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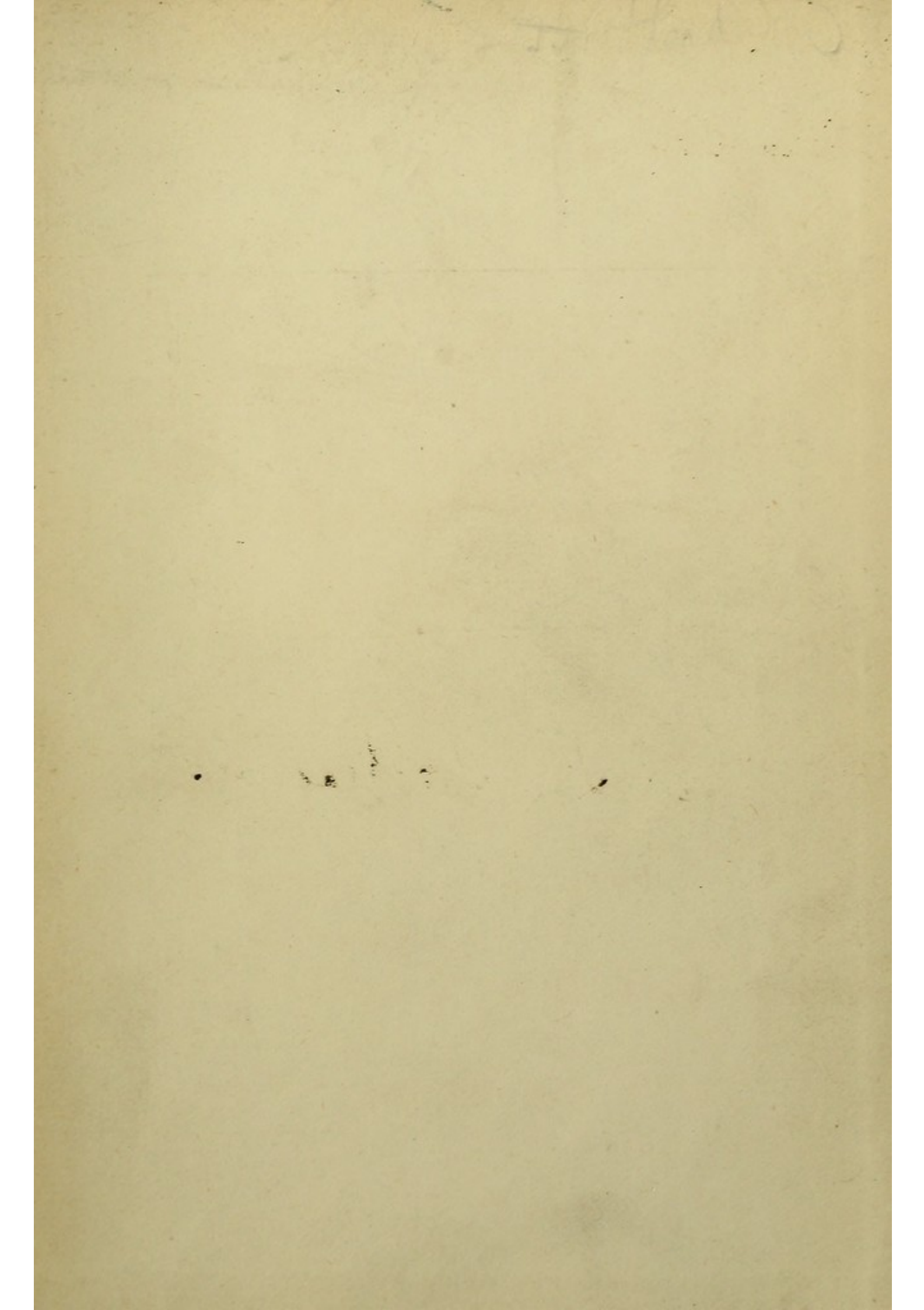
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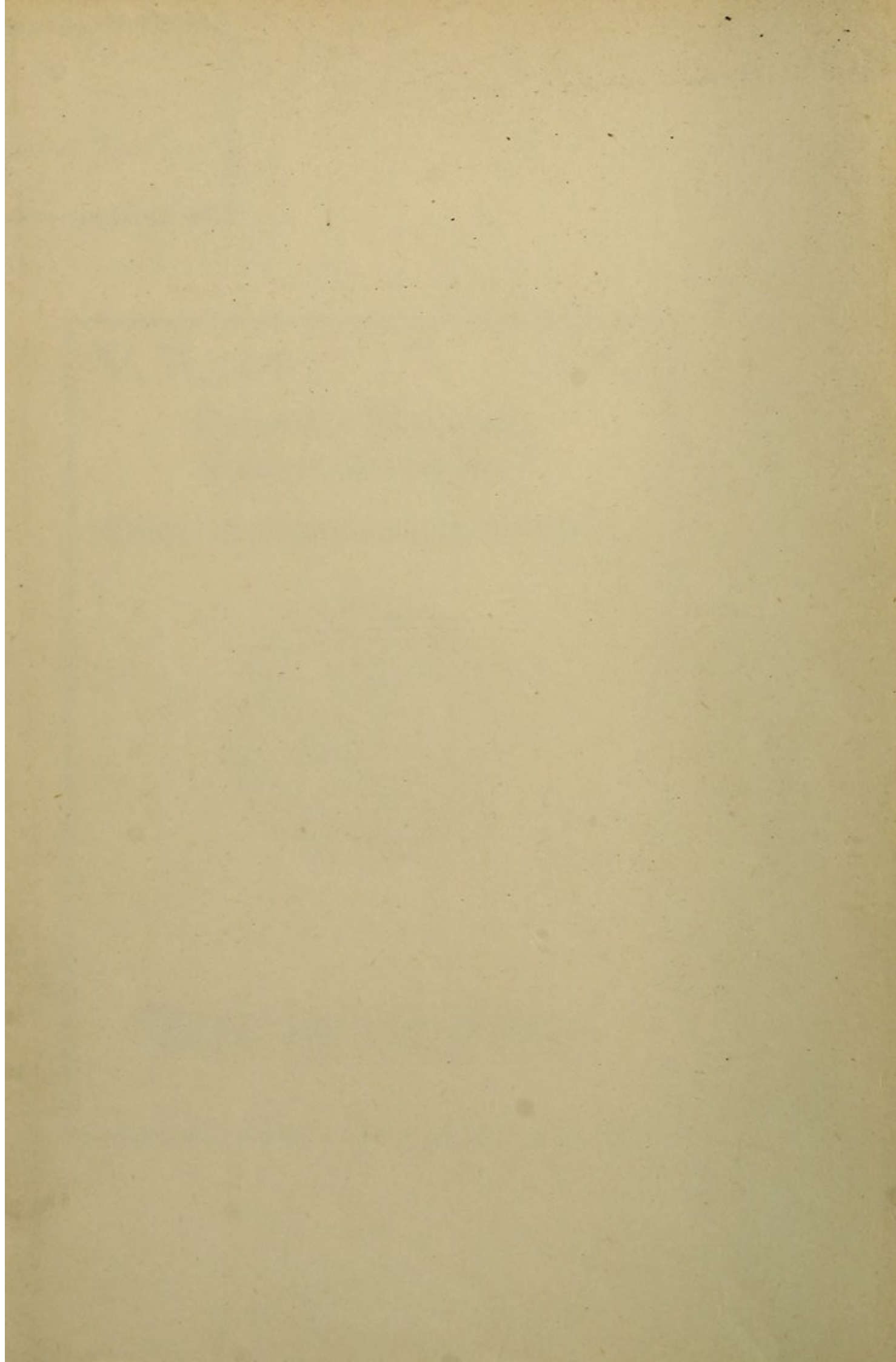
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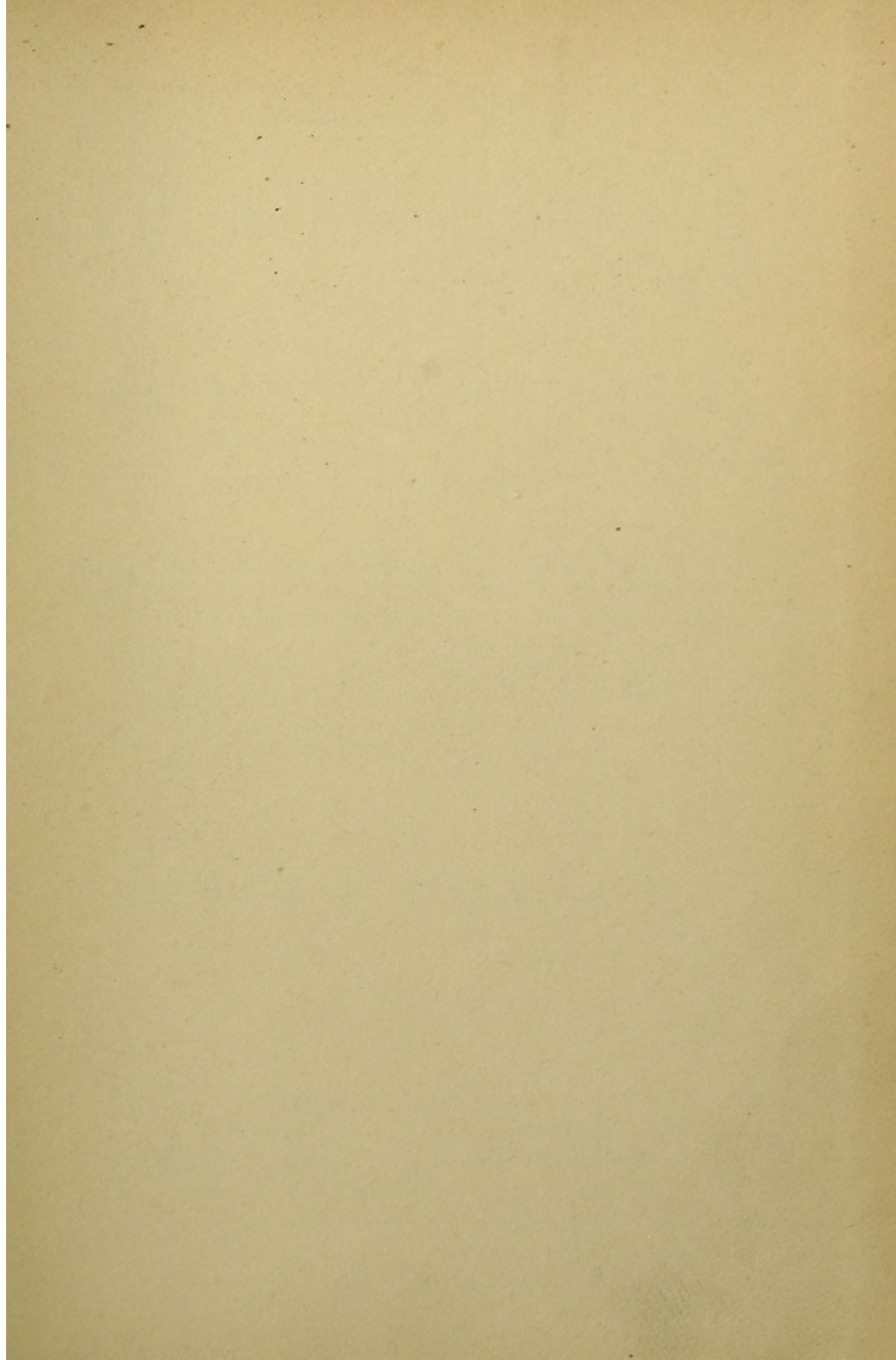
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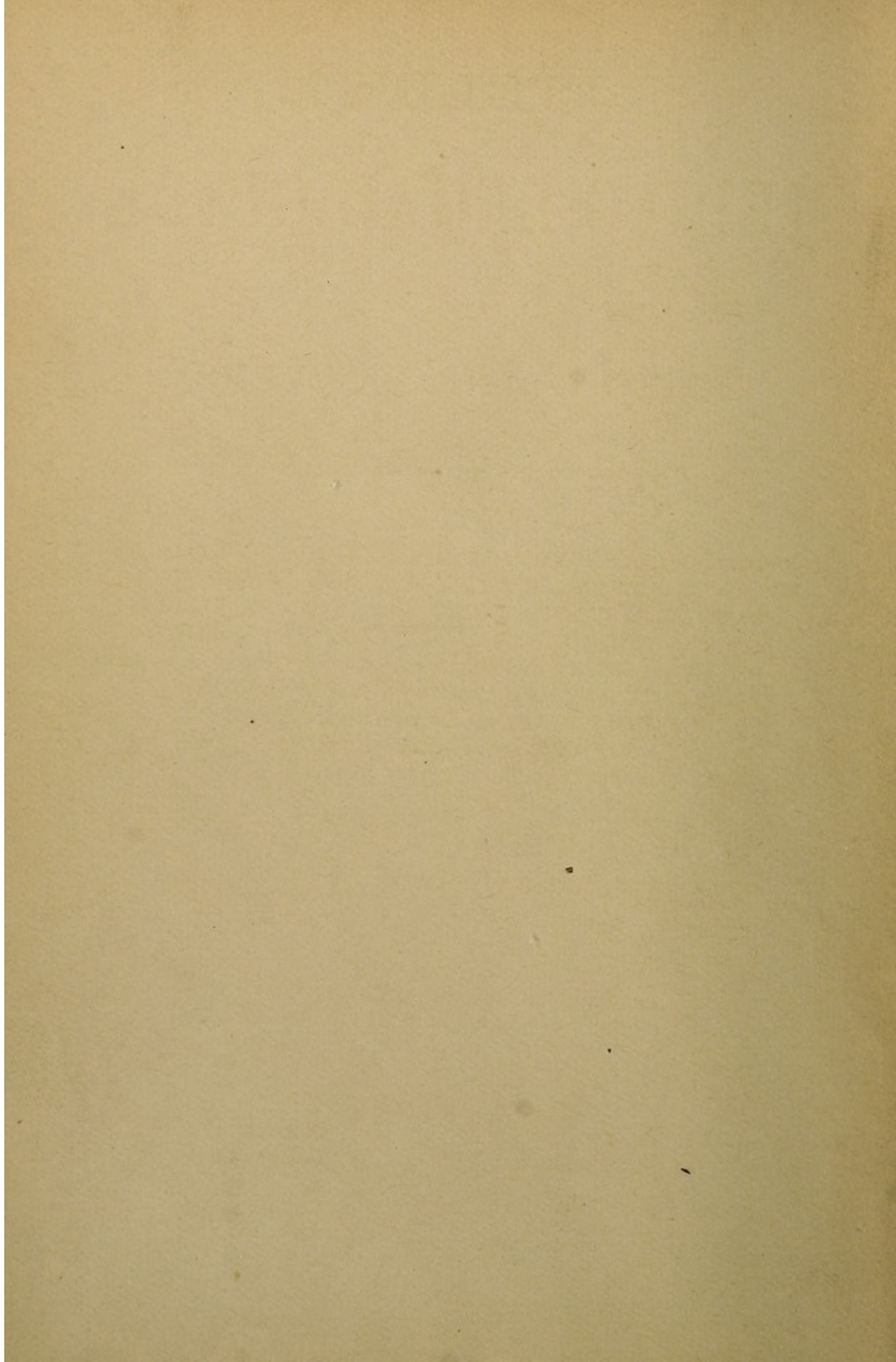


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E. A. Tucker, M.D.
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FIELD'S *Nov. 29/93.*

MEDICO-LEGAL GUIDE

FOR
DOCTORS AND LAWYERS,

EMBRACING THE FOLLOWING SUBJECTS:

*MEDICAL WITNESSES; MEDICAL EXPERT TESTIMONY;
INSANITY AND ITS LEGAL RELATIONS; PRIVILEGED
COMMUNICATIONS; ABORTION; CIVIL LIABILITY
OF MEDICAL MEN FOR MALPRACTICE; CRIMI-
NAL LIABILITY FOR MALPRACTICE; LIA-
BILITY FOR PRACTICING IN VIOLATION
OF STATUTES; DAMAGES; COMPEN-
SATION; MEDICAL ETHICS.*

BY
GEORGE W. FIELD, LL. B.

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TABLE OF CONTENTS.

CHAPTER I.

MEDICAL WITNESSES.

- § 1. Compulsory attendance of.
- 2. The oath; and religious belief.

CHAPTER II.

MEDICAL EXPERT TESTIMONY.

- § 3. In general; the opinions of medical men.
- 4. Unsatisfactory character of expert testimony.
- 5. Opinions of medical men as to sanity.
- 6. Where opinions rest upon personal examination, the facts should be stated.
- 7. Governmental experts recommended.
- 8. Opinions of non-expert witnesses; when allowed.
- 9. Distinction between expert and non-expert witnesses.

CHAPTER III.

INSANITY AND ITS LEGAL RELATIONS.

- § 10. Varieties of unsoundness of mind.
- 11. Insanity defined and described.
- 12. Amentia; what it embraces.
- 13. Imbecility; what it embraces.

- § 14. Cretinism.
15. Idiocy.
16. Imbecility.
17. Question of civil and criminal liability of imbeciles considered.
18. Imbecility as an excuse for acts civil and criminal.
19. Moral imbeciles.
20. Dementia distinguished from amentia.
21. Legal relations of dementia—in case of wills.
22. Mania defined.
23. General mania ; character of.
24. Intellectual mania.
25. Partial mania, or monomania.
26. Delusions and hallucinations in general.
27. Moral and effective mania ; morbid impulses.
28. Homicidal mania, or the propensity to kill.
29. Kleptomania, or propensity to steal.
30. Disinclination to regard it as a defense.
31. Pyromania, or a propensity to burn ; and aidoimania, sexual propensity.
32. These have not received much favor as a defense.
33. Alcohol ; its uses and effects.
34. The psychological effects of alcohol.
35. Alcoholism defined.
36. Quininism ; similarity of symptoms to alcoholism.
37. Delirium in general.
38. Legal relations of delirium.
39. *Delirium tremens*, or *mania a potu*.
40. Symptoms and general characteristics of *delirium tremens*.
41. Legal relations of *delirium tremens*.
42. Civil acts of persons of unsound mind.
43. In case of wills.

- § 44. Conduct and declarations of the testator.
- 45. The test of capacity to manage business.
- 46. Doctrine as to the burden of proof.
- 47. General presumption.
- 48. Test of capacity to contract.
- 49. Liability for torts.
- 50. Unsoundness of mind as a defense to a criminal charge.
- 51. Insane delusions and irresistible impulses.
- 52. Common sources and manifestations of insane delusions.
- 53. Test of capacity required for criminal responsibility.
- 54. Impulsive mania, or uncontrollable impulse.
- 55. Defense on the ground of.
- 56. In case of drunkenness ; legal responsibility.
- 57. Drunkenness as a mitigation of criminal acts.
- 58. *Delirium tremens* as an excuse in criminal cases.
- 59. Dreaming ; illusions and delusions common to.
- 60. Legal relations of dreaming.
- 61. Somnambulism ; common manifestations of.
- 62. The legal relations of somnambulism.
- 63. Statutory provisions relating to the responsibility of persons mentally unsound.
- 64. Construction of statutes and the common law on the subject.
- 65. Rules suggested on examination of mental condition.

CHAPTER IV.

PRIVILEGED COMMUNICATIONS.

- § 66. At common law, between attorney and client.
- 67. Protection of confidential communications by statutes.

- § 68. Protection of confidential communications made to clergymen or priests.
- 69. The privilege may be waived.
- 70. Construction of the statutes on the subject.
- 71. The general rule applicable to other professions.
- 72. Illustration of the rule in case of surgeons.

CHAPTER V.

ABORTION.

- § 73. Defined ; quick with child explained.
- 74. Maternal causes of abortion.
- 75. Foetal causes of abortion.
- 76. Natural and innocent causes of abortion.
- 77. Artificial and innocent abortion ; premature labor.
- 78. Chief methods employed to produce abortion.
- 79. Criminal abortion ; methods of procuring.
- 80. Statutory provisions on the subject.
- 81. Construction of statutes on the subject.
- 82. In case death results from producing.
- 83. The killing of a quick child, or of a woman quick with child, in attempts to produce unlawful miscarriage.
- 84. Signs of abortion during the life of the patient.
- 85. Signs on examination of a female after death.
- 86. Examination of the foetus ; strains, etc.
- 87. Infanticide ; distinction between, and foeticide.
- 88. Evidence of life subsequent to birth of child.
- 89. Modes of destroying the life of a child after birth.
- 90. Summary of matters to be observed on examination of the body of the woman to determine the question of abortion.
- 91. Indictments ; evidence.

CHAPTER VI.

CRIMINAL LIABILITY FOR NEGLIGENCE OR MISCONDUCT.

- § 92. Statutory provisions on the subject.
- 93. General criminal liability at common law for malpractice.

CHAPTER VII.

PRACTICE WITHOUT A LICENSE OR DIPLOMA
PROHIBITED.

- § 94. General provisions of statutes on the subject.
- 95. Criminal liability for practicing without license.
- 96. Criminal liability for causing death by administering a drug or medicine in a state of intoxication.
- 97. Removal of attorneys for misconduct.
- 98. Duty of attorneys to the court.
- 99. Disbarment or suspension of an attorney not necessarily final.

CHAPTER VII.

CIVIL LIABILITY FOR MALPRACTICE.

- § 100. Various kinds of malpractice defined.
- 101. Liability for damages in general for malpractice.
- 102. Skill required of a surgeon or physician.
- 103. Not bound to use the highest degree of skill.
- 104. Implied duty of the physician or surgeon.
- 105. These general principles applicable to dentists.
- 106. Instance of the liability of a physician in a special case of impropriety.
- 107. Proof of malpractice ; burden of.

CHAPTER VIII.

DAMAGES.

- § 108. Matters in defense or mitigation.
- 109. In case of contributory negligence.
- 110. Punishment for the crime no defense to civil action.
- 111. The measure of damages.

CHAPTER IX.

COMPENSATION.

- § 112. The contract for services and compensation may be express or implied.
- 113. Common presumptions; amount of compensation implied.
- 114. Where the request for services is made for the benefit of another.
- 115. Intrusive and voluntary services.
- 116. Measure of value of services.
- 117. Judgment for services a bar to action for malpractice.
- 118. Statutes regulating the collection of compensation.
- 119. Proof of a diploma from a medical college.

CHAPTER X.

MEDICAL ETHICS.

- § 120. Code of medical ethics of the state of New York and other states.

FIELD'S MEDICO-LEGAL GUIDE,

— FOR —

DOCTORS AND LAWYERS.

CHAPTER I.

MEDICAL WITNESSES.

§ 1. Compulsory attendance.

A physician or surgeon may be required to appear and testify in courts or before judicial or other officers, either as an ordinary witness or as an expert, and either orally or by deposition, in the same way as a non-professional person, that is, upon due service of a subpoena upon him, commanding him to do so. In various states the party thus served with a subpoena may, at the time of service, if it be in a civil case, demand fees in advance, usually fixed by statute,

as for one day's attendance and mileage*; and a failure to pay him such sum would usually constitute an excuse for non-attendance. Witness fees are fixed by statutes in the various states, and the amount may vary in different courts in the same state. And usually in the various states expert witnesses are allowed more than common witnesses for attendance, which amount is generally fixed by statutes. When a subpoena has been duly served, and the fees advanced when demanded, if the witness is entitled to advance fees, it is the duty of the person thus served to obey the command of the writ, and a failure to do so without some reasonable cause,—such as physical infirmity or some accident which rendered it impossible, would be a contempt of court, and subject the offender to fine or imprisonment or both. On these subjects it may be necessary to consult the local statutes, or some lawyer, for information where it is important: See 1 Greenl. on Ev., §§ 309, 310; Best on Ev. (Morg. Am. ed.). § 125; 3 Field's Lawyers' Briefs, §§ 297, 335; 1 Phil. on Ev. 116; Field's Fed. Courts, § 225; Rev. Stat. U. S., §§ 848, 870.

§ 2. The oath — religious belief.

Passing all questions relating to the competency of witnesses in general, we will consider briefly the oath, affirmation or asseveration required of the witness, by which he promises to tell the truth in reference to matters under consideration and to which he is called to testify.

It was affirmed by Lord Coke, who represented the bigotry of the age in which he lived, that an infidel could not be a witness, which would exclude Jews, Mohammedans and all pagans, and in fact all who were not Christians: 7 Co. 17; Puffendorf, b. 4, c. 2, § 4; Best on Ev. (Morg. Am. ed.), § 134. A former test of the qualification of a person to take an oath was that he believe in a God who will punish false swearing in a future life. But these tests have generally been discarded by custom or abolished by statute.

The form of administering the oath may be varied to conform to the religious belief of the individual, so as to make it binding upon his conscience; and it may be administered by any ceremony calculated to accomplish the object.

A Jew may be sworn upon the Pentateuch or Old Testament (with his head covered); a Mo-

hammedan on the Koran ; a Gentoo by touching with his hand the foot of a Brahmin or priest of his religion ; a Brahmin by touching the hand of another such priest ; a Chinaman by breaking a China saucer ; a Christian by laying his hand upon the New Testament while a familiar formula is repeated.

In various states, under statutes, it is sufficient for the witness merely to hold up a hand while the usual formula is being repeated by the proper officer. And in most of the states he may merely declare or affirm, if he elects so to do, the proper officer in the presence of the witness merely stating that the witness does so declare or affirm that he will tell the truth, to which the witness assents orally or by a nod of the head : See Bouv. L. D., *Oath* ; Best on Ev. (Morg. Am. ed.), § 163 ; 1 Greenl. on Ev. (7th ed.), § 328 ; Tyler on Oaths, 15 ; 1 Whart. C. L. (7th ed.), §§ 795-799 ; 3 Field's Lawyers' Briefs (sub. Evidence), § 302.

The objection to the competency of witnesses who have no religious belief is removed in England and in most of the states by statutory enactments : 1 Whart. on Ev., § 395.

CHAPTER II.

MEDICAL EXPERT TESTIMONY.

§ 3. In general; opinions of medical men.

Expert witnesses are those who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue: Bouv. Law. Dic., *Experts*. They are persons professionally conversant with the practice, science, skill, or trade in question: Best on Ev., § 346; Strickel on Ev. 408.

On this subject Mr. Greenleaf observes: "On questions of science, skill or trade, or others of a like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. Thus the opinions of medical men are constantly admitted as to the cause of disease or death, or the consequences of wounds, or as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill. And such opinions

are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself, as proved by other witnesses on the trial : " 1 Greenl. on Ev., § 440 ; Phil. & Am. on Ev. 899 ; Stark. on Ev. 154 ; 3 Field's Lawyers' Briefs, § 317 ; *Hardy v. Merrill*, 57 N. H. 227 ; 22 Am. Rep. 441.

It may be observed, generally, that a witness is not required to testify in a positive manner, but he may state his impression as to occurrences, facts or events, from his knowledge or recollection of them, and he has the right, and may be compelled to refresh or assist his memory, where it is at fault, by reference to a written instrument, memoranda, or other document. 1 Greenl. on Ev., § 440 ; *Blake v. People*, 73 N. Y. 586 ; *Reed v. Boardman*, 20 Pick. (Mass.) 441 ; *Kan v. Stivers*, 34 Ia. 123 ; 3 Field's L. B. (sub. Evidence), § 318.

A witness having some knowledge of the value of property may give his opinion of its value : *Emerson v. Gas Co.*, 6 Allen (Mass.), 148 ; *Bank v. Rutland*, 33 Vt. 414 ; *Cautling v. Railroad Co.*, 54 Mo. 385 ; 14 Am. Rep. 467. And an expert in science, skill, or trade, may ex-

press an opinion in reference thereto : Carter *v.* Boehem, 1 Smith's Lead. Cas. 286 ; Stark. on Ev. 154 ; Phil. & Am. on Ev. 899. But a medical expert cannot express an opinion or give his views as to matters of legal or moral obligation, as whether a practitioner of medicine has faithfully and honorably discharged his duty to his medical brethren, as this would be a matter for the court or jury to determine : Ramage *v.* Ryan, 9 Bing. (Eng.) 333 ; Campbell *v.* Richards, 5 B. & Ad. (Eng.) 340 ; Joyce *v.* Ins. Co., 45 Me. 168 ; Gibson *v.* Williams, 4 Wend. 320 ; People *v.* Bodine, 1 Den. (N. Y.) 281 ; Cautling *v.* Railroad Co., *supra*.

In a note by Mr. Smith to Carter *v.* Boehem, *supra*, he observes : " On the one hand it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance ; in other words, when it so far partakes of the nature of a science as to require a previous habit or study in order to the attain-

ment of it ; while on the other hand it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it : " See *Hardy v. Merrill*, 56 N. H. 227 ; *Com. v. Sturtevant*, 117 Mass. 122 ; 19 Am. Rep. 401. And a witness cannot generally give his opinion as an expert upon matters of common knowledge, and not requiring special skill or experience : *White v. Ballou*, 8 Allen (Mass.), 408 ; *New Eng. Glass Co. v. Lovell*, 7 Cush. (Mass.) 321 ; *Luce v. Dorchester Ins. Co.*, 105 Mass. 299. Thus brakemen, baggage-masters and conductors cannot testify as experts as to the coupling of cars and its dangers : *Muldowney v. Ill. C. R. Co.*, 36 Ia. 462 ; *Page v. Parker*, 40 N. H. 47. Nor is it admissible to give an opinion as an expert as to the management of fire : *Teal v. Barton*, 40 Barb. 37 ; *Fraser v. Tupper*, 29 Vt. 409. Or as to the necessity of a gate and signals at an open draw-bridge : *Nowell v. Wright*, 3 Allen, 166.

§ 4. Unsatisfactory character of expert testimony.

The value of expert testimony may depend upon various circumstances, as upon the circumstance of corroboration or not by common or other expert testimony, or upon the circumstance of contradiction or not by testimony, common or expert. And in many cases expert testimony, though it may be competent, is of little value: Best on Ev. (6th ed.), § 514; Taylor's Ev., § 50; Dickinson *v.* Fitchburgh, 13 Gray (Mass.); Winans *v.* New York & E. R. Co., 21 How. (U. S.) 101; Tracy Peerage Case, 10 C. & F. (Eng.) 191. See also article by Prof. Washburn, 1 Am. Law Rev. 45; Mr. Lawson's article, 25 Alb. Law Jour. 367. And this is especially the case in *ex parte* investigations: 1 Whart. C. S. (7th ed.), § 821 *h*. And in such cases expert testimony is inadmissible if better evidence can be obtained: State *v.* Hayes, 22 La. An. 39.

On this subject Mr. Wharton observes: "In all matters of material law, expert testimony, when fully and fairly collected, is to be accepted as a matter of fact. . . . Nothing is more common than to examine a surgeon as to whether

death resulted from natural causes, or from certain artificial agencies which may be the subject of inquiry, and as to whether certain stains were from human blood. In such cases, when experts testify to undisputed demonstrations of physical science, then the court accepts such rendition and declares the law that therefrom springs. When the facts are disputed, then the jury is to determine where the preponderance of proof lies. But when the testimony of the expert touches either jurisprudence or speculative psychology or ethics, then such testimony is to be viewed as a mere argument, which, if admissible at all, is to be treated simply as if addressed to the judgment of the court:" 1 Whart. C. L., § 50. See also 1 Whart. & S. Med. Jur., §§ 280-282; 1 Stark. Ev. 154; *Gardiner v. People*, 6 Park. C. R. (N. Y.) 155; *State v. Knights*, 43 Me. 11; *Caleb v. State*, 39 Miss. 722; *Gaines v. Commonwealth*, 50 Pa. St. 319.

Of the character, quality and value of expert testimony as to sanity, Judge Davis, of the Supreme Court of *Maine*, in *Neal's Case*, used the following perhaps rather extravagant expressions on the subject: "If there is any kind of testimony

that is not only of no value, but even worse than that, it is, in my judgment, that of medical experts upon the question of mental unsoundness. They may be able to state the diagnosis of a case most learnedly ; but upon the question whether it had at a given time reached such a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country : " 1 Redf. on Wills, ch. 3, § 13.

Of the unsatisfactory character of expert testimony Judge Woodruff uses the following more temperate language in his charge to a jury : "Where the opinion is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury. Testimony of experts of this latter description, and especially where the speculative and theoretical character of the testimony is illustrated by opinions of experts on both sides of the question, is justly the subject of remark, and has been often condemned by judges as of slight value. And like observations apply, to a

greater or less degree, to the opinion of witnesses who are employed for a purpose and paid for their services ; who are bought to testify as witnesses for their employees. . . . This condemnation is not always applicable ; often it would be unjust. Where an expert of integrity and skill states conclusions which are the necessary or even the usual results of the facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited : " *Gay v. Mut. Ins. Co.*, 2 *Bigelow's Life Ins. Cas.* 14.

Drs. Wharton and Stiles, in their valuable work on Medical Jurisprudence, express themselves on this subject as follows : " Experts have been found to testify that no sane person commits suicide, and that all suicides are insane ; that all men are more or less insane ; that certain propensities or faculties can become insane by themselves, and when insane are irresistible ; that very bad people, and especially old convicts, are, as a rule, insane ; and that certain signs, which signs the great body of the profession regard as indifferent, are sure marks that insanity has set in. There is in fact no psychological

defense, no matter how whimsical, that has not been based on the speculations of isolated experts, and that has not found some isolated experts to swear to on trial. That the sober, practical thought of the great body of alienists reject these extravagancies, cannot be questioned; but how are the views of this great body to be ascertained? Of course it is easy for a party to summon the single expert who may happen to have propounded the bizarre theory which is necessary to sustain such party's case. But how is such expert to be contradicted? How is it to be shown that the whole sense of the profession is against him, and that he is himself laboring under one of those delusions to which, as has been seen, men of science are liable as men of other professions or modes of training? It is impossible to summon the whole profession to prove this. It is inadmissible for one to testify as to the opinions of others. There is no supreme court among experts by which conflicting views can be reconciled and an authoritative judgment pronounced. There is no power by which the testifying expert, who assumes a semi-judicial post, can be

made to accept judicial responsibilities—can be made to hear counsel to instruct him on both sides of each contested point of psychology; can be made to feel that he is bound to testify to the views of his whole profession. Hence, when the trial comes on, the expert who is selected because he holds views which the great body of his profession rejects, testifies often alone, or with but slight and inadequate correction. Hence it is that high medical authority has called for the abandonment of the present system of ‘voluntary’ experts, and the establishment of a government board, as is the case in Germany. Hence, also, after one conspicuous instance of failure of justice from this cause—that in the case of Mr. Windom, in 1866—the feeling was so strong of the mischief done by crowding cases with incompetent or extravagant experts to the exclusion of the sober and authoritative, that the Lord Chancellor proposed in the House of Lords, though without pressing the proposition to a vote, to exclude such testimony altogether in commissions of lunacy, except so far as it is based on facts within the personal knowledge of the witnesses:” 1

Whart. & S. on Med. Jur., §§ 290-295. See also *post*, sub. Mental Unsoundness and its Legal Relations.

In support of the argument of these distinguished authors as to the unauthoritativeness and capricious character of medical expert testimony they refer to three remarkable trials which took place in the United States in 1872, as follows: Mrs. E. G. Wharton was tried in Maryland for the poisoning of General Ketchum, and the experts called by the State to prove poison were flatly contradicted by experts of at least equal authority, called by the defense, who swore that neither in symptom nor autopsy was poison shown. A few months later occurred the trial of Stokes for the murder of Fisk, in which experts, equal at least in respect to number, contradicted each other directly on the question whether Fisk was killed by Stokes or by the surgeons who endeavored to extract Stokes' balls. And in September, 1872, as if to exhibit this capriciousness in the strongest relief, followed in Pennsylvania the second trial of Dr. Schœppe. He was convicted, on a former trial, on the testimony of a single expert, of murder by poison; and it was not till after a delay of

more than two years, and then only by legislative action, that a new trial was obtained. Then was it discovered that there was nothing in the prosecution's case. The expert on which it relied, though respectable and conscientious, had been guided by tests which recent science had shown to be worthless. The court ordered the acquittal on the ground that there was not even a *prima facie* case of the *corpus delicti*. But a cruel wrong had been done to the accused by the first trial, as well as a great scandal to public justice.

