The doctor in court / by Edwin Valentine Mitchell.

THE DOCTOR IN COURT

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BY

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OF THE MASSACHUSETTS BAR

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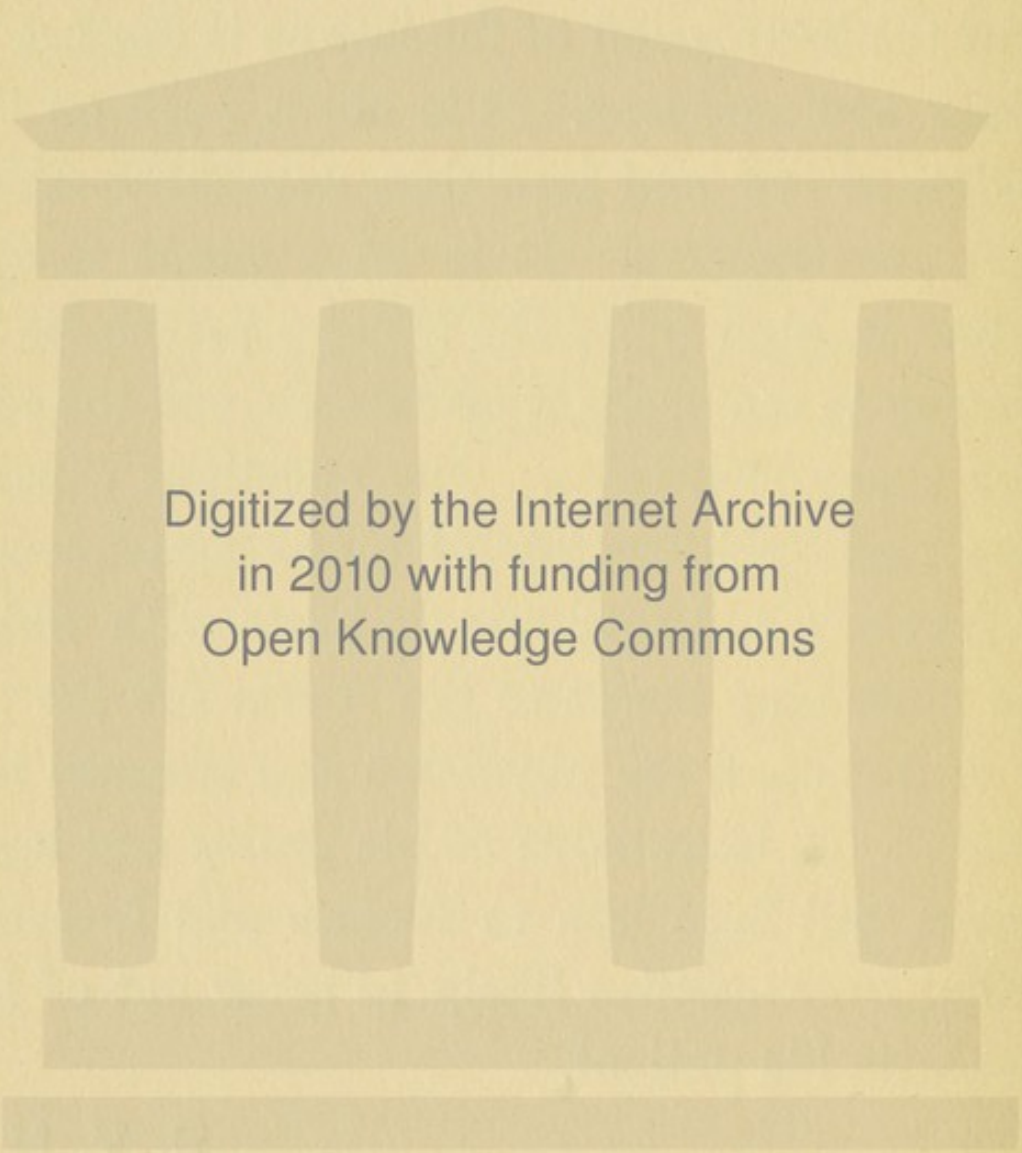
PREFATORY NOTE

The purpose of the following pages is to give a sketch of the impression of the law as it applies to physicians and surgeons. It is not a work on the correlation of law and medicine, popularly called medical jurisprudence. It is an attempt to put briefly and in high relief the general principles of law relating to the medical profession, and the reasons for those principles. The questions considered are rapidly becoming of more consequence. In the feverish and intemperate haste with which persons nowadays resort to the courts for the recovery of damages, the physician and surgeon has not escaped. A knowledge of his duties and legal obligations will help him to foresee and forestall unpleasant eventualities likely to grow out of his relations with his patient.

E. V. M.

Boston, Mass.



CONTENTS

THE DOCTOR IN COURT

CHAPTER I

PROFESSIONAL EVIDENCE

The physician or surgeon, no matter whether his practice be general or special, is certain to be called upon to give medical evidence in court. This cannot be avoided, as cases are constantly arising which involve questions of personal injuries, of mental capacity, and of death, either accidental, homicidal or suicidal. The doctor has no choice in the matter. He cannot tell in what case he will be summoned into court to testify. If called he must go. Because of the publicity of court proceedings a reputation may be won or lost. Consequently it is of great importance for a doctor to know his relations to the court and have his eyes open to the pitfalls set for him by the skilful cross-examiner.

The witnesses giving sworn evidence before a tribunal of justice may be placed in two groups: the accidental or non-expert witness, and the professional or expert witness. It is manifest the doctor may be called to give testimony in either capacity. The greater number of facts investigated in our courts are testified to by the first group,

the jury drawing inferences or conclusions from the facts as given by these witnesses. Back in the early years of our courts this was the sole type of testimony, for the reason that it was the only kind necessary for a jury to render just decisions. Yet with the advancement of learning it became visible that facts and natural laws existed concerning which the average man or jury knew but little. It was necessary to have the aid of one who could correctly interpret these facts. So it came to pass that the expert was evolved to assist the court and jury to a true conclusion as to these facts. Since that time the expert witness's importance as an instrumentality for the dispensation of justice has increased immensely. The discoveries and inventions of science have widened his field of usefulness illimitably.

Now, the examination of a witness in court consists of the direct or examination-in-chief, the cross-examination, and the re-direct examination. The examination-in-chief is where the side calling the witness into court questions him as to his knowledge of the facts in issue, or, in the case of an expert, where the side for which he is testifying puts hypothetical questions to him for his opinion thereon. The cross-examination is conducted by the opposing counsel. Its purpose is to test the truth of the evidence given upon the examination-in-chief, and the prejudice, memory, knowledge, interest, etc., of the witness. The importance of the right of cross-examination can be seen from the

very nature of our system of legal procedure; for example, hearsay evidence, where a witness testifies as to what another said, is inadmissible because the person making the statement was not subject to cross-examination; and for the same reason opinions expressed in the works of scientific writers are not generally allowed. (Other reasons for excluding hearsay evidence are that the person making the statement was not under oath at the time, nor was he before the jury so that they could pass on his veracity as a witness.

There are many exceptions to the hearsay rule. The one with which the physician is most concerned is the rule admitting dying declarations, provided the declarant knew or believed he was about to die when he made the statement and his death is the subject of the indictment. An illustration of the serious consequences which might attend the curtailing of one's right to the cross-examination of witnesses is furnished by the very late New York case of the People v. Lustig (206 N. Y., 162). The prisoner was indicted for poisoning his wife with strychnine in order to get the insurance on her life. There was a divergence in the medical opinions as to the cause of death. The chief medical witness for the prosecution gave evidence that his toxicological tests had revealed one one-hundredth of a grain of strychnine in the liver of the deceased. The physician for the defence testified that the result of his laboratory work showed no traces of strychnine. With the object of showing the worth-

lessness of his own tests the prosecution's expert was asked by the prisoner's counsel to describe his tests. The accused's fate depended upon the accuracy of the physician's work. Did the woman die by poison? The issue was close; a human life was in the balance. Yet the court refused to permit the witness to answer. The higher court justly held this to be serious and reversible error. A new trial was granted.

Immediately on being called to the stand for his examination the oath is administered to the witness which binds him if he assents, to tell "the truth, the whole truth, and nothing but the truth." It has been said that expert testimony should be the colorless light of science brought to bear upon any case where such testimony is necessary. "There should be no half truths uttered, and suppression of the whole truth is in the nature of false testimony." While such evidence should be impartial and unprejudiced, it is often thought by the expert that to benefit the side calling him he must be absolutely sure that he is right. A conscientious and unpurchasable expert will, of course, have the courage of his convictions. Testimony given in a convincing manner undoubtedly carries weight, but so many theories in medicine and surgery have been upset that it is best not to be too confident.

That the skilled witness may be admirably qualified to give evidence and at the same time be modest and not at all sure of the truth of his opinion, is illustrated by the following: Not long ago

a captain in the United States army was called as a skilled witness in a shooting case. The captain astonished all by refusing to swear he could tell the truth. The clerk repeated the oath; the captain did not assent; he said, "No, sir." It was not a case of obstinacy, because the witness was willing to do anything he could to assist the court and jury in getting at the facts. Nevertheless, he refused to swear that his conclusions were correct.

The judge was puzzled, and the captain made the following explanation of his refusal to assent to the oath: "I decline to swear that the expert testimony which I may give is the truth. All that I can swear to is that to the best of my ability and understanding and judgment, after years of experience and experiments in the matter of small firearms, certain conditions produce certain results. But I cannot swear such findings are the truth."

He was accepted as a witness. The effect of what he said on the jury can be imagined. Here was a man who was not positive that his opinion was right, and was willing to say so, regardless of its effect on the side that called him. The testimony of such a man was worthy of serious consideration. This attitude can be strongly recommended to medical witnesses when they take the stand.

It cannot be denied that expert testimony is winked at. It should have high rank as a factor in determining the outcome of cases, yet we often see it go for naught. Some judges go so far as

to tell juries that it is of little probative value. Thus at the trial of William Palmer, at the Old Bailey in 1856, for the poisoning of a man named Cook, Lord Chief Justice Campbell, in the course of his summary, said to the jury: "With regard to the medical witnesses, I must observe that, although there were among them gentlemen of high honor, consummate integrity, and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness."

In a New York case (Ferguson v. Hubbell, 97 N. Y., 507 at 514) the court said: "Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted."

Despite this judicial denunciation of expert testimony innumerable instances of the courts recognizing the knowledge and experience of medical witnesses as of great value might be cited. In many cases it is absolutely indispensable because of the rule of law requiring the production of the best evidence. Who but a toxicologist can give a correct opinion as to whether or not a man came

to his death by poisoning? From the position which experts now hold in legal proceedings it is not unnatural that a great hue and cry should be raised to abolish a system which permits such farces as the Thaw trial to be enacted in our courts. But remove the expert to a non-partisan position by having him appointed by the court and great distance will be covered in the direction of genuine reform. When juries come to look upon the expert more as an officer or servant of the court than as one giving evidence to fortify either side of a case, then the profession will be treated with greater respect and not held up to ridicule. Like the army captain, let the medical witness have constant regard to the serious obligation of his oath, and much of the present misunderstanding of the expert will be dispelled.

Naturally when a skilled witness is called to the stand to give evidence, the question at once arises as to whether he is in fact an expert. Accordingly the foundation for an expert opinion is laid by qualifying the witness as such. The doctor is interrogated as to his education, experience, etc., after which, and before going on with his testimony, he may be taken in hand and cross-examined as to his qualifications. The court then decides whether he shall be permitted to testify. In other words, the presiding justice rules upon the question of the doctor's competency as a witness.

The law does not recognize any particular school or class of medical practitioners as being

better qualified than another for skilled witnesses. The criterion is knowledge. This knowledge may be gained by reading and studying the books, or by experience, or both. The present low status of the expert is also attributed to the low standards set for experts, which, it is said permit the pseudo-expert to thrust himself upon the courts. Civil service examinations have been suggested as a remedy, but if, as recommended, medical witnesses were chosen by the court, it would insure science being interpreted by experts.

In the direct examination the witness should state the facts simply, without qualifying words. If he says the patient suffered from a "very severe nervous shock," this is certain to be picked up on the cross-examination. It is sometimes necessary to use technical words in order to complete the record of the court, so that another medical witness coming into court at some later time can tell exactly what was meant. When such terms are essential be sure to explain them in plain words to the jury. Taylor tells of a case where a doctor testified "that on examining the prosecutor he found him suffering from a severe contusion of the integuments under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissue, which was in a tumefied state. There is also considerable abrasion of the cuticle." On being asked if he meant a black eye, he said "yes." The doctor was laughed out of court. If this witness had stated the patient had

a black eye, then, if pressed and asked what he meant by a black eye, had given a technical description, that would in all probability have relieved him of further examination.

Where, however, the doctor is acting purely as an expert it may not be so easy a task to give answers wholly devoid of medical phraseology. Dr. Reynold Webb Wilcox in his inaugural address as president of the Society of Medical Jurisprudence said: "To a man who is a specialist, the demand which almost invariably occurs, that his scientific analysis of a situation be translated into the vernacular of every-day speech, is maddening. The popular idea that present-day physicians delight in amplifying a medical vocabulary for the purpose of hearing lengthy words, is far from being founded upon fact. The tendency is in exactly the opposite direction.

"No one who knows anything about literature would expect the translator of an idiomatic bit of French verse to obtain in English exactly the same meaning. Yet medical men of international reputation are asked to describe a state of mental disorder in one-syllable words, conceived by our ancestors, in an era when it was scarcely realized that the brain was part of the human system. I do not advocate having the experts' testimony tuned so high that the jury and judge are in the dark, but it does seem that the means should be taken to impart to them the rudiments of medical phraseology."

Efficiency in the high art of cross-examination is a matter upon which a great many lawyers pride themselves. Perhaps no greater opportunity for the trial lawyer to distinguish himself is afforded than the cross-examination of expert witnesses. Extended preparation with the object of undermining the testimony of medical witnesses is often made under the tutorship of other experts. Ingeniously contrived questions are set for the witness. So the doctor must beware the cross-examination.

It is not presumed here for a minute that the physician would testify falsely. The lying witness is generally very easy to corner. Even the cleverest will make a fatal slip sooner or later. As a matter of fact, the cross-examiner must treat the medical witness's testimony with skepticism. This is the attitude of the advocate's mind in approaching any witness if the witness has given testimony conflicting with that already advanced or to be offered by the examiner's side. It is a mistake to believe that when the lawyer rises for the cross-examination his sole object is to make the witness out a liar. He will undoubtedly try to prove his own case from the lips of the witness or some theory not incompatible therewith. This method of turning testimony in favor of the questioner's side is followed by the majority of cross-examiners. It does not mean that he is trying to trip the witness, because what he seeks to bring out has in all probability not been touched on in the examination-in-

chief. Naturally an attorney is not going to ask his own witnesses for facts which he knows are damaging to his cause. He leaves them for the opposition to bring out; it is for these the cross-questioner seeks.

For illustration: In a suit for personal injuries against a railroad company, where the plaintiff suffered a fracture of his leg which resulted in a shortening of the limb, the attending physician testified that "the condition was a simple transverse fracture at the junction of the middle and upper third of the femur. That after reduction and the application of dressings an X-ray plate showed a perfect anterioposterior alignment." A liberal verdict was returned for the plaintiff. The doctor subsequently in conversation with a friend said that he had other X-ray plates taken at various angles showing there was an overlapping of the ends of the bones due to his improper application of dressings. Here a proper cross-examination would have brought out this fact and damages would have been greatly mitigated. By failure to properly cross-examine the witness the defendant was paying for the doctor's carelessness.

A common tactic of the trial lawyer in cross-examining a witness is to attempt the witness's downfall by showing that the witness is "interested" in the outcome of the case. The physician is asked how he happened to come into the case. He is carefully examined as to whether he has received compensation for his services in attending

the patient, or how much he is to receive for appearing as an expert. If an unsatisfactory reply is given, the attorney may use the fruits of such a line of questioning in his argument to discount and nullify the physician's testimony. The advocate will try to persuade the jury that the doctor's being paid is a contingency dependent upon a favorable verdict, and that the testimony of one so interested must necessarily be highly colored.

Many lawyers believe a most cursory reading of medical authorities will qualify them to successfully cross-question the greatest specialists upon their own subjects. A true expert can easily defend himself against the attacks of such an antagonist, but no matter how strongly he may be tempted to strike back let him resist the impulse. It is poor taste to engage in repartee. Medical witnesses in general have been hurt by the physician not long out of medical school matching wits and bandying words with counsel. The latter has the advantage from his position as questioner. Naturally the lawyer knows more about the art of cross-examination than the average witness; for it is part of the practice of his profession, just as it is part of the physician's to prescribe for illnesses. True, the advocate frequently runs himself on his own sword; but the average lawyer is more proficient in the art than the medical witness.

When the physician is tormented by a member of the Spanish Inquisition school of cross-exami-

nation, he should above all things keep his temper. This species of examiner is not half as deadly as the quiet, friendly, persuasive type. But it is important always to be cool while on the stand. If a cross-examiner sees that he can get the witness angry, he will do all in his power to bring this about. For the witness then thinks more of a means of retaliation and not so much of what he is saying, thus making it easier for the examiner to trap him in a statement carelessly inconsistent, or the witness may utter an unguarded statement.

In giving his opinion the expert cannot usurp the right of the jury to judge the facts. The expert is not to say which witnesses are telling the truth. That is for the jury to decide. "In order," says the Supreme Judicial Court of Massachusetts (Dickenson v. Fitchburg, 13 Gray, 546), "to obtain the opinion of a witness on matters not depending on general knowledge, but on facts not testified of by himself, one of two modes is pursued: either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain facts testified of are true, he can form an opinion, and what that opinion is."

Now a hypothetical question is framed on the existence of facts which are assumed to be then proven, or there is a reasonable expectancy that they will be in evidence at a later time. It must

necessarily contain the facts on which an opinion is wanted. It is for the jury to decide whether these facts are the truth.

The following is a good example of a hypothetical question which was put to a physician of standing and experience, for his opinion as to the cause of a sickness, the outcome of which was the death of a little girl: "Suppose a girl between seven and eight years of age, who had always been in good health, on the 9th day of January, 1887, to have been run over by a runaway horse, with sleigh attached, to have been knocked insensible to the ground, the horse and sleigh passing over her, inflicting three cuts, one upon the top, one upon the side, and one upon the back of her head, from the hoofs of the horse or otherwise; that she thereafter was attacked with vomiting, and was confined to the house for two months, suffering great pain in the back and front of the head; that at intervals thereafter increasing in frequency and intensity till the date of her death, on May 18, 1892, she was attacked with violent pains in the head accompanied with vomiting; that in the last few months of her life her sight gradually failed, and she became totally blind; that her legs became unsteady, and her control over them uncertain; that she suffered almost continually great pain in the front and back of her head; that after her death, on examination, it was found that she had one or more tumors of the cerebellum, or at the base of the brain —what, in your opinion, was the exciting cause of

the illness from which she suffered from January 9, 1887, the date of the accident, till the date of her death, May 18, 1892?'' (Hardiman v. Brown, 162 Mass., 585.)

