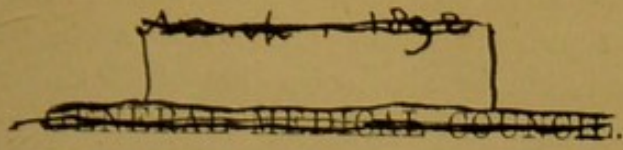
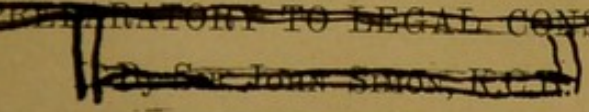
General Medical Council : on the claim, asserted by the Royal College of Physicians, that the College of itself, apart from any other examining authority, can grant such letters-testimonial or licenses in medicine, surgery and midwifery, as shall be valid diplomas of qualification under Sections 2 and 3 of the Medical Act, 1886 : notes preparatory to legal consultation / by Sir John Simon.

(20.) 1892: Revise, March 25, [at. 75½] at S.S. Jan 8, 9



CLAIM, asserted by the ROYAL COLLEGE of PHYSICIANS, at the COLLEGE of ITSELF, apart from any other EXAMINING AUTHORITY, can GRANT SUCH LETTERS-TESTIMONIAL or LICENSES in MEDICINE, SURGERY and MIDWIFERY, as shall be valid DIPLOMAS of QUALIFICATION under *Sections* 2 and 3 of the *Medical Act*, 1886. — March, 1892.



So far as the GENERAL MEDICAL COUNCIL and the Royal College of Physicians may find themselves irreconcilably at issue on the question of giving effect to a command of law, it can only be for the appointed Courts of Judicature to pronounce decisively between them; and a crisis of that sort appears now to have arisen, in that of the COUNCIL's demurrer to the claim which the College addresses to it for the registration of certain diplomas which the COUNCIL does not find to be of sufficiently proven legal validity.

The *Casus Belli*.

It being probable that the COUNCIL will shortly have to consult its legal advisers as to the grounds on which its demurrer to the claim of the College shall be justified, the following notes are submitted by their writer as a connected view of the considerations he thinks most material in the case of the COUNCIL.

Preliminarily, for non-medical participators in the discussion, two points have to be made clear with regard to the ever-recurring terms "Medicine" and "Physic": *first*, that, in the present business, those two terms can be taken as exact equivalents in meaning, interchangeable one with the other; and *second*, that neither of the two can pass muster in this argument unless the sense in which it shall be understood has been

Notice as to the terms "Medicine" and "Physic."

settled. In customary language, each of the terms has for centuries been of recognized double meaning, and each is abundantly on record in its own two different senses; often, namely, in that widest-possible sense which has made "Physic" or "Medicine" a name for the Entire Art of Healing; but often also in that different and restrictive sense which distinguishes between Physic and Surgery, and applies the name "Physic" or "Medicine" only to those particular portions of the field in which physicians (as distinct from surgeons) are accustomed to practise. Relatively to the matter now in controversy, the difference between these two meanings is essential; and the question of privileges legally intended for the College of Physicians cannot be intelligibly argued, unless the arguers recognize from the first that a term so pervasive of their discussion is a term which has been accepted in two senses.

The Medical Acts of the reign of HENRY VIII.

3. History, in relation to the matter which is in controversy, begins with the reign of HENRY VIII; and, as regards some chief points in the matter, may almost be said to end with that reign. Six Acts of Parliament, passed at intervals during some thirty-two years of the period, were the first steps of English endeavour to provide by law for the constitution of a Medical Profession, and for the qualifications and privileges of its members. These Acts respectively were of date and title as follows:—(A) year 3rd, ch. 11, *Act for the appointing of Physicians and Surgeons;*—(B) year 5th, ch. 6, *Act concerning Surgeons to be discharged of Quests and other things;*—(C) years 14th and 15th, ch. 5, *The Privileges and Authority of Physicians in London;*—(D) year 32nd, ch. 40, *For Physicians and their Privilege;*—(E) same year, ch. 42, *For Barbers and Surgeons;*—(F) years 34th and 35th, ch. 8, *Bill that Persons being no common Surgeons may minister Medicines notwithstanding the Statute.* For quotation in the present controversy, those six Medical Acts of the years 1511–43 may best be contemplated as a whole; not admitting any one of them to be of argument, except in such connection with the others as shall allow proper comparative appreciation of the passages for which authority is claimed. Especially it is submitted that, in order to a full interpretation of the Acts C and D which confer privileges on the College of Physicians,

the previous more general Act A, which relates to both Physicians and Surgeons, will be found an indispensable context.

The critical passages in the Henrican Acts.

4. In the Henrican statutes above enumerated, three passages in particular are of such immediate concern to the question now in dispute that they must be weighed and analysed one by one in relation to it. The writer of the present notes has no pretensions to speak as an expert in any matter of law, and of course would not advance any opinion of his own in any such matter except as subject to the correction of experts; but, provisionally speaking, he assumes that English law (like English liturgy) is meant to be "understanded of the people"; and having on the recent occasion, at the GENERAL MEDICAL COUNCIL, felt it his duty to take part in demurring to the claim advanced by the College of Physicians, he will now state, as regards the three passages of statute-law to which he refers, the impressions on which he founded his demurrer.

3rd H. VIII, ch. 11.