Where the question is whether there is unsoundness of mind of a person sufficient to avoid a contract or will made by him, it has been held improper to inquire of a medical expert whether he had sufficient mental capacity to transact business or to make a will, as that is a matter of law : *Fairchild v. Bascom*, 35 Vt. 398. The proper mode of proceeding in such a case would seem to be to take the facts proved by the expert witness or others relating to the subject, or admitted, and assuming them to be true, inquire of the witness if in his judgment they were indicative of insanity or unsoundness of mind : See Woodbury

v. Obear, 7 Gray (Mass.), 476 ; *People v. McCann*, 3 Park. C. R. (N. Y.) 272 ; *R. v. Higginson*, 1 Car. & K. (Eng.) 129 ; *R. v. Francis*, 4 Cox C. C. (Eng.) 57 ; *R. v. Richards*, 1 F. & F. (Eng.) 87.

§ 5. Opinions of medical experts as to sanity on hypothetical cases.

It is admissible for an expert or professional witness to give an opinion of a party's sanity, on a hypothetical case, whether it be for the purpose of determining the competency of the party to contract or to make a will, or his liability for crime. And he may be interrogated as to his opinion of certain designated facts presented in a case, supposing them to be true : *United States v. McGlue*, 1 Curtis (U. S. C. C.), 1 ; *Fairchild v. Bascomb*, 35 Vt. 398 ; *Negro Jerry v. Townshend*, 9 Md. 145 ; *State v. Windsor*, 5 Har. (Del.) 512 ; *Davis v. State*, 35 Ind. 496 ; *State v. Kilingler*, 46 Mo. 224 ; *McAlister v. State*, 17 Ala. 434 ; *Wetherbee v. Wetherbee*, 38 Vt. 454.

But counsel are limited in propounding questions to the case as presented by the evidence : *State v. Stokeley*, 16 Minn. 282. Hence, while medical experts may give their opinions in cases where the facts are not disputed, such experts

are confined, where there is a conflict of testimony, to answers to a hypothetical case : 1 Whart. C. L. (7th ed.), § 50 *d* ; *Wilkinson v. Mosely*, 30 Ala. 562 ; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500.

In the case last cited will be found, in the able opinion of Chief Justice Shaw, a clear and succinct statement and exposition of the law on this subject, as follows : "The opinions of professional men on a question of this description are competent evidence, and in many cases are entitled to great weight and respect. The rule of law on which this proof of the opinion of witnesses who knew nothing of the actual facts of the case is founded, is not peculiar to medical testimony, but is, as a general rule, applicable to all cases where the question is one depending on skill and science in any particular department. In general it is the opinion of the jury which is to govern, and this is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and profession

have brought that class of facts frequently and habitually under their consideration. Shipmasters and seamen have peculiar means of acquiring knowledge and experience in whatever relates to seamanship and nautical skill. When, therefore, a question arises in a court of justice upon the subject, and certain facts are proved by other witnesses, a shipmaster may be asked his opinion as to the character of such facts. The same is true in regard to any question of science, because persons conversant with such science have peculiar means, from a larger and more exact observation, and long experience in such department of science, of drawing correct inferences from certain facts, either observed by themselves or testified to by other witnesses. A familiar instance of the application of this principle occurs very often in cases of homicide, when, upon certain facts being testified to by other witnesses, medical persons are asked whether, in their opinion, a particular wound prescribed would be an adequate cause, or whether such a wound was, in their opinion, the actual cause of death in the particular case. Such question is commonly asked without objection ;

and the judicial proof of the fact of killing often depends wholly or mainly upon such testing of opinion. It is upon this ground that the opinion of witnesses who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease at the time of its supposed existence. It is designed to aid the judgment of the jury in regard to the influence and effect of certain facts which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had, are of great weight, and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives

it. One caution in regard to this point it is proper to give. Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified to by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to put to the professional witnesses is this: If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether in their [the witnesses'] opinion the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances."

In treating the question of evidence relating to the sanity of a testator, Mr. Abbott, in his valuable treatise on Trial Evidence, has furnished a very concise statement of the law relating to opinions as to mental soundness or unsoundness in relation to capacity to make a will; and the

general principle would be the same, whatever the object of the inquiry may be. He says : "An expert may testify directly as to mental capacity in either of three ways :

" 1. If he had adequate opportunities of personal examination of the testator, he may state his opinion positively, based upon his personal knowledge of the facts, but not upon hearsay nor upon conflicting testimony in the cause.

" 2. An expert who has heard all the testimony adduced upon the trial bearing on the question, may, if it is not conflicting, give his opinion on the question, what the facts sworn to, if true, would indicate as to the mental condition.

" 3. An expert may be asked what a supposed state of facts, put to him hypothetically, but corresponding in details to the facts already in evidence, would indicate as to mental condition. When the evidence involves conflict, the opinion, if not based wholly on personal examination, should be drawn out by an hypothetical question, having reference to the facts in evidence on one side or both, or on each side separately. The expert is not to be substituted for the jury; but so long as the question is framed according

to the principles here stated, it can be no objection to it that the issue and the other evidence is such that the question to be submitted to the jury must call for the same answer. An expert may also, within limits not very well defined, be asked general questions upon the laws of mental disorder, decay or imperfect development relevant to the case, or upon the consistency with each other of alleged symptoms, for the purpose of enhancing the qualifications of the court or jury to weigh and apply the evidence; and on cross-examination, he may be interrogated generally for the purpose of testing his qualifications: "Abbott's Tr. Ev. 116, 117. See also, in support of some of the above propositions, *Woodbury v. Obear*, 7 Gray (Mass.), 467; *People v. Schanchez*, 22 N. Y. 174; *People v. Lake*, 12 N. Y. 358; *Com. v. Rogers*, 7 Met. (Mass.) 500; *Dexter v. Hall*, 15 Wall. (U. S.) 26.

It may be observed that an educated practicing physician, who has attended the party whose mental soundness is the subject of investigation, is a competent expert, though not especially conversant with insanity; and in a case of gradual decay (*senile dementia*) his opinion may be more

valuable than that of a specialist who is a stranger to the party : *Baxter v. Abbott*, 7 Gray (Mass.), 71. And it is not essential to a medical man of education and experience in his profession that he has received a diploma in order to make him competent as an expert.

§ 6. Where the opinion rests upon personal examination facts should be stated.

As a general rule it would be better for the medical expert to furnish the facts on which his opinion is founded, where it rests upon examination of the testator or personal acquaintance, and although he may in many cases have to depend to some extent upon the statements of the patient as to his symptoms and feelings in diagnosing his case, which may become a part of the *res gestæ*, his opinion cannot properly rest upon information given him by an attendant of the patient, for such communications would be merely hearsay and incompetent evidence : *Heald v. Thing*, 45 Me. 396 ; *Wetherbee v. Wetherbee*, 38 Vt. 454.

§ 7. Governmental experts recommended.

Drs. Wharton and Stiles, in their valuable work on Medical Jurisprudence, refer to the

German system of governmental experts, and suggest that such a system, with some modifications, could be adopted in this country. We conclude this branch of our subject by copying these suggestions and the arguments in support of governmental experts: "We are all familiar with army physicians and army surgeons, and of subordination in rank in these officers. There would be no difficulty in providing in each county for a county physician, who, by the tests of an adequate competitive examination, would prove his general and special competency for this particular post. In addition to the duties devolved upon him of conducting post-mortem examinations, and of pursuing any other investigations that may be required in a litigated issue, such a physician might be made the arbiter in those moot questions by which the law has been kept in a state of such distressing incertitude: Is there such a disease as moral insanity, or as *mania transitoria*? Can human blood stains be distinguished after having become dried? [We here interpose another question: Can human blood be distinguished from the blood of some of the inferior animals by micro-

scopic or other inspection, or by tests of any kind?] If a question of this kind arises on the trial of a cause, it would not be inconsistent with the analogies of the law to refer it to an official expert, just in the way that a chancellor sends a question of fact to be determined by a master in chancery or by a common-law court and jury. But if this be done, it should be done with the checks which attend the chancery system, which has just been noticed. The official physician who acts as referee must be placed under judicial restraints. He should owe his appointment to neither party, but to the state, irrespective of any particular case. His duty it should be to take testimony, if needed on the case, and hear counsel, so that he will be in no danger of hazarding one of those rash and ignorant opinions which have so much disgraced this branch of medical practice. After thus judically hearing of the case, it should be his further duty to judicially certify his opinion to the court by whom the reference is made. In proper cases there might be allowed an appeal from such opinions to a supreme court of governmental experts appointed by the state at large. It may

be said that this may be productive of occasional delay. This is true; but the difficulties thus arising would not be so great as those which almost every contested medical issue now involves, and which, in cases of insanity, have led courts so often to grant new trials from sheer despair of drawing a decisive conclusion from the jargon thus introduced. Soon, also, the delays of appeals would be reduced, for certain great cardinal questions would be settled beyond dispute. We should soon know whether there is such a thing as moral insanity, [The author would add—if it is among the knowable things] and whether it is practicable to distinguish human blood after the expiration of a week from the period of its drying. [The author would add,—and whether it is possible to distinguish human blood from the blood of some inferior animals by microscopic examination or other tests.] Settle a few such points as these, and we relieve criminal justice of a large part of the uncertainties by which it is now beset, and we will have a series of rules by which cases can be intelligently, consistently and humanely conducted. Nor will this be all. We will be able to get the judicial utter-

ances of science as to vexed issues of fact, instead of the interested arguments of experts who are virtually employed as counsel by the party calling them, or the wild utterances of philosophic monomaniacs who are called simply because of their absorption of some unique theory of their special conception. Such men need not be silenced. Experts as counsel, indeed, will find a proper and important office in presenting the two sides of the issue to the expert who acts as referee. But the expert who fills this last judicial post will be disembarrassed of all personal relations. He will have no client to serve, and no past partisan extravagances to vindicate. He will render his opinion as an advocate neither of another nor of himself. When he speaks he will do so judicially, as the representative of the sense of the special branch of science which the case invokes, governed by the opinion of the great body of scientists in this relation, and advised by the most recent investigation. When this is done, we will have expert evidence rescued from the disrepute into which it has now fallen, and invested with its true rights as the expression of the particular branch of science for

which it speaks : " 1 Whart. & S. Med., § 1250. The author of this manual endorses the recommendations of these learned authors, and duly appreciates their arguments ; and he cannot resist copying the remarks of Dr. Wharton in the concluding paragraph of the first volume of the seventh edition of his valuable treatise on Criminal Law, where he refers to this subject, and his former treatment of it, as follows : " Nor will this be the sole benefit that will result. Not only will the dignity of physical and psychological science be vindicated, but the science of jurisprudence, of all others the secular arbiter, will be able to discharge its great office with the precision, the wisdom and the system which are necessary to the welfare of the community, but which are unattainable when so important a subsidiary agency as expert testimony remains in the chaos in which it is now plunged : " 1 Whart. C. L., § 827.

§ 8. Opinions of non-expert witnesses.

The line between expert and non-expert witnesses, and their competency to give opinions

as evidence, is not always clearly distinguishable. In respect to insanity it may be affirmed as a general rule that non-experts cannot give their opinions. But this cannot be affirmed as a universal rule : See *post*, § 9. In respect to other matters one who is not strictly an expert may sometimes give an opinion, as where it relates to the value of property, the rapidity of locomotion, and the like : See *ante*, § 3 ; *State v. Knight*, 43 Me. 11 ; *Fairchild v. Bascomb*, 35 Vt. 398 ; *Bierce v. Stoking*, 11 Gray (Mass.), 174 ; *State v. Reddick*, 7 Kan. 106 ; *Hardy v. Merrill*, 56 N. H. 227 ; 22 Am. Rep. 441 ; *post*, § 9.

§ 9. **Distinction between expert and common witnesses.**

On this subject Mr. Wharton observes : " A witness who had opportunities of observing a defendant whose insanity is under investigation, may, after stating facts within such observation, be, as a general rule, asked whether, from the defendant's general appearance and conversation, he was at the time of the observation of sound mind. But a non-professional witness will not

be permitted to give mere opinions, disconnected from the facts on which such opinions are based :” 1 Whart. C. L. (7th ed.), § 45. See also *Hardy v. Merrill*, *supra*; *Com. v. Sturtevant*, 117 Mass. 122; 19 Am. Rep. 401.

As a general rule, non-experts are confined to a mere statement of facts : *Com. v. Wilson*, 1 Gray (Mass.), 337; *Caleb v. State*, 39 Miss. 722; *Gehrke v. State*, 13 Tex. 568; *Clapp v. Fullerton*, 34 N. Y. 190; *Real v. People*, 42 N. Y. 270. And they cannot give an opinion upon a hypothetical statement of facts : *State v. Klinger*, 46 Mo. 228; *Farrell v. Brennan*, 32 Mo. 328; *Boardman v. Woodman*, 47 N. H. 120; *Dunham’s Appeal*, 27 Cow. 192; *Weems v. Weems*, 19 Md. 334; *Eckert v. Flowry*, 43 Pa. St. 49.

Medical men who are possessed of medical skill are allowed to testify as experts and to give opinions as to the sanity or insanity of a person, either from personal examination of him or based upon a hypothetical case. So those who are not medical men are permitted to testify and give their opinion under certain circumstances. But the manner of conducting the

examination, and the facts from whence the witnesses draw their inferences or conclusions, are essentially different. The medical expert gives to the jury the result of his professional skill, science and learning. His opinions are brought to their assistance, but they are not conclusive upon the jury, and they may give them such weight as they deem they are entitled to, and no more. If the expert has been present in court, and has heard all the evidence, and there is no dispute about the facts, he may then be asked his opinion about the whole matter. But when the facts are disputed this course is inadmissible, and the question should be stated hypothetically : *State v. Klinger*, 46 Mo. 228.

If a person is indicted for a crime, and a defense of insanity is set up, and evidence is introduced in support of such defense, a medical expert witness who has heard all the evidence may be asked the following question : " You have heard all the evidence in the case ; supposing the jury to be satisfied that the facts and circumstances testified to by other witnesses are true, what is your opinion, as a medical man,

of the state of the prisoner's mind at the time of the commission of the alleged crime?" If the witness should state that the evidence indicated unsoundness of mind, the following question would be proper: "Was the prisoner, in your opinion, at the time of the doing of the act, under any, and what kind of, insanity or delusion; and what would you expect would be the conduct of a person under such circumstances?" *State v. Windsor*, 5 Harr. (Del.) 512; *Com. v. Rogers*, 7 Met. (Mass.) 500.

Witnesses who are not experts may be permitted to state whether they regarded the defendant on trial charged with a crime to be insane at the time of the commission of the alleged criminal act. But this can only be done in connection with their statements of particular conduct, appearance and expressions of the defendant, upon which their opinion is based. They may give their opinion, accompanied by the facts existing within their own knowledge and observation, but they cannot be permitted to give an opinion upon the question whether a hypothetical set of facts would or would not, if true, be evidence of insanity; nor from mere evidence which

they have heard others detail : *State v. Klinger, supra.* See also *Farrell v. Brennan*, 32 Mo. 328; *Boardman v. Woodman*, 47 N. H. 120 ; *Dunham's Appeal*, 27 Conn. 192.

CHAPTER III.

INSANITY AND ITS LEGAL RELATIONS.

§ 10. Varieties of unsoundness of mind.

That branch of forensic medicine, or medical jurisprudence, which relates to unsoundness of mind in its legal relations, is so important to the medical and legal professions, and in respect to both civil and criminal liability, that the author feels justified in presenting a condensed treatment of the subject in this chapter.

Unsoundness of mind, or insanity, has been distinguished into four varieties, or varying degrees, namely : idiocy, dementia, mania and monomania ; but a more concise and perhaps accurate classification would be : amentia, dementia and mania : Guy & F. on Forensic Med. (5th ed.) 172, 173. In the mental conditions indicated by these terms the person is not generally competent to make contracts, nor to dispose of his property by gift or will, or criminally responsible for his acts : See Ray's Med.

Jur. 58 ; Freeman v. People, 4 Denio, 10 ; 47 Am. Dec. 216 ; 6 Field's Lawyers' Briefs, § 409.

§ 11. Insanity defined and described.

In medical jurisprudence insanity has been defined as the prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual in health. "Of late years," observes Dr. Gooch, "this word has been used to designate all mental impairments and deficiencies formerly embraced in the terms lunacy, idiocy and unsoundness of mind. Even to the middle of the last century the law recognized only two classes of persons requiring its protection on the score of mental disorder, viz. : lunatics and idiots. The former were supposed to embrace all who had lost the reason which they once possessed, and their disorder was called *dementia accidentalis* ; the latter those who had never possessed any reason, and this was called *dementia naturalis*. Lunatics were supposed to be much influenced by the moon ; and another prevalent notion respecting them was that in a very large proportion there occurred lucid intervals, when reason

shone out for a while from the cloud that obscured it, with its natural brightness. It may be remarked, in passing, that lucid intervals are far less common than they were once supposed to be, and that the restoration is not so complete as the descriptions of the older writers would lead us to infer. In modern practice, the term 'lucid interval' signifies merely a remission of the disease, an abatement of the violence of the morbid action, a period of comparative calm ; and the proof of its recurrence is generally drawn from the character of the act in question. It is hardly necessary to say that this is an unjustifiable use of the term, which should be confined to the genuine lucid interval which does occasionally occur.

“ It began to be found out at last that a large class of persons required the protection of the law who were not idiots, because they had reason once, nor lunatics in the ordinary signification of the term, because they were not violent, exhibited no very notable derangement of reason, were independent of lunar influences, and had no lucid intervals. Their mental impairment consisted in a loss of intellectual power, of interest in their

usual pursuits, of the ability to comprehend their relations to persons and things. A new term—unsoundness of mind—was therefore introduced to meet the emergency ; but it has been never clearly defined.

“ The law has never held that all lunatics and idiots are absolved from all responsibility for their civil or criminal acts. This consequence was attributed only to the severest grades of these affections,—to lunatics who have no more understanding than the brute, and to idiots who cannot “ number twenty pence nor tell how old they are.” Theoretically the law has changed but little even to the present day, but practically it exhibits considerable improvement ; that is, while the general doctrine remains unchanged, it is qualified, in one way and another, by the courts, so as to produce less practical injustice.

“ Insanity implies the presence of disease or congenital defect in the brain, and although it may be accompanied by disease in other organs, the cerebral affection is always supposed to be primary and predominant. It is to be borne in mind, however, that bodily diseases may be accompanied, in some stage of their progress, by

mental disorder, which may affect the legal relations of the patient.

“ To give a definition of insanity not congenital, or, in other words, to indicate its essential element, the present state of our knowledge does not permit. Most of the attempts to define insanity are sententious descriptions of the disease rather than proper definitions. For all practical purposes, however, a definition is unnecessary, because the real question at issue always is, not what constitutes insanity in general, but wherein consists the insanity of this or that individual. Neither sanity nor insanity can be regarded as an entirety to be handled and described, but rather as a condition to be considered in reference to other conditions. Men vary in the character of their mental manifestations insomuch that conduct and conversations perfectly proper and natural in one might in another, differently constituted, be indicative of insanity. In determining, therefore, the mental condition of a person, he must not be judged by any arbitrary standard of sanity or insanity, nor compared with other persons unquestionably sane or insane. He can properly be compared only with himself.

“ When a person, without any adequate cause, adopts notions he once regarded as absurd, or indulges in conduct opposed to all his former habits and principles, or changes completely his ordinary temper, manners and dispositions,—the man of practical sense indulging in speculative theories and projects; the miser becoming a spendthrift and the spendthrift a miser; the staid, quiet, unobtrusive citizen becoming noisy, restless and boisterous; the gay and joyous becoming dull and disconsolate even to the verge of despair; the careful, cautious man of business plunging into hazardous schemes of speculation; the discreet and pious becoming shamefully reckless and profligate,—no stronger proof of insanity can be had. And yet not one of these traits, in and by itself alone, disconnected from the natural traits of character, could be regarded as conclusive proof of insanity. In accordance with this fact the principle has been laid down, with the sanction of the highest legal and medical authority, that it is the prolonged departure, without any adequate cause, from states of feeling and modes of thinking usual to the individual when in health, which is the essential feature

of insanity :” 43 Lond. Quart. Rev. 355. See Comb on Ment. Derang. 196 ; Medway v. Croft, 3 Curt. Eccl. R. (Eng.) 671.

§ 12. **Amentia ; what it embraces.**

Amentia embraces the forms of unsoundness of mind known as idiocy, imbecility and cretinism. Idiocy is a form of unsoundness of mind, resulting either from congenital defect, or some obstacle to the development of the faculties of mind in infancy. But idiocy has its degrees, like other forms of unsoundness of mind. Usually a total idiot is a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any : 6 Field’s Lawyers’ Briefs, § 410 ; Shelf. on Lunacy, 2.

§ 13. **Imbecility defined ; a mental deficiency.**

Imbecility, in medical jurisprudence, has been defined as a form of mental deficiency, either congenital or resulting from an obstacle to the development of the faculties supervening infancy ; and it is substantially the same as idiocy : Id.

§ 14. Cretinism.

Cretinism is a form of idiocy which exists in some parts of Europe, and which prevails endemically, and is associated with disease or defective development of other organs besides the head. Of this it has been observed : " The stature is dwarfed, the belly large, the legs small, the head conical, the arch of the palate high and narrow, the teeth irregular, the mouth large, the lips thick, the complexion sallow, the voice harsh and shrill, the speech thick and indistinct, the eyes squinting, the gait feeble and unsteady, the sexual powers weak or wanting. The best authorities represent this physical degeneracy, with co-existing mental deficiency, as dating, with rare exceptions, from a period subsequent to birth. About the fifth or sixth month, the bodily development seems checked. The child is weak, and looks unhealthy, the head is large, and its bones widely separated, the belly swells and the limbs shrink, teething goes on very slowly, and the child cannot stand or speak till its fifth or sixth year : " Id.

In its worst phases the subject has no intelligence ; the senses are wholly wanting.

§ 15. Idiocy.

Idiocy is a congenital or serious defect of all the mental faculties, although admitting of degrees : Guy & Fer. on Forensic Med. (5th ed.) 183. And idiots are incapable of committing crimes or of making contracts or wills : Bacon's Arb. Idiot, A ; 4 Bl. Com. 24, 304 ; Arch. Cr. L. 4 ; Shelf. on Lunacy, 458 ; Criminal Law, vol. 2, Field's Lawyers' Briefs, § 270 *et seq.* ; Contracts, vol. 2, Field's Lawyers' Briefs, § 80 ; Coll. on Lunacy, 573 ; Rex v. Oxford, 9 C. & P. (Eng.) 525 ; Rex v. Goode, 7 Ad. & El. (Eng.) 836 ; Com. v. Rogers, 7 Met. (Mass.) 500 ; State v. Spencer, 21 N. J. L. 196 ; McAlister v. State. 17 Ala. 434 ; Guy & Fer. on Forensic Med. (5th ed.) 185.

§ 16. Imbecility.

The term imbecility is sometimes used to designate a mental defect manifesting itself in infancy, as distinguished from that which is congenital. Of this unsoundness of mind it has been said : " Idiocy and imbecility ought perhaps to be equally characterized as congenital defects, of which the more marked (idiocy) reveals itself soonest, while imbecility is not recognized till

the faculties have been tested by education and found wanting. It is obvious, too, that no sharp lines of distinction can be drawn between the idiot and the imbecile, for the fainter shades of imbecility pass into the lighter tints of idiocy. But the possession by the imbecile of the faculty of speech, as distinguished from the parrot-like utterances of a few words which the idiot can learn, is the best line of demarkation which the case allows of. Most imbeciles are intellectually as well as morally deficient. They have a limited power of acquiring or retaining knowledge, cannot understand or appreciate the customs of society or laws, human or divine; cannot control their emotions and passions. But there is a small exceptional class which exhibits intellectual deficiency without seriously offending against morality, and a larger one combines the highest intellectual endowments with utter incapacity in the conduct of life. There is, therefore, an intellectual, a moral and a general mania. . . . The form of imbecility most common, and most important in a medico-legal point of view, is that which affects the intellect, the morals, and the prudential conduct of life. Persons who ex-

hibit this threefold deficiency profit by education, so as to form and express simple ideas, to read, write, count, and to become musicians, draughtsmen or mechanics. They may even attain some proficiency in some one branch of knowledge, or some one accomplishment; but they do not profit by the opportunities afforded them in the same degree as their neighbors. They also present great varieties of character. Some are fickle and changeable and incapable of fixing their attention, and others methodical and persevering. They have no idea, or a very imperfect one, of society, laws, morality, courts and trials; and though they may have the idea of property, they have no conception of the consequences of theft. They may have been taught to refrain from injuring others, but they are ignorant of what would be done to them if guilty of incendiarism or murder:” *Georget’s Sur la Folie*; *Guy & Fer. on Forensic Med.* 188.

§ 17. Question of civil and criminal liability of imbeciles considered.

Questions as to the competency of imbeciles to contract, of ability to manage their own affairs, and to make wills, and as to their criminal

liability, frequently arise. Whether they are competent to make a contract or a will must depend upon the degree of mental ability and understanding which they possess. And the same may be said of their criminal responsibility.

For any process of reasoning, or any general observation or abstract ideas, total imbeciles are incompetent ; but the affective faculties are frequently unusually active, particularly those which lead to evil habits, as thieving, incendi- arism, drunkenness, homicide and assaults upon women. These defects and inclinations vary in degree in different imbeciles, some being hardly distinguishable at first sight from ordinary men of feeble endowments, while others encroach upon the line which separates them from idiocy : 6 Field's Lawyers' Briefs, § 414.

§ 18. Imbecility as an excuse in criminal cases.

In criminal cases the responsibility of imbeciles depends upon their ability to distinguish between right and wrong in connection with the act in question, or in case of homicide, upon the understanding that they were "committing

an offense against God and nature," or whether they are deprived of understanding and memory : See Criminal Law, vol. 2, Field's Lawyers' Briefs, § 271 ; Com. v. Rogers, 7 Met. (Mass.) 500 ; 41 Am. Dec. 458.

§ 19. Moral imbeciles.

In respect to moral imbeciles it has been observed that they are unable to appreciate fully the distinction between right and wrong, and according to their several opportunities and tastes they indulge in mischief as if by an instinct of their nature. To vice and crime they have an irresistible proclivity, though able to discourse on the beauties of virtue and the claims of moral obligation. When young, many of them manifest a cruel and quarrelsome disposition, which leads them to torture brutes and bully their companions. They set all law and admonition at defiance, and become a pest and a terror to the neighborhood. It is worthy of notice, because the fact throws much light on the nature of this condition, that a very large proportion of this class of persons labor under some organic defect. They are scrofulous, rick-

ety or epileptic, or if not obviously suffering from these diseases themselves, they are born of parents who did. Their progenitors may have been insane, or eccentric, or highly nervous ; and this morbid peculiarity has become, unquestionably, the efficient cause of the moral defect under consideration. Thus lamentably constituted, wanting in one of the essential elements of moral responsibility, they are certainly not fit objects of punishment ; for, though they may recognize the distinction between right and wrong in the abstract, yet they have been denied by nature those faculties which prompt men more happily endowed to pursue the one and avoid the other : Ray's Med. Jur. 112-130.

Such humane and philosophical views have not, however, received much favor from the courts or authors, as we have already noticed.

In his legal relations and responsibilities the total imbecile is like the idiot, unable to bind himself by contract, or make a will, and is not criminally responsible for his acts. But as there are varying degrees of imbecility, the competency and responsibility of the imbecile may become the subject of legal inquiry, and his

responsibility will depend upon his knowledge and mental ability to understand the nature of the obligation, or to comprehend the character of the civil or criminal act. In this respect the liability would be the same as in case of partial insanity and dementia, which we have noticed and shall hereafter more fully consider. The author would say that from his knowledge of certain cases of moral imbecility in youths, the asylum would perhaps generally be the appropriate place for them.

§ 20. **Dementia distinguished from amentia.**

Dementia is that unsoundness of mind which is characterized by mental weakness and decrepitude, and by total inability to reason correctly or incorrectly. It has been distinguished from amentia as follows: "In idiocy the deficiency is congenital, in imbecility it shows itself in early life, but in dementia it supervenes slowly or suddenly in the mind already fully developed, and in childhood, manhood or old age. It differs also from mania, for it consists in exhaustion and torpor of the faculties, not in violent and sustained excitement. In dementia we recognize an *acute*

or *primary*, and a *chronic* or *secondary* form. The first is rare, and consists in a state of melancholy or stupor ; the second is very common, and characterized by incoherence, differing from the incoherence of mania by the absence of excitement. Some demented persons, however, are liable to maniacal paroxysms, and maniacs to remissions of comparatively tranquil incoherence. There is a *senile dementia*, and a form of dementia associated with general paralysis. Dementia also has its degrees and stages of forgetfulness, irrationality, incomprehension, and inappetency. A patient suffering from dementia, as he passes from bad to worse, first exhibits want of memory, then loss of reasoning power, then inability to comprehend, and lastly, an abolition of the common instincts and of volition : " Guy & F. on For. Med. (5th ed.) 194 ; 6 Field's L. B., § 417.

In the progress of this mental disorder, the mind usually dwells only on the past, and the thoughts succeed one another without any obvious bond of association. Delusions, if they exist, are only transitory, and leave no permanent impression ; and for everything recent the mind

is exceedingly weak. Occasionally it occurs in an acute form in young subjects, and then only is it curable. In old men, in whom it often occurs, it is called *senile dementia*, and it indicates the breaking down of the mental powers in advance of the bodily decay. It is this form of dementia which usually gives rise to litigation; for in others the incompetency is generally too patent to admit of controversy. It cannot be described by any positive characters, because it differs in the different stages of progress, varying from the simple lapse of memory to complete inability to recognize persons or things. It sometimes manifests itself in breaches of decorum, when the mental infirmity is not so serious as might at first sight be supposed, as frequently in such cases, if the attention be aroused to a matter in which the person is deeply interested, he will show no lack of wonted vigor or acuteness. In other words, the mind may be damaged superficially, to use a figure, when it may be sound at the core; so that, although he may be quite oblivious of names and dates, he may comprehend perfectly well his relations to others and the interests in which he is concerned. In

case of senile dementia, the impression made upon the minds of those who have been long and most intimately acquainted with the subject, as to his mental condition and status, would be better than the impression made upon casual observation : Id. ; see also Judge Redfield in 3 Am. L. Reg. (N. S.) 449 ; 2 Phil. Eccl. L. 449 ; Harrison v. Rowan, 3 Wash. (C. C.) 580 ; 1 Red. on Wills.

§ 21. Legal relations of dementia—in case of wills.

Questions frequently raised respecting persons suffering from this form of mental unsoundness, relate to the validity of wills made or altered by them ; and especially in case of *senile dementia*. The question of mental capacity for such purposes is frequently a difficult one to determine, for such persons vary greatly from day to day, and present themselves in different lights to different observers. Hence we have conflicting testimony and wide divergences of opinion, both among skilled and unskilled witnesses. The only general rule of much practical value in such cases is, that competency must be always measured, not by any fancied stand-

ard of intellect, but solely by the requirements of the act in question : See Ray on Insanity (5th ed.), 133 ; Taylor's Med. Jur. 629 ; Gilm. Med. Jur. 20 ; also Wills, vol. 5, Field's L. B., § 729. A small and familiar matter would require less mental power than one complicated in its details and somewhat new to the testator's experience. Less capacity would be necessary to distribute an estate between a wife and child than between a multitude of relatives with unequal claims upon the bounty of the testator.

It has been observed that the legal principles by which courts are governed are not essentially different, whether the mental incapacity proceed from dementia or mania. In case the question of competency arises upon the contest of a will, if the will coincides with the previously expressed wishes of the testator,—that is, his wishes as expressed before any question as to his competence had arisen,—and if it recognizes the claims of those who stood in near relation to him, and shows no indication of undue influence,—in short, if it is a rational act, rationally done, it will very properly be established, although there may have existed considerable impairment of

mind : *Id.* ; *Jarm. on Wills* (5th Am. ed.), 94 ; *Swinb. on Wills*, pt. 2, § 5 ; *Bird v. Bird*, 2 *Hagg. Eccl. (Eng.)* 142 ; *Creely v. Ostrander*, 3 *Bradf. (N. Y.)* 107 ; *Crolires v. Stark*, 64 *Barb. (N. Y.)* 112 ; *Clark v. Fisher*, 1 *Paige (N. Y.)*, 171 ; *Van Alstyne v. Hunter*, 5 *Johns. Ch. (N. Y.)* 148 ; *Daniel v. Daniel*, 39 *Pa. St.* 191 ; *Higgins v. Higgins*, 28 *Md.* 115 ; *Potts v. House*, 6 *Ga.* 240 ; 50 *Am. Dec.* 329 ; *Yoe v. McCord*, 74 *Ill.* 33 ; *Carpenter v. Calvert*, 83 *Ill.* 62 ; *Lowder v. Lowder*, 38 *Ind.* 638 ; *Thomas v. Stump*, 62 *Mo.* 275 ; *Rutherford v. Morris*, 77 *Ill.* 397 ; *Thomas v. Kyner*, 65 *Pa. St.* 368 ; *Terry v. Buffington*, 11 *Ga.* 337 ; 56 *Am. Dec.* 432 ; *Couch v. Couch*, 7 *Ala.* 519 ; 42 *Am. Dec.* 602 ; *Rigg v. Wilton*, 13 *Ill.* 15 ; 54 *Am. Dec.* 419 ; 5 *Field's Lawyers' Briefs*, §§ 727-730.

We shall hereafter notice the principles of the law, in criminal cases, relating to unsoundness of mind generally.

§ 22. *Mania* defined.

One of the most common forms of insanity or mental unsoundness is mania, and consists of in-

tellectual aberration, or morbid obliquity, or both of these conditions : Bouv. L. D., *Mania*. The term includes all forms of mental unsoundness that are characterized by undue excitement. Mania has been classified into three kinds, namely : General, intellectual, and moral ; the latter has also been divided into general and partial mania : Guy & Fer. on For. Med. (5th ed.) 197.

The term also embraces monomania ; that is, mania confined to a certain point, or partial mania, the understanding being sound in every other respect. The subject of mania involves the consideration of delusions and hallucinations, which will be treated of further on : 6 Field's L. B., § 419.

§ 23. General mania ; character of.

General mania affects the intellect, the emotions, and the passions, and throws the whole mind into a state of mingled excitement and confusion. It has been designated as raging incoherence. The maniac either misapprehends the true relations between persons and things, in consequence of which he adopts notions mani-

festly absurd, and believes in occurrences that never did and never could take place, or his sentiments, affections and emotions are so perverted, that whatever excites their activity is viewed through a distorting medium, or, which is the most common fact, both these conditions may exist together, in which case their relative share in the disease may differ in such a degree that one or the other may scarcely be perceived : Id. ; Bouv. L. D., *Mania* ; Guy & F. on Forensic Med. (5th ed.) 197, 198 ; Beck's Med. Jur. (10th ed.) 705 *et seq.*

§ 24. Intellectual mania.

General intellectual mania is said to consist in many cases in a violent disturbance of all the intellectual faculties, brought about by the over-excitement of some one leading emotion or passion. Mr. Guy illustrates this kind of mania as follows : " A patient of ours, who, after indulging for years in a series of strange and indecent acts, had an attack of general mania, followed by brain softening, in which state he claimed to know all about the human body, as having made it, to be the Christ, King of Eng-

land, and heir apparent, to have written a universal history in a curiously short space of time, and to be in possession of untold wealth :” Guy & F. on Forensic Med. (5th ed.) 200.