Leading questions cannot, as a general rule, be asked on the direct examination, but are permissible on the cross-examination. A leading question is one that suggests the answer. On the examination-in-chief the question would be worded, ''Where were you at 9 o'clock on the night of February 16th?'' Answer, ''I was at the theatre.'' In cross-examining this witness the question could be put, ''Were you not at the theatre on the night of February 16th?''

The witness should watch on the cross-examination for questions so involved as to contain really two questions, one of which can be answered ''yes'' and the other ''no,'' whereas if the physician answered the whole with a ''yes'' or ''no,'' it would trap him. The witness should not hesitate to say that the question has two answers.

Again, many times questions are asked which assume something to be true that has no evidence to support it, as where A is indicted for shooting B, which he denies, and is asked, ''Did B say anything to you before you shot him?'' The doctor is likely to get a question of this description. It is, of course, improper. They are put to the witness on the chance of getting them into the record unchallenged.

The medical witness need not answer a question

which tends to incriminate him. Poore (A Treatise on Medical Jurisprudence) says that "in the old days of duelling any doctor who went out as a surgeon to a duel became an accessory to the fact if the duel resulted in death. Technically he became accessory to a murder. Therefore, in such a case if the doctor was asked whether he went, knowing that a duel was to be fought, he was not bound to answer, because the answer to it might incriminate him."

The use of notes by a witness in court is generally allowed for the purpose of refreshing the memory of the witness. They must be of such a nature that the witness knows they were correct when made. The witness must have made them himself at the time of the occurrence of the facts, or so soon afterward that it is likely they were fresh in his memory (Stephens' Digest of the Law of Evidence, 339). Such writings do not become evidence. Yet testimony given from complete notes is of great worth.

The importance to the physician of keeping full and accurate records of cases in his charge cannot be overemphasized. The physician should keep copies of the death certificates he gives, and the records of the progress of diseases in cases under his care and also hospital records, especially where casualties are concerned. General practitioners are, as a rule, too careless in such matters.

It may be many years before a general practitioner is suddenly summoned as a witness in a

case, and he then finds himself at a loss to account for certain things and cannot answer questions properly. Owing to the multiplicity of personal injury suits with which our courts are congested, the physician is frequently asked to give medical evidence concerning injuries sustained by his patient in an accident which, perhaps, happened years before. If he is without any record he will find himself in an embarrassing situation. In almost every personal injury case the plaintiff has undergone a physical examination by a physician or surgeon hired by the defendant. If called to make such an examination, a record thereof should be made for the benefit of the defendant. The following outline for making these reports is suggested:

Name of Case.
Date.
Time.
Place of Accident.
Date of Examination.

Medical Attendance, stating fully names of physicians with addresses, also hospital, if any, at which injured was treated.

Name.
Age.
Occupation.
Business and Home Address of Injured.
Married or Single, etc.
Diagnosis.
History.

Present Condition of Injured.
Nature of the Accident as told by Injured.
Prognosis.
Remarks.

The "remarks" of the physician should be written on a *separate sheet* of paper; for if the report is to be used by the doctor to refresh his memory in court, it is likely to be scrutinized by the opposing counsel, and it is well not to have these confidential comments a part of the report.

While the rules governing the giving of expert medical opinions in court are purely questions of evidence with which the legal profession is more concerned, still they have been hinted at here, and it does not seem amiss to give the underlying reasons for permitting medical witnesses to give opinions. As a general rule witnesses are not permitted to voice their opinions in court. They are limited to giving in evidence the bare facts of which they have knowledge. It is the special function of the jury after considering the facts thus presented to voice its opinion thereon. In other words, a verdict is the conclusion or opinion of the jury on the facts.

Notwithstanding this, there are, as we have seen, certain cases where by necessity one having special skill and knowledge, is called to give an opinion by way of explanation of the matter in issue to the jury. It is under this exception that the expert medical opinion comes. Obviously a physician and

surgeon has a knowledge and training not common to men in general. Consequently when a question involving medicine or surgery arises, the medical expert is called on account of his superior knowledge. Because the facts speak in a strange tongue to the ordinary man, the physician is called to translate and explain their correct significance. The opinions so given are not conclusive, but are looked upon as any other testimony. Inasmuch as they are based on assumptions of fact the opinion is worthless if the jury do not find the evidence or facts upon which they are laid to be true: if the foundation is unstable the superstructure falls.

The giving of expert opinions in court did not become well established until the eighteenth century. The adoption of the custom has been gradual; its history is that of the correlation of law and medicine. As progress was made in the sciences and arts the professional witness became of ever-increasing importance, until to-day he is indispensable.

In 1532 the diet of Ratisbon, at the instigation of Emperor Charles V, adopted the penal code of Germany, in which provision was made for the calling of physicians as witnesses in case of injury, poisoning, violent death, etc.

In England it was first customary to select jurors who were specially fitted to judge the facts of a particular case (Historical and Practical Considerations Regarding Expert Testimony, by Learned Hand, vol. 15, Harv. Law Rev., 40). Prob-

ably the earliest trial where a medical witness testified as to his conclusions was that of Alsop v. Bowtrell (Cro. Jac., 54) in 1620, when physicians upon the issue of legitimacy of a child said it was possible for a woman to have a child forty weeks and nine days after the death of her husband, because the time might be delayed on account of lack of strength or bad usage. The Witches case (6 Howell, State Trials, 697) tried in 1665, is another early case in which an expert opinion was permitted. In that trial a physician gave his opinion of the accused persons. He declared them to be witches.

Because of the very restricted sense in which medical books can be used in our courts, the deliberately expressed opinions of experts upon scientific matters is of great assistance. A product of our civilization, the employment of the expert daily becomes more frequent and of greater consequence. The desire, therefore, to remedy the faults of the method which now obtains is actively manifesting itself. Yet the task of formulating a satisfactory plan still vexes the members of both professions. Many reforms have been suggested. That one which would have the expert appointed by the court gives most promise of deliverance from the present situation. For the evils of the system seem chargeable to the fact that the expert is now retained by the contending parties in a case. His position is that of an active, interested participant. The suspicion that he is a mere "intellectual prosti-

tute'' is immediately aroused in the minds of the jury. His appointment by the court would remove him from this embarrassing situation and place him in an unprejudiced and neutral position. The viciousness of the present method has brought forth just criticism and reproach. It is a subject which deserves serious reformatory consideration. The remedy lies with the members of both professions (Expert Testimony,—Prevalent Complaints and Proposed Remedies by Judge William L. Foster, 11 Harv. Law Rev., 169; Expert Testimony, by Lee Max Friedman, Yale Law Journal. February, 1910).

When the physician and surgeon is called upon to give evidence in court he should bear in mind the advice of Dr. Taylor. ''It is essential,'' said Taylor, ''first, that he should be prepared on all parts of the subject on which he is about to give evidence; and, secondly, his demeanor should be that of an educated gentleman and suited to the serious occasion on which he appears.''

CHAPTER II

THE CONTRACT OF THE PROFESSION

At this point it seems necessary to introduce a brief preliminary statement of the origin and history of the legal system of our country in order that the law as it specially affects physicians and surgeons in their relations to their patients may be more readily understood. This system in its present complex development is said to be like a mighty cathedral, of slow construction and composite architecture, the materials for which have been brought from various sources, and the growth of which has been supervised by a coalition of legal architects.

Since the evolution of human from animal society man has had his conduct regulated by law. Through the centuries of savagery and barbarism, customary law determined the relations of man to his fellows, and after the dawn of civilization, through conquest and migration and the consequent intermingling and blending of peoples and societies, positive law arose and developed as a natural attendant of advancing civilization and a necessary factor in an increasingly complex society.

In England, which at the close of the thirteenth

century had only two things on her statute-book besides the Magna Charta, the common law has been the foundation of all modern law, written or otherwise. It is composed of customs and maxims which have been acted upon since no man can say what time. In the words of Cooley, "The common law of England consisted of those maxims of freedom, order, enterprise, and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of the domestic institutions, and the acquisition, control, and transfer of property from time immemorial. It was the outgrowth of the habits of thought and action of the people, and was modified gradually and insensibly from time to time as those habits became modified, and as civilization advanced, and new inventions introduced new wants and conveniences and new methods of business" (Cooley's Constitutional Limitations, 32). It must not be supposed then that law is a set of fixed and unalterable rules. It is constantly changing with the welter and cross currents of social and economic conditions to meet the changing needs of a changing society.

Now it must be kept in mind that for more than half of its eventful life this country existed as a British colonial possession. Our forefathers as subjects of England, lived in her territory, and were governed by English law. When as emigrants they crossed to the New World, they brought with them such parts of the common and statutory law of the mother country as were best suited to

their altered circumstances on this side of the Atlantic. After hostilities between the colonies and the crown ended in our independence, it was only natural that our ancestors should keep the laws to which they had been accustomed in so far as they did not abrogate our constitutions and charters. It is not strange then that we find the common law an integral part of the system of law under which we live. In this country, as in England, it is the foundation of all our modern statutes, and, though unwritten, comprises by far the greater part of our law. Therefore it follows that many of the rules relating to the duties and legal obligations of physicians and surgeons are to be found in the common law.

Sir William Blackstone defines a contract as "an agreement, upon a sufficient consideration, to do or not to do a particular thing" (2 Bl. Comm., 442).

Contracts are of different kinds. They are usually divided with reference to their form into contracts of record, specialties, and simple or parol contracts. Contracts of record are those of which the record of a court is the evidence, as a judgment. Specialties are sealed instruments, such as deeds and bonds. The last division into simple or parol contracts includes all other contracts which may be in writing or oral.

Simple contracts are also distinguished as express or implied. This classification is important in the contracts of the physician and surgeon and

his patient. An express contract is a "contract made in distinct and explicit language, or by writing; as distinguished from an implied contract" (2 Kent's Comm., 450), which is "one not created or evidenced by the explicit agreement of the parties, but inferred by law as a matter of reason and justice, from their acts or conduct" (2 Bl. Comm., 443).

For illustration: X engages Y to perform some service for him. The law will here imply an agreement or understanding that X will pay Y a reasonable amount for the work he does.

Contracts are further separated into those which are executed and those which are executory. An executed contract is one that has been performed fully and nothing remains to be done by the parties thereto. A contract is said to be executory when there is yet something to be done.

There are certain elements which are necessary in the formation of every contract enforceable in law. It is essential that the parties should be capable of contracting. It is well known that certain persons are not competent to make contracts. Thus a minor or infant (one who is under twenty-one years of age, though in some instances a female attains her majority at eighteen years) cannot legally contract. The minor's contract, except for "necessaries," is held to be voidable, not void, which means that upon becoming of age or a reasonable time thereafter, he can elect to disaffirm the contract and not bind himself to its terms, or he

can ratify it and become bound. With regard to "necessaries," in the words of Lord Coke (Co. Lit., 172a) "it is agreed by all the books that an infant may bind himself to pay for his necessary meat, drink, apparel, physic and other necessaries." (Insane persons, drunkards, and bankrupts are in certain cases considered incapable of contracting.)

Another constituent element of a contract is that the minds of the parties must meet. There must be mutual consent to its stipulations; there must be no mistake or fraud.

Furthermore, there must be a valid consideration. The consideration is the "inducement to the contract" (Black's Law Dictionary).

It is also necessary that the object of the contract be one that is permitted by law; that is to say, a contract to do an illegal act is void. For example, the owner of a "medical institute" could not contract to cure diseases and give medical advice and treatment when he did not have a license to practise medicine (Deaton v. Lawson, 40 Wash., 486; 82 Pac., 879). He could not perform his part of the contract without violating the law, hence there was no valid consideration, and the contract was void.

The language used in making contracts, whether they be oral or written, and the effect thereof, are matters of fact for the jury to determine. Nevertheless, the law will often infer or imply a contract from certain facts which are undis-

puted. It considers certain elements a part of some classes of contracts, and charges the parties with certain duties in connection therewith. This is the case of contracts of a semi-public nature, as those of lawyers and the contracts of the medical profession. So it is by implication of law that the physician and surgeon holding himself out to the world as such, represents that he possesses the wisdom and skill necessary to qualify him to practise. The law charges him absolutely with the duty of possessing this knowledge (Force v. Gregory, 63 Conn., 167; 38 Am. St. Rep., 371; Pike v. Honsinger, 155 N. Y., 201; Kendall v. Brown, 74 Ill., 232; Potter v. Warner, 91 Pa. St., 362; Sears v. Prentice, 8 East, 348). It is a right of his patient to assume this to be the fact, and an attempt to perform an operation, where the physician lacks the learning and experience to use ordinary skill, will not be excused on the plea of ignorance.

This degree of professional learning and skill which the physician is required to bring to the aid and relief of his patients, has been considered by the courts in a vast number of cases. They have almost universally held that when a physician and surgeon undertakes to attend a case, he impliedly contracts that he will use that degree of learning and skill for his employer which is ordinarily possessed by other members of his profession in localities not dissimilar from that in which he is practising (Whitesell v. Hill, 101 Ia., 629; 37 L. R. A., 830; Small v. Howard, 128 Mass., 131; 35

Am. St. Rep., 363; Force v. Gregory, 63 Conn., 167; Tompkins v. Pacific Mut. Life Ins. Co., 53 W. Va., 479; Akridge v. Noble, 114 Ga., 949; Grainger v. Still, 187 Mo., 197; Utley v. Burns, 70 Ill., 167; Leighton v. Sargent, 31 N. H., 119; McCracken v. Smathers, 122 N. C., 799; Bonnet v. Foote, 47 Colo., 282; Van Skike v. Potter, 53 Neb., 28; Hales v. Raines, 146 Mo. App., 232; Barnes v. Means, 82 Ill., 379; Pike v. Honsinger, 155 N. Y., 201; Jones v. Angell, 95 Ind., 376; McMurdock v. Kimberlin, 23 Mo. App., 523; Gillette v. Tucker, 67 Ohio St., 106; Wells v. Ferry-Baker Co., 57 Wash., 658; 107 Pac. Rep., 869; Wood v. Clapp, 4 Sneed (Tenn.), 65; Dunbauld v. Thompson, 109 Ia., 199. See also exhaustive note in 37 Lawyers' Reports Annotated, 325).

The reason for taking into consideration the place where the medical man carries on his practice is apparent immediately we think of the educational advantages the city doctor has over one who practises in the less thickly populated sections of the country. The former has institutional privileges of hospitals and libraries. He can attend clinics, lectures, and the meetings of medical societies, thus becoming quickly conversant with the most recent and up-to-date methods of diagnosis and treatment. It would obviously work an injustice to hold otherwise. Of course, a country doctor may be equipped with an excellent education and have a wide knowledge of the literature of his profession, but proficiency in performing difficult and

delicate operations comes only through experience. His opportunities for acquiring skill are limited.

Here is an illustration: In the case of Small v. Howard (128 Mass., 131), a physician and surgeon was sued for negligently treating and dressing an injury to the wrist of the plaintiff. It appeared that the defendant was a practitioner in a small town. The wound was a very severe one, having been caused by glass, and the inside of the wrist was cut to the bone, severing all the tendons and arteries. The court charged the jury as to the degree of skill and learning it was incumbent on the defendant to possess, that "the defendant, undertaking to practise as a physician and surgeon in a town of comparatively small population, was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; he was not bound to possess that high degree of art and skill possessed by eminent surgeons practising in large cities and making a specialty of the practice of surgery." It was held by the higher court that there was no error in this charge. The court in pronouncing it correct said: "It is a matter of common knowledge that a physician in a small country village does not usually make a specialty of surgery, and, however well informed he may be in the theory of all parts of his profession, he would, generally speaking, be but seldom called upon as a surgeon to perform difficult operations."

It has been held that the skill and learning essential for the medical man to possess and use is not to be tested by the standard of the particular neighborhood in which he carries on his practice. Said the court in Gramm v. Boener (56 Ind., 497), impugning the contrary doctrine: "There might be but a few practising in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say, that, because one possessed and exercised as much skill as the others, he could not be chargeable with the want of reasonable skill."

He is not bound to exercise that skill which is necessary to put the patient in as good condition as he was before the injury or illness. Thus it was held in McCandless v. McWha (22 Pa. St., 261) to be error to instruct the jury that "the defendant was bound to bring to his aid the skill necessary for a surgeon to set the leg so as to make it straight and of equal length with the other when healed, and if he did not, he was accountable in damages just as a stonemason or bricklayer would be in building a wall of poor materials, and the wall fell down; or if they built a chimney and it would smoke by reason of a want of skill in its construction."

In disapproving of this statement of the law, the upper court said: "The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and length; or the pa-

tient may, by wilful disregard of the surgeon's directions, impair the effect of the best conceived measures. He deals not with insensate matter like the stonemason or bricklayer, who can choose their materials and adjust them according to mathematical lines; but he has a suffering human being to treat, a nervous system to tranquillize, and a will to regulate and control." So also the courts have said the physician and surgeon does not have to possess the *highest* degree of skill (Small v. Howard, 128 Mass., 131; Howard v. Grover, 28 Me., 97; Lamphier v. Phipos, 8 Car. & P., 475); nor need he be *thoroughly* educated (Peck v. Hutchinson, 88 Ia., 320).

It must not be thought when a question of skill and learning is under consideration that the law has no regard for the current state of progress of medicine and surgery. For it takes cognizance of such advancement, and methods fallen into desuetude will not be tolerated, even though the physician and surgeon carries on his practice in a thinly settled neighborhood (Almond v. Nugent, 34 Ia., 300; McCandless v. McWha, 22 Pa. St., 261; Haire v. Reese, 7 Phila. (Pa.), 138; Gates v. Fleischer, 67 Mo., 504; Nelson v. Harrington, 72 Wis., 591; 12 L. R. A., 719; Small v. Howard, 128 Mass., 131; Tefft v. Wilcox, 6 Kan., 33; Hitchcock v. Burgett, 38 Mich., 501; Bigney v. Fisher, 26 R. I., 402; Gillette v. Tucker, 67 Ohio State, 106).

The law imposes upon the physician and surgeon the duty of using reasonable care, zeal, and

diligence in the treatment of every case he engages to attend. The criterion of what constitutes due care on the doctor's part is the same set for cases involving questions of skill and learning; that is, the reasonable degree exercised by the average members of the profession similarly located (see cases cited supra). It was said in Pike v. Honsinger (155 N. Y., 201): "Upon consenting to treat a patient, it becomes his [the physician's and surgeon's] duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed." This rule has been very generally followed by the various States (McCandless v. McWha, 22 Pa. St., 261; McNevins v. Lowe, 40 Ill., 210; Patten v. Wiggin, 51 Me., 594; Carpenter v. Blake, 10 Hun (N. Y.), 358; Craig v. Chambers, 17 Ohio St., 254).

In determining a question of skill and care it is immaterial whether the physician was compensated for his care of and attention to the case. In other words, liability for negligence or malpractice may attach without a contract for compensation, express or implied (Peck v. Hutchinson, 88 Ia., 320; McNevins v. Lowe, 40 Ill., 209; DuBois v. Decker, 130 N. Y., 325; Gladwell v. Steggall, 5 Bing. (N. C.), 773).