(i) The statute which opens the Henrican series is repeatedly referred to in the succeeding statutes, and therefore cannot plausibly be left out of account in interpreting them. The Act bears an explanatory notice that "Surgeons be comprised in it like as Physicians, for like mischief of ignorant persons presuming to exercise surgery." The preamble of the Act sets forth that, through Physic and Surgery being daily within the realm exercised by a multitude of ignorant persons, of whom even the least qualified will take upon themselves things of great difficulty, grievous damage is caused to many of the king's liege people, most especially among such as cannot discern between skilled and unskilled practitioners; and thereupon, as against the grievance set forth, the Act makes provision as follows:—

"... § (i) That no person within the city of London nor within seven miles of the same take upon him to exercise and occupy as a Physician or Surgeon except he be first examined, approved and admitted by the Bishop of London or by the Dean of Paul's for the time being, calling to him or them four Doctors of Physick, and for Surgery other expert persons in that Faculty, and for the first examination such as they shall think convenient, and afterwards alway four of them that have been so approved, upon the pain of forfeiture for every month that they do occupy

as Physicians or Surgeons not admitted nor examined after the tenour of this Act, of five pounds. . . . . " "§ (ii) No person out of the said City and Precinct of seven miles of the same, except he have been as is aforesaid approved in the same, take upon him to exercise and occupy as a Physician or Surgeon in any Diocese within this Realm; but if he be first examined and approved by the Bishop of the same Diocese, or, he being out of the Diocese, by his Vicar-General; either of them calling to them such expert persons in the said Faculties as their Discretion shall think convenient, and giving their Letters-Testimonial under their seal to him that they shall so approve; upon like pain. . . . ." It is necessary to notice in this Act how decidedly its language refers to "Physick" and "Surgery" as *two distinct and separate* "Faculties" in the Art of Healing; and how expressly the Act provides for differentiation of the respective experts who shall examine for Letters-Testimonial in those Faculties. The naming of the two Faculties is without any trace of suggestion that either of the two was to be understood as capable of containing the other; and, for the purposes of the Act, the two Faculties are regarded as mutually independent. The word "Physick," therefore, can hardly be interpreted except in the narrower of the two possible senses of the word (see above, section 2); and popular usage would certainly not at that time have construed it in any but the narrower sense. In relation to the marked duality and distinctness of *Physic* and *Surgery*, as dealt with in the Act of 1511, it is important to remember that, from early mediæval times, *physicians* had been chiefly ecclesiastics, and that, under church-ordinances dating from the thirteenth century, the ecclesiastical physicians had been expressly forbidden to take part in surgical practice. On the founding of the Royal College of Physicians in 1518, at least two of the six Physicians named in the Charter of Incorporation—namely, Chambre and Linacre, if not also others of the number, were beneficed ecclesiastics, apparently within the terms of that prohibition. It is also to be remembered that in 1511 *Physic* and *Surgery* were, and long had been, familiarly known to municipal government in England as two faculties independent of each other, and distinct as grocer from baker. In London, though the College of Physicians was not yet incorporated, the

Faculty of Physic was represented by the Medical Graduates of Universities, especially of Oxford and Cambridge; while the separate *Surgical Faculty* already showed organised representation in the Guild of Surgeons and the Corporation of Barbers practising Surgery. And so long ago as 1423—a hundred years before Parliament's first mention of a College of Physicians, it had happened in London that certain representative men of the Faculty of Physic on the one hand, and the London Guild of Surgeons on the other, concurred as independent parties in bringing before the Mayor and Aldermen of London proposals for an ordinance to provide joint government for their respective faculties by means of one College of Physicians and Surgeons: which ordinance was accordingly made by the Mayor and Aldermen, and was for a time in operation.*

14th and 15th H. VIII, ch. 5.

The College Charter.

(ii) Special importance in the discussion must necessarily attach to the Act which stands "C" in the series. This Act, passed in 1523, rehearses and confirms the Charter by which Henry VIII, five years previously, had incorporated the College of Physicians; and this Act, with the Charter it confirms, is the original source of authority to the College of Physicians to grant Letters-Testimonial and Licenses in Physic. The declared intention of the Charter was to provide as regarded London (including the district for seven miles round) that the faculty to which the Charter relates, and which it throughout designates by the name "*Medicina*," should be made subject to proper government and correction; for which purpose the Charter incorporates as a College six physicians whom it names, and with them all other men then practising in the same faculty in London, and gives to this College perpetual power to make statutes and ordinances for the government, supervision, and correction of the College, and of all men practising in the same faculty in London, and of the medicaments by them employed, and to punish by fine and imprisonment; and the Charter expresses hope that the College, both by its example, and by such correctional means as it can use under the late Act of Parliament and under its own ordinances, will restrain or punish the ignorant and rash who pretend to medical skill; and

* *See* page 52 and Appendix B of the *Memorials of the Craft of Surgery* quoted in the next section of these Notes.

