next regular day. This is, perhaps, the most sensible course, for no man ever knows his profession too well. Another remedy still: If the applicant avers his rejection was caused by improper motives, his remedy is an action for damages against the individuals composing the board; alleging bad faith or arbitrary disregard of their duties, or improper animus against the plaintiff, or other

malversation in their discharge of duty. In such action it might be difficult to prove the charges, unless by declarations made by the defendants themselves, for certainly the examination paper of the plaintiff himself would not be competent, in the first place, since, though experts might testify to its sufficiency in their judgment, that does not negative the good faith of the board, whose judgment, if exercised in good faith, is a protection to them. Malicious, illegal, or arbitrary action must be shown by direct evidence, and not by inference to be drawn by the jury from the fact that the opinion of witnesses introduced as experts may differ from the opinion of a legal board of examiners as to the sufficiency of the examination. It is only when there shall be other evidence first introduced, laying a sufficient ground for a charge of bad faith and misconduct, that the examination paper of the plaintiff could possibly be competent, and then only in corroboration of the evidence first introduced. And in no aspect could the papers of other applicants at the same time and place be put in evidence, for, even if they had been admitted to practice on insufficient answers, the plaintiff was not hurt thereby, and the introduction of irrelevant matter would only confuse the issue, which would be whether the plaintiff was refused a certificate, though he was shown to be qualified by his answers, by the arbitrariness, improper animus, and misconduct of the examining board.

FAILURE TO REGISTER NOT A DEFENSE AGAINST MALPRACTICE SUIT

Musser's Executor v. *Chase, 29 Ohio St. 577*

1876

The original action was brought by the defendant in error (Melvina Chase) against Jacob Musser, in life, to recover damages for the careless and unskillful treatment, by the defendant, of a tumor on the plaintiff's nose, whereby she had wholly lost that organ. Pending the suit the defendant died, and the action was revived against his executor, the plaintiff in error. The trial resulted in a judgment in the plaintiff's favor for $3,000, in which no reversible error was found.

The Supreme Court of Ohio says that under the act of 1868 it is made a penal offense for any person to practice medicine in any of its departments "who has not attended two full courses of instruction and graduated at some school of medicine," unless such person "has been continuously engaged in the practice of medicine for a period of ten years or more."

Conceding that the practice of Musser, as shown in this case, was in violation of this statute, it does not follow that the plaintiff, if injured by his malpractice, is without remedy by a civil action. The court fully recognizes the principle that no right of action arises on a transaction prohibited by law; but the principle does not apply in this case. The object of this statute was not to make the practice of medicine unlawful, but simply to protect the community from the evils of empiricism. Whether the principle would apply if it were shown that the plaintiff, at the time of employment, had knowledge that the defendant was excluded from the right to practice his specialty (to-wit, the treatment of cancers) by this act, we need not inquire, as it is nowhere in this record shown that she had such knowledge. It is enough now to say that the duty and risk of ascertaining the qualifications of the defendant to practice was not devolved by this statute on the plaintiff, and therefore in no sense can she be regarded as a *particeps criminis*. The proposition on this point contained in the defendant's first request to charge the jury is a mere abstraction. Such knowledge was not alleged against her, nor was it made the subject-matter of proof. To hold in such case that public policy forbids a civil remedy for the injury sustained, would be to extend the operation of the statute beyond the purpose for which it was made, and to inflict a punishment where none is prescribed. * * *

The following requests to charge were refused by the court: "1. If the jury find the deceased was not a licensed physician, and said plaintiff knew that fact, and that said deceased only used, at her request, a remedy he had obtained from another, who claimed to be a physician, that then said agreement set up in said petition is illegal and void, and the plaintiff cannot recover in the action. 2. That before the plaintiff can recover in the action she must show by her evidence to

the satisfaction of the jury that said employment must have been entered into at the request of the defendant, as is averred in the petition; and if the evidence shows that said deceased was employed and retained by said plaintiff at her request, then the verdict must be for defendant." * * *

The second proposition contained in the above series of requests is clearly not the law. The averment that the retainer of the defendant was at his special instance and request is technical, and is sufficiently proved by showing that the defendant held himself out as a practitioner soliciting public patronage, and that the employment was by mutual consent. The contract of employment being entered into, it matters not, under this averment, that it was induced at the special instance and request of the plaintiff. * * *

By looking into the record we find that all the law stated in the requests to charge, and material to the issue, was given to the jury, in substance, as follows: "But if you find from the evidence that the plaintiff, at the time of the employment mentioned in the petition, knew that the defendant was not a physician, that she knew he was not skilled in the removal of tumors and cancers, and that he did not know the nature, appearance and character of such diseases, and that she did not rely upon his skill and ability as a physician, or as a person skilled in the removal and cure of tumors and cancers, but upon a recipe or prescription which the defendant claimed would remove and cure tumors and cancers, then, if the injury complained of in the petition was caused or produced by such recipe or prescription, and not by the negligence or carelessness of the defendant, then the plaintiff cannot recover." This charge, upon the propositions contained in the requests, was as favorable to the defendant as he had a right to ask.

The testimony shows that the original defendant was a farmer by general occupation, but also held himself out as a cancer doctor, having skill and experience in the treatment and cure of cancers, and claiming also to be in possession of a certain recipe or prescription, procured from one Dr. Garrett, a cancer specialist, that would remove cancers without affecting sound tissue. Such was the character in which he was employed by the plaintiff below.

Now, it is claimed by plaintiff in error that such proof did not sustain the averment in the petition that he was employed as a physician. We think the gravamen of this averment is, that he was employed as one professing to have skill and experience in the treatment and cure of the malady with which the plaintiff was supposed to be afflicted, and that the proof not only sustains the averment when properly construed, but brings the party employed within the rule of law which requires the exercise of such skill and care as are usually possessed and employed by the general physician in the treatment of such maladies . * * *

CONFERRING JUDICIAL POWER ON BOARD NOT UNCONSTITUTIONAL

France v. *The State, 57 O. St. 1; 47 N. E. 1041*

1897

This is an appeal from a conviction under the medical practice act of 1896. The contention of the plaintiff is that the act is repugnant to the constitution of the state and to the Constitution of the United States. The first contention of the plaintiff is that the act is unconstitutional and that it confers judicial power on the board, which power, under the constitution of the state, belongs exclusively to the courts. The Supreme Court concedes that the authority conferred by the act includes the power to examine into and decide questions requiring the exercise of judgment but holds that it does not follow that the exercise of such authority is necessarily the exercise of judicial power. In numerous instances the legislature has invested various boards, bodies and officers with the power of ascertaining facts and hearing and deciding questions when necessary or expedient to carry into execution laws for the public good. Such powers are conferred on boards of county commissioners and township trustees and other boards requiring the exercise of the power to hear and determine important questions sometimes involving large interests. The validity of such legislation has seldom been challenged and has been uniformly sustained in the courts. The proposed statute is to prevent those who are unfit from engaging in the practice of med-

icine. The power to pass upon the qualifications required must necessarily be committed to some board or body other than the legislature and may be characterized as administrative rather than judicial.

The second contention of the plaintiff is that the statute is in conflict with the provision of the federal constitution which prohibits the passsage of *ex post facto* laws. The court holds that this contention is not sound. Neither the refusal to grant a certificate nor the revocation of a certificate to practice medicine has any retroactive operation nor imposes any new or additional punishment or disability for a past act. The statute has prospective operation only and does not purport to have a retroactive effect. The plaintiff also contends that the statute discriminates against physicians and surgeons who reside out of the state, but as it is not contended that this provision invalidates the right of personal liberty of the plaintiff, the court holds that it cannot be made available by the plaintiff in this case as he is a resident of the state and is not competent to assert the rights of non-residents. The court further holds that the exception in the statute in favor of non-resident physicians does not render the act obnoxious to the federal constitution. The court finds nothing unreasonable in the statute in question and affirms the judgment of the lower court.

ESSENTIALS OF A VALID INDICTMENT

Hale v. *State, 58 Ohio St. 676; 51 N. E. 154*

1898

William F. Hale was convicted in the court of common pleas of unlawfully practicing medicine. The judgment was affirmed by the circuit court, and defendant moves for leave to file a petition in error. Motion overruled.

As the statute on which this prosecution is founded is of recent enactment, and the questions presented are likely to arise in other cases, it has been deemed proper to report the decision upon the motion.

1. The statute provides that any person shall be regarded as practicing medicine or surgery, within the meaning of the act, "who shall append the letters M.D. or M.B. to his name, or for a fee prescribe, direct or recommend for the use of any person, any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily injury, infirmity or disease." The defendant contends that, as the indictment, in the same count, charges that the accused prescribed a medicine for the use of a person named, and appended the letters "M.D." to his name, subscribed to directions written on the package for the use of the medicine, two distinct offenses are charged, rendering the indictment obnoxious to a motion to quash on the ground of duplicity. The court sustains the indictment. The defendant also claims that the indictment contains no averment that he was not a graduate in medicine or surgery, or a legal practitioner under the laws in force when the statute was passed, and that such an averment is necessary to the statement of an offense under the statute, because neither those who were legal practitioners at the time of its passage, nor graduates of medical colleges, are required to leave certificates obtained by them from the medical board with the probate judge; that requirement being applicable, it is said, to those only who receive certificates upon examination by the board. The court is unable to adopt that construction of the statute. It is necessary, for every person, first to comply with the provisions of the statute, before engaging in the practice of medicine or surgery; the only limitation being that persons engaged in the practice when the statute was enacted are authorized to continue therein for a period of ninety days after it took effect, in order to enable them to apply for and obtain the certificate required; but, if they would thereafter engage in the practice, they must have the necessary certificate. The statute was designed to operate uniformly upon all members of the medical profession; and its purpose was to provide a public record, open at all times to public inspection, containing a complete list of all authorized resident practitioners in the county, from which it can be readily ascertained who are legally authorized to practice the profession. An averment in an indictment, therefore, which charges that the defendant engaged in the practice of medicine or surgery at a time more than

ninety days after the passage of the statute, without having first left with the probate judge of the proper county a certificate granted him by the medical board of registration and examination, is a sufficient averment of his failure to comply with the provisions of the statute; and it is unnecessary to aver either that he was not a legal practitioner when the statute was passed, or not a graduate of a medical college.

It is further contended that the indictment is defective because it contains no averment which takes the defendant, or the act charged, out of the operation of the proviso contained in the section defining what shall be regarded as practicing medicine or surgery. It is claimed that inasmuch as the section which makes it a misdemeanor to practice medicine without having complied with the statute refers to this section for a definition of what shall constitute such practice, from which the persons and cases mentioned in the proviso are excepted, the exceptions enter into the description of the offense; so that the indictment should, by negative averment, show that the defendant and the act charged against him are not within the proviso. The statement of the proposition is not without plausibility, but in the opinion of the court it cannot be maintained. An indictment which charges a violation of the general prohibitory provision makes a *prima facie* case; and if the accused, or the act with which he is charged, comes within any clause of the proviso, that is a matter which lies more especially within his knowledge, and should be brought forward by him in defense. This indictment was therefore not demurrable because it contained no averment negativing the existence of the facts to which the proviso relates. Motion overruled.

OSTEOPATHY NOT A PRACTICE OF MEDICINE

Statee v. *Liffring, 61 Ohio St. 39; 55 N. E. 168; 46 L. R. A. 334; 76 Am. St. Rep. 358*

1899

Exceptions from court of common pleas, Lucas county. William J. Liffring was indicted for practicing medicine without a certificate. From an order sustaining a demurrer to the indictment, the state brings exceptions. Exceptions overruled.

Council for the state urge that when Liffring did "prescribe, direct, and recommend for the use of one Carey B. McClelland a certain agency, to-wit, a system of rubbing and kneading the body commonly known as 'osteopathy,' for the treatment, cure, and relief of a certain bodily infirmity or disease," as charged in the indictment, he practiced medicine, as defined in the act of 1896, and not having procured from the state board of medical registration and examination, and left with the probate judge of the county, a certificate of qualification to practice medicine or surgery, as required by the act, he is guilty of misdemeanor and subject to fine or imprisonment or both. The practice which the act regulates is defined in the act: "Any person shall be regarded as practicing medicine or surgery within the meaning of this act who shall append the letters 'M.D.' or 'M.B.' to his name or for a fee prescribe, direct or recommend for the use of any person, any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily injury, infirmity or disease." It does not seem to be supposed that the indictment charges the practice of surgery. The proposition urged by the state is that the "system of rubbing and kneading the body known as 'osteopathy,'" which the indictment does charge, is an agency, within the meaning of the statute, and that prescribing and directing the use of such agency is the offense defined by the statute; and it is urged that, unless we give so comprehensive a meaning to the word "agency," the associated words, "medicine" and "drug," will be denied all meaning, and the purpose of the act defeated. Our knowledge of osteopathy is not definite. The word has not found recognition in the dictionaries. It is, however, certain that its use exceeds the suggestions of its etymology. The rubbing and kneading charged in the indictment are consistent with our general knowledge that, in practice, the adherents to osteopathy wholly reject drugs and medicines. The application of the theory that disease may be cured by the manipulation of different parts of the body would not, with close regard to the meanings of words, be called an agency. But assuming a

meaning of the word which might justify its being so used, if that would be consistent with the associated words, we meet the suggestion that in obedience to the maxim, "*Noscitur a sociis*," the meaning of the word "agency" must be limited by that of the associated words, "drug" and "medicine." The cases in which the meanings of words have been thus limited are so numerous that the labor of collecting them appropriately belongs to the compilers of digests. Certainly this maxim should not be so applied as to defeat the object of legislation. It should always serve the rule that the object of construction is to ascertain intention. In substance, the view presented in support of the exception is that the legislature intended to prohibit the administration of any agency and the recommendation of any mode of treating diseases or patients, except by the holders of certificates from the board. That purpose would have been unmistakably expressed in fewer words than are employed in this act. With the assumed meaning of the word "agency," it would have been precisely expressed by this act if the words "drug" and "medicine" had been omitted. The maxim invoked is applicable to the case, because it serves the universal rule that. in seeking the meaning of an act, all of its words must be considered. It requires the conclusion that the agency intended by the legislature is to be of the general character of a drug or medicine, and to be applied or administered, as are drugs or medicines, with a view to producing effects by virtue of its own potency. The same conclusion will follow a more general, and less technical, view of the subject. The objection which its opponents urge against osteopathy is that it recognizes a fragment of truth, and assumes that it is the universe of truth, and that, by rejecting remedial agencies generally believed to be effective if rightly prescribed, it withholds from those who resort to it available means of relief and cure. It is not charged that it is otherwise hurtful, nor that its administrations are attended with danger. The obvious purpose of the act under consideration is to secure to those who believe in the efficacy of medicines the ministrations of educated men, thus preventing fraud and imposition, and to protect society from the evils which result from the administration of potent drugs by the ignorant and unskilful. The purpose of the act is accurately indicated by its title to be "to regulate the practice of medicine." No provision of the act indicates an intention on the part of the legislature that those who do not propose to practice medicine shall graduate from a college of medicine, or otherwise become learned in its use. Without such knowledge no one is entitled to a certificate from the board of examination. The result of the view urged in support of the exception is that by this act the general assembly has attempted to determine a question of science, and to control the personal conduct of the citizen without regard to his opinions, and this in a matter in which the public is in no wise concerned. Such legislation would be an astonishing denial of the commonly accepted views touching the right to personal opinion and conduct which does not invade the rights of others. From the operation of constitutional provisions designed to establish and perpetuate freedom of thought and action in matters pertaining to religion, it results that in things which are of the first concern we are imperatively denied the guidance of legislative wisdom, and our immortal part is exposed to the enduring pain which is believed to follow the acceptance of religious error. In the absence of a statute clearly indicating it, the general assembly will not be presumed to have intended the consequences involved in this contention. Exception overruled.

UNREASONABLE REQUIREMENTS OF OSTEOPATHS VOID

State v. *Gravett, 65 Ohio St. 289; 62 N. E. 325; 55 L. R. A. 791; 87 Am. St. Rep. 605*

1901

Henry H. Gravett was indicted for practicing medicine irregularly, and a demurrer to the indictment was sustained, and the state brings exceptions. Exceptions overruled.

It is said that the decision of the court below is justified by State v. Liffring, but since the decision in that case, by the act of 1900, the section has been amended, and a more comprehensive definition given of the practice regulated, so that one is now regarded as practicing medicine, within the meaning of the

act, "who shall prescribe, or who shall recommend for a fee for like use, any drug or medicine, appliance, application, operation or treatment, of whatever nature, for the cure or relief of any wound, fracture, or bodily injury, infirmity or disease." The amended act further contains a proviso to prevent its application "to any osteopath who holds a diploma from a legally chartered and regularly conducted school of osteopathy, in good standing as such, wherein the course of instruction requires at least four terms of five months each in four separate years, providing that such osteopath shall pass an examination satisfactory to the state board of medical registration and examination on the following subjects: Anatomy, physiology, chemistry, and physical diagnosis. It seems quite clear that in its present form the statute affords no proper occasion for the application of the maxim of interpretation by which we were aided in State v. Liffring. Careful comparison of the two acts with respect to their definitions of the practice regulated shows that while in the former the legislature intended to prohibit the administration of drugs by persons not informed as to their effect or potency, by the latter it has attempted a comprehensive regulation of the practice of the healing art; so far, at least as to require the preparatory education of those who, for compensation, practice it according to any of its theories. The comprehensive language of the statute, and the purpose which it clearly indicates, require the conclusion that osteopathy is within the practice now regulated.

In support of the decision of the lower court it is further contended that, if the act includes the practice of osteopathy, it is to that extent void on constitutional grounds. It is urged that the defendant has an established practice as an osteopathist, and that the statute is void because it contains no provision saving his vested right therein. This objection is founded on the inhibition of the fourteenth amendment to the constitution of the United States. In urging this objection it is correctly assumed that there is a property interest in a vocation or means of livelihood, but the distinction between the right to establish a practice and the right to pursue a practice already established seems to be inadmissible. By what process of reasoning could it be maintained that the right to enjoy property should be esteemed more sacred than the right to make contracts by which property might be acquired? The provision in the bill of rights includes the right to acquire and the right to possess within the same protection. Our constitutions are founded upon individualism, and they make prominent the theory that to the individual should be granted all the rights consistent with public safety; and our development is chiefly attributable to the firm establishment and maintenance of those rights by an authorized resort to the courts for their protection against all hostile legislation which is not required by considerations of the public health or safety. In the absence of such considerations those rights are alike immutable; in their presence they must alike yield.

It is further urged against the validity of the statute in its application to osteopathists that to their admission to practice it prescribes conditions with which compliance is impossible, and that it is therefore an attempt, by indirect means, to prohibit practice according to their theories. The act requires that the applicant for a certificate "shall be examined in materia medica and therapeutics and the principles and practice of medicine of the school of medicine in which he desires to practice by a member or members of the board representing such school." There is no member of the board representing the school of osteopathy. It could not be maintained, and we do not understand counsel to contend, that the board of medical examination must be so numerous a body that it may have a member of every existing or possible school. The insistence is that, however few or numerous the members of the board may be, the act must contain practicable provisions for ascertaining the attainments of all who apply for certificates, they being in other respects qualified. Such provisions, it is insisted, are not contained either in those sections which relate especially to osteopathists. The question arises on demurrer to the indictment, and the record does not inform us of the fact that there is no school of osteopathy whose diploma would admit its holder to an examination. However well known it may be to those who have sought information concerning it, we are perhaps without such information as would justify us in regarding it as a fact to be considered in the case. But a sufficient foundation for this criticism of the act appears in its

provisions discriminating against those who propose to practice in the school to which the defendant belongs. The proviso quoted contains a list of subjects upon which those desiring to practice are to be examined. Having in view the theories of the osteopathists as they are commonly understood, it seems clear that no adverse criticism could be made upon the discretion exercised in the requirement of these subjects for examination. They are much less numerous and extensive than those prescribed for applicants who contemplate a regular practice, and an appropriate limitation is placed upon the effect of certificates following such limited examination. But one who desires to practice in the regular school is admitted to a more extensive examination without any requirements as to duration of study in the college whose diploma he holds, and without any requirement in that regard except that it shall be a "legally chartered medical institution in the United States in good standing at the time of issuing such diploma, as defined by the board." Why the exaction of four years of study should be made of those only who are to take a shorter examination, and receive a certificate of limited effect, we need not inquire. It is quite obvious that this additional requirement could not have been made of those contemplating the practice of osteopathy because of the number and character of the subjects upon which they are to be examined, nor of the effect of their certificates, nor because of any consideration affecting the public health or safety which does not involve a scientific conclusion adverse to the efficacy of osteopathy. A conclusion of that character cannot be drawn by a body to which legislative power alone is given, and for whose members there is no prescribed qualification of education, knowledge, or intelligence. Authority to discriminate against osteopathy would imply authority to discriminate against any other school of medicine. It seems clear from the reasons involved, and from the discussion of the subject, that this discrimination against those who occupy the position of the defendant is unwarrantable, and that compliance with it cannot be required.

The question lastly considered would dispose of the exception, but the other questions are in the record. It seemed proper to pass upon them to the end that the general assembly may not meet any unnecessary difficulty in the exercise of its ample power to protect the public health and welfare by providing that only the learned may pursue a learned profession whose activities so closely affect them. Exceptions overruled.

"CHRISTIAN SCIENCE" IS PRACTICE OF MEDICINE

State v. *Marble, 72 Ohio St. 21; 73 N. E. 1063; 70 L. R. A. 835; 106 Am. St. Rep. 570*

1905

The Supreme Court holds that the giving of "Christian Science" treatment, for a fee, for the cure of disease is practicing medicine within the meaning of the statute regulating such practice in this state. The statute making it a misdemeanor to give such treatment for a fee is not an interference with the rights of conscience and of worship, conserved by section 7 of the bill of rights, and is not on that ground unconstitutional. Legislation prohibiting any one from treating a disease for a fee, excepting such persons as have qualifications, is a valid exercise of the police power of the state, and is constitutional. The act regulating the practice of medicine in this state exacts reasonable qualifications and excludes no one possessing them, and it is not void as discriminating against Eddyites in that it prescribes that any one possessing certain qualifications may practice osteopathy and does not make especial provision for those who wish to practice Eddyism.

The court says that the right to practice medicine has been so long and so universally subject to state regulation that it might almost be said to be not an absolute right, but a privilege or franchise. Assuming, however, that it is an absolute right, it was conceded to be subject to such reasonable regulations or conditions as the state in the exercise of the police power may prescribe. The Ohio statute provides that "Any person shall be regarded as practicing medicine or surgery or midwifery within the meaning of this act, who shall use the words or letters 'Dr.,' 'Doctor,' 'Professor,' 'M.D.,' 'M.B.,' or any other title, in connection with his name, which in any way represents him as engaged in the practice

of medicine or surgery or midwifery, in any of its branches, or, who shall prescribe, or who shall recommend for a fee for like use any drug or medicine, appliance, application, operation or treatment, of whatever nature, for the cure or relief of any wound, fracture or bodily injury, infirmity or disease." It was contended that the word "treatment" was to be given its meaning as used in the practice of medicine and that as so read it means the application of remedies to the curing of disease, that a remedy is a medicine or application or process; that process is an action or operation and that prayer for the recovery of the sick is neither. Technically this may be correct but the science of medicine has made some advance since the time Macbeth wished to throw physic to the dogs because his doctor could not cure a mind diseased but told him "Therein the patient must minister to himself." Nowadays physicians cure imaginary diseases by means that would, as easily as Eddyism, escape the above definition. What Eddyism is we do not know. The practice of it is referred to as treatment by its followers. If its followers call it treatment they ought not to be heard to say it is not. The statute of 1896 had been held in this court not to comprise the practice of osteopathy and by a lower court not to apply to Eddyism. So that the use of the words "of whatever nature" in the amendment are quite significant and this court has no doubt the legislative intent was to bring within this definition every person who for a fee prescribed or recommended a cure for disease even though the cure was to come not from himself but, through his intercedence, from God. The next contention was that the statute interfered with the defendant's right to worship God according to the dictates of his conscience. The Supreme Court says it is to be observed that the statute does not prohibit the prescribing or recommending the treatment except for a fee and the court is not advised that it is a part of the defendant's religion to exact a fee as well as to pray. But if the inhibition of the statute tends to the public welfare and is not obnoxious on other grounds it is not within the provision of section 7 of the bill of rights that "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience . . . nor shall any interference with the rights of conscience be permitted."

Taking up the question of whether the act, in so far as its application to Eddyism is concerned, is a valid exercise of the police power, the court says that the practice of medicine may be regulated by legislation has been decided in every court in which the question has arisen. But it is said that the offering of prayer to God for the recovery of the sick is not against public health or public morals or public safety or public welfare. Admitted. But is that a correct statement of the case? If the defendant prayed for the recovery of Hehl that was the treatment he gave him for the cure of his rheumatism and for which Hehl paid him. He was practicing healing or curing disease. To assume that legislation may be directed only against the administering of drugs or the use of the knife is to take a too narrow view. The subject of the legislation is not medicine and surgery. It is the public health or the practice of healing. The state might make it an offense, as has been done in New York, for any one to omit to furnish medical attendance to those dependent on him, and at the same time leave him his liberty to die in any manner he may choose. But this is not all. While the state may not deem it wise to go to the extent of requiring the individual to avail himself of the services of a physician yet it may not wish to hasten his death and so to transfer to itself the burden of supporting those dependent on him by making it possible for him to employ an empiric.

Again, where there is an infectious or contagious disease and the public welfare may be vitally affected by a failure promptly to recognize it, and so the state is interested in permitting to practice the art of healing only those possessing recognized qualifications. So that, regarding disease rather than the treatment of it as the subject of the legislation, it is not necessary that the statute be preventive of particular practices, but it may make the right to undertake the treatment of disease dependent upon the possession of reasonable qualifications. Then it was contended that Eddyism is a recognized system or school of healing, and that the statute is unconstitutional, on the ground that it discriminates against Eddyism, or in favor of certain schools of medicine. The court says that if it is correct in the conclusion that disease and not the method of its treatment, is the subject of the legislation, then it is putting the cart

before the horse to say that every school of healing must be recognized. That the legislature, in its wisdom, might prescribe a uniform examination the court does not doubt, and that it may recognize one school without recognizing all, is also true, if the recognition be in the exercise of proper classification and for the public welfare, and not with a view to create a monopoly in the schools recognized or a discrimination against other schools. 'The court fails to find anything in the present act that discriminates against Eddyism. It does not provide for a special examination and limited certificate for the Eddyite practitioner, but he may obtain a certificate to practice medicine upon the same conditions as any other person, and there is nothing in the act requiring him to use the knowledge after he acquires it. To admit that a practitioner may determine what treatment he will give for the cure of disease and that the state may examine him only respecting such treatment would be to defeat the purpose of the statute and to make effective legislation of this character impossible. If the present statute is too comprehensive the remedy is with the legislature.