"Whether the patient be a pauper or a millionaire, whether he be treated gratuitously or for reward, the physician owes him precisely the same measure of duty and the same degree of skill and

care'' (Becker v. Janinski, 27 Abb. N. C., 45). Neither is it material that the medical attendance is to be paid for by some third party (Du Bois v. Decker, 130 N. Y., 325). It was held in Higgins v. McCabe (126 Mass., 13; 30 Am. Rep., 642), where one who professed to be a midwife volunteered gratuitously to treat a child for an eye trouble and the child subsequently became blind, that such a person not being specially qualified could only be required to use that skill which persons similarly qualified would exercise under like conditions. The court said: ''To hold otherwise would be to charge responsibility in large damages upon all who make mistakes in the performance of kindly offices for the sick.'' It is palpable from this case that persons who make no pretentions to possessing the skill and learning of a regular practitioner, but put themselves in the position of such a one, will not be held to so strict a degree of accountability as one who holds himself out as a physician and deceives the patient (Musser v. Chase, 29 Ohio St., 577; see also Nelson v. Harrington, 72 Wis., 591).

From a moral standpoint the doctor must, of course, use the very highest degree of care and skill, but in contemplation of law it is only necessary for him to exercise that which is ordinary and reasonable (Leighton v. Sargent, 27 N. H., 460). It is apparent that some cases require greater attention than others; there is a great difference between the skill and care which is used in a case

of typhoid fever and one of simple coryza. By some courts the view is held that the measure of care and skill which the physician must exercise is dependent upon the nature of the complaint which gives occasion for his employment; that is to say, in serious cases a greater degree of diligence and skill must be used than in cases of minor importance. But the tendency of the courts is contra to this. It is to the effect that the degree of skill and care required is not to be measured by the condition of the patient (Utley v. Burns, 70 Ill., 162; Peck v. Martin, 17 Ind., 115; Reynolds v. Graves, 3 Wis., 371).

The degree of skill and diligence which the physician and surgeon is bound to exercise arises, as we have seen, from the undertaking by implication of law. It is implied in those cases where there is not an express contract. Obviously one who professes to be a specialist or possesses unusual endowments may hold himself out and contract with the patient as one possessed with extraordinary skill and learning in a particular branch of medicine or surgery, not common to the general practitioner of the profession. In such a case, of course, he is held to a higher professional standard. He must use that care and skill in diagnosing and treating a given case which is exercised by other specialists in his particular line with reference to the state of scientific knowledge at the time of his treatment (Pettigrew v. Lewis, 46 Kan., 78; Baker v. Hancock, 29 Ind. App., 456; Feeney v.

Spaulding, 89 Me., 111; 35 Atl., 1027; Williams v. Le Bar, 141 Pa. St., 149; McMurdock v. Kimberlin, 23 Mo. App., 523; Whitesell v. Hill, 101 Ia., 629).

This is the age of specialization, and, owing to the extended range of scientific investigation, it becomes impossible for the average practitioner to attain a use of this knowledge and the development resulting therefrom in the course of his practice. An oculist is one of the many examples of this. He is held to the same measure of skill and care as others practising his specialty (Stern v. Lanng, 106 La., 738). The issue in such cases being whether the physician professed to be a specialist and held himself out as such, it is a question of fact for the plaintiff to prove and the jury to decide (Baker v. Hancock, 29 Ind. App., 456; McMurdock v. Kimberlin, 23 Mo. App., 523).

In addition to his engagement to use due care and skill in diagnosing and treating a case the medical practitioner assumes an implied obligation to use his best judgment in matters of doubt as to the best course to take (Patten v. Wiggin, 51 Me., 594; Du Bois v. Decker, 130 N. Y., 325; Heath v. Glisan, 3 Ore., 64).

The case of Mallen v. Boynton (132 Mass., 443) was an action against a physician for improperly treating a broken arm. The court of last resort held that the jury was properly instructed that, "If the defendant at any time during his attendance upon the plaintiff, either at the time of the original injury or afterward, was uncertain

and in doubt as to the extent and nature of the injury he was attending upon, the defendant was required to use his best judgment as to the best course of treatment, and also whether he should consult some competent surgeon, if such could be found within a reasonable distance. If the defendant had not the required skill and experience to treat the arm or felt incompetent to care for the injury he should have temporarily dressed it, if necessary, and recommended the plaintiff to a more skilful surgeon."

The physician and surgeon, however, does not warrant the infallibility of his judgment where he can prove that he used reasonable care and possessed the skill of the average members of the profession in good standing in similar localities (West v. Martin, 31 Mo., 375; Jackson v. Burnham, 20 Colo., 532).

Naturally there can be such a mistake of judgment as on its face to be repugnant to the belief that the required skill and diligence were used (West v. Martin, 31 Mo., 375), and it is in those cases where the error is so great or gross as to imply a want of ordinary skill and care that the physician and surgeon is made responsible.

For example, a man without any special qualifications or learning in the science of medicine and surgery might attempt a serious and delicate operation with disastrous results. It might be only the result of a mistaken judgment, but, nevertheless, he would be liable, for he did not have the skill and

learning essential to qualify him to undertake such an operation. The physician is bound to employ the remedies and appliances which experience and reason dictate as being best in aiding the patient to a speedy recovery, and even though these be of the simplest kind he must exercise his best judgment together with reasonable care and skill in order to absolve himself from liability (McCandless v. McWha, 22 Pa. St., 261). An improper diagnosis would not render him liable if there was no error in the treatment following such diagnosis (Tomer v. Aiken, 126 Ia., 114).

There is no implication or presumption in the contract of the physician that he will cure his patient. He does not guarantee, warrant, or insure the success of his treatment (O'Hara v. Wells, 14 Neb., 403; Ewing v. Goode, 78 Fed. R., 442; Link v. Sheldon, 136 N. Y., 1; Grainger v. Still, 187 Mo., 197; Gillette v. Tucker, 67 Ohio St.,106), and, even though the patient derives no advantage or benefit from his therapeutic measures, there is no presumption that he did not exercise the proper amount of skill and learning. In other words, the fact that the physician's medical treatment or surgical operation was a failure does not justify drawing the conclusion that he was not careful and skilful (Tomer v. Aiken, 126 Ia., 114; Haire v. Reese, 7 Phila., 138).

Judge Thayer (Haire v. Reese, 7 Phila., 138): "No presumption of the absence of proper skill and attention arises from the mere fact that the patient

does not recover. . . . God forbid the law should apply any rule so rigorous and unjust as that to the relations and responsibilities arising out of this noble and humane profession."

Former President Taft while sitting on the bench in the case of Ewing v. Goode (78 Fed., 442) said: "A physician is not a warrantor of cures." If "a failure to cure was held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practise the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.' "

An important principle of law governing the conduct of the physician and surgeon is that he must follow in a given case the established custom or practice of the profession in treating that particular kind of case (Patten v. Wiggin, 51 Me., 594). The law deals mercilessly with those who for the purpose of experimentation deviate from the established mode of practice; that is to say, the physician is held to methods which have been universally accepted by the majority of the profession. As was said in the well-considered case of Jackson v. Burnham (20 Colo., 532), "There must be some criterion by which to test the proper mode of treatment in a given case, and when a particular mode of treatment is upheld by the consensus of opinion among the members of the profession, it should be followed by the ordinary prac-

titioner, and if a physician sees fit to experiment with some other mode, he should do so at his peril. In other words, he must be able, in case of deleterious results, to satisfy the jury that he had reason for the faith that was in him, and justify his experiment by some reasonable theory."

The physician and surgeon, then, acts at his peril in not following established practice, and, if he employs some other method than that which is generally followed, with an injurious result to his patient, such failure of his experiment will not be excused, regardless of the amount of skill he possessed (Patten v. Wiggin, 51 Me., 594; Jackson v. Burnham, 20 Colo., 532).

This rule on its face seems harsh and arbitrary, for its application and enforcement means that any advancement in the science of medicine and surgery must be at the risk of the individual members of the profession. To the profession this must be still more apparent when they look back over the various periods of medical and surgical history and see the marvellous progress which has been achieved by the experiments of the learned ones of the profession. But such is the law with certain modifications and it should be kept in mind by the physician and surgeon.

The reason for the rule and a good statement of the law relating to this question is in the opinion of the court in Carpenter v. Blake (60 Barb. (N. Y.), 488). It was said, "Some standard, by which

to determine the propriety of treatment, must be adopted; otherwise experiment will take the place of skill, and the reckless experimentalist the place of the educated, experienced practitioner.

"If the case is a new one, the patient must trust to the skill and experience of the surgeon he calls; so must he if the injury or the disease is attended with injury to other parts, or other diseases have developed themselves, for which there is no established mode of treatment. But when the case is one as to which a system of treatment has been followed for a long time, there should be no departure from it, unless the surgeon who does it is prepared to take the risk, by his success, of the propriety and safety of his experiment.

"The rule protects the community against reckless experiments while it admits the adoption of new remedies and modes of treatment only when their benefits have been demonstrated, or when from the necessity of the case, the surgeon or physician must be left to the exercise of his own skill and experience."

Ordinary and established practice means the recognized practice of the school which the physician follows. It is his right, should his conduct be questioned, to have his actions tested by the laws and customs of the particular school to which he adheres. Thus, where a physician was sued for not properly treating a case, his conduct would not be judged by allopathic standards if he followed the homeopathic school (Force v. Gregory,

63 Conn., 167), and the same rule would apply under reverse circumstances (Martin v. Courtney, 75 Minn., 255), but, where the treatment is the same the evidence of a physician of a different school has been held to be admissible (Grainger v. Still, 187 Mo., 197). The term school is used in this connection to denote a recognized system of treating diseases and injuries, and must have rules of practice (Nelson v. Harrington, 72 Wis., 591; Grainger v. Still, 187 Mo., 197).

So where a person practises as a clairvoyant and tries to alleviate diseases by methods usually employed by such healers, he cannot justify his conduct on the plea that he was following the school to which he belonged. For such persons are held to the same degree of care and skill and learning as a member in good standing of a recognized school (Nelson v. Harrington, 72 Wis., 591). The law does not distinguish between schools of medicine (White v. Carroll, 42 N. Y., 161), and in assuming charge of a case the physician undertakes to treat it according to the rules of the school which he follows (Force v. Gregory, 63 Conn., 167; Patten v. Wiggin, 51 Me., 594).

The principle of ordinary care likewise applies in giving proper instructions to the nurse or other person or persons in attendance on the patient. Failure to do so renders the physician liable if there are bad results due to his negligence (Beck v. German Klinik, 78 Ia., 696). It is incumbent upon the physician to exercise that degree of care

in instructing the attendants in cases where the patient needs attention in his absence, which he would if working himself upon the case (Pike v. Honsinger, 155 N. Y., 201), and it is also his duty to instruct the patient as well as the nurse (Carpenter v. Blake, 60 Barb. (N. Y.), 488). But there is no duty imposed upon the physician himself to nurse his patient (Graham v. Gautier, 21 Tex., 111).

There is a correlative duty on the part of the patient to do as he is told; that is, he must cooperate with the physician and follow his instructions and prescriptions (Haire v. Reese, 7 Phila., 138). If he refuses to do this and the physician cannot therefore discover the nature of the patient's illness, or he is thwarted in an attempt to apply the proper means of remedying the complaint, then the physician cannot be held responsible for damaging results (McCandless v. McWha, 22 Pa. St., 261; Haire v. Reese, supra).

The patient has a right to rely on the instructions and directions which the physician gives him (Lawson v. Conaway, 37 W. Va., 159; 18 L. R. A., 627). As was said in the case of McCandless v. McWha (22 Pa. St., 261), "A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction. But if it be painful, injurious and unskilful, he is not bound to peril his health, and perhaps his life, by submission to it. It follows that before the surgeon can

shift the responsibility from himself to the patient, on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper and adequate to the end in view."

Physicians who are attending clients with contagious diseases and visiting others who are not so infected must keep in mind that it is their duty to use due care in not carrying it from one patient to another; and that it is essential that they should take all measures to prevent this which reason and experience dictate as being best. If they take such precautionary measures as are necessary to prevent communication of the disease to one not implicated, they will not be liable for untoward results (Piper v. Menifer, 51 Ky., 565).

Extreme care should be taken by the physician in making his calls not to visit a patient should he have been obliged to attend one afflicted with a contagious disease, without having first properly sterilized himself.

An excellent example of the serious consequences that are likely to follow a lack of care under such circumstances has been called to the attention of the writer. During an epidemic of smallpox in London a few years ago, a doctor who had vaccinated the whole staff of a large draper's establishment there, complained to the physician from whom he had secured the vaccine that a number of young women whom he had vaccinated had shown symptoms of erysipelas a few days after the

vaccination. They threatened to sue him for damages.

Being responsible for the trouble the doctor put the blame on the vaccine. The other physician knowing the vaccine was absolutely pure as it came from a government institute on the continent and as he had sold a great many thousands of tubes and had no similar complaints for the same lot, suspected that there was something wrong with this doctor. He inquired of the doctor if during the time he made the vaccinations he had been attending any obstetrical cases. The doctor admitted he had, and also admitted that among these cases he had had one case of puerperal fever. The other immediately charged him with not having complied with the Parliamentary Act of having reported erysipelas to the medical officer of health for his district and charged him further with having been careless in going from a puerperal fever case to perform the operation of vaccination without having sterilized himself.

When the doctor reached his office he found a notification from the government demanding an explanation as to why he had not reported a certain case of erysipelas which had broken out in a certain draper's establishment. The penalties in England for not lodging information of any contagious diseases are very heavy, and this young doctor disappeared from London and his whereabouts were not known for a long time. He had quit his

practice and settled down somewhere else. He feared the consequences of his negligence.

There is a further duty on the physician of advising his patient against an operation which he believes in the light of his best judgment to be injudicious. "It seems to us to be the duty of a surgeon," said the court in Gramm v. Boener (56 Ind., 497), "when called upon to perform some surgical operation, to advise against it, if, in his opinion, it is unnecessary, unreasonable, or will result injuriously to the patient. The patient is entitled to the benefit of his judgment, whether asked for or not. If the surgeon, when called upon, should proceed to the performance of the operation, without expressing any opinion as to its necessity or propriety, the patient would have a right to presume, that, in the opinion of the surgeon, the operation was proper." In this case the patient was a man along in years and possessed of a normal mind. He insisted contrary to the advice of his physician that a certain operation be performed. It was done. The court held that he relied on his own judgment and not that of his physician, from whom he could not therefore recover damages for deleterious results.

There seems to be a very prevalent idea that if a physician is summoned to attend a case, he is obliged to go, but no such rule of law obtains, and the matter is entirely within his own discretion. However, once he has taken charge of a case, the doctrine of ordinary care applies in the matter of

attendance. If the condition of the patient is such that in the exercise of an honest judgment he believes it necessary or if it would be reasonably expected of him to continue his attendance, then the law imposes that obligation upon him. Of course, there is nothing to prevent a physician and his client making what contract they like regarding the attendance. It can be for a long or short period—even one visit; and in the absence of any special agreement the physician can, after giving reasonable notice, stop attending the patient, and by so doing he does not render himself answerable to his employer. The physician, of course, could not abandon a case in a crisis (Barbour v. Martin, 62 Wis., 536). On the other hand, if he is discharged by one in authority he would not be liable for the consequences of discontinuing his attentions. Generally, however, he must use reasonable care in deciding whether his visits are any longer necessary (Dashiell v. Griffith, 84 Md., 363; Ballou v. Prescott, 64 Me., 305).

In fine the duties and legal obligations of the physician and surgeon can be summed up in the saying of Sir Anthony Fitzherbert: "It is the duty of every artificer to exercise his art rightly, and truly, as he ought." (Further authorities: American Digest (Century Edition), title, "Physicians and Surgeons," §§ 16-30; Vol. 22, American and English Encyclopædia of Law, pp. 798-809; Vol. 30, Cyclopedia of Law and Procedure, pp. 1570-1574.)

CHAPTER III

CIVIL RESPONSIBILITY OF THE PROFESSION

It has been shown that the correlative duties of physicians and surgeons and their patients arise from the contractual relations of the parties, either by express agreements, or, as is more often the case, by implication of law from their conduct or acts. Certain duties are imposed upon the profession. Failure to discharge these obligations in the proper manner renders the professional man liable to his patient if injury results. The basic principle of the doctrine is that one who engages to undertake the performance of any duty, trust, or employment agrees to do it with honesty, skill, and assiduity. The injured person has his option of suing in tort or contract (Goble v. Dillon, 86 Ind., 327).

The principles of law which bear upon questions growing out of an alleged dereliction of duty on the part of the physician and surgeon come under the division known as the law of negligence. Negligence may be by errors of omission or commission. If one fails to do something which a reasonable man under like circumstances with regard to those things which ordinarily regulate the af-

fairs of man, would do; or if he does some act which a reasonable and prudent man would not, then he is in the legal sense negligent, provided there is some duty or obligation left uncompleted. It would seem from an examination of malpractice cases that errors of omission are treated with greater leniency by the courts than errors of commission.

Now there are various degrees of negligence known to the law. The degrees of care exacted under different conditions may be divided into three groups. First, there is the highest degree which it is possible for human beings to attain, where the slightest error renders the negligent party liable in an action for damages.

For example, a common carrier of passengers is held to this highest degree of care, though as has been observed the physician and surgeon is not required to exercise this extraordinary degree of diligence. But he must employ the next degree, known as ordinary or reasonable care. (See the instructions to the jury in the case of Kendall v. Brown, 86 Ill., 387.)

Lastly, we have what is termed gross negligence, which may be so wilful or wanton as to show an intent to harm some person, yet one may be grossly negligent without the element of malice entering his conduct.

In England formerly the physician was considered liable only so far as one who performs a service gratuitously was held amenable to the law, which was for failure to use the lowest degree of

care in the scale called gross negligence. A physician at common law before the passage of the Medical Act (21 and 22 Victoria) could not sue to recover compensation for his services (Chorley v. Bolcot, 4 T. R., 317); though a surgeon was not subject to any such disability and could maintain an action for his fees. (See chapter on Remuneration.) Accordingly, surgeons as well as apothecaries were held to the ordinary degree of care. (Shearman and Redfield on Negligence, 500.) The reason for not then holding the physician to the same degree of care as a surgeon was because his services were regarded as being rendered for an honorarium.

The Roman law, however, did not recognize any difference between physicians and surgeons, holding that they must use ordinary care regardless of whether they were to be compensated or not. Such is the United States rule. The law in this country does not distinguish between physicians and surgeons. They are alike subject to the same duties and legal obligations. Compensation is an immaterial consideration. (See chapter on Remuneration.)

There is an old and important principle of law that figures prominently as a defence in many cases where negligence is the gist of the action. It is called the doctrine of contributory negligence. Where a person is injured by reason of another's negligence, it must appear as a condition precedent to his getting judgment against the other that his

own conduct was blameless and did not contribute materially to the cause of the injuries. For, if his negligence united with that of the defendant, he is barred from recovering damages.