it ordains that in future no one shall practise in this faculty in London, unless admitted to do so (*nisi ad hoc admissus*) by letters with seal of the College. In Section 3 of the Act which confirms the Charter, the jurisdiction of the College as to licenses for practising in the faculty is extended, but (as will hereafter be seen) in somewhat different terms, to the remainder of the country. Neither in the language of the original Charter, nor in the language of the Act which confirms it, is there to be found any specific reference to Surgery; and while "*Medicina*," in the Latin of the Charter, evidently means "medicine" as the faculty of the Physician, so "Physick" in the English of the Act could not, without discord, be read as of other and wider meaning. No sign, no shade of a sign appears, that the authority of the College in respect of Letters-Testimonial and Licenses was intended to be of effect in Surgery; and further examination gives ground for concluding positively that not any such intention was entertained. For it must be observed that both the Charter of 1518, and this Act of Parment confirming it, *refer expressly to the Act of* 1511: that their language has to be compared with its language: that "Medicina" in the Charter, and "Physick" in the present Act, have to be reconciled with the "Physick" of the previous law. In the present Act, Section 3 says as follows:—"And when that in Dioceses of England out of London it is not light to find alway men able sufficiently to examine, after the Statute, such as shall be admitted to exercise Physick in them, that it may be enacted in the present Parliament that no person may henceforth be suffered to exercise or practise in Physick through England until such time as he be examined at London by the said President and three of the said Elects, and to have from the said President or Elects Letters-Testimonial of their approving and examination, except he be a graduate of Oxford or Cambridge, who hath accomplished all things for his form without any grace." The enacters of this section, when making their express reference to the statute of 1511, could not have been unaware that, in the language and spirit of that statute, "Physic" and "Surgery" are the names of *two separate faculties* in the Art of Healing; and it cannot be imagined that now, in amending the statute, they tacitly give a new sense to one of its two principal terms. The inference

accordingly is, that in Section 3 of the present Act "Physick" means (as in the Act of 1511) only the province which is distinctively the physician's; and thus (for the argument applies equally to the language of the Charter) that the authority given to the College in 1518 and 1523 to grant Letters-Testimonial and Licenses in "Physick" does not extend to the province of Surgery. In support of this inference, it seems pretty conclusive to observe that the *repealing power* of the Act of 1523, in relation to the Act of 1511, was never understood as affecting it in respect of both faculties; but only in respect of "Physick" in the narrower sense. The Act, namely, was understood as repealing those parts of the Act of 1511 which had made ecclesiastical authorities supreme in the granting of licenses for the practice of "Physick"; so that thenceforth those authorities figured no more in relation to the one faculty; but in contrast with the repeal introduced as to ecclesiastical licenses in "Physick," the law as to Licenses in Surgery remained without change what the Act of 1511 had made it. That the Act of 1511 was still in force as to Surgery at a period of 150 years from the date of its enactment may be illustrated from Mr. D'Arcy Power's *Memorials of the Craft of Surgery in England*, edited by him in 1886 from materials collected by the late Mr. John Flint South: at page 374 of which volume will be found the copy of a Surgical License, granted in 1661 by the then Bishop of London to a certain Samuel Holditch, with express citation of the Act of 1511 as its sanction, and with account of the examinations on which (in conformity with the Act) the License was granted.*

(iii) The third passage which has to be scrutinized is Section 3 of the Act of 1540. This Act, seventeen years subsequent to the one last mentioned, deals again specially with Physicians and their College; exempting the College from duties of watch and ward in and about the City of London, and providing for the

32nd H. VIII, ch. 40, sec. 3.

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* The Bishop appears to have acted in concert with Henry the Eighth's Corporation of Barbers and Surgeons; compare also various earlier passages in the same volume; and it would seem likely that, for the surgical purposes of the Act of 1511, concert between the ecclesiastical and the surgical authorities may have been of even earlier date than the chartering of this corporation.

annual election of Censors, who shall have authority within the City to act as inspectors of Apothecaries' wares, and then, in Section 3, enacting as follows: "Forasmuch as the Science of Physick doth comprehend, include and contain the knowledge of Surgery as a special member and part of the same, therefore be it enacted, that any of the said Company or Fellowship of Physicians, being able chosen and admitted by the said President and Fellowship of Physicians, may from time to time, as well within the City of London as elsewhere within this realm, practise and exercise the said Science of Physick in all and every his Members and Parts, any Act, statute, or provision, made to the contrary, notwithstanding." It will be observed that here, for the first time in the series of statutes, the "Physick" to which reference is made is "Physick" in the most comprehensive sense of the term; and that, in this respect, no sort of doubt can be thrown on the intention of the law, that *every one of the specified class of persons* should be at liberty to include the practice of surgery within the range of his practice as physician. And the terms of the enactment are precise as to the persons who shall possess the privilege. The privileged class will be "any of the same Company or Fellowship of Physicians, being able chosen and admitted by the said President and Fellowship of Physicians"; that is to say, will include the duly incorporated members of the corporate body, and apparently no other person. The terms do not at all suggest that the privilege was meant to belong to any one in respect merely of his being a *Licentiate* of the College: whether as having received from the College (under authority of its Charter) permission to practise as a physician in London; or as having received from the President and Elects of the College (under Section 3 of the Act of 1523) Letters-Testimonial approving him for practice in dioceses out of London.* Nor would the terms appear to include any one in respect of mere *courtesy-title as member* (but not governing member) of the College.† Nor does anything in the Act of 1540 contained appear to extend or in any way alter

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* *See* footnote to Section 5, below.

† *See* footnote to Section 5, below.

the effect of the Act of 1523, with regard to the *qualificational status* which Letters-Testimonial under that Act (conferring license to practise Physic) would legally imply.