CORPORATIONS CANNOT DO PROFESSIONAL BUSINESS

State v. *Laylin, 73 Ohio St. 90; 76 N. E. 567*

1905

The Supreme Court holds that a foreign corporation, the sole business of which, as authorized by its charter, is that of defending physicians and surgeons against civil prosecution for malpractice, which, in the prosecution and conduct of said business, issues and sells to members of the medical profession a contract whereby it undertakes and agrees to defend the holder of said contract against any suit for malpractice that may be brought against him during the term therein specified, but does not assume, or agree to assume or pay, any judgment that shall be rendered against him in such suit, is not engaged in the business of insurance, nor is the contract so issued and sold an insurance contract. But a foreign corporation, created for the purpose of engaging in and carrying on such business, is not entitled to have or receive from the Secretary of State of the State of Ohio a certificate authorizing it to transact such business in that state, for the reason that the business proposed is professional business, and as such is expressly prohibited to corporations by section 3235 of the Revised Statutes of 1903. It was urged that the company, being a corporation, an impersonal entity, could not and did not itself engage in the practice of law or the management and conduct of defenses in suits at law, but in what it did, or obligated itself to do, it undertook only "to act as the agent of the contract holder in retaining legal counsel, and in managing and maintaining the defense of the suit." But the court says that if this be not the engaging in or carrying on of professional business, then it would be difficult to conceive how professional business could be engaged in or carried on by a corporation. The conclusion reached, it further says, rendered it unnecessary to consider the question suggested that the contract issued and sold by the company was a contract, the making of which was against public policy, because of the stipulations and provisions therein contained, restricting the right to compromise.

"GROSS IMMORALITY" NOT AN INDEFINITE TERM

Rose v. *Baxter et al., 81 Ohio St. 522; 7 Nisi Prisis (N. S.) 132*

[Affirmed without comment.]

1909

The plaintiff sought to enjoin the medical board from hearing an application for the revocation of his certificate to practice medicine on grounds of "gross immorality," claiming that the medical practice act of this state which authorizes the board to revoke certificates of physicians found guilty of "gross immorality," without defining what constitutes such "gross immorality," is unconstitutional and void because of uncertainty in the meaning of that phrase, and that

the act of the plaintiff described in the application for revocation of the certificate as constituting "gross immorality" was not sufficient under the law.

The application charged him with maintaining offices under two different names, thereby intending to perpetrate a gross fraud upon the public. The temporary injunction granted by the county was dissolved. The Supreme Court simply affirms this decision without report, so that the decision of the county court may now be regarded as embodying the law of this state on both these points. The lower court said that the most serious question in this case arises from the consideration of the act itself, in so far as it authorizes the board to revoke after notice and hearing a certificate where the physician has been guilty at any time of felony or of gross immorality, etc. That the defendant board cannot exercise what has sometimes been carelessly termed administrative functions seems conceded. Legislative power has been vested in one body and this board can only carry into effect that which the legislature itself has seen fit to order and direct. If the expression of "gross immorality" is so vague, so uncertain, so broad and comprehensive that it gives to the board the sole power to determine whether or not a physician's certificate or license shall be revoked, and if it furnishes no standard as to qualification, but leaves the matter solely to the opinion of the board as it may be constituted, then the plaintiff's contention must prevail and that part of the act which provides for the revocation of a certificate for gross immorality be held to be void.

Plaintiff's contention has been further upheld in a number of states. The courts in California, Arkansas, Kentucky and the District of Columbia have all held in substance that the use of a general term which vests in a board the duty of carrying out legislation, while it is a proper exercise of police power, yet the acts or conduct which are made the ground of forfeiture must be declared with certainty and definiteness, and hold, following this general statement with which all courts agree, that such general statements as "gross immorality" are not sufficiently certain and definite but leave the question to the caprice of each individual member of the different boards from time to time.

On the other hand, a majority of the authorities take the view that this language is not so indefinite and uncertain as to fall within the ban. Certain expresssions have been handed down through the law for centuries and have received such standard of interpretation and understanding that they no longer are subject to the charge of being indefinite. Thus, with reference to such expressions as the ground for which attorneys may be disbarred, "Unprofessional conduct, involving moral turpitude." The impossibility of anticipating and naming in detail each and every specific act which would constitute gross immorality or which would constitute moral turpitude is apparent.

To hold, therefore, that gross immorality was so indefinite that the board could not carry out the legislative act and intent without resorting to uncertainty and caprice would probably involve a number of other well settled laws. Gross immorality is a term which has been used and has received adjudication at the hands of a great many courts. The word "gross" does not mean great, or big, or excessive, necessarily, but rather such a wilful, flagrant and shameful quality with respect to the office involved as renders the officer unfit to hold his license and authority to act. Sometimes the expression is found, under the law, "gross misbehavior." The expression "moral turpitude" is closely akin to the expression at bar and has received a great many interpretations but always sustained by the courts. In no case has it been held so indefinite as to preclude action against a person guilty thereof. As to the charge itself, while it may be conceded that a physician might for some purposes and under some circumstances assume two names, yet there can be but one rational and natural meaning given to the charges made in this case. The charges are made against the plaintiff as a physician in his quasi public character as such. Secondly, it charges that he maintained a physician's office under the name of Doctor Justin and at the same time maintained an office under the name of E. J. Rose, intending thereby to perpetrate a fraud upon the public. This charge is sufficiently definite, and charges, as a matter of fact, an act which, with reference to his profession and the law governing the same, constitutes gross immorality.

REVOCATION OF LICENSE PROCURED ON PRETENDED DIPLOMA

Gulley v. *Territory, 91 Pac. 1037*

1907

The Supreme Court affirms a judgment for the territory in this case, which was brought by the territory to cancel a license to practice medicine issued on Feb. 11, 1902, by the then superintendent of public health to the said Gulley, on the ground that the license was procured by fraud and deception. The court holds that a license to practice medicine procured through the presentation of a pretended diploma from a fraudulent medical college, without an examination, will be revoked and canceled in a proper proceeding in the district court. Also, that an action to cancel a license on the ground that it was fraudulently obtained is an equitable proceeding, and the licensee is not entitled to a jury trial as a matter of right.

The so-called diploma in this case was one purporting to have been issued by the Independent and Metropolitan Medical College, located in Chicago, Nov. 4, 1896. The court says that the record disclosed a flagrant case of fraud, deception, and misrepresentation in the procurement of the license. And this was not all. The applicant knew, at the time he made his application and verified the same, under oath, that he was not a graduate of a reputable medical college, within the meaning of the statute. He knew that the pretended diploma which he held from the college was a mere sham and fraud, well calculated to mislead and deceive the territorial board of health. He knew that the obtaining of the diploma was a mere pretense and fraud, and he knew that the Supreme Court of the state of Illinois had, long prior to his application for license to practice in this territory, forfeited the charter of this pretended medical college and declared "that the corporation is a mere diploma mill, designed wholly for issuing diplomas to practice medicine, for a consideration, to persons wholly unqualified for such practice." In this case of Independent Medical College vs. People ex rel Akin, Attorney General, 182 Ill., 274, the right of this medical college to transact business in the state of Illinois was directly involved, and this was the college from whence the defendant represented that he was a graduate.

It was argued that the court erred in admitting in evidence the records of the Illinois courts showing the actions brought by the state of Illinois to revoke and cancel the charters of the Illinois Health Institute, and the Independent Medical College, its successor, and the record of the conviction of Armstrong, the head of these institutions, for the fraudulent use of the mails in operating the same. Clearly, this evidence was competent and material for the purpose of showing that these pretended colleges were fraudulent institutions, and that the pretended diploma was procured from a fraudulent institution.

Did the court err in refusing the defendant a jury trial? This question must be answered in the negative. This was not one of the actions in which the party is entitled to a jury trial as a matter of right. Trial by jury is guaranteed only in those classes of cases where that right existed at common law. The case at bar fell under the well-recognized rules of equity jurisprudence to cancel a license on the ground of fraud, and hence the defendant was not entitled to a jury trial as a matter of right.

THE MEDICAL PRACTICE LAW IN OKLAHOMA AFTER THE TERRITORY BECAME A STATE

State v. *Harmon, 3 Okla. C. R. 68; 104 Pac. 370*

1909

The Criminal Court of Appeals says, that the territorial laws relating to the practice of medicine were not extended and did not remain in force in the state of Oklahoma by reason of section 39, article 5, of the Constitution, which provides that: "The legislature shall create a board of health, board of dentistry, board of pharmacy, and pure food commission, and prescribe the duties of each.

All physicians, dentists and pharmacists now legally registered and practicing in Oklahoma and Indian Territory shall be eligible to registration in the state of Oklahoma without examination or cost." This provision of the Constitution was made effective by chapter 70a, article 1, page 701a, of the session laws of 1907-'08, the same being entitled: "An act to define and regulate the practice of medicine, to create a board of medical examiners for the examination and licensing of physicians and surgeons, and to prescribe their qualifications; to provide for their proper regulation, and to provide for the revocation of their license; to require itinerant vendors to procure a county license, and to fix suitable penalties for the violation of this act, and repealing laws and parts of laws in conflict herewith." This law was approved June 12, 1908, and became effective on the 24th day of August, 1908.

NECESSARY TO SHOW ABUSE OF DISCRETION BEFORE COURTS WILL REVIEW RULING OF BOARD

Barmore v. *State Board, 21 Ore. 301; 28 Pac. 8*

1891

The plaintiff asked for a writ of mandamus against the board to compel it to issue him a certificate to practice medicine in the state, claiming that he was a graduate of the Medical Department of the University of Cincinnati and that he had complied with all the requirements of the statute. The board in its reply claimed that the Medical Department of the University of Cincinnati was at that time not in good standing in the state of Ohio or elsewhere. The board further states that the plaintiff submitted himself for an examination and that on said examination his average was only 15 per cent. whereas the rule of the board required a minimum standing of 75 per cent. The litigation is based on the act of 1889, amended in 1891, copied substantially from the laws of Illinois and Missouri. The court holds that by adopting a statute in such case the construction received by the courts of the state from which the statute was taken is adopted with it and that the decisions of such courts are authoritative. After going over the decision of the Illinois Supreme Court as to what constitutes a reputable college and reviewing the decisions of the Illinois and Missouri courts, the supreme court says that to render such a law effective, the power to grant certificates must be lodged in some recognized body of men with supervisory power vested in the courts to review their acts if the discretion given them by law shall be abused, but before the courts will interfere it must be made to appear that there has been an abuse of discretion. It is not enough that there may be men in the same profession who would have decided the other way. No abuse of discretion on the part of the board has been shown. The decision of the lower court is reversed and the writ dismissed.

PASSAGE OF NEW PRACTICE ACT REPEALS ALL PROVISIONS OF FORMER LAW

In re Ferdon, 57 Pac. 376

1899

J. M. Ferdon was committed to the custody of the sheriff, on the charge of itinerantly vending medicine without a license, contrary to statute, and he applied for a writ of habeas corpus. From a judgment dismissing the writ and remanding petitioner, he appeals. Reversed.

The petitioner was held to answer for a violation of the act of 1889, regulating the practice of medicine and surgery, and in default of bail was committed to the custody of the sheriff. He thereupon applied to the circuit court for his discharge under a writ of habeas corpus, on the ground that the section of the act under which he was committed is unconstitutional and void, or, if not, that it was repealed by the subsequent act of the legislature regulating the practice

of medicine and surgery in the state. The writ having been dismissed, and the petitioner remanded to the custody of the defendant, he appeals.

The act of 1889 is entitled "An act to regulate the practice of medicine and surgery in the state of Oregon." It provides for the appointment of a board of examiners, and for the punishment of any person practicing medicine or surgery without a licence. Section 11, as amended in 1891, and under which the petitioner was arrested and committed, provides that itinerant vendors shall pay a license of one hundred dollars per month. The contention of the petitioner is that this section is unconstitutional and void, because not within the subject of the act as expressed in the title. The court says that it is not easy to perceive what connection the licensing or taxing of itinerant vendors of drugs or nostrums has with the question of regulating the practice of medicine and surgery. If it be conceded that an itinerant vendor of drugs and medicines, who publicly professes to cure and treat diseases therewith, is practicing medicine or surgery, and that the section is a mere regulation of such practice, it was repealed by the subsequent act of 1895, which was evidently intended to, and does, revise the whole subjectmatter of the old law, and prescribes the conditions on which the practice of medicine and surgery shall be permitted. The act of 1895 is entitled "An act to regulate the practice of medicine and surgery in the state of Oregon, and to license physicians and surgeons, to punish all persons violating this act and to repeal all laws in conflict therewith, and declaring an emergency." Like the act of 1889, it provides for the appointment of a board of medical examiners, and defines their duties and powers, declares who shall be regarded as practicing medicine or surgery, and prescribes in great detail the qualifications and conditions upon which persons shall be permitted to do so, and the punishment of any person assuming to practice without a license. In short, it is complete within itself, and, under the well-settled rule of statutory construction, that where the legislature, by a new statute, evidently intends to, and does, revise the whole subjectmatter of an old one, operates as a repeal of the former act upon the subject. It follows, therefore, that, assuming the section of the statute under which the petitioner was arrested to have been constitutional and valid at the time of its enactment, it had been repealed at the time of the petitioner's arrest. The judgment of the court below is therefore reversed, and the cause remanded, with direction to discharge the petitioner.

ALTERATION OF UNAUTHORIZED TEMPORARY LICENSE

Volp v. *Saylor et al. State Board of Medical Examiners, 42 Ore. 546; 71 Pac. 980*

1903

In 1891, the Oregon State Board of Medical Examiners issued what was intended to be a temporary license only, certifying that Heinrich Volp, having passed a satisfactory examination in medicine and surgery, was authorized to practice same until a certain date, or, in other words, for six months. The secretary testified that the board had adopted the practice of giving temporary permits so that the applicant, if unsuccessful, could still earn a livelihood, with the understanding that he again submit himself for an examination at the expiration of the period fixed in the certificate. On the trial, however, it was stipulated that the board had no power to issue a temporary permit or license. But because the board of examiners adopted an irregular and unauthorized practice, and issued a permit or license, using the form of a regular certificate, but limiting its duration, the Supreme Court of Oregon does not consider that it followed, as was argued, that such board issued and delivered an ordinary or regular license, unlimited in its scope, and therefore valid. It says that to construe such an act as the board's into absolute regularity, and the permit of six months' duration into a license regular in form and unrestricted as to the time of the operation, would be to contort an irregular and void proceeding into one of due regularity and perfect legal efficacy. The erasure of that portion of the certificate intended as a limitation could not, by any rule of ethics or practice, either in law or morals, operate to admit the holder as a regular practitioner of medicine and

surgery. The fact that it was certified that he had passed a satisfactory examination could not aid him, as the certificate by its very terms limited the time the board intended he should exercise the privilege accorded, and the suggestion that the board was precluded from showing that the examination was unsatisfactory was without relevancy in the argument. He may have been entitled to a full license on such a showing, but he did not get it, and his act of changing the certificate received could not operate as an act of the board granting that which he applied for. Nor does the court accede to the contention that his license could be revoked except for unprofessional or dishonorable conduct, and that his act in changing the certificate, and thus procuring his name to be entered in the register, did not come within the meaning of such terms as declared by the act of 1895, which provided that all persons who had been regularly licensed under theretofore existing laws of the state, and had complied with the provisions thereof, should be taken and considered as licensed physicians under this act. It says that this proceeded on the assumption that he was regularly licensed, and that he was then entitled to practice by reason thereof. But he had no such license to revoke. The record he caused to be made gave him none, but it falsely showed that one had been regularly issued to him, and it was to get rid of this record that the board took action. What the board really did was to vacate a void record. Furthermore, the court holds that, where the record is admittedly fraudulent, as it was here, a court of justice will not intercede to reinstate it, even though it was vacated without notice to the party affected by the order. If the court could see that the party had been deprived of any substantial right without an opportunity to be heard, the case would be different; but he was insisting on a privilege vouchsafed to him by a license or record which he conceded to have been obtained through his own wilful and fraudulent act, and the court would not thus intercede to permit him to enjoy the fruits of his own wrong.

MEDICAL PRACTICE ACT CONSTITUTIONAL

In Re Campbell, 197 Pa. 581; 47 Atl. 860

1901

The Supreme Court holds that the act of 1893 is a valid and constitutional exercise of the police power of the state upon a subject plainly within that power, and urgently in need of control by it. The title of sixty-two words it is certain is not open to criticism for brevity or vagueness. But it says that the purpose of the act is indicated in the phrase "to regulate the practice of medicine and surgery." This gives notice to any one desiring to enter the practice that its provisions do or may concern him. Nothing more is required. Nor does the court consider that the act is in contravention of the provisions of the state constitution vesting the appointing power in the governor, because, it holds, there is nothing in the constitution which prohibits the legislature, in creating an office, from fixing the qualifications of the incumbent and thereby limiting the choice of the governor in the appointment to the class of persons so qualified, which is all this act does in regard to the offices which it provides for. Neither does it think that the act violates the constitutional prohibition against any local or special law "granting to any corporation, association, or individual any special or exclusive privilege or immunity." It says the act is not local or special. It embraces the whole state, and applies to all persons of every school or system of medicine desiring to enter on the practice. The designation of the three medical societies from whose members the board of examiners are to be selected is not the grant of any special or exclusive privilege to those societies, but a convenient method of securing a competent and qualified class from whom the examiners may be selected. But, even if it should be regarded as a special privilege to those societies, it would not be unconstitutional. The board of examiners are state officers, charged with the administration of the state's police power on the subject of admission to the practice of medicine. The constitutional provision quoted does

not apply to such officers. The state may choose its own agents in its own way to carry out its commands in regard to the taxing of police or other general powers. The act, the court further holds, by clear implication provides for registration by entry of record in a county medical register kept by the prothonotary. This register, while not a judicial record, is a public record of matters of public interest and concern, directed to be kept open and accessible for the information of the public, put from motives of public policy under the sanction and control of the court, the duty of so keeping it being imposed on the prothonotary as an officer of the court, in the performance of which duty he is necessarily subject to the orders and control of the court. So, if a licensed physician applying for registration should be refused without good reason, the court, on mandamus or by summary order, would compel its officer to perform the duty laid upon him by the statute; and if he has, through misinformation, made an erroneous entry not warranted by law, the court has power to compel its amendment or cancellation. It is immaterial that he who petitions to have the record corrected should have no personal interest in the matter. It is also irrelevant to a proceeding to have a medical register corrected by striking off a name that on a trial for practicing medicine in violation of the statute the person whose right to registration is questioned was acquitted, it being charged that the entry was procured by falsehood and fraud.

MEDICAL PRACTICE ACT AND PROCEDURE SUSTAINED

Commonwealth v. *Clymer, 217 Pa. 302; 66 Atl. 560*

1907

The Supreme Court affirms, on the opinion of the Superior Court, a conviction of practicing medicine without a license. The opinion referred to holds that the act of May 18, 1893, is not unconstitutional on the ground that the subject of legislation is not clearly expressed in the title. The particular objection was that the title gives no notice of the provision, contained in the fourteenth section, making a violation of any of the provisions of the act, especially those relating to practicing medicine or surgery without license and registration, a misdemeanor punishable by fine. But it is answered that, inasmuch as the subject of legislation, as expressed in the title, is the examination and licensing of practitioners of medicine and surgery, and the further regulation of the practice of medicine and surgery, any one would naturally suppose, from reading the title, that the act not only provided for the licensing of such practitioners, but declared the consequences of practicing without complying with its provisions.

The admission of the testimony of a statistical clerk, who assisted in keeping the records of the medical council and the state board of medical examiners, that he had examined them, and could not find the name of R. S. Clymer therein, was not prejudicial error, even though this mode of proving the contents of the record was open to objection. According to the doctrine of Commonwealth v. Wenzel, 24 Pa. Superior Ct., 467, and in view of the state of the record produced from the prothonotary's office, it was not incumbent on the commonwealth to prove that the defendant had no license.

The record produced from the office of the prothonotary, taken in connection with the uncontradicted testimony of the deputy, showed that none of the papers exhibited by the defendant for the purpose of registration was a license issued by the medical council of Pennsylvania, and no such license was produced on the trial, or was proved, and its non-production accounted for. Moreover, in the affidavit filed by the defendant with these papers, the clauses of the blank relative to the exhibition of a license issued by the medical council, and to compliance with the provisions of the act of 1893, were all erased, thus showing that the defendant was careful not to assert that he had any such license, or that he had complied with the provisions of the act. In view of these facts the judge was justified in expressing to the jury his opinion as to what the verdict should be.

ITINERANT PRACTITIONER DEFINED

Evans v. *State Board of Health, 19 R. I. 312; 33 Atl. 878*

1896

The appellant is a domiciled resident of Boston, Mass., and a practicing physician making a specialty of the treatment of catarrh. His main or regular office is in Boston, and for ten years past, except when absent from the country or prevented by illness, he has visited Providence in the practice of his specialty on stated days each month. He has had no office in Providence except the rooms he has taken in the hotels at which he has stopped. He has notified his patients of his visits to Providence by advertisements in the *Providence Journal*, and has met them in his rooms at the hotels at the times mentioned in the advertisements. He has also during this ten years, for greater or less periods, been in the habit of visiting, in the practice of his specialty, Worcester, Springfield, New Bedford and Lowell, Mass., in the same manner as he has visited Providence.

On these facts the State Board of Health decided that he was to be regarded as an itinerant doctor within the meaning of the laws of 1895, which provides that "Nothing in this chapter shall be so construed as to authorize any itinerant doctor to register or to practice medicine in any part of this state." The court thinks that this decision was correct, and affirms it accordingly.

DIPLOMA OF COLLEGE INDIRECTLY INDORSED SUFFICIENT

Boucher v. *State Board of Health, 19 R. I. 366; 33 Atl. 878*

1896

The appellant is a graduate of the Medical Department of the Laval University, a legally chartered medical college in Montreal, Canada, but his application for a certificate to practice medicine was refused by the respondents on the ground that Laval University had not been endorsed by them as a reputable and legally chartered medical college. It appears, however, that if he had presented with his diploma a license to practice medicine in Canada from the College of Physicians and Surgeons, a board similar to the respondents, they would have granted him a certificate to practice. The evidence shows that the license of the College of Physicians and Surgeons is granted as a matter of course to those holding diplomas from the Laval University who, like the applicant, had been found by the Governors of the College of Physicians and Surgeons qualified to pursue the study of medicine and had been registered in the books of the college as having commenced the study, on the payment of a prescribed fee, and that it merely confers authority on the licensee to practice in Canada. We understand also, from the testimony, that in several instances the Board has granted certificates to practice to graduates of Laval University who, having practiced medicine in Canada prior to coming here, had the license of the College of Physicians and Surgeons. If this be so, the court thinks that, inasmuch as the license of the College of Physicians and Surgeons is granted to holders of diplomas of Laval University, of the class mentioned, without examination, merely on the payment of a prescribed fee, the granting of certificates by the respondents to other graduates of Laval University, qualified as above stated, was in effect an endorsement of that University by them as a legally chartered medical college, to the extent mentioned, and that they therefore erred in refusing a certificate to the appellant merely because, not wishing to practice in Canada, he did not pay the fee and obtain the license from the College of Physicians and Surgeons.

Decision of the State Board of Health overruled.

"SUCCESSFUL PRACTICE" DEFINED

Paquin v. *State Board of Health, 19 R. I. 365; 33 Atl. 870*

1896

The appellant claims to be entitled to a certificate authorizing him to practice medicine, in accordance with the law of 1895, on the ground that he was reputably and honorably engaged in the practice of medicine prior to Jan. 1, 1892, in this

state, within the meaning of the second clause of the section. The court thinks that this clause was intended to apply to physicians who, not possessing a diploma from a reputable and legally chartered medical college, endorsed as such by the State Board of Health, as required by the first clause of the section, had been in practice a sufficient length of time prior to Jan. 1, 1892, and with sufficient success to have acquired an honorable reputation in the community as practitioners.

The appellant has not presented satisfactory evidence that he possessed this qualification. The testimony is that for several years prior to 1889 he was engaged in the dry goods and boot and shoe business in Warren; that in 1889 he took up by himself the study of medicine, and later in that year began to practice, chiefly, if not wholly, among the French residents of the town; that from the latter part of 1889 he gave his attention exclusively to the practice of medicine, leaving the dry goods and boot and shoe business to be managed by clerks, and that he continued his practice up to Jan. 1, 1892, some of his patients being satisfied with his services and some not. There is no evidence that on Jan. 1, 1892, he had come to be regarded by the community in which he practiced as a skillful and successful practitioner, and therefore had acquired the honorable reputation as a physician necessary to qualify him to practice contemplated by the statute.

The decision of the State Board of Health denying a certificate to the appellant is affirmed.

ILLEGAL PRACTICE MUST BE FOR REWARD OR COMPENSATION

State v. *Pirlot, 20 R. I. 273; 38 Atl. 656*

1897

The indictment charges that the defendant did unlawfully practice medicine, for reward and compensation, without first having obtained a certificate from the State Board of Health, and without posessing any of the qualifications set forth in Gen. Laws R. I. cap 165. At the conclusion of the charge to the jury, in the trial in the Common Pleas Division, the defendant requested the justice presiding to charge that "If the jury find that the defendant received no reward or compensation for his services, they must find for the defendant." The court refused the request, and instructed the jury to the contrary.

Gen. Laws R. I. cap. 165, section 2, makes it unlawful for any person to practice medicine or surgery who has not exhibited and registered, in the city or town clerk's office of the city or town in which he resides, authority for so practicing, as prescribed in section 3 of this chapter, to wit, a certificate from the State Board of Health. But while section 2 makes it unlawful to practice medicine or surgery without first exhibiting and having registered a certificate from the State Board of Health, as provided in section 8, which provides the penalty, it also limits the fine to the practice of medicine or surgery for reward or compensation. We think, therefore, that the court erred in refusing the defendant's request.

Defendant's petition for a new trial granted, and case remitted to the Common Pleas Division.

OFFENSE MUST BE CHARGED SPECIFICALLY

State v. *Julius A. Pirlot, State* v. *Alexander A. Walter, 19 R. I. 695; 36 Atl. 715*

1897

These indictments charge merely that the defendants "did unlawfully practice medicine and surgery, for reward and compensation, against the form of the statutes" etc., without setting forth in what the unlawfulness consisted. The rules of criminal pleading require that the offense shall be charged specifically, first, in order that the accused may know precisely what he is to defend against, and secondly, that the record of his acquittal or conviction may be a bar to a subsequent prosecution for the same offense.

Demurrers sustained, and case remitted to the Common Pleas division with direction to quash.

CHRISTIAN SCIENCE NOT THE PRACTICE OF MEDICINE

State v. Anthony, 20 R. I. 644; 40 Atl. 1135

1898

The defendant, who is a Christian Scientist, was adjudged probably guilty of the unlawful practice of medicine, in violation of cap. 165, Gen. Laws R. I. The defendant claims that said cap. 165, so far as it relates to the acts complained of, is in violation of Art. 1, section 3, of the Constitution of Rhode Island. The evidence upon which he was adjudged guilty showed a practice of Christian Science, and, substantially, was like that set forth in the opinion of the court in State 1. Mylod. The testimony fails to show any violation of said cap. 165. Said chapter does not relate to the acts of the defendant, and, therefore, he cannot, in this proceeding, attack its constitutionality.