This rule with its limitations applies in those cases where it is sought to hold a physician and surgeon responsible for negligence or malpractice, and it may be taken as generally true that where the patient does not co-operate with his physician, thereby injuring himself by his own wilful or negligent conduct, he cannot hold the practitioner responsible for the results to which he contributed (Hibbard v. Thompson, 109 Mass., 286; Gramm v. Boener, 56 Ind., 497; Haire v. Reese, 7 Phila., 138; McCandless v. McWha, 22 Pa. St., 261). Accordingly it has been held that where a physician told a patient to visit him again and the patient failed to put in an appearance as directed, he could not hold the physician liable, because he was himself negligent (Jones v. Angell, 95 Ind., 376).

By far the greater number of cases in which this question of contributory negligence plays a part has been where the patient has not faithfully discharged his duty of complying with the reasonable instructions and directions of his physician as the law says he should (Haire v. Reese, 7 Phila., 138; McCandless v. McWha, 22 Pa. St., 261). The case given above is a good illustration. There is a harmonious line of decisions holding that if the patient either wilfully or negligently disobeys the instructions given him he is barred from recovery

(Geiselman v. Scott, 25 Ohio St., 86; Haire v. Reese, 7 Phila., 138; Whitesell v. Hill, 101 Ia., 629), and it makes no difference whether or not he was prevented from following the physician's directions because of his condition (Geiselman v. Scott, 25 Ohio St., 86). In such cases the instructions and directions which the physician gives may be taken into consideration in determining the question of the patient's negligence (Geiselman v. Scott, 25 Ohio St., 86).

There is also a presumption in favor of the members of the profession, in the absence of contrary proof, that they were skilful and used due care (Jacksonville Street R. Co. v. Chappell, 21 Fla., 175; Leighton v. Sargent, 31 N. H., 119; Baird v. Morford, 29 Ia., 531; Haire v. Reese, 7 Phila., 138). In other words the burden of showing a want of the necessary skill, care and knowledge in the prescriptions, directions, and method of treatment must be proved at the trial by the patient in order to secure judgment against the physician. On the other hand the burden of proving contributory negligence is on the defendant (Gramm v. Boener, 56 Ind., 497).

There is, however, a class of cases in which the negligence of the patient follows that of the physician and the injury done through the latter's unskilful or careless conduct is simply aggravated and made more serious. In a New York case (Carpenter v. Blake, 75 N. Y., 12), which was an action for malpractice, the defendant requested the

court to instruct the jury in substance, that if the plaintiff was negligent in any way, with or without guilt on the part of the defendant who attended her, and such negligence in a material degree contributed to the poor result, the defendant could not be held responsible. This charge was held to be erroneous because if there had been negligence on the part of the plaintiff subsequent to that of the defendant, the plaintiff's right of action had already accrued and would not therefore be discharged. The court added that in any view the negligence of the patient following that of the physician would go merely to mitigate the damages.

So also in a case where the plaintiff's foot was crushed and the limb was amputated at the knee but failed to heal properly so that several inches of the bone protruded, it was held, the fact that the defendant refused to keep his leg elevated as directed, thereby causing hemorrhages, and negligently omitted to take medicine prescribed for him, did not defeat his right of action and his negligence would only go toward cutting down the amount of damages (Du Bois v. Decker, 130 N. Y., 325; see, also, Wilmot v. Howard, 39 Vt., 447).

The negligence of the plaintiff then must be the proximate cause of the injury and inseparable from and contemporaneous with the negligence of the defendant in order to be used as a successful defence in an action for malpractice (Newhouse v. Miller, 35 Ind., 463; Lawson v. Conaway, 37 W. Va., 159), because if the negligence is unmixed and

can be distinguished, and the plaintiff can show that there was injury resulting solely from his lack of care, skill, and diligence, then he can recover.

The court said in Hibbard v. Thompson (109 Mass., 286), commenting on the importance of this limitation to the ordinary rule, " . . . a physician may be called to prescribe for cases which originated in the carelessness of the patient; and though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability for his distinct negligence, and the separate injury occasioned thereby. The patient may also, while he is under treatment, injure himself by his own carelessness, yet he may recover from the physician if he carelessly or unskilfully treats him afterward and thus does him a distinct injury. In such cases, the plaintiff's fault does not directly contribute to produce the injury sued for."

Another principle of law very much like this doctrine of contributory negligence is that of the assumption of the risk. The law says that where a person knows the dangers incidental to certain undertakings, he is by law deemed to have assumed the risk and consequently cannot complain if injury results. From this it would seem that a physician and surgeon can forestall malpractice suits against himself by warning the patient of unpleasant possibilities and expressly stipulating with him that in such contingency he shall not be answerable (Nelson v. Harrington, 72 Wis., 591).

As most of the litigation in which the members of the profession have been involved have been in cases of dislocations, fractures, and amputations (McClelland on Civil Malpractice, 55), it is always best to tell the patient that a perfect result is by no means certain.

If the physician states that he is not possessed of much knowledge of certain illnesses or injuries, and the patient then sees fit to hire him, he cannot afterward hold him to account for a lack of knowledge and skill which he knew the physician did not possess (Shearman and Redfield on Negligence, 607).

It must not, however, be supposed that this assumption of the risk will excuse the practitioner from liability when he does not use skill and care. This question was squarely raised in a very recent case before the Missouri Court of Appeals (Hales v. Raines, 162 Mo. App., 46). The defendant, it appeared, undertook to treat the plaintiff's hand by the use of the X-ray, resulting in a burn which seriously injured the member. It was contended that the plaintiff had been warned by the defendant that the use of this appliance involved some danger and by consenting to such treatment he assumed the risk and could not recover damages for the negligence of the physician. The court in upsetting this contention said: "Touching the matter of assumed risk with which alone we are concerned here, it appears quite clear that if, in the circumstances stated, the parties contract with

respect to the assumption of the risk from such danger as is involved in the use of the X-ray, a new appliance not well understood, the risk assumed is one other and distinct from that which is introduced into the case by the defendant's negligence. In other words, though the plaintiff should be regarded as having assumed by express agreement such risks as attend the employment of the X-ray, this agreement essentially implied a careful and skilful application thereof on the part of the defendant. We deem it contrary to the precepts of public policy to declare such agreement valid in the full measure of its scope and entail upon the plaintiff, as within it, the consequences of the defendant's negligence in exposing his hand nine separate times within one-half inch of the tube; for consent concerning such matters avails nothing unless due care and skill is employed by the physician." (See, also, Commonwealth v. Pierce, 138 Mass., 165; State v. Gile, 8 Wash., 12.)

This case must not be confused with that of Gramm v. Boener, given heretofore, where a physician advised his patient against an injudicious operation, and the plaintiff, relying on his own judgment, insisted upon having it performed. The operation, though unsuccessful, was performed by the physician with due care and skill, and in the suit which followed the plaintiff was not allowed to recover damages.

The question now arises, if the physician and surgeon cannot be successfully sued for negligence

or malpractice when the negligence of the patient blended with his own carelessness or recklessness, can he be held responsible for the negligent conduct of a third person having some connection with the case? The answer to this depends on the relationship of the parties. If there was no business relationship as that of agency or partnership between the physician and the negligent third person, then he cannot be held answerable for that person's conduct (Myers v. Holborn, 58 N. J. L., 193; Hitchcock v. Burgett, 38 Mich., 501; Keller v. Lewis, 65 Ark., 578). Thus where a surgeon informed his patient that he was going away for two weeks and said that a certain surgeon would treat the case while he was absent and the latter was negligent in his treatment of the patient, the court said that the former surgeon would not be responsible for the injury done the patient in his absence if no business relationship existed between the two surgeons (Keller v. Lewis, 65 Ark., 578).

The converse of this proposition of law is also true: if the relationship of agency or partnership can be shown to exist they are both liable to the patient if the negligent third party acted within the scope of his authority (Hancke v. Hooper, 7 C. and P., 81; Hess v. Lowrey, 122 Ind., 225; Langdon v. Humphrey, 9 Conn., 209; Hyrne v. Erwin, 23 S. C., 226). The negligence of the agent or partner is imputed to the other.

The liability growing out of these relationships is not peculiar to physicians and surgeons alone,

but is applicable to all persons between whom such relationships are manifest. It is a cardinal rule of the law of agency that the principal is liable for the torts of his agent committed in the course of his employment. The connection between the law of agency and the law of partnership is very close, as a partner can bind his co-partner by acts which are within the limits of the objects and purposes of the partnership. It follows that there is mutual liability among partners for their torts committed in the scope of their vocation or business, but if a partner or agent goes on a "frolic of his own" the others are not responsible for the results. There would be no liability on the part of a physician for the negligence of nurses in a hospital over whom he had no authority (Sanderson v. Holland, 39 Mo. App., 233; Baker v. Wentworth, 155 Mass., 338).

Negligence of a third person contemporaneous with that of the defendant is no defence (Cooley on Torts, 684); that is to say, contributory negligence on the part of another, not the patient, concurring with that of the physician or surgeon having charge of the case cannot defeat a recovery of damages by the patient against the physician (Sanderson v. Holland, 39 Mo. App., 233). For illustration: where a physician wrote a prescription which by lapsus calami had *pulv.* instead of *camph.* following *opii,* and the patient took it and died, it was held in a suit against the physician for malpractice that the fact that the druggist who filled

the prescription may have been negligent in not noticing the mistake, was no defence to the physician who wrote it (Murdock v. Walker, 43 Ill. App., 590).

There is a principle of law long established that a person is chargeable with the natural and probable consequences of his acts. The physician and surgeon is no exception to this rule. The members of the profession in their treatment of patients and their application of drugs and the remedial appliances are bound to know the results of their actions and are answerable for negligence if the condition of the patient is such that, by exercising the professional skill they are presumed to have, they would know such results would in all probability follow (Du Bois v. Decker, 130 N. Y., 325).

But where they have no knowledge of the idiosyncrasies of the patient, they cannot be held for injurious results when they exercise ordinary care and skill. So where an anesthetic is administered the physician cannot be made accountable for results due to the peculiar temperament of the patient of which he was not aware (Bogle v. Winslow, 5 Phila., 136). If the courts laid down a more strict rule in this respect, the nerve of the physician might be shaken or his judgment impaired by the fear of accountability just at a time when his mental activity must be free and undisturbed, that the patient may be benefited.

In the chapter on the Contract of the Profession it was said that there is a duty on the part of the

physician to take care not to carry a contagious disease from one patient to another. From a very recent decision of the supreme court of Washington (Helland v. Bridenstine, 55 Wash., 470; 104 Pac. R., 626), it appears that there may be liability for communicating diseases through the agency of unclean instruments. In the case in question the plaintiff sought the advice of the defendant because of a nervous trouble with which she had been afflicted for several years. The defendant's treatment not affording the desired relief, he told her it was his opinion that she had some disorder of the genital organs and he would examine her in his office. This he did, using a speculum and probe which he took from a drawer close by. The instruments were wrapped in a towel, the defendant using them as he took them out. Within the time after this usual for gonorrhea to generate, the plaintiff had pains and inflammation of the parts accompanied by a discharge. The defendant treated her for some time until finally another physician was called in, who diagnosed the disease as gonorrhea. Plaintiff also testified she had not had intercourse with her husband for several weeks prior to the examination, and the only way she could have contracted the disease was from the instruments of the defendant. The defendant testified that the instruments were always washed in a mercuric iodin solution and soap and hot water besides being sterilized by boiling in hot water before they were used. There was a verdict for the

plaintiff. The court held there was sufficient evidence to submit the case to the jury.

An action will lie against a physician if he fails to use ordinary care and skill in diagnosing a case which has been committed to him for treatment or merely for the purpose of making an examination for information, as where a man who was engaged to be married was examined at the request of the father of his fiancée, and the physician making the examination said he was afflicted with a venereal disease, which erroneous diagnosis resulted in the breaking off of the engagement, the court held that damages could be recovered from the physician (Harriott v. Plimpton, 166 Mass., 585). It made no difference in the above case that the physician was hired by a third person.

While the duty of being faithful, skilful, and careful in dealing with the patient rests substantially on the ground of contract, it would seem from this case and those cited elsewhere that the duties of the physician and the liability attendant on a failure to discharge those duties properly may arise from the mere undertaking or relationship of doctor and patient.

It is a question of fact for the jury to determine as to whether or not due care and skill were used by the physician in making the diagnosis (Harriott v. Plimpton, supra). An erroneous diagnosis does not necessarily give a right of action to the injured party, but must have been the result of negligence or a want of skill on the part of the

physician, though a wrong diagnosis followed by improper treatment is good ground for an action for malpractice (Smith v. Overby, 30 Ga., 241).

A breach of the relationship between a physician and his patient by the deceit of the former may render him liable to his patient. An interesting case of this description arose a few years ago in Michigan (De May v. Roberts, 46 Mich., 160). At the trial it appeared that the patient lived some distance from the physician. It was a confinement case; the doctor was summoned; the night was disagreeable and travelling over the road on foot was the only way in which the physician could reach the patient's house. Illness and overwork prompted the doctor to take with him an unprofessional man to assist him in carrying necessary articles. To the husband of the patient the doctor explained that he had brought a friend along to aid in carrying his things.

The friend was not known to either the husband or the patient, but they supposed he was a doctor or a student and made no objection to his being present in the house, which had only one room. His conduct and manner was not objectionable. The Supreme Court affirmed the judgment of the lower court against the physician and his non-professional assistant, saying amongst other things: "It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most

sacred one, and no one had a right to intrude unless invited, or because of some real and pressing necessity, which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it and to abstain from its violation. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterward sustained from shame and mortification upon discovering the true character of the defendants."

The performance of a surgical operation on a patient whose consent has not been obtained will render the operator liable in damages to that person, as will be seen by the cases hereinafter given. The court of last resort in Illinois (Pratt v. Davis, 118 Ill. App., 161) said in a very late case: "Under a free government, at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person; in other words, the right to himself—is the subject of universal acquiescence, and this right necessarily forbids a surgeon or physician, however skilful or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under anesthetics

for that purpose, and operating upon him without his consent or knowledge."

A text writer has this to say (1 Kinkhead on Torts, 375): "The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon has the right to operate."

Naturally consent in most cases is inferred from the circumstances unless the patient was deceived (Pratt v. Davis, 224 Ill., 300; 7 L. R. A. (N. S.), 609). It has been held where the husband of a patient who had a dangerous disease, had the patient taken some little distance from their home and put under the care of a physician, and a few weeks afterward the physician operated on her despite the fact that the husband's consent had not been given to that particular operation, that the physician was justified and did not exceed his authority in performing the operation if in the exercise of his discretion he believed it necessary (McCallen v. Adams, 19 Pick. (Mass.), 333).

In another case (Pratt v. Davis, 224 Ill., 300; 7 L. R. A. (N. S.), 609), the patient was suffering from a contracted and lacerated uterus, and the lower portion of the rectum was diseased. To alleviate these difficulties a minor operation was performed with the consent of the patient's husband.

This operation was unsuccessful. The husband was requested to bring his wife to the physician again for treatment, which he did. She was operated on and her uterus and ovaries removed. The court held that the husband's consent was not shown by these circumstances.

Again where a woman was operated on for cancer of the breast and the husband believed it to be a tumor and consented to the operation, but expressly stated that if the growth was a cancer of the breast he did not want it removed, it was held that as it appeared the wife was aware she had cancer of the breast, the physician could not be held liable. Said the court: "If she consented to the operation, the doctors were justified in performing it, if, after consultation, they deemed it necessary for the preservation and prolongation of the patient's life. Surely the law does not authorize the husband to say to his wife, 'You shall die of cancer; you cannot be cured, and a surgical operation, affording only temporary relief, will result in useless expense.' The husband has no power to withhold from his wife the medical assistance which her case might require" (State use of Janney v. Housekeeper, 70 Md., 162).

Cases, of course, will arise demanding quick action on the part of the physician to preserve the life or health of the patient, when there will be no opportunity to secure consent to perform an operation from those who are naturally consulted in such matters. Perhaps a person meets with an ac-

cidental injury and is taken to a private physician close by. The injured person may be intoxicated, or unconscious from the injury. He may be a minor; there may be no means of identifying him. An operation is imperative. The doctor is justified in performing the operation if in the light of his best judgment it is necessary. If he uses the requisite skill and care in so doing, he will not be responsible for the results.

As the physician or surgeon may be subsequently criticised or even sued for malpractice, it is best for him to do everything to protect himself. Thus in the case of a private physician it would be a good precautionary measure for him to call in another member of the profession in consultation. Any case must be proved from the attending circumstances, and other evidence besides that of the defendant himself in his behalf is invaluable. Again, during an operation already authorized, new conditions may be discovered or may develop in the most unexpected manner, and in such emergency cases the physician will be justified in performing an operation without any consent, if the operation is necessary and expedient (Pratt v. Davis, supra; Mohr v. Williams, 95 Minn., 261; 1 L. R. A. (N. S.), 439). It has, however, been decided that the fact of a doctor's refusing assistance which was offered by other members of the profession did not mean that he failed to use the skill and care required (Potter v. Warner, 91 Pa. St., 362).

In all these cases of alleged unauthorized surgical operations the burden of proving that the operation was not justified by consent of the proper person rests upon the plaintiff. There is also a prima facie presumption that it was performed with care and skill in the belief that it was proper (State use of Janney v. Housekeeper, 70 Md., 162).

The criterion of careful conduct in a given case, as was stated at the outset of this chapter, is that of the usually prudent man acting under like circumstances. It is not the opinion of the individual and therefore it is ordinarily no defence to an action for negligence that the man acted according to his best judgment. There is, however, a well-recognized variation from this general principle or rule of law. It appears in cases involving questions purely of theory or opinion or judgment. Judge Jaggard, in Staloch v. Holm (100 Minn., 276; 9 L. R. A. (N. S.), 712; 111 N. W., 264), after stating that malpractice cases may come within this exception to the general rule, said: "A physician entitled to practise his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, as in determining upon an operation, where there is a reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done, in accordance with recognized authority and good current practice."

It is important to remember that this exception is not applicable to all acts which a physician and surgeon may do in his professional capacity. The point of difference lies here. Let us again quote from Judge Jaggard's learned opinion. "There is often a fundamental difference in malpractice cases between mere errors of judgment and negligence in previously collecting data essential to a proper conclusion or in consequent conduct in the subsequent selection and use of instrumentalities with which the medical man may execute his judgment. In some matters, medicine is a science; in others, an art. Generally the exception governs cases in which it is a science; the rule, cases in which it is an art. If, for example, a physician certifies that a man is insane without having made an examination, his negligence is of fact and not all of science. But a medical man is not bound to form a right judgment (as to sanity) so as to be liable to an action if he does not (Crompton, J., in Hall v. Semple, 3 Fost. and F., 337; Williams v. Le Bar, 141 Pa., 149; 21 Atl., 525).