To the writer of these notes it seems probable that Section 3 of the Act of 1540, using so large a theoretical preamble for its grant of privilege to a very small number of persons, may, in the minds of its framers, have borne only an *ad hoc* defensive significance; for, be it observed, the Physicians' Act which contains the provision was of twin-birth with an Act (ch. 42 of the same year) specially designed to give development to Surgery; and Section 3 in the Physicians' Act may obviously have meant little or nothing more than a fear entertained by the Physicians, lest, in sequel of that development, annoyance should come to them from their expanding neighbour. That is to say, by the Barber-Surgeons' Act of 1540 Parliament was proceeding to improve the guild-arrangements under which the practice of Surgery in London had long been regulated and controlled; and it would seem likely that, *à propos* of this change, the incorporated physicians may have required assurance that, if any one of their Corporation desired to practise more or less Surgery, neither the new Corporation of Barbers and Surgeons, nor individual Surgeons acting on their own account, should be legally able to vex or hinder him. That some such assurance would have been deemed reasonable, as against Surgeons otherwise in monopoly, may be inferred from the fact that Parliament two years later (see above-named Act F) had to declare in very severe language that the conduct of the licensed Surgeons, in abuse of their monopoly, had made it necessary greatly to reduce the field of practice within which the surgical license (under Act A) should be required.

A point, not to be disregarded by any who would interpret the Medical Acts of Tudor time, is the wide difference there then was, in social style and status, between the two branches of practice to which they related: represented on the one hand by the few Physicians of Linacre's aristocratic College, Doctors of Medicine imbued with the scholarship and studiousness of Oxford or Cambridge, dignitaries of ecclesiastical type more or less, and expected under Act of Parliament to be "profound, sad and discreet"; whereas on the other hand, the Surgeons with the

Barber-practitioners of Surgery (not here including the barbers pure) made a heterogeneous and comparatively very numerous class of persons, among whom scholarly culture would have been highly exceptional; and of whom the large majority, however worthy to rank as diligent and perhaps ingenious handicraftsmen, and however competent to supply an infinity of small surgical services, and to answer constant popular demands for rough-and-ready skill in emergencies, were of type essentially uncultured, redolent rather of shop than of study; men whose "faculty," not yet demarked from the Barbers', would still, for two centuries to come, be under joint guild-government with that other industry. When regard is had to the respective constitutions, and the relative positions of the faculties and corporate bodies concerned in the question, it will hardly (in the absence of positive proof) be deemed probable, either that the College of Physicians, as it was in 1523, could have desired to mix itself in the business of licensing for surgical practice, or that, if such had been its desire, the existing guilds of practitioners in surgery would have been ready to accept the interference.

General outcome of the Henrican law.

5. The passages of statute-law which have been quoted and discussed in the foregoing paragraphs appear to contain all that English law at the close of the reign of Henry VIII had to say with regard to such privileges as are now in question. In commenting on those passages, the writer has not pretended to any other power of interpretation than such as is equally had by every competent reader of plain English, and he of course has no pretensions to say whether perhaps there be legal pitfalls between the lines; but, as a layman, he has read the statutes with careful attention; and, having endeavoured to construe them throughout in the natural sense of their words and connexions, his understanding of them is that, at the end of Henry VIII's reign, the law regarding the privileges was as follows:

(i) that the College of Physicians had no authority, from statute or otherwise, to grant Letters-Testimonial or Licenses extending to the practice of Surgery;

(ii) that each Fellow of the College was specially privileged at his discretion to make surgery a part or the whole of his practice; but that this special privilege belonged to the Fellows of the College in respect of their being parts of the corporate body, and did not in any case attach to Letters-Testimonial or Licenses from the College;

(iii) that, except as regarded the just-mentioned special privilege of the Fellows of the College, the control of surgical practice, with the granting of licenses in relation to such practice, was under jurisdictions of several sorts (general and municipal and of guild-law) with none of which the College of Physicians had aught to do.*

What signs of the asserted privilege during the centuries from 1518 to 1858?

6. From the date of King HENRY VIII's Letters Patent, incorporating the College of Physicians, to the date of the first Medical Act of the reign of Queen VICTORIA, was an interval of 340 years; and inquiry may well be made, whether during those centuries the College of Physicians ever in any way exercised the privilege which it now professes to have possessed. Did it ever during those centuries expressly include Surgery in the examinations for its Letters-Testimonial, or ever give Letters-Testimonial expressly purporting to vouch for the Surgical

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* If the reader should wish at this stage to connect paragraph ii of the above with its modern controversial bearings, he must advert by anticipation to particulars which are given below in Section 9 of these Notes, and must also observe what the College itself declares as to the status of its present Licentiates and Members. In the opening sentence of Chapter XXIII of the College *By-Laws and Regulations*, it is expressly provided that the Licenses of the College "are not to extend to make the Licentiates Members of the Corporation"; and when the higher-class Licentiate is admitted to distinctive titular rank as "Member of the College," it is under the condition expressed in By-Law CVI, that "he shall not be entitled to any share in the Government, or to attend or vote at general meetings, of the Corporation." In view of the limitations here stated, the writer has believed it evident that the present Licentiates and so-called Members of the College are not within the intention of Section 3 of the Act of 1540. Whether the privilege granted by that Section to the *Fellows* of the College was granted to the Fellows in perpetuity, and whether (if so) it is now under any altered conditions in consequence of the Act of 1886, are questions not raised in the present controversy, and the writer therefore leaves them undiscussed.