METAPHYSICAL HEALING NOT THE PRACTICE OF MEDICINE

State v. *Taft, 20 R. I. 645; 40 Atl. 758*

1898

The defendant was adjudged probably guilty of a violation of cap. 165, Gen. Laws R. I., "of the practice of medicine." The defendant, who is a believer in metaphysical healing, claims that said chapter, as far as it relates to the acts complained of, is in violation of Art. 1, section 3, Const. R. I.

Although the testimony differs somewhat in character from that in *State* v. *Mylod*, and *State* v. *Anthony*, ante 644, it fails to show that the defendant, in the statutory sense, was guilty of an unlawful practice of medicine. This being so, the constitutional question is not before the court.

PRACTICE OF MEDICINE NOT INCLUSIVE OF CHRISTIAN SCIENCE

State v. *Mylod, 20 R. I. 632; 40 Atl. 753; 41 L. R. A. 428*

1898

The defendant was adjudged probably guilty, on complaint of the secretary of the State Board of Health. Complaint alleges that the defendant "did then and there practice medicine and surgery for reward and compensation, without lawful license, certificate, and authority, and not being then and there duly registered according to law."

The defendant, upon arraignment, pleaded not guilty, and subsequently, and before judgment, raised a question of the constitutionality of the law.

For the State, Everett Hall testified, substantially, that he called upon the defendant at his residence and asked to be cured of malaria; that the defendant said he was Doctor Mylod; that the defendant sat looking at the floor, with his eyes shaded, as if engaged in silent prayer, for about ten minutes, and then said, "I guess you'll feel better," that defendant gave him a book entitled "A Defence of Christian Science," that he gave defendant one dollar; that defendant did not recommend nor administer any drug or medicine, nor take his pulse or temperature, nor do any of the things usually done by physicians.

Clarence Vaughn, in behalf of the State, testified that he called upon the defendant at his residence on two occasions and requested to be cured of grippe; that he gave defendant one dollar each visit; that defendant said he was Doctor Mylod; that defendant gave him a card stating the defendant's office hours and describing defendant as a Christian Scientist, but not in any way referring to defendant as a physician; that defendant did not take his pulse or temperature, nor do any of the other things that physicians do in treating disease, but seemed to be sitting in silent prayer; that defendant gave him a book entitled "An Historical Sketch of Metaphysical Healing," that defendant told him to look, not on the dark side of things, but on the bright side, and to think of God, and it would do him good, since thought governs all things.

Dr. Gardner T. Swarts, secretary of the State Board of Health, testified that the defendant is not a registered physician; that said defendant does not have authority to practice medicine in Rhode Island, and that physicians often cure disease without the use of drugs or medicine.

For the defense, the charter of the Providence Church of Christ, Scientist, was introduced in evidence, and the defendant testified, substantially, that he is the president and first reader or pastor of said church; that said church has been organized and has held regular religious services for seven years; that said church belongs to the sect known as Christian Scientists, in whose belief God and Jesus Christ and the Bible hold a supreme place; that the principal distinguishing difference between Christian Scientists and other sects consists in the belief of the former regarding disease, which they believe can be reduced to a minimum through the power of prayer; that the public religious services of said church consist of silent prayer, music, reading of the scriptures and of extracts from "Science and Health" by Mary G. Baker Eddy; that he, beyond a greater realization of truth which his longer study of Christian Science may have given him, professed to have no greater power over illness than that possessed by any member of his church; that he did not tell the witnesses Hall and Vaughn that he could cure them, nor did he call himself a doctor; that he did not attempt to cure them by means of any power of his own; that he assured them that it is God alone who heals, acting through the human mind; that all he did was to engage in silent prayer for them, and to endeavor to turn their thoughts to God and toward the attainment of physical perfection; that the efforts made for them were precisely the same in character as those which he makes for his congregation at the public services of his church; that he does not practice medicine nor attempt to cure disease; that he has no knowledge of medicine and surgery; that, as a Christian Scientist, he never recommended to any one a course of physical treatment; that he has only the method of prayer, and effort to encourage hopefulness for all who come to him in public or private, and whatever disease they imagine they have; and that his ministrations often can be, and are, rendered as effectively in the absence as in the presence of the beneficiary.

Other witnesses were called, but there was no material variance in the testimony, except that the witnesses Hall and Vaughn testified that the defendant said that he was Doctor Mylod, which testimony was contradicted by the defendant.

The constitutional question raised by the defendant is that, under Section 3, Art. 1, Const. R. I., which secures to him religious freedom, he has a right to perform the acts shown by the testimony to have been performed, and that, therefore, said cap. 165, Gen. Laws R. I., under which said complaint was made, is unconstitutional if, in so far as, it provides a penalty for the performance of said acts.

This question, properly, cannot be considered by the court unless said cap. 165 is sufficiently broad to include within its prohibitive provisions the acts of the defendant; for the defendant cannot question the constitutionality of said chapter unless his rights would be affected by its enforcement.

There is no testimony tending to show that the defendant practiced or attempted to practice surgery, or that he made any diagnosis or examination to ascertain whether the witnesses Hall and Vaughn were suffering from disease, or that he administered or prescribed any drug, medicine, or remedy, or that he claimed any knowledge of disease or the proper remedies therefor.

On the testimony, the only claim that can be made by the State is that upon a card handed to one of the witnesses appeared the name and office hours of the defendant; that the defendant said he was Doctor Mylod; that he offered silent prayer for the witnesses Hall and Vaughn, who claimed to be suffering from disease; that he gave such witnesses each a book in which, presumably, the principles of Christian science were taught, explained, and defended; that he told the witness Vaughn, substantially, to look on the bright side of things and think of God, and it would do him good; and that he accepted compensation for his services.

Did these acts of the defendant constitute the practice of medicine, in violation of cap. 165, Gen. Laws R. I.?

It is the duty of the court to give effect to the intention of the law-making power as embodied in the statutes. The legislature is presumed to mean what it

has plainly expressed, and when it has so expressed its meaning, construction is excluded. It is only when the meaning of the statute is obscure, or the words employed are of doubtful meaning, that, in order to give effect to the legislative intention, the duty of construction arises. In the construction of penal statutes, a well-established rule is that words and phrases must be taken in their ordinary acceptation and popular meaning, unless a contrary intent appears. While the words of such statutes are not to be restricted in meaning within the narrowest limits, neither are they to be extended beyond their common interpretation; and if there is a reasonable doubt as to whether the acts done are within the meaning of the statute, the party accused of its violation is entitled to the benefit of the doubt.

It follows, therefore, that the acts complained of are excluded from the operation of said cap. 165 unless the words "practice of medicine" taken in their ordinary or popular meaning, includes them, or unless it appears from said chapter that the legislative intent was to give to said words a meaning broader and more inclusive than the popular one.

Medicine, in the popular sense, is a remedial substance. The practice of medicine as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain. It rests largely in the sciences of anatomy, physiology, and hygiene; it requires a knowledge of disease, its origin, its anatomical and physiological features, and its causative relations; and, further, it requires a knowledge of drugs, their preparation and action. Popularly it consists in the discovery of the cause and nature of disease, and the administration of remedies or the prescribing of treatment therefor.

Prayer for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and a fixed determination to look on the bright side of life, does not constitute the practice of medicine in the popular sense.

The State, however, contends that said cap. 165, taken as a whole, indicates a legislative intention to give to the words "practice of medicine" a meaning broader than the popular one. In support of this contention it calls attention to the provision contained in section 8 of said chapter, that "To open an office for such purpose" that is, for the practice of medicine or surgery, "or to announce to the public in any other way a readiness to practice medicine or surgery in this State, shall be to engage in the practice of medicine within the meaning of this chapter." In view of this provision, the State contends that to practice medicine it is not necessary to use internal or other remedies, nor to make diagnoses, nor to have a patient, but that the opening of an office for the practice of medicine or the announcement of a readiness to engage in such practice, constitutes a practice of medicine; and, therefore, as the statute applies not only to those who actually practice, but also to those who announce in any way a readiness to practice, the State contends that the legislature intended to give a broader than the generally accepted meaning to the words "practice of medicine."

We are unable to agree with this contention. Without passing upon the provision referred to, and whatever its significance, it certainly cannot be construed to broaden, in a general sense, the meaning of the words "practice of medicine." The most that can be claimed for it is that it operates to broaden the offense created by said cap. 165, so that the attempt or the announcement of a readiness to practice medicine becomes equivalent to the actual practice.

The State further calls attention, in support of its contention, to section 6 of said chapter, which provides that "nothing in this chapter shall be so construed as to discriminate against any particular school or system of medicine" and it argues that, as the statutory prohibition relates to the practice of medicine "in any of its branches," and that as certain diseases, such as insanity and nervous prostration, are treated by the so-called "regular school" without the use of drugs, and that as all schools recognize the study of mental conditions as affecting bodily health as forming a distinct branch of medicine, the legislative intention to give to the words "practice of medicine" a construction sufficiently broad to include the practice of Christian science is clearly manifested.

The words of the provision against discrimination, like the words "practice of medicine," must be taken in their ordinary sense and meaning. It is a matter

of common knowledge that among medical men there are defined differences regarding the treatment of disease. These differences have resulted in different schools or systems of medicine. A recognition of the existence of such differences, however, does not broaden the meaning of the words "practice of medicine" to include the practice of that which, in the popular sense, is not a practice of medicine. Neither does the statutory reference to the practice of medicine "in any of its branches" affect the meaning of the words in question. While it is true that the study and treatment of mental disease constitute one of the departments or branches of medicine, in which the influence of the mind over the body is recognized, yet mere words of encouragement, prayer for divine assistance, or the teaching of Christian science as testified, in the opinion of the court, does not constitute the practice of medicine in either of its branches, in the statutory or popular sense.

To give to the words "practice of medicine" the construction claimed for them by the State, in the opinion of the court would lead to unintended results. The testimony shows that Christian Scientists are a recognized sect or school. They hold common beliefs, accept the same teachings, recognize as true the same theories and principles. If the practice of Christian science is the practice of medicine, Christian science is a school or system of medicine, and is entitled to recognition by the State Board of Health to the same extent as other schools or systems of medicine. Under said cap. 165 it cannot be discriminated against, and its members are entitled to certificates to practice medicine provided they possess the statutory qualifications. The statute, in conferring upon the State Board of Health authority to pass upon the qualifications of applicants for such certificates, does not confer upon said board arbitrary power. The board cannot determine which school or system of medicine, in its theories and practices, is right; it can only determine whether the applicant possesses the statutory qualification to practice in accordance with the recognized theories of a particular school or system. It would be absurd to hold that under said cap. 165, which provides against discrimination, the requirements necessary to entitle an applicant to a certificate were such that the members of a particular school or system could not comply with them, thus adopting a construction which would operate not as a discrimination only, but as a prohibition. On the other hand, to hold that a person who does not know anything about disease, or about the method of ascertaining the presence or the nature of disease, or about the nature, preparation, or use of drugs or remedies, and who never administers them, may obtain a certificate to practice medicine, is to hold that the operation of the statute is to defeat the beneficial purposes for which it was enacted.

The assumption of the title of "doctor", if defendant assumed such title, was not unlawful. Cap. 165 does not, in terms, prohibit the use of the word "doctor" by any person, whatever his business or profession may be. Its use is entirely immaterial in any case, unless under such conditions or circumstances, or in such connection, that it may serve as an announcement or indication of a readiness to engage in the practice of medicine or surgery.

The object of the statute in question is to secure the safety and protect the health of the public. It is based upon the assumption that to allow incompetent persons to determine the nature of disease, and to prescribe remedies therefor, would result in injury and loss of life. To protect the public, not from theories, but from the acts of incompetent persons, the legislature has prescribed the qualifications of those who may be entitled to perform the important duties of medical practitioners. The statute is not for the purpose of compelling persons suffering from disease to resort to remedies, but is designed to secure to those desiring remedies competent physicians to prepare and administer them.

The opinion of the court is that the words "practice of medicine" as used in Gen. Laws R. I. cap. 165, must be construed to relate to the practice of medicine as ordinarily and popularly understood, and that the acts of the defendant do not constitute a violation of said chapter. The court, therefore, cannot properly pass upon the constitutional question raised, for the right of the defendant would not be affected by any conclusion to which the court might arrive.

LICENSED PHYSICIAN MAY PRACTICE DENTISTRY

State v. *Beck, 21 R. I. 288; 43 Atl. 366*

1899

The indictment charges, in substance, that the defendant did unlawfully practice dentistry in Newport on the first day of August, 1898, without first having obtained a certificate from the Board of Registration in Dentistry, and without first having caused his name and place of business to be registered with said board.

The defendant has filed a special plea in bar to said indictment, in which he sets up, in brief, that at the time aforesaid he held a certificate in due form from the State Board of Health; that he was qualified to practice medicine and surgery by reason of the possession by him of a diploma from a reputable and legally chartered medical college, endorsed by said Board of Health, by virtue of which he was qualified to practice medicine and surgery in all its branches upon all parts of the human body, including the teeth.

To this plea, the attorney-general has demurred, on the ground that a certificate from the State Board of Health authorizing the defendant to practice medicine and surgery, as provided in Gen. Laws R. I. cap., 165, does not authorize him to practice dentistry without having first obtained a certificate from the Board of Registration in Dentistry and otherwise qualifying himself to practice dentistry in accordance with the provisions of Gen. Laws R. I. cap. 155, as amended by Pub. Laws R. I. cap. 470.

The question presented for our decision under the pleadings, therefore, is whether the defendant had the right, by virtue of his authority to practice medicine and surgery, to practice dentistry. The answer to this question depends upon the construction to be given to the statute regulating the practice of dentistry, taken in connection with that regulating the practice of medicine; as, independent of these statutes, there can be no doubt of the right of the defendant to practice dentistry.

After reviewing the dental laws passed by the Legislature, the court says that the evident purpose of the General Assembly, in the passage of the act relating to the practice of dentistry, was to protect the public from being imposed upon by persons who, while holding themselves out as competent to extract, clean, or repair teeth, or replace them by artificial ones, yet from want of instruction and skill in the art were wholly unfit to perform such a delicate and highly important function. It is a matter of common knowledge that before the passage of said act the merest novice in the art was frequently employed to extract and operate upon the teeth, to the unnecessary discomfort, and sometimes to the permanent injury of his patient. These persons were not physicians, and, as a rule, had little or no scientific knowledge of the human body; and the only knowledge which they possessed of the art of dentistry was that which they had acquired by a meager and haphazard practice. Such knowledge, while it might have been considered sufficient in the days of our grandfathers, is wholly inadequate for present demands; for while dentistry, as an independent vocation, may have had an humble and comparatively recent origin, yet it has now become a very important branch of medical science.

From what we have thus said, it would seem clear that the *reason* for the passage of said chapter 155 and the amendments thereto does not apply to the practice of dentistry by regular physicians. A physician is one who practices the art of healing disease and preserving health; a prescriber of remedies for sickness and disease. He is presumed to be familiar with the anatomy of the human body in its entirety; to understand the science of physiology and the laws of hygiene, and to be able to minister, as far as may be, to the relief of pain, disease, and physical ailments of all sorts and kinds whatsoever. And while it is true that many physicians devote themselves entirely to some branch of the medical profession for which they have made special preparation, yet the fact that they have first qualified themselves generally for the practice of medicine and surgery in all its branches, and obtained a license to pursue such practice, must be held to entitle them to operate upon the teeth and jaw, as well as upon other parts of the human organism, unless the statute now under consideration clearly

prohibits them. By the strict terms of said statute, taken by itself, it doubtless does prohibit physicians, as well as all other persons, from practicing dentistry without first obtaining the required certificate, as the inhibition is general and no exception is made in favor of physicians. Said statute, however, should not, in our judgment, be taken by itself, but should be construed in connection with said chapter 165, which, while perhaps not strictly in pari materia, yet deals with the general subject of the practice of medicine and surgery and prescribes the qualifications requisite therefor.

A familiar rule in the construction of statutes is that a statute must be construed with reference to the whole system of which it forms a part, and that statutes upon cognate subjects may be referred to, though not strictly in pari materia. Another rule is that a penal statute must be strictly construed and that the act constituting the offense must be within the letter and the spirit of the statute. And in the construction of such statutes it sometimes becomes the duty of courts, in giving effect to the manifest intention of the legislature, to restrain, enlarge, or qualify the ordinary and literal meaning of the language used. Now by the express terms of said chapter 165, a person holding a certificate, in accordance with the provisions thereof, is authorized to practice medicine and surgery in all its branches. Dentistry is now a well-recognized branch of surgery. A dentist is a dental surgeon. He performs surgical operations upon the teeth and jaw, and, as incidental thereto, upon the flesh connected therewith. His sphere of operations then, as before intimated, is included in the larger one of the physician and surgeon. A fair and reasonable construction of the two statutes taken together, therefore, comes to this: That the General Assembly, by the use of the broad and general language used in said chapter 165 relating to the authority to practice medicine and surgery, must be held to have intended to except physicians and surgeons from the restrictions imposed upon other persons, regarding the practice of dentistry, by said chapter 155 and the amendments thereto. This view is strengthened by the fact, which is common knowledge, that it has always been the custom in this State, and probably everywhere else, for physicians to treat ailing teeth, to extract teeth, and to perform various other professional services which technically come within the purview of dentistry. Physicians who reside in the country towns especially have always been called upon, to a greater or less extent, for the performance of such services. And to now prohibit them from thus treating their patients would be a source of great inconvenience and in many cases of extreme hardship and suffering to the latter, as well as an interference with the proper and legitimate functions of the former. And, as said by defendant's counsel, "any construction of the law that prevents the general practitioner from treating any part of the human body, or restricts him in the discharge of his professional duties, would be a menace to the public health and would deprive the physician of the right to practice a branch of his profession that is as old as the history of medicine itself."

Again, it is to be borne in mind that the statutes under consideration are highly penal in their nature. And it is a familiar rule that, in the construction of such statutes, if there is a reasonable doubt as to whether the acts done are within the meaning of the statute, the person accused of the violation thereof is entitled to the benefit of that doubt.

For the reasons above given, we are of opinion that it was not the intention of the General Assembly, in the passage of said chapter 155 and the amendments thereto, to preclude physicians and surgeons from practicing dentistry; or, at any rate, that there is a reasonable doubt whether they were intended to be thus precluded; and hence the demurrer must be ovrruled and the plea sustained.

Demurrer overruled, plea in bar sustained, and indictment quashed.

VALIDITY OF LAW AND PROCEDURE TO REVOKE CERTIFICATE

State Board of Health v. *Roy, 22 R. I. 538; 48 Atl. 802*

1901

The Supreme Court of Rhode Island holds constitutional section 5 of chapter 165 of the General Laws of Rhode Island, which section provides that the State Board of Health may refuse to issue a certificate to practice medicine to any

individual guilty of grossly unprofessional conduct of a character likely to deceive or defraud the public, and may after due notice and hearing revoke a certificate for like cause, in all cases of refusal or revocation the applicant to have the right of appeal to the appellate division of the supreme court, which may affirm or overrule the decision of the board. It does not think that it violates the constitutional provision that the judicial power of the state shall be vested in a supreme and inferior courts, even if the State Board of Health be only an administrative board, and not a court or judicial body. It says that the way provided to determine, in the first instance, whether a trial before the appellate division of the supreme court is desired, is speedy and inexpensive. He whose application for a license has been refused, or whose license is proposed to be revoked, can have a judicial trial without terms or condition, by taking an appeal, which is practically for the asking, and then his case is tried in full before the highest court in the state. If the State Board of Health decides in his favor, he gets all he asks, with little trouble and expense. If the decision is not in his favor, he gets for the asking a trial before the highest tribunal in the commonwealth. It is difficult to see how his rights could be better protected. The appeal vacates the proceedings before the board so far as results go, and brings the matter up before the appellate division *de novo* or anew for trial as fully as though it had never been heard before the board, save that the original charge or petition remains as the cause of trial, and save, also, that before it can be so tried before the appellate division it must have been brought before the board. Hence, mere errors in proceeding do not afford ground for overthrowing or annulling the whole proceeding, so that an appeal provided to correct such errors can not be prosecuted. Nor does the court think there is any conflict with the constitutional guaranties that no one shall be deprived of life, liberty or property unless by the judgment of his peers, or by the law of the land, or be denied the equal protection of the laws. Moreover, while it says that it is axiomatic that one can not judge in his own case, the court points out that the complaint in this case was not made by any member of the board, *ex officio* or otherwise, and says that if the secretary is personally interested in the complaint, he can not vote upon it, and, if he is officially interested merely (if such a distinction can be taken), his action is similar to boards of aldermen in various health matters where they originate the proceedings which may be appealed from, and it has never been supposed that their so doing was a cause for quashing the proceedings. And the court holds that if a person obtains his certificate to practice medicine by misrepresentation and fraud in palming off upon the State Board of Health a diploma issued to another as one issued to himself, he is guilty of conduct likely to deceive and defraud the public by inducing the public to believe that he is lawfully entitled to practice medicine by reason of the possession of qualifications that would honestly entitle him to the certificate, conduct grossly unprofessional, which is continued every time he practices medicine under the pretended authority of such certificate. No answer of the board to an appeal is required, and one is simply nugatory.

INDICTMENT NEED NOT SET FORTH EXCEPTIONS

State v. Flanagan, 25 R. I. 369

1903

The indictment charges that the defendant "unlawfully did practice medicine for reward and compensation without first having obtained a certificate from the State Board of Health, and without possessing any of the qualifications set forth in Gen. Laws cap. 165.

Section 6 of said chapter provides that nothing therein contained shall apply to gratuitous services in cases of emergency; to commissioned surgeons in the United States army, navy, or marine hospital service; or to legally qualified physicians of another State, called to see a particular case, who do not open an office or appoint any place in this State where they may meet patients or receive calls.

Section 7, as amended by Public Laws (1896), cap. 340. provides that complaints shall be made by the secretary of the State Board of Health.

(1) The first ground of demurrer to the indictment is that it does not show that the secretary made any complaint. The provision has no relation to indictments, and the demurrer on this ground is without foundation.

(2) The second and third grounds of demurrer are that the indictment does not charge the defendant with the offense created by the statute, and that it does not charge that the defendant practiced medicine in violation of the provisions of the chapter, these being the words used in section 8, which provides the penalty.

The offense set out in sections 2 and 8 is that of practicing medicine without a certificate, the words "for reward or compensation" being included in the latter, but not in the former, section. This indictment, however, has all the essential charges of both sections. It is not necessary to use the exact words of the statute, nor to refer to the particular section on which the indictment is based, if it adequately charges the offense therein set forth.

(3) The defendant argues that, by reasons of the exceptions in section 3, the charge in the indictment may be true and yet the defendant not be guilty of a violation of the statute.

The statute in the present case declares it to be unlawful for anyone to practice medicine or surgery who has not exhibited and registered in the town clerk's office his authority so to do, as provided in the chapter. It then declares that the act shall not apply to United States surgeons of the army and navy, nor to legally qualified physicians of another State called to a particular case, etc. These exceptions do not limit the offense by description or qualification. They are exceptions for special cases, which illustrate the rule in regard to exceptions very clearly. If a negative averment must be made, it must be proved. It would be impossible for the attorney-general to prove that a defendant is not a surgeon of the navy, for example. There is no record in this State to which he could appeal. He could not compel the attendance of a witness from the navy department at Washington, beyond our jurisdiction; and he could not prove it by deposition, because of the constitutional right of a defendant to be confronted by the witnesses against him. To show that a defendant is not a legally qualified physician of another State would require similar testimony from every State in the Union. It would be an unreasonable requirement.

The indictment is sufficient, and the demurrer is overruled.

COURT CAN NOT CONSIDER CHARGE OF PREJUDICE AS A BASIS FOR MANDAMUS

Kenney v. *State Board of Dentistry, 26 R. I. 538; 95 Atl. 932*

1904

A writ of mandamus was asked for to compel the issuance of a license to the petitioner to practice dentistry on the allegation that the board was prejudiced against the petitioner, and had not given her a fair and impartial examination; it was sufficient to reply that this court could take no notice of such a charge in a proceeding of this sort. If she was rejected because of improper motives on the part of the board, her remedy was by an action for damages against the individual members thereof, alleging bad faith, and arbitrary disregard of their duties, or improper animus against the applicant, or other malversation in their discharge of duty, but not by mandamus. The court also says that whatever the purpose of the section of the statute requiring the board to keep the examination papers on file for two years might be, it was too clear for argument that such a provision had nothing whatsoever to do with regard to giving jurisdiction to this court to review the findings of the board. In short, jurisdiction in a case of this sort does not depend on the manner in which the board has discharged its duties in matters where it is called on to exercise judgment and discretion, but it depends on whether there has been an absolute refusal to perform either a ministrial or a judicial duty.

INSUFFICIENT EVIDENCE FOR REVOCATION OF LICENSE—COURT NOT BODY OF MEDICAL EXPERTS

Macomber v. *State Board of Health, 28 R. I. 3; 65 Atl. 263*

1906

The court says that it was evidently the intention of the State Board that the court should infer, from the language of various advertisements, that the statements therein contained were untrue, that the claims made were extravagant and therefore likely to "deceive and defraud the public," and that the physician by allowing his name to appear on some of them, or by distributing some of them to his patients or to inquiring parties, had been guilty of such conduct. Unfortunately, however, the State Board had not seen fit to offer any testimony to show that any one of the statements set forth was untrue in fact, or even that it was extravagant or misleading, or tending to "deceive" or "defraud the public." The evidence was submitted to the court as if the court were a body of medical experts fully qualified to pass on the numerous medical questions involved. It is hardly necessary to say that this court disclaims such qualification and can not take judicial notice of such matters, but is bound to form its judgments in such matters solely on the evidence adduced before it. Again, the court says, with regard to a device advertised about which the State Board of Health seemed to desire it to infer that it was a deception and a fraud, that the board was satisfied to place before the court the evidence of a single application of this device to a person not shown to have been suffering from any disease, and not shown to be of any expert capacity in the observation or investigation of devices of that character, and desired the court to infer, from the apparently negative character of this single experiment, that the repeated application of this device, according to the directions given by its inventor, was of no value to the patient, and therefore was a fraud and tended to "deceive and defraud the public." This evidence was purely negative, and did not assist the court in coming to any conclusion regarding the value or want of value of the device in question. As to its mechanical efficiency, whether or not it was capable of producing an electric current or "thermal electricity," it would have been very simple to have subjected the device to the examination of well-known electrical experts, under the conditions named in the circulars, and to have shown whether or not any such electrical energy was produced. The most cogent evidence to show that the physician had been guilty of "gross unprofessional conduct and of conduct of a character likely to deceive and defraud the public" would have been evidence from some one or more persons that he or they had been actually deceived and defrauded, had been led into expense without adequate benefit, or had been told that they would be cured of any of the various diseases mentioned, and had taken the treatment without results, or with bad results, or that the statements made as to cures actually effected were in fact untrue.