"When the physician is actually operating, he is employing surgery as an art; and if, for example, he uses an old rusty saw (Young v. Fullerton, reported in McClelland on Civil Malpractice, p. 253), or if he operate on the wrong arm (Sullivan v. McGraw, 118 Mich., 39; 76 N. W., 149), or sew up a sponge in an abdomen he has opened (Gillette v. Tucker, 67 Ohio St., 106; 93 Am. St. Rep., 639; 65 N. E., 865), his wrong concerns phys-

ical facts, and has fairly been held to be governed by ordinary principles of negligence. Where, however, due diligence and skill have been employed in ascertaining the essential preliminary information for an opinion whether a surgical operation should be performed or not, the formation of the judgment in accordance with appropriate scientific knowledge, in a case of reasonable doubt, is within the exception. One reasonable justification for this exception in many cases is the elementary principle that, when a man acts according to his best judgment in an emergency, but fails to act judiciously, he is not chargeable with negligence. The act or omission, if faulty, may be called a mistake, but not carelessness. (See Brown v. French, 104 Pa., 604.) Physicians, in the nature of things, are sought for and must act in emergencies and, if a surgeon waits too long before undertaking a necessary amputation, he must be held to have known the probable consequences of such delay, and may be held liable for the resulting damage (Du Bois v. Decker, 130 N. Y., 325; 14 L. R. A., 429; 27 Am. St. Rep., 529; 29 N. E., 313; Martin v. Courtney, 75 Minn., 255; 77 N. W., 813).

"Physicians and surgeons," still following Judge Jaggard's words, "deal with progressive, inductive science. On two historic occasions the greatest surgeons in our country met in conference to decide whether or not they should operate on the person of a President of the United States. Their conclusion was the final human judgment.

They were not responsible in law, either human or divine, for the ultimate decree of nature. The same tragedy is enacted in a less conspicuous way every day in every part of the country. The same principles of justice apply. Shall it be held that in such cases, where there is a fundamental difference among physicians as to what conclusion their science applied to knowable facts would lead to, then what they with their knowledge, training, and experience are unable to decide, and what, in the nature of human limitations is not susceptible of certain determination, shall be autocratically adjudged by twelve men in a box, or by one man on the bench, or by a larger number in an appellate court, none of whom are likely to have the fitness or capacity to deal with more than the elements of the controversy?''

The law relating to the disposal of dead bodies and the mutilation thereof is a subject with which every practitioner should be familiar. Certain relatives of the deceased have rights and privileges in this connection which cannot be interfered with, and any unjustifiable mutilation of the corpse will render that person legally responsible to the relatives. Accordingly, where a child died in a hospital and an unsanctioned autopsy was performed, it was held that the father could maintain an action against the doctor who mutilated the dead body (Burney v. Children's Hospital, 169 Mass., 57; see, also, Darcy v. Presbyterian Hospital, 95

N. E., 698); and where a husband did not consent to the performance of an autopsy upon the body of his wife he recovered damages for injury to his feelings (Foley v. Phelps, 37 N. Y. Supp., 471).

A curious legal point has been brought out by this class of cases; for a dead body is not regarded by the law as personal property, and it was therefore at one time held that, this being the fact, no cause of action would lie for the negligent or intentional mutilation of the corpse (Griffith v. Charlotte, etc., R. R. Co., 23 S. C., 25). This was true under the ecclesiastical law, as a body was deemed to belong to the church, and the rule that there can be no property in a dead body holds good in England (2 Bl. Comm., 429; Williams v. Williams, 20 Ch. Div., 659), as well as in the United States (Hackett v. Same, 18 R. I., 155), though in both countries a corpse is regarded as quasi-property and the courts have recognized the right of possession by the relatives of the body together with the right to sue for wrongful acts against the body (Queen v. Fox, 2 Q. B., 24).

Said Mr. Justice Potter, delivering the opinion of the court in Pierce v. Swan Point Cemetery (10 R. I., 227): "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted, yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by

some one toward the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may therefore be considered as a sort of quasi-property, and it would be discreditable to any system of law not to provide a remedy in such a case."

The court of New York (Foley v. Phelps, 1 App. Div., 551) expresses itself in this manner: "The right is to the possession of the corpse in the same condition it was when death supervened. It is the right to what remains when breath leaves the body."

It is not an uncommon thing for individuals to will or sell their bodies in the interests of science. While the courts do not look with favor upon persons doing this, they see the necessity for students and members of the profession having bodies to dissect, and provision has been made therefor in many States by the passage of so-called anatomy acts. Most of these enactments are of comparatively recent origin, it not being very long ago that bodies for dissection had to be procured in a surreptitious manner. The method of Stevenson's body-snatcher was often resorted to.

In England a person has no right to dispose of his body, though in this country he has some authority as to its disposition.

Of course, where the dissection is done by sanction of law or with the consent of the relatives who have a right to the body, the mutilation is justifiable and the physician not responsible. Where death is

sudden or under suspicious circumstances and the cause not ascertainable with any degree of certainty without an autopsy, a post-mortem examination for reasons of public policy becomes lawful, regardless of whether or not the relatives assent, and the physician under such circumstances would not be liable for making his investigation in a scientific manner.

The relatives from whom permission must be obtained to perform an autopsy and the order in which they may take the dead body depends upon the nearness of the relationship. The law recognizes the right of the surviving husband or wife as paramount, then the children, next the parents of the deceased, and so on to the next of kin following the rules governing the descent of personalty. The nearer the relationship, the stronger the right (Larson v. Chase, 47 Minn., 307).

It has been stated in various places in this and preceding chapters that certain questions arising in cases of negligence and malpractice are matters of fact for the jury to decide, but such questions may be said to be mixed questions of law and fact. For it is incumbent on the court in every case to state the law of the subject-matter in controversy. The jury must be guided by these instructions in reaching a conclusion.

Thus in a case in which the issue is whether or not ordinary care, skill, and diligence was exercised by the physician, the court must tell the jury

what constitutes these elements as the authorities define them (Tefft v. Wilcox, 6 Kan., 46). If the court does not pronounce the law correctly, the aggrieved party may usually secure a new trial. In the words of Judge Manly, of the supreme bench of North Carolina (Woodward v. Hancock, 52 N. C., 384), "What amounts to reasonable skill and care belongs to a class of questions which are said to be compounded of law and fact. In this class stand reasonable time, due diligence, legal provocation, probable cause, and the like. A division of the question in such cases between the court and jury is now considered settled; and, therefore, where there is a state of facts concerned or proved, it becomes the duty of the court to draw the conclusion as matter of law."

The law gives the benefit of doubt in cases of negligence and malpractice to the defending physician, and many legal presumptions which have been spoken of are raised in his favor. The law will presume, until contrary proof has been adduced by the patient, that care and skill were used by the physician in his treatment, and the burden of proof is upon the plaintiff to show that the physician was negligent or unskilful. This does not hold true in cases where the acts or omissions to act are of such a nature that negligence can be presumed from proof of the results.

Thus in a case where a physician did not discover a very severe rupture of the perineum after repeated examinations with the express purpose of

such a discovery, his negligence was held to be actionable (Lewis v. Dwinell, 84 Me., 497). Generally, however, there is no presumption of a want of knowledge, skill, and care, where the treatment is unsuccessful and results unsatisfactory (Doyle v. Owen, 150 Ill. App., 415; Pettigrew v. Lewis, 46 Kan., 78; Bonnet v. Foote, 47 Colo., 282), unless the injury is so manifest as to leave no doubt of the negligence of the physician. Under such circumstances affirmative evidence by the plaintiff is dispensed with. In a case in which a surgical operation was performed upon the patient's eye for strabismus, prior to which the patient's eyesight had been good, but afterward was not so strong, the court decided there could be no presumption of malpractice from the condition of the patient's eyes subsequent to the operation (Pettigrew v. Lewis, 46 Kan., 78).

Where a physician is accused of negligence alone, evidence to show his skill and competency is not admissible in evidence for the reason that such a question is not before the court for determination (Baker v. Hancock, 29 Ind. App., 456).

With regard to the weight of the evidence in tort cases, within which class, as we have seen, come civil suits for negligence and malpractice, the rule is different from that in criminal matters. In the latter it is necessary, in order to secure the conviction of the defendant, to show beyond a reasonable doubt or to a moral certainty the truth of the crime

charged. This high standard does not apply in civil cases. It is only necessary in such matters for the plaintiff to demonstrate by a preponderance or superior weight of evidence that his contentions are true.

Like the double-jeopardy plea in criminal cases, there is an analogous rule in civil matters that a person can only recover damages once for one and the same cause of action; and this applies to malpractice cases where a judgment is conclusive for all injuries direct or indirect growing out of the unscientific or negligent conduct of the physician for which suit was brought and judgment secured. The question of how far an action for compensation decided in favor of the physician will act as a bar to a suit for malpractice based upon the neglect or carelessness alleged to have occurred at the time of the services for which the physician sues for his fee, is taken up in the chapter on Remuneration.

The decisions in malpractice cases are by no means uniform, and from those that have been here given one is led to the conclusion that the way of the physician is not without its pitfalls and obstructions. He "is liable to have his acts misjudged, his motives suspected, and the truth colored or distorted, even where there are no dishonest intentions on the part of his accusers" (Upton, Judge, in Williams v. Poppleton, 3 Ore., 139). The testimony adduced in malpractice cases

must necessarily be that of the family, the friends of the patient, or the patient himself, and therefore such testimony is generally colored and biased by reason of an interest and partisanship not unnatural. The physician may himself be the only witness for his own defence.

The hypothetical questions to the experts for the plaintiff must necessarily be founded on the unreliable and unsatisfactory evidence of the plaintiff's prejudiced witnesses. The court of Minnesota, after noting these things, said: "He is confronted by other uncertainties in testimony greater than those of the human constitution, however fearfully and wonderfully we may be made or act, and greater than those of physical science, however elusive it may be. He is faced by the eccentricities of medical experts. We have no inclination to share in the prevalent and intemperate denunciation of their unreliability and veniality. But if every verdict mulcting a reputable physician in damages must be sustained if any of his professional brethren can be induced to swear that, assuming the testimony of the family and friends of the patient to be true, the physician has made a mistake of judgment, or has been guilty of unscientific practice, then the profession would be one which 'unmerciful disaster follows fast and follows faster.'" (Staloch v. Holm, 100 Minn., 276; 111 N. W., 264; 9 L. R. A. (N. S.), 712. For further authorities upon the Civil Responsibility of the

Profession see Vol. 39, American Digest (Century Edition), title, "Physicians and Surgeons," §§ 31-48; Vol. 22, American and English Encyclopædia of Law, pp. 798-809; Vol. 30, Cyclopedia of Law and Procedure, pp. 1574-1592.)

CHAPTER IV.

REMUNERATION

In the acropolis mound in Susa in ancient Elam a code of laws was unearthed in 1902, which is the oldest known code extant, being that of Hamurabi, King of Babylon, who reigned 2,250 years before Christ. Many sections of this code relate to physicians and surgeons, showing that those who followed the profession in the time of Abraham were men of dignity and standing in the community. It is interesting to note that the majority of these provisions deal with the compensation which the physician and surgeon was to receive for his services. These sections of the code follow:

206. "If a man strike another man in a quarrel and wound him he shall swear: 'I struck him without intent,' and he shall be responsible for the physician."

215. "If a physician operate on a man for a severe wound (or make a severe wound upon a man) with a bronze lancet and save the man's life; or if he open an abscess (in the eye) of a man with a bronze lancet and save that man's eye, he shall receive ten shekels of silver (as his fee)."

216. "If he be a freeman, he shall receive five shekels of silver."

217. "If it be a man's slave, the owner of the slave shall give two shekels of silver to the physician."

221. "If a physician set a broken bone for a man or cure his diseased bowels, the patient shall give five shekels of silver to the physician."

222. "If he be a freeman, he shall give three shekels of silver."

223. "If it be a man's slave, the owner of the slave shall give two shekels of silver to the physician." (Code of Hamurabi, King of Babylon, by Prof. Robert F. Harper.)

Before the passage of the Statute of 21 and 22 Victoria, Chapter 90, Section 31, the "Medical Act" so called (passed in 1858), a physician in England could not maintain an action under the common law for his fees (Peck v. Martin, 17 Ind., 115; Chorley v. Bolcot, 4 T. R., 317), except in those cases where there was an express contract. They were presumed to work for an honorary reward and not for remuneration. The reason for this was because in early times a great many monks acted as physicians and they could not recover their fees, for they were incapable of possessing any property or bringing an action in court (Willcock on Medical Law, 112). They were, in the eyes of the law, *civiliter mortui.*

But this custom did not prevail among surgeons who were allowed to recover for their services. In

Chorley v. Bolcot (4 T. R., 317), which was an action for compensation, Lord Chief Justice Kenyon said: "I remember a learned controversy some years ago as to what description was intended by the Medici at Rome, and it seemed to have been clearly established by Dr. Mead, that by those were not meant physicians, but an inferior degree amongst the professors of that art, such as answer rather to the description of surgeons amongst us; but at all events it has been understood in this country that the fees of a physician are honorary, and not demandable of right; and it is much more for the credit and rank of that honorable body, and perhaps for their benefit also, that they should be so considered. It never was yet heard of that it was necessary to take a receipt upon such an occasion; and I much doubt whether they themselves would not altogether claim such a right as would place them upon a less respectable footing in society than that which they at present hold."

In the United States this rule that the rendering of services when requested raises no implied promise to pay therefor has never obtained and physicians have been allowed to sue for remuneration (Vilas v. Downer, 21 Vt., 419); in fact, the law in this country implies a promise to compensate when a physician treats a patient (Peck v. Hutchinson, 88 Iowa, 320; Crane v. Baudouine, 65 Barb. (N. Y.), 261; Green v.Higenbotam, 3 N. J. L. J., 60). But there are nevertheless certain conditions or qualifications with which the physician

and surgeon must comply, or his failure may be successfully pleaded in bar to an action for compensation. In many States statutes have been passed expressly prohibiting one who has not fully complied with the laws regulating the practice of medicine and surgery from recovering his fee for services, and it has also been held by the courts that an unauthorized practitioner cannot recover remuneration (Murray v. Williams, 121 Ga., 63; Orr v. Meek, 111 Ind., 40). There is, however, in a suit for compensation a presumption that the physician is duly licensed (Chicago v. Wood, 24 Ill. App., 42; McPherson v. Cheadell, 24 Wend. (N. Y.), 15).

In an action for compensation the physician does not have to show that his treatment cured or benefited the patient (Cotnam v. Wisdom, 83 Ark., 601; 12 L. R. A., 1089). The court of Wisconsin commenting on this said: "That is not at all the test. So that a surgical operation be conceived and performed with due skill and care, the price to be paid therefor does not depend on the result. The event so generally lies with the forces of nature that all intelligent men know and understand that the surgeon is not responsible therefor. In the absence of express agreement, the surgeon who brings to such services due skill and care earns the reasonable and customary price therefor, whether the outcome be beneficial to the patient or the reverse" (Ladd v. Witte, 116 Wis., 35).

So if a physician uses due care, yet mistakes the nature of the complaint from which the patient

suffers, he can notwithstanding recover compensation (Ely v. Wilbur, 49 N. J. L., 685); but, on the other hand, if he fails to use ordinary skill he will be precluded from getting anything for his services (Logan v. Field, 192 Mo., 54; Howell v. Goodrich, 69 Ill., 556), though it has been held that if a physician is guilty of negligence or malpractice, he can, nevertheless, recover compensation less the amount of damage caused by his conduct (Whitesell v. Hill, 101 Iowa, 629; 37 L. R. A., 830).

Where a physician, upon undertaking the treatment of a case, stipulated with his patient that if he did not cure him he was to receive no pay, it was held that he could not recover either for his treatment or medicines unless he could show the contract, as far as he was concerned, had been performed according to its terms and the patient cured (Smith v. Hyde, 19 Vt., 54).

The case of McKleroy v. Sewell (73 Ga., 657) holds that if a physician is in such a state of alcoholic intoxication as to prevent proper treatment, this fact will be a good defence to an action for compensation provided the plaintiff did not assume the risk, that is, know of the fact of intoxication or a tendency thereto when he employed the physician.

From the excerpt of the code of Hamurabi given at the beginning of this chapter it is patent that the physician practising in those times was permitted to charge the rich man more for his services than he did the poor man. During Henry VI's reign

the physicians in England had rules regarding compensation. The poor man was treated free, and "in no case was the physician to charge excessive fees, but to study to fit his fee to the patient's purse, and measurably after the deserving of his labor."

In the 14th century a specialist in the treatment of fistula, Dr. John Ardern, if he had a "worthy man and great" for a patient and cured him, charged 100 marks "with robez and feez of an hundred shillyns terme of lyfe, by year." He would take less "of lesse men without feez." "Never in alle my lyfe toke I lesse than an hundred shillyns for cure of that sickness." It is said of him that after bargaining with a patient regarding the fee he was to receive, he took security for the payment (Philip Hale in the *Boston Herald*).

How much regard to-day can be had for the patient's purse by the members of the medical profession is a mooted question. On the point of whether or not it is allowable for the physician to graduate his professional charges in accordance with the patient's ability to pay the decisions are muddy, some holding the financial condition of the patient to be a proper subject for inquiry in a suit by the physician for compensation (Succession of Haley, 50 La. Ann., 840), while others hold the contrary view (Robinson v. Campbell, 47 Ia., 625). For as was said by the court in Robinson v. Campbell (47 Iowa, 625), "There is no more reason why this charge should be enhanced on account of the

ability of the defendants to pay than that the merchant should charge them more for a yard of cloth, or the druggist for filling a prescription, or a laborer for a day's work.'' The Alabama court, holding this same view (Morrissett v. Wood, 123 Ala., 384), said: ''The cure or amelioration of disease is as important to a poor man as it is to a rich one, and, prima facie, at least, the services rendered the one are of the same value as the services rendered to the other.''

Notwithstanding this, it seems in those cases where there is evidence of a custom long established among the members of the profession that their services are rendered with a view to charging their patients according to their circumstances and position in life, the courts consider that the services of physicians are accepted in contemplation of such custom, and fees so graduated may be recovered (Cotnam v. Wisdom, 83 Ark., 601; Morrissett v. Wood, 123 Ala., 384). So in proving the true value of his services, evidence of the customary and usual charges in the neighborhood or locality in which the physician practises is admissible (Jonas v. King, 81 Ala., 285), and that his rates were well known by persons in that locality, including the defendant (Paige v. Morgan, 28 Vt., 565). Such evidence is admissible on the physician's behalf to show the amount the defendant impliedly agreed to pay (Paige v. Morgan, 28 Vt., 565).

Yet where it appears that the custom of charging the patient with an eye to his financial standing

is in vogue, but the patient receives the benefit of the physician's attention when unconscious from an accidental injury, or under any circumstances where the patient's condition is such that he cannot himself request the services of a physician, then a promise is implied by law that the person so attended will pay only reasonable compensation for such services (Sceva v. True, 53 N. H., 627; Cotnam v. Wisdom, 83 Ark., 601).