§ 25. **Partial mania, or monomania.**

The simplest form of this disorder is where the subject takes up some one notion opposed to common sense and universal experience. “ He is secretary to the moon, the Crystal Palace, a grain of wheat, a goose pie, a pitcher of oil, a wolf, a dog, or a cat. In many cases this single delusion relates to or is caused by some sensation or disease, which the monomaniac, like the dreamer, associates with imaginary accompaniments. Thus Equirol tells us of a woman who, having hydatids in the womb, insisted that she was pregnant with the devil ; of another, who, having adhesion of the intestines after chronic peritonitis, imagined that a regiment of soldiers lay struggling and fighting in her belly ; of a third, who, suffering in the same way, believed that the Apostles and Evangelists had taken up their abode in her bowels, and were occasionally visited by the Pope and the Patriarchs of the Old

Testament :” Guy & F. on For. Med. (5th ed.) 201. This kind of mania embraces all delusions and hallucinations, which we will proceed to consider.

§ 26. **Delusions and hallucinations in general.**

These are common manifestations of partial mania. By delusions is meant a firm belief in something impossible, either in the nature of things or in the circumstances of the case, or, if possible, highly improbable, and associated in the mind of the patient with consequences that have to it only a fanciful relation. By hallucination is meant an impression supposed by the patient, contrary to all proof of possibility, to have been received through one of the senses. For instance, the belief that one is the Pope of Rome is a delusion ; the belief that one hears voices speaking from the walls of a room, or sees armies contending in the clouds, is hallucination. The latter implies some morbid activity of the perceptive powers ; the former is a mistake of the intellect exclusively : See Bouv. L. D., *Mania*, and authorities cited. We shall notice hereafter the legal consequences of partial mania : 6 Field's Lawyers' Briefs, § 423.

§ 27. Moral and effective mania; morbid impulses.

Moral and effective mania is distinguished by Guy and Ferrer into two classes — general and partial. In criminal cases a test of irresponsibility for acts is mental delusion. But moral mania, it seems, may exist without this, as in case of irresistible tendencies or impulses to do some wrongful act. Partial moral mania “consists in the intense activity of some one passion or propensity, and its predominance or complete mastery over every other. The persons thus affected are usually perfectly conscious of their condition, and either evince the utmost horror at the conduct to which their ruling passion would impel them, and with difficulty restrain themselves, or they give way, as if in desperation, to the impulse. There is no strong impulse of our nature that may not be thus placed, by morbid excitement, beyond the restraint of reason and conscience :” Guy & F. on For. Med. (5th ed.) 204.

The following forms of partial moral mania have been recognized : *homicidal mania*, *kleptomania*, or a propensity to theft ; *pyromania*, or a propensity to incendiarism ; *dipsomania*, or

an excessive craving for intoxicating liquors ; *suicidal monomania*, and *puerperal mania* : Id.

§ 28. **Homicidal mania, or the propensity to kill.**

In case of a plea to an indictment of insanity as a defense, and the proof is clear that the defendant at the time was in the condition of absolute amentia, dementia, or general mania, the court generally directs an acquittal ; and perhaps the same practice should prevail where mental unsoundness in respect to the particular act is clearly shown to have existed at the time the criminal act charged was committed : See Collison on Lunacy, 573 ; 4 Bl. Com. 24 ; *Rex v. Oxford*, 9 Car. & P. (Eng.) 525 ; *State v. Spencer*, 21 N. J. L. 196 ; *McAlister v. State*, 17 Ala. 434.

Homicidal monomania is recognized by medical authors as a mental disorder. It consists of a propensity to kill—to take the life of another—impelled by an inward, irresistible force or necessity, without motive or provocation. The victim may be a devoted wife, or an affectionate child, to whom the unfortunate father or mother has been most tenderly attached.

In most of such cases it has been observed that there has been some derangement of health, or some deviation from the ordinary physiological condition, such as delivery, suppression of menstruation, and the like ; but occasionally no incident of this kind can be detected — the patient has been, apparently, in ordinary condition, both bodily and mentally. This mental condition may sometimes be the result of great religious excitement, and a deluded belief that some great calamity or danger is impending over a child or wife who becomes the victim, and the act is done from a belief that it is necessary to avoid a worse result.

The legal relations of this unsound condition of mind we have before stated, as follows : To constitute a defense [to a criminal charge] on the ground of irresistible impulse, it must exist to such an extent and with such violence as to render it impossible for the party to do otherwise than to submit to it : See 2 Field's Lawyers' Briefs, § 273; *Scott v. Com.* 4 Met. (Ky.) 227 ; *Hoppes v. State*, 31 Ill. 385; *Stevens v. State*, 31 Ind. 486; *State v. Felter*, 25 Ia. 67; *Com. v. Mosler*, 4 Pa. St. 266; *Board v. State*, 30 Miss. 600.

In the case last cited it was observed: "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power; or if, through overwhelming violence or mental disease, his intellectual power is, for a time, obliterated, he is not a responsible moral agent, and is not responsible for criminal acts."

To constitute a complete defense, insanity, if partial, as in case of monomania, must be of such a degree as to wholly deprive the accused of the guide of reason in regard to the act with which he is charged, and of the knowledge that he is doing wrong in committing it: *State v. Spencer*, 21 N. J. Law, 196; 1 Whart. & S. Med. Jur., §§ 144, 162, 531, 537; *R. v. Barton*, 3 Cox C. C. (Eng.) 275; *R. v. Goode*, 7 Ad. & El. (Eng.) 536; *R. v. Oxford*, 9 C. & P. 553; *Willis v. People*, 32 N. Y. 715; *Flanagan v. People*, 52 N. Y. 467. And mere "moral insanity," where the person is intellectually sane, will not exempt from responsibility: *State v. Lawrence*, 57 Me. 574; *Com. v. Heath*, 11

Gray (Mass.), 303 ; Freeman *v.* People, 4 Denio (N. Y.), 10 ; Shater *v.* People, 2 N. Y. 199 ; Farrer *v.* State, 2 Ohio St. 54 ; Choice *v.* State, 31 Ga. 424 ; People *v.* Coffman, 24 Cal. 230 ; United States *v.* Schultz, 6 McLean, 121 ; United States *v.* Holmes, 1 Cliff. (U. S. C. C.) 198 ; 1 Whart. & S. Med. Jur., § 186 *et seq.* ; Whart. on Ment. Unsound. 43 ; State *v.* Spencer, 21 N. J. L. 196 ; Reg. *v.* Barton, 3 Cox C. Cas. (Eng.) 275.

§ 29. **Kleptomania, or propensity to steal.**

The tendency or irresistible propensity to steal is among the recognized forms of mental derangement. It is frequently manifested in persons of irreproachable life, and who are in easy and even in opulent circumstances, and by habit and education above all petty dishonesty. The articles stolen are frequently, and perhaps usually, of trifling value, and are put away out of sight as soon as stolen. This intellectual disease, or obliquity, is said to generally occur in connection with some pathological or other abnormal condition, as a sequel of fever or blows on the head, of pregnancy or disordered men-

struation, and the precursor of mania and organic disease of the brain : See Whart. on Ment. Unsoundness, 44.

§ 30. **Disinclination to regard it as a defense.**

There has been much disinclination of the courts to recognize *kleptomania* as a defense to an act of theft. The spirit of this feeling was expressed by Baron Alderson, who observed : " A man might say he picked a pocket from some uncontrollable impulse ; and in that case the law would have an uncontrollable impulse to punish him : " Reg. v. Pate, Lond. Times, July 12, 1850. Neither theoretically nor practically is this form of insanity recognized as a defense for theft. But when the law comes to reflect more clearly the light of science, such a defense will not perhaps be regarded as a " dangerous innovation," as expressed by Baron Parke : See Reg. v. Barton, 3 Cox C. Cas. 275 ; Chit. Med. Jur. 352.

§ 31. **Pyromania, or a propensity to burn ; and aidomania, sexual propensity.**

These indications of unsound mind are recognized by medical authors. The latter is said

always to occur in young subjects, and is supposed to be connected with disordered menstruation, or that physical evolution which attends the transition from youth to manhood. Of both, the same remarks would be applicable which were made in the last section relating to kleptomania. Doubts have been expressed as to the maniacal character of these singular impulses, which have generally been attributed to depravity of character rather than disease. Nothing, however, seems better established by abundance of cases related by distinguished observers. In spite of all metaphysical cavils, there are the cases on record; and there they will remain, to be increased in number by every year's observation.

§ 32. These have not received much favor as a defense.

Kleptomania, pyromania and idoimania, in what may be called their milder forms, have not received much favor as a defense for the acts which they suggest. But juries have been loath to convict a man for a petty theft who, toward the close of an exemplary life, has been detected in stealing things of insignificant value, or a

woman who, when pregnant, and only then, forgets entirely the distinctions of *meum* and *tuum*, though at all other times a model of moral propriety: Whart. on Ment. Unsound. 43.

Whatever may be the theory of the law as to the milder forms of these kinds of permanent or temporary monomania as a defense in criminal cases, there may be extreme manifestations of it, amounting to "irresistible impulse," or "uncontrollable tendency"; and in such cases the mantle of the law would cover and protect the monomaniac: *Ante*, § 29. And if a youth should set fire to a building under an "uncontrollable impulse," shall it be said that the law would have an "uncontrollable impulse to punish him for it?"

§ 33. Alcohol; its uses and effects.

Alcohol is the product of a fermentation induced by the action of a microscopic fungus, *yeast*, upon certain kinds of sugar, especially grape sugar, and also upon that derived from starch of any description, and in the same manner upon milk sugar. In such cases a peculiar metamorphosis takes place, by which the alcohol

and carbonic acid are produced in considerable amount, together with very minute quantities of succinic acid, glycerine and other bodies : Quain's Med. Dic. (8th Am. ed.) 24. Alcohol may also be produced synthetically from its elements, carbon, hydrogen and oxygen. Alcohol is a powerful *antiseptic*, probably from the fact that it is capable, when diluted, of preventing the development of septic germs, such as vibrios and bacteria, as well as paralyzing the activity of those already formed : 6 Field's L. B., § 425.

§ 34. The psychological effects of alcohol.

On this subject Dr. Binz observes : " There is scarcely any therapeutical agent, the internal effects of which vary so much according to the dose given. In small quantities, and slightly diluted with water, alcohol promotes the functional activity of the stomach, the heart and the brain ; whilst a large quantity, largely diluted, exerts but a limited influence upon these organs. If, however, the dose of alcohol be often repeated, it is readily assimilated, and becoming diffused through the system, undergoes combustion within the tissues of the body, imparts warmth to them,

and yields vital force for the performance of their various functions. Simultaneous with this consumption of alcohol, the body of the consumer is often observed to grow fat, a circumstance due to simple accumulation, the fat furnished by the food remaining unburned in the tissues, because the more combustible alcohol furnishes the warmth required, leaving no necessity for the adipose hydro-carbon to be used for that purpose. . . . The symptoms of intoxication produced by large doses of alcohol are sufficiently well known. When the abnormal condition of excitement in the brain, induced by this stimulant, has been kept up, almost without intermission, for a length of time, or when it is suddenly withdrawn after the organ has been long subjected to it, the disturbance brought about is so great and persistent as to result in a complete overthrow of the reasoning faculties, and the condition known as *delirium tremens* ensues.

. . . . There can be no doubt but that a healthy organism, supplied with sufficient food, is capable of performing all its regular functions without requiring any specially combustible material for the generation of heat and the develop-

ment of vital force. But the case assumes a different aspect when in sickness it transpires that, while the metamorphosis of tissue goes on with its usual activity or with increased energy, as happens in many diseases, the stomach, refusing to accept or digest ordinary food, fails to supply material to compensate for this waste. Here it is, then, that a material which can be most readily assimilated by the system, and which by its superior combustibility spares the sacrifice of the animal tissue, is especially called for; and such material we have in alcohol: Quain's Med. Dic. (6th Am. ed.) 24-26.

§ 35. Alcoholism defined.

This term is applied to the diverse pathological processes and attendant symptoms caused by the excessive ingestion of alcoholic beverages. These are very different if a large quantity is consumed at once, or at short intervals, or if small quantities are taken habitually; hence they are subdivided into those due to acute and chronic alcoholism. To the acute forms of alcoholic poisoning belong the acute catarrh of the alimentary mucous membrane, rapid coma, some cases of

delirium tremens, and certain special forms of acute insanity ; whilst to the chronic class are referred the prolonged congestions, the fatty and connective tissue degeneration of the various organs and tissues, most cases of *delirium tremens*, nervous affections of slow onset and course, and cachexia, which in varying combinations attend a continuously immoderate consumption of alcohol : Id.

The following fragment from an instructive paper, by Dr. John Curnow, may be found in Quain's Med. Dic. (8th Am. ed.) 29. He says : " The forms of insanity caused by alcoholism are acute mania and melancholia, chronic dementia, and onomania. In the first, homicidal impulses, and in the second, strong suicidal tendencies, due to actual delusions and not to mere passive terrors, are added to the other signs of *delirium tremens*. Onomania is a peculiar form of insanity, in which the patient breaks out into paroxysms of alcoholic excess, attended with violent, strange, or even indecent acts, due apparently to uncontrollable impulses. The attack lasts a few days, and is succeeded by a long interval of sobriety and chastity. These patients have gen-

erally some hereditary taint; and not unfrequently evidences, though often slight, of a morbid mental state may be detected in the intervals, if very carefully looked for."

§ 36. Quininism; similarity of symptoms to alcoholism.

From some personal experiences as well as observations the author is induced to say that the excessive use of quinine and perhaps other medicines will produce delirium, and in fact some of the symptoms, at least, of *delirium tremens*. And in this conclusion he is supported, to some extent, by respectable authority.

A disease known as *quininism* is recognized by medical authors; and it is defined to be "a group of symptoms chiefly connected with the nervous system, produced by the presence of quinine in the system:" Quain's Med. Dic. (8th Am. ed.) 1317.

Large doses of quinine, or smaller doses long continued, may act upon the nervous system after absorption, and the nervous symptoms thus produced are usually called cinchonism: Id.

On this subject Dr. Burton observes: "The nervous symptoms to which the term cinchon-

ism is applied consists of affections of the hearing and sight, cephalalgia, and sometimes giddiness. Delirium, convulsions and collapse are said to occur after very large doses. Noises are heard in the ears, the sounds being of a humming character, or resembling a distant water-fall, the ringing of bells, or the striking of a clock. These noises are accompanied by more or less deafness, voices being heard as if the speakers were at a distance. . . . Affections of the sight are less common. They consist of occasional optical illusions, intolerance to light, amblyopia, mydriasis, and even blindness after large doses. . . . Giddiness also comes on, so that the patient may have difficulty in standing or walking, either after a single large dose, or after repeated or continued small doses. . . . The giddiness is probably partly due to weakness of the circulation, in part to the action of quinine on the nerves and nervous centers. In some persons large doses of quinine cause a febrile condition, unaccompanied by cephalalgia, but preceded by humming in the ears, disturbances of the mental faculties, and a slight rigor. In others, the cerebral symptoms have been so

marked as almost to amount to a temporary mania : " Quain's Med. Dic. (6th Am. ed.) 1318. See *post*, topics Delirium and Delirium Tremens, §§ 38, 40.

§ 37. **Delirium in general.**

This is a form of mental aberration incident to febrile diseases and sometimes to the last stages of chronic diseases. Of this aberration of mind, Messrs. Guy & F., in their *Forensic Medicine*, observe : " Regardless of persons or things around him, and scarcely capable of recognizing them when aroused by his attendants, the patient retires within himself, to dwell upon the scenes and events of the past which pass before him in wild and disorderly array, while the tongue feebly records the varying impressions in the form of disjointed, incoherent discourse, or of senseless rhapsody : " Guy & F. on *For. Med.* (5th ed.) 180; Ray's *Med. Jur.* 346. The former authors say : " In fatal cases, delirium usually passes into coma, but occasionally it disappears some hours before death, leaving the patient in the full possession of his faculties. In some cases the memory of things long past

revives, and languages that had long fallen into disuse are again spoken with fluency. Delirium is an almost constant symptom of poisoning by belladonna, hyoscyamus and stramonium ; a frequent result of poisoning by other narcotic acrids ; an occasional one in poisoning by pure narcotics and irritants."

§ 38. Legal relations of delirium.

It will be manifest that the subject of delirium would not be competent to do any civil acts, nor responsible criminally for any act done or committed during an access of delirium. The general rule here prevails, which, as we have noticed, governs in other cases of unsoundness of mind, or where the entire soundness of the mind of a testator is questionable, namely : that the Will of the party will usually be sustained where the provisions are reasonable and consistent, and in harmony with the desires expressed by the testator when mental soundness was unquestioned, when it would not be if it were otherwise. Wills and other instruments executed during lucid intervals would not be affected by a return of delirium. But it has been suggested that it

is important to distinguish delirium, with intervals of perfect consciousness, from the calmness of demeanor sometimes assumed by patients laboring under strange delusions, showing themselves in the first stage of convalescence from fever or other acute disease: *Id.* But actual delirium at the time of the execution of a contract or Will invalidates it: *Dew v. Clark*, 3 Add. Eccl. (Eng.) 79; *Johnson v. Moore*, 1 Litt. (Ky.) 371. See also *Contracts*, vol. 2, *Field's L. B.*, § 80; *Wills*, vol. 5, *Field's Lawyers' Briefs*, § 727.

§ 39. *Delirium tremens*, or *mania a potu*.

This is a form of mental disorder incident to habits of intemperate drinking, which generally appears as a sequel to a few days' abstinence from stimulating drink. But abstinence, as a cause, is not a settled question; and in various cases where the abstinence was apparently voluntary there is reason to suppose that it was, in fact, the incubation of the disease, and not its cause: See *Beck's Med. Jur.* (10th ed.) 807; *Ray's Med. Jur.* 520; *Guy & F. on Forensic Med.* (5th ed.) 181; *Criminal Law*, vol. 2,

Field's Lawyers' Briefs, § 276 ; Quain's Dic. Med. (Am. ed.), sub. Alcoholism.

The disease is easily recognized by the peculiar form which the mental unsoundness assumes, and by the equally characteristic bodily symptoms, and by the previous history ; and in most cases, by the prompt recovery following the judicious use of remedies. But a state closely allied to *delirium tremens* may be brought on by prolonged abstinence, too close attention to study or business, and sexual excesses or malpractices, and these may co-operate to produce the disease.

§ 40. Symptoms and general characteristics of *delirium tremens*.

From the authorities above cited, and others relating to the subject, we find the following are among the common symptoms and general characteristics of the disease : A weak and compressible pulse, cold and clammy extremities, sleeplessness, agitation, hallucination and suspicion ; but malignity of feeling is seldom manifested. The patient is restless, sleepless, suspicious and cunning ; has highly characteristic illusions of hideous and loathsome objects, such as toads, serpents, scorpions, and hears strange

sounds and familiar or strange voices where no one is present ; is constantly trying to escape from some imaginary danger, or the presence of those whom he supposes would injure him ; and in extreme cases the patient exhibits all the symptoms of acute mania. The following is a more particular statement of these symptoms and characteristics : " Its approach is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient knows not how to describe or account for ; disturbed sleep and impaired appetite. These symptoms having continued two or three days, at the end of which time they have usually increased in severity, the patient ceases to sleep altogether, and soon becomes delirious at intervals. After a while the delirium becomes constant, as well as the utter absence of sleep. This state of wakefulness and delirium continues three or four days, when, if the patient recover, it is succeeded by sleep, which at first appears in uneasy and irregular naps, and lastly in long, sound and refreshing slumbers. When sleep does not supervene about

this time, the disease proves fatal. The mental aberration of *delirium tremens* is marked by some peculiar characters. Almost invariably the patient manifests feelings of fear and suspicion, and labors under continual apprehensions of being made the victim of sinister designs and practices. He imagines that people have conspired to rob or murder him, and sometimes insists that he can hear them in an adjoining room arranging their plans and preparing to rush upon him, or that he is forcibly detained and prevented from going to his own home. One of the most common hallucinations of this disease is that of constantly seeing devils, snakes or vermin around him. Under the terrors inspired by these notions, the wretched patient often endeavors to cut his throat, or jump out of the window, or murder his wife, or some one else whom his disordered imagination identifies with his enemies : ” Condensed statement of symptoms in Bouv. L. D., sub. *Delirium Tremens* ; Quain's Dic. Med. (Am. ed.), sub. Alcoholism.

But the hallucinations and delusions of the victim of *delirium tremens*, as well as of other maniacs, are not always of a disagreeable char-

acter. The patient frequently enjoys for hours a succession of hallucinations of the most interesting and pleasing character; and fine panoramic views, visions of the beautiful in nature and art, and pantomimic performances of persons with which he may not be acquainted, apparently intended to convey some useful instruction, or encourage some important resolution of the subject to reform, and which is not unfrequently appreciated and enjoyed by him, are not uncommon: Guy & Fer. on For. Med. (5th ed.) 211 *et seq.*

A recovered religious maniac, author of an interesting autobiography, referring to his illusions, says: "My senses were all mocked at and deceived. In reading, my eyes saw words on a paper, which, when I looked again, were not. The forms of those around me, and their features, changed as I looked on them. . . . I heard the voices of invisible agents, and notes so divine, so pure, so holy, that they alone, perhaps, might recompense me for many sufferings:" Id. And it appears that the conversion of familiar sounds, such as the lowing of cattle, the falling of water, the grating of a chain, the noise of footsteps,

into articulate speech, was not the least remarkable of this most interesting case. And these are common illusions of the subject of *delirium tremens*: See Id. 175; 6 Field's L. B., § 432.

The hallucinations of these subjects are wonderfully variant and unaccountable. Those who are familiar with the play "M'liss" will probably recall the dialogue between Bummer Smith and his daughter, M'liss, which illustrates one phase of these delusions and hallucinations in respect to the reality of impressions upon the senses of sight and hearing as objective realities, and especially the uncertainty which the victim feels in respect to such impressions. It is as follows:

S. M'liss, if I war to ask you a question, you wouldn't deceive your poor old dad, would you?

M. Wouldn't deceive,—you know.

S. In course I do, M'liss, in course I do; now, if I war to ask you, if you seed that ar rabbit that rund along by that ar tree,—did yer see it, M'liss, eh?

M. It war a rabbit.

S. I thought it mought have been a squirrel, but it war a rabbit, weren't it, M'liss?

M. I seed it, dad.

S. Now, M'liss, may be it war a jackass-rabbit ; you wouldn't say it warn't a jackass-rabbit if it war a jackass-rabbit, would ye, M'liss ?

M. It war a jackass-rabbit.

S. You wouldn't say a jackass-rabbit war some other kind of a rabbit — you know I seed it ; now, if I war to ask you, for instance, if it wore a green hat and a yaller ribbon, you wouldn't fool me and say it did if it didn't ?

M. And a red rosette.

S. I didn't quite ketch on to the rosette ; but I say, M'liss, do you think it altogether the square thing for a rabbit to war a rosette ?

M. Shouldn't war a rosette.

S. That's so, M'liss, that's — — eh ?

M. I didn't say anything.

S. Who said you said anything ? What makes you think you said anything, and yer wouldn't think yer said anything, if yer didn't say anything, would yer, gal ?

It may be observed that the subject of an attack of *delirium tremens* is frequently, after he has recovered, misled by the impressions made upon his mind while in the state of delirium, and will

sometimes refer to these impressions as though they were among his ordinary experiences. And it is only after expressions of wonder and incredulity by his associates that he learns to be cautious and reticent in reference to them. To the victim the delusions and hallucinations are actual and objective, although arising from his own diseased brain; and especially is this the case where these phenomena are not so extravagant as to carry on the face of them, even to the recovered victim, manifest evidence that they were delusions and hallucinations, and subjective rather than objective impressions. And it may be further observed that these phenomena may continue for some time after convalescence, and when the victim is apparently restored to his normal mental condition; and especially is this the case in respect to the impression of hearing voices near him, or in an adjoining room, or outside in the open air. And not unfrequently such delusions afford much amusement to the convalescent, who comprehends the source of them as his own un-restored brain. When it occurs, as it frequently does, that the thoughts and sentiments uttered by the unsubstantial visitors are entirely at vari-

ance with his own, which is frequently the case, the phenomena become inexplicable.

Some knowledge of these matters may be important in cases where the mental soundness of a person may be a question under investigation, whether it arises on a question of his credibility as a witness, or on the validity of his will, or on his liability on contract, or even on his responsibility for some apparently criminal act.

§ 41. Legal relations of *delirium tremens*.

Delirium tremens is a recognized disease, with mental unsoundness a symptom; wherefore the person thus diseased cannot be held responsible for his acts, and he will not be responsible for acts that would otherwise be criminal: Guy's For. Med. (5th ed.) 182; see also Criminal Law, vol. 2, 276; *United States v. Clark*, 2 Cranch (U. S.), 158; *United States v. McGlue*, 1 Curt. (C. C.) 1; *United States v. Drew*, 5 Mason (C. C.), 28; *Rennie's Case*, 1 Lew. C. C. (Eng.) 76; *Rex v. Meaken*, 7 C. & P. (Eng.) 297; *O'Brien v. People*, 48 Barb. 274; *Real v. People*, 55 Barb. 551; 42 N. Y. 270; *Lonergan v. People*, 6 Park. C. R. (N. Y.) 209; *Bailey v. State*, 26

Ind. 551 ; Bales *v.* State, 3 W. Va. 685 ; Carter *v.* State, 12 Tex. 500 ; Com. *v.* Rogers, 7 Met. (Mass.) 500 ; 41 Am. Dec. 458 ; Ray's Med. Jur. 520 ; *post*, § 57.

§ 42. Civil acts of persons of unsound mind.

An idiot, lunatic, maniac, or other person *non compos mentis*, cannot make a valid contract or will ; and this rule applies whether the person be permanently or temporarily of unsound mind. If at the time he is mentally disabled from understanding the purpose and effect of the act, it avoids it : See Contracts, vol. 2, Field's L. B., § 80. Such persons are incompetent in law to enter into a contract or to make a valid will : Hovey *v.* Hovey, 55 Me. 256 ; Dennett *v.* Dennett, 44 N. H. 531 ; Bond *v.* Bond, 7 Allen (Mass.), 1 ; Sowers *v.* Pumphrey, 24 Ind. 231 ; Ham. on Ins. 10 ; Wills, vol. 5 ; Field's L. B., § 727 ; *ante*, §§ 18, 22, 26.

§ 43. In case of wills.

Blackstone observes : “ Madmen, or otherwise *non compotes*, idiots or natural fools ; persons grown childish by reason of old age or distemper, such as have their senses besotted by drunk-

eness — all these are incapable by reason of mental disability to make any will, so long as such disability lasts :” 2 Bl. Com. 497 ; see also 1 Jar. on Wills (5th Am. ed.), 63 ; Ray’s Med. Jur., § 54 ; *Brannatyne v. Brannatyne*, 14 Eng. L. & Eq. 581.

The law, however, makes a distinction between the subjects of total mania, or unsoundness of mind, and those of partial insanity, monomania, or unsoundness of mind, so far as it relates to testamentary capacity. In the latter cases the authorities distinctly sustain the doctrine that the person may make a will, unless he at the time is laboring under a delusion which would materially influence the testamentary disposition of his property : Guy & F. For. Med. (5th ed.) 216.

A person may have an insane belief or delusion as to one or more subjects and not as to others ; and if the delusion has no relation to his testamentary disposition, it would not be affected by it ; and this may be inferred from the reasonable provisions of the will, and its entire accord with the wishes of the testator as expressed on former occasions, when there was no

question as to his sanity and competency : See *ante*, § 22 ; 2 Gr. Ev., § 371 ; 1 Best on Ev., §§ 147, 150 ; Foreman's Will, 54 Barb. (N. Y.) 274 ; Seaman's Friend Soc. v. Hopper, 33 N. Y. 619 ; Duffield v. Morris, 2 Harr. (Del.) 375 ; see also Wills, vol. 5, Field's L. B., §§ 727, 729 ; Banks v. Goodfellow, 5 L. R., Q. B. (Eng.) 549 ; Hovey v. Chase, 52 Me. 304 ; Clapp v. Fullerton, 34 N. Y. 190 ; Boardman v. Woodman, 47 N. H. 120 ; Stackhouse v. Horton, 15 N. J. Eq. 202 ; Taylor v. Kelly, 31 Ala. 59.

It is not every degree of unsoundness of mind which will take away the capacity for testamentary disposition. But where insane delusion and mental unsoundness has been shown to exist in a person, a presumption might properly arise against his competency to make a will : Rogers v. Walker, 6 Pa. St. 371 ; 47 Am. Dec. 470. "And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one—that is to say, one in which natural affection and the claims of near relationship have been disregarded. But where, in the result, a jury are satisfied that the delu-

sion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no reason why the testator should have lost his right to make a will, or why a will made under such circumstances should not be upheld :” Cockburn, C. J., in *Banks v. Goodfellow*, 5 L. R. Q. B. (Eng.) 549 ; see also *Stanton v. Weatherwax*, 16 Barb. (N. Y.) 259 ; *Hovey v. Chase*, 52 Me. 304 ; *Boardman v. Woodman*, 47 N. H. 120 ; *Clapp v. Fullerton*, 34 N. Y. 190 ; *Stackhouse v. Horton*, 15 N. J. Eq. 202 ; *Trumbull v. Gibbons*, 22 N. J. L. 117 ; *Taylor v. Kelly*, 31 Ala. 59. As in other cases involving capacity, the questions to be determined are whether the testator had sufficient memory to recall his property, and those upon whom his bounty should confer it, and sufficient mind to construct a will with a due understanding of the business then in hand, and in the manner in which he desired his possessions to be distributed : 1 Jar. on Wills (5th Am. ed.), 94 ; *Clark v. Fisher*, 1 Paige (N. Y.), 171 ; *Higgins v. Carleton*, 28 Md. 115 ; *Yoe v. McCord*, 74 Ill. 33 ; *Lowder v. Lowder*, 58 Ind. 538 ; Quaine’s Dic. of Med. (Am. ed.), topic Wills, p. 260 ; 5 Field’s L. B., § 727 ; 6 id., § 435.

§ 44. Conduct and declarations of the testator.

The conduct and declarations of the testator before and after the execution of the will are held to be competent evidence if they tend to show unsoundness of mind or undue influence at the time of the execution, but not otherwise: *Boylan v. Meeker*, 28 N. J. L. 224; *Kinne v. Kinne*, 9 Conn. 104. So a sudden change of common and usual to eccentric and peculiar habits will frequently furnish very cogent evidence of insanity: *Lucas v. Parsons*, 27 Ga. 593. But it has been held that suicide is not conclusive evidence of it: *Brooks v. Barrett*, Pick. (Mass.) 94; *Burrows v. Burrows*, 1 Hagg. (Eng. Eccl.) 109, 146.

§ 45. The test of capacity to manage business.

"In the majority of cases of imbecility there is no difficulty in deciding on the competency of the individual to take care of his own affairs, to form contracts, to devise property; but in a few cases, and especially when the subject of inquiry has been intrusted with or consulted about the management of his affairs, the question is not so easy. But a comparison of the existing with the former state of mind . . . supplies a simple and obvious test. The tests of capacity usually recommended in

cases of imbecility are obviously insufficient to determine whether or not a man is capable of managing his own property. The arithmetical test, on which so much stress has been laid, is a test of knowledge, not of power. A man may be the best accountant in the world, but he may be a moral imbecile, and have so mean a sense of right, so childish a fancy, so weak a will, that from infancy to age he may yield to every impulse, and gratify every whim, without once counting the cost. A patient of our own, with whom we had been intimate for years, owed pence as a child, and pounds as a boy, and added debt to debt with each year that passed over his head, till at length a severe disappointment brought on a distinct attack of mania, of which a benevolent but extravagant mission, violent outbursts of passion, fierce hatreds, arrangements to spend a year's income in a week, and the unfounded expectation of an immense fortune on the morrow, were constituent parts. He carried with him to an asylum a host of delusions, and died in the firm conviction that he was the Saviour of mankind. In this case there was the cultivated and refined intellect of a man with

more than the weakness of a child ; but no test could have proved him incapable of managing himself and his affairs, save only the history of his life. The criminal acts of persons of weak intellect are as strongly marked by folly as their words and actions. They have no surer characters, and we no better trust. But in this case, as in that of maniacs, the law insists upon the test of a knowledge of right and wrong, which is as insufficient in criminal as the arithmetic test in civil cases. It is the test of knowledge, not of power ; and the knowledge of right, and the power to act aright, are as distinct as science and art : " Guy & F. on For. Med. (5th ed.) 209 ; see also *McCurry v. Hooper*, 12 Ala. 823 ; 46 Am. Dec. 289 ; see also *Foster v. Means*, 1 Spear Eq. (S. C.) 569 ; 42 Am. Dec. 332.

It has been held that a kind or degree of insanity which would not excuse a person for a criminal act may render him legally incompetent to manage himself and his affairs : *Bellingham's Case*, 5 C. & P. (Eng.) 168.

On this question Mr. Mandsley says : " If a person is incompetent to manage property, it is because he has lost some portion of his mental

power ; and this fact cannot justly be ignored in deciding upon his responsibility for criminal acts. Insanity once admitted, it is within the reach of no mortal comprehension to know exactly how far it may have affected the quality of his acts. To say that, possibly, it may have had no effect at all, is not enough. It should be proved by the party who affirms it : " Mandsley on Resp. in Ment. Dis. 111. But this relates to the burden of proof, which we will hereafter consider. Insanity once admitted, in any degree, it is only sheer presumption, not wisdom, to say that it could not have perverted the action of the mind in regard to any particular criminal act : Ray's Med. Jur. 60-64, 273-284.

§ 46. **Doctrine as to the burden of proof.**

The English rule as to the burden of proof, on a plea of insanity in a criminal case, is upon the defendant, and he is required to prove his insanity beyond a reasonable doubt. The defense is one of confession and avoidance, and the matter of avoidance must be fully established by the prisoner : 3 C. & K. (Eng.) 188 ; 4 Cox C. C. (Eng.) 155. And this rule has been fol-

lowed in various states in this country : See 21 N. J. L. 202 ; 76 Pa. St. 414 ; 8 Jones (N. C.), 463 ; 36 Am. Rep. 467.

But in most of the states of the Union the general rule seems to be that, whenever in the course of a trial evidence is produced showing that the defendant was of unsound mind at or before the time the criminal act was done, the burden of proof immediately rests upon the prosecution to show the contrary. In such a case the *onus* shifts upon the prosecution, and it devolves upon that side to show that insanity did not exist, or if it did, that it was not of such a character as to excuse the act : 14 A. L. Reg. N. S. 20 ; 16 *id* 453 ; 40 N. H. 399 ; 43 *id*. 224 ; 19 Ind. 170 ; 40 Ill. 352 : 17 Mich. 9 ; 10 Fed. Rep. 163, 202 ; 2 Field's Lawyers' Briefs, § 272 ; 4 Field's Lawyers' Briefs, §§ 114, 146.

§ 47. General presumption.

The general presumption is in favor of mental soundness, and usually the burden of proof would rest upon the party denying it, whether the question arises upon a contract or will, or upon trial

for a crime. But if a previous state of general insanity is shown, the burden of proof would be changed, and in such a case proof of the sanity of a testator would devolve upon the party affirming it: See Wills, vol. 5, Field's Lawyers' Briefs, § 730; Evidence, vol. 3, Field's Lawyers' Briefs, § 310; Best on Ev., §§ 332, 405; 2 Gr. Ev., § 689; *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418; *Rogers v. Walker*, 6 Pa. St. 371; 47 Am. Dec. 470; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500; 41 Am. Dec. 458; see also *Gerish v. Nason*, 22 Me. 438; *Cilly v. Cilly*, 34 Me. 162; *Dean v. Dean*, 27 Vt. 746; *Gabriel v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418; *Thompson v. Kyner*, 65 Pa. St. 368; *Eckert v. Flowry*, 43 Pa. St. 56; *Trumbull v. Gibbons*, 22 N. J. L. 117; 51 Am. Dec. 253; *Morris v. Stokes*, 21 Ga. 552; *Taylor v. Kelly*, 31 Ala. 59; *Colton v. Ulmer*, 45 Ala. 378; *Chandler v. Barrett*, 21 La. An. 58; *Guthrie v. Pierce*, 33 Ark. 396; *Matter of Coffman*, 12 Ia. 491; *McIntyre v. McCown*, 28 Ia. 480; *Roe v. Taylor*, 45 Ill. 485; *Rutherford v. Morris*, 77 Ill. 397; *Harvey v. Sullens*, 46 Mo. 157; *People v. Meyers*, 20 Cal. 520.