ILLEGAL ADVERTISING AND PRACTICE DEFINED

State v. *Thomas Heffernan, 28 R. I. 20; 64 Atl. 284*

1906

The defendant was charged with practicing medicine without a certificate from the State Board of Health, and upon trial in the Superior Court was found guilty. He appealed to the Superior Court on the grounds that the verdict was contrary to the evidence and to the law.

The Secretary of the State Board of Health testified that the defendant was not registered under the laws of the State; that he had an office in the city of Providence; that the name "Dr. Heffernan" was on the door; that there was also a door label with the words "Dr. Thomas Heffernan, Doctor of Dermatology and Physical Education."

Certain printed advertisements were put in evidence, stating that "Dr. Heffernan has opened offices at 86 Weybosset Street, Providence, R. I., for the practice of Dermatology and Physical Education, in the cure of every and all manner of disease on the inside or outside of the human body. He is also authorized by law

to teach this Science of Healing to students aspiring to become nurses and doctors. Diplomas are grantable by the Heffernan Institute to such as are competent to practice the science. His hours for free public consultations are from 12 to 5, week days only. Special appointments may be made at his office by mail or telephone for treatment at the office or residence outside of office hours."

Exhibit B. states: "Dr. Heffernan has always held that so-called disease is nothing but the result of Nervous Impediments, and he has proved it in ten thousand cases right here in Rhode Island. Here they are," it then enumerates a large number of cases of various diseases, and says: "The last case of Consumption was cured in 22 days. Consultation and advice absolutely free. The only charge is for Electro-Magnetic Nerve Food and work done. Dr. Thomas J. Heffernan, Dermatologist—Physical Educator—Nerve Specialist—86 Weybosset St., Providence."

The defendant admits that these advertisements were published by him.

The testimony of patients treated by defendant, as well as receipts for money paid him, showed that he had treated patients for compensation.

The defendant testified that he is a doctor of dermatology and physical education, denied that he had ever practiced medicine or held himself out as a medical doctor and said that he had never applied to the Board of Health for a certificate. When asked if he had any authority for the practice of dermatology and physical education, he said: "I have a certificate from the State in the form of a charter." He then introduced a certificate of the Secretary of State that certain persons, of whom the defendant was one, "have filed * * * an agreement to form a corporation under the name of Heffernan Institute of Dermatology and Physical Education, for the promoting, teaching and practicing of Dermatology and Physical Education according to the principles developed and taught by Thomas J. Heffernan, the inventor of Nerve-Food.

He testified that he had been interested in the manufacture of nerve food for five years, that he had given it all his time since about June, 1905, that prior to that time he had given it very little of his time, attending to it evenings occasionally, but not regularly; that he had other occupation as president of a life insurance company; that he had been engaged in life insurance about eleven years, as agent in part and president; that prior to that he had been in the market and grocery business; that he had no medical education, never attended any medical school or took any course of studies in medicine; that he discovered the nerve food about five years ago; that it is composed of herbs and fruit entirely; that the nerve food also contains neuzoid, which is made from grasses imported from Japan and other places; that he discovered the use of neuzoid in connection with the other ingredients; that he gets a royalty from the sales of nerve food.

The words "practice of medicine" as used in Gen. Laws, cap. 165, must be construed to relate to the practice of medicine as ordinarily and popularly understood. If the acts shown by the evidence amount to the practice of medicine as meant by the statute, the defendant is not protected by his claim of ignorance of any or all of the learning which is necessary for the safe and successful treatment of disease or by his disclaimer or assumption of any kind or number of titles.

A person who testifies that he is not a medical doctor, and states that he never attended a school or took any course of studies in medicine, but claims to be a doctor of dermatology and physical education by virtue of an Institute of Dermatology and Physical Education, formed by himself and others under the law relating to incorporation, and who also adds the title "nerve specialist," by some authority not disclosed, is still amenable to the law and capable of practicing medicine in violation of the provisions of the statute.

The court is of the opinion that the acts of the defendant shown in the evidence amount to the practice of medicine in violation of the law.

The defendant, in order to lawfully practice medicine in this State, would be obliged to obtain a certificate from the State Board of Health. The definition of medicine, quoted from *State* v. *Mylod, supra*, would certainly include a remedial substance having the qualities claimed by the defendant for nerve food. If the defendant prescribed or administered something which he claimed was good for the alleviation of pain, or the cure of disease, it would not avail him to show by way of defense that what he so administered did not have the remedial qualities

which he had claimed for it. The statute was intended to protect the public from pretense and sham as well as from ignorance. The defendant's exceptions are overruled.

NOT ENTITLED TO LICENSE WITHOUT TAKING EXAMINATION

Moore v. *Napier et al., 64 S. C. 564; 42 S. E. 997*

1902

The supreme court holds that the petitioner, who received a diploma from the South Carolina Medical College, but who studied for only three years, was not entitled to a writ of mandamus requiring the board of medical examiners to issue to him a license to practice medicine without standing an examination before the board as to his qualifications and knowledge of medicine. When he matriculated as a student of the South Carolina Medical College the course of study established for graduation was only three years; before receiving his diploma the South Carolina Medical College established a four years' course of study, commencing with the collegiate year of 1901; and he took only a three years' course. The change in the course of study from three to four years was apparently made to enable graduates holding diplomas to receive the benefit of the amendatory statute of Feb. 15, 1901, exempting from the necessity of standing an examination before the board of medical examiners as to qualifications and fitness "regular graduates, holding diplomas issued by any college of established reputation in this state which has a four years' course of instruction and a standard of not less than 75 per cent. on examination." The court holds that it was the manifest intention of the amendatory act to make the exemption stated when satisfactory evidence of the standing of the college is made to the board of medical examiners, and when the graduate has studied for four years. It says that, in the exercise of its discretion, it will refuse the writ of mandamus when the effect of granting it would be to violate the intention of an act of the legislature.

STATE BOARD NOT REQUIRED TO RECOGNIZE LICENSES FROM OTHER STATES

Hollis v. *State Board of Medical Examiners, 82 S. C. 230; 64 S. E. 232*

1909

The petitioner asked that the court by its writ of mandamus require the State Board of Medical Examiners to issue to him a license to practice medicine. The application rested on the allegations that the petitioner had stood the examinations required by the boards of medical examiners of the states of Georgia and Virginia, and had received from each of those boards a license to practice as a physician; that he presented these licenses to the defendant board of medical examiners of South Carolina, tendering at the same time the statutory fee of $5, and demanded a license to practice medicine in South Carolina, but the license was refused; that at the time of the demand the board of medical examiners of South Carolina recognized licenses granted by the boards of examiners of the states of Georgia and Virginia under a reciprocal arrangement existing by virtue of section 9 of an act, entitled "An act to regulate the practice of medicine in South Carolina, to provide for a State Board of Medical Examiners, and to define their duties and powers," approved Feb. 27, 1904, which provides: "The board shall be empowered without examination to indorse, on receipt of the license fee of five dollars, the licenses issued by other state boards having an equal standard: Provided, said other state boards accord to the licenses of the South Carolina state board the same courtesy; and said other state board licenses, when indorsed, shall entitle the holder to registry in this state, and to all the rights and privileges thereby granted."

The statute does not require the board of medical examiners of South Carolina to indorse or recognize licenses from other states, but merely empowers them to do so on the conditions mentioned in the statute. The matter was one placed

by the statute entirely within the discretion of the board. The case of State v. Matthews, 81 S. C., 414, was relied on by the petitioner; but that case in its facts was the opposite of this. There the mandamus was issued against the board of pharmaceutical examiners, because the petitioner was a graduate of a reputable college of pharmacy, and the statute there under consideration provides: "No examination shall be required in case the applicant is a regular graduate in pharmacy from any reputable college; but such applicant shall be entitled to a license on furnishing evidence of his graduation satisfactory to the said board and on payment of the fee of five dollars." In that case the discretion to refuse a license to the graduate of a reputable college of pharmacy was expressly denied to the board, while in this case the statute contemplates that the granting or refusing of the license in this state to an applicant holding a license from the board of examiners of another state shall be entirely within the discretion of the board of medical examiners of South Carolina. Therefore the petition for mandamus is denied.

PRIOR ACQUITTAL NO BAR TO SECOND INDICTMENT

State v. *Van Buren, 86 S. C. 297; 68 S. E. 568*

1910

The supreme court reverses a judgment sustaining a plea of former jeopardy and acquittal in a prosecution for practicing medicine without the license required by statute. It says that the first indictment, on which the defendant was tried and acquitted, charged that he practiced medicine, without a license, on October 10, and November 5, 1908, by prescribing for the physical ailment of another; while the second indictment charged that, on Oct. 28, 1908, he unlawfully practiced medicine by prescribing for and treating the physical ailments of Mary Crim. The statute contemplates that every violation of its provisions shall be a separate offense. The question was whether it appeared from the faces of the indictments that the offenses charged were the same, so that an acquittal under the first would be a bar to a trial under the second.

It will be observed that the charge in the first indictment was entirely indefinite, except as to the time. No person or place was mentioned, and no circumstances or particular description, except the dates of the alleged offenses. For this reason the time mentioned was a material part of the description of the offense, and it was necessary to prove the dates as alleged. The state, therefore, on the trial under that indictment, was limited in its proof to showing that the defendant practiced medicine without a license on October 10 and November 5, 1908. This being so, it seems perfectly clear that the defendant was never tried and was never acquitted of any charge except that of practicing medicine without a license on the days named. Whether he had practiced on other days in violation of the statute, not being a question in issue, could not have been decided.

The test laid down as useful and generally adequate, though not infallible, by which it may be decided whether two indictments charge the same offense, is: "Would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction on the first?" Apply this test. Obviously evidence to support the second indictment, charging the practice of medicine without a license by prescribing for the physical ailments of Mary Crim on Oct. 28, 1908, could have been introduced which would have been entirely insufficient to produce conviction on the first indictment; for no evidence would have supported the first indictment except evidence of practicing medicine on the days therein named, while the evidence necessary to support the second indictment could have been of practicing medicine by prescribing for Mary Crim on other days than those to which the first indictment was confined. The circuit court, therefore, erred in laying down as a legal inference that the second indictment necessarily charged the same offense as the first.

On a trial on the second indictment no evidence of practicing medicine without a license on the days named in the first indictment would be admissible, because the defendant had been tried for those alleged offenses and acquitted; but he had

not been tried for a like offense committed at any other time, and therefore the first trial and acquittal was ineffectual as a plea against the charge alleged in the second indictment to have been committed at a different time.

FITTING GLASSES IS THE PRACTICE OF MEDICINE

State v. *Yegge, 19 S. D. 234; 103 N. W. 17; 69 L. R. A. 504*

1905

Section 21 of chapter 176 of the laws of South Dakota of 1903, regulating the practice of medicine, provides that: "When a person shall append or prefix the letters M.B., or M.D., or the title Dr. or Doctor or any other sign or appellation in a medical sense to his or her name or shall profess publicly to be a physician or surgeon * * * he or she shall be regarded as practicinig within the meaning of this act." The defendant, who was charged with practicing medicine without a license, had a sign in front of his office with the name "Dr. Yegge" thereon. There was also introduced in evidence the following notice: "Ophthalmology. A Science for the Analysis of the Cause of Human Ills and How to Abolish Them. Everybody should know that this is not a science that practices by guesses. It differentiates between functional derangements and disease. By its assistance nature cures cross-eyes, without operation; headache without drugs; hysteria without a straight jacket; female disorders without a trip to the hospital; and hundreds of nervous troubles. Simply removing causes is the secret. A true Ophthalmologist explains your case to you. Dr. M. F. Yegge," giving address and location of office. The Supreme Court thinks it was quite clear from the evidence that the letters "Dr." were used in a medical sense, and affirms a conviction. It says that the legislature evidently intended, in enacting the law, to prevent persons not properly educated in the science of medicine from assuming to act as physicians and to protect the public, and it has deemed it proper that every person assuming to act as a physician or surgeon should be properly licensed. In carrying into effect this law, it was competent for the legislature to define, as it has assumed to do in Section 21, what evidence shall be deemed sufficient to constitute a practitioner within the meaning of the act. In view of the testimony of the physicians as to the proper definition of ophthalmology, it was quite clear from the defendant's advertisement that he had assumed to hold himself out as a physician within the meaning of the act. And it was not only clear from the language of the advertisement itself, which would be generally understood as an assumption on his part of being a regular physician, or at least a specialist in that branch of medicine treating of ophthalmology, but the legislature has declared that prefixing the term "Dr." to his name should be so regarded. The law should not be so construed as to deprive the people of the benefits intended by the act, but such a construction should be given it as to carry into effect the evident intention of the legislature.

COURT WILL NOT MANDAMUS BOARD IF ACTING REASONABLY

State ex rel. Williams v. *State Board of Dental Examiners, 93 Tenn. 619; 27 S. W. 1019*

1894

Petition by the state of Tennessee, on the relation of M. B. Williams, against the state board of dental examiners, for a writ of mandamus. Judgment for defendant, and plaintiff appeals. Affirmed.

The relator, M. B. Williams, filed his petition in the circuit court of Hamilton County against the state board of dental examiners, seeking to compel that board to issue to him a certificate or license to practice dentistry in the state of Tennessee. In his petition he alleges that he has a valid diploma from the Tennessee Medical College for the practice of dentistry; that said college is a reputable college, duly chartered and organized under the laws of the state, and that in it

is annually delivered a full course of lectures and instructions in dentistry and dental surgery; that he presented said diploma, together with the lawful fee, to the defendant board, and asked them to file and register the same, and to issue to him a certificate to practice dentistry in Tennessee; that said board refused to issue such certificate and license on said diploma, unless petitioner would submit to an examination satisfactory to the board; that such refusal was unwarranted, arbitrary, and unlawful. To this petition a demurrer was filed, setting out that the functions of the board in passing upon applications for license are judicial, and discretionary in the board, and its action on the application was final and conclusive, and that the courts have no jurisdiction to compel the board to issue such certificate or license; that petitioner's demand was purely of a private nature, relating to no particular public duty, function, or office, and therefore the writ would not lie; and that petitioner refused to submit to an examination by the board, and therefore shows no right in himself, and no proper demand, and is hence entitled to no relief. The demurrer was overruled, and thereupon defendant answered (1) that the Tennessee Medical College, which issued the diploma, is not a reputable college of dentistry; (2) that, at the time of the issuance of the diploma, there was not annually delivered a full course of lectures and instructions in dentistry and dental surgery; that the board was not by law compelled to recognize its diplomas as valid and sufficient to warrant the issuance of license; that the board was invested with judicial discretion in the discharge of its duties for the protection of the public against incompetency, and in order to keep the practice of dentistry in the state up to a reasonably high standard, and that it cannot be controlled and coerced in the exercise of this judicial discretion; that the license was refused because the board did not consider the college which granted the diploma as a reputable college, and their determination of this matter is final and conclusive, and mandamus would not lie.

It appeared from the record that the state board had determined to recognize as "reputable" such schools of dentistry as belonged to the National Association of Dental College Faculties, and all others that delivered two full courses of "dental lectures," and furnished sufficient proof of their regularity; that all students not holding a diploma from some literary college, university, or high school, or a teacher's certificate of proficiency, should be required to pass a satisfactory preliminary examination before being allowed to matriculate; and that a three years' course of study be required for graduation. It further appears that when the relator presented his diploma, and asked to be licensed, the board refused to recognize the diploma, but offered to make an examination, and, if satisfactory, to grant him a certificate; and notice to this effect was given to the relator, and also to the college of which he was a graduate. It does not appear that there was any prejudice or ill will on the part of the state board toward the Tennessee Medical College, or that it required more of students or graduates of this college than of others; and it does appear that the Tennessee Medical College had, subsequent to the issuance of the diploma to the relator, changed their course of instruction so as to conform more nearly to that recommended by the National Association, and prescribed by the state board. It had also applied to become a member of the National Association.

On the hearing of the case, the circuit judge excluded all evidence introduced by the relator to show that the Tennessee Medical College was a college in good repute, and held that the action of the state board on this question was conclusive, and dismissed the petition, from which judgment petitioner appealed, and has assigned errors which raise the main question as to the power and functions of the state board, and whether their action is final and conclusive as to the issuance of license.

It is insisted on the part of the board that the power and duty are devolved on it by the terms of the act of 1891 to determine both as to the genuineness of any diploma offered to it, and as to the force and effect of such diploma,—that is, it must pass not only on the question whether the diploma is a genuine document, and not a forgery, but also whether it is issued by a reputable college; and that its determination of these questions is final and conclusive, and its action thereon cannot be controlled by the courts, unless it appear that it has acted arbitrarily or from prejudice, so as to unjustly deprive the applicant of his legal rights; and that such power is necessary to the proper execution and administration of the

law. It is evident from the purpose and tenor of the act that it was intended that an applicant, basing his claim on a diploma from a dental college, and relying on that, and declining to pass an examination, must have a diploma from a reputable dental college. It is also evident that, in order to give force and effect to the act, the board of examiners provided for in it must have discretion and power to determine, in cases of applicants with diplomas, whether they come within the provisions of the law, and whether the diplomas tendered by them as the basis of their application emanate from a reputable dental college. Otherwise, diploma issued by a college without any standing or reputation, and having an existence merely in name, would be as sufficient and satisfactory as if it came from the best college in the land. There must be the power to determine this question lodged somewhere, and it is evident that it was the purpose of the legislature to lodge it in the board of examiners created by the act. It could not be lodged in a more appropriate tribunal, composed of men learned and trained in their profession, and competent to pass on, not only the qualifications of applicants, but also the reputation of schools within the state engaged in dental education. In performing their duties, the board is exercising a quasi judicial function; and, so long as it does not act arbitrarily and illegally, its determination cannot be coerced by the courts through writs of mandamus so far as they involve the exercise of this judicial discretion.

The court has not been able to find that the defendant state board has been guilty of arbitrarily and oppressively exercising its duties and functions, and it has, by rules which seem altogether proper, fixed a standard by which to determine the standing of dental colleges, and, in so doing, has been guided by the opinions and rules of a national association, composed of eminent dental men, selected in different states, with a view to promoting uniformity of decision and advancing of the profession; and having by these rules tested the diploma presented to them, and determined that it did not emanate from a dental college which at the date of its issuance had brought itself up to the standard, although it may have subsequently done so, the court is of the opinion their finding is warranted by the law, and conclusive on the facts, and not subject to be controlled by writs of mandamus from the courts. The adoption of the rules of the National Association is in no sense a surrender of the board's power or discretion, but, on the contrary, an effort to conform to a system recognized over the United States as conducive to the advancement of the dental science, and promoting the best interest of the profession.

The judgment of the court below is affirmed, and the petition is dismissed.

SCOPE OF PROSECUTION FOR UNLAWFULLY PRACTICING MEDICINE

Payne v. *State, 112 Tenn. 587; 79 S. W. 1025*

1904

It was charged that Payne did unlawfully practice medicine without a license. The Supreme Court says that, while it is true that in certain misdemeanor cases testimony may be introduced tending to show numerous infractions of the law, falling within the period of limitation, although there be only one count or charge in the indictment or presentment, and true that in such cases the court, on application of the defendant, will compel the state to elect the particular offense or instance on which it will ask a conviction at the hands of the jury, yet the court does not think the rule applies to a case such as this one. Here the defendant was indicted for practicing medicine without a license. The term "practicing," in respect of the subject in connection with which it is used, indicates the pursuit of a business. The fact that the defendant was pursuing such business may be proven in some cases, no doubt, by a single act, where that act is clear and definite, and is so supported by other circumstances as to indicate that he was indeed pursuing the business in question; but in all cases it is far more satisfactory that a series of acts of a similar nature be proven, all tending to show that the defendant was engaged in the forbidden occupation, to the end that the jury may be enabled to determine from the defendant's course of conduct whether he is guilty of the charge. In other words, under such a charge,

each several instance of advising patients, prescribing for them, or administering medicine to them is not necessarily an offense, but these facts all taken together, when considered in connection with the further fact that the defendant had no license to practice, go to prove the charge of practicing without license. It is no more difficult for the jury to examine and draw conclusions from such a series of facts than from any other series tending to support a general proposition, nor is it more difficult for the defendant and his counsel to prepare the defense and present it to the jury. Nor can any inconvenience or hardship arise in pleading former acquittal or former conviction, as the case may be, in event there should be a subsequent prosecution. Necessarily, from the very nature of the case, an indictment for unlawfully practicing medicine would cover all special instances occurring prior to the indictment or presentment in the particular venue or county, and going to sustain the main charge; hence a former acquittal or conviction could be pleaded in bar of any subsequent prosecution based on such prior acts.

GIVING "LIGHT TREATMENTS," ETC., PRACTICE OF MEDICINE

O'Neil v. *State, 115 Tenn. 427; 90 S. W. 627; 3 L. R. A. N. S. 762*

1905

The facts presented were practically undisputed and embraced the following salient points: O'Neil, who was the defendant in the court below, charged with practicing medicine without a license, opened up an office with all the arrangements necessary for the treatment of his patients. According to the testimony, he would first subject his patients to a careful examination, including a microscopic test of a drop of blood taken from some part of the patient's body. He would then determine, from his diagnosis, the nature of the patient's ailment and whether or not it would require his treatment. It was shown in the record that the method of treatment was practically uniform in all cases. "The patient is denuded of clothing and placed in a closed cabinet, and his body is thereon subjected to the rays of two large electric arc lights, one being located in front of his body and one at the back. This treatment is continued for about thirty minutes at each sitting, and then the patient, who is by this time in a profuse perspiration, is taken into another room and rubbed off, after which he goes about his business. In addition to this general treatment a local application of the rays to the parts specially affected is made in some cases." In addition to prescribing the light treatment as the means of treatment for his patients, he gave medicines of various kinds, kept an account at a drug store where medicines were purchased, gave prescriptions in the form of orders on a certain store, advised several of his patients to take certain patent medicines as an auxiliary to his treatment, and was addressed and known as Dr. O'Neil. The record showed further that he was accustomed to make a uniform charge of $100 in each case, for the application of the light treatment, but made no charge for medicines prescribed; hence he claimed that prescriptions were no part of his treatment.

The principal contentions of the defendant were: 1. That his professional business was not within the purview of the statute regulating the practice of medicine and surgery, for the reason that he was an optician within one of the two recognized definitions of that term, and was, therefore, expressly excepted from the operation of the statute. 2. Conceding that his business was comprehended by the statute, as applied to him, said statute was unconstitutional for two reasons: First, his method of practice was not such as it was within the power of the legislature to regulate, restrict or prohibit; second, the regulation and requirements of the act, as applied to his methods of practice, were arbitrary and unjust, because his business did not require the qualifications prescribed by the statute for those undertaking to practice medicine and surgery. But the Supreme Court is of the opinion that he was properly convicted of practicing medicine and surgery without having first procured a certificate of license from the state board of medical examiners, as required by the act of 1901. It suggests that the definition of "optician" ordinarily understood should be given that word in the statute. Moreover, as the proof showed that the defendant made a micro-

scopic examination of the blood in his diagnosis of disease, and also wrote prescriptions and prescribed remedies, although it must be admitted that his principal mode of treatment was by what he denominated the "functional ray," he could not claim exemption as an optician even under the very technical definition of the word which he invoked. But the determinative fact against him on the record was that he was holding himself out to the world as a practitioner of the healing arts and was soliciting patients afflicted with disease for treatment.

NO RIGHTS AS PHYSICIAN UNTIL CERTIFICATE IS RECORDED

State v. *Haworth, 91 Tenn. (7 Pickle) 16; 18 S. W. 399*

1891

This was a case in which a woman physician, Miss Haworth, sued for a fee, and the defense claimed that she was not a licensed physician within the meaning of the statute, and demurred to the payment. The court below had rendered judgment for the defendant, whereupon the plaintiff appealed.

In delivering the opinion of the court, Judge Lurton said: "Plaintiff in her evidence states that on Feb. 25, 1891, she did register herself before the county court clerk and obtained her certificate. This was after the services rendered to defendant. * * * This cannot help plaintiff's case, for at the time she attended defendant she was prohibited from practicing, and her subsequent registration and compliance with the law can have no retrospective effect. Plaintiff says that prior to this compliance with the law she had obtained what she calls a 'temporary license,' but cannot say she had this 'temporary license' at the time she attended defendant. She admits that this 'temporary license' was never recorded as required by section 9 of act of 1889. This section requires that 'every person holding a certificate from the state board of medical examiners, or the county court clerk, shall have it recorded in the office of the county court clerk in which he resides, and the date of record shall be endorsed thereon.'

"Until such record is made, the holder of such certificate shall not exercise any of the rights or privileges therein conferred to practice medicine. In view, therefore, of the plain provision of this section, it cannot matter what the character of her 'temporary license' was, inasmuch as it was not recorded. The contract sued upon was one expressly prohibited by the statute. Where a statute has for its manifest purpose the promotion of some object of public policy, and prohibits the carrying on of a profession, occupation, trade or business, except in compliance with the statute, a contract made in violation of such statute cannot be enforced. This is familiar law, and the judgment must be affirmed."

LICENSE ALONE DOES NOT MAKE A MEDICAL EXPERT

Smith v. *State, 5 Tex. App. 318*

1878

The Court of Criminal Appeals of Texas holds that a person not being a graduate of any school of medicine, not being shown to have read any books on surgery, or to have been at all familiar with gunshot wounds, his mere license to practice medicine, even predicated on the granting of this license by a medical board, does not qualify him as an expert, to testify regarding the fatal character of a wound.

GENERAL POLICE POWER OF LEGISLATURE SUFFICIENT AUTHORITY FOR STATE REGULATION

Logan v. *State, 5 Tex. App. 306*

1878

The Court of Appeals of Texas holds that information for the offense of illegally practicing medicine need not allege that the accused did not come within the exceptions specified in the provisos to the fifth section of the act of August

21, 1876, "to regulate the practice of medicine." Those exceptions were matters of defense. The constitution of Texas of 1876 expressly empowering the legislature "to pass laws prescribing the qualifications of practitioners of medicine in this state." This provision enabled the legislature to authorize and require each district judge to appoint a board of medical examiners for his district, as provided for in the third section of said act. Moreover, irrespective of this express constitutional provision the general police power vested in the legislature sufficed for the purpose. The court says that the people of this country have long realized the necessity of legal protection against incompetents and pretenders in the practice of medicine, and of providing some means for inquiring into the qualifications of those who claimed to possess the necessary prerequisites to practice among all classes this important profession. At a very early day, whilst Texas was an independent republic, the Congress provided by law for the creation of a board of medical censors, for the examination of those who desired to practice the healing art. This law, however, after remaining upon the statute books a dead letter, was finally repealed.

SINGLE ACT CONSTITUTES VIOLATION OF LAW

Antle v. *State, 6 Tex. App. 202*

1879

The Court of Appeals of Texas holds that, under the act of 1876 "to regulate the practice of medicine," requiring that, before any person engaged in the "practice of medicine, in any of its branches or departments," he should comply with certain provisions of the act, an information need not allege the particular "branch or department" of medicine in which the defendants engaged. Proof that the defendant engaged in any branch or department of medicine sustained the allegation that he engaged "in the practice of medicine." Nor need informations for the violation of the said enactment negative the exceptions contained in the provisos to the fifth section; they were matters of defense, and provable under the plea of not guilty.