Suits for compensation often grow out of a dispute over the amount claimed for services. Resistance may be offered on the ground that the services were intended to be and were gratuitous. In a Mississippi case (Hardenstein v. Brien, 50 S. R., 979) a physician sued the administrator of the estate of a Mrs. Harper, deceased. One witness testified that Mrs. Harper said that she had paid the physician nothing for services for about sixteen or eighteen years previously, but that in the last illness, running over many months, he had come to see her so often by day and night, any hour in the night he was sent for, that he must be paid for this; that the obligation was too great to be passed over. Another witness testified that one day she said to him that she wanted to pay him something for his services, as he had been good and kind to her, and said to him: "Make out a bill for me, Doctor," to which he answered: "Oh, no, Mrs. Harper; I cannot make out a bill; I don't want to, because you are the widow of a physician, and I won't think of doing such a thing." Referring to

it again, she said: "Have you made out that bill?" and he said: "No; I have not made out any bill." Then she said: "I want the thing settled right now; have you made out any bill?" To that he answered: "No; I told you I was not going to make out any bill," and she said: "I want to give you something; will a thousand dollars do?" His reply was: "I would not think of asking that much." Again she said: "How will $500 do?" and he said: "All right, I will take that." The court held this constituted a distinct contract, supported by a valuable consideration, viz., the services in the last illness, and that the physician should have been permitted to recover the $500 on the testimony.

With regard to this matter of gratuitous services, the court of North Carolina (Prince v. McRae, 84 N. C., 674) has this to say: "Whether the plaintiff's services shall be deemed a gratuity or constitute a claim for compensation, must be determined by the common understanding of both parties. If they were intended to be and were accepted as a gift or act of benevolence, they cannot at the election of the plaintiff create a legal obligation to pay."

Testimony from an expert as to the value of services is admissible in evidence (McKnight v. Detroit, &c., R. Co., 135 Mich., 307), as there is no presumption of law with regard to such value (Wood v. Barker, 49 Mich., 295; 13 N. W., 597). It is manifest that a jury would have difficulty in ascertaining their value without evidence from per-

sons knowing something about the matter, and it seems that a jury has no right in a case where the evidence as to the appropriateness of the physician's remuneration is not disputed to reduce it upon their unsupported belief that the treatment should have been different (Wood v. Barker, 49 Mich., 295; 13 N. W., 597). The value to be proved is the ordinary and reasonable figure for services of that nature (Styles v. Tyler, 64 Conn., 432). The criterion of worth is not the physical benefit the patient receives (Cotnam v. Wisdom, 83 Ark., 601). A contract with a physician to pay from $200 to $400 for an operation was held to be valid and bind the parties to the contract for $200, and upon proof of the value of the services to the full extent of the contract—$400.

A great number of cases upon this subject of compensation involve the question of liability of persons other than the patient for the physician's services. Each case must be judged on its own facts just as any contract case. In order to hold a third person liable for medical attendance to another an express or implied promise to pay therefor must be shown by the physician (Crane v. Baudouine, 55 N. Y., 256). In other words in those cases where one is under no legal obligation to pay for medical services rendered another person, the physician cannot hold him responsible where there is no promise to pay relied upon by the physician (Dorion v. Jacobson, 113 Ill. App., 564). Most of these cases have grown out of a dispute as

to whether or not there has been an implied employment. The antecedent acts of the parties determines their obligations. A certain set of circumstances will give rise to certain liabilities if unaccompanied by express stipulations explaining such circumstances, and the law, if it establishes a contract by implication from these circumstances, then proceeds as if the persons had contracted by formal words. The whole matter is largely one of construction and interpretation of contracts.

Let us take a few illustrative cases. It was decided that where a steamboat captain brought a patient to a physician's office, asked the physician to treat the patient, and then left, that the physician could recover his fee from the captain (Berry v. Pusey, 80 Ky., 166); and where a person telegraphed to an infirmary, "I have just learned of L's accident. Show him every consideration and I will pay expenses," the court held that the sender of the telegram would have to pay, inasmuch as an outside physician had been secured pursuant to the request in the telegram (White v. Mastin, 38 Ala., 147).

But where a hotel keeper at a resort telegraphed a friend, "There are many cases of yellow fever at the Well, send out a physician, without fail, this evening," and the friend showed the telegram to a physician asking him to go, which he did, it was held that this telegram did not constitute a promise to pay the physician and he could not therefore re-

cover for his services from the sender of the message (Williams v. Brickell, 37 Miss., 682).

In a Colorado case a young man of 25 was quite seriously injured while at a distance from his family. He was without means and was cared for at a hospital operated by the plaintiff, a physician. The defendant, a sister of injured, wrote the physician concerning her brother's condition and requested that she be kept informed just how he was doing. She said: "And we will gladly pay all expenses. . . . All of his expenses will be paid later on and we want him to have everything to make him more comfortable," etc. The court held that this was an original promise on the part of the sister to pay for the services from the date of the letter on, and her authorization of such services rendered her liable (Hall v. Allen, 104 Pac. Rep., 489).

Naturally a third person could not be held liable for medical expenses when acting for another merely as a messenger or in an emergency (Madden v. Blain, 66 Ga., 49). The court of Georgia put the stamp of approval upon this rule of law in the following words: "When one summoning a physician to care for another, rendered by sudden illness unable to act for himself, and to whom he stands in no relationship which creates no obligation to furnish necessary medical care, and no express undertaking is entered into, then from the mere summoning of the physician and requesting

him to care for the person who is ill, the law does not presume an implied promise by the one so acting to pay for the services of the physician summoned'' (Norton v. Rourke, 130 Ga., 600; 61 S. E., 478; 18 L. R. A. (N. S.), 173; see, also, Jesserich v. Walruff, 51 Mo. App., 270; Starrett v. Miley, 79 Ill App., 658; Smith v. Watson, 14 Vt., 332).

A rule the reverse of this would obviously be unjust. For as Judge Thompson said in Messenbach v. Southern Cooperage Co. (45 Mo. App., 232), ''When a person is dangerously wounded and perhaps unable to speak for himself, or suffering so much that he does not know how to do it, any person will run to the nearest surgeon in the performance of an ordinary office of humanity. If it were the law that the person so going for the surgeon thereby undertakes to become personally responsible for the surgeon's bill, and especially for the surgeon's bill through the long subsequent course of treatment, many would hesitate to perform this office, and in the meantime the sufferer might die for the want of the necessary immediate attention. Nor is there a common and fair understanding that the person making the request, or ordering it to be made in behalf of the sufferer, under the circumstances, assumes responsibility for the surgeon's bill.''

A legal obligation may, however, exist between the patient and some third person whereby the

latter becomes responsible for the medical expenses of the former. Thus a father is chargeable with the care, maintenance, and support of his minor child (Rowe v. Raper, 23 Ind. App., 27), which includes necessary medical attendance (Best v. McAuslan, 27 R. I., 107), though in Holmes v. McKim (109 Ia., 245; 80 N. W., 329) it was said: "One is not under any implied obligation to pay for the services of a physician called to attend a minor living with his family and supported by him, but not otherwise related to him, though he acquiesced in the attendance and had on a former occasion paid the same doctor for attending the same minor, the physician knowing, however, the true relations of the defendant and said child."

It has also been held that a man is not bound to pay a physician for attending his mother-in-law simply because he was present when the services were performed (Madden v. Blain, 66 Ga., 49). A request by a father to a physician to visit his son who was of age, but ill at the father's house, raised no implied promise that the father would pay for such attendance (Boyd v. Sappington, 4 Watts (Pa.), 247).

If the relationship is not sufficient in itself to establish responsibility of the third party, the facts of the case must show an actual employment by the third person (Kearns v. Caldwell, 7 Ky., 449). Thus where an employer merely summoned a doctor to attend an employee suddenly taken ill while

in the line of his employment, the employee being unable to act for himself, the employer would not be liable for the physician's services if there was no express stipulation between the employer and employee that he should furnish such care (Norton v. Rourke, 130 Ga., 600; 61 S. E., 478; 18 L. R. A. (N. S.), 173). Where a woman wounded and bleeding rushed into a man's house to whom she was a stranger and fell unconscious there, and the man called in a physician and told him to care for her, it was held that in the absence of an express promise by the man to pay for the services of the physician he was not liable therefor, even though it appeared that she had been carried to a room in the house.

We have seen in the chapter on the civil responsibility of the profession that a patient can recover damages against a physician only once for the same act of malpractice. In other words, where the question of negligent or unskilful conduct of the physician has been raised between the parties, it cannot again be made the subject of legal controversy between them. As has been observed, malpractice is generally a good defence to an action for compensation, and it is therefore only natural that the law should say when such a defence is interposed that the question of malpractice has been in issue and cannot again be brought before the court to be decided. So where a physician brings suit for the value of his services and upon trial the case

is favorably decided for the physician, the patient is precluded from afterward bringing suit for negligence or malpractice occurring at the time of the services for which the physician sues. The object of this rule of law is to prevent circuity of action and multiplicity of suits. A nice question has been raised in cases where the patient in a suit for compensation is defaulted or does not defend himself in court. The decisions of the various States do not agree as to whether a case won in this manner by the physician will bar the patient from subsequently suing the physician for negligence and malpractice.

The question of compensation for services as an expert witness in court has been a much talked of subject. The disrepute into which medical expert testimony has unfortunately fallen has led several States to put on their statute books enactments regulating the amount of pay an expert shall receive for giving testimony. This has been done to prevent the payment of large fees to experts, which has been a potent factor in creating the impression in the public mind that the opinions of experts are bought and sold in the market like any commodity. Of course, the amount of compensation of the common witness is easily ascertainable. Some of the statutes relating to the expert provide that he shall receive only what the ordinary witness is entitled to, while others make provision for

extra remuneration in a reasonable amount. The question has been raised many times as to whether or not a physician can be summoned into court and compelled to testify as an expert without additional pay. The argument has been advanced that the knowledge and experience possessed by a physician is peculiarly his own, and he cannot therefore be compelled to testify as an expert against his will, but the trend of the decisions seems to be in the other direction and toward the view that he can be made to give his opinion without special pay other than that given the ordinary witness.

The law governing disputes over compensation is the same applicable to all contract cases, and a surfeit of adjudicated cases might be given to substantiate and illuminate the various phases of the subject here touched upon. This, however, is unnecessary. It is best for the member of the profession to refrain from resorting to the courts for their pay, for a doctor's practice may be sensibly hurt by the employment of such drastic measures, especially in the smaller cities and towns where the good will of all is invaluable. If, however, it is expedient and advisable to bring suit, the medical man should first make sure that the debtor can satisfy the judgment in event of recovery. This subject of compensation causes one of the profession to attend the usage of Chinese physicians and speculate on its delightful possibilities. In that republic it is customary for a man to pay his

physician so long as he enjoys good health, but let him become ill and he ceases to compensate the doctor. (Further authorities: Vol. 39, American Digest (Century Edition), title, Physicians and Surgeons, §§ 50-62; Vol. 30, Cyclopædia of Law and Procedure, pp. 1592-1604; Vol. 22, American and English Encyclopædia of Law, pp. 789-798.)

CHAPTER V

CONFIDENTIAL COMMUNICATIONS

The procedure of our courts in civil and criminal cases is in its nature litigious, not inquisitorial: a controversy rather than an investigation. From a time very remote from our own, certain matters have by law been hidden from the gaze and scrutiny of the courts, and persons called to testify cannot be made to answer questions relating to these sacred matters. This seal of silence placed on the lips of witnesses is justified on the grounds of public policy. The interests of the community demand that the state and the individual shall be hedged with safeguards against the disclosure and publication in court of confidential communications between heads of departments of the government regarding secrets of state, and of proceedings of the judiciary. The same cloak is thrown around communications of a professional nature, as those of an attorney and his client, and confidences between husband and wife are likewise protected.

This privilege does not extend to physicians and surgeons under the common law, and they could reveal all information secured from their patients

regardless of the effect of such disclosure on the patient; in fact, physicians and surgeons were compelled to answer questions regarding these hidden matters if called upon in court to do so. In the Duchess of Kingston's trial, a late 18th century case (20 How. St. Tr., 573), Lord Mansfield said a surgeon has no privilege, and "if a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him any indiscretion whatever."

Many of the States, however, have passed statutes prohibiting physicians from disclosing information received from their patients in their professional capacity, upon the ground that such privilege enables a patient without risk of exposure to disclose to his physician all information essential to a proper treatment of the case. Without such protection men would, perhaps, be obliged to suffer injuries without alleviation from the art of medicine and surgery. As in the case of an attorney and his client, a knowledge of all the facts is necessary in order to pursue the course of action best suited to assist the patient in his trouble, and the purpose of such statutes is to invite this confidence and to prevent a breach of that trust.

The following States have acted upon this supposed necessity and have passed laws giving professional communications between physicians and

their patients immunity from disclosure: Arizona, Arkansas, California, Colorado, District of Columbia, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New York, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

Mr. Justice Miller, in speaking of the New York statute, said: "It is a just and reasonable enactment, introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them to properly prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship" (Edington v. Mutual Life Ins. Co., 67 N. Y., 185).

In order that the privilege may be successfully claimed in court, it must appear that the relationship of physician and patient existed at the time the information was given to the physician (Nesbit v. People, 19 Colo., 441; Clark v. State, 8 Kan. App., 782), though this relationship may exist even in cases where the employment of the physician is by some third party. That is to say, the privilege does not depend on compensation (Smart v. Kansas City, 208 Mo., 162; 144 L. R. A. (N. S.), 565;

Colorado Fuel and Iron Co. v. Cummings, 8 Colo. App., 542; Renihan v. Dennin, 103 N. Y., 573; Myer v. Supreme Lodge, 178 N. Y., 63; 664 L. R. A., 839). So it was held where one was being tried for murder and the defence was insanity, the jail physician could not answer questions based on a knowledge of the accused obtained while under his observation in jail (People v. Schuyler, 106 N. Y., 298). It is immaterial whether or not the patient is a charitable patient at a hospital or in a private house; the statute may be invoked by him just the same (Smart v. Kansas City, supra). A partner or physician called in consultation cannot reveal communications he has had brought to his notice (Renihan v. Dennin, 103 N. Y., 573; Raymond v. Burlington Ry. Co., 65 Ia., 152).

Where a physician examines a patient merely for information, and there is no misunderstanding as to the purpose of the examination, then the information so acquired is not held to be confidential in the sense that it cannot be revealed by the doctor in court (Nesbit v. People, 19 Colo., 441). Thus, in Clark v. State (8 Kan. App., 782), the defendant was charged with being the father of an unborn illegitimate child of the complaining witness, who testified that she first had intercourse with the defendant Clark July 15, which he denied, saying that it took place August 3. He doubted the chastity of the woman and the paternity of the child. It was suggested she be examined by a physician of standing and if such inspection showed her

pregnancy to be of no greater duration than four months, he would consider himself the author of the girl's trouble and marry her. This was assented to. The examination showed her pregnancy to be of six months' duration. Dr. P., who made the examination, was a witness at the trial but was not allowed to give evidence that at the time of the examination the girl made the statement to him that the first connection was August 3. This evidence was excluded as being confidential under the statute.

The upper court held otherwise, saying, "Dr. P. was not present as the physician of the complaining witness; she was not his patient; the examination was not made for the purpose of treating her for any physical or supposed physical distress. She agreed and submitted to the examination for the sole purpose of satisfying the plaintiff in error as to whether he was the father of the child. She knew that the result of the examination was to be made known to her parents and to the plaintiff in error, before she submitted to it. Under such circumstances, statements made by her to the physician during the examination as to the time when the first connection took place cannot be regarded as confidential." (See, also, People v. Cole, 113 Mich., 83.)

If, however, a physician after examining a patient for information only, advises or treats the person examined, the relationship of physician and patient is thereby created and the physician will

be precluded from disclosing the information obtained (Weitz v. R. R. Co., 53 Mo. App., 39).

One who seeks the protection of the statute must, generally speaking, be a physician or surgeon or duly licensed practitioner following a recognized school of good repute. A dentist is not included in this definition of persons who may claim the privilege (People v. De France, 104 Mich., 563; 28 L. R. A., 139).

Many of the statutes limit the confidence sought to be protected to information *necessary* for the physician to prescribe for the patient or act in his professional capacity. The word "necessary" must not be taken in a restricted sense, so as to allow evidence of statements honestly elicited by questions or voluntarily given for purposes of assisting the physician to properly treat the case, even though it is manifest that the disease or injury could have been diagnosticated and treated without all of such information (Renihan v. Dennin, 103 N. Y., 573; Sloan v. N. Y. C. R. Co., 45 N. Y., 125; In re will of Bruendl, 102 Wis., 45). The same is also true of the word "prescribe," which must not be limited merely to the meaning "write a prescription," but must be taken to mean remedy or alleviate the disease or injury (In re Will of Bruendl, 102 Wis., 45).

The information considered confidential may be acquired by the physician from the patient not only by verbal communications between them, but by examination or by looking at the patient. It may

come from statements of other persons present, from audible signs, by touching the patient, or by writing. The New York Court said of this feature of the statute: "When it speaks of information, it means not only communications received from the lips of the patient, but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearance and symptoms. Even if the patient could not speak, or his mental powers were so affected that he could not accurately state the nature of his disease, the astute medical observer would readily comprehend his condition. Information thus acquired is clearly within the scope and meaning of the statute" (Edington v. Mutual Life Ins. Co:, 67 N. Y., 185). The presumption is that such information was given for the purpose of treating the patient.

The provisions of many of the statutes, that information is confidential only when it is essential to enable the physician to act in his professional capacity, have provoked a disagreement among the courts. Some maintain that only such information as manifestly applies to the exigencies of the case comes within the provision of the enactments. On the other hand, there are courts which interpret the statute in a broader way, protecting all communications which the physician receives as such. "The legislature," said the court of Wisconsin (Boyle v. Northwestern Mutual Relief Asso., 95 Wis., 312), "has decided wisely that public policy

requires such measure of restriction upon the freedom of the physician to testify or of others to demand testimony. But as it rested with the legislature to discover the necessity for, and to effectively impose, such restrictions, which are in derogation of the common law, it is for the courts only to enforce such as have been imposed and not others which the legislature has omitted. 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 toward liberal construction of these words to effectuate the purpose of the statute.''

There is a large number of cases in the books where a patient who has met with an accidental injury makes damaging statements to the physician as to the cause of such injury. Where such statements are obtained by the physician for the purpose of forming a correct opinion as to the injury and thereby being enabled to efficaciously and safely treat the patient, then admissions of this description are, as we have seen, regarded as confidential and are accordingly protected by the statute. In certain instances the courts have carried this doctrine still further, holding that a physician will not be permitted to abuse the professional relationship by securing statements from the patient against the patient's interest for subsequent use against him.

In a certain case a physician, while assisting

in dressing the injuries of a man who had been hurt in a railroad accident, engaged him in conversation, during which the injured person in reply to a question as to how the accident occurred, made a damaging admission. The court held that the doctor could not disclose this information on the witness stand, and thus expressed himself: "The physician had no business to interrogate his patient for any purpose or object other than to ascertain the nature and extent of the injury, and to gain such other information as was necessary to enable him to properly treat the injury and accomplish the object for which he was called professionally, and such communications are privileged and he cannot disclose them. If the physician took advantage of the fact of being called professionally, and while there in that capacity made inquiries of the injured party concerning matters in which he had no interest or concern professionally, or for the purpose of qualifying himself as a witness, he cannot be permitted to disclose the information received" (Penn Co. v. Marion, 123 Ind., 419).