The rule as to the quantum of evidence to establish insanity as a defense in criminal cases is the same as in civil cases, viz.: that the jury may determine the question from a mere preponderance of evidence ; and proof that such a mental condition existed beyond a reasonable doubt does not seem to be required : *State v. Lawrence*, 57 Me. 574 ; *Com. v. Rogers*, 7 Met. (Mass.) 500 ; *Com. v. Eddy*, 7 Gray (Mass.), 183 ; *Ferris v. People*, 35 N. Y. 125 ; *Hoff's v. People*, 31 Ill. 385 ; *State v. Felter*, 32 Ia. 50 ; *State v. Hundley*, 46 Mo. 414 ; *State v. Reidemire*, 70 Mo. 173 ; 36 Am. Rep. 462.

§ 48. **Test of capacity to contract.**

Partial insanity upon a subject in no wise connected with a contract will not invalidate it : *Boyce v. Smith*, 9 Gratt. (Va.) 704 ; 60 Am. Dec. 303 ; and contracts made with lunatics are not all absolutely void : *Richardson v. Strong*, 13 Ired. L. (N. C.) 106 ; 55 Am. Dec. 430 ; as for goods furnished innocently on his order : See *Beals v. Lee*, 10 Pa. St. 96 ; 40 Am. Dec. 573. Nor will weakness of mind arising from old age or other causes invalidate an obligation executed

by the party. But if the instrument was procured by the use of undue influence or fraud, it would be invalid, and set aside in equity ; and imbecility of mind and understanding usually constitutes a material ingredient in determining the question whether a contract has been obtained by fraud, imposition or undue influence : *Juzan v. Toulman*, 9 Ala. 662 ; 44 Am. Dec. 448 ; *Smith v. Beatty*, 2 Ired. Eq. (N. C.) 456 ; 40 Am. Dec. 435 ; *Clark v. State*, 12 Ohio, 483 ; 40 Am. Dec. 481.

The acts and contracts of persons of weak understanding, or imbecility of mind, and who are therefore liable to imposition, will be held void if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence. And a contract may be set aside in equity where there is imbecility or weakness of mind arising from old age, sickness, intemperance or other cause, and manifest inadequacy of consideration ; or where there is weakness of mind and circumstances of undue influence and advantage : See *Equity Jurisprudence*, vol.

3, Field's L. B., §§ 87, 88; Fraud, vol. 3, Field's L. B., §§ 558, 575; Tracy v. Sackett, 1 Ohio St. 42; 59 Am. Dec. 610.

§ 49. Liability for torts.

A lunatic, or other person *non compos mentis*, is liable in damages in a civil action for any tort which he may commit, although he is not punishable criminally therefor: Morse v. Crawford, 17 Vt. 449; 44 Am. Dec. 349; Williams v. Cameron, 26 Barb. 172; Behrons v. McKinze, 23 Ia. 343; Contracts, vol. 2, Field's L. B., § 81.

§ 50. Unsoundness of mind as a defense to a criminal charge.

An idiot, lunatic, or permanently insane person, or one who is otherwise unsound in mind, to the extent that he does not know whether he is doing right or wrong, is not punishable for any act he may do while in that state: See vol. 2, Field's L. B., §§ 270, 271; Reg. v. Law, 2 F. & F. (Eng.) 836; Rex v. Offord, 5 C. & P. (Eng.) 168; Vance v. Com., 2 Va. Cas. 132; State v. Spencer, 21 N. J. L. 196; McAlister v. State, 17 Ala. 434. A person cannot be responsible for a crime unless he possesses sufficient mental capacity and intel-

ligence to have a criminal intent, and if his mental powers are so deficient that he has no will, conscience, or controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not responsible criminally for his acts : *Commonwealth v. Rogers*, 7 Met. (Mass.) 500 ; 41 Am. Dec. 458 ; see also *McAlister v. State*, 17 Ala. 434 ; 52 Am. Dec. 180 ; *Freeman v. People*, 4 Denio (N. Y.), 1 ; 46 Am. Dec. 216 ; *Criminal Law*, vol. 2, § 271 ; *Shelf. on Lunacy*, 458 ; *Wills v. People*, 32 N. Y. 715 ; *State v. Lawrence*, 57 Me. 574 ; *State v. Hunting*, 21 Mo. 464 ; *People v. Coffman*, 24 Cal. 230 ; *People v. Sprague*, 2 Park. C. R. (N. Y.) 43 ; *Commonwealth v. Heath*, 11 Gray (Mass.), 303.

The broad doctrine on this subject may be stated as follows : No act done by a person in a state of insanity can be regarded as an offense, and no insane person can be tried, sentenced to any punishment, or punished for any act or offense which he commits in that state. On this subject Blackstone says : " If a man in his sound memory commits a capital offense, and before

arraignment for it he becomes mad, he shall not be tried ; if after he be tried and found guilty he loses his senses, before judgment, judgment shall not be pronounced ; and if after judgment he becomes of non-sane memory, execution shall be stayed. If there be any doubt whether the person be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy or absolute insanity excuses from the guilt, and of course from the punishment of any criminal action committed under such deprivation of the senses ; but if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency : " 4 Bl. Com. 24 ; Shelf. on Lunacy, 467 ; Freeman *v.* People, 4 Denio (N. Y.), 10 ; 47 Am. Dec. 216 ; Commonwealth *v.* Meriam, 7 Mass. 168 ; 1 Whart. Cr. L., § 53 ; see also Criminal Law, vol. 2, Field's Lawyers' Briefs, § 277.

§ 51. Insane delusions and irresistible impulses.

We have before referred to the answers of the English judges to questions propounded by the House of Lords on the subject of insane delu-

sion in its relations to the criminal law : See Criminal Law, vol. 2, Field's Lawyers' Briefs, § 272 ; Reg. v. McNaughten, 10 C. & F. (Eng.) 210. The questions were suggested by the case of McNaughten, who shot Mr. Drummond in London in 1843, and was tried therefor and acquitted on the ground of insane delusion. The questions propounded were as follows :

“ 1. What is the law respecting alleged crimes committed by persons affected with insane delusion in respect to one or more particular persons, as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit ?

“ 2. If a person, under insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused ? ”

To these questions fifteen English judges responded as follows :

“ 1. The jury ought to be told in all cases that every man is presumed to be sane, and to possess

a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

“ 2. Assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party did the act complained of with a view, under the influence of the delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expressions we understand your lordships to mean the law of the land.

“ 3. The answer to this (the 2d) question must

of course depend upon the nature of the delusion ; but making the same assumption as we did before, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take his life, and he kills that man, as he supposes in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted serious injury to his character or fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

These conclusions of the fifteen judges have received some criticism, and in the light of more recent observation and experience their soundness in various respects has been questioned, if not destroyed. They, it has been said, take no note of irresistible impulses of the insane to do wrongful acts, and hold a partially insane person as responsible as a sane one.

Of the principles thus laid down it has been

observed that they are open to the following objections :

“ 1. To make delusion the sole test of insanity in criminal cases, and especially in cases of homicide, is at complete variance with the well ascertained facts of impulsive insanity, in which the existence of delusion can be distinctively negatived, as well as in many forms of emotional insanity, in which delusions form no necessary feature of the disease.

“ 2. On the other hand, the test of a knowledge of right and wrong is condemned by the notorious fact that a great many insane patients, and even imbeciles, have a clear conception of the two ideas. Indeed, the whole management of asylums presupposes a knowledge of right and wrong on the part of inmates.

“ 3. Nothing is more illogical than the statement of the law in reference to the partially insane. It amounts to nothing less than an absolute denial of the significance of a state of things universally acknowledged to constitute a valid test of insanity. The error has arisen from confounding single and harmless delusions, such as occur in most cases of hypochondriasis, with

those that affect the insane, commonly so called. Such single delusions are doubtless more compatible with self-restraint ; but they are of rare occurrence, and do not often figure in courts of law, and harmless as they may seem to be, . . . we cannot safely assume that they may not take a dangerous turn. That a man should believe that he is the Crystal Palace, may seem a very harmless fancy ; but if he grew angry with the government for removing it, to assassinate some member of the government, would be far less illogical than the fancy itself. The partial delusions of the insane are much more common, but when they are closely examined, they are found to be the offspring and natural expression of some one excited feeling or passion, which, having had force enough to create illusions of the senses and delusions of the mind, may be expected to give rise to insane impulses of great power ; to which we may add that a multitude of delusions implies mental confusion and excitement in proportion, and that in many instances these conditions are heightened by the co-existence with these delusions of the mind, of illusions of the senses, and illusive transformations

of real objects and persons. The excited feelings or passions which, having first destroyed the integrity of the senses and mental faculties, proceed to instigate acts of violence and cruelty, are religious excitement or despondency, jealousy, domestic anxieties exaggerated into fear of starvation, and discontent transformed into an insane belief in persecution. Now the acts of violence which ultimately flow from these excited feelings or passions, the true source of delusion, ought to be judged by the same rules that apply to the delusions themselves. It is reasonable and logical to infer that the acts are as little subject to restraint as the delusions to correction. What right have we to assume that the man who cannot control his thoughts is master of his actions?" Guy & F. on Forensic Med. 220.

§ 52. Common sources and manifestations of insane delusions.

These distinguished authors refer to four sources of homicidal acts by those of unsound mind, as follows: "1. Maniacs under the influence of religious excitement or despondency are subject to illusions and delusions of a very sin-

gular kind. They transform the persons with whom they are associated into supernatural beings, endowed with authority or power not to be questioned or resisted, and they convert common and familiar sounds into the articulate language of temptation or command. One religious maniac, therefore, kills a relative or a keeper, imagining him to be a fiend; another thinks that he has a direct commission from the Deity to fulfill some mission of wrath or extirpation. In case of religious mania, then, we can never safely affirm that the homicidal act was not the consequence of a command which the maniac would deem it impious to resist, or a delusion which places him in his own sincere conviction beyond and above the operation of human laws. The maniac who believes himself to be God, Christ or the Holy Ghost, would from the very nature of the case deem himself irresponsible.

“ 2. Of homicidal acts instigated by jealousy, shaping itself into a distinct delusion, it will suffice to observe that they are such acts as, if committed by sane men, on the evidence of their senses, would be punished as manslaughter, and not as murder.

“ 3. Of fathers and mothers who kill their children under the pressure of domestic anxiety culminating in an insane dread of starvation, it may be observed that they are generally remarkable for domestic virtue and devoted attachment to their victims, and that between them and ordinary murderers there is no single point of resemblance.

“ 4. Discontent, transformed into an insane belief in persecution, presents greater difficulties. The case is generally put in a form which seems to preclude a satisfactory answer. A maniac thinks he has been injured by another and kills him. If the injury were real, a sane murderer would be responsible, and so, it is contended, ought the madman to be. This curiously illogical argument ignores the simple fact that the two cases have nothing in common but the act itself. The imaginary offense has imaginary accompaniments, and every thought connected with it is one of confusion. To suppose that a mind which can imagine an impossible offense is sound in all other respects, is to outrage common sense, and set at nought the experience of all who have knowledge of the insane ; for with one consent

they repudiate the notion of a mind subject to such a delusion as being sound, and free to act as it will, beyond the sphere of its influence. The more closely the victim of this painful delusion is observed, the more extensive is found to be the disorder of his intellect. Those acts which are not directly prompted by his delusion are more strange, and his passions more excitable than those of other men. The theory of a single insane idea, springing up in a mind otherwise sound, having no effect on the remaining faculties, and simply prompting an action which, once suggested, is carried out with the same complete consciousness of its real nature as exists in the mind of the sane man acting under the suggestion of a corresponding reality, is too absurd to be for a moment entertained. Even in this case, then, the question of responsibility cannot be decided by the simple test of a knowledge of right and wrong. But there is another case allied to the one now under consideration which presents still greater difficulties. A man receives a real injury, and avenges himself; but it is alleged that he was not of sound mind when he committed the act. The unsoundness of his

mind is admitted, but he is deemed responsible because his act was instigated by the common motive of revenge. The obvious answer is, that the real injury has been by his insane mind magnified to undue importance, and then acted upon just as if it had been altogether imaginary ; and that he is therefore neither more nor less responsible for his act than the man whose motive was from the very first in the nature of a delusion. In this case, too, an inquiry into the state of mind, extending much beyond the legal test, will be necessary, and cannot be refused ; and this once granted, must result in showing the insufficiency of the test. Even in those cases where the criminal act cannot be traced to any delusion of which it is the legitimate offspring, but it is simply alleged in defense that the party is of unsound mind, the very fact of the unsoundness becomes an irresistible plea in mitigation. It would be strange indeed if the case of the maniac under the accusation of crime is the only one in which such a plea is ignored and refused. . . . We cannot, therefore, too strongly condemn the credulity which credits a mind already occupied by delusions with an otherwise efficient state of

faculties ; and we contend that it is in the highest degree improbable that a mind so possessed can, beyond the sphere of its delusions, think, feel and act with clearness, force and freedom from the same. . . .

“ Some writers, under a strong sense of the failure of the legal test of knowledge of right and wrong, have sought to set up in its place the power of control or restraint. The test has been thus transferred from the intellect to the will — from the knowledge of right to the power of acting aright. But this is a mere shifting of the difficulty ; for it is obviously not more easy to measure the exact amount of a man’s self-restraint than to gauge his abstract knowledge of right and wrong, lawful and unlawful : ” Guy & Fer. *Forensic Med.* (5th ed.) 121–124. See also Quain’s *Dic. of Med.* (Am. ed.), sub. *Insanity*, topics *Impulsive Insanity*, *Moral Insanity*, pp. 725, 727.

We have copied the able and philosophical views of these authors to show the inaccuracy of the test of criminal responsibility laid down by the fifteen learned English judges in response to the questions propounded by the English Lords.

§ 53. Test of capacity required for criminal responsibility.

It is perhaps difficult to furnish any absolute test in such cases ; but it may be said that in order to make a person responsible for his acts as criminal, he must possess enough intelligence and capacity to have a criminal intent and purpose : See Criminal Law, vol. 2, Field's L. B., § 272 ; *Com. v. Mosler*, 4 Pa. St. 261 ; *Com. v. Rogers*, 7 Met. (Mass.) 500 ; *Sanchez v. People*, 22 N. Y. 147 ; *Freeman v. People*, 4 Denio, 9 ; *Bovard v. State*, 30 Miss. 600 ; *State v. Neeley*, 20 Ia. 199 ; *Pond v. People*, 8 Mich. 150 ; *Willis v. People*, 32 N. Y. 715. Perhaps the opinion of the court in *Bovard v. State* contains as clear an exposition of the modern doctrine on this subject as can be found in the adjudications in this country. It was observed in this case that "in order to constitute a crime a person must have intelligence and capacity enough to have a criminal intent and purpose. If his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power ; or if, through the overwhelming power of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not pun-

ishable for criminal acts. But these are extremes easily distinguished and not to be mistaken. The difficulty lies between these extremes and cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusion as to act under false impressions and influence. In these cases the rule of law, as we understand it, is this: A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing,—a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him, and that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of the act and its consequences, if he has a knowledge that it is wrong

and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts :” See also Quain’s Dic. Med. (Am. ed.), topic, Legal Insanity, p. 726 *et seq.*

§ 54. **Impulsive mania, or uncontrollable impulse.**

Of this form of mania Messrs. Guy & Ferrer observe : “ The acts committed under its influence have most all of the following characters : They are without discoverable motive, or in opposition to all known motives. A man kills his wife, to whom he is tenderly attached, a brother his sister, a mother her infant, or the victim is one whom he never saw before, and against whom it is impossible that he can bear malice. Nay, the victim of this blind passion may be a horse or other animal incapable of offense. After the commission of the act he does not seek to escape ; he often publishes what he has done ; does not conceal the body, but openly exposes it ; delivers himself up to justice ; describes the state of mind which led to the act, and either

remains stupid and indifferent or is overwhelmed with remorse. He has no accomplices, has made no preparations, and takes nothing from his victim. Sometimes he has previously spoken of his strong temptation and begged to be prevented from doing mischief. These homicidal acts are generally preceded by a striking change of conduct and character, and, on inquiry, the accused is often found to have an hereditary tendency to insanity, to be subject to fits, to have attempted suicide, to have expressed a wish for death, or to be executed as a criminal. . . . Imbeciles are peculiarly liable, as we should suppose they would be, to these wild impulses, and it is easy to understand how the instinct of destruction is sometimes associated with delusions, the criminal act itself being the result of strong excitement of the homicidal passion, while the delusion suggests the motive. To this class probably belong those cases of wholesale murder in which the father of a family destroys his wife and children to prevent them falling the victims of starvation, and then puts an end to his own life ; the idea that such an evil threatens them being insane, no less than the impulse which prompts such a mode

of escape. Some imbeciles, who are addicted to petty theft, rob their victims ; but they make so childish a use of that which they have stolen as to afford fresh proof of their inherent weakness of mind. Violent homicidal impulses are also very common in the *epileptic*—sometimes preceding, sometimes following the fits, and sometimes taking their place : ” Guy & Farrer on For. Med. (5th ed.) 228, 229 ; Whart. & S. Med. Jur. 159, n.

§ 55. **Defense on the ground of.**

To constitute a defense on the ground of impulsive mania or irresistible impulse, it must exist to such an extent and with such violence, as to render it impossible for the party to do otherwise than to submit to it ; and a mere temporary and violent passion will not exempt the person from responsibility nor constitute a defense for wrongful acts : Reg. v. Barton, 2 F. & F. (Eng.) 762 ; Reg. v. Townley, 3 F. & F. 839 ; Scott v. Com. 4 Met. (Ky.) 227 ; Smith v. Com. 1 Duval (Ky.), 224 ; Com. v. Mosler, 4 Pa. St. 266 ; Hopps v. State, 31 Ill. 385 ; State v. Felter, 25 Ia. 67 ; Stevens v. State, 31 Ind. 486 ;

Sanchez v. People, 22 N. Y. 147 ; *Whart. & S. Med. Jur.*, §§ 144, 162, 531, 537; *Reg. v. McNaughten*, 10 Cl. & Fin. (Eng.) 130 ; *Willis v. People*, 5 Park. C. R. (N. Y.) 620 ; *State v. Spencer*, 21 N. J. L. 196 ; see also 2 Field's L. B., § 273.

§ 56. In case of drunkenness ; legal responsibility.

Alcoholic drinks will produce intoxication and drunkenness of various degrees, the extreme of mental unsoundness in such cases reaching a condition of incoherent utterances and unconsciousness. In this condition the contracts of the victims would be void or voidable, and this would apply to all gifts by will or otherwise : See *ante*, § 43. And on general principles they should be held irresponsible criminally for their acts. But it seems, in consideration of public policy, the law, as it is now recognized and administered by the courts, is otherwise, and drunkenness, voluntary or involuntary, is not an excuse for an act of a general criminal nature, done under its influence : *People v. Robinson*, 2 Park. C. R. (N. Y.) 649 ; *Hester v. State*, 17 Ga. 146 ; *State v. Harlowe*, 21 Miss. 446.

The common law seldom excuses or relieves the drunkard from responsibility for his acts, either in civil or criminal cases. A person *non compos mentis*, or permanently or temporarily of unsound mind, cannot make a valid contract or perform a valid civil act. A temporary insanity or intoxication, "produced by the excessive and voluntary use of alcoholic liquors, may be a good ground for avoiding a contract entered into while in that state; and, generally, when one enters into a contract while deprived of his reason, he may repudiate it when he recovers his reason:" See Contracts, vol. 2, Field's L. B., § 80; Gore v. Gibson, 13 M. & W. (Eng.) 623; Cook v. Clayworth, 18 Ves. (Eng.) 15; Mitchell v. Kingman, 5 Pick. (Mass.) 431; Arnold v. Richmond Iron Works, 1 Gray (Mass.), 434; Gant v. Thompson, 4 Conn. 303; Lang v. Whidden, 2 N. H. 435; see also Shelf. on Lunacy, 274, 304.

But this rule is not universal, as where one makes a note in that condition, it would be valid in the hands of an innocent holder; and the contract of a drunken man is not void, but voidable: State Bank v. McCoy, 69 Pa. St. 201;

8 Am. Rep. 246 ; 1 Ames' Cas. on B. & N. 558.

But in criminal cases a more rigorous rule prevails, and drunkenness, whatever the degree, will not excuse a criminal act. The doctrine of the common law was stated by Blackstone, as follows : " As to artificial and contracted madness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as an aggravation of the offense, rather than an excuse for any criminal misbehavior. The law, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime with another : " 4 Bl. Com. 26 ; see also *R. v. Meakin*, 7 C. & P. (Eng.) 297 ; *R. v. Thomas*, 7 C. & P. 820 ; *Swan v. People*, 4 Park. C. R. (N. Y.) 649 ; *Kenny v. People*, 31 N. Y. 330 ; *Boswell v. Com.*, 20 Grat. (Va.) 860 ; *Choice v. State*, 31 Ga. 424 ; *Flanigan v. People*, 86 N. Y. 554 ; *Criminal Law*, vol. 2, § 274 ; *Ray's Med. Jur.* 514 ; 3 Par. & Fonbl. Med. Jur. 39.

The soundness of this old doctrine may well be questioned, and the reasons for it might as

well be applied in other cases ; for it is a matter of common understanding among the enlightened members of the medical profession that other habits and practices, as well as the intemperate use of spirituous liquors, may produce mania or unsoundness of mind, and the person may pursue these habits well knowing this probable result, and would be exempt from criminal responsibility for acts done while in such unsound condition of mind : Allis. Princ. C. L. (Scot.) 654 ; 22 Am. Jur. 290; *ante*, § 44.

§ 57. **Drunkenness as a mitigation of criminal acts.**

Notwithstanding drunkenness will not excuse criminal acts, still in case of the trial of a person for murder the present doctrine seems to be that the intoxicated condition of the defendant at the time of the taking of the life may be proved to show either a want of intent to murder or of premeditation, and to reduce the offense from murder to some inferior degree of homicide: Reg. v. Cruise, 8 C. & P. (Eng.) 546 ; R. v. Meakin, 7 C. & P. (Eng.) 297 ; R. v. Thomas, *supra* ; People v. Robinson, 1 Park. C. R. (N. Y.) 649 ; People v. Hammill, 2 Park. C. R. 223 ; Lonergan v.

People, 6 Park. C. R. 209; 50 Barb. 266; People *v. Rogers*, 18 N. Y. 9; *Kenny v. People*, 31 N. Y. 330; *Choice v. State*, 31 Ga. 424; *Humphreys v. State*, 45 Ga. 190; *Rafferty v. People*, 66 Ill. 118; *McIntyre v. People*, 38 Ill. 515; *Keenan v. Com.*, 44 Pa. St. 55; *Shannahan v. Com.*, 8 Bush (Ky.), 463; *Dawson v. State*, 16 Ind. 428; *State v. Harlow*, 21 Mo. 446.

But want of intent or premeditation will not be conclusively presumed from any degree of intoxication at the time of the killing, as this may have existed before the intoxication, and the latter may have been induced as a part of a plan or purpose to accomplish the felonious act with impunity: *Id.*; see also *O'Brien v. People*, 48 Barb. (N. Y.) 274. Intoxication in such cases is a mere circumstance to be considered for the purpose of mitigation: *Whart. on Hom.* 371; *Com. v. Hawkins*, 3 Gray (Mass.), 463; *Com. v. French*, *Thatcher's Cr. Cas.* (Mass.) 163; *Pirtie v. State*, 9 Humph. (Tenn.) 663; *Swan v. State*, 4 id. 136; *State v. Bullock*, 13 Ala. 413; *Pigman v. State*, 14 Ohio, 555.

The old and modern doctrine on this subject is well stated in the opinion of the court in the case

last cited, where it is said : " Drunkenness is no excuse for crime ; yet in that class of crimes and offenses which depend upon guilty knowledge, or the coolness and deliberation with which they are perpetrated, to consummate their commission or fix the degree of guilt, it should be admitted to the consideration of the jury. If the act is of that nature that the law requires it should be done with guilty knowledge, or the degree of guilt depends upon the calm and deliberate state of mind at the time of the commission of the act, it is proper to show any state or condition of the person that is adverse to the proper exercise of the mind and the undisturbed condition of the faculties. The older writers regard drunkenness as an aggravation of the offense, and excluded it for any purpose. It is a high crime against one's self and offensive to society and good morals ; yet every man knows that acts may be committed in a fit of intoxication which would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effect of drink, which he would not have done if sober, is worse than the man who commits it from sober and de-

liberate intent. The law regards an act done in sudden heat, in a moment of frenzy, when passion has dethroned reason, as less criminal than the same act when performed in cool and undisturbed possession of all the faculties.

“There is nothing the law so much abhors as the cool, deliberate and settled purpose to do mischief. That is the quality of the demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication, though to be punished, may, to some extent, be softened and set down to the infirmities of human nature. Hence, not regarding it as an aggravation, drunkenness, as anything else, showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of mind necessary to constitute murder in the first degree.”

§ 58. *Delirium tremens* as an excuse in criminal cases.

We have already referred to the legal relations of *delirium tremens*: See *ante*, § 42. But a fur-

ther consideration of the subject in criminal cases may be appropriate.

Whether a sound reason exists for a distinction between that direct and immediate insanity, delirium or frenzy, frequently produced by the intemperate use of alcoholic drinks, inducing the condition of drunkenness, and that mania or delirium which sometimes follows an excessive use of such drinks, and known as *delirium tremens*, our criminal law recognizes a distinction. The law in the latter case does not look to the remote causes of the mental disturbance, and if the act is not committed under the immediate influence of intoxicating drinks, the plea of insanity is not invalidated by the fact that it is the result of drinking at some previous time: Whart. C. L., § 48; *State v. Birdsall*, 1 Beck's Med. Jur. (10th ed.) 808; *State v. Wilson*, Ray's Med. Jur. 520; *R. v. Watson*, 2 Taylor's Med. Jur. 599; *United States v. Drew*, 5 Mason (C. C.), 28; *R. v. Meakin*, 7 C. & P. (Eng.) 297; *R. v. Runie*, 1 Lew. C. C. (Eng.) 76; *Maconahay v. State*, 5 Ohio St. 77; *Bales v. State*, 3 W. Va. 685; *Carter v. State*, 12 Tex. 500; *Smith v. Com.*, 1 Duval (Ky.), 224; *United States v. Drew*, 5 Mason (C. C.), 28.

We have already stated the general doctrine on this subject as follows: "If a person is entirely incapacitated by *delirium tremens*, so as not to be conscious of the nature or moral turpitude of the act, he is not punishable therefor, even though such *delirium tremens* is produced by the voluntary use of intoxicating liquor:" See vol. 2, Field's Lawyers' Briefs, § 276; also cases cited in the last paragraph; also United States v. Clark, 2 Cranch (U. S.), 158; United States v. McClue, 1 Curt. (C. C.) 1; Bailey v. State, 26 Ind. 422; 40 Ind. 263; 64 Ind. 435; O'Brien v. People, 48 Barb. 274; Real v. People, 55 Barb. 551; 42 N. Y. 270; Lonergan v. People, 6 Parker's C. R. (N. Y.) 209; 50 Barb. 266.

§ 59. Dreaming; illusions and delusions common to.

It has been observed that "the phenomena of dreaming have a striking analogy to those of some forms of unsoundness of mind. The external world being shut out, and the higher faculties inactive, illusions and delusions have the vivid impress of reality, and follow each other according to associations over which we have no

control. Many dreams are directly traceable to states of body which, when we are awake, produce pain and uneasiness, such as fullness of stomach, distension of bladder, or irritation of skin. The sleeper is conscious of this uneasy sensation, and seems seeking relief in unlikely ways and places, or he associates it with imaginary events. Thus a fit of indigestion is converted into a *nightmare*, and the ruffled dressing of a blister on the head suggests a dream of being scalped by savages. In other instances the uneasy sensation gives rise to a dream which has no other relation to the sensation itself than that of being painful or disagreeable; or to induce a state of mind in which disconnected occurrences, recent or remote, having nothing in common but the feeling of annoyance or discomfort, are blended together. We hear of a distressing accident; we receive bad news from an absent friend; we have been concerned in some anxious business; a dream combines these scattered elements; we are ourselves connected with the accident; the absent friend is in our company; and the person with whom the business is transacted appears upon the scene:” Guy & Ferrer on Forensic Medicine, 177.

§ 60. Legal relations of dreaming.

It sometimes occurs that a person suddenly aroused from sleep kills another, under the influence of his dream and the impression of necessity for self-defense. Thus two men, being out at night in a place infested with robbers, engaged that one should watch while the other slept; but the former falling asleep, and dreaming that he was pursued, shot his companion through the heart, on being aroused from his slumber. So in another case, a person being suddenly awakened from sleep at midnight, thought he saw a frightful phantom, which, though twice challenged, gave no answer and seemed to advance upon him. He attacked it with a hatchet, and killed his wife. These and like acts could not reasonably be regarded as criminal : Guy & F. on Forensic Med. 178.

§ 61. Somnambulism; common manifestations of.

Somnambulism or sleep-walking differs from simple dreaming in this, that although a degree of mental activity is common to both conditions, the somnambulist enjoys the use of his senses in some degree, and the power of locomotion. He

is thereby enabled to perform manual operations as well, frequently, as in his waking state. The farmer goes to his barn and threshes his grain ; the house servant lights a fire and prepares the breakfast for the family ; and the scholar goes to his desk and writes or reads. Usually, however, the action of the senses is more or less imperfect, many of the impressions being incorrectly or not at all perceived. The person walks against a wall, or stumbles over an object in his path ; he mistakes some projection for a horse, strides across it, and imagines himself to be riding ; he hears the faintest sound connected with what he is doing, while the voices of persons near him, and even the blast of a trumpet, are entirely unnoticed. Occasionally the power of the senses is increased to a degree unknown in the waking state. Jane Rider, whose remarkable history was published some thirty years ago, could read almost obliterated dates of coins in a dark room, and was able to read and write while her eyes were covered with several folds of handkerchief. For the most part, however, the operations of the somnambulist consist in getting up while asleep, groping about in the dark, endeavoring to make

his way out of the house through doors and windows, making some inarticulate sounds, perhaps, and all the while unconscious of the persons and things around him. The power of the perceptive faculties, as well as that of the senses, is sometimes increased in a wonderful degree. It is related of the girl just mentioned that in the fit she would sing correctly, and play at backgammon with considerable skill, though she had never done either when awake : Guy & Fer. on For. Med. 178 ; Ray's Med. Jur.

§ 62. The legal relations of somnambulism.

The legal relations of somnambulism should be precisely those of insanity. The party should be held exempt from criminal liability for acts done in that condition, but liable in damages for his torts. Criminal acts have been committed in a state of somnambulism by persons of irreproachable character : Whart. & S. Med. Jur., § 472 ; Gray & F. on Forensic Med. 265 ; Rush on the Mind, 302.

§ 63. Statutory provisions relating to the responsibility of persons mentally unsound.

In various states there are statutory provisions relating to the responsibility of persons of un-

sound mind, although they generally only declare the common law on the subject: See *ante*, §§ 22, 23; 2 Field's L. B., §§ 270-279. Thus the Penal Code of New York provides as follows:

“§ 20. An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime. A person cannot be tried, sentenced to any punishment or punished for any crime while he is in a state of idiocy, imbecility, lunacy or insanity, so as to be incapable of understanding the proceeding or making his defense.

“§ 21. A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as either,

“1. Not to know the nature and quality of the act he was doing; or

“2. Not to know that the act was wrong.

“§ 22. No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such a condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species

or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act.

“ § 23. A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.”

§ 64. Construction of statutes and the common law on the subject.

Insanity occasioned by previous habits of intemperance, and not resulting directly from the immediate use of intoxicating liquors, as in case of *delirium tremens*, exempts the victim from criminal responsibility for his acts : *Ante*, §§ 56, 57 ; *O'Brien v. People*, 48 Barb. (N. Y.) 274 ; see also 2 Field's L. B., §§ 270-279 ; *Kenny v. Peo.*, 31 N. Y. 330 ; *Lonergan v. People*, 50 Barb. 266 ; 6 Park. 209 ; *Freery v. People*, 54 Barb. 319 ; *Com. v. Hawkins*, 5 Gray (Mass.), 463.

A person may be insane at the time of the commission of the criminal act, or he may be insane at the time he is called to make a defense

thereto. In the former case he would not be responsible ; but if sane at the time he is called to make a defense he must interpose the insanity as a defense. In case he is insane at the time of trial, he cannot be required to make a defense. The common law, if not the statutes, requires, in case of a suggestion or plea of insanity, or in case such a mental condition is manifest, the court to appoint a commission or impanel a jury to inquire, in a preliminary way, into the mental condition of the accused, and to determine whether the accused be sane or insane,—whether *compos mentis* or *non compos mentis*,—and if they find for the accused the trial will be suspended : Arch. C. L. (Watt. Notes, 7th ed.) 27 ; 1 Whart. C. L., § 53 ; 2 Field's L. B., § 277.

And a finding upon such a preliminary issue that the prisoner is sane and capable of making a defense, has no bearing upon the question of his responsibility for the crime with which he is charged : *Freeman v. People*, 4 Denio (N. Y.), 9. A lunatic is responsible for a crime committed during a lucid interval ; but mere weakness of intellect, not amounting to insanity, will not exempt from criminal responsibility in the

present stage of our legal development : Clarke's Case, 1 C. H. (N. Y.) 176 ; Patterson *v.* People, 46 Barb. (N. Y.) 625 ; *ante*, §§ 54-56. But if it appears that the accused has been insane, on general principles of the law, this condition of mind would be presumed to continue until the contrary is shown, and it would devolve upon the prosecution to show that the accused was sane at the time of the commission of the act charged as criminal : *Ante*, §§ 45, 46 ; People *v.* Montgomery, 13 Ab. Pr., N. S. (N. Y.) 207.

In New York it has been held that if the accused knew, at the time of doing an act, that it was criminal, and that he was committing a crime which was legally and morally wrong, he is responsible : Willis *v.* People, 32 N. Y. 715 ; 5 Park. C. R. 621 ; Flannagan *v.* People, 52 N. Y. 467 ; People *v.* Kline, Edm. S. C. (N. Y.) 13 ; People *v.* Moett, 23 Hun (N. Y.), 60 ; People *v.* Sprague, 2 Park. C. R. 43.

A mere frenzy, without total derangement, will not exempt the person from criminal responsibility : Pierrow's Case, 3 C. H. Rec. (N. Y.) 123 ; see also Sanchez *v.* People, 22 N. Y. 147 ; 4 Park. C. R. (N. Y.) 535. And volun-

tary intoxication, though amounting to frenzy, is no defense to a homicide committed without provocation: *Ante*, § 57 ; *People v. Rogers*, 18 N. Y. 9 ; 9 Park. C. R. 632 ; *Kenny v. People*, 31 N. Y. 330 ; *People v. Eastwood*, 3 Park. 25 ; *Rafferty v. People*, 66 Ill. 118 ; *State v. Harlow*, 21 Mo. 446 ; *Shannahan v. State*, 8 Bush (Ky.), 463 ; *Charce v. State*, 31 Ga. 424 ; *Humphreys v. State*, 45 Ga. 190.

And if the accused at the time he did the criminal act was in such a state of mind as to know that it was morally wrong and unlawful, he would be criminally responsible, unless it was the result of an irresistible impulse or insane delusion : *Ante*, §§ 50-54 ; 6 Field's Lawyers' Briefs, §§ 440-444 ; *Willis v. People*, 32 N. Y. 715 ; 5 Park. C. R. (N. Y.) 621 ; *Flannagan v. People*, 52 N. Y. 467 ; *People v. Sprague*, 2 Park. C. R. (N. Y.) 43.