There was no error in refusing to charge the jury that "a person who was attending a single case cannot be adjudged guilty, under the law, of practicing medicine, even though he held and filed no certificate, as required by the law." That did not give such an interpretation and application of the law as the court deems correct. Bearing in mind that the violation charged in the information was the engaging in the practice of medicine without having furnished the clerk with a certificate of qualification, the court is of opinion that proof of one act in violation of the statute would be sufficient to support a conviction, the proof being in other respects sufficient—as, that he held himself out to the community in which he lived or sojourned, as a physician, and the like.

ISSUANCE OF BUT ONE TEMPORARY CERTIFICATE AUTHORIZED

Peterson v. *Seagraves, 94 Tex. 390; 60 S. W. 751*

1901

A statutory provision that one member of a board of medical examiners may give a temporary certificate entitling the holder to practice medicine until the next meeting of the board, will confer on an individual member of the board authority to issue but one temporary certificate to a person. An express prohibition of the issuance of more than one temporary certificate or license to the same person it deems unnecessary. Nor does it consider that the fact that the laws regulating the practice of dentistry and pharmacy in the state may contain provisions expressly forbidding the issuance of more than one temporary certificate can be taken to determine the construction of a practice act existing before those laws were passed.

LEGISLATURE HAS POWER TO REQUIRE REREGISTRATION

Wickes-Nease v. *Watts, 30 Tex. Civ. App. 515; 70 S. W. 1001*

1902

The Court of Civil Appeals holds that the medical practice act of that state of Feb. 22, 1901, did not go into effect until ninety days after the legislature adjourned on April 9, 1901. The reason given is that the act did not contain any direction when it should go into effect, without which, in view of the constitution, it could not go into effect until ninety days after adjournment. It recited, "The fact that there is no law in force adequately providing for the license of physicians, surgeons and midwives creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and this act placed on its final passage and it is so enacted." But the court sees in this no more than a suspension of the rules regarding the reading of bills. It also holds here that one who had been duly examined, in 1882, and given a certificate of qualification, which he had recorded in the office of the county clerk, but which he had never filed or recorded in the office of the clerk of the district court, as required by the act of March 23, 1887; could not recover for professional services rendered in May, 1901, the court holding that each new registration act must be strictly observed and that the legislature has power to pass a reregistration act.

PHYSICIAN MUST COMPLY WITH STATUTE IN ORDER TO RECOVER FOR SERVICES

Wooley v. *Bell, 33 Tex. Civ. App. 399; 76 S. W. 797*

1903

It is now settled, the Court of Civil Appeals of Texas says, that a physician cannot recover for professional services unless he shows compliance with the statute of this state (Texas) regulating the practice of medicine.

NOT TRAVELING PHYSICIAN UNDER STATUTE

Adams v. *State, 45 Tex. Cr. R. 566; 78 S. W. 935*

1904

The Court of Criminal Appeals of Texas reverses a conviction of Adams for pursuing the occupation of a medical specialist traveling from place to place, without having paid the occupation tax prescribed by the act of 1897. It says that the undisputed facts showed that he came to G. about May 1, 1903, and established and equipped an office; that he maintained an office at E., and at J. and B.; that he divided his time between these offices, and kept an assistant at each place, and treated patients at the places at stated intervals; that prior to coming to G. he had his headquarters and lived at M., and had practiced there and at J., and had lived at M. eighteen months; that on leaving M. he moved with his wife and children to G., where they lived at a hotel up to within three weeks of the time of filing the information, when his wife and children went on a visit to relatives at Q. He received his mail at G., which was his headquarters, and practiced nowhere except at his offices before mentioned. In the court's opinion these facts did not constitute him a traveling physician as contemplated by the act.

A CERTIFICATE INDISPENSABLE

Stone v. *State, 48 Tex. Cr. R. 114; 86 S. W. 1029*

1905

Where the plaintiff had a diploma from an institution in another state, it appeared from a reading of section 8 of the act of the twenty-seventh legislature, although one may have a diploma "issued by a *bona fide* medical college of

respectable standing," still he must receive a certificate to practice medicine from one of the duly constituted boards of medical examiners of the state of Texas, which shall be recorded, before he would be authorized to practice. The court takes it, however, that it would not be necessary for the plaintiff to be examined by said board, if he had complied with the other provisions of the statute, to-wit, filed his diploma, with satisfactory evidence that his diploma was issued by a *bona fide* medical college of respectable standing, and certificate issued by the board, and properly recorded, as required by the statute. But he did not secure a certificate. Whether he should be examined or not was immaterial, in the absence of the certificate. It was true, the statement of facts showed that the board refused to examine him or issue a certificate. This was a matter that might be reached through the civil courts. But the certificate was the *sine qua non* to his practicing medicine. Having received no certificate, he could not practice. As to whether the board arbitrarily refused to examine him, or not, was a matter with which this court had nothing to do. If the board arbitrarily refused him a certificate, it was no defense to a prosecution for practicing medicine, since he must have the certificate from a board of medical examiners before he could practice. The court would not be understood as holding that he had not complied with the requirements of the statute in order to secure his license, but does hold that he had not secured the certificate to practice, and this must be done before he could practice medicine. Again, it says that it does hold that the act is constitutional, and that, if the boards of medical examiners had arbitrarily refused to give the plaintiff a certificate or license, still he must get such certificate from one of said boards before he could practice. Failing in this, he was subject to prosecution under the terms and conditions of the law. It was contended that the act was unconstitutional on account of giving preference to the allopathic, homeopathic and eclectic schools of medicine, to the exclusion of all other schools, but the court does not think it repugnant to the constitutional provision that "no preference shall ever be given by law to any schools of medicine."

NEED FILE CERTIFICATE ONLY IN COUNTY OF RESIDENCE

Person v. *State, 53 Tex. Cr. R. 334; 109 S. W. 935*

1908

The Court of Criminal Appeals says that it was evidently the purpose and intent of the legislature in passing the act of 1895, that, for the protection of society, all persons undertaking to practice medicine as physicians, or act as physicians, should, before being permitted so to do, be required to furnish evidence of their skill and preparation by being compelled to file in the office of the district clerk the evidence of their qualification, such instrument, either certificate or diploma, to be filed in the county of their residence, or where at the time they were sojourning. The court thinks it clear that where the physician had once complied with the law by filing a certificate or diploma in the county where he resides that he would and should be permitted to accept professional calls and practice in any adjacent county, and as for that matter throughout the counties of the state where his services might be needed, and that it would not be required of him that he must file such certificate or diploma where he might be called after he had, in the terms of the law, filed such diploma in the county where he resided, or where at the time he might sojourn.

INDICTMENT SHOULD ALLEGE A "PRACTICING FOR HIRE"

Marshall v. *State, 56 Tex. Cr. R. 205; 119 S. W. 310*

1909

Tom Marshall was convicted of unlawfully practicing medicine, and he appeals. Reversed, and prosecution ordered dismissed. Appellant was convicted of unlawfully practicing medicine, and his punishment assessed at a fine of $100 and ninety days' imprisonment in the county jail. The charging part of the indict-

ment is as follows: "* * * In the county of Wilson and state of Texas, did then and there unlawfully engage in the practice of medicine upon a human being, to-wit, upon Mrs. T. Duke, without first having registered in the office of the district clerk of the county of his residence his authority for so practicing medicine, as required by law. * * *" The Assistant Attorney General suggests that the indictment is defective on the ground that the indictment should have alleged that appellant practiced for hire; second, it should have stated county of residence of appellant and his failure to file certificate in said county. The court thinks the indictment is insufficient. The judgment is accordingly reversed, and the prosecution ordered dismissed.

VALIDITY AND CONSTRUCTION OF ILLEGALLY LIMITED LICENSE—RIGHT TO VERIFICATION LICENSE

Board of Medical Examiners of Texas v. *Taylor, 120 S. W. 574*

1909

The board refused Mrs. Taylor's application for the verification license required by the medical practice act of 1907 to practice medicine, tendering her instead one to practice "obstetrics only." This was based on the fact that her original license, issued by a district board of medical examiners in 1889, used the words, "branches of obstetrics and diseases peculiar to women and children." But the district board certified that it had examined the applicant "as required by the laws of the State of Texas," and was "satisfied" as to her "qualifications," while it was duly established that from such time she had been a legal and regular practitioner of medicine, in general practice in the state.

Under these circumstances, the court considers that she was entitled to a writ of mandamus to compel the issuance of a verification license "to practice medicine," without the limitation sought to be imposed on her. It says that it does not think that in the facts admitted and by giving proper effect to the entire language of the certificate that the words in the certificate, "branches of obstetrics and diseases peculiar to women and children," were intended, or should be so construed, by the board to declare that they were not "satisfied" as to the applicant's qualifications in the requirements of the law. If the board intended by the words just mentioned to designate in the certificate the branch or department of medicine that she was to practice, any such designation would have no legal force or effect, would be surplusage, and would not affect her legal rights in the premises. So the fact, appearing from the certificate and admitted, that she appeared before the board, not as an applicant to practice midwifery or obstetrics only, and bearing in mind that the board was not authorized to give certificates "to females practicing midwifery exclusively," and it appearing that the board intended to and did act within its legal authority, it follows that the court would not be justified or warranted in construing the certificate in question to be a certificate intended to certify the right to practice obstetrics only.

Holding as the court does, that the legal effect of the certificate granted to the applicant by the district medical board was to authorize her "to practice medicine under the laws at the time in force," it follows that she was entitled to a verification license at the hands of the state board as broad as the legal effect of her certificate, which, by force of the law, was "to practice medicine." The duty of verification imposed on the state board by the law is to confirm or substantiate something already done. The power involved in the verification extends to the ascertainment of the genuineness and valid existence of the license previously by law granted by authorized board, and the identity of the person claiming and presenting the same, there being no cause as defined in section 11 of the act authorizing a refusal to issue.

OSTEOPATHS MUST SECURE REGULAR LICENSE TO PRACTICE MEDICINE—CONSTITUTIONALITY OF PRACTICE ACT—"MEDICINE" DEFINED

Ex Parte Collins, 57 Tex. Cr. R. 2; 121 S. W. 501

1909

The Court of Criminal Appeals of Texas affirms a refusal to release the petitioner on a writ of habeas corpus, after his arrest for practicing medicine without a license as required by the act of 1907 of the thirtieth legislature. It says that he demanded his discharge on the ground that the act was unconstitutional, which provided that an osteopath should pay a license, because the evidence showed that he used no medicine or drugs to relieve the patient, and therefore there was no evidence from which the court could conclude that he should be held in custody on a charge of practicing medicine without a license.

Section 13 of the act reads: "Any person shall be regarded as practicing medicine within the meaning of this act, (1) who shall publicly profess to be a physician or surgeon and shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation." The court holds that the decision appealed from was correct, and that the statute is in all respects constitutional.

Nor does the court agree with the contention that section 31 of article 16 of the Texas constitution, which says that the legislature may pass laws prescribing the qualifications of practitioners of medicine in that state, and punish persons for malpractice, but no preference shall ever be given by law to any school of medicine, limits the power of the legislature in authorizing the licensing of practitioners to practitioners of medicine; or that as the relator, as he is called, in practicing osteopathy used no medicine, therefore he did not come within the provisions of the act. As the court understands him on this point, he conceded that the statute was broad enough to cover his offense, but that the constitutional provision just cited limited the power of the legislature to the regulation of the practice of medicine, and that osteopathy was not practicing medicine.

However, the constitution, when it demanded the regulation of the practice of medicine, the court says, was not attempting to say that the legislature was limited to any mode or method of healing in order to regulate it; but the word "medicine," used in the constitution, means the art of healing by whatever scientific or supposedly scientific method may be used. It means the art of preventing, curing, or alleviating diseases, and remedying, as far as possible, results of violence and accident. It further means something which is supposed to possess, or some method which is supposed to possess, curative power; but if this definition of medicine is not correct, as stated in the constitution, yet there is no limitation on the power of the legislature in said provision of the constitution which inhibits the legislature under its police power to prevent any one practicing any species or character of remedy to cure any real or supposed ill that the body has or is subject to for pay.

Acts with somewhat similar provisions to the act of the thirtieth legislature now under consideration were held constitutional by the Supreme Court of Texas. So the court holds that osteopathy is one of the methods of curing the ills to which human flesh is heir, and is one of the methods of curing covered by the act of the thirtieth legislature. In other words, in order for one in Texas to practice osteopathy for pay, he must secure a license, as provided for by the act of the thirtieth legislature. This the relator did not do. The court accordingly holds that he must be remanded to the custody of the sheriff, where he will be called on to answer the complaint and information relied on in this case.

VALIDITY OF STATUTE AND GROUNDS FOR REFUSAL OF VERIFICATION LICENSE

Morse v. *State Board of Medical Examiners, 122 S. W. 446*

1909

This case was brought by said Morse to compel the board to issue to him a verification license to practice medicine. The defense was that he had been guilty of grossly unprofessional or dishonorable conduct, of a character likely to deceive and defraud the public, section 11 of the medical practice act of April 17, 1907, being relied on to support the position taken. This section provides that the board may refuse to issue the certificate provided for in case of the presentation of a license, certificate or diploma illegally or fraudulently obtained, or when fraud or deception has been practiced in passing the examination; for conviction of a crime of the grade of a felony, or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion; or for "other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public," etc.

It was contended that this last clause was too general and uncertain, and that it should therefore be disregarded and the statute administered as though the clause were eliminated therefrom, but the court does not think the statute subject to the objection urged against it, and affirms a judgment for the board. An important distinction, the court says, exists between granting a license and revoking a license, which distinction may justify the application of different rules of law. Many courts hold that the cancelation or revocation of a license to practice medicine constitutes a penalty; but such result does not follow from a refusal to grant such license. A license to practice medicine is a privilege or franchise granted by the government, and a refusal to grant such franchise, whatever the reason may be for such refusal, does not constitute a penalty.

The particular clause of the statute assailed in this case not only requires proof of unprofessional or dishonorable conduct, but it must be other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public. It is not unreasonable to conclude that, by the use of the word "other," the legislature intended that the conduct referred to should be similar in its nature to that designated in the preceding subdivision of that section and defined as "a crime of the grade of a felony, or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion." Not only that, but such conduct is further qualified by the use of the word "grossly." Furthermore, such conduct must not only be grossly unprofessional or dishonorable, but it must be of a character likely to deceive or defraud the public. It has been held, in construing a similar statute, that the language "unprofessional or dishonorable" was not intended to describe two classes of conduct, and that the word "unprofessional" was used in the same sense as "dishonorable," and not as signifying "unethical."

Nearly if not all the states have statutes requiring applicants for license to practice either medicine or law to present satisfactory evidence of good moral character and this court knows of no case in which it has even been held that such a statute was invalid because of uncertainty. It would seem that statutes of the latter class afford as much room for difference of opinion as does the statute under consideration in this case.

ILLEGAL PRACTICE OF MEDICINE BY "MASSEUR DOCTOR"

Newman v. *State, 58 Tex. Cr. R. 223; 124 S. W. 956*

1910

The evidence showed that Newman inserted in a local paper an advertisement which read: "Prof. J. M. Newman, the Masseur Doctor, has located," etc. "He is the doctor that cures consumption, appendicitis, as well as all other diseases. Now is your time to be healed. Come and see him while he is here." Soon thereafter he undertook to treat a number of persons for sundry ailments, including

warts, fever, kidney diseases, and stammering. Testifying in his own behalf, he stated that he was a doctor and a great one; that he could cure the diseases that the M.D.'s could cure, and the diseases that they could not cure; that he had treated various patients of various ailments, and received pay for his services in so doing; that he never used or prescribed medicine in treating his patients; that he used only the massage treatment; that he only rubbed patients for their ailments, and at no time pretended to be a physician or surgeon; that he did not practice medicine, but was opposed to the use of any medicine to effect cures. It was shown by the clerk that he had filed no license or authority to practice medicine.

Section 10 of the Texas medical practice act of 1907 provides that the act shall not apply, among others, to masseurs, in their particular sphere of labor, who publicly represent themselves as such. A fair analysis of section 13 classifies the practitioners who shall be subject and amenable to the law. First, it includes any one who shall publicly profess to be a physician, and claim to effect cures by any system or method; and, second, those who shall treat or offer to treat any disease by any system or method, or to effect cures thereof, and charge therefor. Evidently the words "system or method" were intended to be wide enough in their scope to reach any and every school of medicine, whether based on the administration of pills, potions, or pellets, or the modern—as many persons believe, excellent—system of osteopathy or massage. The history of legislation on this subject in Texas shows that heretofore the legislature, in dealing with the practice of medicine, had attempted to classify the different branches, and provide for boards for the different schools. Evidently the ineffectiveness of these laws was brought to public attention, because it is certain that the thirtieth (1907) legislature, with a view of closing every avenue of escape on technical grounds, and for the protection of the public health, as well as individual citizens, against the quack faker and charlatan, undertook to provide that any person shall be regarded as a practitioner of medicine who professes for pay to cure any kind of disorder or injury by any system or by any method.

The first statement in the advertisement put out by the accused characterized him as a masseur doctor. He advertised himself to be the doctor, and to cure consumption, appendicitis, as well as all other diseases, and warned the public, "now is your time to be healed." Pursuant to his invitation, many people did call to see him, to be healed of their troubles. Can it be said that this man was not holding himself out as a physician, as one who treated and cured diseases? Can it be said that he did not, in the sense that the legislature understood this term and method or system of treatment, know he was not exempt on the mere ground that he did not use drugs and medicines or surgical instruments?

He was charged with unlawfully engaging in the practice of medicine without having first registered and filed for record the certificate required by law. He was undoubtedly guilty under all the proof, and a judgment of conviction is affirmed.

CONSTRUCTION OF MEDICAL PRACTICE ACTS WITH REFERENCE TO CERTIFICATES AND VERIFICATION LICENSES—REQUIREMENTS FOR AND CONSTRUCTION OF RESTRICTED CERTIFICATE—PRESUMPTIONS AS TO ACTS OF BOARDS—RIGHT TO LICENSE

State Board of Medical Examiners v. *Taylor and Wife, 129 S. W. 600*

1910

Taylor and wife sought by mandamus to compel the board to issue to Mrs. Taylor the verification license to practice medicine provided for by section 6 of the act of 1907. A district board of medical examiners had issued to her, in 1889, a certificate stating that they had examined her and "find her qualified to practice the branches of obstetrics and diseases peculiar to women and children, as required by the laws of the state of Texas." Under this she practiced medicine from its date, but the state board refused any evidence of authority to practice, except a license to practice obstetrics only.

The provision of the act of 1907 above referred to requires the issuance by the present board of the "verification license" on production of documents sufficient to establish "the existence and validity" of the "valid and existing license heretofore issued by previous examining boards." What the verification license is to be the law does not expressly say; but its name and the purpose for which it is required plainly indicate that it is to be merely the evidence of the continuance of authority to practice as before, neither adding to nor taking from that authority. Pre-existing lawful authority is thus recognized and continued in force by compliance with the law. Therefore, if it was true that the first certificate was a valid license to practice medicine at all, either generally or in the branches mentioned in it, it must follow that the plaintiffs were entitled to a verification license to continue in force such authority as it had conferred.

The law formerly regulating the licensing of physicians, and which was in force when the certificate in question was issued, provided that it should be the duty of the board to examine thoroughly all applicants for certificates of qualification to practice medicine, in any of its branches or departments, on anatomy, physiology, pathological anatomy and pathology, surgery, obstetrics and chemistry, and when satisfied as to the qualifications of an applicant should grant to him a certificate to that effect, which should entitle him to practice medicine.

For the state board it was contended that the certificate granted to Mrs. Taylor showed by its statements that the requirement that she should be found qualified in all those subjects was not complied with, and that it was issued on a finding by the former board that she was qualified only in obstetrics and in diseases peculiar to women and children, and that she was not qualified in the other subjects named in the statute. If it were true that the certificate showed all this, it would probably follow that the board so transcended its authority in extending a license of any character as to make its action void, since it was true that the statute did not admit any one to practice without the examination in all the prescribed subjects, resulting in the satisfaction of the board of the applicant's proficiency therein. But the court cannot say that the certificate meant that, consistently with the presumption that the board did its duty, which presumption must be indulged unless its action showed the contrary. The most that could be conceded was that a certificate so worded might be used to cover up a state of facts such as that which it was thus asserted to show affirmatively. It could not even be admitted that those facts would be fairly consistent with the truthfulness of the certificate, assuming the members of the board knew their duty. They said they had examined the applicant as required by law, which meant that they had examined her in all the named subjects and that they had found her qualified to practice the branches named. They could not truly have said that she was so qualified, in the sense of the law they were sworn to follow, unless they were satisfied that she possessed the knowledge required by that law of all the prescribed subjects.

All that rendered the certificate ambiguous or questionable was the mention of particular branches, and that might be explained by the fact that the statute plainly contemplated that there might be applicants who intended to confine their practice to particular branches or departments, which made it natural, and not improper, in such cases, to mention the branches or departments in the certificate, without restricting its meaning as to the scope of the examination and of the qualifications of the applicant. The statute proceeded on the conviction that qualification to practice in any branch or department could only be attained through adequate knowledge of the subjects named, and the court thinks it should be presumed that a board of medical gentlemen, selected because of their own proficiency, would proceed on a like conception, and would not issue a certificate affirming fitness to practice a branch without being satisfied themselves of the adequacy of the information of the person licensed concerning those things declared to be essential to that fitness.

The language, "When the board shall be satisfied as to the qualifications of an applicant, they shall grant him a certificate to that effect," meant no more than that the certificate should state that they were satisfied as to his qualifications to practice medicine, and a certificate in that language would have entitled an applicant to practice in all the branches or departments, or in particular branches or departments, as he might choose. The certificate in question, if the

board understood their duty and spoke the truth, implied as full an examination and as complete qualifications as if it had been the more general one just instanced, since, under the statute, no one could be qualified, as was certified, to practice in the diseases peculiar to women and children without the required knowledge of the subjects mentioned. The provisions referred to did not apply to females practicing midwifery.

The question of whether the certificate entitled Mrs. Taylor to practice medicine generally, or restricted her to the branches mentioned, was not involved in this case. The state board were not required to enlarge or diminish her authority, but only to issue to her a verification license to have the effect already explained. The judgment of the district court required them to issue only such a verification license as required by the act of 1907, "according to the provisions and wording" of the former certificate, and to that the Supreme Court thinks that the plaintiffs were entitled.

VALIDITY OF MEDICAL PRACTICE ACT UPHELD

People v. *Hasbrouck, 11 Utah, 291; 39 Pac. 918*

1895

Richard A. Hasbrouck, upon conviction before a commissioner of practicing medicine without a license, appealed, and from a judgment of conviction in the district court appeals. Affirmed. The defendant was convicted of practicing medicine without a license, in violation of the provisions of the act of 1892; and was fined $50. An appeal was taken by the defendant, who alleged, in defense, that the appointment of the board by the governor was illegal because not made with the consent of the council, and that the law was for a number of reasons unconstitutional. The defendant was adjudged guilty as charged, and sentenced to pay a fine in the sum of $50. From this judgment the defendant appealed to the Supreme Court.

The statute upon which this prosecution is founded is of the same general character as the statutes of a large number of states upon the same subject—the regulation of the practice of medicine. The predominant characteristic and purpose of such statutes is to prevent the practice of medicine by incompetent and improper persons, to provide for the ascertainment and certification by a public officer or board of qualifications to practice, and for the public registry of legally licensed physicians, and to prohibit and punish the practice of medicine by those who have failed or refused to obtain the prescribed license or certificate of qualifications. This statute provides for the appointment of a "board of seven medical examiners from various recognized schools of medicine," who shall qualify by taking an oath that they are "graduates of legally chartered colleges in good standing, and that they will faithfully perform the duties of their office."

After reviewing the act the court says that legislation of this character is a legitimate exercise of the police power of the state, and that depriving persons not so qualified of the right to practice is not obnoxious to the inhibition of the federal constitution against the deprivation of property without due process of law, are propositions which are thoroughly settled. This general proposition is admitted by the appellant, but he attacks the statute as violative of the constitutional provisions that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, in that graduates of respectable medical colleges who were at the time of the passage of the act engaged in actual practice of medicine in the territory may be licensed, under section 4 of this act, without examination, and upon the payment of a fee of only $5; while citizens of a state or other territory who were likewise graduates of respectable medical colleges, but who were not engaged in actual practice in this territory at the time of the passage of the act, are not entitled to such privilege, but, in addition to presenting their diplomas and making proof of their identity, must also submit to an examination as to their qualifications to practice, and must pay a fee of $25. This statute does not contravene this provision of the constitution; nor does it contravene that part of the fourteenth amendment which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"; nor is

the statute obnoxious to either of these constitutional provisions by reason of the fact that persons who have practiced medicine for ten years continually in this territory prior to the taking effect of the act may be licensed to practice upon passing a satisfactory examination, although without a diploma, while others are required both to pass an examination and to possess a diploma. The plain answer to the appellant's objection is that these provisions of the statute are not directed against the citizens of other states. They do not abridge any of their privileges or immunities. They do not withhold from them any privileges or immunities which are not withheld also from citizens of Utah similarly situated. "Citizens of other states are entitled to practice medicine and surgery here on precisely the same terms and subject only to the same restrictions as our own citizens." Even if it were true that one of the sorts of qualifications is such that none but the citizens of Utah could possess it, this would not render the act obnoxious to this provision of the constitution.

It is contended by the appellant that the statute is unconstitutional, because no disposition is directed of the fees authorized by the act. The fees provided for are all manifestly intended to meet the cost of executing the law, and are therefore legitimate and proper license fees. The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise "judicial power," as that phrase is commonly used, and as it is used in the organic act, in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are no wise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government. It does not trench upon the judicial power. This act entitles every persson whose qualifications to practice medicine, in point of learning and skill, or in point of moral character, is in any manner drawn in question, to a hearing before the board. It would be absurd to contend that the courts must be converted into boards of medical examiners to ascertain and decide whether an individual possesses such technical knowledge or such moral character that he may be permitted to practice medicine with safety to the public, or whether the institution from which he holds a diploma is a "respectable medical college," or, on the other hand, a fraud or an institution whose instruction is unfit to properly and decently prepare its graduates for practice. The determination of these and kindred questions relating to the fitness of an individual to carry on an occupation requiring for its safe and proper conduct a person of decent moral character, or to engage in an occupation requiring special knowledge, care, and prudence, such as that of a pilot or many others which may be mentioned, including, of course, the practice of the professions of law and medicine, may constitutionally be and is very properly devolved everywhere upon boards of inspection composed of experts in the particular occupation in question. The right of every person whose qualifications, mental or moral, are to be determined by this board, to a hearing before it, is clearly implied by the provisions for the administration or oaths and the taking of testimony "in all matters relating to its duties," and from other provisions of the act. If the board should, through malice or prejudice or dishonesty, arbitrarily refuse or revoke a license, the injured party would have his remedy by appropriate proceedings in the courts, and the board would be restrained from doing or compelled to undo the wrong. But, if the action of the board is in good faith, its final determination of qualification is not obnoxious to any constitutional provision. Due process of law is not necessarily judicial process. A uniform rule and a uniform process for ascertaining and determining qualifications as prescribed by this act, operating equally on all persons, affording to all persons the right to establish their qualification before the board, this is due process of law.