It must be remembered that the object of the statutes is not to smother the truth, and the courts therefore deem it their right to know something of the attending circumstances under which the communication was made (Edington v. Ætna Life Ins. Co., 77 N. Y., 564). While the privilege is created for the patient's benefit alone (Springer v. Byram, 137 Ind., 15), nevertheless he has the right

to waive the protection offered him by the statute (Morris v. Morris, 119 Ind., 341), and this right does not rest upon any statutory provision authorizing him to do so (Boyle v. Northwestern Mut. Relief Asso., 95 Wis., 312).

If a patient sues his physician for negligence or malpractice, or if he has the physician give evidence in his behalf, it is patent that either course of action would constitute a waiver. The privilege being a personal one, it must be claimed by the patient or his representatives before evidence of the communication which it is desired to protect is admitted (Briesenmeister v. Supreme Lodge Knights of Pythias, 81 Mich., 525; Heuston v. Simpson, 115 Ind., 62).

The beneficiary or assignee of a beneficiary under a life insurance policy on the patient's life may claim the privilege (Briesenmeister v. Supreme Lodge, 81 Mich., 525).

The statute does not prevent a physician from testifying that he prescribed for the deceased, but a prescription for the patient or the drugs contained therein could not be put in evidence (Nelson v. Nederland Life Ins. Co., 110 Ia., 600), nor could the account books of the physician be examined if they held confidential and privileged knowledge concerning the patient (Mott v. Ice Co., 2 Abb. N. C. 143). It has been held, however, that a physician can testify to the number of visits he paid his patient as family physician and the dates thereof (Briesenmeister v. Supreme Lodge, supra).

Information imparted to a physician with an illegal purpose in view, as the performance of a criminal operation, would not, of course, come within the policy of the statute. But in a breach of promise suit where the defendant called a physician as witness and asked him if at a certain time prior to the trial the plaintiff had consulted him with regard to ridding herself of a child she was then pregnant with, it was held that such communication was privileged and could not be disclosed. For, procuring an abortion may be lawful and justified if necessary to save the mother's life (Guptill v. Verback, 58 Ia., 98).

It may be said in summing up that under most of the statutes the essential elements of a privileged or confidential communication are: (a) The relationship of physician and patient; (b) information acquired during the existence of this relationship; and (c) the propriety and necessity of the information so acquired to enable the physician to skilfully treat the patient professionally. These statutes being in derogation of the common law oftentimes through their operation exclude the best evidence. It must not be supposed that they are intended to prevent the physician from testifying to all communications passing between himself and his patient. The purpose and object of all trials is to bring to light the true facts of the case, and the scope of the statutes cannot be enlarged to include matters not clearly within their policy, as the ends of justice would be thwarted and the beneficial

purpose of the statutes defeated. It is upon this question that the courts dealing with enactments not dissimilar from each other clash.

An extended examination of the various acts and the host of decisions they have given rise to has not been made here. If the physician is called upon in court to reveal a communication of a confidential nature, it is always best for him to ask if it is necessary for him to do so, as the relation of physician and patient should always be regarded by the members of the profession as one of trust and confidence.

CHAPTER VI

THE CRIMINAL RESPONSIBILITY OF THE PROFESSION

Thus far we have been concerned only with the civil rights and obligations of physicians and surgeons. The state is neutral in its attitude toward many wrongful acts which are of a private character in the injury they cause. This is the case with the civil wrongs which we have been considering. Yet where an injury is "so atrocious in its nature, or so dangerous in its example, that, besides the loss it occasions to the individual who suffers by it, it affects, in its immediate operation or in its consequences, the interest, the peace, the dignity, or the security of the public" (3 Wilson, 4), it is said to be a crime, and the government then steps in and punishes such wrong by a criminal proceeding in its own name.

We have seen that in civil suits for damages the malice or intent of the wrongdoer does not have to be proved. The rule of the criminal law is different. Legal guilt has to do with the animus or mind of the wrongdoer. To be guilty of a crime, one must have had an intent coupled with a wrongful act and capacity to commit that act. The relationship between intent and capacity is very

close, for a person by reason of physical or mental incompetency may be presumed to be incapable of entertaining a criminal intent. This is the theory of the insanity defence; that is, one who is found to be legally insane is deemed incapable of entertaining a criminal intent and is therefore not responsible for committing a crime. The guilty mind or criminal purpose may be implied from the criminal act. It is an antique maxim that ignorance of the law excuses no man, and consequently it is not necessary that the person committing the wrongful act should be aware that it was forbidden. In other words, from the mere doing of the prohibited act the intent will be supposed.

The compliment which our law pays a man accused of crime of presuming him to be innocent until the contrary has been proved beyond all reasonable doubt is so well known as to hardly bear repeating. The individual is likewise protected from being compelled to give incriminating evidence, the law recognizing the unsoundness of such testimony. In fine, the law hedges the individual with an elaborate system of outworks to guard his personal liberty and prevent the possibility of an innocent person suffering punishment for a crime. Happily the number of cases in the books in which physicians and surgeons have come afoul the criminal law are comparatively few in number. Their absence is significant. There are, however, in all walks of life corrupt and dishonest persons, and it is with few exceptions their cases which have re-

ceived the attention of the courts in criminal proceedings.

Now far and away the greater number of cases in which physicians and surgeons have been charged with crime are prosecutions for the performance of criminal abortions. Let us first then consider the crime of abortion. Abortion may be legally defined as the expulsion of the fœtus by artificial means at any time during the period of gestation. The law does not make the distinction as in medicine where an abortion is generally taken to mean the destruction of the life of the fœtus during the first six months of pregnancy. The crime of abortion must not be confused with that of infanticide, which is the killing of a child after it has been born.

To procure the premature delivery of a pregnant woman by artificial means may be justifiable or criminal. If there are reasonable grounds for believing the mother's life will be forfeited if an abortion is not performed, then there is legal justification for such a course of action. It is, however, best for a physician to obtain a concurring opinion from another physician of good standing to substantiate his own belief in such necessity. Special provision is made for this by the statutes of some States. The consent of the patient must, of course, be secured before proceeding with the operation, or, as we have seen, the physician will be answerable in damages (Civil Responsibility of the Profession).

Under the old common law one who attempted to procure an abortion with the mother's consent was deemed unindictable for such act unless the mother was "quick with child" at the time when the abortion was attempted or in fact accomplished. Save with regard to certain civil rights the child was not considered in esse or to have an independent existence until it had quickened in its mother's womb (1 Bl. Comm., 129).

Blackstone said: "Life begins, in contemplation of law, as soon as an infant is able to stir in its mother's womb." So at common law if the mother or a physician prior to the time of quickening attempted to or actually did destroy the life of the fœtus by the use of drugs or by external or internal violence, they were only guilty of a misdemeanor. If, however, the physician brought about premature action of the organs through the agency of drugs or instruments or otherwise, without the consent of the mother and before she had become quick with child, the physician was guilty of an assault and battery. But the consent of the mother would be no defence if she died as a result of such acts.

Said Chief Justice Shaw in Commonwealth v. Parker (9 Metc. (Mass.), 263): "The use of violence upon a woman, with an intent to procure a miscarriage, without her consent, is an assault highly aggravated by such wicked purpose, and would be indictable at common law. So where, upon a similar attempt by drugs or instruments, the

death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice, any more than in the case of a duel, where, in like manner, there is consent of the parties."

Lord Hale speaking more than two centuries ago laid down the law in these words: "If a woman be with child and any gives her a potion to destroy the child within her, and she takes it and it works so strongly that it kills her, this is murder; for it was not to cure her of disease, but unlawfully to destroy the child within her; and therefore he who gives a potion to this end, must take the hazard, and if it kills the mother it is murder" (1 Hale P. C., 429). It is not necessary that the agency employed to procure an abortion should be capable of accomplishing it (Dougherty v. People, 1 Colorado, 514). Consent is not a justification that would avail one as a defence in court (Commonwealth v. Snow, 116 Mass., 47), and to say that the act was prompted by a desire to shield a woman's shame would not vindicate the wrongdoer (Commonwealth v. Wood, 11 Gray, 85).

The common law rule distinguishing between a woman quick with child and one who is pregnant but has not reached the quickening stage was also law in this country until supplanted by statute (Commonwealth v. Bangs, 9 Mass., 387; Common-

wealth v. Parker, 9 Metcalf (Mass.), 263; State v. Cooper, 22 N. J. L., 52; Mitchell v. Commonwealth, 78 Ky., 204). Under the common law the test as to the time at which a woman became "quick" seems to have been whether or not she herself felt the child within her (Rex v. Phillips, 3 Camb., 73), though it would also involve a question of medical jurisprudence to be determined by other evidence. Yet all this difference between one who is quick with child and one who is not, has been generally done away with by statute, it now being considered equally wrongful to procure or attempt to procure the abortion of a woman whether she be in an early or advanced stage of pregnancy. This was apparently first remedied by a statute passed in the reign of King George III, which took cognizance of the common law distinction and made it a felony to cause the miscarriage of a woman not quick with child.

The Massachusetts statute covering this crime is illustrative of the type of enactment in force very generally throughout the country. It reads as follows:

> "Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her, or with the like intent, unlawfully uses any instrument or other means whatever, or with

like intent, aids or assists therein, shall, if she dies in consequence thereof, be punished by imprisonment in the state prison for not less than five nor more than twenty years; and, if she does not die in consequence thereof, by imprisonment in the state prison not more than seven years and by a fine of not more than two thousand dollars." (Revised Laws, Chapter 212, Section 15.)

In preceding chapters we have seen that by the employment of a physician and his undertaking to treat a case certain duties and legal obligations are imposed upon him, which he must faithfully discharge or respond in damages to the patient. The physician is required to bring to his employment reasonable skill and cannot be negligent in his attention to or treatment of the patient. Let us suppose, as occasionally happens, that the death of the patient ensues. Would a want of skill and care on the physician's part render him criminally responsible?

Now an act which causes the death of a human being may be murder, manslaughter, or misadventure, according to the circumstances. Where it appears the killing was with malice aforethought, it is murder; where there is no premeditation or malice it is manslaughter. Manslaughter may be voluntary where the killing is done in heat of blood, or it may be involuntary by negligently performing a legal duty or negligently omitting to discharge

such an obligation. If death results while one is committing an unlawful act, such as procuring the miscarriage of a woman, that also would be manslaughter.

"The meaning of negligence, in the common use of language," says Mr. Justice Stephen (History of the Criminal Law, Vol. II, p. 123), "is very general and indefinite. It is practically synonymous with heedlessness or carelessness, not taking notice of matters relevant to the business in hand, of which notice might and ought to have been taken. This meaning is no doubt included in the legal sense of the term, but in reference to criminal law the word has also the wider meaning of omitting, for whatever reason, to discharge a legal duty, e. g., the omission by a medical man to exercise the skill which it is his duty to exercise."

The doctrine as laid down by the courts of England and followed in that country seems to be to the effect that a person undertaking to concern himself with the life and health of another must suffer the penalty if he cause his patient's death through a *gross* want of skill and care. It is immaterial whether he is educated or not, whether he is licensed or unlicensed, if death follows as a result of his gross negligence or incompetency, he is guilty of manslaughter. As Judge Park said in the English case of Rex v. Long (4 C. & P., 398), "I call it acting wickedly when a man is grossly ignorant and yet affects to cure people, or when he is grossly inattentive to their safety."

In another case where the defendant was indicted for manslaughter, having administered white vitriol, thereby causing a man's death, the court said: "I am clear that if a person not having a medical education, and in a place where medical education might be obtained, takes on himself to administer medicine which may have a dangerous effect, and such medicine destroys the life of the patient to whom it is administered, it is manslaughter. The party may not mean to cause death; on the contrary he may mean to produce beneficial effects; but he has no right to hazard medicine of a dangerous tendency where medical assistance can be obtained. If he does, he does it at his peril" (Nanny Simpson's Case, 1 Levin, 172).

In Rex v. Williamson (3 C. & P., 635, cited in State v. Hardister, 38 Ark., 605) the defendant who acted as a man-midwife tore away part of the prolapsed uterus of a woman whom he had delivered of a child, thinking it to be a part of the placenta. The woman died as a result. Upon the trial of the midwife for murder Lord Ellenborough said in his summary to the jury: "There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder; but still it is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate the charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal

inattention. One or the other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter.''

Nevertheless, there was a tendency at one time in this country to adopt the seemingly more humane doctrine that the interests of society are subserved by holding a physician civilly liable in damages for the consequences of his ignorance, without imposing on him criminal liability when he acts with good motives and an honest intent (State v. Schulz, 55 Iowa, 628; Commonwealth v. Thompson, 6 Mass., 137; Rice v. State, 8 Mo., 561). Thus in the early Massachusetts case of Commonwealth v. Thompson (6 Mass., 137, decided in 1809) the defendant, an ignorant doctor administering remedies of his own concoction, so persistently gave emetics to his patient that he became exhausted, and from all appearances the treatment was the proximate cause of the patient's death. The court held that ''if one assuming the character of a physician, through negligence administered to his patient with an honest intention and expectation of cure, but which causes the death of the patient, he is not guilty of felonious homicide.''

In Rice v. State (8 Mo., 561, decided in 1844) the prisoner caused the death of a woman by giving lobelia. His treatment was for sciatica, but the woman was then in the eighth month of pregnancy and soon after taking the defendant's treatment she had a premature delivery and died. She was

the mother of three children, had always done well after confinement, and prior to the prisoner's treatment had been in better health than for many years. The court said: "If a person assume to act as a physician however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed or the nature of the disease or both, the patient die in consequence of the treatment contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm."

By the later American cases it appears that the courts in this country lean toward the English doctrine of holding the professional or unprofessional practitioner guilty of manslaughter if by gross negligence, inattention, or foolhardy presumption he unintentionally causes the death of his patient. In the later Massachusetts case of Commonwealth v. Pierce (138 Mass., 165) which criticises the case of Commonwealth v. Thompson, it appeared that the prisoner was called upon to attend a sick woman confined to her bed. He prescribed that her clothing should be kept saturated with kerosene oil.

This was done, but in about two hours the defendant was sent for again. The testimony of the husband at the trial was that, "On his (the defendant's) arrival, I told the defendant how my wife had suffered and what we had done; she said it was as if she was in the fire; he replied that it was doing just what he wanted, like a poultice on a boil, drawing it out; that it was her only salvation. I told him she would not bear it, and asked him if he would try to persuade her; he said that he was too tender-hearted, that it was my wife instead of his; I then talked with her and told her the doctor said it would not hurt so much the next time; finally she said if he would stay and see the effect she would try it, and I so reported to him and the flannels were saturated and replaced. The doctor remained until the patient fell asleep. She did not appear to suffer so much as before."

This treatment was kept up for three days at the direction of the defendant. The evidence tended to show the effect of the oil was to burn and blister a large part of the surface of the body, and that the oil had had this same effect prior to this particular treatment, though it was shown that in certain instances it had benefited patients. The defendant continued to attend the woman for five days and then other help was summoned. Two days later she died.

It was held the defendant on these facts could be found guilty of manslaughter, because in order to constitute the crime of manslaughter where there

is no intent, it is not essential that the killing should be the result of an illegal act, but it is enough if it appears that death was due to gross negligence or foolhardy presumption of the defendant judged by the external criterion of the ordinarily prudent man in like circumstances. In other words, if the danger of an act is obvious to the jury, the failure or inability of the defendant to predict consequences which he did not intend or foresee is immaterial. The court in this case put a limitation upon the application of the rule to cases in which there are no exceptional circumstances or sudden emergency calling upon one to act as a physician. The unsoundness of the earlier American view is manifest. For surely the law cannot give recognition to a privilege to do acts manifestly endangering human life on the ground of good intentions alone. (See, also, State v. Hardister & Brown, 38 Ark., 605; State v. Reynolds, 42 Kansas, 320.)

It must be kept in mind that a *mere* error or mistake of judgment in treating a patient resulting in the patient's death does not render the physician amenable to the criminal law, any more than he is civilly responsible for a mere mistake of judgment. This would be neither murder nor manslaughter, but misadventure. So where a physician examines the womb of one of his patients and without malice or culpable negligence accidentally inflicts a wound which causes the patient's death, he is not guilty of either murder or manslaughter (State v. Reynolds, 42 Kansas, 320; see, also, State v. Hardister &

Brown, 38 Ark., 605). The consent of the patient to the treatment or operation resulting in death is no defence if the physician does not use due care and skill. (State v. Gile, 8 Wash., 12; for collection of cases upon the subject of negligent homicide by a physician see note in 61 Lawyers' Reports Annotated, 287.)

A rather interesting defence was interposed in a murder trial in New Mexico a few years ago. The principals were Chinese. Yee Dan was indicted for the murder of Yee Yot Woh, who was struck upon the head by the former with a bar of iron. The defence introduced evidence that after Yee Woh had been taken to the hospital the surgical operation of trepanning was performed upon his skull in such a manner as to be the proximate cause of his death. In explanation of the unlooked-for result it was shown that Yee Yot Woh's skull was abnormally thin, so as to deceive the physician who operated and cause the instrument to suddenly penetrate the brain. There was an autopsy performed by two physicians. One of these physicians gave the following testimony:

"Q. In the condition that you found this operation had been performed, what, in your opinion, would have been the effect on the subject?"

"A. Well, it settled all his chances for life. It was an exceedingly grave injury. In addition to the one received by the blow, it put beyond all hope any recovery."

This physician upon cross-examination testified as follows:

"Q. But in this instance you found the blood-clot unusually large?"

"A. Yes, sir."

"Q. And very compressed?"

"A. Yes, sir."

"Q. And would have caused death?"

"A. Undoubtedly the hemorrhage was the proximate cause of the death; the blow, the remote cause."

"Q. Even under the care of a more skilful physician, an injury to the brain might probably cause death?"

"A. Yes, sir; it is a very grave injury."

The testimony of the other physician was practically the same, though he differed upon the size of the blood-clot and though there was some possibility of its being absorbed except for the operation. The prisoner was found guilty of second degree murder. The upper court held that under the circumstances where an apparently necessary operation was resorted to in order to save the deceased from the probable fatal result of the wound, that it must be clearly established in order to save the prisoner from responsibility that the improper treatment of the wound was the sole cause of the death and not the wound itself (Territory v. Yee Dan, 7 New Mexico, 439).

The necessity for one charged with the com-

mission of a crime to disclose all facts to his legal advisers was most forcibly brought out in the famous case of Professor Webster of the Harvard Medical School, who was convicted of the murder of Dr. Parkman. The evidence was circumstantial.