Evidence of intoxication, both at common law and under statutes, is always admissible to explain the conduct and intent of the accused : *People v. Hammill*, 2 Park. C. R. (N. Y.) 223 ; *Lonegran v. People*, 6 Park. C. R. 209 ; *People v. Rogers*, 18 N. Y. 9. And this would fre-

quently be material for the purpose of establishing the grade of the crime : *People v. Batting*, 49 How. (N. Y.) 392 ; *ante*, § 62.

§ 65. Rules suggested on examination of mental condition.

Drs. Ray and Ferrie, in their valuable treatise on Forensic Medicine, suggest the following rules for the guidance of the medical man in the examination of persons in various cases supposed to have want of mental capacity or to be of unsound mind :

“ 1. Observe narrowly the general appearance, conformation, and shape of the head ; the complexion and expression of the countenance ; the gait and movements, and the speech.

“ 2. Ascertain the state of the health, of the appetite and digestion, of the tongue, skin and pulse. Notice especially the presence or absence of febrile symptoms, as distinguishing delirium from madness. Ascertain whether there is sadness or excitement, restlessness or stillness, and whether the sleep is sound and continuous, or disturbed and broken. In females, inquire into the state of the menstrual function.

“ 3. The family history should be traced out in order to ascertain whether there is any hered-

itary predisposition to insanity, and whether other members of the family have been subject to fits, or have betrayed marked eccentricity of behavior.

“ 4. The personal history should be ascertained with equal care. If the mind appear unsound, ascertain whether the unsoundness dates from birth, from infancy, or from what time. If the unsoundness have supervened later in life, whether it followed severe bodily illness, accident, mental shock, long continued anxiety of mind, repeated epileptic fits, or indulgence in habits of intemperance, or in solitary vice.

“ 5. Inquire whether the present state of the mind differs from that which existed when it was reputed to be sound ; and whether the feelings, affections, and domestic habits have undergone a change.

“ 6. Ascertain whether the existing unsoundness is a first attack, and if so, whether it began with oppression or excitement ; if not, did the first seizure follow a period of melancholy, passing then into mania, and then into slow convalescence ? If any signs of any general paralysis are present in speech or gait, has the patient squan-

dered his money, grown restless, and wandered about, exposed his person, committed petty thefts, or had delusions of wealth and grandeur?

“ 7. When our object is to ascertain the mental capacity, it must be tested by the conversation directed to such matters as age, the birth-place, profession, or occupation of parents, number of brothers, sisters, and near relations, common events, remote and recent, the year, name of the month, and day of the week, the name and family of the sovereign, and of persons best known and most talked of. The power of performing operations of arithmetic, and the knowledge of the value of money should be tested, and the memory by repeating simple forms of words in general use, such as the Lord's Prayer. In testing the power of attention, merely negative or affirmative answers to leading questions should be distinguished from such replies as indicate judgment, and reflection. If the inquiry relate not to the capacity of the mind, but to its unsoundness in other respects, delusion should be sought for by conversations directed to the topics most likely to interest and excite the mind. The state of the moral feelings will be tested by conversation di-

rected to relatives and friends. In cases of supposed moral insanity, diligent inquiry should be made into the motives which might have led to the commission of the act of which the party is accused.

“ 8. The medical man should insist on full opportunity being given him of forming his opinion. He should rarely be content with a single visit, and in difficult cases should require that the party be placed for some time under his observation.

“ 9. When undergoing examination in a court of law, the medical witness is recommended to avoid all definitions of insanity, on the plea that mental, like bodily diseases, do not admit of definition, but, in common with many familiar objects, can be recognized but not described :” See also Quain's Dic. of Med. (Am. ed.), sub. Civil Incapacity, p. 259.

CHAPTER IV.

PRIVILEGED COMMUNICATIONS.

§ 66. At common law, between attorney and client.

At common law confidential communications between attorney and client, relating to matters of professional employment, on grounds of public policy, cannot be divulged by either on the witness stand, without the consent of the other. And courts will interpose to protect parties entitled to the privilege : See *Cohen v. Ins. Co.*, 41 N. Y. Superior Ct. R. 296 ; 1 Field's Lawyers' Briefs, § 473-479 ; 3 *id.* 300 ; 1 Whart. C. L. (7th ed.), § 775 ; 1 Greenl. on Ev. (13th ed.), §§ 239-246. But if a party to a suit offers himself as a witness, he cannot, upon cross-examination, refuse to answer questions as to any conversation with his counsel, testified to in his direct examination : *Inhabitants, etc., v. Henshaw*, 101 Mass. 193 ; 3 Am. Rep. 333.

The same public policy would seem to require the protection of confidential communications between clergymen or priests and laymen, as

where the guilty conscience disburdens itself by penitential confessions, and by spiritual advice, instruction and discipline, seeks pardon and relief. But the common law does not protect such communications : 1 Greenl. on Ev. (13th ed.), § 247 ; 1 Whart. C. L. (7th ed.), § 775.

Nor does the common law of England, or of this country, protect similar communications made between physicians or surgeons ; and in the absence of statutory provisions to the contrary, they may be required as witnesses, to disclose information acquired in professional confidence, and even where it was necessary for proper advice or treatment of the patient : 1 Greenl. on Ev. (13th ed.) 248 ; Whart. on C. L. (7th ed.) 774 ; Duchess of Kingston's Case, 11 Harg. St. Tr. (Eng.) 243 ; 20 How. St. Tr. (Eng.) 613 ; *Rex v. Gibbons*, 1 C. & P. (Eng.) 97 ; 1 Phil. on Ev. (7th ed.) 147 ; *Broad v. Pitt*, 3 C. & P. (Eng.) 518 ; *Dixon v. Parmelee*, 2 Vt. 185 ; *Sherman v. Sherman*, 1 Root (Ct.), 486.

§ 67. Protection of confidential communications by statutes.

The statutes of various states make not only confidential communications to a physician or

surgeon by his patient, but by a layman to a clergyman or priest, privileged, and they cannot be revealed when they are called as witnesses.

The statute of New York provides as follows :
“ A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, which was necessary to enable him to act in that capacity : ”
N. Y. Code of Civ. Proc., § 834 ; see also 2 R. S. N. Y. 406, § 73.

In New York it has been held that, under the statute, it is not essential that the relation of physician and patient should actually exist, but it is sufficient if the physician visits a person under such circumstances as to lead the latter to believe that the visit was a professional one, and to induce the patient to make disclosures on the strength of such belief : *People v. Stout*, 3 Park. C. R. (N. Y.) 610 ; *Edington v. Ins. Co.*, 67 N. Y. 185.

It may be observed that if, as between attorney and client, a communication is privileged, it cannot be disclosed by the party to whom it is communicated, when called as a witness, either

in a civil or criminal proceeding. And the privilege is not limited to oral discourse, but covers all disclosures by writings, documents, books, papers, pictures or other visible or material objects : Crosby *v.* Berger, 11 Paige (N. Y.), 377 ; 1 Field's Lawyers' Briefs, §§ 474, 476 ; Durkee *v.* Leland, 4 Vt. 612 ; Lynde *v.* Judd, 3 Day (Conn.), 499 ; Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116 ; People *v.* Benjamin, 9 How. (N. Y.) 419.

The same doctrine would be applicable to the relation of physician and patient : Eddington *v.* Life Ins. Co., 67 N. Y. 185 ; *ante*, § 66.

Statutes of a similar character may be found in Michigan, Indiana, Iowa, Wisconsin, Missouri and other states.

§ 68. Protection of confidential communications made to clergymen or priests.

In many of the states will be found statutory provisions, similar to the one in New York, protecting confidential communications made to clergymen or priests, in certain cases, and making them privileged. The New York statute is as follows : " No minister of the gospel or priest of any denomination whatsoever shall be allowed to disclose any confession made to him in his

professional character in the course of discipline enjoined by the rules or practice of such denomination : " 2 Rev. Stat. N. Y. 403, 572.

In Ohio, Missouri and other states they have a similar statute.


§ 69. The privilege may be waived.

The patient may, it seems, waive the privilege thus secured to him by the statute, and permit his medical adviser or attendant to disclose the communication : *Johnson v. Johnson*, 14 Wend. (N. Y.) 637. And if a party makes himself a witness he, it seems, cannot refuse on cross-examination to testify as to communications made to his legal or medical adviser, on the ground of privilege : See *Inhabitants, etc., v. Henshaw, supra*. In this respect the law is the same, whether the privilege be in favor of a patient or client : See 1 Field's *Lawyers' Briefs*, sub. *Attorney and Client*, § 473.

§ 70. Construction of the statutes on the subject.

The full scope and effect of a statute is not always known with certainty until it has been interpreted and construed by the courts. Then the statute, with the interpretation of it, becomes

the law of the state, as a general rule. In construing the statute of New York, prohibiting a physician or surgeon from disclosing any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, it has been held that the provision includes not only information obtained from the statements of the patient, but such as may be conveyed by others present at the time, or obtained from his own observations of the patient's symptoms and appearance ; and that it will be presumed that information so imparted or acquired was given or obtained for the purpose of enabling the physician to prescribe for the patient, and that it was material. And it has been further held that the right of objecting to the disclosure of such privileged communications is not limited to the patient and his personal representatives, but that a third party may avail himself of it, such as an assignee of the party, where his rights may be affected by the communication : *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185 ; see also *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256 ; *Westover v. Ætna Life Ins. Co.*, 99 N. Y. 56.

 In the case last cited, EARLE, J., after referring to the statutes of New York restraining clergymen, attorneys and counselors at law, and physicians and surgeons, from disclosing confidential communications made to them in their professional character, observes as follows: "It is thus seen that clergymen, physicians and attorneys are not only absolutely prohibited from making the disclosures mentioned, but that by an entirely new section it is provided that the seal placed upon such disclosures can be removed only by the express waiver of the persons mentioned. Thus, there does not seem to be left any room for construction. The sections are absolute and unqualified. These provisions of the law are founded upon public policy, and in all cases where they apply, the seal of the law must forever remain until it is removed by the person confessing, or the patient or the client:" See also *Grattan v. Life Ins. Co.*, 80 N. Y. 281.

§ 71. The general rule applicable to other professions.

Under statutes in various states, as we have noticed, the general principles of the law protecting confidential and professional communica-

tions between attorney and client, have been extended to similar communications between a clergyman or priest and the confessor or penitent, and between the physician or surgeon and his patient.

§ 72. Illustration of the rule in case of surgeons.

Upon the trial of an indictment in New York, in 1865, for abortion, the evidence on the part of the prosecution tended to show, that the defendant, arranged with one Dr. S. to perform an operation to procure an abortion, and took the female to the office of said doctor, where the operation was performed; that the defendant then took her to a boarding-house and arranged for her board and care until she recovered from her sickness, and paid the bill. After the discovery of the circumstances of the case, the district-attorney sent a physician to attend upon the girl, and he called upon her and made an examination of her person and prescribed for her. Upon the trial the said physician was called as a witness for the prosecution, and was permitted to give his opinion, under objection and exception, that an abortion had been performed, founded upon

personal examination so made by him, and upon what the girl told him in regard to the matter. It appeared that the girl was alive at the time of the trial.

On appeal, the admission of this testimony was held to be error ; that the fact that the physician was selected and sent by the public prosecutor to attend upon the female did not affect the question, as she accepted his services in his professional character, and the relation of physician and patient was established between them : *Peo. v. Murphy*, 101 N. Y. 126 ; *Grattan v. Life Ins. Co.*, 80 N. Y. 281 ; 15 Hun, 74. On this subject see also 1 Beck's Med. Juris. 288-331 ; 2 Whart. & S. Med. Jur., § 84 ; 2 Whart. C. L., § 1220 ; Ros. C. Ev. 190 ; *Dilliber v. Home Ins. Co.*, 69 N. Y. 258 ; *Westover v. Etna Life Ins. Co.*, 99 N. Y. 56. As to the common law see 1 Greenl. on Ev., § 248 ; 1 Whart. Crim. L. 774 ; *Duchess of Kingston*, 20 How. St. Tr. (Eng.) 613 ; Phil. Ev. (7th ed.) 147. As to expert testimony see 1 Whart. Crim. L., §§ 45, 49, 821*a*, 821*g*.

In reference to such communications between attorney and client it is observed by Mr. Greenleaf :
“The protection given by the law to such commu-

nications does not cease with the termination of the suit or other litigation, nor is it affected by the party ceasing to employ the attorney to which the communication was made and retaining another, nor by any other change of relations between them, nor by the death of the client. The seal of the law once fixed upon them remains forever, unless removed by the party himself in whose favor it was then placed. It is not removed without the client's consent, even though the interests of criminal justice may seem to require the production of the evidence:" 1 Greenl. on Ev. 243; see also *Brown v. Payson*, 6 N. H. 444; *Com. v. Swan*, 30 Conn. 6; *Flack v. Null*, 26 Tex. 273.

Under statutory provisions protecting professional and confidential communications made to a priest, clergyman, physician or surgeon the same rule would seem to apply. And this seal of confidence would undoubtedly be placed upon the mouth of an interpreter employed to translate such communications: See *Jackson v. French*, 3 Wend. 337; *Parker v. Carter*, 4 Mumf. (Va.) 273; and to private secretaries and clerks: See *Taylor v. Foster*, 2 C. & P. (Eng.) 195; *Fort v. Hayne*, 1 C. & P. 545; *Landsberger v. Gorham*, 5 Cal. 450; *Sibley v. Waffle*, 16 N. Y. 180.

CHAPTER V.

ABORTION.

§ 73. Defined ; quick with child explained.

Abortion is defined as the expulsion of the foetus at a period of utero-gestation so early that it has not acquired the power of independent life : Bouv. L. D., *Abortion* ; Quain's Dic. of Med. 3.

By the common law of England an attempt to destroy a child, *en ventre sa mere*, was a misdemeanor ; and in case of the death of the child it was, at an early period, held to be murder : Rosc. Cr. Ev. (4th Lond. ed.) 260 ; 1 Rosc. C. L. (3d Lond. ed.) 671 ; 2 Whart. C. L., § 1220. But the English law on this subject, it seems, has never been fully adopted in this country ; and in the absence of statutory regulations to the contrary it is not a criminal offense in this country to administer a drug, or to perform an operation upon a pregnant woman, by her request or with her consent, with the intention and for the pur-

pose of causing an abortion and premature birth of the foetus of which she is pregnant, and by means of which an abortion is in fact accomplished, unless at the time of the administration of the drug or the performance of such operation such woman was quick with child : See *Com. v. Wood*, 11 Gray, 419 ; *Wilson v. State*, 22 Ohio, 319 ; *Russ. on Crimes*, 671 ; 15 Ia. 177 ; *Evans v. People*, 49 N. Y. 86.

The term "quick with child," in the sense here used, is the sensation the mother has of the motion of the child she has conceived. The period at which the mother first experiences a quickening or motion of the child may vary with different persons or under different circumstances. The child is in fact alive from the first moment of conception, and, according to its age and state of development, the foetus has different modes of manifesting its life, and during a portion of the period of gestation, by its motion. By the growth of the embryo, the womb is enlarged until it becomes too great a size to be contained in the pelvis. It then rises to the abdomen, when the motion of the foetus is for the first time felt. The period when quickening is first experienced or

observed varies from the tenth to the twenty-fifth week after conception ; but usually it occurs about the sixteenth week : Denman on Midw. 129 ; 1 Leg. Gaz. Rep. (Pa.) 183.

Life of the foetus is said to commence when a woman first becomes quick with child ; and procuring an abortion after that period is manslaughter by the more modern common law of England, as well as by statutes. The common law did not interfere to prevent women convicted of a capital offense from being executed, unless they were " quick with child : " 2 Hale Pl. Cr. 413. But this, as it will be observed, is quite an arbitrary rule ; and there would appear to be no ground for making this particular point of time in foetal development the pivot upon which such important results and responsibilities are made to hinge. The following distinctions relating to this subject have been approved : " Quick with child, is having conceived ; with quick child, is where the child has quickened : " 8 C. & P. (Eng.) 265 ; 1 Leg. Gaz. Rep. (Pa.) 183 ; see 26 Am. Dec. 60 n. ; 2 Whart. & St. Med. Jur. 1230.

Dr. Alexander Russell Simpson, in his valuable article on the subject of Miscarriage, found

in Quain's Dictionary of Medicine, referring to the maternal causes of miscarriage, observes as follows : " The causes of miscarriage on the part of the mother are either general or local. Amongst the general or constitutional conditions that favor the occurrence of abortion we note : *Firstly*. All the causes that lead to depression of a woman's health. Abortions are frequent, for instance, in times of famine—amongst women who yield themselves to excesses ; in anæmic women, and in those tainted with syphilitic poison. Often enough, especially in the last class, the cause of the abortion can be traced to some morbid change in the maternal portion of the placenta ; but sometimes it seems to be due simply to the impure or impoverished condition of the patient's blood. *Secondly*. Fevers, such as the zymotic fevers, and acute inflammations, more particularly of important viscera, such as pneumonia, occurring in gravid women, very frequently become complicated by abortion. *Thirdly*. Shock may bring on miscarriage, whether operating simply through the nervous system, of which we meet occasional examples ; or, as is more frequently the case, by producing

a more direct physical impression upon the uterus, as in cases where the patient leaps or steps suddenly down from a height, or lifts a weight, stretches her arms above her head, or is exposed to any sudden jar or more protracted jolting. Though many cases of abortion are attributed to such a cause, it is always to be borne in mind that in some of these, at least, that supposed cause would not have led to the disaster unless there had already existed a predisposition in some morbid condition of the uterus or its contents.

“ Amongst the local causes we find, *first*, and most frequently, diseased conditions of the deciduæ. Commonly in these cases the patient had previously been the subject of chronic endometritis; though occasionally cases are met with where there have been no marked symptoms previously, and the generative process may affect either the vera, or reflexa, or serotina separately or simultaneously. *Second* in frequency, under this head, we have the abortions due to displacements of the uterus, these being commonly either descents or retroversions. *Thirdly*, neoplasms of the uterus, such as cancers or fibroid

tumors, sometimes permit the occurrence of conception, but prevent gestation running to its natural term. *Fourthly*, the presence of tumors in the neighboring organs, or inflammatory adhesions among them, may prevent the uterus from attaining its full growth, and compel it to early evacuation of its contents."

Mr. Chitty says: "Miscarriage is the expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time and the expiration of the sixth month of gestation, when the child may possibly live, it is termed abortion. But the criminal act of destroying the foetus at any time before birth is termed in law miscarriage:" Chit. Med. Jur. 410. The expulsion of the foetus at a period of uterogestation so early that it has not acquired the power of sustaining an independent life is now generally termed abortion: Bouv. L. Dic., *Abortion*.

Again, it has been observed that abortion signifies the expulsion of the contents of the pregnant uterus before the seventh month of gestation: Quain's Dic. of Med. (8th Am. ed.) 5.

In a recent case in Kentucky it was held that criminal abortion could not be committed, in the

absence of statutes to the contrary, unless the woman was quick with child : *Mitchell v. Com.*, 78 Ky. 204 ; 39 Am. Rep. 227 ; 10 Cent. L. J. 338. And in New York it has been held that the willful killing of an unborn child is not manslaughter, except it is made so by statute : *Evans v. People*, 49 N. Y. 86.

§ 74. Maternal causes of abortion.

Abortion or miscarriage may be natural and innocent, or it may be artificial and criminal, depending upon the cause or the circumstances of the case. Again, abortion may be distinguished into two varieties : 1. Miscarriage, or the expulsion of an ovum or of a non-viable child ; or, 2. Premature labor, or the expulsion of a viable child : See Verrier's *Obstetrics* (1st Am. from the 4th French ed.), 167 ; Dr. Barnes' *Obstet. Operations* (Eng. ed.), 385 *et seq.*

The maternal causes of abortion have been classified as follows :

1. Poisons circulating in the mother's blood, as fevers, syphilis, various gasses, lead, copper, etc.; or the products of morbid action, as jaundice, albuminuria, carbonic acid from asphyxia and in the moribund.

2. Diseases degrading the mother's blood, as amæmia, obstinate vomiting, over-lactation.

3. Diseases disturbing the circulation dynamically, as liver, heart, and lung disease.

4. Causes acting through the nervous system, as chorea, mental shock, diversion or exhaustion of nerve force, as from obstinate vomiting.

5. Local disease—uterine, as fibroid tumors, inflammation, hypertrophy, etc., of the uterine mucous membrane; mechanical anomalies, retroversion, pressure of tumors external to the uterus, etc.

6. Climatic abortion.

7. Abortion artificially induced.

§ 75. Foetal causes of abortion.

The foetal causes of abortion are as follows:

1. Diseases of the membranes of the ovum, as fatty degeneration, hydratiform degeneration, inflammation, congestion, apoplexy, fibrous deposits.

2. Diseases of the embryo itself, as malformation, inflammation of the serous membrane, diseases of the nervous system; diseases of the kidney, liver, etc.; mechanical, as from torsion of the cord or funis.

The causes of abortion are often complicated ; in other words, they may be partly maternal and partly foetal. And it is often difficult to discover the primary cause ; and it may be further observed that abortion has a great tendency to become a habit : Dr. Barnes' *Obstetric Operations* (1st ed.), 385; Tidy's *Leg. Med.* (Am. ed.) 97.

§ 76. **Natural and innocent causes of abortion.**

Abortion may be naturally and innocently caused, or artificially and criminally produced. Natural and innocent abortion or miscarriage may arise from a nervous and irritable temperament, disease, malformation of the pelvis, immoderate venereal indulgence, a habit of miscarriage, plethora, great debility, or from disease in the ovum or in the membranes.

§ 77. **Artificial and innocent abortion ; premature labor.**

The laws of England, it seems, do not recognize the induction of premature labor by the medical practitioner ; but English judges have always held that medical men are morally justified in inducing premature labor, provided the object

be to save the life of the mother or child, or both : Tidy's Leg. Med. (1st Am. ed.) 98 ; Verrier's Man. of Obstet. (1st Am. from 4th French ed.) 319.

In this country the statutes making the procuring of an abortion or miscarriage criminal, make an exception in case "the same is necessary to preserve the life of the woman, or the child of which she is pregnant : " See *post*, § 80 ; N. Y. Penal Code, § 294.

The cases in which it has been recommended to induce premature labor are as follows :

1. In cases of extreme narrowness of the pelvic rim ; and in certain cases of deformity, where neither version nor forceps can succeed at full term in bringing into the world a living child. This may often be accomplished with perfect safety to the mother, by inducing premature labor at the seventh month.

2. In some cases of obstinate vomiting, where all expedients have proved fruitless and a fatal result is anticipated.

3. In case of pregnancy complicated with insanity and disease of the uterus or other organs, such as cancer, fibrous tumors, etc.

4. In case of placenta prævia, or where there is severe hemorrhage.

5. In case of rupture of the uterus.

6. In case of narrowing of the soft passages, cicatrices of the vagina, etc.

§ 78. Chief methods employed to produce abortion.

It may be observed that the methods employed to induce a miscarriage or to produce an abortion may be the same, whether it be lawful or unlawful, whether it be necessary to save the life of the mother or child, or both, or whether the purpose be otherwise and criminal.

Dr. Barnes, in his *Obstetric Operations*, says : The chief methods of inducing premature labor are:

1. Puncturing the amniotic sac or membranes.
2. The administration of ergot of rye, or other cebofic.

3. Separating the membranes from the lower portion of the uterus.

4. Passing a flexible catheter between the membranes and the uterus (*i. e.*, within the womb), and retaining it there for some hours.

5. Mechanical dilatation of the cervix by instruments, or by sponges, or by laminaria tents, or

by india-rubber bags filled with warm water or air.

6. Galvanism.

7. Irritation of the mammary glands or breasts.

8. Injection of carbolic acid into the uterus.

[Some fatal cases are related as occurring from treatment by this method.]

9. Injection of warm or cold water, or both alternately, into the vagina or uterus. The use of cold water applied externally is said sometimes to be successful. Large enemata, or the introduction of plugs into the rectum or vagina, would probably be effectual: Barnes' Obs. Operations (1st ed.), 385; Tidy's Leg. Med. (Am. ed.) 99.

§ 79. Criminal abortion; methods of procuring.

There are two means or methods of producing unnatural criminal abortion. One may be designated as general; the other local. In the former case the purpose is to produce the unnatural expulsion of the foetus through the constitution of the mother, by means of venesection, emetics, cathartics, diuretics, emmenagogues, comprising mercury, savin, and the spurred eye or ergot, to

which much importance has been attached; the other is by local or mechanical means, which consist either in external violence applied to the abdomen or loins, or in the use of instruments introduced into the uterus for the purpose of rupturing the membranes, and thus bringing on premature action of the womb. The latter is the more generally resorted to, as being the most effectual, and not unfrequently the larger cities have their experts for this purpose,—generally women. But such mechanical means of producing abortion not unfrequently produces the death of the mother as well as of the foetus.

It may be further observed on this subject that drugs taken into the stomach for the purpose of producing an abortion, and in sufficient quantities to accomplish the object, are always dangerous to the life of the patient. The most common instrumental means employed for this purpose is the uterine sound, or some similar instrument.

The introduction of a catheter or similar instrument inside the womb, which is allowed to remain, will sooner or later produce contraction of the womb and expulsion of its contents.

Water is sometimes injected for the same purpose. A galvanic stem pessory is sometimes used. And it is said that electricity may be employed in such a way as to destroy the foetus or ovum without injuring the tissues of the mother.

A knowledge of these various modes of procuring an abortion may be useful both to the medical and the legal professions, and especially to the latter in cases of criminal prosecutions for abortion. It may be observed that the chief methods of inducing miscarriage or abortion, which we have referred to, have been resorted to by criminal abortionists in general. See *ante*, § 78.

§ 80. Statutory provisions on the subject.

In most if not all of the states there are statutory provisions against procuring abortions, and by the provisions of such statutes it is a grave offense, except in certain cases, to procure an unnatural abortion by any means, or to advise, aid or assist in doing so. The provisions of the Penal Code of New York on this subject are substantially the statutory provisions of other states, and they are as follows :

“ § 294. A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or of the child of which she is pregnant, either,

“ 1. Prescribes, supplies or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug or substance ; or

“ 2. Uses, or causes to be used, any instrument or other means, is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in county jail for not more than one year.

“ § 295. A pregnant woman, who takes any medicine, drug, or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment for not less than one year, nor more than four years.

“ § 296. Any person who endeavors to conceal the birth of a child by any disposition of the dead body of the child, whether the child died

before or after its birth, is guilty of a misdemeanor.

“ § 297. A person who manufactures, gives or sells an instrument, a medicine or drug, or any other substance, with intent that the same may be unlawfully used in procuring the miscarriage of a woman, is guilty of a felony.”

Similar provisions will be found in the statutes of most if not all of the United States.

§ 81. Construction of statutes on the subject.

Under the provisions of such statutes it is not essential to constitute the offense that the woman be *quick* with child ; and in New York, under an indictment for producing abortion of a *quick* child, it was held that the defendant could properly be convicted, though it should appear that the child was not *quick*. See also, as to the sufficiency of an indictment under the statute of New York, *People v. Davis*, 56 N. Y. 95 ; *Monegan v. People*, 55 N. Y. 613 ; *People v. Stockham*, 1 Park. C. R. (N. Y.) 427 ; *Hunt v. People*, 3 id. 569. It is a misdemeanor, in New York, to attempt to administer drugs to a pregnant woman with intent to produce miscarriage : *Lohman v*

People, 1 N. Y. 379 ; 2 Barb. 216 ; Evans *v.* People, 49 N. Y. 86 ; People *v.* Davis, 56 N. Y. 101 ; Hunt *v.* People, 3 Park. C. R. (N. Y.) 569.

In New York a misdemeanor is a crime which is not punishable by death or imprisonment in a state prison : See Penal Code N. Y., §§ 5, 6. And it is a misdemeanor in that state to administer drugs to a pregnant female with intent to produce miscarriage : People *v.* Lohman, 1 N. Y. 379. The female in such a case is not regarded as an accomplice, but rather as a victim : Dunn *v.* People, 29 N. Y. 523.

And it is not essential, under the New York or other similar statutes, that the defendant accused of administering drugs to produce a miscarriage be present at the time of the taking of the same : State *v.* Howard, 32 Vt. 380 ; Watson *v.* State, 22 Alb. L. J. 318 ; Reg. *v.* Wilson, 1 Dears. & B. (Eng.) 127.

§ 82. In case death results from producing.

Under statutes, if not by the common law, if in consequence of the means used to procure an abortion, the death of the woman ensues, the crime is either murder or manslaughter. Under

a former English statute it was held that if a person intending to produce an abortion does an act which causes the death of a *quick* child, or which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by his misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder ; and the mere existence of the possibility that something might have been done to prevent the death would not render it less murder : See 43 Geo. III, c. 58 ; Geo. IV, c. 51, § 14 ; 2 C. & K. (Eng.) 784.

This would not, of course, be the case where the purpose of the abortion was to save the life of the mother or child. But see more recent English statutes on the subject : 24-25 Vict. ch. 100, §§ 58, 59.

§ 83. **The killing of a quick child, or of a woman quick with child, in attempts to produce unlawful miscarriage.**

Statutes in most if not all the states of our Union provide that where death results from

procuring an unlawful abortion or an attempt to procure the same, the offending party is guilty of manslaughter. Thus the Penal Code of New York provides :

“ § 190. The willful killing of an unborn quick child, by any injury committed upon the person of the mother of such child, is manslaughter in the first degree.

“ § 191. A person who provides, supplies or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter in the first degree.

“ § 192. Manslaughter in the first degree is punishable by imprisonment for not less than five nor more than twenty years.”

The penal statutes of various states contain similar provisions.

§ 84. Signs of abortion during the life of the patient.

The common signs and symptoms of a recent natural delivery of a living child would for the most part usually exist in case of abortion, especially if the abortion occurs during the later periods of gestation. Where the question of delivery is presented, as in case of suspected child-murder and concealment of birth, constituting infanticide and consequently murder, the certainty with which the question may be determined by a medical expert will largely depend upon the time that has elapsed since the birth of the child : See 4 Field's Lawyers' Briefs, §§ 121-123. " If the examination be conducted within the week, most of the following symptoms will be present ; but if delayed much beyond a week or ten days, the evidences of recent delivery will, at best, be of a somewhat indefinite character :

" 1. The pulse will be a little quickened, and more than usually soft and compressible. . . .

" 2. A peculiar expression of countenance, a dark areola under and around the eyes, and a peculiar odor about the body will be observed ; the skin is usually moist, soft and relaxed.

“ 3. The breasts are almost certain to contain milk, and to show the areola, pigmentation and follicles already described. They will be tender and knotty, and the nipples more than usually prominent. The character of the milk should be examined. The first milk, or colostrum, is yellower, richer in salts, and of higher specific gravity than the milk afterward secreted. It also contains an enormous number of granular corpuscles, like the so-called exudation corpuscles. With reference to the silvery streaks on the breast, whilst we admit that they may indicate a previous pregnancy (or, to speak more accurately, a previous *distension*), it is certain they do not prove recent delivery.

“ 4. The skin of the abdomen will be found flaccid, and in many women thrown into folds. Numerous shiny, silvery, riband-like streaks, or cicatrices, due to atrophy of the skin, following a stretching of the integuments, may be seen on the abdomen and also on the thighs. There will probably be noticeable the dark line observed during pregnancy, passing from the navel to the pubes, whilst sometimes the muscles are separated by the median line.

“5. On passing the hand downwards, or pressing it firmly over the pubic region, the enlargement of the uterus will be apparent, often remaining the size of a cricket ball for a considerable time after pregnancy. In health the involution of the uterus takes from fourteen to twenty-eight days, although in some cases (sub-involution) many weeks or months elapse before it is complete. The womb, it is to be remarked, is often felt to incline to one side.

“6. By vaginal examination the os uteri will be found gaping. Two or three fingers may be passed into it with ease, and its margins will probably be found fissured and torn. By sound, the increased depth of the uterine cavity may be ascertained.

“7. We may find the lochia exuding from the uterus. The lochial discharge is at first colored with blood, but afterwards becomes green or brown (green waters). After a week the lochia may be absent.

“8. The perinæum will in all probability exhibit more or less recent laceration, whilst the vagina and uterus will present a dark and almost bruised appearance:” Tidy's Leg. Med. (1st Am. ed.) 78.

We now pass directly to the symptoms and indications of miscarriage or abortion, as manifested by the woman during life, and within a short time after the occurrence of the same. But before these signs and indications are considered it may be remarked : *First*, that if the symptoms hereafter mentioned occur during the earlier periods of gestation, they are at most of an exceedingly evanescent character, whilst it is fairly open to question whether they are not as a rule entirely absent ; and, *secondly*, that some if not all of the symptoms named may be simulated by menstruation.

Mr. Tidy, in his valuable work on Legal Medicine, in presenting the signs of abortion, observes : “The signs of abortion in the living are commonly stated as follows :

“ A relaxed condition of the vulva and passages, patulousness of the os uteri, the presence of a lochial secretion in the earlier stages, and a white mucous secretion at a later period, accompanied by that characteristic acrid smell common to puerperal women. The distension of the breasts, yielding a flow of milk on pressure, with a fullness and knotty feeling for a short time after

aborting, are also observable. A general anæmic appearance from loss of blood, with sunken eyes, will be noticed. A peculiar excitement of the pulse, with dryness of skin, is also invariably present. A speculum may be needed to see the lacerations of the os uteri, but as a rule they may be felt by the finger. It will, of course, be of primary importance to remark on all the signs of violence to uterus or vagina; also whether there be an excessive inflammatory condition of the genital organs. Further, all marks on the body of a female which may indicate general violence for the purpose of effecting the object in view, should be carefully recorded.

“If an abortion occurs naturally at an early period of utero-gestation, the signs usually found may be very slight or even altogether absent. After the third month the insertion of the placenta may be detected by a rough place on the inner uterine wall. In making a *post mortem* care is necessary in removing the uterus and laying it open, as if there be a wound it may be suggested that it was made during the *post mortem*. The specimen itself should refute the charge. Punctures, lacerations and incisions in the uterus and con-

tiguous organs must be specially looked for. These, particularly the punctures, are often multiple. 'He stabbed me three or four times,' is a common remark of the victim."

§ 85. Signs on examination of the female after death.

It is usually not difficult to distinguish wounds made before from those made after death, because the former will have cicatrized surfaces or be coated with lymph, pus or blood. It is not always possible, but generally it is easy, to distinguish the results of violence from natural or spontaneous ruptures: Barnes' Obst. Oper. (2d ed.), §§ 320-375. Peritonitis, when resulting from violence, is generally more localized than when it is, so to speak, spontaneous in puerperal cases at term. Note should especially be taken in all cases of abortion whether there are signs of irritant poisoning in the stomach and intestines or any inflammation of the bladder and kidneys resulting from the administration of abortive drugs. Note further any general marks of violence, especially on the abdomen; also the general character of the viscera, *i. e.*, whether they indicate loss of blood during life, such as commonly results from abortion

If a woman die during the menstrual period a thickened state of the uterus, a swollen condition of its mucous lining and a generally increased hyperæmic appearance are invariably found. And it is well to bear this in mind lest we mistake the appearance resulting from menstruation for that produced by abortion : Id.

§ 86. **Examination of the foetus; strains, etc.**

If the foetus be found, a very careful examination should be instituted to determine, 1st, its age; 2d, whether it was born alive; and, 3d, if so, to what cause its death may probably be attributed. Further, the foetus must be most carefully examined for punctures or wounds, and every attempt made to form an opinion whether the injuries, if such be found, were caused during life or after death. This latter point is essential, not so much to prove that the wound was sufficient to cause death as to negative the certain contention on the part of the defense that the injury was caused after birth : Id.

§ 87. **Infanticide; distinction between, and foeticide.**

Infanticide is the murder of a new-born infant; whereas miscarriage, abortion or foeticide

is the destruction of life of the *foetus in utero*. To constitute the offense of murder, the child whose life is destroyed must be wholly born. At common law the killing of an unborn child or foetus, though quick, was only manslaughter, and this is generally the case under statutes ; but the crime of infanticide, or the killing of a child after it is fully born, is murder both at common law and under statutes. In criminal cases the question is sometimes presented whether the child was killed before or after birth, and whether there was any delivery, premature or otherwise.