The validity of the appointment of the board acting at the time specified in the complaint is challenged upon the ground that none of the members were

appointed by, and with the advice and consent of, the council. It may be noted, that not only was the act approved on the last day of the session of the legislature which enacted it, but, there being no specified time mentioned in the act upon which it should go into effect, it would take effect upon June 1, 1892. It was therefore legally impossible for the governor to appoint a board of medical examiners by and with the advice and consent of the upper house of the legislature which passed the act. The provision that the governor shall appoint the board upon the passage of this act is to be construed as equivalent to a provision that he should appoint upon the taking effect of the act.

REPEAL OF PRACTICE ACT NO JUSTIFICATION FOR SUIT FOR ILLEGAL SERVICES

Warren v. *Saxby, 12 Vt. 146*

1840

In this case the plaintiff sought to recover for medicines, and for services rendered the defendant, as a physician, without being licensed in the manner provided by the statute of 1820, and while that act was in force. The act provides that no person, who shall be employed in the practice of physic and surgery, etc., within this state, shall, hereafter, have any right to make any demand for the same, or shall be entitled to the benefit of law, for the collection of his fees, etc., unless, etc., stating the modes of license. This statute was repealed before the commencement of the present action. It is now contended that the plaintiff is entitled to recover. The history of legislation in regard to apothecaries, surgeons and physicians, from the date of the statute of 14 Henry 3, when the subject was first attempted to be regulated by law in England, to the present time, would afford a curious subject of investigation, and might tend, in some degree, to throw light upon the present question. Since that period there have been many statutes passed in England, with a view to establish scientific practice and to discourage mere pretenders. The College of Physicians was incorporated there as early as 14th Henry 6, with most enormous powers, both of restriction and coercion, in relation to all who attempted either of the above named acts. And it seems still to be supposed, there, that much harm may be prevented by these legislative restrictions. In this state, no doubt, the legislature which passed the statute of 1820 entertained the same opinion. "But, as the grand contest here is, first, for subsistence, and, finally, for wealth, which is supposed by many to confer almost the only solid distinction, it was well supposed, by the legislature, that, by depriving mere pretenders, in physic and surgery, of all hope of pecuniary advantage, they would remove from that class of practitioners the principal motive to intrude themselves upon the educated members of that honorable profession. And the court entertains no doubt that it was the design of the legislature, not only to take away all right of action for such services, but to make them, when rendered, absolutely gratuitous. Such being the effect of the statute, it is obvious the mere repeal of the statute could give no right of action for past services. It needed something more than to remove an impediment. There must be life infused, and a course of action created, which before did not exist. This was not done by the repeal of the statute and could not legally and constitutionally have been done by a positive enactment even. It is not competent for the legislature, even, to create an obligation out of a by-gone transaction, which, at the time of its occurrence, all parties understood to be and was strictly gratuitous. If this had been the repeal of a statute of limitations, which only interposes an impediment to the recovery, or if it had been the repeal of the statute against frauds and perjuries, which provides that 'no action shall be maintained' upon certain contracts unless reduced to writing, leaving the contracts themselves in force, for certain purposes, it might have merited a different consideration."

BOARD HAS POWER TO PASS DIPLOMA

Townshend v. *The Board of Censors, 62 Vt. 373; 19 Atl. 635; 8 L. R. A. 112*

1890

The plaintiff claimed to be a graduate of the Vermont Medical College and asked for a writ of mandamus against the censors of the Vermont State Eclectic Medical Society, commanding them to issue her a certificate to practice medicine. The act of 1880 provides that every medical society chartered by the legislature shall issue certificates to physicians and surgeons who furnish evidence by diploma from a medical college, or by examination satisfying the censors of the medical society that the applicant is qualified to practice medicine. The record shows that the censors of the Vermont State Eclectic Medical Society refused to issue a certificate on the ground that the Vermont Medical College had no legal right to confer the degree of M.D. The question at issue is, therefore, the right of the medical college to issue diplomas. The court says that it is plain that the board of censors has the power to decide whether a diploma presented to it is genuine or spurious. In this case the board decided that this diploma did not have legal efficacy to warrant the issuance of a license. A corporation has such power only as is conferred by its charter with such incidental powers as are necessary to enable it to exercise its chartered power. No express power to confer degrees can be found in the statute under which this medical college was organized. Hence the power to confer degrees, if it exists at all, must be classed as incidental to the general powers of the corporation. The degree of M.D. is something more than a mere honorary title. It is a certificate attesting the fact that the person upon whom it has been conferred has successfully mastered the curriculum of study prescribed by the authorities of the institution legally authorized to issue such a certificate. A diploma conferring the degree of M.D. has, therefore, legal sanction and authority. It also carries with it the confidence and patronage of the general public and thereby becomes a property right of great pecuniary value. The power to confer degrees not being conferred explicitly by the statute and not being necessary to enable a literary and scientific institution to carry forward studies of a literary or scientific character, clearly does not exist. The legislature has evidently intended that special authority was necessary in order to confer degrees. The court is clearly of the opinion that the college in question has no power in its articles of association to confer degrees of any kind. To hold that the legislature, by the general law, intended that any three men in any town in the state, however illiterate or irresponsible, might organize and flood the state with doctors of medicine, doctors of law, doctors of divinity and all the various titles that everywhere in the civilized world have signified high attainment and special equipment for professional work, is absurd. The court holds that the plaintiff did not furnish the board sufficient evidence of qualification to entitle her to the license asked for and is consequently not entitled to a writ of mandamus.

FAILURE TO APPEAR BEFORE BOARD—REVOKING LICENSE

Stevens v. *Hill, 74 Vt. 164; 52 Atl. 437*

1902

The Supreme Court says that the petitioner got himself licensed to practice medicine on the strength of a diploma from a college in Ohio. The board of censors who licensed him became suspicious that the diploma was fraudulent and sent him word that they wanted to see it again. He promised to come, but failed to keep his word. Finally, they had him summoned to appear and show cause why his license should not be revoked as having been procured by fraud in presenting a forged and spurious diploma. He did not appear, and the board revoked his license, basing their action, as they stated, partly on the affidavit of the secretary of the Ohio college that no such person as the petitioner had ever been granted a diploma therefrom. His request for a writ of certiorari, by which he hoped to get the case before the court for review, was put on the ground that the board acted without any evidence, in that the affidavit was not taken on

notice to him. But the Supreme Court declares that it could not be said that the affidavit was no evidence. If the petitioner wished to insist on formal and regular proof, he should have made his appearance. He chose to stay away, and it was not just that he should take the objection by this extraordinary writ. He had his day in court, and must be treated as having waived such formal objections as much as if he had been present and held his peace. Wherefore, the writ was denied.

INDICTMENT MUST STATE WAY ONE HOLDS HIMSELF OUT AS PHYSICIAN

State v. *Wilson, 79 Vt. 379; 65 Atl. 88*

1906

The Supreme Court says that it has been decided by some courts, under statutes prohibiting the practice of medicine without a license, and which enumerated various acts which should be regarded as "practicing medicine," that an indictment charging the offense must allege some one of the acts so enumerated. In this case the material allegation in the indictment, apparently following the language of the statute, was that the respondent "did hold himself out to the public as a physician in this state, without having . . . passed the examination required by law, . . . and without having received a license from the medical registration . . . to practice as a physician." But it is held that this was not sufficient. The court says that there are various ways in which the respondent might have held himself out to the public as a physician, and he was entitled to know in what manner the state claimed he "held himself out" before he was compelled to plead. As the rule is sometimes stated, the allegation must descend far enough into particulars. and be certain enough in its frame of words to give the respondent reasonable notice of what will be produced against him at the trial. The court thinks that the allegation in this indictment did not fulfill the respondent's right under the constitution "to demand the cause and nature of his accusation."

INDICTMENT NEED NOT BE IN EXACT WORDS OF STATUTE

Whitlock v. *Commonwealth, 89 Va. 337; 15 S. E. 893*

1892

Whitlock was convicted of practicing as a physician without having a license therefor, and appeals. Affirmed. This was a prosecution against the plaintiff in error in the corporation court of the city of Winchester for a violation of the revenue laws. The indictment contains two counts. The first charges that the defendant did practice medicine, for compensation, without having obtained a license. The second count is like the first, except that it omits the averment that the defendant practiced for compensation. The defendant demurred to the indictment, and to each count thereof, but the demurrer was overruled, and this ruling is the subject of the first assignment of error. It is contended that the demurrer ought to have been sustained, because the indictment does not follow the words of the statute in setting out the offense, and is uncertain and otherwise defective. The language of the statute is that no person shall practice as a physician without a license, and the indictment charges that the defendant did practice medicine. The court is of opinion, however, that the indictment substantially adheres to the words of the statute, and is sufficient. It is not always necessary that in an indictment under a statute the precise language of the statute shall be used in describing the offense. It is sufficient if the words used are equivalent to those employed in the statute; and to charge a person with practicing medicine is equivalent to charging that he practiced as a physician. The indictment states all the circumstances which constitute the offense, as set down in the statute, to bring the defendant precisely within it, and is good. The second count does not state that the defendant practiced for compensation, but that is immaterial.

EXEMPTIONS DO NOT MAKE LAW DISCRIMINATORY

Fox v. *Territory*, 2 *Wash. T. 297; 5 Pac. 603*

1884

The plaintiff in error was indicted, tried, and convicted for practicing medicine for gain. The court does not think the medical practice act involved is in any sense an *ex post facto* law, or in the nature of a bill of attainder. It prescribes qualifications for all persons proposing to practice medicine and surgery in the territory, and in so doing excludes many from the practice who might otherwise engage in it; but this exclusion does not proceed upon the idea of punishment for past acts. It is claimed by counsel for plaintiff in error that the law is in conflict with the fourteenth amendment to the constitution, in that it prescribes a standard of qualification to entitle one to practice medicine and surgery, namely, the being a graduate of a medical college or university, and it relaxes the standard in favor of those who were engaged in the practice at the time of the passage of the law. We see a discrimination here, it is true, but no deprivation of a right secured by the fourteenth amendment. It will hardly be contended that it is the right of medical practitioners, bearing diplomas from a medical college or university, to have excluded from the practice all who are not thus qualified. Another objection to the law, urged by counsel, is that it discriminates between persons of equal learning and skill, by permitting that person to practice medicine and surgery who was so engaged the day before the passage of the law, while it denies the privilege to the person who may seek to engage in the practice the day after or at any time after the passage of the law. It appears to be an answer to this objection to say that the law does not deny the privilege of practicing medicine and surgery to any one. Any citizen of the territory may qualify himself in the manner pointed out by the law, and thereafter may lawfully engage in the practice of medicine and surgery. The legislature, for good and valid reasons, has exempted a particular class from the necessity of having this qualification, but this action does not entitle persons of another class to claim the exemption as a legal right to themselves under the fourteenth amendment or under any other clause of the federal constitution. Another objection, founded upon the provision of the law which exempts from its operation physicians and surgeons in another state, territory, or province, living adjacent to this territory, who may cross the border to attend patients in the territory, is disposed of by the same line of reasoning.

MEDICAL PRACTICE ACT VALID EXERCISE OF POLICE POWER

State v. *Carey*, 4 *Wash. 424; 30 Pac. 729*

1892

Carey, convicted of practicing medicine without a license, appeals on the ground (1) of the unconstitutionality of the law under which the defendant was prosecuted; and (2) that the facts stated in the complaint do not constitute a crime or misdemeanor, in that the offense sought to be charged is not sufficiently described, and that said complaint is too vague, indefinite, and uncertain.

It is urged in support of this position that the law under which this prosecution is urged is obnoxious to section 12 of article 1 of the constitution of the State of Washington, which is as follows: "Sec. 12. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." The contention of the appellant is that the law under consideration is unequal, because (1) the governor alone furnishes the test of the qualifications of the nine physicians comprising the returning board by the arbitrary exercise of the appointing power; (2) that the nine physicians comprising the board are not subject to an examination or to the payment of the examination fee of $10 required of applicants for examination, and that consequently privileges and immunities are by this law accorded to a certain portion of that class engaged in practicing medicine and surgery in the state of Washington which are not on the same terms equally accorded to all citizens

belonging to such class. We think the law in question affords no substantial basis for these objectionss. From the very necessities of the case, the test of the qualifications of the examining board in the first instance must arbitrarily rest somewhere. This is true of every examining board in every department of the government, and to deny the right of the legally appointed tribunal to thus arbitrarily exercise this discretion is practically to deny the right of the state to enact and enforce the law. In this instance the legislature has invested the governor with this power of selection. There might possibly be something in the second proposition of appellant, if it were conceded that his premises were correct; but we are unable to find anything in the act which warrants the conclusion that the members of the examining board are exempt from any of the burdens which are imposed upon other physicians who desire to practice medicine and surgery in the state. The fact that a person who practices medicine in the state is a member of the board will not release him from the necessity of obtaining the license and paying the fee required. A majority of the board may grant the license, and it can as consistently be granted to a member of the board as to any one else.

It is also contended by the appellant that the law is in violation of the conclusion that the members osf the examining board are exempt from any of the the character of the one in question is founded upon the "police power" of the state, and the scope of this power has been the subject of much controversy, and the term has been variously defined by courts and text-writers. It is defined by the Supreme Court of Illinois in the case of Lake View v. Rose Hill Cemetery, 70 Ill., 192, as "that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." Many definitions have been announced by the courts, but the above, it seems to us, is so terse and comprehensive that we need look no further for a definition. Under our form of government especially, all the personal liberty possibly consistent with the general welfare is conceded to the individual, and while, as a general proposition, it is doubtless true that any citizen has a right to pursue any lawful calling, yet in respect to certain occupations not in themselves unlawful, this right is necessarily subject to legislative restrictions from considerations of public policy. In the profession of medicine, as in that of law, so great is the necessity for special qualifications in the practitioner, and so injurious the consequences likely to result from the want of it, that the power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties cannot be doubted.

The practice of medicine and surgery is a vocation that very nearly concerns the comfort, health and life of every person in the land. Physicians and surgeons have committed to their care the most important interests, and it is an almost imperious necessity that only persons possessing skill and knowledge should be permitted to practice medicine and surgery. For centuries the law has required physicians to possess and exercise skill and learning, for it has mulcted in damages those who pretend to be physicians and surgeons who have neither learning nor skill. It is therefore no new principle of the law that is asserted by our statute, but if it were it would not condemn the statute, for the statute is an exercise of police power inherent in the state. It is of high importance to the community that health, limb and life should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of respectable, skilled and learned men, although it is not within the power of the legislature to discriminate in favor of any particular school of medicine. When intelligent and educated men differ in their theories, the legislature has no power to condemn the one, or approve the other, but it may require learning and skill in the school of medicine which the physician professes to practice. Our statute does not undertake to discriminate between rival or different schools of medicine, nor can we see that it invades or abridges any citizen's constitutional right. No one is proscribed or prevented from practicing medicine. All that is required of the applicant is that he shall possess the necessary qualifications, and the test of qualification is prescribed by the

law. That test may not be the best that could have been devised; it may be exceedingly imperfect and faulty; and in some respects we think it is, as it is difficult to see how a practitioner's qualifications can be affected by the mere accident of his residence in the state at the time of the passage of the law, or why the community should not be protected from resident as well as non-resident charlatans and quacks; yet, conceding the right of the legislature to legislate upon the subject, the wisdom of the act, its reasonableness or unreasonableness, is a question for legislative discretion, and not for judicial determination. The court is of the opinion that the law is not in conflict with any constitutional right, and therefore it must be sustained.

The court then discusses the objection that the facts stated in the complaint do not constitute a crime or misdemeanor. It is argued by the respondent that the statutory provisions are not a definition of the crime, but simply an enumeration by statute of probative facts, which need not be alleged in the complaint. The court holds that it was the intent of the legislature to define the crime by the use of the language quoted. This is a crime not known to the common law, —it is purely statutory; and, if the statute has failed to define it, it is not defined at all, and the defendant is called upon to answer to an undefined crime where no particular act constituting the crime is charged. To meet this objection it is contended by the respondent that everybody knows what the term "practicing medicine" means. Every person may know what his particular idea of practicing medicine means, but one person's idea as to what it means may differ from another's. The court holds that the indictment in this case was defective, and on this ground reverses the judgment.

INSUFFICIENT PROOF OF PRACTICING MEDICINE

State v. *Dunham, 31 Wash. 636; 72 Pac. 459*

1903

The Supreme Court says that the acts constituting the practice of medicine charged in this case were that at a certain time and place the latter "did wrongfully and unlawfully establish and maintain an office, and advertise the title of doctor" in a certain newspaper. No attempt at all was made to prove that he maintained an office, and the only evidence introduced as to the other fact was a paper containing an advertisement. Clearly, the court holds, there was here no proof of the crime charged, namely, the practicing of medicine without a license. As against the presumption of innocence, it could not be presumed from the mere fact that an advertisement appeared in a paper that it was authorized by the accused, nor would it be presumed that he was the persosn named in the advertisement, though the name therein and his name were the same.

LAW AGAINST OWNING OR MANAGING OFFICE UNCONSTITUTIONAL

State v. *Brown, 37 Wash. 106; 79 Pac. 638*

1905

The Supreme Court holds that the police power of the state does not authorize the enactment of a statute requiring examination by and license from a dental board before one may "own, run, or manage" a dental office. It says that it is solicitude for the physical well-being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to "treat diseases or lesions of the human teeth or jaws, or to correct malpositions thereof." To perform such work with safety and with proper regard for health and comfort, the operator must possess technical knowledge and skill peculiar to the study and practice of dentistry. Can the same be said of one desiring to own, run or manage a dental office? The court thinks not. To own and run property, it says, is a natural

right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist. To illustrate: Suppose a man thoroughly qualified and legally licensed as a dentist should die, leaving a perfectly and completely equipped dental office to his widow, who knew nothing of dentistry and was incapable of securing a license. By continuing to own this property any appreciable time she would become liable to prosecution under this part of the statute. Can the police or any other power be constitutionally invoked to produce such a result? The court is led to believe not. Carry the illustration a little further: The widow, not being able to sell the dental office to advantage, decides to hire competent and legally licensed dentists to treat patrons of the office, and undertakes the management herself—paying bills, collecting accounts, arranging credits, making appointments, and doing other acts necessary to the supervision and control of the business affairs of the concern. Then she becomes a criminal, if this portion of the statute have virtue, because she has managed a dental office. And yet it will scarcely be contended that any of these acts injuriously affect "the health, good order, morals, peace or safety" of society, or menace "the lives, limbs, health, comfort, quiet or property" of the patients treated in such office. Many similar illustrations will readily occur to the mind given to the contemplation of the natural results reasonably to be anticipated under the operation of such a statute. Should the owner or manager hire operators not legally qualified, or should they participate in the treatment or operations mentioned in the other portion of the statute, they would, of course, be amenable to and punishable under those provisions. But the court is unable to say or to perceive that the health, moral or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required.

CONSTITUTIONALITY AND APPLICATION OF PRACTICE ACT

State v. *Lawson, 40 Wash. 455; 82 Pac. 750*

1905

The Constitution of the State of Washington provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth at full length." In this case it was contended that there was no law in the state of Washington authorizing the licensing of persons to practice medicine and surgery; that the act of 1890 was entirely superseded by the amendatory act of 1901. The basis of this contention was that the amendatory act of 1901 did not set forth at full length the sections of the original act which were not amended, as it was claimed the constitution required. But the Supreme Court of Washington says that, whatever support this connection might find in the earlier decisions of the courts of Louisiana and Indiana, it is no longer considered as sound. And it holds that the unamended sections of the act of 1890 and the three sections as amended by the act of 1901 are in full force and effect and constitute the law on the subject under consideration.

The uncontradicted testimony in this case showed that the defendant practiced medicine as defined by the statute. Did he have a license so to do? The testimony tending to show that he had no such license was the following: (1) The testimony of the secretary of the state board of medical examiners to the effect that he never obtained a license from said board; (2) the testimony of the county clerk of King county to the effect that no license or certified copy of a license was of record in his office, and (3) the testimony of the county auditor of King county to the effect that the defendant's name did not appear as a licensed physician in the records of his office. The defendant contended that, notwithstanding all such testimony, he might have been duly licensed in some

other county in the state prior to the passage of the act of 1890, and such license not appear in any of said offices. This, the Supreme Court, which affirms a conviction, says, was, no doubt, true, but the statute makes the records of the clerk's office *prima facie* evidence of the existence or non-existence of a license. The defendant conceded this, but said that the statute declared an arbitrary and illogical rule of evidence, and was, therefore, unconstitutional.

The court's answer is: Where a license issued in any county of a state authorizes the prosecution of a business or the practice of a profession in any part of the state, the difficulty of proving that a given person has no license is very great. This fact has induced many of the states to enact laws imposing on the defendant the burden of proving a license in all prosecutions such as this, and these statutes have been declared constitutional. If the state can require the defendant to justify under his license in the absence of any proof whatever, it goes without saying that it can likewise declare what character of proof shall constitute *prima facie* evidence.

WHEN MAY COURT COMPEL EXAMINATION BOARD TO ISSUE LICENSE

State v. *Board of Dental Examiners of the State of Washington, 38 Wash. 325; 80 Pac. 544*

1905

The Supreme Court says, that the confusion in the discussion of the right of the courts to interfere with the discretion of an examining board arises more from the inaccurate terms which are used by the law writers than from any inherent difficulty in the law itself. The general rule is well established that the courts can not review the discretion which has by law been vested exclusively in inferior tribunals, and mandamus will therefore not lie to compel the performance of acts or duties which necessarily call for the exercise of discretion on the part of the officer or board at whose hands their performance is required, because the state has, as in this instance, specified the officers on whose judgment on the questions submitted to them the state is willing to rely. Taking the case at bar (where a mandamus was sought) for an example, if a record of the examination had been produced in court, with the questions, answers, and credits given to each question, who would determine whether or not a particular answer had received a sufficient credit? Certainly not the jury, for they are not presumably competent to pass a proper judgment on such subjects. Not the judge, for his qualifications do not embrace, or at least require, an expert knowledge of the science of dentistry. Expert witnesses could not be properly permitted to testify for the reason that the state has already designated and empowered experts to pass on these questions, presumably by reason of their recognized qualifications. But, notwithstanding this, it is equally well established that courts will compel by mandamus the honest performance of official duty, and if, under pretense of exercising discretion, the power is exercised with manifest injustice, or is grossly abused, or duty is avoided, the courts will grant relief. The action of the court must in reality be based on the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed, because, if it acts arbitrarily or fraudulently, or through unworthy or selfish motives, or conspires against the rights of individuals, under the law, and therefore against the law itself, it has not strictly, as is frequently said, "abused its discretion"—a term which is responsible for some confusion of ideas on this subject—but, in contemplation of law it has not exercised its discretion at all, but has sought to substitute arbitrary and fraudulent disposition and determination of the question submitted for the honest discretion demanded by the law. In such cases the law will by mandamus compel the tribunal to act honestly and fairly, or, in other words, to exercise its discretion; and, when this distinction is kept in mind, the seeming difficulties which have surrounded this question, and which have caused so much discussion, disappear.

NO TIME BAR AGAINST REVOCATION OF LICENSE AFTER CONVICTION OF OFFENSE INVOLVING MORAL TURPITUDE.

State Medical Examining Board v. *Stewart, 46 Wash. 79; 89 Pac. 475*

1907

The Supreme Court of Washington says, in the case of State Medical Examining Board v. Stewart, that a complaint was filed with the state medical board on June 16, 1906, seeking to revoke the license of the defendant to practice medicine within the state. The complaint alleged that he was guilty of unprofessional and dishonorable conduct, and particularly stated facts showing his conviction on Sept. 30, 1903, for an offense involving moral turpitude. The state statute provides that a license to practice medicine may be revoked by the state examining board on complaint charging unprofessional or dishonorable conduct, and it is provided by section 6285, Pierce's Code, that a conviction of any offense involving moral turpitude shall constitute unprofessional or dishonorable conduct. Section 6287 provides for an appeal from the board of examiners to the Superior Court of the county in which was held the last general meeting of such board; and also provides that such appeal shall stand for trial anew in all respects as ordinary civil actions, and like proceedings shall be had thereon. No time is limited within which such proceedings shall be commenced. It was argued here that, because no time is fixed, such actions must be commenced within two years, under the provision of the state of limitations. But the court does not think that provision applicable to this case.

The court says that the character of the person at the time the charge of unprofessional conduct is made controls his right to the license. A conviction of any offense involving moral turpitude is made conclusive evidence of unprofessional conduct. It is not contemplated by the statute that the examining board shall try the accused and find him guilty of an offense involving moral turpitude when there has already been a trial and conviction. The statute, therefore, constitutes a rule of evidence in such cases, to which the statute of limitations does not apply.

REASONABLE CONDITIONS WILL NOT INVALIDATE STATUTE

State ex rel. Thompson v. *Board of Dental Examiners of Washington et al, 93 Pac. 515*

1908

Thompson made application for a writ of mandamus to compel the State Board of Dental Examiners to examine him touching his qualifications to practice dentistry in the State of Washington, and to further compel such board to issue to him a license to practice dentistry in the event that he successfully passes such examination. The defendants interposed a demurrer to his affidavit, which was sustained by the trial court. Thereupon the relator declined to plead further, and an order of dismissal was entered, from which he has appealed.

Appellant's only contention is that the provision of the statute requiring him to present his diploma as a condition precedent to taking the examination is unconstitutional and void. He has alleged that he has sufficient skill, learning, and experience to enable him to pass any reasonable or proper examination and fit him for the practice of dentistry. Appellant's apparent position is that, while a valid statute might be enacted requiring him either to pass an examination or present a diploma from some dental college in good standing, it cannot compel him to do both without invading his constitutional rights. In other words, he contends that, if he has, as admitted by the demurrer, sufficient skill and knowledge to fit him for the practice, and is able and willing to pass the examination, he cannot also be required to present a diploma to the board as a condition precedent to being permitted to take such examination. The statute makes the same requirements of all applicants for examination. No favored or preferred classes are created or recognized. An applicant who holds a diploma must also pass the examination. Rightful possession of his diploma does not of itself authorize him to practice, or entitle him to a license. The requirement for both diploma and

examination as a test of knowledge and skill is not such an unreasonable or arbitrary one as to invalidate the statute. The right to determine what requirements must be met by an applicant is within the exclusive province of the Legislature.

MAKING A CHARGE CONSTITUTES ILLEGAL PRACTICE

State v. *Thompson, 48 Wash. 683; 94 Pac. 667*

1908

The appellant was convicted of practicing dentistry for a fee without first having procured a license therefor. He appeals from a judgment imposing upon him a fine.