qualifications of their bearers? The present writer does not feel called upon to answer these questions with proofs which would be of negative effect; but he assumes that the College of Physicians, if possessed of any affirmative evidence on the point, will be willing, and even eager, to produce it; and he submits that, if no such evidence be offered, an absolute non-exercise of the alleged privilege during the period of 340 years may be taken for granted. *De non apparentibus ac de non existentibus eadem est ratio.* Meanwhile, however, it may with certainty be stated that, throughout the 340 years, Surgeons and organisations of Surgeons, *not* arising from or connected with the College of Physicians, were a growing fact in English History. In 1629 HENRY VIII's Corporation of the Barbers and Surgeons of London received from CHARLES I a further Charter, giving power to make annual election of Masters or Governors whereof two should be Professors in the Art and Science of Surgery, and also to elect and constitute ten of the freemen of the Company to be Examiners of Surgeons in London. In 1745, corporate union between the Barbers and the Surgeons of London was dissolved by Act of Parliament, with provision that such freemen of the Company as had been admitted and approved Surgeons within the rules of the Company should thenceforth be a separate and distinct corporation—"the Master, Governors, and Commonalty of the Art and Science of Surgeons in London." In 1800 a new Charter, granted by GEORGE III, declared the Corporation of 1745 to be at an end, and created in its stead a Royal College of Surgeons in London. In 1843, under Charter from her present Majesty, GEORGE III's College received a radically new constitution, and became the now existing Royal College of Surgeons of England. In that long consistent progress of special provisions for the granting of credentials in Surgery, never does there appear the casting of any side-glance towards the College of Physicians; such as would probably have appeared if that College had also been of chartered or statutory authority to grant credentials of like nature. And during the same long succession of years English Surgery, besides passing out of partnership with Barbery, had passed into as ready communion with Science as English

Physic had ever had, even under HARVEY and his many eminent followers. Among its representatives, it had had WISEMAN, and CHESELDEN, and POTT, and HUNTER, and BELL, and BRODIE: in attainments and social status, as also in respect of currency in public favour, Surgeons had risen to fully equal rank with Physicians; and, except perhaps in London, "Surgeon" had grown to be an usual name for any general practitioner of the Art of Healing. The two Royal Colleges in London, respectively entitled "of Physicians," and "of Surgeons," were universally understood as corresponding to two entirely different "faculties" or branches of practice; which, though rooted in one common ground of pathological or physiological science, were yet not confounded in the customs of the country. In relation to the interests of the Art of Healing as a whole, and in relation to the discipline of the Medical Profession as a whole, those two London Colleges were probably, by all enlightened persons, regarded as complementary one to the other; and probably no one, qualified to have an opinion on the subject, regarded them as of overlapping jurisdictions. True, that the duality of the faculties had, with progress of time, become an almost extinct tradition to the mass of those who practised the Healing Art in England, for their practice was equally in both the branches; but the developments of the Art in all principal centres of population had given rise to Consultant Practitioners, respectively Medical and Surgical, by whom the principle of duality was strictly observed, and who affiliated themselves respectively to one College or the other in a spirit of mutual exclusiveness. The separateness of the two branches was intensely expressed in the government of the two Colleges; and especially at the College of Physicians, the principle of "purity" from any trace of surgical admixture was emphasized as fundamental and sacred. Conceptions of Physic as "including Surgery" were not only in the most absolute sense unrecognized in the administration of the College, and in the professional practice of its Fellows, but were so utterly alien from the general feeling of the corporate body that, if they ever crossed the mind of an orthodox physician, they could hardly not have caused him to shudder. All who at present are old members of the Medical Profession can certify from the experiences and hearsays of their younger

life, how extremely strict in the earlier half of this century was the etiquette with which every reputable physician kept himself "pure" from any touch of surgery, and represented to the utmost of his power the absolute non-surgicality of his College.* And with regard to the College itself, the present may be a convenient point at which to note (as for contrast with facts afterwards to be mentioned) that, in the earlier half of the present