The signs and symptoms, in such cases, we have already stated. But such a case would usually call for expert testimony, where the pregnancy of the woman, and delivery, premature and criminal, or otherwise, is proved or admitted, and the question presented is, whether the child was killed before or after delivery.

This question is sometimes of great interest to both the legal and medical professions.

It may be observed that to constitute infanticide murder, the child must be born, and "must have been a reasonable being alive," and a child

is not born until the whole body be detached from that of the mother. *R. v. Poulton*, 5 C. & P. (Eng.) 329 ; *R. v. Enoch*, 5 C. & P. 539 ; *R. v. Crutchley*, 7 C. & P. 814.

If, on examination by an expert, it appears that the deceased child has breathed, this is not a decisive proof that it was born alive, as it may have breathed before the delivery was complete ; nor is it necessary that the child should have breathed to make the killing murder, as it is not an uncommon thing for a child to be wholly born and alive some time before breathing : 4 Field's Lawyers' Briefs, §§ 123, 124 ; *R. v. Sellis*, 7 C. & P. (Eng.) 850 ; *R. v. Brain*, 6 C. & P. 349 ; *R. v. Trilloe*, 1 C. & M. (Eng.) 650. And breathing may commence before circulation, as where it commences after birth, but before the umbilical cord is severed : *Id.*

§ 88. **Evidence of life subsequent to birth of child.**

In the absence of direct proof, evidence of the existence of life subsequent to birth may necessarily rest, as we have seen, upon the signs and symptoms furnished by the supposed mother, if living, or even dead, and upon expert testimony

based upon the examination of the identified child or foetus, and especially if it be found in a suitable state of preservation, to furnish evidence for an opinion on the subject.

In such a case the expert testimony must depend upon certain organic facts relating to the foetus or child, and to the circulatory and respiratory systems. In respect to the circulatory system of the child it may be observed :

1. That the foetal blood usually differs from that of the fully born child in this, that the blood of the former is wholly dark like venous blood, destitute of fibrous matter, and forming coagula much less firm and solid than that which has been subjected to the process of respiration. So the coloring matter is darker, and contains no phosphoric acid, and its proportion of serum and red globules is comparatively small. The circulation of the blood anterior to birth is usually different from that subsequent to that event ; the former being, by means of the foetal openings, the *foramen ovale*, the *ductus arteriosus*, and the *ductus venosus*, enabled to perform its circuit without sending the entire mass of the blood to the lungs for the purpose of oxidization. But

this test would not perhaps be very conclusive in case of breathing before an entire and complete delivery : See Verrier on Obstet. (1st Am. from 4th French ed.) 86, 87 ; Dean's Med. Jur. 142 *et seq.* If the extra-uterine life commences, the double circulation is established in all cases, and the ante-natal openings above referred to gradually close, so that their closure is considered very good, if not clear, evidence of life subsequent to birth.

2. After delivery, the child, if alive, is *in verum natura*, and "a reasonable being alive," in the sense of law, so as to constitute its willful and premeditated killing, "with malice aforethought," the crime of murder. On this subject Baron Park once observed: "The child might breathe before it was born, but its having breathed is not sufficiently life to make the killing of the child murder ; there must have been an independent circulation of the child, or the child cannot be considered alive for this purpose:" *R. v. Enoch*, 5 C. & P. (Eng.) 539.

3. Whether the child was born alive or dead may be determined also from the difference in the distribution of the blood in the different

organs of the body. The two organs in which this difference is most perceptible are the liver and lungs. The circulation of the whole mass of the blood through the lungs distends and fills them with blood, so that their relative weight will be nearly double, and any incision into them will be followed by a free effusion : See 1 Beck's Med. Jur. 478 *et seq.* ; Dean's Med. Jur. 142 *et seq.*

But if the child may breathe before the delivery is complete, this would not furnish a complete test.

“ When the child escapes from the womb,” observes Dr. Verrier, “ or just before the end of labor, the placental circulation diminishes and ceases completely. The defective oxygenation that results induces a congested state of the brain that excites it and induces contraction of the muscles of inspiration. The air enters and dilates the lungs, the child cries, and life is fully entered upon :” Verrier's Manual of Obstet. (1st Am. ed. from the 4th French ed.) 87.

At this period the crime of murder may be committed upon the child, but previous to this the willful destruction of the foetus, especially if

quick, would be foeticide, and the offense manslaughter : See *ante*, § 87 ; R. v. Poulton, 5 C. & P. (Eng.) 329.

But, as we have before observed, the weight of authority favors the conclusion that respiration of the child fully born is not essential to constitute the destruction of its life murder ; and respiration before a fully completed birth of it would not furnish the condition which would raise the willful killing of it from manslaughter to murder : *Ante*, § 87 ; R. v. Crutchley, 7 C. & P. (Eng.) 814 ; R. v. Sellis, 7 C. & P. (Eng.) 850 ; R. v. Wright, 9 C. & P. 754 ; R. v. Brain, 6 C. & P. 349.

Evidence of life after birth, as derived from the respiratory system of the child, may be summarized as follows :

1. From the thorax ; its size, capacity, and arch are increased by respiration.

2. From the lungs, which are increased in size and volume, and projected forward by respiration. So by respiration they become rounded and obtuse, of a pinkish red hue, and their density is inversely as their volume. Lungs that have not respired are specifically heavier than

water, and if placed within it will sink to the bottom. If they have respired, their increase in volume and decrease in density render them specifically lighter than water, and when placed within it will float. It is observed by Dr. Dean that there are several objections to this test, and if it be conceded that the foetus or child may breathe before it is fully born, it would not be conclusive on the question whether the child was or was not fully born alive ; but it may be entitled to its due weight in the settlement of the question : Dean's Med. Jur. 154 ; 1 Beck's Med. Jur. 459 ; *ante*, § 88.

3. From the state of the diaphragm, as the act of expanding the lungs enlarges and arches the thorax, and, by necessary consequence, the diaphragm descends, whereas prior to respiration it is found high up in the thorax : *Id.*

§ 89. **Modes of destroying the life of a child after birth.**

The criminal modes commonly resorted to for the purpose of destroying the young child are ; suffocation ; drowning ; cold and exposure ; starvation ; wounds, fractures, and injuries of various kinds ; the introduction of sharp-pointed instru-

ments in different parts of the body ; luxation and fracture of the neck ; strangulation ; poisoning ; intentional neglect to tie the umbilical cord ; and causing the child to inhale air deprived of oxygen, or gases positively deleterious : See Beck's Med. Jur. 509 *et seq.* ; Ryan's Med. Jur. 137 ; Dean's Med. Jur. 179 *et seq.*

§ 90. Summary of matters to be observed on examination of the body of the woman to determine the question of abortion.

The following directions are suggested for consideration and observance on examination of the woman, if living or dead, for the purpose of determining the question of abortion, whether innocent or criminal.

Where the woman is alive :

1. Temperature.
2. As to the woman's predisposition to abort, and the period at which the abortion had commonly occurred.
3. General state of health. Note the existence of leucorrhœa, excessive menstruations, syphilis, asthma, malignant diseases, uterine disease, etc.

4. Whether the woman is well or ill-formed. Note pelvic malformations, effects of tight lacing, etc.

5. Whether any cause can be assigned to account for the abortion; for example, violent coughing, blood-letting, straining at stool, violent exercise, undue excitement, septic poisoning, violence, administration of medicines, etc.

6. All injuries to the genital organs. If any exist, consider whether they might be self-inflicted.

Examination of the body of the woman if dead.

1. Be careful not to mistake the effects of menstruation for those produced by abortion.

2. Avoid injuring the parts by the knife, or otherwise, during the autopsy.

3. Consider the possibility of injuries being self-inflicted.

4. Note the existence of any marks of violence on the abdomen or other parts.

5. Observe the condition of the genital organs, noting all inflammations, rents, tears, perforations, etc. If the uterus is injured it should be preserved.

Note also,

1. The condition of the passage, whether relaxed or otherwise.
2. The condition of the os uteri, whether virginal or gaping.
3. Vaginal secretions, and if present, their character.
4. The general appearance of the breasts, presence of milk, etc.
5. Whether there be any signs of irritant poisoning in the stomach, or inflammation of the bladder, kidneys, rectum, etc. ; the contents of the stomach, if necessary, to be preserved.
6. Whether the viscera generally indicate loss of blood during life.

Examination of the supposed product of conception.

1. The nature of the supposed product of conception.
2. Consider whether there is evidence of a diseased condition of the membranes or the placenta ; that is, the structural degeneration.
3. If a foetus be found, determine whether it was born alive, its probable age, and the cause of its death.
4. Determine whether, if there be wounds or

other injuries, they were inflicted during life or after death.

5. Examine all drugs, instruments, etc.

The crime of abortion may be committed in any stage of pregnancy : *State v. Slagle*, 83 N. C. 630.

§ 91. Indictments ; evidence.

Under the provisions of the New York Penal Code the defendant V. was tried and convicted upon an indictment charging that he together with one P. used instruments upon the body of one W. to procure her miscarriage. The operation was performed by P. in his office, and it was not claimed that V. took any part in it, or was present when it was performed. He offered no testimony to show that it was not performed, his position being that he neither took any part in the operation nor advised it, nor had anything to do with it. The only direct testimony showing that he had advised it was that of the woman upon whom it was performed, who testified that the operation was performed by P. at his office, by use of an instrument, and that she submitted to it upon the advice and procurement of the de.

fendant. A police officer testified that about a month after the crime was alleged to have been committed he found in the office of P. instruments which were shown to be suitable for the purpose of procuring an abortion. The defendant's counsel requested the court to charge the jury, in substance, that W. was an accomplice if the crime was committed, and that the finding of the tools in P.'s office was not any evidence of corroboration of W. on the question of the committing of an abortion, as against V. This the court refused to do, and the appellate court sustained this decision. The trial court held that to justify V.'s conviction only two things, under the indictment, were necessary to be established : 1. That an abortion had been committed ; 2. That the defendant had induced the woman to submit to it. The court further held that the finding of the instruments tended to corroborate the woman's testimony as to the first, though not as to the second of those facts, and was therefore admissible ; that W. could not be indicted with the defendant for the offense charged, and that she was not technically an " accomplice " within the meaning of the statute which provides that

“ a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.” And the appellate court held there was no error in this : *People v. Vedder*, 34 Hun (N. Y.), 280. See also *Com. v. Blair*, 126 Mass. 40; *Com. v. Adams*, 127 Mass. 15; *Watson v. State*, 9 Tex. App. 237.

The statutes of New York make it a crime to administer “ to a woman, whether pregnant or not,” any medicine, etc., “ with intent thereby to procure the miscarriage of a woman,” etc. Under this statute it has been held sufficient to charge in the indictment that the offense was committed upon “ a woman with child :” *Eckhardt v. People*, 83 N. Y. 462 ; 22 Hun, 525 ; 38 Am. Rep.

The Penal Code of Texas makes it a crime to administer any drug or medicine to pregnant women for the purpose of producing an abortion : *Tex. Pen. Code*, art. 536. Under this statute it has been held that the indictment for the offense need not allege what the drug was : *Watson v. State*, 9 Tex. App. 237.

Under the provisions of the statute in Iowa on

this subject it is a crime to administer any drug, etc., with intent to procure an abortion: Iowa Code, § 3864. Under this provision it has been held that the offense is complete if there be a criminal intent, although the attempt be made before the woman is quick with child, and although the substance used would not produce miscarriage: *State v. Fitzgerald*, 49 Ia. 260.

So under the statutes of Massachusetts, making it a crime for attempting to procure the miscarriage of a woman, it has been held that it is not necessary to the maintenance of an indictment therefor that it be shown that she was in fact pregnant: *Com. v. Taylor*, 132 Mass. 261.

Under the statutes of Indiana it is a crime to administer any drug, etc., with intent to procure the miscarriage of a pregnant woman, where it is not necessary in order to preserve her life: 2 Ind. Rev. St. 471, § 36 (1876). An indictment under this provision, averring that the defendant unlawfully and willfully employed and used in and upon the body and womb of a pregnant woman a certain instrument called a catheter, with intent to procure a miscarriage, it not being necessary to cause such miscarriage in order to

preserve the life of the woman, was held sufficient : *State v. Sherwood*, 75 Ind. 15.

In a recent case in Illinois it was held that an indictment for an attempt to procure an abortion, which alleged the insertion of "a certain instrument," not describing it, "into the private parts," etc., without adding "and womb," was sufficiently definite : *Baker v. People*, 105 Ill. 452.

Under the statute of New Jersey, to constitute the crime of attempting to procure a miscarriage, the thing administered or prescribed to procure it must be to a woman pregnant with child, and it must be noxious in its nature : *New Jersey Crimes Act*, § 75. But it is not necessary to prove that the thing will produce an abortion, nor to allege in the indictment that the mother did not die : *State v. Gedicke*, 43 N. J. L. 86.

In that state the statute does not make it a crime for a woman voluntarily to take drugs or medicines for the purpose of procuring an abortion ; and she would not become an accomplice in the crime of another who should administer a potion to her for that purpose, although he would be guilty of a crime : *State v. Hyer*, 39 N. J. L. 598.

Where an indictment charged the defendant with procuring an abortion resulting in the death of the patient, A. B., and the indictment closed with an allegation as follows: "in manner and form and by the means aforesaid, did then and there kill and murder her, the said A. B.," and objection was made to the indictment on the ground of duplicity, the indictment was sustained, the procurement of the miscarriage constituting the *corpus delicti*: Taylor v. State, 101 Ind. 65.

CHAPTER VI.

CRIMINAL LIABILITY FOR NEGLIGENCE OR MIS- CONDUCT.

§ 92. Statutory provisions on the subject.

In this connection it may be proper to observe that the penal statutes of various states provide generally for the punishment of physicians, surgeons and others for negligence or misconduct in their professional employment or business which causes the death of some person.

Thus the Penal Code of New York provides as follows :

“§ 195. A person who, by any act of negligence or misconduct in a business or employment in which he is engaged, . . . or by any unlawful, negligent or reckless act, . . . occasions the death of a human being, is guilty of manslaughter in the second degree.”

[It has been held that a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it into the

market as such, is liable to all persons who, without fault on their part, are injured by such medicine in consequence of the false label: *Thomas v. Winchester*, 6 N. Y. 397.]

“§ 200. A physician or surgeon, or person practicing as such, who, being in a state of intoxication without a design to effect death, administers a poisonous drug or medicine, or does any other act as a physician or surgeon to another person which produces the death of the latter, is guilty of manslaughter in the second degree.

“§ 202. Manslaughter in the second degree is punishable by imprisonment for not less than one year nor more than fifteen years, or by a fine of not more than one thousand dollars, or by both.”

§ 93. General criminal liability at common law for malpractice.

It may be observed that at common law, as well as under statutes, a physician or surgeon who, by his culpable negligence in his professional practice, causes the death of his patient, is guilty of manslaughter; and if a person unlawfully engages in the practice of medicine, as where he does so contrary to the statute, and

kills a person by administering to him medicines, even which he thinks will be beneficial to the patient and not dangerous to health or life, would, it seems, still be guilty of manslaughter : *Marsh v. Davidson*, 9 Paige (N. Y.), 579.

If a physician or surgeon, or any person assuming to be such, by his gross negligence or gross ignorance, or by his rashness or want of proper caution, causes the death of his patient, it is manslaughter at common law : 1 Hale's P. C. (Eng.) 429 ; 4 Bl. Com. 197 ; *Rex v. St. John Long*, 4 C. & P. (Eng.) 432 ; *Rex v. Van Butchell*, 3 C. & P. 333 ; *Rex v. Ellis*, 2 C. & K. (Eng.) 470 ; *Rex v. Spiller*, 5 C. & P. 333 ; *Rex v. Williams*, 3 C. & P. 635.

In the case last cited the defendant, a surgeon and physician, was indicted and tried for manslaughter at common law. Lord Ellenborough charged the jury as follows : " It is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that 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 neces-

sary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter. It does not appear in this case that there was any want of attention on his part ; and from the testimony of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill."

It may be affirmed as a general rule, in the absence of statutory regulations on the subject to the contrary, that a physician or surgeon, qualified and authorized by law to practice as such, could not be held criminally responsible for an honest error of judgment in the treatment of his patient, although it may cause his death. But if the death of a patient results from his gross carelessness, or ignorance, or from criminal misconduct or inattention, he would be guilty of manslaughter at common law, if not under statutes : See 3 Wheeler's Crim. Rep. (N. Y.) 312 ; *Commonwealth v. Thompson*, 6 Mass. 134 ; *Fairlee v. People*, 11 Ill. 1 ; *Brice v. State*, 8 Mo. 561 ; *State v. Morphy*, 33 Ia. 270 ; 11 Am. Rep. 122. Thus where a physician recklessly applied kerosene oil to a patient's body, which

caused blistering and death, it was held that he might be convicted of manslaughter, although there was no evil intent: *Commonwealth v. Pierce*, 138 Mass. 165 ; 52 Am. Rep. 264.

A person who merely assumes to act as a physician, but is known not to be such, is not criminally liable for the death of his patient caused by the medicine which he administers, provided he acts in good faith and to the best of his abilities : *State v. Shultz*, 55 Ia. 628 ; 39 Am. Rep. 187.

CHAPTER VII.

PRACTICE WITHOUT A LICENSE OR DIPLOMA PROHIBITED.

§ 94. General provisions of statutes on the subject.

In various states, if not generally, the practice of medicine or surgery, without a license therefor or a diploma, is prohibited by statute, and a penalty is imposed for its violation.

Thus it is provided by statute in New York as follows :

“ No person shall practice physic or surgery, unless he shall have received a license or diploma for that purpose from one of the incorporated medical societies of the state, or the degree of doctor of medicine from the Regents of the University ; or shall have been duly authorized to practice by the laws of some other state or country, and have a diploma from some incorporated college of medicine, or legally incorporated medical society in such state or country.

“ No person coming from another country

shall practice physic or surgery in this state until he shall have been examined and licensed by the censors of the State Medical Society ; and no person coming from another state shall practice physic or surgery in this State until he shall have filed a copy of his diploma in the office of the clerk of the county where he resides, and until he shall have exhibited to the medical society of that county satisfactory testimonials of his qualifications, or shall have been examined and approved by its censors.

“No diploma, granted by any authority out of this State, to an individual who shall have pursued his studies in any medical school within this state, not incorporated and organized under its laws, shall confer on such individual the right of practicing physic or surgery within this State.

“Every person licensed to practice physic or surgery, or both, shall deposit a copy of such license with the clerk of the county where he resides, who shall file the same in his office ; and until such license is so deposited, such person shall be liable to all the penalties provided by law, in the same manner as if he had no license.

“No person under the age of twenty-one years

shall be entitled to practice physic or surgery :”
2 Rev. Stat. N. Y., ch. xiv, tit. 7, §§ 16, 17, 18,
19, 20.

The foregoing provisions have been amended, and perhaps some of them repealed in part by subsequent statutes. The copying these provisions was for the purpose of indicating the general scope and character of the legislation regulating and controlling the practice of medicine and surgery, without intending to furnish the exact status of the law as it now exists in the State of New York. The statutes of other states contain very similar provisions ; but it does not fall within the compass of this volume to present the provisions of the law on this subject in the various states. These must be consulted in the state where information is desired on this subject. In some of the states it is expressly provided that a person shall not be permitted to recover by action for services rendered as a medical practitioner unless he shall have received a license or diploma therefor, and complied with the statutes regulating the practice of medicine and surgery. But in the absence of such a provision, a claim for services

rendered in violation of the statute could not be enforced by action at law.

§ 95. Criminal liability for practicing without license.

Penalties are usually imposed by statute for a violation of the provisions of the statutes regulating the practice of medicine and surgery in the various states. And if the offender persists in a violation of the statutes on the subject, the statutes frequently provide that he may be either fined or imprisoned, or both.

On this subject the Penal Code of New York provides :

“ § 356. A person who practices or attempts to practice medicine or surgery in this State, unless authorized to do so by a license or diploma from some chartered school, state board of medical examiners, or medical society, or who practices under cover of a license or diploma illegally or fraudulently obtained, is guilty of a misdemeanor, punishable for the first offense by a fine of not less than fifty dollars nor more than two hundred dollars, and for any subsequent offense by a fine of not less than one hundred dollars nor more than five hundred dollars, or by im-

prisonment not less than thirty days, or by both such imprisonment and fine."

It has been held that such a statute does not apply to one who undertakes to cure diseases by manipulating the body of the patient, as by rubbing, kneading or pressing it : *Smith v. Lane*, 24 Hun (N. Y.), 632. Where the defendant was charged with practicing without a diploma, the production of a diploma by the defendant would be *prima facie* evidence of a right to it : *Raynor v. State*, 62 Wis. 289 ; *Wendel v. State*, 62 Wis. 300 ; *Holmes v. Halde*, 74 Me. 28.

It has been further held, in New York, that if a person engaged in the unlawful practice of medicine, contrary to the statute, kills a person by administering medicines which he believes not to be dangerous to his health or life, he is guilty of manslaughter : *Marsh v. Davieson*, 9 Paige, 597. And it has also been held in that state that an unlicensed physician cannot maintain an action for his services : *Zimmerman v. Moerison*, 14 Johns. 369 ; *Alcott v. Barber*, 1 Wend. 526 ; *Smith v. Tracy*, 2 Hall, 465. But see *Bronson v. Hoffman*, 7 Hun, 614.

§ 96. Criminal liability for causing death by administering a drug or medicine in a state of intoxication.

In addition to the statutory provisions in New York, before referred to, relating to the criminal liability of a physician or surgeon who in a state of intoxication administers a drug or medicine which causes death, there is a further provision in the Penal Code of that state as follows :

“§ 357. A physician or surgeon, or person practicing as such, who, being in a state of intoxication, administers any poison, drug or medicine, or does any other act as a physician and surgeon to another person by which the life of the latter is endangered or his health seriously affected, is guilty of a misdemeanor.”

Similar statutory provisions may be found in various states.

§ 97. Removal of attorneys for misconduct.

We have noticed that at common law and under statutes the confidential communications made between attorney and his client, and physician or surgeon and his patient, relating to professional business, will generally be protected, and the seal of secrecy is applied to the mouth of each under such circumstances. So we have

seen that the physician or surgeon may forfeit his right to practice as such for violation of the statutes and rules duly ordained and established by medical institutions and boards in various states.

In this connection it may be proper to remark that an attorney duly admitted to practice in any court, state or national, may forfeit this right by his misconduct; and he may be suspended or removed from such office by such court if it appear that he has been guilty of such misconduct, after investigation by the court on charges made, and after opportunity is had by the attorney to be heard on the charge: *Ex parte Burr*, 2 Cranch, U. S. 379; *Same*, 9 Wheat. (U. S.) 529; *Austin's Case*, 5 Rawle (Pa.), 191; *Re Yale*, 75 N. Y. 526; *Fletcher v. Dangerfield*, 20 Cal. 427; *State v. Sharp*, 7 Ia. 191; see also 1 Field's Lawyers' Briefs, § 460.

The charge or information against an attorney in such a case should state the facts with reasonable precision; and where it merely charged that the attorney took legal papers belonging to the files, etc., this was held to be too indefinite: *People v. Allison*, 68 Ill. 151. And all such charges

should be clearly sustained by evidence: *Matter of Balluss*, 28 Mich. 507. In some states attorneys may be disbarred for neglecting to pay or deliver on demand property or money of clients in their hands and which should be paid or delivered: *Klingensmith v. Kepler*, 41 Ind. 341; *People v. Palmer*, 61 Ill. 255; *Slemmer v. Weight*, 54 Ia. 164.

§ 98. **Duty of attorneys to the court.**

In general it may be observed that an attorney's duty towards the court embraces at least integrity, courteous demeanor, and a proper respect for its authority; and a willful disregard of such duty is a contempt of court, and a ground of suspension or disbarment, besides constituting sufficient ground for a fine or imprisonment, in certain cases, where the circumstances warrant it; and the court may, in some cases where the contempt is manifest, act upon its own personal knowledge.

On this subject we have heretofore said: "The duty of the attorney to the court is not merely that of courteous demeanor, but he is required to show proper respect to its authority. And if an

attorney is guilty of contempt of court, by the use of abusive and insulting language, or by indecent conduct in the presence of the court, or a willful disregard of its authority, this is sufficient ground for a fine, or for suspension, or for disbarment, and the court could act upon such a case without further evidence than its own personal knowledge: *Ex parte* Robinson, 19 Wall. 505. But the right to disbar, it has been observed, should not be exercised except under circumstances which would render the continuance of the attorney in practice incompatible with a proper respect for the court itself, or a proper regard for other attorneys at the bar; and not where a fine, reprimand or temporary suspension would accomplish the purpose desired: *Ex parte* Seacomb, 19 How. (U. S.) 9; see also *Bradley v. Fisher*, 13 Wall. 335; *Jackson v. Texas*, 21 Tex. 668; *Ex parte* Cole, 1 McCrary (U. S. C. C.), 405; *Re. McCarthy*, 42 Mich. 71. The duty to the court embraces integrity; and where an attorney's name was stricken from the rolls for erasing the word "not" in a letter to a county judge, advising him not to allow bail to one indicted for murder, it was held a proper case for disbar-

ment : *Baker v. Com.*, 10 Bush (Ky.), 592 ; see also *Re Hirst*, 9 Phil. (Pa.) 216 ; *Stout v. Proctor*, 71 Me. 288 ; *Re Arctander*, 26 Minn. 25. In case of a manifest contempt of court and its authority in its presence and under its observation, it has been suggested by high authority that the attorney should ordinarily be heard before the order is made for his disbarment, especially in explanation of any matters that may show an absence of improper motives on his part, or that would mitigate the offensive character of his conduct ; and to make reparation and apology : *Ex parte Robinson*, 19 Wall. (U. S.) 505 ; *Bradley v. Fisher*, 13 Wall. 335 ; *Ex parte Bradley*, 7 Wall. 364 ; *Beene v. State*, 22 Ark. 157 ; *Fletcher v. Dangerfield*, 20 Cal. 430 ; *Saxton v. Stowell*, 11 Paige (N. Y.), 526 ; see also *Re Attorney*, 86 N. Y. 573 ; *Stout v. Proctor*, 71 Me. 288 ; *Re Davis*, 93 Pa. St. 116 ; *Re Steinman*, 95 Pa. St. 220 ; 1 Field's Lawyers' Briefs, § 461.

§ 99. Disbarment or suspension of an attorney not necessarily final.

The judgment or order of the court disbarring or suspending an attorney is not always final.

But so long as it remains unmodified, or is not set aside or repealed, the attorney has no authority to practice in the same or similar courts ; nor can he be readmitted to practice in such courts, except the judgment or order be set aside. But the court making the order may upon proper application restore the attorney to his original rights : 1 Field's Lawyers' Briefs, § 462. During the suspension or disbarment of an attorney he cannot represent any person in court as an attorney or agent : *Cobb v. Superior Judge*, 43 Mich. 289. As to the remedy of the attorney in such cases, see 1 Field's Lawyers' Briefs, § 463.

CHAPTER VII.

CIVIL LIABILITY FOR MALPRACTICE.

§ 100. Various kinds of malpractice defined.

Malpractice, from the Latin *mala praxis*, may be defined as bad or unskillful practice in a physician, surgeon, or other medical person, whereby the health of the patient is injured, or his life destroyed. Willful malpractice takes place when the physician or surgeon purposely administers medicines or performs an operation which he knows and expects will result in damage to the health or in death of the individual under his care : Elwell on Malp. 243 ; People v. Lohman, 2 Barb. (N. Y.) 216.

Negligent malpractice comprehends those cases where there is no criminal or dishonest intent or object, but gross negligence of that attention which the situation of the patient requires ; as if a physician should administer medicines while in a state of intoxication, from which injury to the health, or the death of the patient arises.

Ignorant malpractice is the administration of medicines, or the performance of surgical operations, calculated to do injury, and which do harm, and which a well educated and scientific medical man would know were not proper in the case : Elwell on Malp. 198 ; 7 B. & C. (Eng.) 493 ; 5 C. & P. (Eng.) 333 ; 1 Mood. & R. (Eng.) 405 ; 5 Cox C. C. (Eng.) 587 ; 6 Mass. 134.

We have noticed that at common law, as well as under statutes in various states, malpractice is an offense. And this is true, whether it be occasioned by curiosity and experiment, or by neglect, as it breaks the trust which the patient has put in his physician or surgeon, and tends directly to his destruction : 3 Chit. C. L. 863 ; 2 Russ. C. L. 863 ; see also *Patten v. Wiggin*, 51 Me. 594. But our purpose in this connection is to treat of the civil liability of the medical man for malpractice.

§ 101. Liability for damages in general for malpractice.

A physician or surgeon may become liable in damages for an injury to a patient, at common law and under statutes, or for the death of a patient caused by his malpractice.

In the case of surgeons, especially, civil actions for damages are very common where surgical operations are necessary, or supposed to be so, by reason of disease or injury, and the operation is so unskillfully performed as either to shorten a limb, or render it stiff, or otherwise prevent the free use of it, by which the patient ever afterward suffers inconvenience and sustains damages. Injury of this kind, and consequent damages, may result from almost every kind of unskillful surgical operations, and especially in cases of amputation, fractures or dislocations: Elwell on Malp. 55; *Barnes v. Means*, 82 Ill. 379. In the case last cited it was held that where, from want of skill of the defendant as a surgeon, a limb he was employed to set was shortened, he was liable in damages therefor.

§ 102. Skill required of a surgeon or physician.

To the performance of all surgical operations the surgeon is bound to bring, at least, ordinary knowledge and skill. He must adopt the means and apply the skill well settled by the highest lights of the profession. He must possess and practically exercise that degree and amount of

knowledge and science which the leading authorities have pronounced as the result of their researches and experience up to the time, or within a reasonable time, before the issue or question to be determined is made: Elwell on Malp. 55 ; 6 Am. Law Reg. (N. S.) 774 ; see also 8 East (Eng.), 347 ; 1 H. Bl. (Eng.) 61 ; McCandless *v.* McWha, 22 Pa. St. 261 ; 27 N. H. 460 ; 13 B. Mon. 219 ; Shear. & Redf. on Negligence, § 440 ; McLalon *v.* Adams, 19 Pick. (Mass.) 333 ; Carpenter *v.* Blake, 60 Barb. 488 ; Patten *v.* Wiggin, 51 Me. 594 ; Rex *v.* Long, 4 C. & P. (Eng.) 423 ; Slater *v.* Baker, 2 Willes (Eng.), 259.

Messrs. Shearman and Redfield, have stated the general rule of civil liability of the medical man for malpractice as follows: "Although a physician or surgeon may doubtlessly by express contract undertake to perform a cure absolutely, the law will not imply such a contract from the mere employment of a physician. A physician is not an insurer of a cure, and is not to be tried for the result of his remedies. His only contract is to treat the case with reasonable diligence and skill. If more than this is expected it must be

expressly stipulated for. . . . The general rule, therefore, is, that a medical man, who attends for a fee, is liable for such want of ordinary care, diligence or skill on his part as leads to the injury of his patient. To render him liable, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. . . . But a professed physician or surgeon is bound to use not only such skill as he has, but to have a reasonable degree of skill. The law will not countenance quackery; and although the law does not require the most thorough education or the largest experience, it does require that an uneducated ignorant man shall not, under the pretense of being a well-qualified physician, attempt recklessly and blindly to administer medicines or perform surgical operations. If the practitioner, however, frankly informs his patient of his want of skill, or the patient is in some other way fully

aware of it, the latter cannot complain of the lack of that which he knew did not exist : *Shearm. & Red. on Neg.*, §§ 433-435. See also, in support of the foregoing propositions, *Leighton v. Sargent*, 27 Me. (7 Fost.) 468; *Reynolds v. Graves*, 3 Wis. 416; *Carpenter v. Blake*, 60 Barb. (N. Y.) 488 ; *Patten v. Wiggin*, 51 Me. 594; *Briggs v. Taylor*, 28 Vt. 180; *Landon v. Humphrey*, 9 Conn. 209; *MacNevins v. Lowe*, 40 Ill. 209; *Smothers v. Hanks*, 34 Ia. 286; *Teft v. Wilcox*, 6 Kan. 46; *Howard v. Grover*, 28 Me. 97; *Long v. Morrison*, 14 Ind. 595; *Com. v. Thompson*, 6 Mass. 134; *Smothers v. Hanks*, 34 Ia. 286; 11 Am. Rep. 141; *Small v. Howard*, 128 Mass. 131; 35 Am. Rep. 363; *Potter v. Warner*, 91 Pa. St. 362 ; 36 Am. Rep. 668.

The last proposition reminds the author of a case said to be found in the judicial records of the Mohammedans, which is reported as follows : "A man who had a disease in his eyes called on a farrier for a remedy, and he applied to him a medicine commonly used for his patients ; the man lost his sight and brought an action for damages, but the judge said no action lies, for if

the complainant had not been himself an *ass* he would never have employed a farrier :” Jones on Bailm. 100 ; 1 Field’s Lawyers’ Briefs, sub. Bailments, § 573. See also *Musser v. Chase*, 29 Ohio St. 577.

Continuing the subject as to the care and skill required of the physician and surgeon, and their liability for the proper use of them, we again quote from our favorite authors : “ The standard of skill may vary according to circumstances, and may be different even in the same state or country. In country towns and in unsettled portions of the country remote from cities, physicians, though well informed in theory, are but seldom called upon to perform difficult operations in surgery, and do not enjoy the greater opportunities of daily observation and practice which large cities afford. It would be unreasonable to exact from one in such circumstances that high degree of skill which an extensive and constant practice in hospitals or large cities would imply a physician to be possessed of. A physician, though inexperienced and unlearned, may in some circumstances undertake an operation, and in such a case he is bound only to use the best

skill he has, for, as has been before remarked, 'Many persons would be left to die, if irregular surgeons were not allowed to practice.' . . . None but the most general tests of a physician's skill can be stated as rules of law. The great variance between the medical theories which find acceptance among the different schools, each of which has its sincere and devoted adherents, and each being, in the estimation of its opponents, mere quackery, make it impossible to assert as a proposition of law that any particular system affords an exclusive test of skill. But one who professes to adhere to a particular school must come up to its average standard and must be judged by its tests, and in the light of the present day. Thus a physician who should now practice the reckless and indiscriminate bleeding which was in high repute thirty years ago, or should shut up a patient in fever and deny all cooling drinks, would doubtless find the old practice a poor excuse for his imbecility. So, if a professed homœopathist should violate all the canons of homœopathy, he would be bound to show some very good reasons for his conduct, if it was attended with injurious effects. Upon many

points of medical and surgical practice all of the schools are agreed, and indeed common sense and universal experience prescribe some invariable rules, to violate which may generally be called gross negligence. . . . The state of health of the patient may have much weight in determining whether ordinary diligence and care have been used by the attending physician. What might be deemed ordinary care in some circumstances would be gross negligence in others. A disease known to be rapid and dangerous will require more instant and careful attention and application of remedies, than one comparatively harmless and requiring only good nursing. . . . Aside from the manipulation of a fractured limb, a surgeon has to contend with very many powerful and hidden influences, such as the habits, hereditary tendencies, vital force, mental state and local circumstances of the patient. While on the one hand these will explain his ill success and moderate the degree of his responsibility, it would seem that he is bound to inform himself of these facts, so far at least as they would be likely to influence, in the management of the case, the conduct of a prudent phy-

sician. We should say, for example, that a physician about to administer an anæsthetic is bound to inform himself as to the condition of the patient's heart, lungs, or other organs, which, if diseased, would warn a prudent physician against the administration of that beneficent agency :” Shear. & Red. on Neg., §§ 436-439.

§ 103. Not bound to use the highest degree of skill.