He argues that the evidence was insufficient to show that he practiced dentistry or that he received a fee therefor. The evidence shows without dispute that the appellant maintained a dental office in Seattle, and agreed to make a new mouth plate for the prosecuting witness for the price of $5; that, in order to fit the plate, it was necessary to extract a tooth. Appellant extracted the tooth, and took an impression for the plate, and collected $3 on account. Subsequently the plate was made, but the prosecuting witness did not return for it. It was conceded that appellant at the time did not have a license authorizing him to practice dentistry in the state, as required by the dental act. Appellant stated to the prosecuting witness at the time the tooth was extracted that he made no charge for extracting the same. These acts of the appellant clearly constituted the practice of dentistry within the meaning of the act. While appellant made no independent charge for extracting the tooth, that was a necessary part of the work in fitting the plate to the mouth, because the plate could not be fitted or the impression taken without the removal of the tooth. The charge, therefore, covered that as much as any other part of the work. But the taking of the impression was itself practicing dentistry, because that act was for the purpose of correcting a malformation of the jaw by inserting a tooth in place of the one removed. The evidence was clearly sufficient.

Appellant also argues that the act is unconstitutional. The court has heretofore passed upon all the questions presented here, and is satisfied with the conclusions there reached.

There is no error in the record, and the judgment must therefore be affirmed.

UNLAWFUL USE OF TITLES BY "OSTEOPATHIC AND MAGNETIC" PHYSICIANS AND "DRUGLESS" DOCTORS

State v. *Pollman, 51 Wash. 110; 98 Pac. 88*

1908

The Supreme Court affirms a conviction of the defendant of practicing medicine without a license, and says that the defendant had maintained an office and place of business in front of and on the doors of which he had caused his name to be lettered, with the words, "Physician," and "Dr.," and had otherwise advertised a title which tended to show that he was a lawful practitioner of medicine and surgery under the laws of the State of Washington, when, in fact, he was not such a practitioner. It is competent for the legislature to prohibit acts of this kind. Its purpose in so doing is to protect the people against deception.

The Washington statute provides that "Any person shall be deemed as practicing within the meaning of this act who shall have and maintain an office or place of business with his or her name and the words physician or surgeon, 'Doctor,' 'M.D.' or 'M.B.' in public view, or shall assume or advertise the title of doctor or any title which shall show or shall tend to show that the person assuming or advertising the same is a lawful practitioner of any of the branches of medicine or surgery in such a manner as to convey the impression that he or she is a practitioner of medicine or surgery under the laws of this state." The titles which the statute sets out are those usually associated with practitioners of the regular schools who treat diseases by the administration of remedies in the nature of drugs and their compounds, rather than with practitioners

who treat solely by appeals to Divinity, the occult, or by "manually manipulating the limbs, muscles, nerves, and by flexing and manually manipulating the joints of the body," and it is practitioners of the regular schools rather than the others that the ill and infirm seeking relief usually expect to find when entering a room whose door has lettered on it the name of a person preceded by the title, "Dr.," or followed by the letters "M.D." or "Physician and Surgeon."

The defendant, it was true, prefixed to the word, "Physician" the words "osteopathic and magnetic" in one instance, and the word "drugless" in another; but these did not make the use of the word lawful. The statute is a prohibition against any use of the word in connection with announcements of the profession or business of a person other than practitioners of medicine and surgery who have passed the examination prescribed in the statute and received the license therein provided for, and this prohibition is not evaded by the use of qualifying adjectives prefixed to the prohibited words. The statute also uses the word "doctor," instead of the more common abbreviation "Dr.," but it is equally a prohibition against the use of either. Its purpose being to prevent deception, the courts will give to it that meaning which will most effectually accomplish that purpose. It was said, however, that the part of the statute here in consideration could not lawfully be enacted under an act entitled, "An act to regulate the practice of medicine and surgery in the State of Washington," etc., but the court thinks the title sufficiently broad. To provide who may lawfully call themselves "Doctors," "Physicians," or "Surgeons" is clearly within the title of an act entitled, "An act to regulate the practice of medicine and surgery."

SUFFICIENT EVIDENCE OF PRACTICING WITHOUT A LICENSE

State v. *Dodson, 54 Wash. 31; 102 Pac. 872*

1909

The Supreme Court says, where it affirms a conviction of practicing medicine without a license, that it was contended that under the provision of the statute the state did not make out a prima facie case against the defendant, because it did not show that he had not been a practicing physician prior to the enactment of the statute under which he was convicted. But it is held sufficient that the state showed by the clerk that the defendant had not filed a license in his office, and that none had been filed. The statute makes the records of the clerk's office *prima facie* evidence of the existence or non-existence of a license.

Again, the court says that the statute provides that "any person shall be deemed as practicing medicine within the meaning of this act who shall have and maintain an office or place of business with his or her name and the words physician or surgeon, "Doctor," "M.D.," or "M.B." in public view, or shall assume or advertise the title of doctor or any title which shall show or shall tend to show that the person assuming or advertising the same is a lawful practitioner of any of the branches of medicine or surgery in such a manner as to convey the impression that he or she is a practitioner of medicine or surgery under the laws of this state." Evidence to prove that the defendant had done the things prescribed by the statute was offered, and it was for the jury to determine the weight of such evidence.

SAVING CLAUSE NECESSARY FOR COMPLETION OF PROSECUTIONS AFTER REPEAL OF LAW

State v. *Hanover, 55 Wash. 403; 104 Pac. 624*

1909

The Supreme Court says that the defendant was charged with practicing medicine without a license, convicted and sentenced to pay a fine. The prosecution was under the act of 1890. The information alleged that the offense was committed on Oct. 26, 1908. The trial was had in the month of April, and the judgment was entered on May 1, 1909. But between the date when the offense was charged to have been committed and the date of the trial, the state Legisla-

ture passed a new act regulating the practice of medicine and surgery, repealing prior acts, which new act took effect on its approval, namely, March 18, 1909. This act, however, contained no saving clause for the prosecution of offenses committed under the old law, and therefore it is held that, under well-settled principles of law, there was no authority at the time of the trial for the prosecution of the defendant on the offense charged, and the judgment rendered against him must be reversed. As said by this court in another case, the repeal of a statute pending a prosecution thereunder, without any saving clause as to such prosecution, will prevent its being further prosecuted, and this rule applies as well after judgment and sentence, pending an appeal duly taken therefrom, as before the final determination in the trial court.

LICENSE NEED BE FILED IN COUNTY OF RESIDENCE ONLY

State v. *Dechmann, 57 Wash. 690; 107 Pac. 858*

1910

In prosecutions under the statute of that state for practicing medicine without a license, evidence that the defendant has failed to file a license with the county clerk, as required, is prima facie evidence that he is not a legally licensed practitioner. But, under the law, the failure to file the license in a county other than the county in which the defendant resides will not be proof of the violation of the law or the commission of the crime charged, because it is not one of the requirements of the statute that the practitioner shall file the license in counties other than the one in which he resides, even though he may be called to another county for the purpose of practicing his profession temporarily. Hence a conviction cannot be sustained by evidence showing merely that the defendant practiced medicine in a given county, and that no license had been filed in such county, without any proof that he was at the time a resident of the county.

CONSTRUCTION OF MEDICAL PRACTICE ACT AS TO PERSONS ENTITLED TO LICENSES BY PRIOR PRACTICE

In re Christensen et al, 109 Pac. 1040

1910

The Supreme Court of Washington affirms judgments reversing decisions of the Board of Medical Examiners and directing a license to be issued to each of the applicants, who had been for more than two years prior to March 18, 1909, the date of the approval of the law, a resident of the state, and had for the same period been in continuous practice, in one locality in the state, of his or her respective mode of treatment.

This law, the court says, purports to cover the entire subject matter of licensing practitioners of medicine and other modes of treating the sick or afflicted. It does not purport to amend any prior existing law, and expressly repeals all laws in anywise conflicting with its provisions. In section 4 it provides: "Any person who treats the sick or afflicted may register his or her diploma with the board of medical examiners, and receive a license to practice his or her respective mode of treatment, by paying a fee of $10, * * * Provided, that he or she show evidence satisfactory to said board that he or she had been legally engaged in such practice prior to the passage of this act, in the state of Washington, and is a graduate of a legally incorporated school or college * * *; or by having been in continuous practice in one locality in this state for the past two years. * * * " Section 6, which refers to those licensed on examination, requires the applicant to file "satisfactory testimonials of good moral character, and a diploma * * * ." Section 20: "All persons receiving a certificate or license under this act shall use no deception in the use of titles of his or her mode of treating the sick, but shall use only such titles as are designated by his or her diploma; or those not having a diploma shall use only such title as he or she holds license to practice. * * * "

It was contended in behalf of the Board of Medical Examiners that an applicant must, in addition to showing two years' practice in one locality, have a diploma and register the same with the board before he would be entitled to a

license under the provisions of the last clause above quoted from section 4. It must be conceded that the provisions of this law are somewhat involved, and that the question of its meaning is not free from doubt. However, the court is of the opinion that one who has been in continuous practice in one locality in the state of Washington for two years prior to the enactment of this law is not required to furnish further evidence of his qualifications by a diploma, and that such a person would be entitled to a license regardless of the fact of his ever having a diploma.

By section 20 it clearly appears that the legislature had in mind that at least some of those entitled to a license under this law should not be required to show their qualifications by diplomas. It was contended that the words "those not having a diploma" referred only to a licensee under section 6 on examination, who is required to produce a diploma from a medical school of a certain standing "or satisfactory evidence of having possessed such diploma." But the court cannot agree with that contention. It seems to the court that if a person ever had such a diploma, and is basing his right to a license on it, as he must under section 6, he will be governed in using his title as a practitioner by that which is designated in such diploma, whether he has physical possession of such diploma at that time or not. In other words, if he has or ever had a diploma, and is granted a license on it, then its designation of his title will govern, whether it has any present physical existence or not. He is not one of those mentioned in section 20 as "not having a diploma." The only licensees mentioned in this law that these words could possibly refer to are those who are entitled to licenses by virtue of practice in one locality in the state for two years as provided in section 4. It is quite common, in laws regulating professions and vocations and prescribing qualifications to be possessed by those entering on them, to exempt those already engaged in them from showing any qualifications other than the fact that such persons are already so engaged, or have been so engaged for a certain time. This seems to have been the policy pursued by the Washington territorial and state legislatures. And it has been held that such a provision is not such a discrimination as violates any constitutional right of those seeking to enter such professions or vocations.

It appeared that some of the applicants here were engaged in the practice of medicine and surgery for the two years prior to the passage of this law without having a license required by the law as then existing. This, it was contended, excluded such a person from the right to a license, because he was not legally engaged in practice and therefore was not engaged in practice at all within the meaning of the two years' practice clause of section 4. But it has been noticed that the law here involved is a new and independent act complete in itself, and repeals all former laws on the subject. That part of section 4 following the word "provided" refers to two classes who may receive licenses. The first are persons who have been "legally engaged in such practice prior to the passage of this act." The second are those persons who have been in "continuous practice" in one locality for two years. It may be difficult to see a reason for the legislature exempting one class from the effect of their unlawful acts, and not the other; but the use of the word "legally" in referring to one class, and omitting it in referring to the other, clearly indicates the legislative intent to give the license privilege to the second class, even though they have violated a previously existing license law. The offense was in any event purely statutory, merely a misdemeanor, did not involve moral turpitude, and there is nothing so extraordinary in granting the license privilege by the legislature to those engaged in practice for two years, even though such persons did thereby violate the then existing license law, as to suggest that the court should attribute to the word "practice," as here used without qualification, any other than its ordinary meaning.

ONLY LEGAL PRIOR PRACTICE EXCEPTS PHYSICIAN

In re Harold, 59 Wash. 322; 109 Pac. 1043

1910

I. S. Harold applied to the board of medical examiners for a license to practice medicine and surgery, claiming to be entitled to such license under the law of 1909, relating to the licensing of those engaged in practice at the time of the

enactment of the law. The board refused to grant him a license, and he appealed to the superior court, where, as the law provides, his right to a license was tried de novo, resulting in findings and judgment affirming the decision of the board. From this judgment he has appealed.

The facts upon which appellant bases his right to a license are undisputed, and may be briefly stated as follows: He became a resident of the state of Washington Jan. 1, 1909, having been prior thereto a resident of the state of Indiana and engaged in the practice of medicine and surgery therein. Since then, and until after the enactment of this law, he was engaged in the practice of medicine and surgery in the state of Washington without having a license so to do as provided by the then existing law. In addition to showing such practice in this state he presented his diploma and evidence showing graduation from a school having the curriculum of study specified in section 4 of the law. He did not offer to submit to an examination as to his qualifications to practice medicine and surgery under the provisions of the law relating to the licensing of those who are seeking to enter the profession, but relied wholly upon his alleged compliance with the provisions of the law relating to the licensing of those so engaged at the time of its enactment.

It is contended in behalf of appellant that, by his showing of graduation from a school having the required curriculum of study and his practice in this state prior to the enactment of the law, he has thereby complied with all of its requirements, relating to a certain class, entitling him to a license; while it is contended in behalf of the Board of Medical Examiners that since he was not *legally engaged* in the practice in this state prior to the enactment of the law he is not entitled to a license, except he prove his qualifications as required by other provisions of the law.

The controversy is reduced to the question: Has appellant satisfied the requirement of the law? It is manifest that at the time he was engaged in the practice of medicine and surgery in this state from Jan. 1, 1909, until the time of the enactment of this law without having a license so to do, he was violating the plain provisions of the then existing law regulating the licensing of physicians and surgeons. This being true, it needs no argument to demonstrate that he was not "*legally engaged in such practice prior to the passage of this act.*" The court finds nothing in the law giving to the word "legally" any other than its ordinary meaning and concludes that within the meaning of the law appellant was not engaged in such practice prior to the enactment of the law as will aid him in procuring a license thereunder.

The judgment is affirmed.

POWERS OF COURTS ON APPEALS FROM BOARD DECISIONS REFUSING LICENSES

In re Littlefield, 112 Pac. 234

1910

The Supreme Court of Washington determines the powers, under the 1909 statutes of that state, of the courts on appeals from decisions of the State Board of Medical Examiners refusing licenses to practice medicine and surgery, and affirms a judgment directing the board to issue the license applied for in that case.

The record, the court says, showed that the license was refused by the board principally for the reason that the applicant did not obtain a rating equal to 60 per cent. on the subjects of histology, pathology and general diagnosis, which he was required to obtain under the statute before a license could issue to him. The first contention on the part of the board was that the court had no jurisdiction to hear this case; that it could not administer the provisions of the medical act as applied to appeals from others of the board denying a license after examination, because, it was asserted, it is familiar law that, if the court cannot administer the law on a subject brought before it by virtue of the appellate statute, the court has no jurisdiction, to sustain which announcement of the law many cases were cited. But this was assuming the very question at issue. It seems to the Supreme Court that under the statute the court has the right to administer the

provisions of the medical act, for the statute specially provides for an appeal from the decisions of the board. Section 13 of the act provides that, "In any case of the refusal or revocation of a license by the said board under the provisions of this act, the applicant whose application shall be so refused, and the licentiate whose license shall be so revoked by said board, shall have the right to appeal from the decision so refusing or revoking such license within thirty days after the filing of such decision * * * to the superior court," etc. And provision is made for an appeal from the decision of the Superior Court to the Supreme Court.

It was contended that, if this statute was to be given force at all, it must be construed to the effect that the appeal is not from the facts in the case or the merits of the case, so far as the examination is concerned, but only for the purpose of having determined any questions of law arising on the examination or in connection with the same. But the statute is a general one, and confers the general right without any limitation of this kind. So far as the statute itself is concerned, it does not remove from the operation of the appeal questions of fact, any more than it does questions of law.

But it was insisted that it must be construed with reference to the asserted fact that it would be a travesty for the superior court to undertake to pass on the qualifications of applicants to practice medicine; that it would resolve itself simply into the hearing of expert testimony on questions brought before the court. Difficulties of this kind are presented in the trials of many cases. A common instance is where a defense is based on the alleged insanity of a defendant in a criminal action. The testimony of alienists and other scientists is the controlling testimony in the case. The legislature evidently was not willing to leave the exclusive and final determination of this question to the discretion of the examining board, but evidently thought that justice and public policy demanded that there should be a review of the action of this tribunal.

It is true, there are some inconsistencies in the act; one of which is the fact mentioned by the board, that there may be an oral examination which it would not be possible to transmit in the record. But that it was intended by the legislature that the evidence generally should be transmitted to the Superior Court is evident from the provisions of the statute, for the law requires that the secretary shall within ten days after the service of such notice of appeal, transmit to the clerk of the Superior Court to which such appeal is taken, a certified copy, under the seal of said board, of the decision of said board, and the grounds thereof in the case of the refusal of the license; that the clerk of the court shall docket such appeal cases, and that they shall stand for trial in all respects as ordinary civil actions, and like proceedings be had thereon. It also provides that on said appeals said causes shall be tried *de novo* (anew), which excludes the idea advanced that only questions of law shall be passed on by the Superior Court. It provides that the examination papers shall form a part of the records of the board, and shall be kept on file by the secretary for a period of one year after each examination. All these and other provisions of the statute tend to show that the preservation of such records is in the interest of appeal.

Again, it was contended that, if the statute is to be literally construed, the proper procedure was not followed in this case, for the court only passed on the question in the main as to whether the applicant had been properly rated in his examination on the subjects of histology, pathology and general diagnosis, while the other subjects on which he was examined were not examined by the Superior Court; that a trial *de novo* is a trial anew, and that a trial anew means a trial of all questions that were involved in the case below. But it seems to the Supreme Court that this is not a broad view of this statute. Undoubtedly a trial *de novo* does mean, and is generally understood to mean, a trial anew; but it means anew, of course, only as to the questions in issue. In this case, so far as the applicant was concerned, he was satisfied with the rating he received on the other subjects of examination, and there was no objection made to them by the board, so that they were really not in issue in the case, and the case was tried *de novo* so far as the issues were concerned.

Finding no reversible error, the judgment directing the issuance of a license is affirmed.

REGULATION OF THE PRACTICE OF MEDICINE NOT INTERFERENCE WITH VESTED RIGHTS

State v. *Dent*, *25 W. Va. 1*

1884

The defendant was indicted for practicing medicine without a license and moved to quash the indictment on the ground that the act of 1882 was unconstitutional. The court overruled the motion and the defendant was found guilty. He then appealed to the Supreme Court, claiming that the medical practice act was unconstitutional so far as it interfered with the vested rights of the defendant to practice medicine. The constitutionality of the medical practice act was the only question before the court. The court says that there can be no doubt that the legislature of this and every other state should permit the utmost freedom of action consistent with public welfare and ought not to impose any restraint which the paramount interest of the community did not demand, but that the legislature can by law legitimately restrain the action or conduct of any individual citizen by a general law applicable alike to all when such restraint is imposed for the purpose of promoting the comfort, the health or the prosperity of the community at large. Any state has a right, under its general police power, to pass laws placing individuals under restraint in the exercise of any business, calling or profession. This power has been universally recognized and has been held by the courts to be constitutional and valid. In a great variety of cases states have required licenses before a citizen could engage in certain businesses or professions when from the character of the business or profession the public was liable to be imposed upon unless the individual citizen was placed under restraint. The court reviews the law regulating bakers, liquor dealers, lawyers and other businesses and professions, and says that since it is obvious that the doctor requires a special education to qualify him to practice and since the community was incompetent to judge of his qualifications and is liable to be imposed upon by imposters and quacks, the state has required that no one should be allowed to practice medicine who has not been first examined by some body, person or persons, as to his qualifications. In previous questions in which the right of the state to regulate the practice of medicine was involved, no question as to the constitutional right of the legislature to pass such an act was raised. The court reviews the medical practice acts of different states and Supreme Court decisions affecting them and holds that both on reason and on authority the court cannot do otherwise than to regard all the provisions in the act of 1882 as constitutional and valid. The court is surprised to find that such laws have ever been claimed to be special acts. All men have a right to the means of acquiring property but the means used must be lawful means. One cannot acquire property by stealth or robbery. In so doing he infringes on the rights of others. One cannot have a right to acquire property by the practice of medicine if he has no qualifications to practice medicine, since in attempting to do so he destroys the health of others in violation of the law. A legislature has a right to declare that one shall not acquire property by the practice of medicine unless he possess the requisite qualifications and can thus assure the community that he will not destroy the health of others. The legislature in declaring what shall be the qualifications of a person engaging in the practice of medicine does not violate the bill of rights. The courts have no right to decide whether the legislature has acted wisely in determining the requisite qualifications or has adopted the wisest method of determining whether such qualifications are possessed by one who wishes to practice medicine. This is a purely legislative question. The arguments made against the law should be addressed to the legislature and not to the courts. While the law remains in force it must be enforced by the courts. Judgment affirmed.

Judgment affirmed.

WHAT CONSTITUTES AN ITINERANT VENDOR

State v. *Ragland, 31 W. Va. 453; 7 S. E. 424*

1888

J. B. Ragland was indicted as an itinerant physician and vendor of drugs, etc., and found guilty of vending drugs without a license. The first error assigned is overruling the demurer to the indictment. The indictment above set forth was found under section 14, chapter 150, page 819, Amended Code. The section is as follows: "Any itinerant physician, desiring to practice medicine in this state, or any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind, intended for the treatment of disease, or injuries, or who shall by writing or printing, or in any other method, publicly profess to cure or treat diseases, injuries or deformities, by any drug, nostrum, manipulation, or other expedient, shall, before doing so, pay to the sheriff of every county in which he desires to practice a special tax of $50 for each month, or fraction of a month, he shall so practice in such county, and take his receipt in duplicate therefor. He shall present said receipts to the clerk of the county court of such county, who shall file and preserve one of them in his office, and shall endorse on the other the words, "A duplicate of this receipt has been filed in my office," and sign the same; and if any such physician or vendor of patent medicines shall practice, or attempt to practice, in any such county, without having paid such tax, and filed such receipt with the clerk of the county court, and obtained his indorsement on the other as aforesaid, or if he shall practice, or attempt to practice, for a longer time than that for which he has paid such tax as aforesaid, he shall be guilty of a misdemeanor, and shall be fined not less than one hundred nor more than five hundred dollars. Any person who shall travel from place to place, and by writing, printing, or otherwise, publicly profess to treat or cure diseases, injuries or deformities, shall be held and deemed to be an itinerant physician, and subject to the taxes, fines and penalties prescribed in this section." This is a very crudely drawn statute. Its provisions are by no means clear, but we think we understand what was intended by the statute. It is clearly intended to prevent itinerant physicians from going from county to county in the state, and practicing medicine, without they should pay the heavy tax prescribed in each county, which undoubtedly was intended to prohibit such practice. It was also intended to prevent any one, whether a physician or not, from traveling from county to county, vending drugs, nostrums, ointments, or appliances of any kind intended for the treatment of diseases, or injuries, unless the special tax were paid, or to prevent any one who should by writing or printing, or in any other method, publicly profess to cure or treat diseases, injuries or deformities by any drug, nostrum, manipulation, or other expedient, from doing so until he should pay the special tax imposed. Therefore it seems the statute was intended to reach the itinerant physician, the itinerant vendor of drugs, etc.; and any one, physician or not, who shall, by writing or printing, or in any other method, publicly profess to cure or treat diseases, injuries and deformities, by any drug, nostrum, manipulation, or other expedient, and practiced what he professed to do. By this statute any one and all persons are prohibited from doing anything mentioned therein, or pertaining to either of the three classes, without first paying the special tax prescribed. This indictment in one count charges the defendant with doing all three of the things prohibited without first paying the special tax.

After discussing the form of the indictment which the court sustains, the court then considers the evidence, which showed that the defendant sold a bottle of medicine known as "Raglands Lightning Relief," which he represented to be his own preparation, good for and would cure certain diseases, and that the medicine was patented. The printed matter with the bottle stated that "the public are most respectfully referred to the following certificates from gentlemen well known in this city, who testify, from actual experience, to the efficacy of this most excellent and reliable preparation." Then follows a number of testimonials

from persons in Mississippi, Tennessee and Kentucky, telling of the wonderful cures effected by the medicine. The defendant claimed that he was not an itinerant physician, practicing or attempting to practice medicine in this state; that, on the occasion of the sale of the bottle of medicine before mentioned, he publicly and distinctly announced that he was not pretending to treat or cure diseases, nor in any manner to practice medicine, but simply to introduce and sell his medicine, the same being his own preparation, and being patent or proprietary medicine, under the laws of the United States; and that he had on the occasion of such sale, as well as all other occasions, in offering it for sale, announced that he would not treat diseases in any manner whatever, and that the virtue of the remedy was in the medicine itself, and not in him, the defendant; that any one else could sell such medicine as well as he himself could. The evidence of the printed matter on the bottle when sold was proper. From all the evidence, the court was certainly justified in finding the defendant an itinerant vendor of a drug. The finding was justified by the evidence, and the motion for a new trial was properly overruled. The indictment being good, the motion in arrest of judgment was properly overruled. There is no error in the judgment, and it is affirmed.

TO PRESCRIBE AS A PHYSICIAN DEFINED

In re Bruendl's Will, 102 Wis. 45; 78 N. W. 169

1899

Appeal from Circuit Court, Ozaukee county; John J. Dick, Judge. A petition for probate of the will of Maria Bruendl, deceased, was contested and, from a judgment admitting the will to probate, contestants appeal. Two of the witnesses were physicians, partners, who made an examination of the deceased about four months before she made her will. The lower court ruled that their testimony was privileged. The Supreme Court, in overruling this decision, discusses the meaning of the word "prescribe" as follows: The seal placed on the lips of the physician only relates to "information necessary to enable him to prescribe for such patient as a physician." The tendency of all courts has been, and should be, towards liberal construction of these words to effectuate the purpose of the statute. Thus, it has been held that the word "necessary" should not be so restricted as to permit testimony of statements or information, in good faith asked for or given to enable intelligent treatment, although it may appear that the physician might have diagnosed the disease and prescribed for it without certain of the information, so that it was not strictly necessary. So, also, the word "prescribe" is not to be used in its most limited sense of writing an order upon an apothecary for specific drugs, but should be given as liberal and enlarged an effect as the word itself will bear in the connection found.

Applying such rule, it is nevertheless apparent that the word "prescribe," when used as applicable to physicians, embodies the purpose of cure, remedy, or alleviation. The word means "to advise, appoint, or designate as a remedy for disease." We think, therefore, that the purpose to cure or alleviate is an essential element in the meaning of the words "to prescribe as a physician," as used in this statute, and that the prohibition against disclosing information only applies when such purpose is present. It may be contended, not without force, that there is the same reason for confidence when the examination is only to ascertain whether a certain disease exists, without any purpose that the physician shall attempt any prescription or advice for cure; but the legislature has not seen fit to so declare, and such a case is as it was before the statute. In the present case, the purpose of attempting anything remedial was wholly wanting in the interview between the medical witnesses and the deceased. The question was not whether resumption of control over her property would or would not be beneficial to her physically or mentally, but whether her mental condition was such that the county court would be likely to restore such control to her. Advice, if any, was sought, not with reference to treatment of any disease, but as to whether to make an application to the court.