* In illustration, the writer may advert to the facts of a conspicuous case which he remembers as having been under warm discussion in the public press just after the date when he was himself first admitted to practice, and the chief contemporary statements regarding which may be read in Vol. 1 of the *Lancet* for 1838–9. On October 2, 1838, the then President of the Royal College of Physicians, Sir Henry Halford, leaving London by the North-Western Railway for his country seat in Leicestershire, where he was to entertain a party of guests, and having with him his friend Mr. Lockley, whom he had invited to be of the number, had sped but some twenty miles of the way, when he saw Mr. Lockley begin to show signs of cerebral apoplexy; and, before Tring station was reached, Mr. Lockley had become entirely insensible and helpless. At that station, the sufferer was removed from the carriage: Sir Henry recommending him to the care of the station-officials, and giving them some directions what to do for him, and then himself at once continuing his journey. The officials conveyed the unconscious Mr. Lockley by omnibus to the inn at Tring; whence, four days later, he was transported to his home in London; and there, on October 14, his seizure terminated in death. As soon as the story of this death became publicly known, Sir Henry's relation to it, in his twofold capacity of friend and physician, was subjected to much criticism, which it is not here necessary to reproduce; and Sir Henry, replying to some of this by a letter to the *Times*, explained under what views of duty he had acted. In that explanation, the essential plea of the representative physician of the day, the President of the Royal College of Physicians, was *non possum* in respect of Surgery. Why had it been that at the crisis of Mr. Lockley's case, when the (as then supposed) supreme help of bleeding was in demand for him, the typical physician, who saw his friend and guest before him struggling for life, and as it were crying for life's sake to be bled, did not himself perform the venesection? Sir Henry's language (as reproduced in the *Lancet* of November 15) was the following:—"I gave directions what should be done, and requested further that Mr. Dewsbury [the local practitioner whom the officials were to summon] when he had bled Mr. Lockley, would send a message to London to apprise his family of the misfortune, and to request his son, Dr. Lockley, to come down immediately. Having given these precise directions, I felt that I could not be of any further use at present, and therefore pursued my journey. . . . If I could have administered, instead of directing only, the expedients of our art to my friend, I should have done so; but, feeling assured that I had provided Mr. Dewsbury's or his assistant's immediate attention, I went on; and my conscience does not reproach me with the slightest neglect of my friend." Thus, if in 1838 the abstract doctrine of 1540 still held good, that the "*Science* of Physic includes the *Knowledge* of Surgery," evidently this did not carry as consequence, that *Practice* of the former would imply practice of the latter, or would afford any security for skill in it.

century, not only was the College conspicuously and fastidiously non-surgical, and scrupulous that none of its members should trespass across the line which divided surgery from the College's distinctive province, but moreover, within this distinctive province, the powers of the College were deliberately not exercised, except in relation to the small class of specially *consultant* practitioners. A highly important fact within the first fifteen years of the century was the refusal of the College of Physicians to be made the examining and licensing authority for the non-surgical parts of the practice of general practitioners: a refusal which made it necessary to call into existence an additional licensing authority for the faculty of Physic, and virtually obliged Parliament to legislate in 1815 that the London Society of Apothecaries should be invested with the authority which the College of Physicians would not take upon itself to exercise.

Privilegiary competition excited by the Act of 1858.

7. The *Medical Act* of 1858, in respect of its first furnishing to the public, in an authenticated *Medical Register*, the means to distinguish between legally-qualified and not legally-qualified practitioners, whereof only the legally-qualified should be entitled to recover payment for professional services, and in respect of the general rule laid down in the Act, that only the holders of specified titles of qualification from one or more of the corporate bodies respectively granting such titles should be registrable as qualified practitioners, gave increased pecuniary value to the title-granting privilege of the corporate bodies; and many of those bodies, in their exercise of that privilege under the new conditions created by the Act, would be more than ever under temptation to compete commercially with each other. Under cover of what Parliament had intended to be a security for medical qualifications, there evidently might exist more or less of (so to speak) license-and-title market, subject to ordinary commercial conditions of supply and demand, and to the ordinary liabilities of commercial competition. Partly, of course, such competition might be only in respect of the pecuniary charge to be made for qualifications; but largely, too, it might be in other respects. Of the candidates who brought their respective degrees of professional competence to be measured as conditions for title and license, a very considerable number would

not willingly bestow their patronage on authorities who should be reputedly of strict standard; and to many a man the essential questions would be—with which authority could he get easiest pass for his degree of competence, and from which authority, if he succeeded in passing, would his degree of competence obtain him the biggest title for subsequent registration and display. Competition between the authorities was not likely to be unmindful of the large proportion of cases in which the special demand would be for relatively big titles and relatively slight examinations; and the drag-down tendency of these demands, both as against the main intention of the Medical Acts, and as against every endeavour which could be made to give higher or more exact meaning to the registrable qualifications, has been persistent and notorious from 1858 to the present time. It was in consequence of painful illustrations in that sense, dating from the first year when the Act was in operation, and continuing if not multiplying from year to year, that impartial competent persons soon became convinced of a necessity for amending the Act of 1858, and that from 1869 to 1882 the successive Governments of the country made repeated (though always unsuccessful) endeavours to terminate the evils of competitive title-mongering.

Distinction in 1858 between medical & surgical qualifications.

8. With regard to the present controversy, it may be well to notice how particularly the Act of 1858 recognized the prevailing separation of surgical from medical titles of qualification. *See* the opening words of Section 31 of the Act: "Every person registered under this Act shall be entitled, according to his qualification or qualifications, to practise Medicine or Surgery, or Medicine and Surgery, as the case may be, in any part of Her Majesty's dominions;" and *see* there the relation of these words to the rights of registered practitioners to demand and recover payment for professional services.

New Departure of the College of Physicians in 1862.

9. It was under influence of the Act of 1858, and amid the new circumstances which have been described, that in 1862 the Royal College of Physicians suddenly discarded the almost monastic unworldliness in which for centuries it had secluded itself, and proceeded, with the zeal of a new convert, to compete against other authorities as a license-giver for general practice.