A physician or surgeon is not bound to use the highest degree of skill, but he must use reasonable skill and diligence, and in judging of this, regard must be had to the advance in medical and surgical knowledge and the improvements of recent times : *Smothers v. Hanks*, 34 Ia. 286 ; 11 Am. Rep. 141 ; *Almon v. Nugent*, 34 Ia. 300 ; 11 Am. Rep. 147 ; *Haire v. Reese*, 7 Phil. (Pa.) 138 ; *Lamphier v. Phipos*, 8 C. & P. (Eng.) 475 ; *O'Hara v. Wells*, 14 Neb. 403 ; *Elwell on Malp.* 22-24, 204.

§ 104. Implied duty of the physician or surgeon.

If a person holds himself out to the world as a physician or surgeon, the law implies a duty on his part to exercise reasonable skill and diligence

in the treatment of patients he may be called upon to attend, and does attend, in a professional capacity : *Patten v. Wiggin*, 51 Me. 594 ; *Carpenter v. Blake*, 5 N. Y. 696 ; *Reynolds v. Graves*, 3 Wis. 416 ; *Hoopingarner v. Levy*, 77 Ind. 455.

But he does not impliedly undertake to perform a cure, nor to use the highest possible degree of skill : *Haire v. Reese*, 7 Phila. (Pa.) 138 ; *Lamphier v. Phipos*, 8 Car. & P. (Eng.) 475 ; *Smothers v. Hanks*, 34 Ia. 286 ; 11 Am. Rep. 141.

If more than ordinary skill and care is expected from the medical man, he would not be liable for this unless an express contract for this purpose be made, or such contract is to be fairly inferred from all the circumstances of the case : *McCandless v. McWha*, 22 Pa. St. 261 ; *Barnard v. Means*, 82 Ill. 379.

A medical man cannot experiment with his patients to their injury without liability to damage for the same : *Patten v. Wiggin*, 51 Me. 594.

It would be the implied duty of a regular family physician or one who had usually been called to attend upon a family or an individual,

in responding to a call for professional services in such a case, to attend the case so long as it requires attention, unless he should give reasonable notice declining so to do, or is discharged by the patient. And he is under obligation to use ordinary care and skill not only in his attendance, but in determining when it may be safely and properly discontinued. But it is competent for a physician or surgeon and his patient to enter into a contract limiting the attendance for a longer or shorter period, or to a single visit, or the frequency of the visits; and without this the medical man may elect to discontinue his attendance for any cause or without cause, upon giving reasonable notice of his intention to do so: See *Ballou v. Prescott*, 64 Me. 305; *Todd v. Myers*, 40 Cal. 357.

§ 105. These general principles applicable to dentists.

It may be observed that the general doctrine of liability for malpractice of a physician or surgeon, above indicated, would be equally applicable to dentists; and they would be liable in damages for injuries inflicted in their professional practice and operations arising from want of

reasonable care, skill and attainments in the profession : *Simonds v. Henry*, 39 Me. 155. But the practice of dentistry is regulated by statutes in various states. If he uses chloroform or other anæsthetic agent, it would be his duty, like that of the physician or surgeon, to look to the probable effect ; and, generally, it would be his duty to inform himself as to the condition of the heart of his patient, and the lungs or other organs, which, if diseased, would warn a prudent dentist, physician or surgeon, against the administration of such a beneficent agency, in the practice of their respective professions : *Boyle v. Winslow*, 5 Phila. (Penn.) 136 ; *Shearm. & Red. on Neg.*, § 439 ; *Jones v. Fay*, 4 Fost. & F. (Eng.) 525.

§ 106. Instance of the liability of a physician in a special case of impropriety.

Where a physician took an unprofessional and unmarried man with him to attend a confinement case, and no necessity existed for the latter's assistance, it was held that both were liable in damages to the woman, and that the right to recover was not affected by the fact that the patient and her husband supposed the intruder was a medical man, and therefore submitted without ob-

jection to his presence : *De May v. Roberts*, 46 Mich. 160 ; 41 Am. Rep. 154.

§ 107. **Proof of malpractice ; burden of.**

On this subject we have heretofore stated the general rule as to the burden of proof, as follows : " As to the order of the production of evidence, it is held that the burden of proving any fact lies upon the party who substantially asserts the affirmative of the issue, and such party is entitled to begin and reply. In general, the party commencing the proof is also required to develop the whole, and go through with the proof of his whole case : " 3 Field's Lawyers' Briefs, § 310 ; see also *Powers v. Russell*, 13 Pick. (Mass.) 69 ; *Crowningshield v. Crowningshield*, 2 Gray (Mass.), 524 ; 1 Greenl. on Ev., § 74 ; Best on Ev. (Morg. Am. ed.), Par. 637.

It follows that, in an action against a physician or surgeon for damages for malpractice, where there is a denial of the claim, the plaintiff must affirmatively prove all the material elements of the negligence charged ; and if want of skill or knowledge is charged, this must be

affirmatively shown by the plaintiff by a preponderance of evidence before he can claim the verdict of a jury in his favor. On proof of the mode of treatment by a physician or surgeon, in a particular case, it would be competent to introduce expert testimony as to skill or want of knowledge : *Leighton v. Sargent*, 31 N. H. (11 Foster) 119 ; *Carpenter v. Blake*, 60 Barb. 488. "The defendant may, however, produce evidence of his general skill, where an issue is made upon his possession of skill, and not merely upon his use of it. And where there is much doubt as to the skillfulness of his treatment of a particular case, evidence of his general skillfulness will be material upon all issues of the case ; for if he had skill it is natural to presume he would use it. But where the plaintiff does not question the defendant's general skillfulness, evidence thereof is not competent on behalf of the defendant, in a case not otherwise evenly balanced. But to rebut evidence introduced by the defendant to support his general professional character, it is competent to show that he was not a regular bred physician. The fact that some surgeons approve the practice adopted,

does not necessarily preclude a jury from condemning it as negligent, if the decided weight of authority is to that effect:" Shear. & Redf. on Negligence (3d ed.), § 442.

The want of proper care and skill may be shown by evidence of the mode of treatment pursued by the defendant: *Leighton v. Sargent*, 31 N. H. 119; *Baird v. Morford*, 29 Ia. 531.

CHAPTER VIII.

DAMAGES. •

§ 108. Matters in defense or mitigation.

It is the duty of every person to use reasonable care, diligence and prudence, not only to avoid injuries from others, but to avoid, as much as possible, damages or losses from the wrongs or torts of others.

Although a patient may have sustained injury from the malpractice of his physician or surgeon, if there be on the part of the patient a want of ordinary and proper diligence and care to avoid the consequences of such malpractice, he may be chargeable with contributory negligence, and thereby be prevented from recovering damages, or at least limited in his recovery to such damages as could not have been avoided by the exercise of ordinary and reasonable care and diligence, under all the circumstances of the case: 2 Field's Lawyers' Briefs, §§ 445, 446. See also *Harrison v. Berkley*, 1 Strob. (S. C.) 548;

Stover v. Bluehill, 51 Me. 439; *Dorwin v. Potter*, 5 Denio (N. Y.), 306; *Walker v. Ellis*, 1 Sneed (Tenn.), 518; *Hamilton v. McPherson*, 28 N. Y. 73; *Bennett v. Lockwood*, 20 Wend. (N. Y.) 223; *Hassa v. Junger*, 15 Wis. 598; *McGrew v. Stone*, 53 Pa. St. 436. A surgeon may generally be liable for malpractice in shortening a limb he is employed to set, still it may be otherwise if he is discharged before the proper time arrives for applying the proper treatment to prevent shortening: *Rendall v. Brown*, 74 Ill. 232.

§ 109. In case of contributory negligence.

A physician or surgeon is liable for injury caused his patient by the want of skill and diligence which an intelligent and respectable member of the profession would use under the same circumstances. But if the proximate cause of the injury was the neglect of the patient to use the remedies prescribed, or if he aggravated the case by his own misconduct, the physician or surgeon would not be liable for the injury caused by such misconduct on his part: *Craig v. Chambers*, 17 Ohio St. 253; *McCandless v. McWha*, 22 Pa.

St. 261; 25 Pa. St. 96; *Hibbard v. Thompson*, 109 Mass. 288. And if the patient contributes to his injury by failing to obey the reasonable instructions of his physician or surgeon, he cannot recover for such injury, although such physician or surgeon may have failed to use the skill and diligence imposed upon him by law : 4 Field's L. B., § 733; *Geiselman v. Scott*, 25 Ohio St. 86 ; *McCandless v. McWha*, 25 Pa. St. 95 ; *Hibbard v. Thompson*, 109 Mass. 286 ; *Smith v. Smith*, 9 Pick. (Mass.) 621. But where one has received a personal injury from the negligence of another, the damages of the former in an action against the latter will not be reduced by reason of his not having secured the most skillful medical aid, if he used reasonable and ordinary care : 32 Ia. 324 ; 7 Am. Rep. 200.

§ 110. **Punishment for the crime no defense to civil action.**

It may be observed that a trial and punishment for criminal malpractice would be no bar to a civil action for damages arising therefrom, nor would it affect the right of the injured party to recover exemplary damages where, according to the authoritative decisions of the courts of the

states, such damages are allowable : Field on Dam., §§ 436-439 ; Childs *v.* Drake, 2 Met. (Ky.) 146 ; Hendrickson *v.* Kingsbury, 21 Ia. 379 ; Garland *v.* Wholeham, 28 Ia. 185 ; Corwin *v.* Walton, 18 Mo. 71 ; Cole *v.* Tucker, 6 Tex. 266 ; Hadley *v.* Watson, 45 Vt. 289 ; Cook *v.* Ellis, 6 Hill (N. Y.), 466 ; Roberts *v.* Mason, 10 Ohio St. 277 ; Kloppe *v.* Bromme, 28 Wis. 372.

It is not a defense to a suit brought against a physician or surgeon for malpractice that the defendant was practicing in violation of the statute, making it an offense to practice medicine or surgery without certain preliminary qualifications, unless, perhaps, where the patient or employer knew, when employing the physician, that he had not the proper qualifications : Musser *v.* Chase, 29 Ohio St. 577.

§ 111. The measure of damages.

The rule for the measure of damages, in case of injuries sustained by the malpractice of a physician or surgeon, would be the same as in case of injuries arising from negligence of common carriers, or from assault and battery. The usual elements of damages in such a case would be as follows :

1. Loss of time and labor arising from the injury sustained by the malpractice.

2. The reasonable expenses incurred for surgical, medical and other attendance in consequence thereof.

3. Diminished capacity to work at the trade or business of the injured party in consequence thereof.

4. Bodily pain and mental anguish in consequence thereof: Field on Dam., § 600.

This classification embraces only the elements of the direct pecuniary damages which may be sustained in such a case.

They are the direct and immediate injury arising from malpractice. But it has been held in cases where the principle would be the same that in estimating damages for personal injury, the jury may take into consideration the fact of permanent disability, and probable future disability and suffering; and, in the language of a distinguished legal author, "whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly dif-

ferent rule. It permits the jury to give what it terms punitive, vindictive or exemplary damages; in other words, blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender: " Seg. on Dam. 38. And see Field on Dam., § 26 ; 2 Greenl. on Ev., §§ 263-273 ; Field's Lawyers' Briefs, §§ 429, 434, 436, 437, 438.

In an action to recover damages for malpractice the plaintiff is not in any case entitled to recover anything on account of pain and suffering caused by the disease or injury, but only for such additional pain and suffering as is produced by the negligence or want of proper care and skill by the defendant: *Wenger v. Calder*, 78 Ill. 275.

CHAPTER IX.

COMPENSATION.

§ 112. The contract for services and compensation may be express or implied.

The contract between a physician or surgeon and his patient or employer may be express or implied, and if express it may be specific or general, conditional or unconditional. If the agreement is formally stated, either verbally or in writing, it is an express contract; but if it is a matter of inference or deduction from the acts and conduct of the parties, and the circumstances attending them, it is an implied contract. And in the latter case the contract may be enforced as well as in the former, as by a fiction of law, so to speak, the parties are supposed to have made those stipulations and agreements which as nonest and fair men they ought to have made, and the law assumes that they have made them. This doctrine is universally recognized in all cases of implied contracts; and it may be ob-

served that the contract between the physician or surgeon, and his patient or employer, is usually an implied one; the services being rendered merely on the express or implied request of the latter: See *Secoa v. True*, 53 N. H. 627; *Allen v. Merchants' Bank*, 22 Wend. 215; *Bank v. Wheeler*, 48 N. Y. 492; *Express Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Nevins v. Lowe*, 40 Ill. 209; *Ogden v. Saunders*, 12 Wheat. (U. S.) 341; *States v. Russell*, 13 Wall. (U. S.) 623. An employment of a physician by a husband to attend his wife would be presumed to continue through the illness, though the wife be removed from the husband's home: *Potter v. Virgil*, 67 Barb. (N. Y.) 578. But if there be an express contract, whether verbal or in writing, that will regulate the rights of the parties in respect to all matters covered by it, and no contract or stipulation will be implied to affect such contract. If, however, the express contract embraces only a part of the subject-matter of it, as where there is a stipulation as to the price to be paid a physician or surgeon for each visit to the patient, and there is no stipulation as to the number or frequency of the visits, or the skill and

care to be bestowed, the former would be fixed by the express contract, whereas the latter would be controlled by an implied contract: See *ante*, § 96; *Lynch v. Onondaga Salt Co.*, 64 Barb. (N. Y.) 558; *Creighton v. Toledo*, 18 Ohio St. 447; *Walker v. Brown*, 28 Ill. 378; *Ballou v. Prescott*, 64 Me. 305.

§ 113. Common presumptions; amount of compensation implied.

The general principles of the law relating to master and servant would be applicable to the physician or surgeon and his patient or employer. Thus, if the former renders services to the latter by his request, express or implied, or if he has knowledge that they are being performed under such circumstances as raise a presumption of employment, and especially where he is present and assents to the performance, it would, in the absence of proof to the contrary, raise a reasonable if not conclusive presumption of a contract between the parties for the services, and of an undertaking on the part of the latter to pay so much as they were reasonably worth: See *Cummins v. Chambers*, 75 Ind. 409. The following cases illustrate the general principles on this sub-

ject : *Cummings v. Nichols*, 13 N. H. 420 ; *Christee v. Sawyer*, 44 N. H. 298 ; *Law v. Railroad Co.*, 45 N. H. 370 ; *Weeks v. Holmes*, 12 Cush. (Mass.) 215 ; *Academy v. Allen*, 14 Mass. 176 ; *Hurley v. Van Wagoner*, 28 Barb. (N. Y.) 109 ; *Moreland v. Davidson*, 71 Pa. St. 371 ; *Van Arman v. Boynton*, 38 Ill. 443 ; *Jones v. Quincey*, 9 Gratt. (Va.) 708 ; *Martin v. Fox*, 19 Wis. 552 ; *Allen v. Richmond College*, 41 Mo. 302. In the case last cited it was observed by the court : "No person can by officious intermeddling cast a liability upon another, and an obligation will not generally be imposed unless there has been a previous request moving from the obligor and inuring to the obligee. But where the party derives a benefit from the consideration, or the act done is beneficial, his subsequent express promise will be binding, and even his subsequent assent will be sufficient evidence upon which to predicate a previous request. Assent may be implied from the acts of another, or his silent acquiescence : " See *Hapgood v. Houghton*, 10 Pick. (Mass.) 154 ; *Munger v. Munger*, 33 N. H. 581 ; *Aney's Appeal*, 49 Pa. St. 126 ; *De Wolf v. Chicago*, 26 Ill. 443 ; *Ford*

v. Ward, 26 Ark. 360 ; *Cooper v. Railroad Co.*, 13 N. Y. Supreme Ct. 276.

§ 114. Where the request for services is made for the benefit of another.

If a mere request is made by one to another to do some act or perform some service for the benefit of a third party, and the act or service is done with the knowledge that the party making the request will derive no benefit therefrom, and does not expect to pay for the same, the law will not imply an employment by the latter, and there would be no implied promise to pay therefor : *Norris v. Dodge*, 23 Ind. 190. Thus, where a person requested a physician to render some medical assistance to his brother, in an action by the physician against the person making the request to recover for the services, it was held that in order to recover on the ground of a request it must appear that the person making it intended to pay for the services, and that both parties understood it that way : *Smith v. Watson*, 14 Vt. 332. See also *Boyd v. Sappington*, 4 Watts (Pa.), 247 ; *Williams v. Breckell*, 37 Miss. 682 ; *Bachelder v. McKinney*, 36 Me. 555 ; *Kittridge v. Newbury*, 14 Mass. 448 ; *Dunbar v. Williams*,

10 Johns. (N. Y.) 249 ; *Evarts v. Adams*, 12 Johns. 352 ; *Anderson v. Hamilton*, 25 Pa. St. 75 ; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28 ; *Percival v. Nevilla*, 1 Nott & McC. (S. C.) 452 ; 4 Field's Lawyers' Briefs, §§ 581, 582.

§ 115. Intrusive and voluntary services.

The same rule would apply in case of the voluntary and intrusive services of a physician or surgeon, as in case of such services in other cases. We have heretofore stated the general rule of law in such cases as follows : "If a person gratuitously or voluntarily renders services to another, without expectation of compensation or reward, or without the assent or request of the latter, express or implied, no recovery can be had therefor, however meritorious they may have been, as it is a principle of the law that a person cannot make another his debtor without his assent : 4 Field's Lawyers' Briefs, § 580 ; *Bartholomew v. Jackson*, *supra* ; *Lee v. Lee*, 6 G. & J. (Md.) 316 ; *Hertzog v. Hertzog*, 29 Pa. St. 465 ; *Doane v. Badger*, 12 Mass. 65 ; *Mumford v. Brown*, 6 Cow. (N. Y.) 475 ; *Watson v. Ladoux*, 8 La. An. 68 ; *Levee Com. v. Harris*,

20 La. An. 291. But meritorious services voluntarily rendered will constitute a valid consideration for a promise thereafter made to pay for the same: *Davidson v. Davidson*, 13 N. J. Eq. 246; *Grandier v. Reading*, 10 N. J. Eq. 370; *Snyder v. Castor*, 4 Yeates (Pa.) 353; *Lee v. Lee*, 6 G. & J. (Md.) 316.

§ 116. Measure of value of services.

The value of the services of a physician or surgeon may depend upon a variety of circumstances, as upon the nature and character of the disease or other physical or mental affliction of the patient; the amount of knowledge and skill required in the treatment; the circumstances under which the services were rendered; the difficulties and expenses attending them, and the responsibilities devolving upon him: See *Commissioners v. Chambers*, 75 Ind. 409; *Coms. v. Brewingtown*, 74 Ind. 7.

In a recent case it was held that a physician, claiming for his services, may properly consider the patient's ability to pay. And where a physician claimed \$2,000 for services in operating upon a cancerous stricture of the œsophagus,

and it appeared on the trial that the patient's estate was of the value of between seven and eight thousand dollars, and the jury rendered a verdict for only \$500, on appeal, the Supreme Court of Louisiana, increased the amount to \$1,000.

§ 117. Judgment for services a bar to action for malpractice.

On general principles, it may be observed that, if a judgment is recovered by a physician or surgeon against his patient for services, the latter cannot, at least under the modern practice, afterwards maintain an action against the former for malpractice in performing the services, especially if the latter had knowledge of the alleged malpractice, and could have interposed it as a defense to the original suit, and have claimed therein damages for the alleged malpractice, by way of counter-claim : *Blair v. Bartlett*, 75 N. Y. 150. See also *Actions and Defenses*, 1 Field's L. B., § 91.

§ 118. Statutes regulating the collection of compensation.

In various states there are statutes regulating the collection of fees of physicians and surgeons,

and the practice of medicine. In some of them they cannot recover for their services unless they have a diploma, and in others unless they are licensed to practice medicine by a board appointed for this purpose under statutes: *Ante*, § 90.

Thus in Georgia a physician cannot recover for his services unless he shows that he is licensed as provided by statute, or unless he shows himself to be within the proviso in favor of physicians who were in practice before the statute was adopted: 8 Ga. 74.

So in Alabama and Missouri an unlicensed physician cannot recover for professional services: 21 Ala. 680; 15 Mo. 407.

So in Wisconsin, he cannot recover for his services unless he has a diploma. But it has there been held that in an action by a practicing physician for personal injuries, he may claim damages for being rendered unable to continue his practice, although he had no diploma: *McNamara v. Clintonville*, 62 Wis. 207. And in an action for medical services it has been held that it will be presumed that the plaintiff has one until the contrary is shown: *Thompson v. Sayre*,

1 Denio (N. Y.), 175 ; Crane v. McLaw, 12 Rich. (S. C.) 129 ; but see Adams v. Stuart, 5 Harr. (Del.) 144 ; Bower v. Smith, 8 Ga. 74.

Similar statutes will be found in other states, which must be consulted when information is desired on this subject, in the state where it is required.

In Massachusetts, where the wife of the defendant, being affected by a dangerous disease, was carried by him to a distance from his residence and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks the plaintiff performed an operation on her for a cure of the disease, soon after which she died, it was held, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority if, in his judgment, it was necessary and expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant : 19 Pick. (Mass.) 333.

If a physician carries a contagious disease into the family, on a suit for his services, this may be shown to defeat his right or to reduce the amount of his claim : 12 B. Mon. (Ky.) 465.

And an agreement between physicians whereby, for a money consideration, one promises to use his influence with his patrons to obtain their patronage for the other, is lawful and not void as contrary to public policy : 39 Conn. 326 ; 12 Am. Rep. 390.

§ 119. Proof of a diploma from a medical college.

A diploma from a medical college may be proved by one who identifies the corporate seal and the genuineness of the signatures of the officers by a comparison with a diploma granted by the same college to himself and by those granted to others : *Finch v. Gridley*, 25 Wend. (N. Y.) 469.

CHAPTER X.

MEDICAL ETHICS.

§ 120. Code of medical ethics of the State of New York.

The Medical Society of the State of New York, in 1882, adopted the following Code of Medical Ethics :

As to the relations of physicians to the public, the code provides as follows :

“ It is derogatory to the dignity and interests of the profession for physicians to resort to public advertisements, private cards, or handbills, inviting the attention of individuals affected with particular diseases ; publicly offering advice and medicine to the poor without charge, or promising radical cures ; or to publish cases or operations in the daily prints, or to suffer such publications to be made ; or through the medium of reporters, or interviewers, or otherwise, to permit their opinions on medical or surgical questions to appear in the newspapers ; to invite laymen to be present at operations ; to boast of

cures and remedies ; to adduce certificates of skill and success, or to perform other similar acts. It is generally derogatory to professional character, and opposed to the interests of the profession, for a physician to hold a patent for any surgical instrument or medicine, or to prescribe a secret nostrum, whether the invention or discovery or [be the] exclusive property of himself or others. It is also reprehensible for physicians to give certificates attesting the efficacy of patented medical or surgical appliances, or of patented, copyrighted or secret medicines, or of proprietary drugs, medicines, wines, mineral waters, health resorts, etc : " Trans. Med. Soc. (N. Y.) 1882, p. 74.

As to the rules governing consultations, the code provides as follows :

" Members of the Medical Society of the State of New York, and of the medical societies in affiliation therewith, may meet in consultation legally qualified practitioners of medicine. Emergencies may occur in which all restrictions should, in the judgment of the practitioner, yield to the demands of humanity.

" To promote the interests of the medical pro-

fession and of the sick, the following rules should be observed in conducting consultations :

“(1) The examination of the patient by the consulting physician should be made in the presence of the attending physician, and during such examination no discussion should take place, nor any remarks as to the diagnosis or treatment, be made. When the examination is completed the physicians should retire to a room by themselves, and after a statement by the attending physician of the history of the case, and of his views of the diagnosis and treatment, each of the consulting physicians, beginning with the youngest, should deliver his opinion. If they arrive at an agreement, it will be the duty of the attending physician to announce the result to the patient, or to some responsible member of the family, and to carry out the plan of treatment agreed upon.

“(2) If, in the consultation, there is found to be an essential difference of opinion as to diagnosis or treatment, the case should be presented to the patient, or some responsible member of the family, as plainly as possible, to make such choice, or pursue such course, as may be thought best.

“(3) In case of acute, dangerous or obscure illness, the consulting physician should continue his visits at such intervals as may be deemed necessary by the patient or his friends, by him or by the attending physician.

“(4) The utmost punctuality should be observed in the visits of physicians when they are to hold consultations ; but as professional engagements may interfere or delay one of the parties, the physician who first arrives should wait for his associates a reasonable period, after which the consultation should be considered as postponed to a new appointment. If it be the attending physician who is present, he will of course see the patient and prescribe, but if it be the consulting physician he should retire, except in an emergency or when he has been called from a considerable distance, in which latter case he may examine the patient and give his opinion in writing and under seal, to be delivered to his associates :” Id.

As to the relations of physicians to each other the code provides as follows :

“(1) All practitioners of medicine, their wives and children, while under paternal care, are en-

titled to the gratuitous services of any one or more of the faculty near them whose assistance may be desired. Gratuitous attendance cannot, however, be expected from physicians called from a distance, nor need it be deemed obligatory when opposed by both the circumstances and the preferences of the patient.

“(2) The affairs of life, the pursuit of health and the various accidents and contingencies to which a medical man is peculiarly exposed may require him temporarily to withdraw from his duties to his patients and to request some of his professional brethren to officiate for him. Compliance with this request is an act of courtesy which should always be performed with the utmost consideration for the interests and character of the family physician, and when exercised for a short period, all the pecuniary obligations of such service should be awarded to him. But if a member of the profession neglect his business in quest of pleasure or amusement, he cannot be considered as entitled to the advantages of the frequent and long continued exercise of this fraternal courtesy without awarding to the physicians who officiated the fees arising from the discharge of his professional duties.

“(4) In obstetrical and important surgical cases, which give rise to unusual fatigue, anxiety and responsibility, it is just that the fees accruing therefrom should be awarded to the physician who officiates.

“(5) Diversity of opinion and opposition of interest may, in the medical as well as in the other professions, occasion controversy and even contention. Whenever such cases unfortunately occur, and cannot be immediately terminated, they should be referred to the arbitration of a sufficient number of physicians, before appealing to a medical society, or the law, for settlement.

“(6) If medical controversies are brought before the public in newspapers or pamphlets by contending medical writers, and give rise to, or contain assertions or insinuations injurious to the personal character or professional qualifications of the parties, the effect is to lower, in the estimation of the public, not only the parties directly involved, but also the medical profession as a whole. Such publications should therefore be brought to the notice of the county societies having jurisdiction, and discipline inflicted, as the case may seem to require :” *Trans. of Med. Soc. N. Y.*, 1882, pp. 74, 75.

In conclusion, it may be observed that similar codes or rules of medical ethics will be found in various other states. The author inserts those found in the Transactions of the Medical Society of New York ; but these, in the main, are but the generally recognized rules of ethics observed by the respectable members of the profession, without the formal declaration of any positive rules, or the adoption of a code of ethics, requiring their observance.

APPENDIX.

OPINION AS TO THE CONSTITUTIONALITY OF THE IOWA STATUTE "REGULATING THE PRACTICE OF MEDICINE."

Since the preparation of the preceding pages, the author's attention has been called to the opinion of Hon. C. C. Nourse, Attorney-General of Iowa, as to the constitutionality of the Iowa statute "Regulating the Practice of Medicine." The provisions of the act are set forth in the opinion, which is as follows :

"The act in question purports to be an exercise by the General Assembly of the 'police power of the state for the preservation of the health of the people,' and can be justified only, if at all, upon that ground. The principle provisions of the act are as follows :

"*First.* It requires every person within the state, who assumes the duties of a physician, surgeon or obstetrician, or who publicly professes to 'cure or heal by any means whatsoever,' to

previously obtain a license from the state board of health. The conditions upon which this license can be obtained are :

“ 1st, To hold a diploma from a medical school that, in the opinion of the board, is legally organized and in their judgment is in good standing ; or,

“ 2d, To have practiced in the state for five consecutive years ; three years of which shall have been in one locality ; or,

“ 3d, To answer in writing and satisfactorily, such a percentage of written questions, to be submitted by the board of health, as they may determine shall be sufficient, and

“ 4th, To pay two dollars for a certificate for the first and second classes above specified, and ten dollars for the examination specified for the third class.

“ The 8th section of the act provides :

“ *First.* That women, who are engaged in the practice of midwifery, at the time of the taking effect of the act, may continue in the business without license. It also permits the sale of patent medicines and the advertising, selling and prescribing of natural mineral waters, provided, they *flow* from a well or spring.

“The act also permits gratuitous services in cases of emergency, by unlicensed persons. The penalty prescribed for violating the provisions of the act, is a fine of not less than fifty dollars or more than one hundred dollars, or imprisonment not less than ten, or more than thirty days in the county jail.

“The constitutional provisions designed to protect the people against monopolies and unjust discriminations are as follows :

“*First*, Art. 4, sec. 2 of the Constitution of the United States provides that, ‘The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.’

“And the 14th amendment provides as follows :

“ ‘No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.’

“The Constitution of the State of Iowa contains the following in the ‘Bill of Rights :’

“ ‘Sec. 1. All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

“ ‘Sec. 6. All laws of general nature shall have a uniform operation ; the general assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not belong to all citizens.’

“ ‘In ascertaining or testing the constitutionality and validity of the law in question, the first point to be settled is the rule of criterion by which we are to be governed. The Supreme Court of West Virginia, in the case of *State v. Dent*, 25 W. V. 41, sustaining an act of their legislature, similar in many respects to the Iowa enactment, adopts as the rule to be followed in such cases the language of Judge Hawley, in the case of *Ex parte Spincy*, 10 Nev. 328, which is as follows : ‘I entertain no doubt that among the inherent privileges of the citizens of a free country is the right to pursue a lawful calling in a lawful manner, that is, subject to such restrictions and none others, as

may be deemed necessary for the public welfare. What restrictions are necessary in that view it is the province of the legislature to decide, and its decision, no matter how ill-advised it may appear to be, is binding on the court *whenever it appears to have been based on motives of policy or general expediency*. But when the law excludes a class of citizens from the pursuit of a useful, honorable and profitable avocation, and there is no assignable motive of policy or expediency to justify the exclusion, or in other words, when it is apparent that the whole scope and object of the law is to make a forbidden discrimination, without looking to the attainment of any public benefit, I think a court should not hesitate to say such a law is forbidden by the Constitution.'

"The Supreme Court of Illinois, in the case of *Yeazelle v. Alexander et al.*, 68 Ill. Rep. 258, speaking of the right of the legislature of that state, under the exercise of the police powers to prohibit the importation or keeping of Texas cattle in that state, uses the following language: 'It is true that the power of the legislature is not arbitrary and unrestricted. We cannot recognize wholly unrestrained power in this country.

We concede, too, that the discretion must be reasonable and should not be exercised in such a manner as to subvert natural and constitutional rights. In case of a glaring abuse of power, the courts might properly interpose to arrest a remedy which might be worse than the mischief proposed to be avoided. But when there is reasonable cause for the action of the legislative department, its determination ought not to be disturbed. Its motive in the enactment cannot be inquired into. 'The facts and conditions of things which render a law necessary for the public welfare are generally to be judged by the legislature.'

"The above cases, I believe, state the rule as claimed by those who favor such legislation as that under consideration, and is the basis upon which it has been sustained. Stripped of all verbiage and circumlocution, it is : That because the legislature has power to enact laws for the preservation of the public health, that any law it may enact under color of the exercise of that authority must be sustained by the court, unless the law is so manifestly absurd that the court cannot imagine any reasonable motive for its

enactment as a police regulation. The case above cited from 58 Ill. Rep., was taken to the Supreme Court of the United States and was by that court reversed, and a different and, I think, more reasonable rule of construction was adopted. The case is reported in 95 U. S. 473. The court says : ' The Supreme Court of Illinois refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statute was not something more than the exercise of a police power. That inquiry, they have said, was for the legislature and not for the court. In this we cannot concur. The police power of a state cannot obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise ; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Constitution.'

" In the case of *Henderson v. The Mayor of New York*, 92 U. S. 268, the Supreme Court of the United States lays down the rule as follows : ' In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.'

* * * * *

“ Non-residence cannot be made a disqualification for the pursuit of any calling or trade in any state of the Union. A few adjudicated cases upon other statutes, where such discrimination was sought to be made, I will refer to. In the case of the City of Marshalltown *v.* Blum, 58 Iowa, 184, an ordinance of the city of Marshalltown required a license of twenty-five dollars from all persons selling merchandise on the streets, but excepted from the provisions of the ordinance all persons retailing their own productions or their own manufacture, *if they resided in Marshall county*, or if the goods were manufactured in Marshall county.

“ The Supreme Court of Iowa, following and citing the decision of the Supreme Court of the United States in the case of Welton *v.* The State of Missouri, 91 U. S. 275, held this ordinance unconstitutional and void. The court says the ordinance is void because it discriminates, not only as to the place of production of the merchandise, but also the place of residence of the peddler. The ruling in this case is followed by our Supreme Court in the case of The Town of Pacific Junction *v.* Dyer, 64 Iowa, 38.

“The case of *Welton v. The State of Missouri* was that of a vender of sewing machines not manufactured in the state of Missouri, and who was convicted of violating a penal statute of the state of Missouri, requiring all persons going from place to place and selling goods, wares and merchandise, within the state, not the growth, produce or manufacture of that state, except books, maps, etc., to take out a license and to pay a certain sum therefor. The court held the act was a restraint upon inter-state commerce, and as such violated that provision of the Constitution of the United States that gave to Congress the exclusive power to regulate commerce between the states. The case of *Ward v. The State of Maryland*, 12 Wallace, 423, is, however, more in point. That was an act of the legislature of Maryland attempting to tax non-resident merchants doing business within the state, according to a schedule based upon their average stock in trade. The tax was in the form of an annual license, varying from fifteen to one hundred and fifty dollars, according to the amount of stock in trade.

* * * * *

“Some of the states have no provisions at all in their constitutions prohibiting monopolies, but the organic law of Iowa is very specific. Both sections 1 and 6 of the Bill of Rights in letter and spirit forbid, I think, such legislation as this.

“The right to acquire, possess and protect property is declared to be an inalienable right. To justify, therefore, the legislature prohibiting a man from employing another, or from being employed by him, a public necessity must exist for such a prohibition. It must not, in my judgment, be a theoretical, imaginary or possible necessity. To admit of this is at once to fritter away the protection of the citizen intended by the Constitution. To make the legislature the exclusive judge of the existence of such a necessity is to make omnipotent for evil the very power that the Constitution intended to restrain.

“Section 6 prohibits the granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

“It will not do to say that any mental or literary qualification may be prescribed, and that if the citizen does not come up to the

standard he may be excluded from the exercise of an important inalienable right or privilege.

“Equality before the law does not mean that men of certain intellectual attainments or mental endowments shall have certain rights, and those who fall short of them shall not exercise them. If college graduates alone were permitted, under the statute, to organize corporations for pecuniary profit, the court would undoubtedly hold the statute unconstitutional.

“And yet it is expedient that a certain amount of intelligence should be possessed by those who undertake the management of great enterprises. But if we admit of the educational standard in one trade or profession, upon what theory can you refuse to apply it in any other ?

* * * * *

“The arbitrary character of the law is further illustrated in the provision that it shall not be construed to prevent the sale of patent or proprietary medicines.

“The veriest quack, whether resident or non-resident of the state, may compound the most worthless or injurious nostrums, and by public prints or by means of medical almanacs, recom-

mend and advertise them as remedies for all the 'ills that flesh is heir to,' and no attempt is made to prevent or regulate this. But however intelligent the proprietor or meritorious his compound, if he is guilty of a personal interview with the patient, and attempts to tell him what is the matter, and which of his advertised compounds will be appropriate to his case, the 'public health' requires that he shall be fined or imprisoned. In other words, the law justifies and encourages the use of patent medicines, so long as the people are willing to go it blind and take this or that remedy on their own unaided judgment or guess ; but the proprietor nor any other man, save a licensed physician, may not tell them what to take or what to reject. And why this strange anomaly and inconsistency ? Merely because the druggist has his profits and pecuniary gains out of the patent medicines, and this is the 'tub to the whale' that the projectors of the scheme give to the druggist to secure his influence to sustain the monopoly. The same is true of Colfax water, or mineral waters from flowing wells or springs. It is another concession to buy off opposition to the monopoly. Yet all these features of the law

demonstrate the fact that its provisions are arbitrary restraints, not founded on any reasonable or logical theories of protection to the public health.