REQUIREMENT OF AN EXAMINATION REASONABLE

State ex rel. Kellogg v. *Currans et al. 111 Wis. 431; 87 N. W. 561; 56 L. R. A. 252*

1901

Kellogg complained that he was refused a license to practice medicine in Wisconsin except upon the condition of passing an examination before a medical board created therefor, and paying a fee which must be considered as but compensation for the service of holding that examination. It appears that he matriculated in 1897, and took one course of six months at a reputable medical college of Wisconsin, and then completed his course at a reputable medical college located in Chicago. As the law was in Wisconsin until its amendment in 1901, he would have been entitled to a license to commence practice either on the diploma he obtained, or upon passing examination. But the amendment makes both diploma and examination prerequisite to license to beginners, with proviso that "any student who is now matriculated in any medical college of this state which requires [specified courses of study], shall, on presentation of his diploma from such medical college and on payment of the fees specified in this act, be admitted to practice without further examination." "The fee for such examination shall be fixed by the board, but shall not exceed $10, and $5 additional for the certificate if issued." He strenuously attacked the validity of this statute. But the Supreme Court of Wisconsin does not think that it infringes either that provision of the federal constitution which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, or the one which prohibits any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor does it consider that it violates the provision that no state "shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It declares that there can be no doubt that it is within the proper power of the legislature to provide that some people may and some may not practice medicine, provided that the characteristics and conditions distinguishing the former class from the latter are of a kind tending to make their exercise of that profession more beneficial or less perilous to the community than the class excluded. The reasonableness of a requirement that one establish his educational qualifications by submitting to an examination, it continues, is one which pertains directly to one of the characteristics which should distinguish those permitted to practice medicine from those not permitted. As to the statute making a class of those who should obtain the education afforded by the then existing medical colleges in the state of a specified standard, it asks: May not the legislature of 1901, upon evidence or investigation, have been convinced that such colleges could be trusted to give education to their graduates to make them safe practitioners, while they could not be so satisfied as to all colleges outside the state? The character of the men conducting the former class, the opportunity and right of the legislature to control and to prevent deterioration, the special applicability of the instruction to the diseases or phases of diseases characteristic of Wisconsin—might not considerations such as these have weight with honest and reasonable minds, and lead them to deem safer the graduates of such institutions, as a class, then those of all other colleges, as to the great majority of which the legislature could neither gain knowledge nor exercise any control? Wherefore, the court holds the act within the police power of the state. And it adds, in closing its opinion: "The fact, if it were a fact, that less educational requirements are demanded from osteopaths as preliminary to an examination by the board, in no wise affects the relator, whose qualifications for admission are, as he alleges in his relation, all conceded, except the passing of the examination. The question whether the requirement of a diploma is an unconstitutional one, as discriminating against those who by some other method of study have acquired equal education, is not open to the relator, who confessedly has his diploma. We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others."

COMPLAINT DID NOT DESCRIBE STATUTORY OFFENSE

Schaeffer v. *State, 113 Wis. 595; 89 N. W. 481*

1902

The Supreme Court says that the statutes in relation to persons practicing medicine and surgery in that state are in considerable confusion. Nor does it attempt to untangle them in this case. This was a prosecution under the law of 1898. The first section mentioned provides, in substance, that no person practicing physic or surgery shall have the right to collect fees for his services or testify in a professional capacity in any case "unless he, before the 20th day of April, 1897, received a diploma from some incorporated medical society or college, or shall since said date have received a license from the state board of medical examiners." Section 4603a provides that any person prohibited by section 1436 from testifying in his professional capacity as a physician or surgeon, who shall assume the title of doctor under circumstances detailed therein, shall be punished by fine or imprisonment, and the burden of showing his right to use any such title shall be upon the accused. The complaint in this case charged that the party in question unlawfully used the title of doctor without having obtained a license from the state board of examiners. The Supreme Court holds that this did not describe an offense under the statutes. It says that the offense consists in assuming the title by one not having a diploma or license. The offense charged was that of having no license. Certainly this did not describe the offense prescribed in the statute.

BOARD MAY PASS ON REPUTABILITY OF COLLEGE

State v. *Chittenden, 127 Wis. 468; 107 N. W. 500*

1906

The meaning of the word "reputable" as used in the law regulating the practice of dentistry is, "worthy of good repute"; it relates to real character, not to mere reputation in that regard. Reputability, as the term is used in the dental law, relates to that which will enable the college to do good work and the actual accomplishment thereof; it is separate and distinct from other requisites as to a diploma being a passport to the favor of the official board as regards the issuance of a license. It may or may not exist, and all the other requisites be present. It is proper, in administering the law regulating the practice of dentistry, for the official board, of its own motion, or on petition of a college of which it has jurisdiction, to adjudicate its status as regards reputability. The adjudicated status of a college is presumed to continue till the presumption shall have been reasonably rebutted, under the general rule that "when the existence of a person, a personal relation or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before until the contrary is shown, or until a different presumption is raised from the nature of the subject in question."

POWER TO REVOKE CERTIFICATE FOR FRAUD ANTEDATING LAW

State v. *Schaeffer, 129 Wis. 459; 189 N. W. 522*

1906

This was an action commenced Dec. 21, 1905, to revoke and annul the certificate of registration issued to the defendant by the Wisconsin Board of Medical Examiners Sept. 25, 1899, pursuant to chapter 87 of the Laws of 1899. The action was based on a verified complaint in writing made by the secretary of said board, charging the defendant with having procured such certificate by fraud and perjury and through error, as prescribed by chapter 422 of the Laws of 1905. This was met with the contention that the circuit court had no power to revoke or annul the certificate, although obtained by fraud, perjury and misrepresentation, as alleged, for the simple reason that it was issued prior to the passage of the act of 1905.

The law of 1905 provides that: "The circuit courts of this state are hereby vested with jurisdiction and power to revoke and annul any license or certificate of registration which has been heretofore or which may be hereafter issued to any person to practice medicine or surgery, or osteopathy in this state, who is guilty of immoral, dishonorable or unprofessional conduct, after the passage of this act or who has procured such license or certificate of registration by fraud or perjury, or where the same was obtained through error." It was contended that the act is not retroactive, and therefore that the complaint did not state a cause of action. This was based on the claim that the words, "after the passage of this act," in the portion of the act above quoted, qualify the entire clause so quoted. And so it was claimed that, not only must the dishonorable and unprofessional conduct therein mentioned occur after the passage of the act, but also that the fraud, perjury or error for which it is sought to annul the certificate must also have occurred after the passage of the act.

The Supreme Court answers that it should be slow to hold that the Circuit Court has no jurisdiction or power to set aside a certificate of registration thus obtained, even in the absence of the act in question. But it is unnecessary to consider that question here, since the act declares, in effect, that such court may "revoke and annul any license or certificate of registration which has been . . . procured . . . by fraud or perjury, or where the same has been obtained through error." The word "heretofore," in the portion of the act quoted, manifestly refers to "any license or certificate of registration" issued prior to the passage of the act. So the act declares, in effect, that such practitioner "who is guilty of immoral, dishonorable or unprofessional conduct," as defined therein, "after the passage of the act," may have his license or certificate of registration revoked or annuled, even though it was obtained without fraud or perjury or misrepresentation. The manifest purpose of the act is to prevent any incompetent or unfit person from practicing medicine or surgery or osteopathy, and thus protect the public from the injuries which might otherwise be incurred. The court must hold that the act is retroactive to the extent indicated. Nor does the court think that with such construction chapter 422 is unconstitutional and void.

This not being an action to enforce a penalty or forfeiture, but a civil action to set aside a certificate of registration for the reasonss stated, the court says that it perceives no ground for the claim that the action is barred by the two years' statute of limitation, or the three years' statute of limitation, or any other statute of limitation. Lastly, this action was brought in the name of the State of Wisconsin, and the Wisconsin State Board of Medical Examiners was not a party, but the court perceives no ground for claiming that there was a defect of parties.

OBJECT OF MEDICAL PRACTICE ACT NOT TO FORM MONOPOLY

State v. *Schmidt, 138 Wis. 53; 119 N. W. 647*

1909

The act of 1897 provided for a state board of medical examiners and required all beginning to practice medicine or surgery in Wisconsin after July 1, 1897, first to procure a certificate of qualification from such board. It did not deal in any respect with members of the profession in actual practice in Wisconsisn, on such date. The law of 1899 enlarged the scope of the board's jurisdiction by making the privilege of every person who was a resident practicing physician in Wisconsin July 1, 1897, to continue in such practice contingent on his obtaining a certificate of qualification from the board within a prescribed time and becoming duly registered with the board. The law prescribed, as a condition of granting the certificate, that the application should be made therefor and the applicant submit in support thereof his "diploma or other credential or evidence of qualification" and be a "reputable resident physician or surgeon of good moral character who was on the first day of July, 1897, in the actual practice of medicine or surgery in the state of Wisconsin." In mandatory language the board was required, on such application being made by a person competent, as provided

in the law, to make it, and supported by the evidence of qualifications prescribed —to grant the registration and certificate.

The law of 1905 gave the circuit courts of Wisconsin jurisdiction to annul any certificate obtained as aforesaid, in case of the issuance thereof resulting from error of the board or fraud or perjury. From the foregoing it will be seen that the board of medical examiners in acting on the defendant's application, was required to decide, by the exercise of quasi judicial authority, first, whether the defendant was, July 1, 1897, a resident physician or surgeon and actually engaged in practice in Wisconsin; second, whether he was, at the time of the application, a reputable physician or surgeon; third, whether he was a man of good moral character.

The board was left free to prescribe its own rules of procedure, governed only by the requirement that the applicant should submit the evidence of his qualification. That, in the broadest sense the language can be reasonably viewed, related to all of the three matters of fact mentioned. It might possibly be held more restrictive, but for the purposes of this case the broader view is taken to be the correct one. Manifestly, the legislature conceived that it was dealing with the entire class of persons known as physicians, in the broadest sense of the term, not in any narrow sense, which would favor those claiming, and perhaps entitled to superior distinction. The purpose was very far from that of creating a monopoly in favor of special schools of medicine. The term was evidently used in its proper sense, that of including any person of whatever school, and whether belonging to any known school, engaged in good faith, in treating human ills by any remedy, or remedies, however simple, so as to be known among the people as a physician.

What has been said as to the legislative meaning is so manifest, in the court's judgment, from the very fact alone that it was dealing with an existing condition which it did not intend to disturb except to the extent of weeding out disreputable and immoral characters. But that is placed beyond all reasonable doubt by the fact that the law of 1897, to which the law of 1899 referred, expressly defined the term, making it include every person "who shall for a fee, prescribe drugs or other medical or surgical treatment for the cure or relief of any wound, fracture, bodily injury, infirmity or disease."

The court must also appreciate that the act of 1905 did not contemplate a new trial of the questions presented to the board. Aside from whether it was imposed on by fraud or perjury, the scope of the trial was limited, by the act, to the question of whether the board committed error. Just what the legislature intended by the use, unexplained, of the word "error" may admit of some doubt, but the court is constrained to believe that the term was used in the sense it is ordinarily understood as applied to trials in courts before juries. That is, while, aside from jurisdictional errors in the limited sense of such as would render the decision void, it is confined to such absence of evidence in support of the board's decision that, in no reasonable view thereof, could its decision be justified, or prejudicial refusals to admit or exclude evidence, or other prejudicial misapprehensions of law; error which might properly be denominated "jurisdictional," as regards trials before quasi judicial bodies—errors which, in the general sense are purely judicially, in the sense that a decision is binding on all concerned, till set aside by some proper proceedings for that purpose.

The board was not in error in its construction of the term "physician," as it was evident that it did not understand that term as applied to persons practicing the healing art July 1, 1897, referred only to such as possessed that technical knowledge of the human system and knowledge of drugs and other remedies and how to administer them, commonly supposed to be possessed by members in good standing of the great schools of medicine.

Did the board commit error as to the meaning of the word "reputable"? Here was the state's bone of contention. The claim is not new, that a physician or surgeon, however learned in fact, is disreputable, unless he belongs to some incorporated medical society or holds a diploma from some reputable medical school. This court has said, and other courts have said, that the term "reputable" as used in the statute has no such legal and technical meaning as counsel claimed for it. Therefore, until the legislature shall have unmistakably used it in such sense, no such meaning can be given thereto by judicial construction.

The word "reputable" has a plain ordinary meaning having reference to general character for some honorable work. Whether one is reputable or not, means whether he is worthy of praise or not in the particular line under consideration. If one is regarded as honorable and praiseworthy as a member of the medical profession, of whatever school, or whether classed with any particular school, by reason of the character of his work and his conduct professionally, he satisfies the statutory essentials of reputability as to his particular line, though he may never have crossed the threshold of a medical college or been a member of any medical society. Whether as a matter of fact, as an original matter, the defendant possessed the qualifications one would expect to characterize a physician or not, as before indicated, was not for the Circuit Court, nor is it for this court to decide. The board had full authority to inquire into the matter.

REGULATION OF PRACTICE OF MEDICINE NOT DEPRIVATION OF VESTED RIGHTS

Dent v. *West Virginia, 129 U. S. 114; 32 L. Ed. 623; 9 Sup. Ct. 231*

1889

This is an appeal from the decision of the Supreme Court of West Virginia alleging that the medical practice act of West Virginia is unconstitutional and void and in conflict with the clause of the fourteenth amendment, which declares that no state shall deprive anyone of life, liberty or property without due process of law, and that the denial to the defendant of the right to practice his profession without the certificate required by the state constituted the deprivation of his vested right and estate in his profession which he had previously acquired. The Supreme Court says that it is undoubtedly the right of every citizen of the United States to follow any lawful calling, profession or business he may choose, subject only to such restrictions as are imposed upon all persons of like sex, age and condition. All vocations are open to everyone on like condition. The right to continue their prosecution is of great value to the possessors and cannot be arbitrarily taken from them any more than their real or personal property can thus be taken, but there is no arbitrary deprivation of such right where its exercise is not permitted because of the failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. It has been the practice of different states from time immemorial to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination by competent persons or inferred from a diploma or license from an institution established for instruction on the subjects with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession or are unattainable by reasonable efforts that they can operate to deprive one of his right to pursue a lawful vocation. After reviewing the need of careful preparation on the part of those desiring to practice medicine and the importance of regulation of the practice of medicine by the state for the protection of society, the court holds that there is nothing of an arbitrary nature in the provisions of the statute in question and that if in the proceedings under the statute there should be any unfair or unjust action on the part of the board the remedy would be found in the courts of the state. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under the authority of the state. The judgment of the Supreme Court of West Virginia is affirmed.

CONTINUING REGULATION DOES NOT MAKE LAW EX POST FACTO

Hawker v. People of New York, 170 U. S. 189; 4 L. Ed. 1002; 18 Sup. Ct. Rep. 573

1898

In 1878, the plaintiff in error was tried and convicted of the crime of abortion, and sentenced to imprisonment in the penitentiary for the term of ten years. In 1893 the legislature of the state of New York passed an act which provides that any person who, after conviction of a felony, shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by fine or imprisonment. Under this statute, defendant was indicted. The indictment alleged the conviction in 1878, and charged that, having been so convicted of the crime and felony of abortion, defendant did unlawfully practice medicine. He was tried and convicted. That conviction having been sustained by the court of appeals of the state, the defendant appealed to the Supreme Court of the United States.

The single question presented is as to the constitutionality of this statute when applied to one who had been convicted of a felony prior to its enactment. Its unconstitutionality is alleged on the ground of an alleged conflict with article 1, section 10, of the constitution of the United States, which forbids a state to pass "any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." On the one hand, it is said that defendant was tried, convicted, and sentenced for a criminal offense. He suffered the punishment pronounced. The legislature has no power to add to that punishment. The right to practice medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and, after the defendant has once fully atoned for his offense, a statute imposing this additional penalty is one simply increasing the punishment for the offense, and is *ex post facto*.

On the other, it is insisted that, within the acknowledged reach of the police power, a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the state is not possessed of sufficient good character, it can deny to such a one the right to practice medicine; and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character.

The court is of opinion that this argument is the more applicable, and must control the answer to this question. No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed.

But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine.

It is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter. but is only appealing to a well-recognized fact of human experience; and, if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata*, and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance, and not the form; and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that, and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of violation to be determined according to the ordinary rules of evidence; would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform, and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. At common law, one convicted of crime was incompetent as a witness; and this rule was in no manner affected by the lapse of time since the commission of the offense, and could not be set aside by proof of a complete reformation. So, in many states a convict is debarred the privileges of an elector, and an act so debarring was held applicable to one convicted before its passage. In a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established.

Such legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming what is deemed to be, and what is in fact, appropriate evidence of such qualifications.

The court finds no error in the record, and therefore the judgment of the state court is affirmed.

Mr. Justice Harlan, dissenting.

If the statute in force when the offense of abortion was committed had provided that, in addition to imprisonment in the penitentiary, the accused, if convicted, should not thereafter practice medicine, no one, I take it, would doubt that such prohibition was a part of the punishment prescribed for the offense. And yet it would seem to be the necessary result of the opinion of the court in the present case that a statute passed after the commission of the offense in 1877, and which, by its own force, made it a crime for the defendant to continue in the practice of medicine, is not an addition to the punishment inflicted upon

him in 1878. I cannot assent to this view. It is, I think, inconsistent with the provision of the constitution of the United States declaring that no state shall uass an *ex post facto* law.

If long after the commission of a crime, and long after the offender has suffered all the punishment prescribed at the time for its commission, a statute should, by its own force, and solely because of his conviction of that offense, take from him the right to further pursue his profession, would not such a statute inflict upon him a greater punishment than was annexed to the crime when committed, and alter the situation to his disadvantage, "in relation to the offense or its consequences?" In my opinion, this question should receive an affirmative answer.

It was said in argument that the judgment below was sustained by Dent v. West Virginia, 129 U. S., 114, 9 Sup. Ct., 231. That case presented no question under the *ex post facto* clause of the constitution. It only involved the question whether any one could, of right, pursue the practice of medicine without obtaining a license to do so, if the state required a license as a condition of exercising the privilege of pursuing that profession. This court held that such a statute was within the reserved police power of the state, and consistent with the due process of law enjoined by the fourteenth amendment. It was not the case of a state enactment which, by its own force, made it a crime for any person, lawfully engaged, when such act was passed, in the practice of the medical profession, to continue to do so, if he had at any time in his past life committed a felony, although he may have suffered all the punishment prescribed for such felony when it was committed. If the statute of West Virginia had been of that character, the same question would have been presented that arises under the statute of New York.

The statute in question, it is to be observed, takes no account whatever of the character, at the time of the passage, of the person whose previous conviction of a felony is made an absolute bar to his right to practice medicine. The offender may have become, after conviction, a new man in point of character, and so conducted himself as to win the respect of his fellow men, and be recognized as one capable, by his skill as a physician, of doing great good. But these considerations have no weight against the legislative decree embodied in a statute which, without hearing, and without any investigation as to the character or capacity of the person involved, takes away from him absolutely a right which was being lawfully exercised when that decree was passed. If the defendant had been pardoned of the offense committed by him in 1877, he would still, under the statute of 1895, have become a criminal if he continued in the practice of his profession.

It will not do to say that the New York statute does nothing more than prescribe the qualifications which, after its passage, must be possessed by those who practice medicine. I must withhold my assent to the opinion of the majority.

Mr. Justice Peckham and Mr. Justice McKenna concur in this dissent.

CONSTITUTIONALITY OF MEDICAL PRACTICE ACT

Reetz v. *People of the State of Michigan, 188 U. S. 505; 23 Sup. Ct. Rep. 390; 47 L. Ed. 563*

1903

The Supreme Court of the United States says, in that the power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question. It was objected in this case that the board of registration in medicine was given authority by Michigan Public Act No. 237 of 1899 to exercise judicial powers without any appeal from its decision, inasmuch as it might refuse a certificate of registration if it should find that no sufficient proof was presented that the applicant had been "legally registered under Act No. 167 of 1883." That, it was contended, was the determination of a legal question which no tribunal other than a regularly organized court could be empowered to decide. The answer is, that the

decision of the State Supreme Court is conclusive that the act does not conflict with the state constitution, and the Supreme Court of the United States says it knows of no provision in the federal constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process. Neither is the right of appeal essential to due process of law. But while the statute makes in terms no provision for a review of the proceedings of the board, yet it is not true that such proceedings are beyond investigation in the courts. In Metcalf v. State Board of Registration, 123 Mich., 661, an application for mandamus to compel this board to register the petitioner was entertained, and although the application was denied, yet the denial was based, not on a want of jurisdiction in the court, but on the merits.

Again, the court holds that when a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice. If this party had applied at any meeting for a hearing, the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the state courts to what extent the action of the board had deprived him of his rights. Then, he seemed to assume that the proceedings before the board were in themselves of a criminal nature, and that the state by such proceedings was endeavoring to convict him of an offense in the practice of his profession. The court says that this was a mistake. The state was simply seeking to ascertain who ought to be permitted to practice medicine or surgery, and criminality arises only when one assumes to practice without having his right to do so established by the action of the board. The proceedings of the board to determine his qualifications were no more criminal than examinations of applicants to teach or practice law, and if the provisions for testing such qualifications are reasonable in their nature, a party must comply with them, and has no right to practice his profession in defiance thereof. It was further insisted that having once engaged in the practice, and having been licensed so to do, he had a right to continue in such practice, and that this statute was in the nature of an *ex post facto* law. But the court says that the case of Hawker v. New York, 170 U. S., 189, was decisive on that question. The statute does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon.

Meffert v. *Packer et al., State Board of Medical Registration and Examination, 195 U. S., 625; 25 Sup. Ct. Rep., 790; 49 L. Ed., 350*

Decided by Supreme Court, without opinion. Decision of Kansas Supreme Court affirmed.

CONSTITUTIONALITY OF MEDICAL PRACTICE ACTS

Watson v. *State of Maryland, 218 U. S. 173; 54 L. Ed. 987; 30 S. Ct. R. 644*

1910

The Supreme Court of the United States says, that it is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only qualified persons shall undertake its responsible and difficult duties. To this end many of the states of the Union have enacted statutes which require the practitioners of medicine to submit to an examination by a competent board of physicians and surgeons, and to receive duly authenticated certificates showing that they are deemed to possess the necessary qualifications of learning, skill and character essential to their calling.

In such statutes there are often found exceptions in favor of those who have practiced their calling for a period of years. In the Dent case an exception was made in favor of practitioners of medicine who had continuously practiced their profession for ten years prior to a date shortly before the enactment of the law. Such exception proceeds on the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts. In the Maryland statute under consideration, the excepted class were those who had practiced before Jan. 1, 1898, being more than four years before the passage of the law, and who could show, presumably with a view to establishing that they were actively practicing at that time, that they had treated at least twelve persons within one year of that date.

Conceding the power of the legislature to make regulations of this character, and to exempt the experienced and accepted physicians from the requirements of an examination and certificate, the details of such legislation rest primarily within the discretion of the state legislature. It is the lawmaking body, and the federal courts can interfere only when fundamental rights guaranted by the federal constitution are violated in the enactment of such statutes.

This subject has been so frequently and recently before this court as not to require an extended consideration. The right to regulate occupations was considered by this court at the present term in the case of Williams v. Arkansas, 217 U. S., 79. It was therein held that regulations of a particular trade or business essential to the public health and safety were within the legislative capacity of the state in the exercise of its police power, and that unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the state; and that the classification of the subjects of such legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws. Applying these tests, the court sees nothing arbitrary or oppressive in the classification of physicians subject to the provisions of this statute, which excludes from its requirements those who have practiced prior to Jan. 1, 1898, and were able to show that they had treated at least twelve persons in a professional way within a year of that date.

But it was insisted that undue discrimination was shown and equal protection of the law denied in the exceptions of the statute ". . . . but nothing herein contained shall be construed to apply to gratuitous services, nor to any resident or assistant resident physicians or students at hospitals, in the discharge of their hospital or dispensary duties, or in the office of physicians, or to any physician or surgeon from another state, territory, or district in which he resides, when in actual consultation with a legal practitioner of this state, or to commissioned surgeons of the United States Army or Navy or Marine-Hospital Service, or to chiropodists, or to midwives, or to masseurs or other manual manipulators, who use no other means; nor shall the provisions of this subtitle apply to physicians or surgeons residing on the borders of a neighboring state, and duly authorized under the laws thereof to practice medicine or surgery therein, whose practice extends into the limits of this state: Provided, that such practitioners shall not open an office or appoint places to meet their patients or receive calls within the limits of this state without complying with the provisions of this subtitle: Provided, that the same privileges be accorded to licensed physicians of this state: Provided, further, that nothing in this subtitle shall annul any of the provisions of article 32, title 'Dentistry,' nor shall apply to any registered graduate of dental surgery now practicing in the said state of Maryland, with the sign titles: Dentist, surgeon dentist, dental surgeon, or stomatologist."

The court will not take occasion to consider each of these exceptions. A reading of them makes it manifest that they are not without reason. Before a law of this kind can be declared violative of the fourteenth amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the court must be able to say that there is "no fair reason for

the law that would not require with equal force its extension to others whom it leaves untouched."

The stress of the argument as to these exceptions was put on the exemption of resident physicians, or assistant physicians, at hospitals, and students on hospital and dispensary duties. The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive, and apply equally to all persons similarly situated. The court cannot say that these exceptions nullify the law. The reason for them may be that hospitals are very often the subject of state or municipal regulation and control, and employment in them may be by boards responsible to public authority under state law or municipal ordinance. Certainly the conduct of such institutions may be regulated by such laws or municipal regulations as might not reach the general practitioner of medicine. In any event, the court cannot say that these exceptions are so wholly arbitrary and have such slight relation to the objects to be attained by the law as to require the courts to strike them down as a denial of the equal protection of the law, within the meaning of the federal constitution.

Another point: The Court of Appeals of Maryland determined that section 99 of Article 43 of the Maryland Code of 1904, under which the indictment in this case was prosecuted, making it a misdemeanor to attempt to practice medicine in the state of Maryland without registration, was not subject to the limitations of section 80, relating to the sending of notice, etc. The offense, the Court of Appeals held, was created solely by section 99 in broad and general language, without exceptions or qualification, and that for conviction under that section it was not essential to prove the sending of the notice required by section 80, which provides for the sending of notices to physicians practicing in the state without being legally registered. That construction of the Maryland statute is conclusive on this court (the Supreme Court of the United States). The accused had a trial before a court and jury under the statutes of Maryland, was proceeded against under the forms provided for by the laws of that state, and under a statute which the highest court of the state has held completely defined the offense without resorting to the necessity of notifying unregistered physicians before they became liable for the penalties of the act for practicing without registration. The contention that the conviction in this aspect was without due process of law under the federal constitution cannot be sustained.

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(REFERENCES ARE TO PAGES)

(See Medical Practice Act, Medicine, Practice of Medicine).