Under a short Act passed in 1860 some changes had been made in the interior constitution of the College—changes which need not here be particularly described; and the College, with its interior constitution thus modified, proceeded to re-organize its system of licenses. One object of the change was to provide for the creation of a license which should not by its conditions be as inconsistent as the old license had been with the ordinary business-requirements of general practice, particularly (the writer believes) regarding partnerships and the dispensing of medicines; and this object was attained by enacting (in effect) that future candidates for Letters-Testimonial should be divided into two classes, differing as to the examinations appointed for them, and as to the privileges which Letters-Testimonial would confer; namely, *first*, candidates for higher-class license, to which a courtesy-title of *Membership* (not implying participation in the College government) and also an exclusive privilege of eligibility for fellowship in the College should attach, and which would be prohibitory of partnerships and of dispensing; *secondly*, candidates for lower-class license which would not be subject to those prohibitions; and the title *Licentiate* of the College was henceforth to be used exclusively for the holders of the lower-class licenses.* Steps to be thus far taken by the College in alteration of its system of licenses would plainly have been no more than a legitimate, though sadly deferred, exercise of rights which it had possessed for 340 years; but not the same can be said of the further steps now to be mentioned. The College, when announcing its new system of licenses, made also the startling announcement that it intended its Letters-Testimonial to be regarded as valid *Licenses for the practice of Medicine and Surgery and Midwifery*, and that its future examinations would be shaped accordingly.

Criticism of the New Departure: (i) relatively to the examinations for "pass";

10. At the time when that step was taken by the College of Physicians, the system of so-called "half-qualifications" was in full swing: the system, under which a one-faculty board, examining only in surgery without medicine, or in medicine without surgery, could pass on to the *Medical Register* men who might

* With regard to the privilegiary status of Licentiates and Members under this constitution, *see* footnote to Section 5, above.

be grossly ignorant of essential parts of the Healing Art considered as a whole—the parts, namely, in which their one-faculty examiners had not examined them. The inadequacy of that system, as basis for a *Medical Register* in any satisfactory sense of the term, was already obvious to competent observers; and to many such observers, it was becoming evident that in order to terminate the evil of half-qualifications it would be necessary that no one-faculty board should give titles for registration, unless it were co-operating with some other authorized body or bodies in such combination as would provide for the granting of joint-diplomas, and thus ensure for every registered practitioner the possession of an all-round qualification. The opinions just described soon began to bear fruit in the well-known attempts which eventually, though only very slowly, succeeded, to provide for the establishment of joint examining boards, and to secure the statutory prohibition of half-qualifications; but to win success, or even partial success in those endeavours, was an affair of many years; and in the meantime something could be pleaded for the adoption of any stop-gap expedient which would make the half-qualifications less dangerously insufficient than they were. In 1868, that is to say six years after the step taken by the College of Physicians, the English College of Surgeons resolved that it would not in future grant its one-faculty diploma to any candidate unpossessed of a registrable diploma in the other faculty, unless the candidate passed satisfactorily an examination to be holden in that other faculty by physician-examiners whom the College would appoint; and provisionally, without doubt, this was better for the security of the public, than if the candidate had been allowed to register on the results of an exclusively surgical examination; but the College did not pretend to confer a medical license or title on those whom it had so caused to be examined in medicine. The step taken by the College of Physicians in 1862 did not, so far as merely the principle of the examinations was concerned, differ from that step afterwards taken by the College of Surgeons; and it may be noted that, at the new departure of 1862, the College of Physicians, notwithstanding its contention that Physic includes Surgery, did not appoint its examiners in surgery from within its own body of physicians, but engaged Fellows of the College of

Surgeons to perform the duty; just as afterwards the College of Surgeons, when establishing its examination in Physic, engaged Fellows of the College of Physicians to examine for it. Thus, if the course entered upon by the College of Physicians in 1862 be regarded merely in its examinational relations, apart from the other relations in which it has to be discussed, it could be described as the step taken by the College of Surgeons in 1868 has been described. It might seem a measure by which the College (in the absence of joint-board arrangements) would provisionally integrate its one-faculty examination; and it could fairly have been said to constitute, in the circumstances of the time, a desirable improvement in that examination. Further (though this needs hardly be added) absolute reliance could, of course, be placed on the good faith with which the College of Physicians would conduct any surgical examination which it undertook. Unfortunately, however, other relations of the step have also to be regarded. Whether the authority which the College of Physicians claimed in connection with its new system of licenses and examinations was an authority legally belonging to it, is a question which must in great part, if not wholly, depend on the construction given to the Statutes of Henry VIII already discussed in these notes; and on that legal question nothing further needs here be said. But what at any rate invited comment in the present departure was its spirit of competitive aggressiveness, especially as towards the College of Surgeons: the spirit in which the College of Physicians had now discarded its traditional "purity," and had given itself florid colouring for the new enterprise. If pretext for the change were supposed to exist in the law of 340 years before, or in particular interpretations of particular passages in that law, the use of any such pretext in 1862 was discredited by its extreme anachronism. Pending question of what might or might not be exhumed from antiquarian crypts, patent facts of the case were:

(ii) relatively to the competition for candidates.

that this new competitor in the granting of Licenses for general practice had, for so far back as common information extended, been in the most exclusive sense a College of *Physicians*—a College distinctively, not to say proudly, *non-surgical*;

that, side by side with it in headship of the Medical Profession, and of Crown-creation parallel with its own, there stood a *College of Surgeons*, specially chartered for the culture of Sur-

gery, and for the granting of Letters-Testimonial in that branch of practice;

that, in relation to the Healing Art as a whole, and to the interests of the State and of the Medical Profession therein, those two Colleges had long been understood as joint factors, *supplementary each to the other*, and each with its distinct privileges and duties;

but that now, in the circumstances which have been described as to the demand for titles and licenses, the Royal College of Physicians deemed it consistent with its duty to Crown and Public, that it should *commercially compete* with the Royal College of Surgeons in the granting of licenses for that branch of practice which the Surgeons' College had specially in public trust.