“Upon its face the act concedes there is no standard of practice, and every candid man must acknowledge that in the present stage of medical science, learned men are further than ever from agreeing upon any standard for the theory and practice of medicine. This law provides for and contemplates the granting of license to men of different schools, opposite and antagonistic in their theories and practice, for the sole purpose of securing the exclusion of others from practice, who are counted out only because it is not necessary, in order to secure the monopoly, to count them in.

“That the allopath physician on the board of health, if exercising his own judgment as to the fitness of the applicant to practice medicine, would exclude the homœopath, the hydropath and the eclectic, no one can doubt, unless he believes the allopath is a hypocrite and does not believe in the teachings of his school; and that the homœopath and eclectic would, in like man-

ner, exclude the allopath with his alleged 'mineral poisons,' must also be conceded. Why, then, do these men agree to forego their judgment and conscientious convictions of what is best for the public health? There is only one answer, and that is, simply because their combined influence is necessary to exclude the specialist, the itinerant, the non-resident, the clairvoyant, the faith cure, the mesmeric, the magnetic and the midwife.

"Forty years ago the allopath would have scouted the idea of tolerating these other schools of medicine. Under the legislation of a few years ago and under the decisions of boards of examiners, composed of their schools, the eclectic and Thompsonians were excluded and were fined and imprisoned by the courts: *State v. Thompson*, 15 Wend. 395.

"But things have changed. Now the gentlemen of the old school find among the most intelligent and educated classes those who believe in and patronize the other once despised and persecuted schools, and in this law they make common cause with quite a number of them, to persecute, fine and imprison all who are not yet suffi-

ciently seated in the public confidence and estimation to compel recognition. And the eclectic, whose brother is sent to prison in West Virginia, with his diploma in his pocket, is hand in glove in Iowa with the persecutors of his brother in Virginia, because in this state he has secured a position on the board of health, and he is ready now to fine and imprison the magnetic, the faith cure, the non-resident, the itinerant, or any other man that the legislature will allow him to lay violent hands upon.

“A monopoly is defined by Bouvier to be ‘an institution or allowance by a grant from the sovereign power of the state by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working or using a thing is given.’

“In the case 99 N. Y. 386, the court held that a statute to permit the fraudulent sale of imitations of butter and cheese is constitutional.

“But the legislature went further and enacted another law to prohibit the manufacture of any article intended to take the place of butter without reference to the question of fraud or imposition, and the latter act was held unconstitutional.

“The court says : ‘Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative counsels, prohibit the manufacture or sale of dairy products ? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an act ? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what is intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them.’

“Justice Bradley, of the Supreme Court of the United States, in the slaughter-house cases, 16 Wallace, 116, uses the following language : ‘Rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty and property. These are the fundamental rights

which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified by lawful regulations necessary or proper for the mutual good of all ; and these rights, I contend, belong to the citizens of every free government. For the preservation, exercise and enjoyment of these rights, the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conclusive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect ; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.'

“ In the same opinion, page 120, he says :
' The granting of monopolies or exclusive privileges to individuals or corporations, is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty. It was so felt by the English nation as far back as the reigns of Elizabeth and James. A fierce struggle for the suppression of such monopolies,

and for abolishing the prerogative of creating them, was made and was successful. The statute of 21st James, abolishing monopolies, was one of those constitutional land-marks of English liberty which the English nation so highly prize and so jealously preserve. It was a part of that inheritance which our fathers brought with them. This statute abolished all monopolies except grants for a term of years to the inventors of new manufactures. This exception is the groundwork of patents for new inventions and copyrights of books. These have always been sustained as beneficial to the state. But all other monopolies were abolished as tending to the impoverishment of the people and to interference with their free pursuits. And ever since that struggle no English-speaking people have ever endured such an odious badge of tyranny.'

"The opinion of many other eminent jurists might be cited to the same effect, but I deem it unnecessary.

"To sum up my conclusions upon this law, they are briefly as follows :

"*First.* The provision of the act attempting to discriminate in favor of those who have re-

sided and practiced five years within the state, and to exclude physicians of like experience who have resided and practiced in other states, is void as to citizens of other states, and clearly violates the provisions of the Constitution of the United States.

“*Second.* The provision requiring that a physician who has practiced five years in the state, must have practiced three years in one locality, is an unjust and arbitrary discrimination and is a violation of articles 1 and 6 of the Bill of Rights of the Constitution of the State of Iowa.

“*Third.* The same is true of the provision that makes a distinction founded on sex, as to those who now practice midwifery.

“*Fourth.* The same is true as to those who prescribe mineral waters from flowing springs or wells,—I don't think it matters whether the well flows or otherwise. I find authorities, which, in my judgment, are not well considered or well grounded in reason, upon which it is possible this law may be sustained by our Supreme Court in its general features, but I am clearly of the opinion that the entire act is intended to establish and procure for certain schools of practice a

monopoly, founded merely on arbitrary legislative power and not on principle, and that it ought to be declared void."

TABLE OF CASES.

A.

	PAGE.
Academy v. Allen.....	280
Adams v. Stuart.....	236
Almon v. Nugent.....	214
Allen v. Merchants' Bank.....	228
Allen v. Richards.....	230
Alcott v. Barber.....	198
Anderson v. Hamilton.....	282
Arnold v. Richmond Iron Works.....	116

B.

Bank v. Rutland.....	6
Ballou v. Prescott.....	216, 229
Baler v. State.....	122
Banks v. Goodfellow.....	86
Bartholomew v. Jackson.....	232
Banks v. Goodfellow.....	87
Bailey v. State.....	123
Baxter v. Abbott.....	24
Barnard v. Means.....	215
Bartholomew v. Jackson.....	232
Bank v. Wheeler.....	228
Barley v. State.....	83
Bales v. State.....	84
Baker v. People.....	187
Bird v. Bird.....	54

	PAGE.
Baker v. Commonwealth.....	203
Blake v. People.....	6
Bierce v. Stoking.....	30
Beene v. State.....	203
Behrons v. McKinze.....	96
Beals v. Lee.....	94
Bennett v. Lockwood.....	222
Bond v. Bond.....	84
Boyland v. Meeker.....	87
Boyd v. Sappington.....	231
Boyce v. Smith.....	94
Boardman v. Woodman.....	31, 34, 86, 87
Boyle v. Winslow.....	217
Bovard v. State.....	110
Bower v. Smith.....	236
Boswell v. Com.....	117
Bronson v. Hoffman.....	110
Bradley v. Fisher.....	203
Briggs v. Taylor.....	210
Brannatyne v. Brannatyne.....	85
Brown v. Payson.....	146
Brice v. State.....	192
Brooks v. Barrett.....	88
Bradley v. Fisher.....	202
Burrows v. Burrows.....	88

C.

Carpenter v. Calvert.....	54
Carpenter v. Blake.....	208, 210
Carter v. Boehem.....	7
Cantling v. Railroad Co.....	7
Carter v. State.....	122

	PAGE.
Carter v. State.....	84
Caleb v. State.....	10, 31
Childs v. Drake.....	224
Charce v. State.....	131
Choice v. State.....	63, 117, 119, 131
Christee v. Sawyer.....	280
Chandler v. Barrett.....	93
Cilly v. Cilly.....	93
Clark v. Fisher.....	54, 87
Clark v. State.....	95
Clapp v. Fullerton.....	31, 86, 87
Commonwealth v. Rogers.....	96
Commonwealth v. Blair.....	185
Commonwealth v. Adams.....	185
Commonwealth v. French.....	119
Commonwealth v. Mosler.....	61, 110, 114
Commonwealth v. Thompson.....	210
Commonwealth v. Rogers.....	18, 23, 33, 43, 47, 84, 94, 110
Commonwealth v. Heath.....	62
Commonwealth v. Meriam.....	98
Commonwealth v. Heath.....	97
Commonwealth v. Sturtevant.....	8
Commonwealth v. Hawkins.....	119
Commonwealth v. Eddy.....	94
Commissioners v. Brewington.....	233
Commonwealth v. Wood.....	148
Commonwealth v. Pierce.....	193
Commonwealth v. Hawkins.....	129
Commonwealth v. Sturtevant.....	31
Commonwealth v. Wilson.....	31
Commonwealth v. Taylor.....	186
Couch v. Couch.....	54

	PAGE.
Cook v. Ellis.	224
Cooper v. Railroad Co.	231
Crolires v. Stark.	54
Cobb v. Superior Judge.	204
Corwin v. Walton.	224
Commissioners v. Chambers.	233
Cohen v. Insurance Co.	137
Colton v. Ulmer.	93
Creighton v. Toledo.	229
Craig v. Chambers.	222
Crane v. McLaw.	236
Crosby v. Berger.	140
Crowningshield v. Crowningshield.	318
Creely v. Ostrander.	54
Cummings v. Nichols.	230

D.

Daniel v. Daniel.	54
Davison v. Davidson.	233
Davis v. State.	17
Dauson v. State.	119
De Wolf v. Chicago.	230
Dew v. Clark.	75
Dennett v. Dennett.	84
Dexter v. Hall.	23
De May v. Roberts.	218
Dixon v. Parmelee.	138
Dilleber v. Home Life Insurance Company.	142, 143
Dickinson v. Fitchburgh.	9
Doane v. Badger.	232
Dorwin v. Potter.	222
Duffield v. Morris.	86

	PAGE.
Dunn v. People.....	163
Durkee v. Leland.....	140
Dunbar v. Williams.....	231

E.

Eckhardt v. People.....	185
Eckert v. Flowey.....	23, 31
Edington v. Life Ins. Co.....	140, 142
Emerson v. Gas Co.....	6
Evarts v. Adams.....	232
Evans v. People.....	148, 153, 163
Express Co. v. McVeigh.....	228

F.

Fairchild v. Bascomb.....	8, 17
Farrell v. Brennan.....	31, 34
Farrer v. State.....	63, 94
Fletcher v. Dangerfield.....	203
Flannigan v. People.....	2, 117
Flannagan v. People.....	131, 181
Flack v. Null.....	146
Ford v. Ward.....	231
Foster v. Means.....	90
Fraser v. Tupper.....	8
Freeman v. People.....	34, 63, 97, 98, 110, 120
Fort v. Hayne.....	146
Finch v. Gridley.....	237

G.

Gabriel v. Barr.....	93
Garland v. Wholeman.....	125
Gant v. Thompson.....	116

	PAGE.
Gardner <i>v.</i> People.....	10
Gay <i>v.</i> Mutual Insurance Company	12
Gaines <i>v.</i> Commonwealth.....	10
Gerish <i>v.</i> Nason.....	93
Gehrke <i>v.</i> State.....	31
Geiselman <i>v.</i> Scott.....	223
Gibson <i>v.</i> Williams.....	7
Gove <i>v.</i> Gibson.....	116
Grattan <i>v.</i> Life Insurance Company	143, 145
Grabill <i>v.</i> Barr.....	93
Grandier <i>v.</i> Reading.....	233
Guthrie <i>v.</i> Pierce.....	93

H.

Haire <i>v.</i> Reese.....	214, 215
Hadley <i>v.</i> Watson.....	224
Harrison <i>v.</i> Rowan.....	52
Harrison <i>v.</i> Berkley.....	221
Hardy <i>v.</i> Merill.....	6, 8, 31, 80
Hamilton <i>v.</i> McPherson.....	222
Hapgood <i>v.</i> Houghton.....	230
Harvey <i>v.</i> Chase.....	86, 87
Harvey <i>v.</i> Sullens.....	93
Hertzog <i>v.</i> Hertzog.....	232
Heald <i>v.</i> Thing.....	24
Hester <i>v.</i> State.....	115
Hendrickson <i>v.</i> Drake.....	224
Higgins <i>v.</i> Carleton.....	87
Higgins <i>v.</i> Higgins.....	54
Hibbard <i>v.</i> Thompson.....	223
Hoopingarner <i>v.</i> Levy.....	215
Hovey <i>v.</i> Hovey.....	84

	PAGE.
Holmes v. Halde.....	189
Howard v. Grover.....	210
Hoffs v. People.....	94
Hoppes v. State.....	61, 114
Hunt v. People.....	162, 163
Hurley v. Van Wagoner.....	230
Hundley v. State.....	94
Humphreys v. State.....	13, 119

I.

Inhabitants v. Henshaw.....	137, 141
-----------------------------	----------

J.

Jackson v. French.....	146
Jackson v. Texas.....	202
Johnson v. Moore.....	75
Johnson v. Johnson.....	141
Jones v. Quincey.....	230
Jones v. Fay.....	217
Joyce v. Insurance Company.....	7
Juzan v. Toulman.....	95

K.

Keenan v. Commonwealth.....	119
Kenny v. People.....	117, 119, 131, 229
Kelogg v. Kelogg.....	140
Kinne v. Kinne.....	88
Klopper v. Bromme.....	224
Klingensmith v. Kepler.....	201

L.

Lamphier v. Phipos.....	214, 215
Landon v. Humphrey.....	210

	PAGE.
Landsberger v. Gorham.....	146
Lang v. Whidden.....	116
Law v. Railroad.....	230
Leighton v. Sargent.....	15, 210, 228
Lee v. Lee.....	232, 233
Levee Com. v. Harris.....	232
Lohman v. People.....	163
Lowder v. Lowder.....	54, 87
Lonergan v. People.....	83, 118, 123, 129
Luce v. Dorchester Insurance Company.....	8
Lucas v. Parsons.....	88
Lynde v. Judd.....	140
Lynch v. Onondaga Salt Company.....	229

M.

MacNevins v. Lowe.....	210
McAlister v. State.....	17, 43, 60, 81, 96
McIntyre v. People.....	119
McCurry v. Hooper.....	90
McCandless v. McWha.....	208, 215, 222, 223
McGrew v. Stone.....	222
McLalon v. Adams.....	208
Marsh v. Davidson.....	191, 198
Martin v. Fox.....	230
Maconahay v. State.....	122
Matter v. Coffman.....	93
Medway v. Croft.....	41
Mitchell v. Commonwealth.....	153
Mitchell v. Kingman.....	116
Morse v. Crawford.....	96
Morris v. Stokes.....	93
Monegan v. People.....	162

	PAGE.
Muldowney <i>v.</i> Illinois Central Railroad.....	8
Munger <i>v.</i> Munger.....	230
Mumford <i>v.</i> Brown.....	232
Musser <i>v.</i> Chase.....	210

N.

Negro Jerry <i>v.</i> Townshand.....	17
New England Glass Co. <i>v.</i> Lovell.....	8
Nowell <i>v.</i> Wright.....	8

O.

O'Brien <i>v.</i> People.....	83, 119, 123, 129
Ogden <i>v.</i> Saunders.....	228
O'Hara <i>v.</i> Wells.....	214

P.

Parker <i>v.</i> Carter.....	146
Page <i>v.</i> Parker.....	8
Patten <i>v.</i> Wiggin.....	107, 206
Patterson <i>v.</i> People.....	121
People <i>v.</i> Rogers.....	119, 131
People <i>v.</i> Davis.....	162, 163
People <i>v.</i> Lohman.....	163
People <i>v.</i> Palmer.....	201
People <i>v.</i> McCann.....	17
People <i>v.</i> Kline.....	131
People <i>v.</i> Robinson.....	11, 115, 118
People <i>v.</i> Hammill.....	118
People <i>v.</i> Coffman.....	63, 97
People <i>v.</i> Benjamin.....	140
Percival <i>v.</i> Nevilla.....	232
People <i>v.</i> Meyers.....	93
People <i>v.</i> Sprague.....	97

	PAGE.
People v. Murphy.....	145
People v. Schanchez.....	23
People v. Stout.....	139
People v. Lohman.....	205
People v. Moett.....	131
People v. Stockham.....	162
People v. Eastwood.....	18
People v. Vedder.....	185
People v. Montgomery.....	131
Pigman v. State.....	119
Pirtie v. State.....	
Potter v. Warner.....	210
Potter v. Virgil.....	228
Potts v. House.....	54
Patten v. Wiggin.....	210, 215
Pond v. State.....	110
Powers v. Russell.....	218

R.

Raynor v. State.....	198
Rafferty v. People.....	119, 131
Ramage v. Ryan.....	7
Rex v. Oxford.....	43, 60, 62
Rex v. Goode.....	43
Reg. v. Pate.....	64
Reg. v. Barton.....	63, 64, 114
Rex v. Spiller.....	191
Rex v. Ellis.....	191
Rex v. Van Butchell.....	191
Rex v. St. John Long.....	191
Rex v. Williams.....	191
Rex v. Long.....	208
R. v. Wright.....	178

	PAGE.
R. v. Thomas.....	117
R. v. Brain	174
R. v. Trilloe.....	174
R. v. Brain	178
R. v. Meakin.....	118
R. v. Goode.....	62
R. v. Barton.....	62
R. v. Sellie.....	178
Reg. v. Townley.....	114
Real v. People.....	31, 83, 123
Reg. v. McNaughton.....	99, 115
R. v. Higginson	17
R. v. Francis.....	17
R. v. Richards.....	17
R. v. Meakin.....	117
R. v. Crutchley.....	174
R. v. Sellis.....	174
R. v. People.....	118
R. v. Enoch.....	174
R. v. Meakin.....	122
R. v. Crutchley.....	178
R. v. Watson.....	122
R. v. Runie.....	122
Reynolds v. Graves.....	210, 215
Richardson v. Strong.....	94
Roe v. Taylor.....	93
Rogers v. Walker.....	86, 93
Roberts v. Mason.....	224
Rutherford v. Morris.....	54, 93

S.

Sanchez v. People.....	110, 131
Scott v. Com.....	61, 114

	PAGE.
Secoa v. True	228
Saxton v. Stowell	203
Seaman's Friend Society v. Hopper	86
Shannahan v. State	81
Sherman v. Sherman	138
Shannahan v. Commonwealth	119
Shear v. Redf	208
Shater v. People	63
Sibley v. Waffle	146
Slemmer v. Weight	201
Slater v. Baker	208
Smith v. Watson	231
Small v. Howard	210
Smith v. Tracy	198
Smith v. Beatty	95
Smith v. Lane	198
Smith v. Commonwealth	119, 122
Smothers v. Hanks	210, 214, 215
Sowers v. Pumphrey	84
State v. Birdsall	122
State v. Bullock	119
Stover v. Bluehill	222
State v. Hyer	187
State v. Hunting	97
Stackhouse v. Horton	83, 131
State v. Hayes	9
State v. Harlowe	115
State v. Fitzgerald	186
State v. Felter	61, 94, 114
State v. Gedicke	187
State v. Knight	30
State v. Klinger	17, 31, 34, 82
State v. Lawrence	62, 94, 97

	PAGE.
State v. Harlow	119
Stout v. Proctor	203
State v. Reddick	30
State v. Reidemire	94
State v. Murphy	192
State v. Sherwood	187
State v. Spencer	4, 31, 60, 62, 96, 115
State v. Stokeley	17
State v. Schultz	193
State v. Sharp	200
State v. Neeley	110
State v. Windsor	17, 33
State v. Wilson	122
Stanton v. Weatherwax	87
State v. Russell	228
State Bank v. McCoy	116
Stackhouse v. Horton	86
Stevens v. State	61, 114
Swan v. People	117

T.

Trumbull v. Gibbons	87, 96
Todd v. Myers	216
Taylor v. Kelly	83, 86, 87
Teal v. Barton	8
Thompson v. Kyner	93
Thomas v. Kyner	54
Terry v. Buffington	54
Taylor v. State	188
Teft v. Wilcox	210
Taylor v. Foster	146
Tracy v. Sackett	96
Thomas v. Stump	54

U.	PAGE.
United States <i>v.</i> McGlue.	17, 83, 123
United States <i>v.</i> Clark.	83, 123
United States <i>v.</i> Holmes.	
United States <i>v.</i> Drew.	83, 122, 132
V.	
Vance <i>v.</i> Com.	96
Van Arman <i>v.</i> Boynton.	230
Van Alstyne <i>v.</i> Hunter.	54
W.	
Watson <i>v.</i> Ladoux.	232
Walker <i>v.</i> Brown.	229
Watson <i>v.</i> State.	163, 185
Williams <i>v.</i> Cameron.	96
Westover <i>v.</i> Etna Life Insurance Company.	145
Wetherbee <i>v.</i> Wetherbee.	17, 24
Weems <i>v.</i> Weems.	31
Wenger <i>v.</i> Calder.	226
Wendel <i>v.</i> State.	198
Weeks <i>v.</i> Holmes.	230
Westover <i>v.</i> Ætna Life Ins. Co.	142
White <i>v.</i> Ballou.	8
Willis <i>v.</i> People.	62, 110, 115, 131
Wilkinson <i>v.</i> Mosely.	18
Williams <i>v.</i> Breakell.	231
Wilson <i>v.</i> State.	148
Wilson <i>v.</i> Reg.	163
Winans <i>v.</i> New York & E. R. R. Co.	9
Woodbury <i>v.</i> Obear.	16, 23
Y.	
Yoe <i>v.</i> McCord.	54, 85
Z.	
Zimmerman <i>v.</i> Moerison.	198

INDEX

TO FIELD'S MEDICO-LEGAL GUIDE.

A.

	SEC.
ABORTION. (See MISCARRIAGE; INFANTICIDE.)	
defined and explained.....	73
meaning of the term "quick with child".....	73
common, under various circumstances	73
miscarriage, what it is.....	73
maternal causes of.....	74
foetal causes of.....	75
may be partly maternal, partly foetal	75
natural and innocent causes of.....	76
artificial and innocent abortion	77
premature labor.....	77
statutes relating to the subject	78
when premature labor may be properly induced..	79
chief methods employed to produce.....	78
criminal; methods of producing.....	79
statutory provisions on the subject.....	80
construction of statutes on the subject	81
in case of death resulting from.....	82
statutes relating to	83
signs of, during life ..	84

ABORTION— <i>Continued.</i>	SEC.
general symptoms of	84
signs on examination after death	85
examination of the foetus	86
summary of matters to be observed on examina-	
tion as to	90
where the woman is alive.	90
dead	90
indictments for, under statutes	90
statutes of New York on the subject.	91
Texas	91
Iowa	91
Massachusetts	91
Illinois	91
ALCOHOL,	
its uses and effects	33
psychological effects	34
ALCOLOLISM,	
defined	35
forms of insanity caused by.	35
symptoms similar to quininism	36
delirium in general	37
legal relations of	38
AMENTIA. (See UNSOUNDNESS OF MIND ; INSANITY.)	

C.

CIVIL LIABILITY,	
of medical men for malpractice	100-107
malpractice ; various kinds of	100
liability for, in general	101

CIVIL LIABILITY— <i>Continued.</i>	SEC.
skill required of physician or surgeon.....	102
ordinary skill required	102
not the highest skill	102
care and skill required, illustrated.....	102
highest degree not required	103
implied duty of.....	104
general principles applicable to dentists.....	105
under statutes	105
in case of impropriety.....	106
proof of malpractice	107
matters in defense.....	108
in case of contributory negligence	109
punishment for the crime no defense.....	110
the measure of damages; rule.....	111

COMMUNICATIONS PROTECTED. (See PRIVILEGED COMMUNICATION.)

generally when made to a professional person by client or patient.....	66-72
by statutes	70
in case of surgeons	72

COMPENSATION, .

contract for services.....	112
may be express or implied.....	112
when express	112
implied.....	112
common presumptions relating to.....	113
amount of	113
for services rendered at request of a third party..	114
in case of intrusive and voluntary services	115
measure of the value of.....	116

COMPENSATION—*Continued.*

SEC.

in case of judgment for services.	117
generally bar to action for malpractice.	117
statutes regulating.	118
requiring diploma.	118
certificate.	118
diploma, how proved.	119

CRIMINAL LIABILITY,

for negligence or misconduct.	92, 93
statutory provisions on the subject.	92
general liability at common law.	93
for practicing without license.	94-96
provisions of statutes on the subject.	94
penalties imposed.	95
in case of intoxication.	96
for misconduct of attorneys.	97
attorneys, duty of, to the court.	98
suspension of.	98, 99

D.

DAMAGES,

matters in defense or mitigation of.	108
in case of contributory negligence.	109
the measure of.	110, 111

DELIRIUM TREMENS,

cause of.	39
symptoms of.	40
general characteristics of.	40
hallucinations of.	40
delusions of.	40

DELIRIUM TREMENS— <i>Continued.</i>	SEC.
legal relations of	41
excuse in criminal cases	58
DEMENTIA. (See INSANITY.)	
distinguished from amentia	20
legal relations of	21
in case of wills.	21
DENTISTS. (See CRIMINAL LIABILITY.)	
civil and criminal liability, the same as surgeons..	105
DIPLOMA. (See CRIMINAL LIABILITY.)	
general provisions of the statutes requiring	94
criminal liability for practicing without	95
requirements of statutes relating to	95
DREAMING,	
illusions and delusions common to	59
legal relations of	60
DRUNKENNESS. (See INSANITY ; ALCOHOLISM.)	
legal responsibility in case of.	56, 57

E.

EXPERTS. (See EXPERT TESTIMONY.)	
opinions of medical, as to sanity	5
on hypothetical cases	5
general doctrine in respect to	5
rule where it rests upon personal examination,	6
when facts should be stated.	6
governmental, recommended	7
general consideration of.	7

EXPERTS—*Continued.*

SEC.

opinion of non-experts	8
when proper	8
distinction between, and non-experts.....	9
non-experts generally confined to facts.	9

EXPERT TESTIMONY. (See EVIDENCE; EXPERTS.)

in general	3
opinions of medical men	3
scientific men	3
in other cases.....	3
as to value, etc.....	3
not allowed as to matters of common knowl- edge.....	3
when allowed as evidence.....	3
unsatisfactory character of.....	4
as to sanity	4
cause of death	4
general consideration of.....	4
conflict of opinions in important cases.....	4
opinions as to sanity.....	5
on hypothetical cases.....	5
value of	5
cases illustrating.....	5
what it depends upon	5
where it rests upon personal examination....	6
medical, should be appointed by government....	7
reasons stated.....	7
opinions of non-experts, when proper	8
distinction between expert and common witnesses..	9
non-experts cannot give an opinion upon hypotheti- cal case.....	9
cases illustrating	9
in criminal cases	9

I.

INSANITY. (See UNSOUNDNESS OF MIND.)	SEC.
varieties of	10
defined and described	11
instances of.....	11
amentia; what is ementia.....	12
imbecility defined	13
cretinism	14
idiocy	15
imbecility	16
as a civil and criminal defense.....	17, 18
general moral imbeciles	19
dementia distinguished from amentia.....	20
degrees of	20
senile.....	20
illustration of.....	20
legal relations of.....	21
in case of wills.....	21
mania defined.....	22
general.....	23
character of.....	23
intellectual.....	24
partial or monomania.....	25
delusions and hallucinations.....	26
moral and effective.....	27
morbid impulses.....	27
homicidal.....	28
as a defense.....	28
kleptomaniac, a propensity to steal	29
pyromania, a propensity to burn.....	31
as a defense not favored.....	29, 32
delirium in general.....	37

INSANITY— <i>Continued.</i>	SEC.
legal relations of.....	38
<i>delirium tremens</i>	39
symptoms of.....	40
legal relation of.....	41
civil acts of persons subject to.....	42
in case of wills.....	43
conduct of the testator.....	44
test of capacity to manage business.....	45
to contract.....	48
burden of proof.....	46
general presumptions.....	47
liability for torts.....	49
as a defense against crime.....	50
insane delusions as a defense.....	51
irresistible impulse.....	51
McNaughton's case.....	51
common sources of.....	52
test of capacity.....	53
impulsive mania.....	54
defense.....	55
responsibility in case of drunkenness.....	56
drunkenness as a mitigation.....	57
<i>delirium tremens</i> as an excuse.....	58
delirium.....	59
illusions and delusions.....	59
dreaming, legal relations of.....	60
somnambulism, legal relations of.....	61, 62
statutory provisions relating to mental unsound-	
ness.....	63
construction of statutes.....	64
rules suggested on examination.....	65

IMBECILES,	SEC.
in general	16
civil and criminal liability of	17
not generally liable for crimes	18
moral	19

IMBECILITY. (See INSANITY; UNSOUNDNESS OF MIND.)

what is	16
an excuse in criminal cases	18

INFANTICIDE. (See ABORTION; FŒTICIDE.)

distinction between, and foeticide	87
evidence of life subsequent to birth	88
modes of destroying a child after birth	89

L.

LICENSE, OR DIPLOMA. (See CRIMINAL LIABILITY.)

practice without, prohibited	94
a crime	95

M.

MANIA. (See INSANITY.)

in general	21
defined	22
general	23
intellectual	24
partial, or monomania	25
delusions and hallucinations	26
moral and effective	27
morbid impulses	27
homicidal	29
kleptomania	32

MALPRACTICE. (See CRIMINAL LIABILITY ; CIVIL LIABILITY.)	SEC.
civil liability for	100-107
burden of proof of	107
MENTAL CONDITION. (See INSANITY.)	
rules for determining	65
MEDICAL ETHICS,	
code of, in New York	120
general rules.	120
MEDICAL WITNESSES. (See WITNESSES.)	
compulsory attendance of	1
by subpoena	1
fees of.	1
excuse for non-attendance.	1
oath of	2
test of competence of.	2
religious belief of.	2
statutes regulating subject.	2

O.

OATHS. (See WITNESSES.)	
religious belief required	2
generally unnecessary	2

P.

PROTECTED COMMUNICATIONS. (See PRIVILEGED COMMUNICATIONS.)	
PRIVILEGED COMMUNICATIONS,	
at common law between attorney and client.	66
under statutes.	67

PRIVILEGED COMMUNICATIONS— <i>Continued.</i>	SEC.
protection of, made to priest or clergyman.....	68
may be waived.	
construction of statutes on the subject.....	69
general rule applied by statute to other professions,	69
applicable to physicians and surgeons....	70
construction of the statutes....	70
applicable to all professions.	71
illustration of, in case of physicians and sur-	
geons.....	72

S.

SOMNAMBULISM,

common manifestations of.....	61
legal relations of	62

STATUTORY PROVISION. (See INSANITY.)

on the subject of insanity	64
----------------------------------	----

U.

UNSOUNDNESS OF MIND. (See INSANITY.)

varieties of	10
defined and described	11
cases illustrating the subject	11
amentia	12
imbecility	13
cretinism	14
idiocy	15
imbecility	16
liability of imbeciles.....	17
for crimes	18
of moral imbeciles	19

UN SOUNDNESS OF MIND—*Continued.*

	SEC.
dementia distinguished from amentia	20
senile	20
legal relations of.	21
in cases of wills	21
mania defined	22
general	23
character of	23
intellectual	24
partial	25
delusions and hallucinations.	26
moral and effective.	27
homicidal	28
kleptomania	29
pyromania, or propensity to burn	31
not favored as defenses	32
delirium in general.	37
legal relation of	38
<i>delirium tremens</i>	39
symptoms of.	40
characteristics of.	40
legal relations of.	41
civil actions of persons of	42
in case of wills.	43
in case of testators	44
conduct of	44
test of capacity to manage business	45
conduct	45
doctrine as to the burden of proof	46
general presumptions.	47
test of capacity to contract	48
liability for torts	49
as a defense to a criminal charge.	50

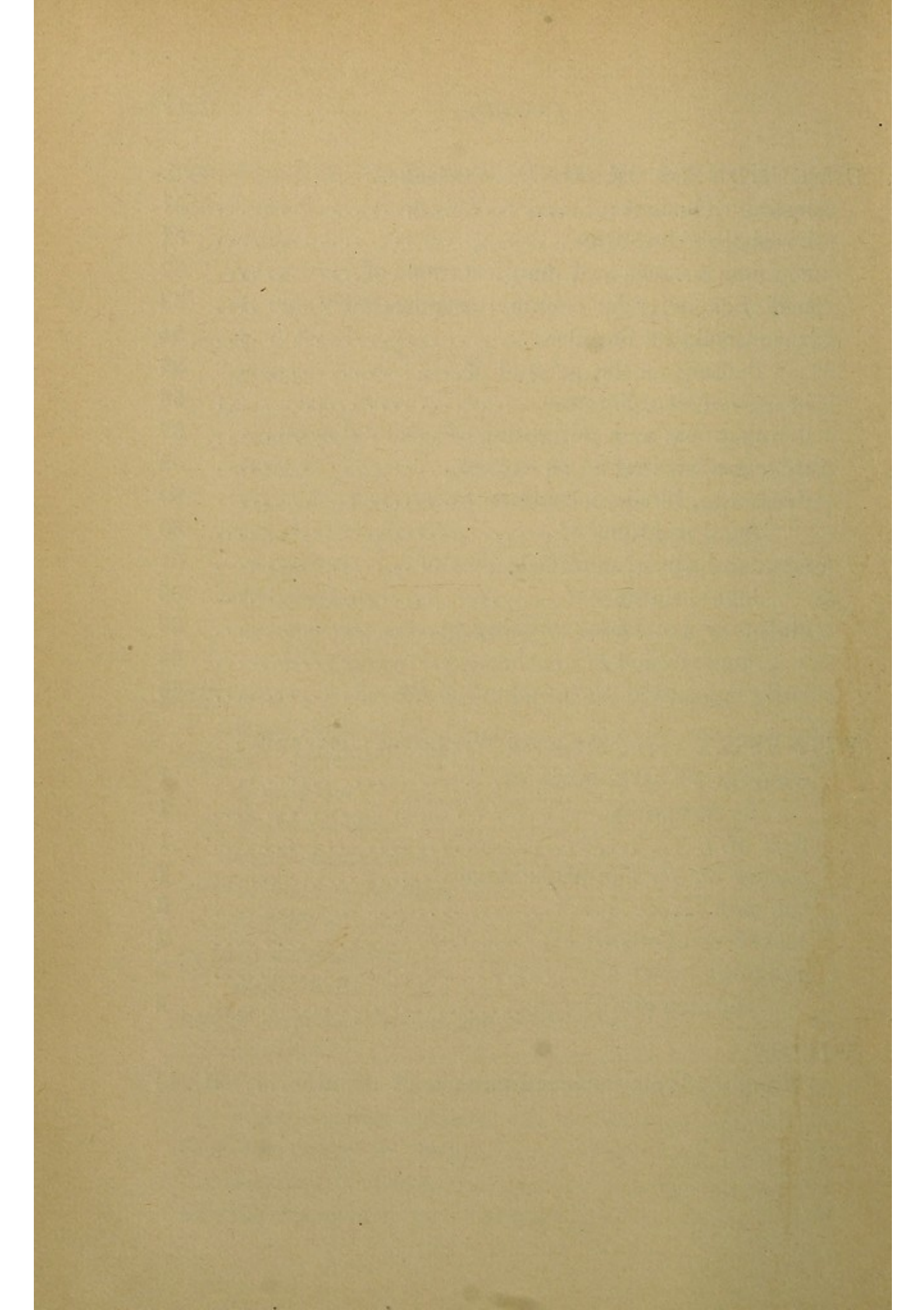
UNSOUNDNESS OF MIND— <i>Continued.</i>	SEC.
insane delusions.....	51
irresistible impulses.....	51
common sources and manifestations of.....	52
test of capacity for criminal responsibility.....	53
uncontrollable impulse.....	54
defense on the ground of.....	55
in case of drunkenness.....	56
drunkenness as a mitigation of criminal acts.....	57
<i>delirium tremens</i> as an excuse.....	58
dreaming, illusions common to.....	59
legal relations of.....	60
somnambulism, manifestations of.....	61
legal relations of.....	62
statutory provisions relating to.....	63
construction of.....	64
rules suggested on examination for.....	65

WITNESSES. (See MEDICAL WITNESSES; EXPERTS.)

compulsory attendance of.....	1
by subpoena.....	1
fees of.....	1
excuse of, for non-attendance.....	1
the oath.....	2
test of competence of.....	2
religious belief of.....	2
statutes relating to.....	2

WILLS,

When voidable for incompetence of testator.....	21, 43
---	--------





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