Webster was a chemistry professor in the Harvard Medical School. It was proved at the trial that on the morning of November 23, 1849, Dr. George Parkman, a well known Boston character, left his home apparently in sound health and in good spirits; that about nine o'clock the same morning Professor Webster had left word at Dr. Parkman's house that if Dr. Parkman would call at the medical school about one thirty p. m., he would see that Dr. Parkman was paid certain notes on which he was indebted to him; that Dr. Parkman was last seen alive by witnesses about one-forty-five p. m. that day when he was going toward and about to enter the medical school; that Dr. Parkman never returned home, and the next day and until November 30, search was made in Boston and vicinity for him, but in vain. Large rewards were offered for information leading to his whereabouts.

In an assay furnace of the laboratory of the medical school on November 30, fragments of human bones were found and some false teeth. It was proved there were no duplicate parts among the bones found; that these remains were not of a dissected body, and that they were all similar to the same parts of Dr. Parkman's body. The teeth

were identified as belonging to Dr. Parkman by the dentist who fitted them two weeks prior to his disappearance. There was also evidence that Professor Webster said he had had an interview with Dr. Parkman in the laboratory about one-thirty p. m. the day of Dr. Parkman's disappearance. The government furthermore showed that at this time Professor Webster did not have the means to pay the notes which were subsequently found in his possession. Professor Webster was tried, convicted, and hanged (5 Cush. (Mass.), 295). His confession was made public after his death. It showed that he killed Dr. Parkman suddenly in the heat of blood, without malice aforethought, by striking him with a stick of wood which was used in some connection with the laboratory. In fear he had attempted to dispose of the body.

If Professor Webster had disclosed all the facts to his lawyers he would in all probability have saved his own life. The lawyer who is not in possession of all the facts in a case is in a similar position to the physician whose patient conceals facts concerning his history or condition: propitious results for the client or patient as the case may be are made less easy of attainment. (Further authorities: Vol. 22, American and English Encyclopædia of Law, pp. 810-811.)

CHAPTER VII

QUALIFICATIONS

A recurrence to history shows us that the law has for hundreds of years sternly regulated the practice of medicine and surgery (3 Henry VIII, Ch. 11, passed 1511). Yet under the civil law of Rome and the English common law it was open to all desiring to practise until the year 1422, when an act confined it to those who had studied in a university and held degrees. Hippocrates in his Law of Medicine, after bewailing the low state of the art and the ignorance of the practitioners of his time, says, "Their mistake appears to me to arise principally from this, that in the cities there is no punishment connected with the practice of medicine (and with it alone) except disgrace, and that does not hurt those who are familiar with it."

It was King Henry VIII who granted letters patent incorporating and erecting the College of Physicians in London, with power to elect a president and make by-laws for the government of all practitioners and examine the medicines and prescriptions, and punish malpractices by fines, amerciaments, and imprisonments. King Henry VIII also constituted the company of Surgeons and

Barbers and prescribed regulations for it, but in the eighteenth year of the reign of King George II this union was dissolved and regulations made as to the surgeons of London.

The basic principle of medical legislation and the reason the state has given its attention to the matter is apparent immediately we think of the great interests with which the profession is charged. It has given to its care the welfare of the multitude. Taking the maxim that "prevention is better than cure," the various states have not been content with holding the members of the profession responsible in damages for negligence and malpractice, but in addition to this remedy have passed laws, preventive in their nature, designed to protect the health and lives of the people against fraud and incompetency.

The court of last resort in Rhode Island in speaking of a statute of that state relating to medical licensure said: "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 the disease, and to prescribe remedies therefor, would result in injury and loss of life. To protect the public, not from theories, but from 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'' (State v. Mylod, 20 R. I., 632).

Mr. Justice Field of the Supreme Court of the United States says, ''Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of the vegetable and mineral substances, but 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 be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration therefor, for the protection of society may well induce the State to exclude from practice those who have not such a license, or are found upon examination not to be fully qualified'' (Dent v. State of West Virginia, 129 U. S., 114).

The right of the State to regulate the practice of medicine and surgery has been repeatedly attacked on every conceivable legal ground. A per-

son, however, is not born with the right to practise any more than he is born with the right to vote. In other words there is no vested right to practise the medical profession free from supervision by the state (Reetz v. Michigan, 188 U. S., 505). The Supreme Court of Iowa has gone so far as to call it the exercise of a "privilege" (State v. Edmunds, 127 Iowa, 333), yet in the absence of any law prescribing qualifications a person would have the right to practise medicine.

Among the many arguments against such statutes it has been urged that laws of this kind are unwise, and in support of this contention Herbert Spencer is cited. It is worth remarking that in his "Social Statics" Spencer claims there are no good reasons why the principles of free trade should not be applied to the practice of medicine. He says, "All measures which tend to put ignorance upon a par with wisdom inevitably check the growth of wisdom. Acts of Parliament to save silly people from the evil which putting faith in empirics may entail on them do this, and are therefore bad. It is best to let the foolish man suffer the penalty of his foolishness. For the pain, he must bear it as he can; for the experience, he must treasure it up, and act more rationally in the future. To others, as well as to himself, will his case be a warning. And by multiplication of such warnings there cannot fail to be generated a caution corresponding to the danger to be shunned" (Social Statics, 205; see Thompson v. Van Lear,

77 Ark., 506; 5 L. R. A. (N. S.), 588; 7 Am. Cas., 154).

Notwithstanding this and the many provisions of the federal and state constitutions which these statutes are said to violate, the various States have passed statutes regulating the matter, such statutes being justified under the police power of the state. "This police power of the state," says Chief Justice Redfield of the Vermont court (Thorpe v. R. & B. R. Co., 27 Vt., 140), "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons." In Dent v. State of West Virginia (129 U. S., 114) the Supreme Court of the United States said: "The power of the state to provide for the general welfare of its people authorizes it to prescribe all 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. As one means to this end, 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."

This police power it must be understood is an inherent, inalienable right of every State. That great piece of statutory law, the federal constitution, is a document of enumerated powers. All powers not expressly given therein by the States to the national government are deemed to have been kept by the States; and therefore it is re-

served to the several States to pass laws protecting the lives and health of the community against a citizen exercising his rights in a manner tending to injure the community. In the words of Chief Justice Rugg of the Supreme Judicial Court of Massachusetts, "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 provisions of the state or federal constitutions" (Commonwealth v. Porn, 196 Mass., 326).

The right or power of the state to make reasonable provisions for determining the qualifications of those engaging in medical practice, and punishing those who attempt to engage therein in defiance of such statutory provisions is no longer an open question, but well settled law (Dent v. State of West Virginia, 129 U. S., 114; People v. Phippin, 70 Mich., 6; Gosnell v. State, 52 Ark., 228; People v. Hasbrouck, 11 Utah, 291; State v. Wilcox, 64 Kansas, 789; State v. Edmunds, 127 Iowa, 333; State v. Call, 121 N. C., 643; Hawker v. New York, 170 U. S., 189; Foster v. Police Commissioners, 102 Cal., 483; see note in 14 Lawyers' Reports Annotated, 579).

Hardly a State has failed to use its power to regulate the practice of medicine and surgery by prescribing qualifications a candidate or applicant must possess as a condition precedent to his securing a license. There being no distinction between the power to revoke and the power to grant a

license, the statutes usually give to the board or tribunal before which one's qualifications are approved or disapproved the power to revoke licenses for cause. In other words both revocation and granting of licenses are exercise of the state's police power. Revocation is protection, not punishment.

While it has been held that a statute which authorized a State board to revoke a certificate for dishonorable conduct and making grossly improbable statements is void as being indefinite and uncertain (Hewitt v. State Board, 148 Cal., 590), the weight of authority seems to be contra to this and is to the effect that it would be well nigh impossible for the legislature to catalogue all the acts for which one's license might become forfeit (Macomber v. Board of Health, 28 R. I., 3; Aiton v. Medical Examiners, 13 Ariz., 354).

Since the medical statutes find their justification under the police power or the right of the state to frame laws regarding the public health, we find these practice acts among the laws of the various States. They are, then, like our divorce laws, by no means uniform. For this reason, it is impossible to make here an extended and exhaustive examination of these statutes and the legion of decisions handed down by the different State courts interpreting them. It is manifest that many such decisions have application only to the statute of a particular State and are not therefore of universal interest or relevancy. So we must

needs limit ourselves here to a consideration of the cases decided under sections of the statutes common to all the statutes. Those having occasion to look into the qualifications of medical licensure in a given State may consult the practice act of that State. The contents of the different acts are familiar to the profession. (For all ordinary purposes reference may be had to the abstract of these laws issued by the American Medical Association.)

Now, the criminal prosecutions under the practice acts for the illegal practice of medicine and surgery have caused many technical points for judicial construction to be raised. The Supreme Court of Rhode Island has this to say of the term "medicine" in respect of the subject in connection with which it is used. "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 science 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" (State v. Mylod, 20 R. I., 632). Words of any statute are taken in their natural meaning provided such words are of common use. Subtle

and forced constructions are not tolerated by the law unless such words if taken in their natural meaning, would be senseless.

There is a great number of cases where unlicensed persons have rendered services of a medical or surgical character and seek to evade responsibility by claiming they do not come under the statute. As to what constitutes the practice of medicine within the meaning of the various acts, it may be said that many of the statutes give definitions and the cases of those who claim not to be covered by the statutes show an inclination by the courts to stretch the jurisdiction of the statutes to all methods of treatment. (The New York statute on this point reads as follows: "§ 7. The practice of medicine is defined as follows: A person practises medicine within the meaning of this act, except as hereinafter stated, 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." L. 1907, Ch. 34.)

Thus it has been held that one who practises "bonesetting and reducing sprains, swellings and contraction of the sinews by friction and fomentation, but no other branch of the healing art" comes within the provisions of a statute prohibiting one practising physic or surgery from recovering a fee

without first complying with the law relating to licensure (Hewitt v. Charier, 16 Pick., 353). So one who practises as a clairvoyant has been considered as rendering medical services within the meaning of an act providing for licensing persons performing medical services.

Said the court: "The services rendered were medical in their character. True, the plaintiff does not call herself a physician, but she visits her sick patients, examines their condition, determines the nature of the disease, and prescribes the remedies deemed by her appropriate. Whether the plaintiff calls herself a medical clairvoyant, or a clairvoyant physician, or a clear-seeing physician, matters little; assuredly, such services as the plaintiff claims to have rendered purport to be and are to be deemed medical" (Appleton, C. J., in Bibber v. Simpson, 59 Me., 181).

In the case of Commonwealth v. Porn (196 Mass., 326) the complaint charged that the defendant "did practise medicine" and "held herself out as a practitioner of medicine" contrary to the statute. It appeared that she was unlicensed and while she did not claim to be a general practitioner of medicine yet held herself out as a midwife. She delivered many women in childbirth for a fee, and it also appeared that she carried with her when attending patients the customary obstetrical instruments, though she used these but rarely and then only when a physician was beyond call. She also prescribed for certain conditions

in accordance with the directions of six printed formulas. The court held these facts constituted the practice of medicine as intended by the statute. The defendant could therefore, it was held, be found guilty of a violation of the law.

The court said that although childbirth is not a disease, but a normal function of women, nevertheless the practice of medicine does not appertain exclusively to disease, and obstetrics as a matter of common knowledge has for a long time been treated as a highly important branch of the science of medicine. In another case in Massachusetts it was contended that a person could not be found guilty of the violation of a statute prohibiting one from practising medicine without prescribing or dealing out a substance used as a remedy for disease, but the court did not take this view of the matter as it considered it too narrow.

"The science of medicine," the opinion reads, "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 substance. 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 specific methods of treatment that are most effective in promoting cures" (Commonwealth v. Jewelle, 199 Mass., 558).

So also it has been held that one who practises osteopathy, which as a science or art includes the diagnosis and treatment of disease, comes within the purview of a statute making it illegal to practise medicine or surgery without first obtaining a certificate of qualification from the duly authorized board of examiners (Bragg v. State, 134 Ala., 165). The defence in many prosecutions for practising osteopathy is that no drugs nor other medicinal substances were administered nor applied internally, nor was any form of surgery resorted to in the treatment of disease. Therefore, it is argued, an osteopath does not come within certain statutory provisions. The availability of such a defence depends largely upon the phraseology of the statute under which the prosecution takes place. Thus it has been held that the term "medicine" as used in a statute pertaining to the regulation of medical practice had a technical meaning, and as a science its followers were not merely those who prescribed drugs or other remedial agents, but included practitioners of osteopathy who diagnosed and treated disease by a certain method (Bragg v. State, 134 Ala., 165).

On the other hand it has been held that one who practises osteopathy is not within such a statute, the court saying, "Medicine is an experimental, not an exact science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the

Master, who was Himself called the Good Physician, was told that other than his followers were casting out devils and curing diseases, He said: 'Forbid them not' " (State v. Biggs, 133 N. C., 729). What has been said of osteopathy is likewise true of Christian Science.

The lack of uniformity in the texts of the statutes has given birth to decisions diametrically opposed to each other in the conclusions reached, and it follows that many of these decisions are only of local importance, having been decided under provisions of practice acts differing materially from the corresponding provisions of practice acts of other States. In some States express provision is made by statute for practitioners of osteopathy and Christian Science. It should be noted here that generally speaking all cases of practising medicine and surgery under the acts mean practising for compensation.

Despite the fact that many of the statutes expressly prohibit the use of any title, word, letter or designation intending to imply or designate a person as a practitioner of medicine or surgery, yet it has been held that in the absence of a provision to this effect one may lawfully assume the title "doctor" (State v. Mylod, 20 R. I., 632). In State v. Heath (125 Iowa, 585) Mr. Justice Ladd said: "It is doubtless true 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." Where a person kept an office over the door of which was a sign, "Dr. Phippin, Magnetic Healer," and several persons visited him, receiving treatment, it was held this constituted a holding out as a physician in violation of law (People v. Phippin, 70 Mich., 6).

In another case where the evidence showed that the defendant held himself out as a magnetic healer styling himself "Professor," yet was not a graduate of a medical school and had no license, but treated a patient for a lame ankle, diagnosed as rheumatism, the treatment consisting in rubbing and holding the ankle, for which treatment he charged one dollar, it was held that this evidence was sufficient to show the defendant guilty of practising medicine (Parks v. State, 159 Ind., 211).

But where one advertised himself as a famous eye expert and extended an invitation to all persons with certain defects of vision to have glasses fitted, yet did not treat or prescribe for disease or deformities, it was held that even though his glasses had relieved and cured eye trouble, he did not profess to practise medicine and surgery within the meaning of the statute (People use of Board of Health v. Smith, 208 Ill., 31).

In Witty v. State (173 Ind., 404) the defendant advertised himself as a graduate of a school of suggestive therapeutics. He was unlicensed and in his advertisement stated, "Every known disease cured without medicine or surgery." He an-

nounced himself as a specialist in all chronic diseases, mentioning a long list of diseases which responded readily to his treatment. His treatment consisted in rubbing the afflicted parts. For such treatment he charged a fee. He was held responsible for practising medicine without complying with the law.

The sale of patent medicines is not unlawful, but where an unlicensed person claimed to be a physician, held himself out to the world as such, examined a patient who had requested his services and then diagnosed the disease, fixed the amount of compensation and gave the patient a prescription, it was held that he could not evade the law by proving that the medicine was a proprietary remedy prepared and sold by him (State v. Van Doran, 109 N. C., 864).

It has also been decided that where one prescribed or administered something which he claimed was good for the alleviation of pain or the cure of disease, the fact that what he so administered did not have the remedial qualities he claimed for it, would be unavailing as a defence, inasmuch as the statute was intended to protect the community from fraud and pretence (State v. Heffernan, 28 R. I., 20).

In Payne v. State (112 Tenn., 588) a person engaged in advertising a patent medicine by speeches to a crowd gathered in the open air said in his harangue that if a sufferer with a stiff neck or joint or hand, headache, neuralgia or rheuma-

tism would come onto the platform he would guarantee to cure such person in five minutes with his liniment. He would then treat any person coming upon the stage. To one person he said his medicine was good for nervousness and stomach trouble and that person thereupon bought a bottle. He also said that directions were on the bottle and a patient could graduate a dose according to the needs of his case. He gave other directions regarding diet. On this evidence he was found guilty of practising medicine contrary to law.

A very recent case of interest in Arkansas doubted the right of the legislature of that State to pass a law prohibiting physicians from soliciting patients by paid agents. The court held that such a statute is not void, but justified under the police power. The court said, inter alia: "Counsel for the plaintiff quotes Oliver Wendell Holmes as saying that, 'if the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes.' We do not dispute that statement, for there may be some truth in it; and it is possible that the legislature had something of the kind in mind when it passed this act. It may have thought that people are too much inclined to imagine themselves in ill health, too prone to consult doctors and take medicine anyway, without being urged to do so by hired agents.

"If it is true, as the 'eminent medical author-

ity' quoted by counsel says, 'that out of twenty-four serious cases of disease three could not be cured by the best remedies, three others might be benefited, and the rest would get well anyway.' If this be true, is it not better as a rule to 'throw physic to the dogs,' and let nature take her course? Now, it is probable the conscientious physician would give that advice to his patient in a case where he needed no medicine.

"But it is not likely a physician would hire an agent to drum up patients for him, only to say to them: 'Go thy way; thou dost not need a physician.' A physician who has secured a patient by means of a hired agent has paid out a certain sum to obtain his patient, and is under a strong temptation to put him through a course of treatment, whether he needs it or not, in order to get his money back and make a profit on his investment. And therein lies a danger to the public from such practice. When a physician obtains a patient in that way, he, in effect, buys them, just as if he said to the agent, 'I will pay you a certain sum for every patient you send me;' or, 'I will pay you a certain fee out of the money I receive from each patient you send me.'

"Now, we do not think prudent people would wish to submit to the advice of a physician who had paid out money to get them under his treatment. To be successful, the agent would necessarily have to keep his interest in the transaction

secret from the patient; and it can be easily seen that such a method of securing patients would very often result in imposition and fraud on the patient, and in inducing many people to take treatment who did not need it'' (Thompson v. Van Lear, 77 Ark., 506; 5 L. R. A. (N. S.), 588).

Résumé.—The conservation of the public health has caused the legislatures of the various States to act upon the supposed necessity of restricting medical practice. This is vindicated under the police power of the state. The individual right is subordinated to the public weal. As long as the nature and extent of the qualifications required are appropriate to the profession and are attainable by reasonable study or application and are not arbitrary and capricious, their stringency or difficulty is immaterial. The provisions and regulations of the statutes are enforceable in the usual mode established with regard to kindred matters, with proceedings adapted to the nature of the case, which need not necessarily be court proceedings. No attempt has been made here to review the various grounds upon which these statutes are said to contravene State and federal constitutions. Nor have we like a chemist in his laboratory with crucible and test-tube, attempted to find the constituent elements and make a critical analysis of these statutes. (See Part II of Medical Law, by J. W. Wilcock, containing Acts of Parliament; Statutes Regulating Medical Practice, by Lewis Hoch-

heimer, Vol. 61, Central Law Journal, 428; Vol. 39, American Digest (Century Edition), title, Physicians and Surgeons, §§ 1-15; Vol. 30, Cyclopædia of Law and Procedure, pp. 1547-1570; American and English Encyclopedia of Law, Vol. 22, pp. 780-788.)

TABLE OF CASES CITED

GENERAL INDEX