Legal state of the case from 1862 to 1886.

11. Under the legal conditions which existed in 1862, and for twenty-four years afterwards, there was little likelihood of any occurrence which could cause judicial decision to be invoked as to the validity of the claim which the College of Physicians had advanced. The license of the College was without doubt a registrable diploma, and the MEDICAL COUNCIL had no other concern with it than to register it whenever presented. Whether its bearers really held, in virtue of it, the privileges which it purported to convey, was a question of warranty between vendor and purchaser, in which, if dispute had arisen, the COUNCIL would not have had to decide. The present writer does not attempt to judge what may have been the commercial success of the venture. No doubt there would have been considerable attractiveness in a diploma which bore the time-honoured seal of the College of Physicians, and which, though to certify the bearer's all-round qualification in medicine and surgery and midwifery, could be gained without the candidate's having to find answers and fees for more than one examining authority; but as regarded the surgical element in the qualification, it probably never took nearly equal rank with the diploma of the College of Surgeons, and probably was never in very wide use as a permanent substitute for the latter. It is to be noted that after some years, namely in 1869, the College succeeded in obtaining from the then Poor Law Board, that the license of the College for the practice of "Physic," which the

license now expressly defined as "including therein the practice of medicine, surgery, and midwifery," might be accepted as evidence of such all-round qualification as is required of Medical Officers under Boards of Guardians. Meanwhile, however, in the general progress of events, it was becoming probable that little or no permanent importance could attach to the question which the College had raised. The question of the formation of Joint Boards had come to be thoroughly in the front; and though in fact many years were yet to elapse before the first Joint Board would be in operation, the interval was almost fully occupied with endeavours and protracted negotiations relating to the object, and belief was always entertained that, so soon as the object was attained, questions like that now in controversy could no longer be of practical interest. As early as 1877, a scheme of combination for all the Medical Authorities of England to co-operate in the granting of diplomas had been agreed upon by the parties concerned, and been sanctioned by the GENERAL MEDICAL COUNCIL; but before this scheme could be brought into effect, some of the combined Authorities desired to set it aside; and eventually, but not till 1884, there was established in its stead a combination which included only the Royal College of Physicians of London and the Royal College of Surgeons of England. In the scheme for this combination, approved by the MEDICAL COUNCIL, the fundamental condition between the two English Royal Colleges is as follows: "it being understood that, liberty being left to each College to confer as it may think proper its honorary distinctions, each of them will abstain, so far as allowed by law, from the exercise of its independent privilege of giving a qualification necessary for admission to the *Medical Register*." In view of that condition, and of the fact of the combination's having now for seven years been in satisfactory action, it might fairly have been hoped that no question as to the *independent* qualificational value of the license of the College of Physicians could in future be of any interest except in mere antiquarian curiosity; but present events are showing that serious controversy can be raised on the question in its abstract form; and there is reason to believe that, under the reservation which the condition contains, individual cases may also arise (if indeed they have not already arisen) in which judicial decision on the claim of the College would be indispensable.

Question crucially raised under the Act of 1886.

12. The *Medical Act* of 1886 made an essential change in the legal circumstances. In the language of its second and third sections, it raised a barrier against which the claim of the College of Physicians, if ever again raised for practical use, would unavoidably have to test its legal soundness; and the point of present emergency is, that the College has seen fit to raise the question in its most general form, by challenging the correctness of the terms in which the license of the College is described in one of the supererogatory pages of the published *Medical Register*. The College in effect calls upon the COUNCIL to declare that the College license is a valid diploma in respect of medicine and surgery and midwifery; and the COUNCIL declines to make that declaration till the College shall have obtained judicial authority for its claim. Whether the College of Physicians, at the passing of the *Medical Act*, 1886, was, in the intention of Sections 2 and 3 of that Act, a "medical corporation legally qualified to grant, *in respect of Medicine and Surgery*, a diploma or diplomas conferring the right of registration under the Medical Acts," will apparently be the crucial question for judicial answer. The writer of the above notes has in several of them set forth historical reasons, which he thinks can be justly urged against giving an affirmative answer to that question, and the opinions which he would more particularly desire to press are the following:—

first, that the doctrinary preamble of section 3 of the Act of 1540 is not rightly applicable except to the immediate practical purpose of that section—~~the purpose of securing surgical privilege for the incorporated Fellows of the College, and is in no degree entitled to rank as law in respect of the quite different matter of the granting of surgical licenses~~;

secondly, that the College Charter of 1518, and the confirming Act of 1523, when duly collated with the Act of 1511, will not be found to confer on the College the privilege of granting any diploma in Surgery, and that no such privilege has ever in any other way been given to the College.

~~March 25th~~ ~~January 9th~~, 1892.

~~T. S.~~

~~[Revised, March 25th.]~~

Judgment on this case was given on March 8th 1893, in the Queen's Bench Division of the High Court of Justice, by Lord Justice A. L. Smith to the effect that the College of Physicians possessed the legal right to grant diplomas in respect of medicine and surgery.